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„Zum immerwährenden Gedenken an die Ausrufung des Freistaates“: Das Selbstbild der (deutsch-)österreichischen Republik 1918/19 und seine Verdrängung

(„To the Everlasting Commemoration of the Free State“: Self-Imagination of the (German-)Austrian Republic in 1918/19 and its Repression)

Christian Neschwara *

Abstract

Events, resulting from a victorious war, a successful revolution or formation of a state, striking amendments relating the constitutional system or international status, are able to constitute identity of the citizens of a state, they can constitute the self-image of a state, from which a sense of national community can grow out within all groups of a society supporting a state. In order to consolidate this collective emphasis, national holidays were found, which periodically have to impose the recall of events, forming identity of a state. In (german-)austrian republic such a state holiday was found by decision of the Constituent National Assembly in April 1919, serving for: "The everlasting memory of the declaration of the free state of German-Austria" on November 12th 1918.

Keywords: *Austria; Constituent National Assembly (of German-Austria); constituting a state; declaration of Austrian neutrality (in 1955); democratic republic; free state [= republic]; founding of German-Austria (in 1918); liberation of the Republic of Austria (in 1945); national holiday; Provisional [= temporary] National Assembly (of German-Austria); state holidays (in general).*

I. Einleitung

Identitätsstiftende Ereignisse bilden das Fundament für das Selbstverständnis eines Staates – sie resultieren aus siegreichen Kriegen, erfolgreichen Revolutionen oder Staatsgründungen, markanten Änderungen des Verfassungssystems oder des internationalen Status –, woraus ein Gemeinschaftsgefühl der den Staat tragenden Gesellschaft wachsen kann. Um das kollektive Bekenntnis zum Staat zu festigen, werden staatliche Feiertage geschaffen, womit die für den Staat identitätsstiftenden Ereignisse regelmäßig in Erinnerung gerufen werden können.[1]

Ein solcher Feiertag wurde für die (deutsch-)österreichische Republik mit Beschluss der Konstituierenden Nationalversammlung am 25. April 1919 ins Leben gerufen: „Zum immerwährenden Gedenken an die Ausrufung des Freistaates Deutschösterreich“, wobei das Wort Freistaat synonym für Republik stand, wurde – nach bloß mündlichem Bericht – „der 12. November eines jeden Jahres als allgemeiner Ruhe- und Feiertag erklärt“.[2] Dieser Tag wurde von der nur wenige Wochen davor, im Februar 1919 vom Staatsvolk Deutschösterreichs gewählten Konstituierenden Nationalversammlung bald nach Beginn ihrer Legislaturperiode als Staatsfeiertag festgelegt.

Die Vorlage der Staatsregierung dazu vom 24. April 1919 musste in großer Eile[3] behandelt werden.[4] Diese Dringlichkeit der Beschlussfassung über die Festlegung eines Staatsfeiertages war allerdings nicht dem Gedenken an das Ereignis vom 12. November 1918 geschuldet, sondern dem Umstand, dass man am 25. April „nur mehr wenige Tage vor dem 1. Mai“ 1919 stand, und auch dieser Tag zu einem allgemeinen Ruhe- und Feiertag erklärt werden sollte, damit – so die Begründung der sozialdemokratischen Berichterstatterin (Adelheid Popp) – dieser Tag „ohne Zerrissenheit, nicht nur von der einen Seite des

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1 Sie unterliegen meist der Arbeitsruhe, was im Allgemeinen für Sonntage bzw. auch andere staatlich anerkannte kirchliche Feier- oder Festtage gilt: NEUSSER, G., Feiertage. In: ERLER, A. / KAUFMANN, E. (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte* [*HRG*], Band I, 1. Auflage Berlin 1975, Spalte 1094–1097; NEUSSER, G., Feiertage. In: CORDES A. / et al. (Hrsg.), *HRG*, Band I, 2. Auflage Berlin 2008, Spalte 1527–1529; JÄGER, F. (Hrsg.), *Enzyklopädie der Neuzeit*, Band III, Neuwied 2006, S. 867–873, 872f.

2 „Nach dem Vorbilde anderer Freistaaten (Frankreich, Nordamerikanische Union)“ sollte auch die deutschösterreichische Republik „ihren Feiertag… besitzen“: So die sozialdemokratische Berichterstatterin Adelheid Popp im Plenum. Die Nordamerikanische Union, die Vereinigten Staaten von Amerika, hatte sich den Tag der von der britischen Kolonialherrschaft erlangten Unabhängigkeit am 4. 7. 1776 als Nationalfeiertag eingebürgert, ohne dass dieses Datum gesetzlich fixiert worden war; in Frankreich wurde die mit dem Sturm auf die Bastille am 14. 7. eingeleitete Revolution seit 1790 festlich gewürdigt, aber auch erst 1880, erst zehn Jahre nach der definitiven Realisierung der Republik, zum Nationalfeiertag erklärt.

3 Nr. 158 der Beilagen zu den *Stenographischen Protokollen über die Sitzungen der konstituierenden Nationalversammlung* [*StPKNV*] der Republik Österreich, Wien 1919/20.

4 *StPKNV*, S. 271, 273: Ob einstimmig oder einhellig muss dahingestellt bleiben, das Protokoll konstatierte lediglich, dass die erforderliche Zweidrittelmehrheit für die sofortige Vornahme der dritten Lesung gegeben war. Im Verfassungsausschuss hatte darüber jedenfalls Einstimmigkeit bestanden.

Volkes“ – nämlich den Sozialdemokraten – feierlich begangen werde, sondern dass sich künftig „alle [Staatsbürger]… an diesem neuen Fest- und Feiertage erfreuen“.[5]

„Über die Notwendigkeit, auch „dem Inkrafttreten der Republik durch einen Feiertag die höhere Weihe zu verleihen, darüber“ sei „wohl nicht viel zu sagen“, glaubte die Berichterstatterin; sie vermeinte sich damit „in Übereinstimmung mit dem Hause“ zu befinden, dass die „Proklamierung des 12. November als Staatsfeiertag den Bedürfnissen, Wünschen und Idealen weitester Kreise der Bevölkerung [Deutschösterreichs] Ausdruck geben“ werde:[6] „Zum immerwährenden Gedenken“ an dieses Ereignis sollte dieser „Arbeitsruhetag“ geschaffen werden, vor allem „ein demokratisches Staatswesen“ benötige „einen derartigen Festtag“, durch den „die Zusammengehörigkeit von Bürger und Staat ganz besonders zum Ausdrucke“ komme – so die lapidare Begründung der Vorlage der Staatsregierung.

II. Identitätsstiftende Gedenktage zu Beginn der Republik im Herbst 1918

Dem Ereignis der Proklamation der Republik am 12. November 1918 (dazu unten C) wurde offenbar eine solch starke identitätsstiftende Wirkung beigemessen, dass über die Festlegung dieses Datums als Staatsfeiertag im Plenum der Nationalversammlung Ende April 1919 nicht einmal diskutiert wurde. Andere – für die Existenz von Deutschösterreich als Staat ausschlaggebende – Ereignisse, nämlich der Zusammentritt der deutschen Abgeordneten des österreichischen Reichsrates am 21. Oktober 1918 zu einer Vollversammlung, um die für das Schicksal des deutschen Volkes in Österreich erforderlichen Entscheidungen vorzubereiten (dazu unten A), sowie ihr nur wenige Tage später am 30. Oktober erfolgter Beschluss – nun in ihrer Doppelrolle als Nationalversammlung für das deutsche Volk in Österreich – den neuen Staat Deutschösterreich ins Leben zu rufen (dazu unten B), wurden im April 1919 bei der Beschlussfassung über die Festlegung des 12. November „zum immerwährenden Gedenken“ an die Ereignisse des Spätherbsts von 1918 nicht mehr in Erwägung gezogen.

Die publizitätswirksam inszenierte „Ausrufung des Freistaates“ Deutschösterreich an diesem Tag vor dem Parlamentsgebäude am Ring in Wien hatte einen Prozess zum Abschluss gebracht, welcher mit den Entscheidungen vom 21. und vom 30. Oktober im niederösterreichischen Landhaus eingeleitet worden war.

A) 21. Oktober 1918: „Ankündigung“ eines deutschösterreichischen Staates

1. Vorgeschichte[7]

Die Initiative zum Zusammentritt der deutschen Abgeordneten des österreichischen Reichsrates zu einer Vollversammlung war Anfang Oktober 1918 von den deutschnationalen Parteien ausgegangen, um in gemeinsamen Besprechungen das weitere – gemeinsame – Vorgehen zu erörtern. Wenige Tage später waren die Sozialdemokraten in einer Resolution mit der Forderung hervorgetreten, wonach künftig „alle deutschen Gebiete Österreichs zu einem deutschösterreichischen Staat“ vereinigt sein sollten, „der seine Beziehungen zu den anderen Nationen Österreichs und zum Deutschen Reich nach seinem eigenen Bedürfnis regeln“ müsse, wobei zunächst noch „die Umwandlung Österreichs in eine Föderation freier nationaler Gemeinwesen“ aktuell schien. Nachdem sich die Deutschnationalen diese Entschließung zu eigen gemacht hatten und ihre Inhalte auch von den Christlich-Sozialen akzeptiert worden waren, war in grundsätzlichen Fragen Übereinstimmung erzielt, so dass es auch als die „Pflicht der deutschen Parteien“ angesehen wurde hierbei „vereint“ vorzugehen – konkrete Schritte wurden zunächst aber noch nicht in Aussicht genommen.

Erst nach Kundmachung des kaiserlichen Manifests, das die Umwandlung der österreichischen Monarchie in einen Nationalitäten-Bundesstaat angekündigte, woran die Reichsratsabgeordneten nicht als Ländervertreter, sondern nach nationaler Zugehörigkeit, als Nationalräte organisiert, mitwirken sollten, erfolgte am 17. Oktober – nach gemeinsamer Vorberatung der Tagesordnung durch die Parteivorstände – die Einladung zu einer „Vollversammlung“ der deutschen Reichsratsabgeordneten für 21. Oktober am Sitz des niederösterreichischen Landtags in der Herrengasse in der Wiener Innenstadt.

2. Ablauf der Ereignisse

a) Bewertung in der Presse

Die nun ablaufenden Ereignisse und die daraus resultierenden Ergebnisse wurden von den Zeitgenossen rückblickend als eine Revolution[8] empfunden: Dass sich am 21. Oktober 1918 etwas Revolutionäres anzubahnen begann, zeigte sich schon in der Wahl des Versammlungsorts der Nationalversammlung im niederösterreichischen Landhaus: Es war der Ort, wo vor gut 70 Jahren, am 13. März 1848, eine Volksbewegung ihren Ausgang genommen hatte, welche als ein „Völkerfrühling begann“[9], und deren „Ziel das Selbstbestimmungsrecht der Völker war“ – ein Gedanke, der zwar „durch lange Zeit zurückgedämmt“[10] wer-

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[5] Die sozialdemokratische Maifeier wurde in Wien seit 1890 durchgeführt. Sie hatte ihren Standort zunächst im Prater und wurde 1919 auf die Ringstraße verlegt, von wo große Aufmärsche der Parteiorganisationen zum Rathaus des seit den Wahlen vom 16. 2. 1919 sozialdemokratisch regierten Wien führten. In Erinnerung an die früheren Maifeiern wurde die Große Zufahrtsstraße zum Pratergelände im 2. Wiener Bezirk 1920 in „Erste-Mai-Straße“ umbenannt.: CZEIKE, F., *Historisches Lexikon Wien*, Band 2, Wien 2004, S. 208.

[6] *StPKNV* (n 3), S. 272f.

[7] NESCHWARA, Ch., Die Rolle der Parlamente, in: NESCHWARA, Ch. / RAINER, M. (Hrsg.), *100 Jahre Republik. Die Provisorische Nationalversammlung und ihre Rolle bei der Entstehung der Republik Deutschösterreich*, Graz 2018, S. 11–53, hier 24ff.

[8] Dazu auch SCHEFBECK, G., Verfassungsentwicklung 1918–1920, in: ÖSTERREICHISCHE PARAMENTARISCHE GESELLSCHAFT (Hrsg.), *75 Jahre Bundesverfassung. Festschrift aus Anlass des 75. Jahrestages der Beschlußfassung über das Bundes-Verfassungsgesetz*, Wien 1995, S. 53–197, hier 64.

[9] *Neue Freie Presse* [*NFP*] in der Ankündigung der Vollversammlung der deutschen Abgeordneten des Reichsrats am 20. 10. 1918, Morgenblatt, S. 1.

[10] So Karl Seitz am 21. 10. 1918 in seiner einleitenden Stellungnahme für die Sozialdemokraten in der konstituierenden Sitzung der Provisorischen Nationalversammlung. In: *Stenographische Protokolle der Sitzungen der Provisorischen Nationalversammlung für Deutschösterreich* [*StPPNV*], Wien 1919, S. 4.

den konnte, der aber nun, nach dem mehr als „vier Jahre langen Wüten des… Weltkrieges“ wieder auftauchte „aus einem Meer von Blut und Schrecken“, um „in einem merkwürdigen Kreislaufe“[11] wieder an diese „historisch denkwürdige Stätte“ zurückzukehren.[12] Die Neue Freie Presse kündigte am selben Tag bereits die „Gründung des deutschen Volksstaates im Landhause“ an und rief euphorisch auf: „Ein Maler sollte am nächsten Montag in das Landhaus geladen werden. Ein Geschichtsschreiber müßte anwesend sein; in Wort und Bild sollte der Augenblick festgehalten, der Zukunft sollte überliefert werden, was sich dort zutragen wird“.[13] Die christlichsozial orientierte Reichspost dagegen ging von einer evolutionären Entwicklung aus, welche zu einer „Föderalisierung Österreichs“ im Sinne des kaiserlichen Manifests vom 16. Oktober unter Mitwirkung von Nationalräten aller Volksgruppen führen sollte.

Die Kommentare in der Tagespresse über die am 30. Oktober erfolgte Konstituierung der Nationalversammlung waren eher nüchtern-sachlich. Die Neue Freie Presse berichtete, schon weit vor Beginn der Versammlung habe sich „in der Herrengasse eine Menschenmenge angesammelt – darunter viele Offiziere und auch Frauen“. Die Polizei musste den Mandataren den Weg zum Landhaus freihalten, die Ankommenden seien „von der Menge mit Heilrufen begrüßt worden“. Der Sitzungssaal im Landhaus „reichte knapp aus, um die Abgeordneten aufzunehmen[14], auch auf der Galerie war „dichtgedrängtes Publikum“ wahrzunehmen: „Immer mehr und mehr… drängten nach“, dennoch herrschte „eine erwartungsvolle Stille“.[15]

Die Arbeiter-Zeitung bestätigte, dass eine „ernste, tiefbewegte Stimmung… über dem Landtagssaal“ gelegen habe.[16] Die Reichspost berichtete, dass die „Konstituierung des Nationalrates… würdevoll und Hoffnungen erweckend“ verlaufen sei[17] – „ohne Aufwand von demagogischen Schlagworten, in einer einfachen Weise“, so die Neue Freie Presse.[18] Die Konstituierung der Nationalversammlung sei „ruhig vergangen“, „ohne Fahnenschwenken und Böllerschüsse, würdig, wenn auch nicht ganz mit jener Hochstimmung, die so bedeutsame Veränderungen sonst begleitet“. Nichts habe „an die großen Tage des Jahres 1848“ gemahnt: „Der deutschösterreichische Staat“ begann „sachlich… verstandesmäßig“ unter dem Zwang „schmerzlicher Notwendigkeiten“, freilich stand er auch erst „in den Anfängen“.[19] Die Arbeiter-Zeitung vermisste das „Kraftgefühl eines zur Selbstbestimmung sich erhebenden Volkes“. Die Erklärungen der Parteienvertreter erweckten „den Eindruck, daß hier das Restösterreich sprach, das, was übrig geblieben ist, nachdem die Slaven aus Österreich fortgegangen sind“: „Nur in der Erklärung der Sozialdemokraten“ habe „der volle Gehalt der Stunde“ sich angekündigt, habe „die deutsche Nation mit dem Bewußtsein ihrer geschichtlichen Stellung, ihres Zusammenhanges mit der großen Kulturgemeinschaft im [deutschen] Reiche“ geäußert – „in dem Bekenntnis zur uneingeschränkten Demokratie, im Rufe nach der deutschen Republik“.[20]

b) in der Sicht der Politiker

Mit den Beschlüssen vom 21. Oktober war der „Grundstein für ein neues Deutschösterreich“ (Karl Seitz, Sozialdemokrat) bzw. für einen „neuen Staat“ (Viktor Waldner, Deutschnationaler) gelegt worden, nämlich eines „demokratischen“ Staates (Viktor Adler, Sozialdemokrat), der von der Monarchie „unabhängig und selbständig“ (Ferdinand Pantz, Deutschunabhängiger) bestehen sollte.[21] Die Nationalversammlung müsste diese Staatsgründung freilich – zu gegebener Zeit – noch „feierlich erklären“ (Waldner).[22] Offen waren in Bezug auf dieses künftige Deutschösterreich aber noch weitere Fragen, wie vor allem die Festlegung seiner Staatsform und seines Verhältnisses zu den anderen „Nationalstaaten“ der Monarchie, wobei – als Alternative zu einem solchen Staatsverband – bereits der Eintritt in das Deutsche Reich in Erwägung gezogen wurde.

3. Ergebnis

Zur Durchführung ihrer Absichtserklärungen wurde von den – nun als Provisorische Nationalversammlung für Deutschösterreich konstituierten – deutschen Abgeordneten des Reichsrates aus ihrer Mitte ein Präsidium sowie ein Vollzugsausschuss gewählt. Das Präsidium bestand aus Vertretern der drei großen Parteien, nämlich: Franz Dinghofer (Deutschnationaler), der als Vertreter der stärksten Fraktion auch als „erster“ Präsident angesehen werden konnte; Jodok Fink (Christlich-Sozialer), dem schon in der nächsten Sitzung Johann Hauser folgen wird; und Karl Seitz (Sozialdemokrat). Im Vollzugsausschuss waren dagegen auch Kleinparteien, radikale und liberale Abspaltungen der deutschfreiheitlichen Bewegung, vertreten und damit auch in den Prozess der Verfassunggebung eingebunden.

Aus der Versammlung der deutschen Reichsratsabgeordneten war nun ein (vor-)staatliches Organ hervorgegangen, dem die Vorbereitung der Staatsgründung und der weitere Aufbau der Verfassungsordnung von Deutschösterreich oblag. Mit den Be-

[11] *NFP*, 31. 11. 1918, Morgenblatt, S. 1.
[12] Seitz in seiner Rede am 21. 10. 1918: *StPPNV* (n 10), S. 4.
[13] *REICHSPOST*. Unabhängiges Tagblatt für das christliche Volk Österreich-Ungarns [*RP*], 20. 10. 1918, 2; *NFP* 20. 10. 1918, 1.
[14] Von den 208 Mitgliedern waren letztendlich nur gut 160 erschienen: Dazu NESCHWARA, Parlamente (n 7), S. 24f.; HÖBELT, L., Die Gliederung der Provisorischen Nationalversammlung, in NESCHWARA / RAINER (n 7), *Republik*, S. 56, 58; HÖBELT, L., Die provisorische Regierung Deutschösterreichs 1918/19: Staatsrat, Kabinett und Unterstaatssekretäre, NESCHWARA / RAINER (n 7), *Republik*, S. 71.
[15] *NFP* (n 9), 22. 10. 1918, Morgenblatt, 2.
[16] *Arbeiter-Zeitung*. Organ der deutschen Sozialdemokratie in Österreich [*AZ*], 22. 10. 1918, S. 2.
[17] *RP* (n 13), 22. 10. 1918, S. 1.
[18] *NFP* (n 9), 22. 10. 1019, S. 2.
[19] *NFP* (n 9), 22. 10. 1019, S. 1.
[20] *AZ* (n 16).
[21] *StPPNV* (n 10), S. 3f, 7f. – Nach Pantz unter Einschluss auch „der jenseits der Leitha lebenden Deutschen“: *StPPNV* (n 10), S. 9.
[22] *StPPNV* (n 10), S. 3.

schlüssen der Provisorischen Nationalversammlung wurde aber auch die Abwicklung der „alten" Staatlichkeit und ihr Übergang auf den „künftigen" Staat angebahnt.

Es war zunächst mit einem länger andauernden Übergangsprozess gerechnet worden. Es wurden daher Vorbereitungen für die Schaffung einer – bloß vorläufigen – Verfassungsordnung getroffen. Die Initiative dazu ging abermals von Karl Renner aus, der unmittelbar nach Konstituierung der Provisorischen Nationalversammlung den Entwurf einer provisorischen Verfassung für Deutschösterreich auszuarbeiten begann. Das in nur wenigen Tagen entstandene Konzept wurde aber weder im Vollzugsausschuss noch im Plenum der Nationalversammlung debattiert. Als sich – unmittelbar nach Bekanntwerden des österreichisch-ungarischen Sonderfriedensangebots durch Außenminister Julius Andrassy – am 28. Oktober 1918 in Prag die Proklamation einer Tschechoslowakischen Republik vollzogen hatte und am nächsten Tag überdies die Proklamation eines Staates der Slowenen, Kroaten und Serben Österreich-Ungarns folgte, musste rasch gehandelt werden und auch für Deutschösterreich der Weg der Verfassunggebung eingeschlagen werden.[23] Renner wurde nun vom Vollzugsausschuss mit dem Entwurf eines Organisations-Statuts für Deutschösterreich betraut, womit Deutschösterreich als neuer Staat gegründet werden sollte. Der – über Nacht – ausgearbeitete Entwurf wurde am folgenden Tag im Vollzugsausschuss angenommen und sollte der für 30. Oktober einberufenen Nationalversammlung vorgelegt werden.

B) 30. Oktober 1918: „Geburtstag" Deutschösterreichs

1. Vorgeschichte

Mit ihrem Entschluss, die Organisation eines neuen Staates in die Wege zu leiten, hatte die Nationalversammlung den Weg der Revolution eingeschlagen, freilich handelte es sich dabei nur um einen Umsturz im juristischen Sinn, da sich die rechtliche Existenz des neuen Staates nicht aus der Verfassung der österreichischen Monarchie ableitete. Dieser „Umsturz" war zwar unter reger Beteiligung der Bevölkerung über die Bühne gegangen, letztendlich aber ohne Gewalt und ohne jedes Blutvergießen.

2. Ablauf der Ereignisse – Schauplätze

Nach Bekanntmachung der bevorstehenden Staatsgründung – mittels Extra-Ausgabe der Wiener Zeitung und öffentlichem Anschlag als Plakat – war Bewegung in die Straßen Wiens gekommen: Die Stadt war „voll von aufgeregten Menschen", welche Zeugen der Entstehung des neuen Staates sein wollten. Zwei Schauplätze spielten an diesem Tag eine besondere Rolle: das Parlamentsgebäude am Ring (als Sitz des Reichsrates) und das niederösterreichische Landhaus in der Herrengasse als aktives Zentrum der kommenden neuen Staatsmacht. Die Hofburg, das politische Zentrum der alten Staatsmacht, blieb passiv.[24] Gegenüber der Hofburg, am Ballhausplatz, trat noch einmal der gemeinsame Ministerrat der Gesamtmonarchie zusammen.

a) Parlamentsgebäude am Ring

Im Reichsrat war für 11 Uhr vormittags eine Sitzung des Abgeordnetenhauses anberaumt[25], von den 516 bei den letzten Wahlen im Jahr 1911 gewählten Mandataren fehlten mehr als die Hälfte, es waren keine Vertreter der Regierung anwesend, auch die Galerien blieben – anders als sonst – leer. Die Sitzung wurde nur wenige Minuten nach ihrer Eröffnung – „mit Rücksicht auf die obwaltenden Verhältnisse" – wieder geschlossen und auf 12. November vertagt.

Ähnliches ereignete sich am späten Nachmittag auch im Herrenhaus: Die für 17 Uhr einberufene Sitzung wurde – mangels Tagesordnung: einziger Gegenstand der Tagesordnung war die „Vorstellung des neuen Ministeriums"[26], welchem unter Leitung des am 25. Oktober ernannten – letzten – Ministerpräsidenten Heinrich Lammasch nur mehr die Aufgabe zukam, den „unvermeidlichen Liquidierungsprozess" des Gesamtstaates fortzuführen; Lammasch war aber nicht im Stande dazu eine Erklärung abzugeben. Die Sitzung wurde – bis zur schriftlichen Bekanntgabe eines neuen Termins – vertagt, wozu es letztendlich aber nicht mehr kam.[27]

b) in der Herrengasse

aa) zu Mittag

Im niederösterreichischen Landhaus war zu Mittag in einer Sitzung des Vollzugsausschusses[28] noch die Tagesordnung für die Plenarversammlung am Nachmittag festzulegen: Zunächst sollte eine erste Maßnahme getroffen werden, um dem neuen Staat völkerrechtliche Anerkennung zu verschaffen. Erste Adresse dafür war der US-amerikanische Präsident Wilson, auf dessen Kriegsziel-Programm Deutschösterreich seinen internationalen Status kraft Selbstbestimmungsrecht als selbständiger Staat stützte: Vorzüglich Wilson musste der Anspruch Deutschösterreichs auf „die Gebietshoheit" über die Siedlungsgebiete der Deutschen im Gebiet der Österreichischen Monarchie inklusive ihrer Siedlungsgebiete in den Sudentenländern angezeigt werden.[29] Erst danach sollte

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[23] NESCHWARA, Parlamente (n 7), 22f., 27f.

[24] Die Zugänge waren versperrt und wurden von bewaffneten Soldaten bewacht Dahinter und in den Fenstern waren Maschinengewehre platziert, in den Innenhöfen, Gängen und Sälen waren zahlreiche Soldaten in Bereitschaft: BRAUNEDER, W., *Deutsch-Österreich 1918. Die Republik entsteht*, Wien 2000, S. 16ff.

[25] *Stenographische Protokolle des Abgeordnetenhauses des österreichischen Reichsrathes* [*StPAHRR*], Wien 1917/18, XXII. Session, S. 4697ff.

[26] Vergleiche dazu die von Lammasch vorbereitete programmatische Rede für den letzten Ministerrat am Abend des 30. Oktober bei: NEISSER, K. (Hrsg.), *Poltische Chronik*, Heft 10 Oktober 1918, Wien 1918, S. 511f.

[27] Am 31. 10. 1918 nahm der deutschösterreichische Staatsrat Räumlichkeiten des Herrenhauses im Parlamentsgebäude für sich in Anspruch.

[28] ENDERLE-BURCEL, G. / et al. (Hrsg.), *Der österreichische Staatsrat. Protokolle des Vollzugsausschusses und des Geschäftsführenden Direktoriums 21. Oktober 1918 bis 14. März 1919* [*PStR*], Band 1, Wien 2008, S. 63ff.

[29] Die Erklärung Deutschböhmens war dem Vollzugsausschuss schon am 29. 10. , jene der Deutschen von Mähren und Schlesien erst am frühen Vormittag des 30. 10. zugegangen: NESCHWARA, Parlamente (n 7), S. 37.

die Verhandlung über die künftige Verfassung Deutschösterreichs aufgenommen werden, wofür als erstes Stück durch die Nationalversammlung die „grundlegenden Einrichtungen der Staatsgewalt" festgelegt werden sollten. Anschließend war die Neuwahl des Präsidiums und der Mitglieder des Vollzugsausschusses, nunmehr Staatsrat bezeichnet, durchzuführen.[30]

Gegen[31] 15 Uhr begaben sich die deutschen Abgeordneten des Reichsrates zu ihrer zweiten Vollversammlung. Sie verstanden sich selbst als ein provisorisches Parlament, das der durch das deutschösterreichische Volk erst zu wählenden Konstituierenden Nationalversammlung zeitlich voranzugehen hatte. Sie wollte sich darauf beschränken, diese Wahlen vorzubereiten und den Staat auf Grundlage einer provisorischen Verfassung handlungsfähig zu machen.

bb) am Nachmittag

Um 15 Uhr 05 wurde im Sitzungssaal des Landhauses die Sitzung eröffnet.[32] Nachdem der Text für die Notifikation der Existenz von Deutschösterreich und der von ihm beanspruchten Gebietshoheit an US-Präsident Wilson nach emotionaler Debatte angenommen worden war[33], kam die Staatsgründung auf die Tagesordnung. Renner war Referent[34] des den von ihm für die Nationalversammlung vorbereiteten Staatsgründungsbeschlusses. Sein als juristischer Kommentar konzipierter Bericht ging auch auf die Staatsform ein: Darüber war, wie er betonte, „kaum ein Wort ausdrücklich gesprochen", es war „nicht von Monarchie und nicht von Demokratie und nicht von Republik die Rede". Aus dem Kontext der Bestimmungen und dem Willen der eminenten Mehrheit der Nationalversammlung ging aber klar hervor, dass Deutschösterreich eine demokratische Republik sein sollte.

Die Frage der Staatsform bildete auch in der anschließenden Debatte[35] über Renners Bericht eine zentrale Rolle: Von den Christlich-Sozialen abgesehen, waren alle anderen Redner mehr oder weniger überzeugt, dass mit dem Staatsgründungsbeschluss bereits eine republikanische Ordnung entstehen werde:[36] Renner teilte diese Meinung zwar auch, erklärte aber, dass man „jede Deklaration" darüber vermeiden wollte – solange sich der Monarch zur Existenz Deutschösterreichs noch nicht erklärt habe.[37]

Renners Entwurf wurde einstimmig angenommen; das Präsenzquorum wirkte – im Verhältnis zur Zahl der insgesamt 208 Abgeordneten – eher bescheiden: Bei der anschließenden Wahl des Präsidiums[38] wurden 163 Stimmen konstatiert, was einer Präsenz von etwa 75% der Abgeordneten gleichkam, insbesondere während des Referats von Renner waren einige Mitglieder nicht im Sitzungssaal, sondern auf dem Balkon des Landeshauses, um zu den Demonstranten in der Herrengasse zu sprechen und sie über die Vorgänge im Inneren auf dem Laufenden zu halten.[39]

Nach Erledigung der weiteren Tagesordnungspunkte[40] wurde die Sitzung nach genau fünf Stunden für beendet erklärt. Die Verhandlungen über die Staatsgründung hatten mehr als die Hälfte der Zeit in Anspruch genommen, sie waren eingebettet in eine Tagesordnung, welche streng nach Geschäftsordnung abgearbeitet wurde, ohne dass der Staatsgründung dabei eine besondere Beachtung geschenkt worden wäre. Renners nüchterner juristischer Bericht wurde nur einige Male durch Beifall unterbrochen, es wollte aber keine Begeisterung aufkommen.

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30 ENDERLE-BURCEL, *PStR* (n 28), S. 66. – Danach sollte noch ein Bericht über die Ernährungslage und die Aufhebung von – bei Kriegsausbruch verfügten – Zensurmaßnahmen behandelt werden. Schließlich waren auch die staatsrechtlichen Erklärungen der Vertreter der sudetendeutschen Gebiete über ihren Beitritt zu Deutschösterreich entgegen zu nehmen.

31 BRAUNEDER, *1918* (n 24), S. 45ff.

32 *StPPNV* (n 10), S. 19ff.

33 Wilhelm Ellenbogen hatte in diesem Zusammenhang den sozialdemokratischen Standpunkt für die Staats- und Regierungsform Deutschösterreichs bereits festgelegt, nämlich: „die Konstituierung des deutschen Staates als deutsche Republik", was mit anhaltendem stürmischem Beifall quittiert wurde, gefolgt von Rufen „Hoch die Republik!"; es gab auch Zwischenrufe von der Galerie: *StPPNV* (n 10), S. 24ff.

34 *StPPNV* (n 10), S. 30ff.

35 *StPPNV* (n 10), S. 35ff.

36 Karl Malik (Alldeutsche) fordert sogar eine Abänderung des Wortlautes von § 1 des Beschlusses „über die grundlegenden Einrichtungen der Staatsgewalt", wo statt vom „Staat" Deutschösterreich, deutlicher vom „Freistaat" – als Synonym für Republik – gesprochen werden sollte, was aber mangels Unterstützung nicht zur Debatte gestellt wurde. Gustav Hummer (Deutschradikale), der dies bedauerte, war der Meinung, man solle „sich keinen Täuschungen" hingeben, „das Grundgesetz" – Renners Entwurf des Staatsgründungsbeschlusses – sei „ein rein republikanisches", Ernst Viktor Zenker (Deutschfortschrittliche) bekräftigte, das von Renner vorgeschlagene Gesetz sei „ein durch und durch republikanisches, und der Staat, welcher hier aus diesem Entwurfe geboren werde, könne nichts anderes als eine Republik sein": *StPPNV* (n 10), S. 48.

37 Auch er war der Meinung, dass „im Rahmen" dieses „Gesetzes" für einen Monarchen „gar kein Raum" vorhanden sei: NESCHWARA, Parlamente (n 7), S. 32.

38 Seitz hatte mitzuteilen, dass der am 21. 10. gewählte zweite Präsident, der Christlich-Soziale Jodok Fink aus Vorarlberg, sich auf telegraphischem Weg von der Teilnahme an der Sitzung entschuldigt und zugleich auch seine Funktion zurückgelegt hatte; an seiner Stelle wurde im Verlauf der Sitzung ein Parteikollege, der katholische Geistliche Johann Hauser, später Landeshauptmann von Niederösterreich, gewählt: NESCHWARA, Parlamente (n 7), S. 25.

39 Während der Debatte musste Seitz zwar einige im Saal anwesende Abgeordnete, die sich zwischen den Sitzbänken der Abgeordneten und dem Präsidium aufhielten, auffordern, ihre Privatgespräche in die dafür vorgesehenen Räumlichkeiten zurückzuziehen (*StPPNV*, n 10, S. 36), die Behauptung des Abgeordneten Malik, dessen Antrag in der Debatte keine ausreichende Unterstützung gefunden hatte, dass bei der Stellung seines Antrags „eigentlich diese Nationalversammlung gar nicht anwesend war… weil alles draußen war!", scheint aber doch ein wenig übertrieben.

40 „Bericht über die Ernährungsfrage" und die daraus resultierende prekäre Lage der Bevölkerung in Bezug auf die Versorgung mit Nahrung, Heizmitteln und Bekleidung.

Auch nach Verkündung der einstimmigen Annahme des Staatsgründungsbeschlusses wurde im Protokoll bloß vermerkt: „Lebhafter Beifall und Händeklatschen“.[41]

Die Staatsgründung war völlig unspektakulär als ein Tagesordnungspunkt neben anderen abgehandelt worden, sie wurde als solche auch weder von Renner noch in der Debatte ausdrücklich angesprochen, einige Wortmeldungen erweckten sogar den Eindruck, als wären die Redner davon überzeugt, dass der neue Staat bereits bestand, nämlich seit 21. Oktober![42] Während die Nationalversammlung im Landhaus „in aller Ruhe und mit aller Sachlichkeit“ ihr „Arbeitsprogramm“ abwickelte, präsentierten sich die Herrengasse und die umgebenden Straßenzüge beim Landhaus aber als Kulisse „eines stürmisch bewegten Straßenbildes“.[43]

Das[44] herbstlich nebelfeuchte Wetter war – im Vergleich zum Vormittag – mittags einigermaßen besser geworden; es hatte zu regnen aufgehört, die Temperaturen waren nicht allzu niedrig, sodass ein längeres Verweilen im Freien möglich war. Der Zustrom der Menschen zur Herrengasse verlief „ruhig und ungestört“. War es vor dem Landhaus zu Beginn der Sitzung noch „ganz ruhig“, so wurde es im Verlauf des Nachmittags in den Straßen immer lauter und lebhafter, je mehr die Teilnehmerzahl anwuchs. Bei Beginn der Sitzung der Nationalversammlung reichten die Massen vor dem Landhaus bis zum Kohlmarkt und Minoriten-Platz bei der Hofburg.[45] Die Demonstration wandelte sich in eine große Volksversammlung unter freiem Himmel, als auf dem Balkon des Landhauses zunächst Mitglieder deutschnationaler Vereine, in der Folge aber auch Mitglieder der Nationalversammlung erschienen, welche die Tausenden vor dem Gebäude laufend über den Sitzungsverlauf in Kenntnis setzten; in fast ununterbrochener Folge löste ein Redner den anderen ab. Nach Mitteilung der erfolgten Staatsgründung erreichte die Stimmung auf der Straße den Höhepunkt. Die vor dem Landhaus unter dem Balkon versammelten Demonstranten jubelten stürmisch und winkten mit Sacktüchern, es ertönten Hochrufe auf das freie Deutschösterreich und die deutschösterreichische Republik. Bürgerliche und Deutschnationale dominierten zunächst die Szene in der Herrengasse, darunter auch viele Offiziere und Soldaten in Uniform, sie trugen Rosetten in den deutschen Nationalfarben auf ihren Kappen. Schwarz-rot-goldene Banner wurden entrollt, es wurde die „Wacht am Rhein“ und dann das „Lied der Deutschen“ angestimmt, dazwischen erschollen stürmische Heilrufe auf das deutsche Volk, die sich lawinenartig nach allen Richtungen fortpflanzten, gefolgt von Forderungen nach dem „Anschluß“. Später mischten sich in die deutschnationalen Parolen zunehmend Hochrufe auf die internationale Sozialdemokratie und Forderungen nach „Friede und Brot!“. Funktionäre der deutschfreiheitlichen Parteien, ausgestattet mit schwarz-rot-goldenen Armschleifen und solchen Abzeichen auf Hut oder im Knopfloch, sorgten mit Umsicht und höflichem Takt für Ruhe und Ordnung. Sie wurden durch einzelne Gruppen sozialdemokratischer Arbeiter verstärkt. In den Nachmittagsstunden waren dann geschlossene Züge von Arbeitern aus den Außenbezirken Wiens in die Innenstadt geströmt, unter Vorantragen von großen roten Fahnen und Standarten mit sozialdemokratischen Parolen fluteten sie in die Herrengasse, in der nun ein Menschenmeer wogte. Eine Menge von mehreren Zehntausend bewegte sich über den Nachmittag hinweg durch die Herrengasse und ihre Umgebung. Die Stimmung wurde „durch keinen Oppositionslärm getrübt“, Vertreter aller Parteirichtungen waren sich einig: Hier wurde „das alte Österreich zu Grabe getragen“ und „der Geburtstag eines neuen Deutschösterreichs gefeiert“. Nur vereinzelt war es in der Innenstadt zu Zwischenfällen gekommen, Sozialdemokraten waren zum Parlament gezogen, hatten dort die Rampe besetzt, auf dem linken Flaggenmast eine rote Fahne gehisst und Steine gegen das Parlament geschleudert.[46]

cc) am Abend

Um 20 Uhr wurde in einem Nebensaal des Landhauses, dem Prälaten-Saal, die erste Sitzung des Staatsrates abgehalten. [47] Bis in die Morgenstunden wurde über die Besetzung der Staatsämter mit den von den politischen Parteien vorgeschlagenen Staatssekretären verhandelt, womit ein erster Schritt gesetzt war, um in Deutschösterreich von den monarchischen Ministerien die Regierungsgewalt zu übernehmen.[48]

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[41] Nach einstimmiger Annahme des Staatsgründungsbeschlusses wurde sofort der nächste Tagesordnungspunkt („Arbeitsvermittlung und Arbeiterschutz“) in Verhandlung genommen. Auch am Schluss der Sitzung wurde vom Präsidium kein Kommentar über die Tragweite des Beschlusses „über die grundlegenden Einrichtungen der Staatsgewalt“ als einer Staatsgründung abgegeben. Die Sitzung hatte genau fünf Stunden gedauert; mit dem Hinweis, die „Ereignisse überstürzen sich“, wurde noch kein Termin für die nächste Sitzung festgelegt, die Abgeordneten wurden aber ersucht, soweit „möglich ist, in Wien… [zu] verbleiben“. Es war damit zu rechnen, dass die nächste Sitzung „in der allernächsten Zeit, etwa sogar während der Allerheiligentage“ stattfinden könnte (*StPPNV,* n 10, S., 60), tatsächlich sind dann fast zwei Wochen verstrichen, ehe die Nationalversammlung am 12. November zu ihrer nächsten Sitzung einberufen wurde – nachdem sich die Ereignisse tags zuvor mit der Verzichtserklärung des Kaisers tatsächlich überstürzt hatten (dazu unten C 1).

[42] In der Tagespresse war nach der am 21. 10. erfolgten Konstituierung mehrfach von einem „neuen Staat“ gesprochen worden (dazu oben A 2.a und b).

[43] Die Reichspost notierte lapidar, die Nationalversammlung habe trotz der „stürmischen Kundgebungen der Straße… in voller Ruhe Deutschösterreich eine provisorische Verfassung gegeben“: *RP* (n 13) 31. 10. 1918, Morgenblatt S. 3.

[44] Dazu – statt vieler anderer Zeitungsberichte – das Folgende nach: *Fremden-Blatt.* Organ für die böhmischen Kurorte 31. 10. 1918, S. 1f.

[45] Auch die Fenster sämtlicher Häuser der Herrengasse waren dicht besetzt mit Schaulustigen, auch in den Portalen der Geschäfte standen die Leute eng geschlichtet wie Heringe in Konservenbüchsen. Die Kaffeehäuser in der Herrengasse, Central und Herrenhof, waren überfüllt mit Gästen.

[46] *Fremden-Blatt* (n 45) 31. 10. 1918, S. 2.

[47] ENDERLE-BURCEL, *PStR* (n 28), S. 71ff, 82f.

[48] Die Übergabe erfolgte ab 31. 10. 1918: ENDERLE-BURCEL, *PStR* (n 28), S. 106 und in Anm 6.

c) Ballhausplatz

Abends fand auch der letzte (gemeinsame) Ministerrat der Monarchie statt, allerdings ohne Beteiligung ungarischer Vertreter[49] – die ungarische Regierung in Budapest hatte nach dem 16. Oktober den Verkehr mit Wien abgebrochen und den 1867 vereinbarten Ausgleich mit Wirkung zum Monatsende aufgekündigt: Damit war die Gesamtmonarchie faktisch beendet, Ungarn blieb mit Österreich zwar durch den gemeinsamen Monarchen in Personalunion verbunden, aber auch diese bestand nur mehr auf dem Papier.[50] Und auch die österreichische Monarchie sollte in etwas mehr als einer Woche der Vergangenheit angehören (dazu unten C).

3. Das Ereignis und seine Bewertung

a) in der Tagespresse

Die Neue Freie Presse[51] sprach – ohne auf die Staatsform einzugehen – von der „Gründung des neuen Staates", welche „unter großer Teilnahme des Volkes" stattgefunden habe.

Die Reichspost[52] äußerte sich skeptisch über die Zukunft Deutschösterreichs: „kaum gegründet, droht schon schwerste Gefahr". Vor dem Parlament und vor dem Landhaus sei es „zu ernsten Kundgebungen gegen die monarchische Regierungsform und für den Anschluß" gekommen[53], was, wenn nun die Sozialdemokraten dafür „ihre Maschine in Betrieb" und die „sozialdemokratische Massen" in Bewegung setzen würden, eine „Lawine ins Rollen" bringen könnte, welche „Deutschösterreich…zertrümmern" würde.

Die sozialdemokratische Arbeiterzeitung[54] berichtete am Morgen nach den Ereignissen in der Herrengasse tatsächlich unter der Schlagzeile „Die deutsche Republik": Das „Staatsvolk des alten Österreich" habe den „Volksstaat von Deutschösterreich" begrüßt. Deutschnationale und Sozialdemokraten hatten zusammengefunden: Auf „getrennten und weit voneinander abliegenden Wegen" seien „Arbeiter… und… Studenten wieder einmal zur gemeinsamen Tat in der Herrengasse" aufgezogen – wie seinerzeit im Jahr 1848. Es seien zwar inzwischen „Jahrzehnte der Entfremdung" eingetreten, doch „das kurze gemeinsame Erleben" von damals habe sie „jetzt… endlich wieder… dorthin" zurückgeführt, „wo sie im Jahre 1848" gemeinsam den kaiserlichen Truppen gegenübergestanden waren – nun haben sie „das alte Österreich ins Grab der Geschichte" gesenkt. Zunächst seien es nur „einige hundert Deutschnationale gewesen, doch bald seien „die Arbeitermassen" aus allen Bezirken vor das Landhaus gezogen und hatten „das Häufchen Deutschnationale eingekeilt": „Ruhig und eindrucksvoll" sei der Aufmarsch vor sich gegangen, die ganze Herrengasse entlang standen Massen von Menschen „dicht gedrängt, Kopf an Kopf… Männer und Frauen im Arbeiterkleid". Es habe sich ein „gewaltiges Schauspiel geboten", eine „riesige Kundgebung, die die Revolution bedeutete", doch ohne dass sich „auch nur ein Zusammenstoß mit der „massenhaft aufgebotenen Polizei" ereignet hätte. Es erscholl „tausendstimmig der Ruf": „Es lebe die Republik!". Die Arbeiterzeitung sprach daher von einer „Feier der Verkündung der Republik… durch die neue Verfassung", wofür die Nationalversammlung mit dem Beschluss „über die grundlegenden Einrichtungen der Staatsgewalt" das erste Stück geliefert hatte.

b) in parteipolitischer Sicht

Der auf seinem Entwurf beruhende Beschluss der Nationalversammlung „über die grundlegenden Einrichtungen der Staatsgewalt" vom 30. Oktober, der sogenannte Staatsgründungsbeschluss, gab dem neuen Staat – so Renner –,keine Verfassungsurkunde", sondern lediglich das „Stück einer Verfassung"[55], das sich zunächst nicht einmal explizit zur Staats- und Regierungsform äußerte.

Die Sozialdemokraten hatten sich in der Zwischenzeit – als Alternative zu „einem freien Völkerbunde" mit den anderen Nachfolgestaaten der Österreichischen Monarchie – auf den Beitritt von Deutschösterreich als „Sonderbundesstaat" zum Deutschen Reich festgelegt, das allerdings erst als „ein echter Volksstaat", als eine „demokratische Republik" zu organisieren wäre.[56] Gemäßigt gaben sich die Christlich-Sozialen; sie sprachen von einer „grundsätzlichen Festhaltung an der monarchischen Regierungsform", freilich „im Sinne einer Demokratisierung"; ähnlich argumentierten die Deutschnationalen: Sie deklarierten sich als „Anhänger der konstitutionellen monarchischen Staatsform" und plädierten dafür, dass die Deutschen „in voller Einigkeit" ihr „Verhältnis zum Deutschen Reich" sowie zu den „anderen Nationen in freier Selbstbestimmung" ordnen sollen. Auch die Deutschliberalen begrüßten „den Zusammenschluß aller Deutschen Österreichs", welche nun ihr „Schicksal selbst zu bestimmen" hätten. Die radikalen Gruppen des Deutschen Nationalverbandes lehnten die Errichtung eines Bundesstaates, einen „Staatenbund mit… slawischen Staaten", ab und forderten den sofortigen „Anschluß Deutschösterreichs… an das Deutsche Reich".[57]

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[49] BRAUNEDER, *1918* (n 24), S. 21f.

[50] Von ungarischer Seite wurden die Marine am 31. 10. und die ungarischen Einheiten aus dem gemeinsamen Heer in den folgenden Tagen ausgegliedert. Im Parlament in Budapest wurde die bestehende monarchische Regierungsform bereits offen in Frage gestellt, aber erst am 16. 11. mit der Erklärung der Republik klargestellt: BRAUNEDER, *1918* (n 24), S. 127ff., 130f.

[51] *NP* (n 9) 31. 10. 1918, Morgenblatt, S. 1.

[52] *RP* (n 13) 31. 10. 1918, Morgenblatt, S. 1.

[53] „Eine Woche lang war das neue Deutschösterreich einig. Das große Wunder war Ereignis geworden", weil alle Parteien im Interesse der Zusammenarbeit „für den Aufbau des neuen Staates", ihre Parteiinteressen zurückgedrängt hatten – „es gab nur mehr Deutsche". „Neu" sei aber nun, dass „das Schlagwort… Republik von bürgerlicher Seite", am „leidenschaftlichsten" von Teilen der Deutschnationalen, in die Debatte eingebracht werde, in der „Hoffnung, dadurch dem Anschluss… den Weg zu bahnen".

[54] *AZ* (n 16) 31. 10. 1918, Morgenblatt, S. 1f.

[55] *StPPNV* (n 10), S. 30f. (Renner).

[56] NEISSER, Chronik (n 26), S. 514; HAAS, H., Einleitung, in ENDERLE-BURCEL, *PStR* (n 28), S. LVIf., LXIIIf.

[57] NEISSER, *Chronik* (n 26), S. 514f.; HAAS, Einleitung (n 57), S. LVIIIf., LXIIf.

c) in verfassungsrechtlicher Sicht

Mit dem Beschluss der Nationalversammlung „über die grundlegenden Einrichtungen der Staatsgewalt" war „die Konstituierung des Staates… vollendet"; damit hatte sich Deutschösterreich „als ein Staat konstituiert", war es „als souverän erklärter Staat entstanden" – so Hans Kelsen in seinem Kommentar über „Verfassungsgesetze Deutschösterreichs".[58] Renner sprach später davon, dass die Deutschösterreicher „über Nacht… ein Volk ohne Staat geworden" seien, und dass ein solcher aber am 30. Oktober ins Leben gerufen wurde – auf Grundlage des von ihm konzipierten Statuts, oder wie der deutschfreiheitliche Abgeordnete Ernst Viktor Zenker formulierte: „aus diesem Entwurfe geboren" worden war.[59]

Von einer Staatsgründung sprach die Nationalversammlung in ihrem Beschluss selbst aber nicht. In dem Text der davor nach lebhafter Debatte angenommenen Note an den US-Präsidenten Wilson war freilich ausdrücklich die Rede von der Absicht, „einen selbständigen deutschösterreichischen Staat zu bilden". Am folgenden Tag wurde mit Kundmachung des Staatsrates durch die Präsidenten der Nationalversammlung – im Wege der Pressemedien – außerdem allgemein bekannt gemacht, dass mit dem Beschluss „über die grundlegenden Einrichtungen der Staatsgewalt" von der Nationalversammlung „das provisorische Grundgesetz des neuen deutschösterreichischen Staates" geschaffen worden sei: Auf seiner Grundlage sei „der deutschösterreichische Staat zu lebendiger Wirklichkeit geworden".

Nach Vorarbeiten der Staatskanzlei unter Federführung von Renner waren in der Folge im Staatsrat Entwürfe für weitere „Grundgesetze" zur Vorberatung eingebracht worden, womit die am 30. Oktober offen gebliebenen Lücken der Verfassungsordnung geschlossen werden sollten.[60] Zug um Zug sollte eine neue Verfassungsordnung für Deutschösterreich aufgebaut werden. Nur die Frage der Staatsform wurde zunächst zurückgestellt. Renner wollte die Klärung dieser Frage zwar den „Staatsrechtslehrern überlassen", war aber selbst davon überzeugt, es habe „von Anfang an eine republikanische" Staatsform bestanden, bereits am 30. Oktober sei eine „republikanische Ordnung entstanden",[61] in der „kein Raum mehr für… monarchische Gewalt" geblieben war.[62]

C) 12. November 1918: Der „Namenstag" Deutschösterreichs

1. Die Vorgeschichte

Als am 9. November im Deutschen Reich die Republik ausgerufen wurde, war ein ähnlicher Formalakt auch für Deutschösterreich fällig geworden. Der Monarch, Kaiser Karl, weigerte sich zwar, eine formelle „Abdankungserklärung" abzugeben, erklärte jedoch am 11. November 1918 auf jeglichen Anteil an den Staatsgeschäften zu verzichten. Die rechtlichen Folgen dieser Handlung waren umstritten: Nach herrschender Ansicht war damit das monarchische Element der Verfassung von 1867 erloschen.[63] Der Anteil des Volkes an den Staatsgeschäften war zwar bestehen geblieben, doch auf diesen verzichtete das Abgeordnetenhaus des Reichsrates als Volksvertretung am Vormittag des 12. November 1918[64].

Mit dem Verzicht der bisherigen Träger der Staatsgewalt – Kaiser und Reichsrat – war die Monarchie de jure untergegangen. Damit wurde der Weg frei für die Proklamation von Deutschösterreich als Republik, womit das im Staatsgründungsbeschluss bereits schlüssig erkennbare republikanische Prinzip ausdrücklich fixiert werden konnte. Damit sollte nun aber auch die Verkündung des Anschlusses der kleinen deutschösterreichischen an die große deutsche Republik verbunden werden.[65]

Diese für das Selbstverständnis des neuen Staates wesentlichen Erklärungen sollten mit einem Gesetz „über die Staats- und Regierungsform" verfassungsrechtlich fixiert werden. Die Vorberatungen dazu im Staatsrat waren unmittelbar nach Bekanntwerden der Verzichtserklärung des Deutschen Kaisers angelaufen. In Bezug auf die Fixierung der republikanischen Staatsform gab es im Staatsrat eine im Wesentlichen einhellige Haltung aller Parteien, zumal damit „nur mehr auszusprechen" war, was Deutschösterreich bereits seit 30. Oktober gewesen ist. In Bezug auf die Frage des Anschlusses aber gab es im Staatsrat am 11. November Vorbehalte seitens einiger christlich-sozialer Stimmführer.[66]

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[58] KELSEN, H., *Die Verfassungsgesetze der Republik Deutschösterreich*, Band I, Wien 1919, S. 8, 32, 37.

[59] *StPPNV* (n 10), S. 45.

[60] Entwürfe zu einem Gesetz über die Einführung eines Staatsgesetzblattes, den Umfang und die Grenzen des Staatsgebietes, den Erwerb der Staatsbürgerschaft, die Ausübung der richterlichen Gewalt und der Staatsgewalt in den Ländern.

[61] Renner in *StPPNV* (n 10), S. 31; RENNER, Vorwort. In: KELSEN, *Verfassungsgesetze* (n 59), S. I, IV.

[62] Renner Ende März 1919 in: *StPKNV*, (n 3), S. 113 (27. 3. 1919); WITTMAYER, L., Zu den Voraussetzungen und Grundproblemen der provisorischen Verfassung von Deutschösterreich. In: *Österreichische Zeitschrift für Öffentliches Recht* I, Leipzig-Wien 1919/20), S. 64:‚republikanisch war schon der erste Atemzug des neuen Staates".

[63] BRAUNEDER, *1918* (n 24), S. 140ff., 153ff., 235ff. – Eine andere Ansicht geht davon aus, dass der Kaiser noch keine endgültige Entscheidung treffen wollte, wie auch sein anschließendes Verhalten zeigte: Er blieb in Österreich. Seine Weigerung, formell abzudanken, führte im April 1919 mit Gesetz zu seiner Landesverweisung. Der ehemalige Kaiser begab sich bereits kurz vor der Beschlussfassung des sogenannten Habsburgergesetzes ins Exil in die Schweiz. Von dort aus versuchte er 1921 zweimal in Ungarn, für das er am 13. 11. 1918 eine analoge Erklärung wie am 12. November in Österreich abgegeben hatte, wieder an die Macht zu kommen. Nach dem Scheitern des zweiten, militärisch durchgeführten Versuches wurde er im Oktober 1921 gefangen genommen und – auf Anordnung der Alliierten – auf die Insel Madeira verbannt, wo er 1922 starb: STADLER, K., Die Gründung der Republik. In: WEINZIERL, E. / SKALNIK, K. (Hrsg.), *Österreich 1918–1938. Geschichte der Republik*, Band 1, Graz-Wien-Köln 1983, S. 71f.;

[64] Das Herrenhaus war am 30. Oktober, am Tag der Staatsgründung Deutschösterreichs, auseinandergegangen, ohne einen konkreten Sitzungstermin festzulegen (dazu oben B 2 a.bb), was nachträglich als eine konkludente Selbstauflösung angesehen werden kann: Vergleiche NEISSER, *Politische Chronik* (n 26), Heft 11 November 1918, S. 576, 580.

[65] mit der Unmöglichkeit einer Zusammenarbeit mit der tschechoslowakischen Republik, vor allem auf wirtschaftlichem Gebiet, hatten sich die deutschösterreichischen Politiker infolge der ablehnenden Haltung der Regierung in Prag davor schon abgefunden: ENDERLE-BURCEL, *PStR* (n 28), 282ff.

[66] Ebda, 349ff., 353ff., 358f.

Der Entwurf des Gesetzes sollte schon am folgenden Tag von der Nationalversammlung in Verhandlung genommen werden – darüber wurde die Bevölkerung von Wien am 11. November nachmittags durch Bekanntmachung mittels öffentlichem Anschlag und Veröffentlichung durch eine Extra-Ausgabe der amtlichen Wiener Zeitung in Kenntnis gesetzt. Auf Vorschlag von Renner sollte nach Annahme des Entwurfes in der Nationalversammlung am Nachmittag des folgenden Tages dieser für das Selbstverständnis Deutschösterreichs wesentliche verfassungsrechtliche Schritt im Rahmen einer öffentlichen Kundgebung als Verfassungsfest inszeniert werden. Die politischen Parteien sollten ihre Anhänger mobilisieren und zu einer Massenversammlung vor dem Parlamentsgebäude am Ring aufrufen.

Mit der geplanten Inszenierung einer Republikfeier sollte die Szene nachgestellt werden, welche drei Tage zuvor am 9. November in Berlin von der Rampe des Reichstagsgebäudes zur Ausrufung der Republik im Deutschen Reich geführt hatte.

2. Der Ablauf der Ereignisse – Schauplätze

a) Im Parlamentsgebäude

Mit der Verzichtserklärung des Monarchen vom 11. November war die weitere Existenz des Abgeordnetenhauses obsolet geworden, es hatte bei seiner Sitzung am Vormittag des folgenden Tages „keine Aufgaben mehr zu erfüllen", es oblag ihm nur „die große, mächtige Aufgabe, Deutschösterreich aus der konstitutionellen Monarchie hinüberzuführen zur Republik", wie Präsident Gustav Groß abschließend feststellte. Die knapp nach 11 Uhr eröffnete Sitzung wurde nach einer Viertelstunde schon wieder geschlossen – ohne einen neuen Sitzungstermin festzulegen, was faktischer einer Selbstauflösung gleichkam.[67]

Bis auf wenige Ausnahmen, etwa der rumänische Vizepräsident Theofil Simionovici aus Bukowina, waren die Reichsratsabgeordneten im Parlamentsgebäude verblieben: Die deutschen Abgeordneten sollten hier um 15 Uhr zu ihrer dritten Plenarversammlung zusammentreten, und zwar im Herrenhaussaal. Sie brauchten an ihrem neuen Versammlungsort – anders als im beengten Sitzungssaal des niederösterreichischen Landhauses – nur einen Teil der verfügbaren Plätze in Anspruch zu nehmen. Die Sitzordnung blieb dieselbe wie im Landhaus: Im Zentrum saßen die Deutschnationalen, rechts die Sozialdemokraten und links die Christlich-Sozialen; auf der Ministerbank nahmen die Staatssekretäre Platz.[68]

Unter den Abgeordneten herrschte gespannte Ruhe, lebhaft ging es aber auf den Galerien zu, bürgerliches Publikum drängte sich dort, wo sich sonst exklusive und elegante Gestalten einzufinden pflegten. Zehn nach 15 Uhr wurde die Sitzung eröffnet.[69] Nach einem bewegenden Nachruf auf den am Vortag verstorbenen sozialdemokratischen Parteiführer Viktor Adler wurde sofort zur Tagesordnung geschritten: Dinghofer nahm völlig ungerührt, als ob es sich um eine alltägliche Sitzung handelte, die Tagesordnung auf, welche eine Reihe von Entwürfen des Staatsrates über Gesetze zum Ausbau der Verfassungsordnung von Deutschösterreich zum Gegenstand hatte: Gemäß Beschluss des Staatsrates vom Vortag wurde mit dem Entwurf eines Gesetzes „über die Staats- und Regierungsform" begonnen, der – ohne Vorlage an einen Ausschuss – nur aufgrund eines mündlichen Berichtes sofort in Verhandlung genommen wurde. Als Berichterstatter fungierte – wie schon am 30. Oktober aus Anlass der Behandlung des Beschlusses „über die grundlegenden Einrichtungen der Staatsgewalt" – wieder Karl Renner, nun in seiner neuen Funktion als Staatskanzler: Auch er sprach zunächst ganz unpathetisch, erläuterte in seiner Rede den Gesetztext im Stil eines juristischen Kommentars, wurde im Laufe seiner Ausführungen aber zunehmend bewegter und auch mehrmals von lebhaftem Beifall unterbrochen[70]; es gab auch Kundgebungen von der Galerie. Bei seinen Ausführungen über den Anschluss erhob sich die Versammlung mit stürmischem, langanhaltendem Beifall und Händeklatschen im Saal wie auf den Galerien: Es bot sich am 12. November somit ein völlig anderes Stimmungsbild als am 30. Oktober:[71] „Gleich darauf erfolgt die Abstimmung; einstimmig angenommen. Im Laufe einer Minute hat sich der ganze Umsturz vollzogen, ist ohne überflüssige Worte in aller Ruhe eine neue Staatsform geschaffen worden. Unwillkürlich blickt man auf die Uhr: dreiviertel vier: Jetzt sind wir also Republik…", so der Kommentar der Neuen Freien Presse.[72]

Danach wurde die Sitzung der Nationalversammlung von Dinghofer unterbrochen[73], „um gemeinsam in feierlichem Zuge sich vor die Rampe des Hauses zu begeben, das deutschösterreichische Volk zu begrüßen und ihm die gefaßten Beschlüsse mitzuteilen". Nach den Worten von Dinghofer: „Der wichtigste Markstein für unsere Zukunft ist gesetzt. Die Heiligkeit der Stunde muß auch äußerlich zum Ausdruck kommen. Unsere Volksgenossen harren draußen… der frohen Botschaft", findest sich im Protokoll vermerkt, dass die „Sitzung um 3 Uhr 55 Minuten nachmittags unterbrochen" und „um 4 Uhr 35 nachmittags" wiederaufgenommen wurde, um die Verhandlungen über die übrigen Punkte der Tagesordnung fortzusetzen. Doch schon

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67 *StPAHRR* (n 25), S. 4701.

68 *RP* (n 13) 22. 10. 1918, 2 („Die Konstituierung der provisorischen Nationalversammlung Deutschösterreichs).

69 *StPPNV* (n 10), S. 63ff. *NFP* (n 9) 13. 11. 1918, Morgenblatt S. 4ff.

70 Zum Folgenden *StPPNV* (n 10), S. 65 f.: „Stürmischer Beifall und Händeklatschen": (3x); 66f.: „Lebhafter Beifall und Händeklatschen" (2x); 67: „Großer Beifall und Händeklatschen"; S. 66: „Erneuter Beifall und Händeklatschen"; 65, 67: „Beifall"; 66: „Lebhafte Zustimmung"; 65ff.: „Zustimmung" (5x).

71 Die allgemeine Euphorie im Sitzungssaal wurde ein wenig gedämmt durch eine Wortmeldung von Wilhelm Miklas, welcher im Namen Christlich-Sozialen die Erklärung abgab, dass „so vitale und fundamentale Fragen" – wie die Staatsform und der Anschluss – nicht von der provisorischen Nationalversammlung entschieden werde, sondern „einer ehestens vorzunehmenden allgemeinen Volksabstimmung… vorzubehalten" wäre. Doch wolle man seitens der Christlich-Sozialen „um die Einigkeit der deutschösterreichischen Volksvertretung in diesem so geschichtlichen Augenblick nicht zu gefährden, von der Stellung eines (anderen) Antrags absehen": *StPPNV* (n 10), S. 67f.

72 *NFP* (n 9) 13. 11. 1918, Morgenblatt, 2.

73 Wie im Staatsrat am Vortag auf Antrag Renners beschlossen: ENDERLE-BURCELL, *PStR* (n 28), S. 374f.

nach fünf Minuten wurde sie abermals unterbrochen, nachdem „Rufe: Es wird hereingeschossen!“ laut geworden waren. Die Sitzung konnte aber nach 30 Minuten wiederaufgenommen und dann auch bis zum letzten Tagesordnungspunkt fortgesetzt werden. Am Schluss der Sitzung stellte Dinghofer fest: „Die Sitzung hat in etwas ungewöhnlicher Weise stattgefunden. [Was sich auf die Ereignisse bezog, die sich während der Sitzung vor dem Parlament abgespielt hatten.] Trotzdem haben wir die Tagesordnung… zu Ende beraten“.

b) Vor dem Parlamentsgebäude

Über den Ablauf der am 12. November von den Parteien, insbesondere den Sozialdemokraten und Anhängern der Deutschnationalen inszenierten Massenkundgebung vor dem Parlament, wobei die Christlich-Sozialen nicht parteimäßig organisiert auftraten, wurde in den Blättern der Tagespresse ausgiebig berichtet; Dinghofer selbst lieferte etwa ein Jahr später für die Neue Freie Presse darüber folgende „persönliche Erinnerungen“:[74]

„Auf der Ringstraße vor dem Parlament hatte sich… der Aufmarsch der Massen vollzogen und unvergeßlich bleibt uns allen der Anblick, der sich uns bot: Unabsehbar war die Menschenmenge. Man sah eigentlich nur Köpfe, vielleicht 200.000 bis 300.000, niemand konnte sie wohl zählen. Feierliche Ruhe und Stille herrschte. Die Kraft meiner Stimme bis ans Äußerste anstrengend, erinnerte ich an den Ernst der Stunde, an die Größe der Zeit; die Geschichte vieler Jahrhunderte ist dahin, eine neue Zeit, geboren aus Blut, Jammer und Elend ist da. Das alte Österreich ist nicht mehr. Die Vorrechte sind beseitigt, Jungdeutschland ist im Bau, gestützt auf die Grundpfeiler der Rechte des Volkes. Freiheit und Friede sind die Lichtpunkte unserer Zukunft. Zeigen wir uns dieser großen Zeit würdig, gehen wir entschlossen weiter diesen Weg, beharren wir fest auf unseren demokratischen Zielen und Idealen, dann muß der Bau gelingen, dann muß unser Volk eine bessere Zukunft haben, trotz der ungeheuren Wunden, die uns der Krieg gerissen, trotz der Härten, die von des Siegers Machtgier drohen. Laßt uns einig sein und vereint mit unseren Brüdern im Deutschen Reich, vereint mit der jungen Republik Deutschland. Der Traum, von dem wir viele Jahre geträumt haben, der Traum von der Freiheit geht in Erfüllung.‚Freiheit‘ war das Stichwort, bei dem die rot-weiß-roten Fahnen an den Flaggenstangen gehißt werden sollten. Aber es kam anders. Ich konnte meine Anrede nicht mehr mit dem Gedankengang enden, daß die rot-weiß-roten Fahnen hinaus über ganz Deutschösterreich verkünden, die demokratische Republik Deutschösterreich sei erstanden, denn die unberufenen Elemente rissen mit Gewalt das weiße Tuch aus den Fahnen heraus, bloß rote Fetzen wurden sichtbar. Trotz der Unruhe um den Flaggenstamm herum hielten die Volksmassen Ruhe. Ich schloß meine Rede nach einem kurzen Übergange mit einem, Hoch‘ auf die demokratische Republik, in welches mit überwältigender Begeisterung die Massen einstimmten.“

D) Ergebnis: Proklamation der Republik verdrängt Konstituierung des Staates

Mit der Verkündung der republikanischen Staatsform Deutschösterreichs hatte der mit dem kaiserlichen Manifest vom 16. Oktober einsetzende Prozess der Abwicklung der alten Staatlichkeit und ihres Übergangs auf den neuen Staat seinen Abschluss gefunden: Die Abfolge der Ereignisse von 21. Oktober bis 12. November wurde von den Zeitgenossen vielfach auch als eine Revolution[75] empfunden – initiiert am 21. Oktober auf Basis des Selbstbestimmungsrechts durch die deutschen Abgeordneten des Reichsrats als deutschösterreichischer Nationalrat und abgeschlossen am 12. November, auch durch diese, nun aber in ihrer Doppelrolle als Provisorische Nationalversammlung für Deutschösterreich.[76]

Diese von Parlamentariern getragene Revolution sollte auf Basis eines von den Parteien stillschweigend geschlossenen Übereinkommens einträchtig verlaufen[77], sie ist aber letztendlich doch nicht völlig gewaltfrei ausgegangen. Nach ersten Störungen der Republik-Feier beim Aufziehen der Staatsfarben auf den Flaggenmasten vor dem Parlamentsgebäude vollzog sich, im Gefolge des Versuchs von kommunistischen Aktivisten das Parlamentsgebäude mit Waffengewalt zu besetzen, ein durch Rote Garden provozierter Einsatz von Schusswaffen, der einen minutenlangen Schusswechsel – auch mit regulären Kräften der Volkswehr – auslöste: Die mehrere hunderttausend Menschen umfassende Versammlung, welche sich im Bereich der Ringstraße von der Universität bis zur Bellaria vor dem Parlamentsgebäude ausgebreitet hatte, wurde in Panik versetzt. Dutzende Verletzte – und auch zwei Todesopfer – waren infolge der chaotischen Auflösung der Versammlung zu beklagen.[78] Dinghofer berichtete in seinen Erinnerungen an den 12. November 1918 darüber wie folgt: „Kaum hatten wir uns zur Fortsetzung der Sitzung wieder in das Parlament zurückgezogen, kaum waren die Tore geschlossen, als plötzlich Schüsse fielen, Gewehrkolben an die Tür schlugen, Kugeln in die Hallen und durch die Fenster flogen. Ich sah von meinem Arbeitszimmer auf die Menge, die in Angst wirr durcheinander tobte. Das gewaltsame Eindringen der bolschewistischen Elemente gelang nicht, das erste Attentat auf unseren jungen Freistaat […] war mißlungen. Wir Abgeordnete setzten unsere Beratungen fort und führten die Tages-

[74] *NFP* (n 9) 28. 11. 1919, Morgenblatt, 1f. („Vor einem Jahre. Aus persönlichen Erinnerungen“).

[75] Dazu SCHEFBECK, Verfassungsentwicklung 1918–1920 (n 8), S. 64.

[76] Eine detailreiche, quellenfundierte Darstellung der für Staatsgründung und Proklamation der Republik ausschlaggebenden Ereignisse vom 21. und 30. 10. sowie 12. 11. 1918 findet sich bei BRAUNEDER, *1918* (n 24), S. 16ff. und 164ff., 287ff.

[77] Vergleiche dazu aber die Stellungnahme von Viktor Adler anlässlich der Konstituierung der Nationalversammlung am 21. 10. 1918: Stenographische Protokolle über die Sitzungen der Nationalversammlung *StPPNV* (n 10), S. 8: „Wir wollen mit… unseren Klassengegnern… kein Bündnis, keinen Burgfrieden schließen, wir bleiben Gegner… An dem Neuaufbau des deutschösterreichischen Staates wollen wir mit redlichem Willen… mitarbeiten…“. Beispiele für kontroverse Beschlüsse bei HÖBELT, Gliederung Nationalversammlung (n 14), S. 59f.

[78] Einen raschen Überblick über die Berichterstattung am 13. 11. 1918 bietet *ANNO* – AustriaN Newspapers Online. Historische österreichische Zeitungen und Zeitschriften online): [http://anno.onb.ac.at/cgi-content/anno?datum=19181113&zoom=33].

ordnung trotz der Belagerung zu Ende. Die Geburtsstunde der neuen demokratischen Republik… war vorüber."[79]

Diesen Ereignissen, welche die Proklamation der Republik umgaben, und derart bedrohlich wirkten, dass sie die eben deklarierte Staatsform zu gefährden schienen, wurde – ein halbes Jahr später – eine so starke identitätsstiftende Wirkung für die weitere Existenz des Staates beigemessen, dass darüber im Plenum der Konstituierenden Nationalversammlung Ende April 1919, als der 12. November als Staatsfeiertag eingeführt werden sollte, nicht einmal diskutiert wurde. Die Verkündung der Republik sollte von nun an als die „legitime Geburtsstunde" der Republik gelten: Nicht die „Neuerscheinung im Kreise der Staaten"[80] am 30. Oktober, sondern „die Ausrufung des Freistaates" Deutschösterreich. Der Tag seiner Proklamation als demokratische Republik wurde zum Staatsfeiertag erklärt. Karl Renner – der Urheber des Staatsgründungsbeschlusses – hatte dem 12. November bloß die Bedeutung zugemessen, dass man nach der bereits am 30. Oktober erfolgten Geburt des neuen Staates „an dem jungen Geschöpf nur noch den feierlichen Akt der Taufe vollzogen" habe.[81]

Mit dem Beschluss über die „demokratische Republik" am 12. November[82] hatte die Nationalversammlung daher „nur mehr auszusprechen, was [Deutschösterreich bereits seit 30. Oktober gewesen] ist"[83]; sie hatte damit die im Staatsgründungsbeschluss über die Staats- und Regierungsform unbestimmt gebliebenen Sachaussagen gleichsam authentisch – und damit auch rückwirkend – interpretiert. Der ausdrücklichen Festlegung des republikanischen Prinzips am 12. November kam – so besehen – keine konstitutive, sondern bloß deklaratorische Bedeutung zu.[84]

III. Öffentliches Gedenken an 1918

A) Bis 1932: Republikfeiern als sozialdemokratische Domäne

Von den für die Entstehung der Republik ausschlaggebenden Ereignissen im Oktober und November 1918 wurde – als gesetzlich mit Arbeitsruhe fixierter Feiertag – vor allem der 12. November immer wieder in Erinnerung gehalten, sodass die anderen denkwürdigen Ereignisse am 21. Oktober und am 30. Oktober von dem Akt der Deklaration als Republik überschattet und in der Erinnerung verdrängt wurden.

Eine wesentliche Rolle spielte dabei die Einstellung der Sozialdemokratie in Deutschösterreich als selbstbestimmte Trägerin der Traditionspflege des 12. November als identitätsstiftendes Ereignis für Deutschösterreich. Der Staatsfeiertag gab ihr Gelegenheit, zusätzlich zum 1. Mai einen weiteren arbeitsfreien Tag für politische Demonstrationen zur Verfügung zu haben und dabei auch ihre Rolle bei der Begründung der Republik publikumswirksam in Szene zu setzen. Der zentrale Bezugspunkt dieser Demonstrationen auf der Ringstraße war das Parlament; der davor gelegene Abschnitt der Ringstraße konnte in der Republik auch nicht mehr „Franzensring" (benannt nach dem unter Kaiser Franz I. von Österreich am heutigen Standort des Burgtheaters errichteten Stadttores) bezeichnet werden: Knapp vor dem ersten Geburtstag der Republik erfolgte auf Anordnung des Wiener Stadtrats am 6. November 1919 die Umbenennung des betreffenden Abschnitts der Ringstraße in „Ring des 12. November".[85]

B) Im autoritären Ständestaat: Auslöschung der Erinnerung an die Republikgründung

Das 15. Jahr des Bestandes der Republik markiert schließlich 1933 das Ende der Republikfeiern am 12. November. Nach der Ausschaltung des Parlaments im März dieses Jahres durch den christlichsozialen Bundeskanzler Engelbert Dollfuß wurden politische Kundgebungen zunächst am 1. Mai und dann auch am 12. November verboten.

Die Neue Freie Presse brachte an diesem Tag eine Stellungnahme zu den Anordnungen der Bundesregierung über die Einschränkung der Feierlichkeiten zum 15. „Geburtstag des neuen Österreich" und nahm mit dieser Schlagzeile[86] – unbewusst – bereits den unter dem Regime der Verfassung 1934[87] eingeführten neuen Staatsfeiertag vorweg, der unter der Bezeichnung „Tag des neuen Österreich" auf den 1. Mai verlegt worden war. Ein Erlass der Bundesregierung ordnete an, dass von nun an der 1. Mai als „Tag des neuen Österreich"[88] zu gelten habe: „Zum dauernden Gedenken an die Proklamation der Verfassung 1934", wie dies nun – analog zum Gesetz von 1919, das gleichzeitig aufgehoben wurde – begründet wurde.[89]

C) Nach dem Zweiten Weltkrieg

1. Verdrängen des Gedenkens an die Entstehung von Deutschösterreich[90]

a) 1945 bis 1955: „Befreiungsfeiern"

Nach der Wiedererlangung der Unabhängigkeit wurde von den neuen – nichtfaschistischen – Parteien, der christlich-sozia-

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79 *NFP* (n 9), 28. Oktober 1919, Morgenblatt, S. 2.

80 MERKL Adolf J., *Die Verfassung der Republik Deutschösterreich*, Wien-Leipzig 1919/20, S. 2.

81 Zitiert nach: BRAUNEDER, W., Der vergessene Schicksalstag. In: *Die Presse* 20./21. 10. 1984, Spectrum, S. III.

82 *StPPNV* (n 10), S. 65ff (Berichterstattung durch Staatskanzler Renner), S. 67f. (Debatte), 68 (einstimmige Annahme); KELSEN, *Verfassungsgesetze* (n 59), S. 32.

83 Der Präsident des Abgeordnetenhauses erklärte in der letzten Sitzung, die Nationalversammlung habe „Deutschösterreich aus der konstitutionellen Monarchie… zur Republik" geführt: *StPAHRR (n* 25), S. 4701.

84 Renner in: *StPPNV* (n 10), S. 65f.

85 CZEIKE, *Lexikon* (n 5), S. 363.

86 *NFP* vom 12. 11. 1933, 4.

87 Am 24. April 1934 wurde mit Notverordnung eine neue Verfassung auf ständisch-autoritärer Grundlage erlassen und mit einem speziellen Ermächtigungsgesetz am 30. April ein zweites Mal kundgemacht: *Bundesgesetzblatt der Republik Österreich* [*BGBl.*] 1934 I/Nr. 329.

88 *BGBl. 1934 I*/Nr. 249.

89 Unter der Herrschaft des Nationalsozialismus wurde der 1. Mai als „Tag der Nationalen Arbeit" auch für das Land Österreich maßgeblich; nun war in Wien der Rathausplatz Sammelpunkt und der Heldenplatz Zielpunkt der nationalsozialistischen Aufmärsche; während des Zweiten Weltkrieges wurden die Aufmärsche eingestellt. Im Krieg wurde der 1. Mai in den Pressemedien auch als „Nationaler Feiertag" apostrophiert: *ANNO* (n 76).

90 Zum Folgenden allgemein: SPANN, G., Zur Geschichte des österreichischen Nationalfeiertages. In: *Beträge zur historischen Sozialkunde* 1/96 (1990), S. 27–34.

len Volkspartei sowie den Sozialisten und den Kommunisten, in einer gemeinsamen Erklärung zwar die Wiederherstellung der Republik „im Geiste der Verfassung von 1920" beschlossen, ein Anknüpfen an die damit verknüpfte Staatsfeiertags-Tradition, und damit an das Gedenkjahr 1918, war damit aber nicht verbunden: Von den Staatsfeiertagen aus der Zeit der Geltung der Bundesverfassung (bis 1933) wurde – in Verbindung mit dem Feiertagsruhegesetz im August 1945 nur der 1. Mai im Sinne seiner früheren Bedeutung wiederhergestellt und 1949 auch wieder zum „Staatsfeiertag" erklärt.[91]

In Wien hatte schon am 1. Mai 1945 zu Ehren der Roten Armee am Rathausplatz eine „Befreiungsfeier" stattgefunden. Außerdem wurde von allen alliierten Besatzungsmächten am 8. Mai in Wien auch eine gemeinsame „Siegesparade" durchgeführt; analog dazu gab es solche Paraden in anderen Landeshauptstädten, etwa in der amerikanischen Besatzungszone in Linz und in Salzburg.[92] 1946 wurden der Tag der Befreiung in der sowjetischen Besatzungszone dann auf den 13. April, dem Tag der „Befreiung" Wiens von der nationalsozialistischen Besetzung durch die Rote Armee, verlegt, während es für die Bundesländer beim 9. Mai blieb.[93]

b) 1955–1965: Vom „Tag der Flagge" zum österreichischen „Nationalfeiertag"

Mit dem Ende der Besatzungszeit durch Wirksamwerden des in Wien zwischen Alliierten und Österreich unterzeichneten Staatsvertrags vom 15. Mai 1955 „über die Unabhängigkeit der Republik Österreich" erfolgte bis 25. Oktober 1955 die Räumung der Besatzungszonen. Man hatte diese Tatsache vielfach auch als „Befreiung" empfunden und dies – vor allem in der sowjetischen Besatzungszone – auch mit „Befreiungsfeiern" unterstrichen, etwa in Baden im Kurpark schon am 1. Oktober[94] oder in Wien – auf Einladung des sozialistischen Bürgermeisters – am 22. Oktober auf dem Rathausplatz.[95]

Nach Ablauf der im Staatsvertrag mit 25. Oktober festgelegten Räumungsfrist war die Unabhängigkeit der Republik wiedererlangt: Mit Erlass des Unterrichtsministers wurde dieser Tag zum „Tag der Flagge" erklärt und sollte, primär an den Schulen, entsprechend gewürdigt werden. Dieser Tag war ein Werktag, er wurde 1956 auf Beschluss des Ministerrats aber in „Tag der Fahne" umbenannt und auf den 26. Oktober verlegt, wodurch das politisch inkorrekte Empfinden des Endes der Besatzungszeit als eine „Befreiung" kaschiert werden sollte: Stattdessen rückte die am 26. Oktober 1955 erfolgte Neutralitätserklärung Österreichs in den Mittelpunkt der feierlichen Würdigung dieses Tages. 1965 wurde der 26. Oktober schließlich zum „Nationalfeiertag" erklärt, er unterlag aber erst 1967 auch der gesetzlichen Feiertagsruhe[96], sodass er sich nun allmählich auch zu einem allgemein gegangenen Feiertag entwickeln konnte und schließlich sogar Volksfestcharakter gewann.

2. Wiederbelebung des Gedenkens seit dem 50. Jahrestag der Republikgründung

Die Bedeutung des 12. November im öffentlichen Gedenken war – zumindest bis zum Ende der Besatzungszeit – nahezu verschwunden. Erst mit den danach anfallenden runden Jubiläen kam es auf parlamentarischer Ebene zu einer allmählichen Rückbesinnung auf die Entstehung der Republik im Jahr 1918: Erstmals aus Anlass der 50jährigen Wiederkehr dieses Ereignisses – und dann zum 60., 75. und 80. Jubiläum[97] – wurden gemeinsame Festsitzungen von Nationalrat und Bundesrat abgehalten, wobei neben dem Gedenken an die Proklamation der Republik die beiden anderen Ereignisse, der 21. Oktober 1918, als der Tag der Konstituierung der Nationalversammlung zur Gründung eines deutschösterreichischen Staates, als der Tag der Durchführung dieser Absichtserklärung mit der Staatsgründung am 30. Oktober 1918, weitgehend negiert wurden.[98]

3. Zum 100. Jahrestag: Fake News über die Staatsgründung 1918

Zum 90. Jubiläum fand zwar keine besondere parlamentarische Würdigung statt, der sich anbahnende 100-jährige Bestand der Republik gab aber schon 2016 den Anstoß zur Einrichtung eines mit politischer und wissenschaftlicher Prominenz besetzten Beirats[99], dem die Organisation einer

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[91] Bundesgesetz [BG] vom 7. 8. 1945 (*BGBl*. Nr. 116); BG vom 14. 7. 1949 (*BGBl*. Nr. 173).

[92] *ANNO* für den Zeitraum 1945–1947, Volltextsuche: Suchwort „Siegesparade".

[93] Zum Zweck der Anwendung der sogenannten „Befreiungsamnestie" BG vom 6. 3. 1946 (BGBl. Nr. 79) wurde für Wien der 13. 4. und für die anderen Bundesländer der 9. 5. festgelegt. Die Gründe für die Diskrepanz zwischen dem 8. und dem 9. 5. ergab sich vermutlich aufgrund der zwischen Deutschland und Russland bestehenden Zeitverschiebung, wodurch die deutsche Kapitulationserklärung in der Sowjetunion erst nach Mitternacht des 8. Mai wirksam geworden war: Die Sowjetunion und ihre Nachfolgestaaten begehen daher am 9. 5. den Tag des Sieges – deswegen wurde auch in Österreich der Befreiungstag mit 9. 5. fixiert.

[94] MASCHER-PICHLER, H. A., *Baden bei Wien zur sowjetischen Besatzungszeit 1945–1955 mit besonderer Berücksichtigung der ersten beiden Besatzungsjahre und des Jahres 1955*, philosophische Dissertation Universität Wien 2009, S. 303.

[95] In der Annahme, „daß die letzten fremden Soldaten Wien und Österreich verlassen haben", hatte der Wiener Bürgermeister Franz Jonas, später (1965–1974) österreichischer Bundespräsident, bereits am 20. 10. zu einem „Tag der Freiheit" aufgerufen, womit der „Tag der endgültigen Befreiung" von Wien gefeiert werden sollte. Die Wiener Bevölkerung wurde aufgefordert, „jedes Haus und jedes Fenster in der Zeit vom 22.Oktober bis einschließlich 25. Oktober zu beflaggen". Am Samstagabend (22. 10.) wurde am Rathausplatz ein Konzert gegeben, danach am Heldenplatz ein Feuerwerk abgeschossen, das Rathaus und der Hochstrahlbrunnen am Schwarzenberg-Platz beim *„Denkmal zu Ehren der Soldaten der Sowjetarmee, die für die Befreiung Österreichs vom Faschismus gefallen sind", waren festlich beleuchtet, ebenso andere bedeutende Gebäude in Wien. An weiteren Standorten in der Stadt wurden Platzkonzerte gegeben, alle endeten mit dem Donauwalzer: AZ* (n 16), 20. 10. 1955, S. 1.

[96] *BGBl.* 1965/Nr. 298 sowie 1967/Nr. 263.

[97] Zum 70. und 90. Jahrestag der Republik gab es im Parlament keine festliche Würdigung der Ereignisse von 1918.

[98] BRAUNEDER, *1918* (n 24), S. 299f.

[99] Verordnung des Bundeskanzlers *BGBl.* 2016 II/Nr. 256.

umfassenden Würdigung, dieses, aber auch anderer in das Gedenk- und Erinnerungsjahr 2018 fallender Ereignisse oblag – gedacht wurde des Revolutionsjahrs 1848 und des Anschluss 1938, der Einführung von internationalrechtlichen Grundrechten 1948 und 1958 sowie des 1968 durch die politische „Linke" auf den Weg gebrachten Wandel der Gesellschaft. Die Entstehung der Republik stand 2019 erst gegen Jahresende im Mittelpunkt des Gedenkens: Den Auftakt der betreffenden Feierlichkeiten bildete eine Festsitzung von Nationalrat und Bundesrat im Sitzungsaal des ehemaligen niederösterreichischen Landtags (nun „Palais Niederösterreich") am 21. Oktober 2018 – also am selben Ort, aber auch zur selben Stunde wie seinerzeit bei der Vollversammlung der deutschen Abgeordneten des österreichischen Reichsrats als deutschösterreichischer „Nationalrat". Den Höhepunkt bildete ein Staatsakt, der – bedingt durch den Umstand, dass das Parlamentsgebäude am Ring wegen baulicher Sanierung nicht benutzbar war – in der Staatsoper stattfand: nämlich am 12. November 2018, um 11 Uhr, zur selben Zeit, als vor 100 Jahren das österreichische Abgeordnetenhaus zu seiner letzten Sitzung zusammengetreten war. Am 30. Oktober 2018, am 100. Geburtstag von (Deutsch-)Österreich, aber fand kein Gedenken des Parlaments statt! Der österreichische Rundfunk verbreitete auf seiner Internetseite news.orf.at an diesem Tag sogar die – rechtshistorisch falsche – Nachricht: „Österreich fast Republik… Am 30. Oktober 1918 traf sich die provisorische österreichische Nationalversammlung zum zweiten Mal in diesem Herbst im niederösterreichischen Landhaus. Es sollte ein Tag weitreichender Beschlüsse sein, ja eigentlich einer, bei dem die Republik in provisorischem Rahmen beinahe das Licht der Welt erblicken hätte können." [100]

IV. Ausblick: „Wiedereinführung des 12. November als Feiertag der Republik"?

Über eine Restauration des 12. November als staatlichen Feiertag wurde nach 1945 nur einmal ernsthaft diskutiert, nämlich im Zuge von Überlegungen anstelle des „Tages der Fahne", der 1965 bloß in „Nationalfeiertag" umbenannt worden war, und dessen Würdigung im Wesentlichen auf Schulen und öffentliche Institutionen, vor allem auf das österreichische Bundesheer, beschränkt blieb, durch ein anderes Datum zu setzen: Als Alternative zum 26. Oktober wurde – neben dem 27. April (dem Tag der österreichischen Unabhängigkeitserklärung 1945) und dem 15. Mai (dem Tag der Unterzeichnung des Staatsvertrags 1955) – von sozialdemokratischer Seite (Fritz Klenner) zwar auch der 12. November ins Spiel gebracht, dann aber von sozialdemokratischer Seite (Bruno Kreisky) selbst wieder in Frage gestellt, weil mit diesem Datum auch der Beitritt zum Deutschen Reich verbunden war, sodass es auch als „Tag der Selbstaufgabe Österreichs" empfunden werden konnte. Allein die Freiheitliche Partei hätte sich mit diesem Datum damals „durchaus einverstanden" erklären können.[101] Schließlich einigte man sich darauf, den 26. Oktober wenigstens für arbeitsfrei zu erklären, um seine Attraktivität beim Bundesvolk zu heben.

Anlässlich der Festsitzung des Parlaments am 21. Oktober 2018 wurde diese Diskussion von dem grün-alternativen Abgeordneten Alfred Noll in Erinnerung gerufen: Er stellte fest, dass „wir nicht 100 Jahre Republik feiern, weil wir 12 Jahre davon in Unfreiheit gelebt haben", und forderte: Wenn „man die Feierlichkeiten zum 100. Geburtstag der Republik ernst" nehmen wollte, dann müsste man „eigentlich für die Wiedereinführung des 12. November als Feiertag der Republik sein".[102]

[100] https://orf.at/stories/3085721/ (aufgerufen 17. 12. 2018). – Die Parlamentskorrespondenz, der Nachrichtendienst des Parlaments, berichtete am 21. 10. 2018 unter dem Titel „Tage der Entscheidung: Von `großen Namen' und vielen `Vergessenen'" über die Festsitzung des Parlaments anlässlich der Republikgründung vom 21. Oktober 1918 und am 12. November unter dem Titel „Gedenkjahr 2018: Parlamentarische Dokumente zur Geburt der Republik vor 100 Jahren sind online", dass auf der Parlamentswebsite die parlamentarischen Materialien der Provisorischen und der Konstituierenden Nationalversammlung sowie die Verwaltungsakten aus dieser verfügbar sind. Am 30. 10. 2018 wurde mit dem „AVISO: Volkstheater bringt die Lebenserinnerungen von Gertrude Pressburger als szenische Lesung auf die Bühne Veranstaltung von Volkstheater und Parlament im Gedenken an die Novemberpogrome 1938" lediglich auf einen der anderen Schwerpunkte des Gedenkjahres hingewiesen: https://www.parlament.gv.at/AKT/PR/JAHR_2018/, hier PK1190/index.shtml, PK1192/index.shtml sowie PK1251/index.shtml (aufgerufen jeweils 17. 12. 2018).

[101] SPANN, Geschichte (n 90), 30f.

[102] https://www.parlament.gv.at (n 99), hier PK1138/index.shtml (aufgerufen 17.12.2018).

Zur Geschichte des österreichischen Weinrechts von 1907 bis 1985

(On the History of Austrian Wine Law from 1907 to 1985)

Martin Paar*

Abstract

This essay deals with the history of Austrian wine law. The contribution starts with the first Austrian Wine Act of 1907 and ends with the Wine Act of 1985, which can be considered as a direct outcome of the so called Austrian wine scandal in the same year. A brief outlook on the further development of the wine law after 1985 completes the description. At the end follows a summary of the legal development of legislation concerning wine in the period from 1907 to 1985 and conclusions about the main features of this legal development.

Keywords: *wine law; wine act 1907; wine act 1925/29; wine act 1961; wine act 1985; wine scandal.*

I. Einleitung und historische Hinführung

Wein ist sowohl als alkoholisches Getränk als auch als Kulturgut in Europa und in Österreich seit Jahrhunderten bekannt. Schon die Römer haben im ersten Jahrhundert vor Christus Geburt im heutigen Donauraum, rund um den Neusiedlersee, in Südburgenland und in der Südsteiermark systematischen Weinbau betrieben.[1] Über diesen Weinbau hinaus war das Produkt Wein auch Gegenstand zahlreicher Schriften römischer Autoren. So hat sich beispielsweise der römische Feldherr, Geschichtsschreiber und Staatsmann Cato der Ältere in seinem Werk über die Landwirtschaft *„De agri cultura"* u.a. auch mit dem Kauf und Betrieb eines Weinguts auseinandergesetzt und Vorschläge zur Auswahl richtiger Rebsorten, des Rebschnitts, der Bodenpflege und der Hygiene bei der Weinherstellung erteilt. Der römische Gelehrte, Offizier und Verwaltungsbeamte Plinius der Ältere hat in seinem naturgeschichtlichen, aus 37 Büchern bestehenden Werk *„Naturalis historia"* im 14. Buch u.a. das Produkt Wein, im 17. Buch die Weinbau-Techniken und am Anfang des 23. Buches die Heilkraft des Weines dargestellt.

Mit Niedergang des Römischen Reiches kam der Weinbau im heutigen Österreich praktisch zum Erliegen. Erst unter der Herrschaft von Kaiser Karl I. erlebte der Weinbau in Österreich einen Wiederaufschwung.[2] *Postmann* bezeichnet Kaiser Karl I. in diesem Zusammenhang als *„bedeutender Förderer der Weinkultur in seinem gesamten Herrschaftsbereich, der nicht nur Musterweingüter betrieben ließ, sondern auch Neuanlagen anordnete."*[3] Von Kaiser Karl I. stammten auch die sogenannten *„Capitulare de villis vel curtis imperii"*[4], mit welchen u.a. die Wirtschaftsorganisation der königlichen Güter geregelt wurde. Diese kaiserlichen Anordnungen enthielten auch Regelungen für den Weinbau, wie beispielsweise die Anordnung, Trauben nicht mit Füßen zu stampfen (Kapitel 48)[5], oder Weine in Tierhäuten aufzubewahren oder Weine in Holzfässern zu lagern (Kapitel 68)[6].

Auf Reichsebene wurde in weiterer Folge mit dem Erlass aus dem Jahr 1438 von König Albrecht II. zum ersten Mal die Weinverfälschungsproblematik aufgegriffen, in dem dieser anordnete, dass *„kein unziemlich Gebrauch mehr in den Wein"* getan werden sollte.[7] Rund vierzig Jahre später befahl Kaiser Friedrich II. mit Verordnung aus dem Jahr 1475, *„[…] dass nymand, weder geistlich noch weltlich, daherum Wein machen soll, bey aidts Pflicht, anders, dann er gewachsen sey, außgenommen allain Senffwein, die etlich Jar zu machen zugelassen werden syen."* Mit diesem kaiserlichen Befehl sollte die Beimengung von Zusatzstoffen in den Wein verboten sein und sohin die Weinfälschungen unterbunden werden.[8] Ungeachtet der kaiserlichen Verordnung nahmen aber die Weinfälschungen trotzdem zu. Dieser Umstand führte zum Erlass der *„Ordnung und Satzung über den Wein"* im Jahr 1487 durch Kaiser

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1 POSTMANN, Mein Wein aus Österreich (2003) 28f.

2 Vgl. FISCHER, Weinbau, in: Cordes/Haferkamp/Lück/Werkmüller/Schmidt-Wiegand (Hrsg.), HRG[1], Band V., 1227.

3 POSTMANN (FN 1) 29.

4 GAREIS (Hg.), Die Landgüterordnung Kaiser Karls des Großen (Capitulare de villis vel imperii), https://archive.org/details/dielandgterordn00frangoog/page/n55, zuletzt aufgerufen am 16. 11. 2018.

5 GAREIS (FN 3) 50.

6 GAREIS (FN 3) 60.

7 MARINGER, Weinrecht und Verbraucherschutz. Vom Alten Reich bis zur Gegenwart unter besonderer Berücksichtigung des Anbaugebiets Mosel (2014), 33.

8 MARINGER (FN 6) 34; THEISEN, Weinbau, in: Cordes/Haferkamp/Lück/Werkmüller/Schmidt-Wiegand (Hrsg.), HRG[1], Band V., 1231 und 1232.

Friedrich III., mit welcher das Volk vor gefährlichen Zusatzstoffen im Wein geschützt werden sollte. Die Weinordnung enthielt Regelungen betreffend Weinbehandlung im Allgemeinen, betreffend der Schwefelung von Wein, betreffend Ausnahmen für Würz- und Kräuterweine und betreffend der Durchführung und Überwachung des Weinbaus.[9] Die Weinordnung 1487 wurde durch die Reichsweinordnung aus dem Jahr 1498 von Kaiser Maximilian I. geringfügig weiterentwickelt, wesentliche Neuerungen wurden nicht normiert. Die Weinordnung 1498 wurde zwei Jahre später, konkret im Jahr 1500, am Reichstag zu Augsburg bestätigt und galt diese als Reichsrecht bis 1806 unverändert fort.[10]

Im heutigen Österreich selbst haben sich ab dem 11. Jahrhundert auf Grund der zahlreichen landwirtschaftlichen Betriebshöfe österreichischer Klöster der Weinbau sowie der Weinkonsum stark verbreitet und erlangten diese im 15. und 16. Jahrhundert ihren Höhepunkt. In dieser Zeit, konkret im Jahr 1580, veröffentlichte *Johann Rasch* das älteste Weinbuch über den Weinbau, nämlich das Werk *„Von Bau, Pflege und Gebrauch des Weins"*, mit welchem der Weinbau- und die Kellertechnik sowie die Weinverkostung dargestellt wurden.[11]

Nachdem der Weinbau zunächst durch Religionskriege, Türkenbelagerungen, hohe Steuern und nicht zuletzt auch durch den Aufschwung des Bieres stark zurück ging, erlebte die Weinwirtschaft unter der Herrschaft von Maria Theresia und Joseph II. in den österreichischen Erbländern ihre zweite Blüte. Aus dieser Zeit stammt auch die erste rechtliche Grundlage des heute vor allem in Wien und Niederösterreich bekannten *„Heurigen"*. Mit Erlass der Zirkularverordnung von Joseph II. vom 17. August 1784 wurde erlaubt, *„die von ihm selbst erzeugten Lebensmittel, Wein und Obstmost zu allen Zeiten des Jahres, wie, wann und zu welchem Preis er will, zu verkaufen oder auszuschenken."*[12] Für die Entwicklung des Weinrechts von Bedeutung ist auch die rund fünfzehn Jahre später erlassene Verordnung des Steirischen Guberniums vom 12. Juni 1802, welche die Vermischung von Birnen- und Apfelmost mit Wein verbot.[13] Mit dem Verbot sollte lediglich erreicht werden, dass die Weinkonsumenten nicht durch überhöhte Weinpreise weiter benachteiligt würden und nicht etwa, um Weinfälschungen hintanzuhalten.[14] Dass die Herstellung von „Kunstwein" auf dem Gebiet des heutigen Österreich durchaus gestattet war, zeigt das Hofkanzleidekret vom 21. April 1824, welches Rechtsvorschriften im Zusammenhang mit dem *„Benehmen bey Privilegirung von Erfindungen, Entdeckungen und Verbesserungen künstlicher Weine"* enthielt und in welchem ausdrücklich festgehalten wurde, dass *„der Bereitung künstlicher Weine […] kein positives Gesetz entgegen steht; […]"*.[15]

In der zweiten Hälfte des 19. Jahrhundert kam es wegen Rebkrankheiten und Schädlingen auf dem Gebiet des heutigen Österreichs abermals zu einem schweren Rückschlag für die Weinwirtschaft. Der sogenannte *„Echte Mehltau"* und der *„Falsche Mehltau"* sowie die über Frankreich aus Amerika eingeschleppte Reblaus vernichteten die österreichischen Weinkulturen weitgehend.[16] Der Mangel an Weintrauben führte in der Folge zur starken Zunahme der Erzeugung von Kunstweinen und sah sich der österreichische Gesetzgeber zur ersten gesetzgeberischen Reaktion auf dem Gebiet des Weinrechts veranlasst, nämlich zum Erlass des Gesetzes vom 21. Juni 1880 betreffend die Erzeugung und Verkauf weinähnlicher Getränke (im Folgenden kurz: „Kunstweingesetz 1880").[17] Es unterschied Kunstwein von Naturwein, erfasste jedoch nur die Erzeugung von Kunstwein.

Was unter den Begriff *„Kunstwein"* zu verstehen war, normierte die Verordnung der Ministerien des Inneres, der Finanzen, des Handels und des Ackerbaus vom 16. September 1880, welche auf Grundlage des Kunstweingesetzes 1880 erlassen wurde.[18] Kunstwein war demnach ein weinähnliches Erzeugnis, welches ohne Traubensaft aus einer den Wein nachahmenden Mischung verschiedener Stoffe (Wasser, Weingeist, Glycerin, Zucker, Weinstein, Oenanthäther usw.) hergestellt wurde.[19]

Nach dieser Verordnung wurde als „Naturwein" der durch alkoholische Gärung des Traubensaftes gewonnene und allenfalls nur zur Verbesserung seiner Qualität oder zur Erzielung größerer Dauerhaftigkeit behandelte Wein bezeichnet.[20]

Das Kunstweingesetz 1880 normierte, dass die Erzeugung von Kunstwein nur als erwerbs- und einkommenssteuerpflichtiges Gewerbe betrieben werden dürfte, wenn der Kunstwein zum Verkauf oder Ausschank bestimmt war.[21] Ausdrücklich wurde vorgesehen, dass Kunstweine nicht unter einer für Wein üblichen Bezeichnung verkauft und ausgeschenkt werden durften. Stuften die Gewerbebehörden den Kunstwein als ge-

[9] MARINGER (FN 7) 38.
[10] MARINGER (FN 7) 51 und 58.
[11] POSTMANN (FN 1) 30.
[12] Abgedruckt in TSCHINKOWITZ, Darstellung des politischen Verhältnisses der verschiedenen Gattungen von Herrschaften zur Staatsverwaltung zu ihren Beamten und Unterthanen in der k.k. österreichischen Monarchie mit besonderer Rücksicht auf die Provinzen Steyermark, Kärnthen und Krain (1827), 378.
[13] PGS 46/1802.
[14] In gegenständlicher Verordnung wurde wie folgt u.a. ausgeführt: *„[…] Da sich aber besonders dermahl, ungeachtet die steyerischen Weine auf einen so außerordentlichen Verkaufspreis gestiegen sind, eine solche unzulässlige Bevortheilung des Publicums zur noch größeren Belastung desselben erlaubet, […]"*
[15] PGS 193/1824.
[16] CRAPOUSE, Katharsis oder Katalysator? Wie der österreichische Weinbau aus der Krise kam und welche Rolle der Weinskandal 1985 dabei spielte, (2010) 11ff.
[17] RGBl Nr. 120/1880.
[18] RGBl Nr. 121/1880.
[19] Vgl. § 1 Abs 1 Z 1 Verordnung der Ministerien Inneres, der Finanzen, des Handels und des Ackerbaus vom 16. September 1880, RGBl Nr. 121/1880.
[20] Vgl. § 1 Abs 1 Verordnung der Ministerien des Inneres, der Finanzen, des Handels und des Ackerbaus vom 16. September 1880, RGBl Nr. 121/1880.
[21] § 1 Kunstweingesetz 1880.

sundheitsschädlich ein, war dieser auf Kosten des Erzeugers zu vernichten. Die erste rechtliche Grundlage für den Handel mit Naturwein war das Gesetz vom 16. Jänner 1896 betreffend den Verkehr von Lebensmitteln und einigen Gebrauchsgegenständen (im Folgenden kurz: „Lebensmittelgesetz 1896"), in dessen Anwendungsbereich nicht nur der Handel mit Lebensmitteln oder kosmetische Mitteln, Spielwaren, Tapeten, Bekleidungsgegenstände, sondern ebenso der Handel mit Naturwein fiel.[22] Es verwundert nicht, dass das Lebensmittelgesetz 1896 auf Grund des äußerst breiten Regelungsgegenstandes lediglich *„Rahmenregelungen mit allgemeiner Gültigkeit"* enthalten hatte und daher die *„Etablierung einer speziellen gesetzlichen Vorschrift über das Inverkehrbringen von ‚Naturwein' absehbar"* war.[23]

Sowohl das Kunstweingesetz 1880 als auch das Lebensmittelgesetz 1896 werden in der Literatur als Vorläufer des im Jahr 1907 kundgemachten Weingesetzes angesehen.[24]

Gegenständlicher Aufsatz stellt nun im Folgenden die Entwicklung des österreichischen Weinrechtes an Hand der kundgemachten Weingesetze von 1907 bis 1985 dar. Der gewählte zeitliche Untersuchungsrahmen erklärt sich damit, dass das Weingesetz aus 1907 als Beginn der österreichischen Weinrechtsgesetzgebung angesehen werden kann. Das Ende der Darstellung mit dem Weingesetz aus dem Jahr 1985 lässt sich mit dem nationalen und internationalen bekannten Weinskandal begründen, der einerseits die Weinwirtschaft Österreich an den Rand des Ruins führte und der andererseits Auslöser für die Neufassung des Weingesetzes gewesen war, das mitunter als strengstes Weingesetz der Welt tituliert wurde.[25] Die Darstellung der Weinrechtsgesetzgebung nach 1985 muss einer anderen Untersuchung vorbehalten bleiben, da auf Grund der danach zahlreich erlassenen Weingesetz-Novellen der Umfang dieser Darstellung gesprengt werden würde.

II. Weingesetz 1907

Zehn Jahre nach Erlassung des Lebensmittelgesetzes 1896 wurde mit dem Gesetz vom 12. April 1907 betreffend den Verkehr mit Wein, Weinmost und Weinmaische (im Folgenden kurz: „Weingesetz 1907") das erste österreichische Weingesetz erlassen, mit welchem zugleich das Kunstweingesetz 1880 außer Kraft gesetzt und die Erzeugung von Kunstwein verboten wurde.[26]

In den Anwendungsbereich des Weingesetzes 1907 fiel der Verkehr mit Wein, Weinmost und Weinmaische. Als Wein wurde ein durch alkoholische Gärung des Weinmostes oder zerquetschter frischer Weintrauben (die sogenannte *„Weinmaische"*) hergestelltes Getränk bezeichnet. Als Weinmost definierte das Weingesetz 1907 die aus frischen Weintrauben gewonnene Flüssigkeit.[27] Auf Grund ausdrücklich gesetzlicher Regelung kam das Weingesetz 1907 nicht für Obst-, Beeren-, Malz- und Metwein zur Anwendung.[28] Diese Weinarten unterlagen weiterhin dem Lebensmittelgesetz 1896.[29] Das Weingesetz 1907 kannte zudem noch den Begriff *„versetzter Wein"*, dabei handelte es sich um Süßweine, Schaumweine, aromatisierte und gewürzte Weine (§ 4 Abs 1 Weingesetz 1907).

In § 3 ff Weingesetz 1907 wurden die zulässigen Verfahrensarten, Behandlungsmöglichkeiten, Vermischungen und Zusätze des Weines normiert, die gemäß § 6 Weingesetz 1907 nicht als Verfälschung des Weines angesehen wurden. Zu den zulässigen Verfahrens- und Behandlungsarten zählten alle in der rationellen Kellerbehandlung anerkannten Verfahrensarten. Wann eine Kellerbehandlung rationell war, wurde vom Weingesetz 1907 nicht bestimmt. Ausdrücklich für zulässig erklärt wurden Behandlungsmethoden wie z.B. das Schwefeln, das Umgären oder das Auffrischen mit Kohlensäure. Ebenso nicht als Verfälschung des Weines angesehen wurde der Verschnitt (dh die Verschmischung von Wein mit Wein oder Weinmost), das Entsäuren mit kohlensaurem Kalk, die Wiederherstellung von erkrankten Weinen und Weinmosten durch Zusatz von Weinsäure in einem bestimmten Umfang und das Auffärben von Wein durch Behandlung von Rotweintrestern oder durch Zusatz von Karamell.[30]

Der Zusatz von Rohr- und Rübenzucker, hier sprach das Weingesetz 1907 vom *„Konsumzucker"*, war mit Ausnahme der versetzten Weinen nur dann erlaubt, wenn eine behördliche Erlaubnis vorlag. Nach dem Weingesetz war eine solche Erlaubnis, die zu beantragen war, nur von Fall zu Fall an eine Person zu erteilen bzw. bei schlechter Ernte für eine ganze Gemeinde erlaubt.[31]

Die oben genannten Verfahrensarten und Behandlungsmethoden des Weines fanden auch Anwendung auf die *„versetzten Weine"*, wobei für die Herstellung besondere Vorschriften zur Anwendung kamen.[32]

Hinsichtlich der Bezeichnung des Weines enthielt das Weingesetz 1907 nur rudimentäre Rechtsvorschriften. Ausdrücklich verboten wurde die Bezeichnung eines Weines als *„Naturwein"* oder *„Originalwein"*, welchem - wenn auch erlaubterweise – Zuk-

[22] RGBl Nr. 89/1896. Vgl. HEINRICH-LENZ, Weinrecht in Österreich 1880 bis 2003 (2005) 9.
[23] So vollkommen zu Recht HEINRICH-LENZ (FN 22) 17.
[24] Vgl. POSTMANN (FN 1) 95.
[25] Der Spiegel Nr. 52/1985, 101.
[26] RGBl Nr. 210/1907.
[27] § 2, erster Absatz Weingesetz 1907.
[28] § 2, zweiter Absatz Weingesetz 1907.
[29] Vgl. HEINRICH-LENZ (FN 22) 18.
[30] Die Zufügung bestimmter Stoffe, wie beispielsweise Glyzerin, unreiner Sprit, Gummi, Färbemittel, Säuren oder Gips, wurde vom Weingesetz 1907 ausdrücklich als Verfälschung angesehen und als verboten erklärt. Vgl. § 6 Weingesetz 1907.
[31] § 5 Weingesetz 1907.
[32] Bei der Herstellung von Süßwein war z.B. darüber hinaus die Verwendung von technisch reinem Rohr- und Rübenzucker, Rosinen oder Korinthyen und der Zusatz von Alkohol in solchen Mengen gestattet, dass das Produkt nicht mehr als 22 ˝ Volumprozent Alkohol enthielt. Vgl. § 4 Weingesetz 1907.

ker zugesetzt war. Das Weingesetz 1907 erklärte diesfalls eine solche Bezeichnung ausdrücklich als Falschbezeichnung iSd Lebensmittelgesetzes 1896.[33]

Das Weingesetz 1907 enthielt ebenfalls nur rudimentäre Rechtsvorschriften hinsichtlich der Kontrolle der Einhaltung der Rechtsvorschriften desselben. Die Kontrolle bezog sich gemäß § 12 Weingesetz auf die Kellereien und sonstige Räumlichkeiten, die zur Herstellung, Aufbewahrung und Verkauf von Wein bzw. Weinmost bestimmt waren. Eine Kontrolle der Weingärten war nicht vorgesehen. Die Einhaltung der Rechtsvorschriften des Weingesetzes überwachten eigens geschaffene Kellereiinspektoren. Diese hatten u.a. das Recht der Nachschau in den Kellereien und sonstigen Betriebs- und Lagerungsstätten. Die Kellereiinspektoren mussten entsprechend fachlich gebildet und beeidet sein und wurden zur Verschwiegenheit über ihnen zur Kenntnis gelangten Geschäfts- und Betriebsgeheimnisse verpflichtet.[34]

Die Herstellung von anderen Getränken als Obst-, Beeren- und Malzwein, Met sowie weihnähnlichen und weinhaltigen Getränken wie auch die Herstellung von Gemengen, die als Mittel zur Herstellung von weinähnlichen oder weinhaltigen Getränken dienten, war verboten. Eine Übertretung dieser Vorschrift wurde nach dem Lebensmittelgesetzes 1896 bestraft.[35] Des Weiteren sah das Weingesetz 1907 eine Reihe von Geld- und Haftstrafen durch die politische Behörde erster Instanz vor, wie z.B. wenn Wein oder Weinmost ohne behördliche Erlaubnis mit Zucker versetzt worden war.[36]

III. Weingesetz 1925

A. Entstehung und Inhalt des Weingesetzes 1925

Obzwar die österreich-ungarische Monarchie im Jahr 1918 unterging, hatte das Weingesetz 1907 auf Grund des Beschlusses der Provisorischen Nationalversammlung für Deutschösterreich vom 30. Oktober 1918 über die grundlegenden Einrichtungen der Staatsgewalt, mit welchem im § 16 normiert wurde, dass *„Gesetze und Einrichtungen, die in dem im Reichsrate vertretenen Königreiche und Länder in Kraft stehen, durch diesen Beschluss nicht aufgehoben oder abgeändert sind… bis auf weiteres in vorläufiger Geltung“* bleiben, weiterhin Bestand.[37] Auch für das Weinrecht galt daher der Grundsatz der materiellen Kontinuität bei formeller Diskontinuität der Habsburgermonarchie und der Republik (Deutsch-)Österreich.

Die im Beschluss der Provisorischen Nationalversammlung angesprochene vorläufige Geltung des Weingesetzes 1907 hielt sieben Jahre an. Erst 1925 wurde das Weingesetz 1907 durch das Bundesgesetz vom 17. Juni 1925 über den Verkehr mit Wein und Obstwein (im Folgenden kurz: „Weingesetz 1925“) außer Kraft gesetzt.[38] Die vorangegangenen Jahre hatten deutlich gezeigt, dass ein neues Weingesetz immer notwendiger wurde, da die aus Italien importierten kräftigen Verschnittweine den eher „schlanken“ heimischen Wein langsam, aber doch verdrängten.[39]

Das Weingesetz 1925 unterschied zwischen, Traubenmost, Wein und Obstwein und regelte deren Inverkehrbringen. Traubenmost war der Saft aus frischen Weintrauben oder der aus bereiteter Traubenmaische gewonnene Saft, von dessen Zuckergehalt mindestens ein Drittel noch nicht alkoholisch vergoren war.[40] Als Wein wurde das durch eine weiter vorgeschrittene alkoholische Gärung des Traubenmostes oder der Traubenmaische hergestellte Getränk definiert.[41] Wein lag demnach dann vor, wenn mehr als ein Drittel des Zuckergehaltes im Traubenmost vergoren war (§ 1 Abs 1 Weingesetz 1925). Als Obstwein bezeichnete das Weingesetz 1925 das durch begonnene oder vollendete alkoholische Gärung des Saftes oder der Maische von frischem Kern-, Stein- oder Beerenobst hergestellte Getränk sowie auch den aus getrockneten Kern-, Stein- oder Beerenobst erzeugten Obststützwein.[42] Der noch im Weingesetz 1907 verwendete Begriff *„versetzter Wein“* wurde im Weingesetz 1925 nicht mehr verwendet, wohl aber kannte das neue Weingesetz den Süßwein, den aromatisierten oder gewürzten Wein und den Schaumwein.[43] Getränke wie Limonaden oder alkoholfreie Fruchtsäfte udgl. hingegen waren auf Grund ausdrücklicher Nennung vom Regelungsgegenstand des Weingesetzes 1925 nicht umfasst und unterlagen nach wie vor dem Lebensmitelgesetz 1896.[44]

Für die Herstellung von Traubenmost, Wein und Obstwein waren nur die gesetzlich angeführten Verfahrensarten, Verschnitte und Zusätze erlaubt.[45] Grundsätzlich waren, wie bisher, die in der rationellen Kellerwirtschaft anerkannten Verfahrensarten und Zusätze gestattet. Was unter dem Begriff *„rationelle Kellerwirtschaft“* zu verstehen war, hatte weder das Weingesetz 1907 noch das Weingesetz 1925 ausgeführt.

Ausdrücklich gesetzlich zulässig war das so genannte *„Schönen“* (Klären) mit chemisch oder mechanisch wirkenden *„Schönungsmitteln“*, das Zusetzen von Tannin, das Auffrischen mit Kohlensäure, das Entfärben mit gereinigter Tier- oder Pflanzenkohle, das Auffärben mit Karamell, das Vergären mit Hilfe rein gezüchteter Hefe oder von Wärme und das Schwefeln, mit flüssiger schwefeliger Säure oder durch einen Zusatz von

[33] § 7 Weingesetz 1907.
[34] § 13 Weingesetz 1907.
[35] § 8 Weingesetz 1907.
[36] § 5 Weingesetz 1907.
[37] StGBl Nr. 1/1918.
[38] BGBl Nr. 217/1925.
[39] Vgl. POSTMANN (FN 1) 96.
[40] § 1 Abs 1 erster Satz Weingesetz 1925.
[41] § 1 Abs 1 zweiter Satz Weingesetz 1925.
[42] § 1 Abs 2 Weingesetz 1925.
[43] Vgl. § 10, 11 und 12 Weingesetz 1925.
[44] § 2 Z 1 bis Z 5 Weingesetz 1925.
[45] § 3 Weingesetz 1925.

Natriumbisulfit oder Kaliummetasulfit (Kalziumpyrosulfit) im bestimmten Umfang.[46]

Für Wein und Traubenmost wurden zusätzlich, ebenfalls ausdrücklich, das Entsäuern mit reinem, gefälltem kohlensaurem Kalk, das Zusetzen von Weinsäuren zur Wiederherstellung von erkrankten Weinen sowie das Auffärben von Rotwein durch Behandlung mit frischen Rotweintrestern erlaubt.[47]

Die Zuckerung von Wein wurde grundsätzlich verboten. Ausgenommen davon waren der Süßwein, aromatisierte Wein und Schaumwein, für welche Sondervorschriften für ihre Herstellung bestanden hatten. Die Zuckerung von Traubenmost war zur Ausbesserung mit behördlicher Bewilligung gestattet, aber nur in einem Ausmaß, in dem der Gesamtzuckergehalt nach der Zuckerung den natürlichen Zuckergehalt des Traubenmostes aus Weintrauben gleicher Art und Herkunft nicht überstieg.[48]

Es wurde bereits darauf hingewiesen, dass für die Herstellung von Traubenmost, Wein und Obstwein nur die im Weingesetz 1925 erlaubten Verfahrensarten, Verschnitte und Zusätze zulässig waren (§ 3 Weingesetz 1925). Unzulässige Verfahrensarten, Verschnitte und Zusätze wurden als Verfälschung bezeichnet und beispielshaft besondere Behandlungsarten, wie das Strekken von Wein mit Wasser, das Vermischen von Wein mit Obstwein oder weinähnlichen oder weinhaltigen Getränken oder die Beifügung von getrockneten Früchten, Feigen, Johannisbrot, Glyzerin, Stärkezucker, Gummi, Ameisensäure, Kochsalz, Gips usw. ausdrücklich zu Verfälschungen erklärt.[49]

Auch wenn das Weingesetz 1925 ansonsten nur wenige Rechtsvorschriften zur Frage der Bezeichnung von Weinen enthielt, ist die Anordnung, dass erstmals zwischen Bezeichnungsvorschriften für inländische und ausländische Erzeugnisse unterschieden werden musste, zu erwähnen. Von Interesse ist auch jene Regelung, dass Wein, welcher erlaubterweise einen Zuckersatz erhielt, nicht als *„rein"*, *„natürlich"* oder *„original"* bezeichnet werden durfte.[50] Bei Weinen, die aus ausländischem Lesegut erzeugt worden sind und in geschlossenen Flaschen in Österreich in Verkehr gesetzt wurden, musste, wenn sie eine auf ihre ausländische Herkunft hinweisende Bezeichnung getragen hatten und nicht schon im Ursprungslande der Trauben in Flaschen abgefüllt worden sind, der Staat angegeben werden, in dem der Wein in Flaschen abgefüllt worden ist.[51]

Neu eingeführt wurde auch die Verpflichtung Aufzeichnungen zu führen und zwar mittels des sogenannten *„Eingangs- und Ausgangsbuchs"*. Nach § 31 Weingesetz 1925 waren all jene Personen, die Wein, Traubenmost oder Obstwein erzeugten und in Verkehr setzten oder mit diesen Getränken Handel trieben, zur Führung von Eingangs- und Ausgangsbüchern verpflichtet. Das Eingangsbuch hatte u.a. die Menge an Traubenmost, Wein oder Obstwein, welche aus eigener oder fremder Lese erzeugt wurden oder von anderen bezogen wurden, zu enthalten. Das Ausgangsbuch hatte die Menge des veräußerten Traubenmosts, Weins oder Obstweins zu enthalten. Den Kellereiinspektoren, denen wie bisher die Pflicht zur Überwachung der Einhaltung der Rechtsvorschriften des Weingesetzes 1925 aufgetragen wurden, war ein Einsichtsrecht in die Eingangs- und Ausgangsbücher eingeräumt.[52]

Um die Einhaltung der Rechtsvorschriften des Weingesetzes zu gewährleisten waren sowohl verwaltungsbehördliche als auch gerichtlich zu verfolgende Straftatbestände vorgesehen.[53] Von den Verwaltungsbehörden war beispielsweise die unerlaubte Zuckerung von Traubenmost oder Wein zu ahnden, von den Strafgerichten der Verkauf von weinähnlichen Getränken wie Kunstwein, sofern die tatbestandsmäßigen Handlungen nicht nach Lebensmittelgesetz 1896 oder anderen Bestimmungen strenger zu bestrafen waren.[54]

B. Fortentwicklung des Weingesetzes 1925

Das Weingesetz 1925 wurde in weiterer Folge im Jahr 1928 und 1929 novelliert und mit Verordnung des Bundesministers für Land- und Forstwirtschaft vom 27. September 1929 wiederverlautbart.[55] Der Novelle 1929 kommt besondere Bedeutung zu, da erstmals die Verwendung geographischer Bezeichnung zur Kennzeichnung der Herkunft von Wein geregelt wurde. Mit Verordnung konnte angeordnet werden, dass im geschäftlichen Verkehr mit Wein und Traubenmost bestimmte inländische geographische Bezeichnungen zur Kennzeichnung der Herkunft von Wein und Traubenmost, die in der betreffenden Örtlichkeit gewachsen sind, gebraucht werden durften.[56] Weiters wurde normiert, dass zur Bezeichnung von Weinen, die ausschließlich oder vorwiegend aus ausländischem Lesegut erzeugt worden sind, im inländischen Verkehr keine österreichischen geographischen Bezeichnungen verwendet werden durften.[57] Aus Trauben von Direktträgerreben hergestellte Weine und Traubenmoste sowie Verschnitte mit solchen mussten im rechtsgeschäftlichen Verkehr als *„Hybridwein"* oder *„Direktträgerwein"* bezeichnet werden.[58]

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[46] § 4 Abs 1 Weingesetz 1925.
[47] § 4 Abs 2 Weingesetz 1925. Auch für Obstwein sowie Beeren- oder Steinobstwein waren bestimmte Zusätze erlaubt.
[48] § 5 Weingesetz 1925.
[49] § 15 Weingesetz 1925.
[50] § 23 Abs 1 Weingesetz 1925.
[51] § 28 Weingesetz 1925.
[52] § 31 Weingesetz 1925.
[53] HEINRICH-LENZ (FN 17) 57.
[54] § 7 Weingesetz, § 16 Abs 1 Z 1 iVm § 18 Weingesetz 1925.
[55] BGBl Nr. 233/1928 und BGBl Nr. 254/1929.
[56] § 23a Abs 1 Weingesetz 1929.
[57] § 23c Abs 1 Weingesetz 1929.
[58] § 23d Weingesetz 1929. Von einer Direktträgerrebe spricht man dann, wenn die Rebe auf den eigenen Wurzeln wächst, also nicht aufgepfropft oder veredelt wurde. Diese Veredlung bzw. Aufpfropfen steht im Zusammenhang mit der Bekämpfung der Reblaus in der zweiten Hälfte des 19. Jahrhunderts. Durch das Aufpfropfen auf reblausresistente amerikanische Wurzelstöcke konnten viele europäische Sorten erhalten werden. Die Folge war jedoch, dass alle Rebsorten aufgepfropft und somit keine Direktträger waren.

IV. Entwicklung des Weinrechts von 1929 bis 1945

Es ist allseits bekannt, dass die Zeit von 1929 bis 1938 für die Republik Österreich eine Zeit mit großen Veränderungen war. Während mit der Verfassungsnovelle 1929 an Stelle der gewaltenverbindenden parlamentarischen Republik die gewaltentrennende parlamentarische Präsidentenrepublik trat, kam es im Jahr 1934 zur Einführung einer ständisch-autoritären Verfassung und schlussendlich zum Untergang der Republik Österreich durch den Anschluss an das Deutsche Reich im Jahre 1938.

Innerhalb dieses Zeitraumes wurde das Weingesetz 1929 nicht abgeändert, jedoch wurden andere für den Weinbau bedeutsame gesetzliche Regelungen getroffen. Von diesen sind folgende zwei Gesetze hervorzuheben:

Mit einem eigenen Bundesgesetz aus dem Jahr 1936 wurde die Neuanlage von Weingärten bis auf weiteres und das Anpflanzen von Direktträgerreben verboten.[59] Gleichzeitig wurden die Eigentümer der Weingärten verpflichtet, die Gesamtfläche der Weingärten anzuzeigen.[60]

Mit dem Bundesgesetz über die Regelung des Weinbaues vom 4. November 1936, genannt Weinbaugesetz, wurde das Höchstausmaß der in Österreich für den Weinbau zu verwendenden Grundfläche mit 44.000 Hektar bestimmt und auf die Bundesländer aufgeteilt.[61] Konkret entfielen auf Burgenland 10.200 Hektar, Niederösterreich 29.200 Hektar, Steiermark 4.000 Hektar, Vorarlberg 40 Hektar und Wien 560 Hektar.[62] Zudem wurde die Neuanlage eines Weingartens sowie jede Auspflanzung von Rebstöcken nur in den Weinbaugebieten für zulässig erklärt und bedurfte einer Bewilligung durch die Landwirtschaftskammer.[63] Außerhalb der Weinbaugebiete bestehende Weingärten waren bis spätestens Ende 1946 zu roden.[64]

Während nach deutscher Rechtsansicht mit dem Anschluss Österreich als Staat untergegangen war und sohin formelle Diskontinuität bestand, galt für das materielle Recht der Grundsatz der materielle Kontinuität, d.h. soweit das Reichsrecht nichts anderes normierte, galt österreichisches Recht fort.[65] Für das österreichische Weinrecht sah nun jedoch die Kundmachung des Reichskommissars für die Wiedervereinigung Österreichs mit dem Deutschen Reich, wodurch die Verordnung zur Einführung der Lebensmittelgesetzgebung in der Ostmark und im Reichsgau Sudetenland vom 4. Jänner 1940 kundgemacht wurde, vor, dass das deutsche Weingesetz vom 25. Juli 1930 samt den dazu ergangenen Verordnungen galt.[66] Diese Verordnung trat mit 1. Februar 1940 in Kraft, ab diesem Zeitpunkt galt das Deutsche Weingesetz 1930.

Nach dem Untergang des Deutschen Reiches wurde mit der Proklamation vom 27. April 1945 die demokratische Republik Österreich wieder hergestellt und der Anschluss an das Deutsche Reich für null und nichtig erklärt.[67] Nachdem mit dem Verfassungsgesetz vom 1. Mai 1945 über das neuerliche Wirksamwerden des Bundes-Verfassungsgesetzes 1920 in der Fassung 1929 (das sogenannte Verfassungsüberleitungsgesetz) die Verfassung nach dem Stand der Gesetzgebung vom 5. März 1933 wiederhergestellt wurde[68], wurde in weiterer Folge das sogenannte Rechts-Überleitungsgesetz vom 1. Mai 1945, mit welchem das Recht des Deutschen Reiches rezipiert wurde, sofern dieses mit den Grundsätzen der echten Demokratie nicht in Widerspruch stand bzw. nicht dem typisches Gedankengut des Nationalsozialismus entsprach, erlassen.[69] Für das österreichische Weinrecht wurde jedoch bereits kurze Zeit nach der Wiederherstellung der Republik Österreich mit dem Bundesgesetz vom 29. August 1945 das österreichische Weingesetz 1929 *„nach dem Stande der Gesetzgebung vom 13. März 1938“* wieder in Kraft und somit die deutschen Rechtsvorschriften zum Weinrecht außer Kraft gesetzt.[70]

V. Weingesetz 1961

A. Entstehung und Inhalt des Weingesetzes 1961

Das Weingesetz 1929 wurde bis zum Erlass des Weingesetzes 1961 zweimal novelliert, konkret durch die Erste Weingesetz-Novelle 1959 und durch die Zweite Weingesetz-Novelle 1959. Mit der Ersten Weingesetz-Novelle 1959 wurde das Weingesetz 1929 um einen Sorte Wein ergänzt, den sogenannten Perlwein, und um ein neues Herstellungsverfahren zur Erzeugung von Schaum- oder Obstwein erweitert.[71] Mit der Zweiten Weingesetz-Novelle wurden u.a. die Verwendung von Traubendickmost zur Lesegutaufbesserung und zur Herbeiführung einer Restsüße im Wein erlaubt. Des Weiteren wurden weitere Weinkategorien, nämlich die sogenannte *„Spätlese“* und die sogenannte *„Auslese“*, geschaffen.[72]

Im Jahr 1961 wurde das Bundesgesetz vom 6. Juli 1961 über den Verkehr mit Wein und Obstwein (im Folgenden kurz: „Weingesetz 1961“) erlassen und das Weingesetz 1929 außer Kraft gesetzt.[73] Mit diesem Gesetz sollten die bisherigen ge-

[59] BGBl Nr. 73/1936. § 1 Abs 1 und § 2 Bundesgesetz, womit die Neuanlage von Weingärten und das Anpflanzen von Direktträgerreben verboten wird.
[60] Vgl. § 3 Abs 1 Bundesgesetz, womit die Neuanlage von Weingärten und das Anpflanzen von Direktträgerreben verboten wird.
[61] BGBl Nr. 367/1936.
[62] § 1 Abs 1 und 2 Weinbaugesetz.
[63] § 5 Abs 1 Weinbaugesetz.
[64] § 7 Abs 1 Weinbaugesetz.
[65] Vgl. hierzu BRAUNEDER, Österreichische Verfassungsgeschichte[11] (2009), 248 und 249.
[66] GBlÖ Nr. 16/1940.
[67] StGBl Nr. 1/1945.
[68] StGBl Nr. 4/1945.
[69] StGBl Nr. 6/1945.
[70] BGBl Nr. 157/1945.
[71] Bundesgesetz vom 4. Februar 1959, mit dem das Weingesetz 1929 abgeändert wird. BGBl Nr. 39/1959.
[72] Bundesgesetz vom 18. Dezember 1959, mit dem das Weingesetz 1929 neuerlich abgeändert wird. BGBl Nr. 5/1960.
[73] BGBl Nr. 187/1961.

setzlichen Regelungen zum Weinrecht auf den aktuellen Stand der Weinwirtschaft gebracht werden. Demgemäß wurden die Rechtsvorschriften betreffend Erzeugung, Bezeichnung und Kontrolle neu gefasst.[74] Hierbei sollten zwei Grundgedanken, nämlich die Etablierung von Mindestanforderungen an die Qualität des Weins und Schutz der Herkunftsbezeichnung des Weins, tragend werden.[75]

Das Inverkehrbringen und die Kontrolle von Wein und von Obstwein blieben auch Regelungsgegenstand des neuen Gesetzes.

Als Wein bezeichnete das Weingesetz 1961 das durch alkoholische Gärung aus dem Saft von frischen Weintrauben hergestellte Getränk. Diese Definition wich kaum von der bisherigen Definition des Weines nach dem Weingesetz 1925/29 ab. Neu aufgenommen wurde jedoch der Begriff *„frische Weintrauben"*. Als *„frisch"* galten Weintrauben solange sie ohne Zusatz fremder Flüssigkeit Saft hergeben konnten.[76] Als Wein galten auch die versetzten Weine wie der Dessertwein, aromatisierte Wein, Perlwein sowie der Schaumwein.[77]

Als Obstwein definierte das Weingesetz 1961 das durch begonnene oder vollendete alkoholische Gärung des Saftes oder der Maische von frischem Kern-, Stein- oder Beerenobst hergestellte Getränk sowie Obstwein der im § 22 Abs 3 bis 6 aufgezählten Arten (Obstsüßwein, aromatisierter Obstwein und Zider).[78]

Zum ersten Mal in der Weinrechtsgeschichte normierte das Weingesetz 1961 allgemeine Grundsätze der Weinbehandlung. Der Wein durfte nur so behandelt werden, dass an dem Charakter als Naturerzeugnis, dessen entscheidende stoffliche Grundlage die frische Weintraube war, nichts geändert wurde (§ 4 Weingesetz 1961). Bei den versetzten Weinen galt dieser Grundsatz nur für den Ausgangswein. Ebenfalls zum ersten Mal wurde der Begriff „*Weinbehandlung*" näher bestimmt. Weinbehandlung war demnach die auf die Herstellung und auf die Pflege von Wein gerichtete Tätigkeit, die mit der Traubengewinnung begann und mit der Abgabe an den Verbraucher endete.[79] Keine Weinbehandlung war das auf Verlangen oder mit Kenntnis des Verbrauchers vorgenommene Zurichten des Weines, wie z.B. das Zumischen von Sodawasser, wenn der Wein sofort genossen werden sollte.[80] Im Zusammenhang mit der Weinbehandlung legte das Weingesetz 1961 auch fest, was unter einer rationellen Kellerbehandlung zu verstehen war. Demnach entsprach die Weinbehandlung der rationellen Kellerbehandlung, wenn sie auf Grund wissenschaftlicher Erprobung, der in der Kellerwirtschaft gewonnenen Erfahrungen und auf Grund ihrer Wirtschaftlichkeit geeignet war, die Gewinnung, den Ausbau, die charakterliche Formung, die Stabilisierung, die Konsumfähigkeit, die Grunderhaltung oder die Wiederherstellung des Weines günstig zu beeinflussen.[81]

Die Behandlung des Weines in Form eines physikalische Verfahrens, durch welches kein Stoff in den Wein gelangte, wurde für zulässig erklärt, sofern diese den allgemeinen Grundsätzen des Weingesetzes 1961 entsprachen und – so das Gesetz ausdrücklich – der Wein keine gesundheitsschädliche Änderung erfuhr! Ein solches physikalisches Verfahren lag nach dem Weingesetz 1961 beispielsweise vor, wenn der Wein z.B. durch Wärme oder Kälte behandelt wurde.[82]

Das Zusetzen von Stoffen, um den Wein zu strecken (wie z.B. durch Wasser), um über wesentliche Eigenschaften des Weines, wie etwa sein Bukett zu täuschen oder um unzulässige Änderungen oder Zusätze zu decken, war untersagt. Bei nicht versetzten Weinen war das Zusetzen von Alkohol und Zucker ebenfalls verboten.[83] Das Entziehen von Weinelementen, die der Wein auf Grund seiner natürlichen Entwicklung enthielt, war nach dem Weingesetz 1961 grundsätzlich verboten. Ausgenommen von diesem Verbot war jedoch der Entzug von Wasser in den gesetzlich vorgesehenen Fällen, wie z.B. der Wasserentzug bei der Strohweingewinnung oder Erzeugung von Traubendicksaft.[84] Das Vermischen von Wein mit Wein, also sohin der Verschnitt, war zwar grundsätzlich zulässig, wurde aber beschränkt.[85] Die Lesegutaufbesserung war nur unter bestimmten Voraussetzungen erlaubt. Eine solche war beispielsweise dann möglich, wenn das Lesegut einen natürlichen Mangel an Zucker und Alkohol hatte. Die Lesegutaufbesserung konnte durch Zucker oder Traubendicksaft oder beides erfolgen.[86] Neu hinzugekommen war auch der Begriff *„Lesegut"*. Lesegut waren demnach Kellertrauben und die ihnen als Ausgangserzeugnis gleichgestellten Tafeltrauben, die Traubenmaische, der Traubenmost und die Jungweine in der Zeit von der Lese bis zum 31. Dezember des Jahres, in dem die Trauben gewonnen wurden.[87]

Wie oben bereits hingewiesen wurde, enthielt das Weingesetz 1961 auch zahlreiche neue Vorschriften in Bezug auf die Bezeichnung des Weins. Neben dem Verbot der irreführenden Bezeichnung des Weines wurde mit dem Weingesetz 1961 auch

[74] CRAPOUSE (FN 16). Ebenso POSTMANN (FN 1) 97.
[75] So POSTMANN (FN 1) 97. Ebenso HEINRICH-LENZ (FN 22) 73.
[76] § 1 Abs 1 Weingesetz 1961.
[77] § 1 Abs 2 lit a bis lit d Weingesetz 1961 enthielt eine genaue Definition der versetzten Weine.
[78] § 22 Abs 1 Weingesetz 1961.
[79] § 3 Abs 1 Weingesetz 1961.
[80] § 3 Abs 2 Weingesetz 1961.
[81] § 3 Abs 3 Weingesetz 1961.
[82] § 5 Abs 1 Weingesetz 1961.
[83] § 6 Abs 1 und Abs 2 Weingesetz 1961. Im § 6 Abs 3 Weingesetz 1961 wurden jene Stoffe angeführt, die dem Wein erlaubterweise zugesetzt werden durften.
[84] § 7 Weingesetz 1961.
[85] § 8 Weingesetz 1961.
[86] § 9 Abs 1 Weingesetz 1961.
[87] § 9 Abs 1 Weingesetz 1961.

das erste Mal die örtliche Herkunftsbezeichnung des Weines unter gesetzlichen Schutz gestellt.[88] Zur Kennzeichnung der örtlichen Herkunft nicht versetzter inländischer Weine durften nur bestimmte geographische Bezeichnungen verwendet werden, konkret die Bezeichnung *„Österreichischer Wein"* oder die Nennung des entsprechenden Bundeslandes, die Namen der Weinbaugebiete, die Namen der Gemeinden und die Namen von Rieden in Verbindung mit dem Namen der Gemeinde, in der das Ried lag.[89]

Bei einem Verschnitt eines inländischen Weins mit einem ausländischen Wein durfte die örtliche Herkunftsbezeichnung des Auslandes nur dann verwendet werden, wenn der Anteil an Wein der betreffenden Herkunft mindestens zwei Drittel betrug und die Art bestimmte.[90]

Neben weiteren Bestimmungen betreffend Obstwein[91] enthielt das Weingesetz auch konkrete und umfangreiche Regelungen zur Weinaufsicht.[92] Zur Überwachung des Verkehrs mit Wein sowie für die Dauer der kellermäßigen Bearbeitung wurden sogenannte *„Bundeskellereiinspektoren"* bestellt. Ihnen wurde das Recht der Nachschau in den Kellern oder Preßhäusern zu halten, das Recht zur Kost und Untersuchung von Proben, das Recht zur Beschlagnahme udgl eingeräumt.

Wie bisher wurden Übertretungen mit gerichtlichen oder verwaltungsbehördlichen Strafen geahndet. So beging nach dem Weingesetz 1961 beispielsweise eine gerichtlich strafbare Handlung, wer Wein verfälschte und eine Verwaltungsübertretung etwa, wer die Buchführungspflicht für den Traubendicksaft verletzte.[93] Sowohl für das Strafverfahren als auch für das Verwaltungsstrafverfahren kannte das Weingesetz 1961 entsprechende Verfallsbestimmungen für den Wein.[94]

B. Novellen zum Weingesetz 1961

Das Weingesetz 1961 wurde in weiterer Folge mehrfach novelliert.[95] Von diesen zahlreichen Novellen werden die für die Entwicklung des Weinrechts aus rechtshistorischer Perspektive wichtigsten Neuerungen vorgestellt.

Mit der Weingesetznovelle 1971 wurde der Begriff *„Wein"* ein weiteres Mal neu definiert.[96] Wein war demnach das durch alkoholische Gärung aus dem Saft frischer und für die Weinbereitung geeigneter Weintrauben hergestellte Getränk.[97] Wie bisher galten die Weintrauben als frisch, solange sie ohne Zusatz fremder Flüssigkeiten Saft geben konnten.[98] Für die Weinbereitung geeignet waren die Trauben, wenn der Saft ein Mostgewicht von mindesten 13°, in Jahren ungünstiger Reifeverhältnisse 11° Klosterneuburger Mostwaage aufwies.[99] Neu eingeführt wurde der Begriff *„Klosterneuburger Mostwaage"*. Die Klosterneuburger Mostwaage ist eine Senkspindel zum Messen des Zuckergehalts von Traubenmost in Gewichtsprozent (g/100 g). Ihre Skala zeigt Klosterneuburger Zuckergrade, abgekürzt als *„° KMW"* an.

Zum ersten Mal wurden auch die Weinbauregionen gesetzlich konkretisiert. Als Weinbauregionen wurden das Burgenland mit den Weinbaugebieten Rust-Neusiedlersee und Eisenberg, das Donauland mit den Weinbaugebieten Krems, Langenlois, Traismauer-Carnuntum und Wachau, die Thermenregion mit den Weinbaugebieten Baden und Vöslau, das Weinviertel mit den Weinbaugebieten Falkenstein und Retz, die Steiermark mit den Weinbaugebieten Südsteiermark, Weststeiermark und Klöch-Oststeiermark und Wien mit dem Weinbaugebiet Wien bestimmt.[100]

Ebenso wurden die Rechtsvorschriften betreffend örtliche Herkunftsbezeichnungen der inländischen Weine neu gefasst. Ein Wein durfte nur dann als *„Österreichischer Wein"* bezeichnet werden, wenn der Wein aus Trauben gewonnen wurde, die ausschließlich im Inland gewonnen wurden. Bei Rotwein war diese Bezeichnung zulässig, wenn der Anteil des inländischen Weines 85 Raumhundertteile betragen hatte und weiterhin die Eigenart eines österreichischen Rotweines aufwies.[101]

Mit der Weingesetznovelle 1971 wurden die Bezeichnungen *„Qualitätswein"* und *„Kabinett"* eingeführt. Ein Wein durfte unter der Bezeichnung Qualitätswein in Verkehr gesetzt werden, wenn u.a. Weintrauben, die für die Herstellung des Weines gebraucht wurden, aus einer der Weinbauregionen stammte und zu einer durch Verordnung des Bundeministers für Land- und Fortwirtschaft bezeichneten Rebsorte gehörte, es sich um keinen versetzten Wein handelte und in Aussehen und Geschmack harmonisch und frei von Fehlern war. Weiters musste der Wein für die Rebsorte typisch sein, der Saft der Weintrauben ein Mostgewicht von mindesten 15° KMW und bestimmte Mindestwerte zuckerfreier Extrakte und Alkohol udgl enthalten sowie mit einem Hinweis auf seine geographische Herkunft versehen sein.[102]

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[88] § 13 und § 15ff Weingesetz 1961.
[89] § 15 Abs 1 Weingesetz 1961.
[90] § 17 Weingesetz 1961.
[91] § 22 Abs 1 Weingesetz 1961 definiert Obstwein wie bisher als das durch begonnene oder vollendete alkoholische Gärung des Saftes oder der Maische von frischem Kern-, Stein- oder Beerenobst hergestellte Getränk.
[92] § 25ff Weingesetz 1961.
[93] § 45 Abs 1 lit a Weingesetz 1961, § 51 Abs 1 lit c Weingesetz 1961.
[94] § 46ff und § 53 Weingesetz.
[95] Durch das BGBl Nr. 198/1964, Nr. 334/1971, Nr. 60/1972, Nr. 506/1974, Nr. 419/1975, Nr. 300/1976, Nr. 446/1980, Nr. 391/1983, Nr. 273/1985 und Nr. 444/1985.
[96] Bundesgesetz vom 16. Juli 1971, mit dem das Weingesetz 1961 geändert wird, BGBl Nr. 334/1971.
[97] § 1 Abs 1 Weingesetz 1961 idF BGBl Nr. 334/1971.
[98] § 1 Abs 1 lit a Weingesetz 1961 idF BGBl Nr. 334/1971.
[99] § 1 Abs 1 lit b Weingesetz 1961 idF BGBl Nr. 334/1971.
[100] § 15 Abs 2 Weingesetz 1961 idF BGBl Nr. 334/1971.
[101] § 16 Abs 1 Weingesetz 1961 idF BGBl Nr. 334/1971.
[102] § 19 Abs 1 Weingesetz 1961 idF BGBl Nr. 334/1971.

Der Qualitätswein durfte mit der Bezeichnung *„Kabinett"* in Verkehr gesetzt werden, wenn er die oben genannten Voraussetzungen erfüllte hatte und der Saft der Weintrauben ein Mostgewicht von mindestens 17° KMW statt der 15° KMW aufwies. Diese Qualitätsweine konnten auf Antrag des Verfügungsberechtigten mit einem Weingütesiegel besonders gekennzeichnet werden.[103] Diese Gesetzgebung war nicht nur ein Schritt zur Hebung der Qualität des Weines, sondern bereits vom Gedanken der Konsumenteninformation getragen.

Mit der Weingesetznovelle 1972 wurde das sogenannte *„Kellerbuch"* etabliert.[104] Es handelt sich hierbei um die Verpflichtung desjenigen, der Wein, Keltertrauben, Traubenmost, Traubendicksaft oder Obstwein zukauft und zum Verkauf bereit hält, verkauft oder sonst in Verkehr setzt, ein Eingangs- und Ausgangsbuch zu führen. Die Verpflichtung zur Führung eines Kellerbuchs bestand nach dem Weingesetz 1961 bisher nur bei der Erzeugung von Traubendicksaft.[105]

Nicht zuletzt ist noch die Weingesetznovelle 1980 erwähnenswert, da diese das Hilfsorgan *„Mostwäger"* schuf.[106] Bei dem sogenannten *„Mostwäger"* handelte es sich um ein Hilfsorgan der Behörde, das mit der Kontrolle des für die Erzeugung von Prädikatswein bestimmten Leseguts beauftragt wurde.[107] Für die Tätigkeit als Mostwäger mussten die Bewerber jedoch bestimmte Voraussetzungen wie z.B. die Vollendung des 19. Lebensjahrs, entsprechende Ausbildung, fachliche, geistige und körperliche sowie charakterliche Eignung udgl. erfüllen.

VI. Weingesetz 1985

A. Anlass: Der Weinskandal des Jahres 1985

Das Weingesetz 1985 war unmittelbare Folge des sogenannten Österreichischen Weinskandals im Jahr 1985. Obwohl es sich bei dem Weinskandal um einen der größten nationalen und internationalen Wirtschafts- und Lebensmittelskandale der Geschichte bzw. Weingeschichte handelte, war der österreichische Gesetzgeber in seiner Wortwahl zur Einführung des Weingesetzes 1985 nüchtern und sehr zurückhaltend. In den Allgemeinen Erläuterungen zum Weingesetz 1985 führte dieser aus:

„Das Weingesetz 1961 hat den Bereich der Weinwirtschaft so weit geregelt, als dies dem Bund auf Grund der verfassungsmäßigen Kompetenzverteilung möglich war und als es sich nicht um die finanzielle Förderung des Weinabsatzes handelt. Schwerpunkt der weinrechtlichen Regelungen waren und sind daher die Regelungen über die Behandlung und Bezeichnung des Weines, über die Ein- und Ausfuhr sowie über die Weinaufsicht. Seit 1961 wurde das Weingesetz mehrmals novelliert, um es den Erfordernissen anzupassen. Die letzte derartige Novelle wurde erst im Juni dieses Jahres verabschiedet. Zu diesem Zeitpunkt war noch nicht absehbar, daß das bestehende Instrumentarium - auch in seiner verbesserten Form - nicht ausreicht, um in der gesamten Weinwirtschaft das erwünschte hohe Qualitätsniveau zu erreichen und den Konsumenten vor Täuschungen zu sichern. Die Ereignisse der letzten Zeit haben gezeigt, daß es erforderlich ist, ein neues Weingesetz zu schaffen und für seine effektive Kontrolle vorzusorgen."[108]

Interessant sind die Feststellungen des österreichischen Gesetzgebers, dass nicht absehbar gewesen sei, dass das rechtliche Instrumentarium des Weingesetzes 1961 nicht ausreichend gewesen sei, das hohe Qualitätsniveau zu erreichen und in diesem Zusammenhang der lapidare Hinweis des österreichischen Gesetzgebers auf die *„Ereignisse der letzten Zeit"*. Dieser Hinweis auf die *„Ereignisse der letzten Zeit"* darf beruhigt als Untertreibung des österreichischen Gesetzgebers bezeichnet werden. Was waren nun aber diese *„Ereignisse der letzten Zeit"*?

Ende Dezember 1984 erhielt das Forschungslabor der landwirtschaftlich-chemischen Versuchsanstalt in Wien einen anonymen Hinweis auf Verwendung unerlaubter Substanzen bei der Weinherstellung samt Probe. Ende Jänner konnte vom Forschungslabor die unbekannte Substanz als Diethylenglykol bestimmt werden. Hierbei handelte es sich um ein extrakterhöhendes Fälschungsmittel, mit welchem einerseits es möglich war, höhere Qualität vorzutäuschen, und mit welchem andererseits es möglich war, die Mengen zu vermehren.[109] Nach dem Schrifttum dürften jedoch auch andere Hinweise dazu geführt haben, dass die Weinverfälschungen zahlreicher Weinbauer amtsbekannt wurden. So wird in der Literatur in diesem Zusammenhang berichtet, dass einem Finanzamt im Rahmen der steuerlichen Veranlagung des Einkommens ein Antrag auf steuerliche Absetzung einer großen Menge Diethylenglykol – größer als für den vom Antragsteller angegebenen, einzigen Traktor überhaupt verwendet werden hatte können – als Frostschutzmittel aufgefallen sei.[110]

Von der zuständigen Staatsanwaltschaft wurden in weiterer Folge entsprechende Ermittlungsverfahren eingeleitet, die dazu führten, dass rund 280.000 Hektoliter Wein beschlagnahmt, 325 Anzeigen erstattet, 52 Strafanträge – großteils wegen Verstößen gegen das Lebensmittel- oder Weingesetz – und 21 Anklagen wegen gewerbsmäßigen Betrugs erhoben wurden und nach Durchführung des entsprechenden Strafverfahrens mehrere Personen auch zu Haftstrafen verurteilt wurden.[111]

Es verwundert nicht, dass dieser Weinskandal mit seinen systematischen Verfälschungen und Gesundheitsgefährdungen zum Zusammenbruch der österreichischen Weinwirtschaft führte und der österreichische Gesetzgeber auf diesen Weinskandal umgehend mit dem Bundesgesetz vom 24. Oktober 1985

[103] § 19a Abs 2 Weingesetz 1961 idF BGBl Nr. 334/1971.
[104] Bundesgesetz vom 2. Februar 1972, mit dem das Weingesetz 1961 geändert wird, BGBl Nr. 60/1972.
[105] § 33 Abs 1 Weingesetz 1961. Die mit der Weingesetznovelle 1972 eingeführte Buchführungspflicht hatte bereits das Weingesetz 1929 vorgesehen.
[106] Bundesgesetz vom 8. Oktober 1980, mit dem das Weingesetz 1961 geändert wird, BGBl Nr. 446/1980.
[107] Der Begriff *„Prädikatswein"* wurde mit der Weingesetznovelle 1980 eingeführt, für die höchste Stufe der Qualitätsweine.
[108] RV 693. Beilage der XVI. GP, 37.
[109] CRAPOUSE (FN 16) 116.
[110] CRAPOUSE (FN 16) 115.
[111] https://derstandard.at/2000013869587/Na-dann-Prost.

über den Verkehr mit Wein und Obstwein (im Folgenden kurz: „Weingesetz 1985“) reagierte bzw. reagieren musste[112].

B. Das Weingesetz 1985

Das Weingesetz 1985 änderte den Begriff „*Wein*“ nicht wesentlich. Als Wein wurde wie bisher ein durch alkoholische Gärung aus dem Saft frischer und für die Weinbereitung geeigneter Weintrauben hergestelltes Getränk bezeichnet.[113] Ebenfalls entsprechend der bisherigen Rechtslage wurde auch der versetzte Wein als Wein iSd Weingesetzes 1985 angesehen. Versetzte Weine waren der Dessertwein, der aromatisierte Wein, der alkoholarme aromatisierter Wein, der Wermut, der Perlwein, der Schaumwein und die Mistela.[114] Anders als zuvor hatte der Gesetzgeber nunmehr aber den Begriff „*versetzter Wein*“ definiert. Unter „*versetzter Wein*“ verstand das Weingesetz 1985 Wein, dessen Beschaffenheit auf besondere Behandlungsweisen oder auch auf die Verwendung von Zusätzen bei der Erzeugung neben der durch die Weintrauben gegebenen Eigenart zurückzuführen war.[115] Neu war auch die Bestimmung, dass auch der sogenannte „*Brenntwein*“, der Grundlage für die Herstellung von Weinbrand ist, als Wein iSd Weingesetzes 1985 galt.[116]

Ebenfalls neu gefasst wurden die Allgemeinen Grundsätze des Weingesetzes. Wie bisher durfte Wein nur so behandelt werden, dass an dem Charakter des Weines als Naturerzeugnis nichts geändert wurde (§ 4 Weingesetz 1985).[117] Aus Gründen der Qualität und des Umweltschutzes wurde neu vorgeschrieben, dass Wein an den Letztverbraucher nur in Glasflaschen abgegeben werden durfte. Damit war der Verkauf von Wein in Verpackungsformen wie Tetrapack oder Aluminiumdosen verboten.[118]

Zum ersten Mal enthielt das Weingesetz eine taxative Aufzählung der physikalischen Behandlungsverfahren des Weines. Damit sollte gewährleistet werden, dass durch die Behandlung des Weines kein Schaden für die menschliche Gesundheit entstehen konnte und nur jene Verfahren angewendet wurden, die einer rationellen Kellerwirtschaft entsprachen.[119] Zu diesen Verfahren zählten die mechanische-technische Behandlung des Lesegutes, wie durch Pressen, Maischen, Rebeln, die Belüftung, das thermische Verfahren, die Verwendung von Kohlendioxid und Stickstoff u.a. zum Schutz vor Luft während der Erzeugung und die Entschwefelung.[120]

Das Zusetzen von Stoffen – das Gesetz sprach in diesem Zusammenhang von Weinbehandlungsmitteln – war nur erlaubt, wenn eine Gesundheitsgefährdung nicht bestand und ihr Einsatz dem Stand der Kellertechnik entsprach.[121] Ausdrücklich verboten wurde beispielsweise das Zusetzen von Stoffen, die geeignet waren, Wein zu strecken oder das Zusetzen von Stoffen, die geeignet waren, über wesentliche Eigenschaften des Weines zu täuschen.[122] Weinbehandlungsmittel wie beispielsweise Zukker oder Alkohol wurden vom Weingesetz 1985 ausdrücklich als unbedenklich angeführt.[123] Alle anderen Weinbehandlungsmittel unterlagen einem Anmelde- bzw. Zulassungssystem.[124]

Ebenfalls zur Steigerung der Qualität des Weines diente die Neuregelung der Lesegutaufbesserung. Hier wurde die Möglichkeit, dem Lesegut Zucker zuzusetzen, stark eingeschränkt. Zum Ausgleich des natürlichen Mangels an Zucker und Alkohol durfte Zucker oder Traubensaft oder beides dem Lesegut nur dann zugesetzt werden, wenn dadurch die Eigenart des Weines verbessert wurde und seine Zusammensetzung nicht wesentlich gestört wurde. Im Rahmen der Lesegutaufbesserung durften Tafel-, Land- und Qualitätswein höchsten 3,5 kg Zucker je Hektoliter Most zugesetzt werden und das Lesegut nur soweit aufgebessert werden, dass 18° KMW nicht überschritten wurde. Für Jahre besonders ungünstiger Reifeverhältnisse wurden besondere Vorschriften vorgesehen.[125]

Wie bisher durfte Wein nicht unter einer zur Irreführung geeigneten Bezeichnung oder Ausstattung zum Verkauf bereit gehalten, verkauft oder sonst in Verkehr gebracht werden. Neu geregelt wurde die örtliche Herkunftsbezeichnung nicht versetzter Weine. Hier ging der Gesetzgeber vom Grundsatz der Bezeichnungswahrheit aus.[126] Der Name einer Gemeinde durfte u.a. nur dann verwendet werden, wenn Trauben benutzt wurden, die ausschließlich im Gemeindegebiet verarbeitet wurden. Stammt das Lesegut aus verschiedenen Gemeinden, durfte nur der Name des Weinbaugebietes gebraucht werden.[127]

Das Weingesetz 1985 unterschied nunmehr zwischen Tafelwein, Landwein und Qualitätswein. Tafelwein war jener Wein, der nicht den Anforderungen an einen Qualitätswein entsprach und war als solcher ausdrücklich zu bezeichnen. Dieser Tafelwein durfte als Landwein bezeichnet werden, wenn die verwendeten Weintrauben aus einer Weinbauregion stammten und der Wein die für die Herkunft typischen Eigenschaften aufwies.[128]

[112] BGBl Nr. 444/1985.
[113] § 1 Abs 1 Weingesetz 1985.
[114] § 1 Abs 2 Weingesetz 1985.
[115] § 1 Abs 2 Weingesetz 1985.
[116] § 1 Abs 3 Weingesetz 1985.
[117] § 4 Abs 1 Weingesetz 1985.
[118] § 4 Abs 3 Weingesetz 1985.
[119] RV 693. Beilage der XVI. GP, 38.
[120] § 5 Weingesetz.
[121] § 6 Abs 1 Weingesetz 1985.
[122] § 6 Abs 2 Weingesetz 1985.
[123] § 7 Weingesetz 1985.
[124] § 9 Weingesetz 1985.
[125] § 19 Weingesetz 1985.
[126] RV 693. Beilage der XVI. GP, 39.
[127] § 25 Abs 5 und 6 Weingesetz 1985.
[128] § 28 Abs 1 und Abs 2 Weingesetz 1985.

Als Qualitätswein durfte ein Wein dann bezeichnet werden, wenn die verwendeten Weintrauben aus einem einzigen Weinbaugebiet stammten, Wein ausschließlich aus einer Qualitätsweinrebsorte, welche durch Verordnung des Bundesminister für Land- und Forstwirtschaft bestimmt wurden, stammten, der Saft der Weintraube ein Mostgewicht von mindestens 15° KMW sowie weitere genau gesetzlich definierten Mindestwerten von bestimmten Extrakten aufwies, der Wein staatlich geprüft wurde und auf dem Etikett *„Qualitätswein mit staatlicher Prüfnummer"* aufschien.[129] Wie bisher enthielt das Weingesetz 1985 auch Regelungen für Qualitätswein besonderer Reife und Leseart, den sogenannten Prädikatswein. Hier wurden die Qualitätsanforderungen gegenüber dem Weingesetz 1961 weiter erhöht.[130]

Auf Grund der Erfahrungen im Zuge des Weinskandals wurden nunmehr auch die Befugnisse der Bundeskellereiinspektoren erweitert. So wurde normiert, dass Organe des öffentlichen Sicherheitsdienstes die Bundeskellereiinspektoren sowie Mostwäger unterstützen konnten, wenn Widerstand im Rahmen der durchzuführenden Nachschau geleistet wurde.[131] Die Rechtsvorschriften betreffend Beschlagnahme wurden insofern erweitert, als nunmehr auch Geschäftsaufzeichnungen umfasst waren, wenn dies zur Beweissicherung erforderlich war.[132] Ebenso wurden die Vorschriften zur Kontrolle des Lesegutes verschärft. So wurden Meldepflichten bei Absicht, die Trauben zu ernten, sowie Pflichten zur Abgabe von Erntemeldungen bis zum 30. November eines Jahres bei jener Gemeinde, in deren Bereich das betreffende Weingartengrundstück lag, vorgesehen. Weiters bestand die Pflicht zur Meldung der vorhandenen Menge von Wein bis zum 30. Juni und 30. November eines Jahres.[133] Damit sollte den Behörden ein Überblick über den Bestand an Wein und Weinbewegungen verschafft werden. [134]

Ebenso neu war die Regelung, dass Wein, der in Österreich in Flaschen oder sonstigen Behältnissen mit einem Inhalt bis zu 50 Liter abgefüllt wurde, nur in Verkehr gebracht werden durfte, wenn die Flasche oder das Behältnis mit einer Banderole versehen war. Solche Banderolen waren mit einer fortlaufenden Nummer ausgestattet und wurden auf Antrag von der Behörde ausgegeben.[135]

Neu gefasst wurden auch die Aufgaben der Untersuchungsanstalten, welche nunmehr einheitlich zusammengefasst wurden. Verwaltungsstrafen in Form von Geldstrafen bis zu einer Million Schilling und Freiheitsstrafen bis zu einem halben Jahr waren vorgesehen.[136] Wie bisher kannte auch das Weingesetz 1985 gerichtliche Straftatbestände, wie z.B. die Verfälschung des Weines, der für den Verkehr bestimmt war, und Verwaltungsstrafen, wie z.B. der Verstoß gegen die gesetzliche Pflicht Wein in Glasflaschen abzufüllen.[137]

VII. Ausblick und Schlussfolgerungen

Das Weingesetz 1985 hatte in seiner kundgemachten Form keinen langen Bestand. Schon im Jahr 1986 wurde es umfangreich novelliert.[138] Diese Novelle blieb jedoch nicht die einzige. Bis zum Weingesetz 1999 wurde das Weingesetz 1985 weitere zehnmal novelliert. Vierzehn Jahre später wurde das Weingesetz 1999 erlassen, welches selbst wiederum nach weiteren zehn Jahren und zahlreichen Novellen durch das Weingesetz 2009 ersetzt worden war. Insgesamt betrachtet kann festgehalten werden, dass das Weinrecht bis zum heutigen Tag in rund ein- und zweijährlichen Schritten novelliert wurde.

Blickt man auf die Entwicklung des Weinrechtes von 1907 bis 1985 zurück, kann man zusammenfassend festhalten, dass die Geschichte des Weinrechts zunächst dadurch gekennzeichnet ist, dass mit jedem neuen Gesetz bzw. mit jeder neuen Novellierung ein immer dichter werdendes Regelwerk in Hinblick auf die Herstellung des Weines, die Bezeichnung des Weines und die Kontrolle der Einhaltung der Rechtsvorschriften erlassen wurde. Während das Weingesetz 1907 lediglich 16 Paragraphen enthielt, wuchs der Paragraphenbestand des Weingesetz 1925 auf 43 Paragraphen, des Weingesetzes 1961 und des Weingesetzes 1985 auf 57 Paragraphen an.

Ein inhaltlicher Blick auf die Entwicklung des Weinrechtes von 1907 bis 1985 zeigt, dass ein Wandel vom Prinzip, alles ist erlaubt, was nicht ausdrücklich verboten ist, zum Prinzip, alles ist verboten, was nicht ausdrücklich erlaubt ist, stattfand. Auch lässt sich ein Paradigmenwechsel hinsichtlich der Bezeichnungsvorschriften ausmachen, bei welchem der Gesetzgeber vom Prinzip des Verbots der Irreführung hin zum Gebot der Bezeichnungswahrheit samt Vorschriften betreffend geographische Herkunftsangabe übergegangen ist.[139] Zuletzt ist auf die stete Erweiterung der Kontrollaufgaben der Kellereiinspektoren hinzuweisen, die ihren Höhepunkt im Weingesetz 1985 findet, wie z.B. durch die Mitwirkungspflicht der Organe der öffentlichen Sicherheit bei Kellerinspektionen. Ob mit dem Weingesetz 1985 ebenfalls der Weinskandal verhindert worden wäre, ist jedoch eine andere Frage. Im Schrifttum wird in diesem Zusammenhang u.a. die Ansicht vertreten, dass Manipulationen bei der Weinherstellung den Behörden schon Jahre vor 1985 bekannt gewesen seien und bei konsequenter Handhabung des Weingesetzes 1961 guter Schutz gegen Betrügereien gegeben gewesen wäre. Darüber hinaus wären die Forderungen nach Personalaufstockung der Kellereiinspektoren sowie Änderungen im Aufbau und Neubesetzung der Weinaufsichtsgebieten ungehört geblieben und sei auf Grund dieser Umstände eine Weinkontrolle, wie sie im Weingesetz 1961 eigentlich vorgesehen war, nicht möglich gewesen.[140]

[129] § 29 Abs 1 Weingesetz 1985.
[130] § 30 Weingesetz 1985.
[131] § 38 Abs 1 Weingesetz 1985.
[132] § 40 Abs 5 Weingesetz 1985.
[133] § 44 Abs 1 Weingesetz 1985.
[134] RV 693. Beilage der XVI. GP, 41.
[135] § 45 Weingesetz 1985.
[136] § 61 Weingesetz 1985.
[137] § 61 Weingesetz 1985, § 65 Weingesetz 1985.
[138] BGBl Nr. 372/1986.
[139] Ebenso POSTMANN (FN 1) 465f.
[140] CRAPOUSE (FN 16) 94f.

Entscheidungsfindung auf kommunaler Ebene vor 80 Jahren – Mobilmachung 1939 im Landkreis Saarlouis

(Decision Making at Municipal Level 80 Years ago – War Mobilization in the District of Saarlouis)

Thomas Gergen *

Abstract

The study deals with the preparation for the II. World War („mobilization") taking the example of the district of Saarlouis. Two written sources are utilized, an extract of the war diary composed by the former Prussian district administrator (Landrat) as well as a report describing, after war, the school enrolment 1939 until the reconstruction after war.

Keywords: *Decision making; District of Saarlouis; War mobilization; War diary of Dr. Franz Schmitt; School enrolment; reconstruction.*

Vor 80 Jahren kam es auf kommunaler Ebene zu erheblichen Veränderungen. Die so genannte erste Mobilmachung musste organisiert und in die Verwaltungspraxis umgesetzt werden; dieser Ereignisse möchte unser Artikel gedenken. Das Saar(becken-)gebiet des Versailler Vertrages (1920-1935) war seit 1935 wieder in das Deutsche Reich „heimgekehrt". Die h.M. der Staatsrechtslehrer besagte, dass das Saargebiet in der Völkerbundszeit von 1920-1935 Teil des Deutschen Reichs, Preußens und Bayerns blieb, die deutsche Staatsgewalt zugunsten des Völkerbunds suspendiert und das Gebiet kein Sukzessionsstaat des Deutschen Reichs, sondern ein völker- und staatsrechtliches Gebilde *sui generis* war.[1]

Unter der Regierung Hitlers kam es 1937 zu einer Gebietsreform und einer neuen kommunalen Ordnung, 1939 an der Saar zur ersten Mobilmachung als Vorbereitung für den II. Weltkrieg. Aus dem Landkreis Saarlouis[2] sollen dazu zwei einschlägige Quellen herangezogen werden. Zum einen das noch unveröffentlichte, sehr lesenswerte Kriegstagebuch des Landrats Dr. Franz Schmitt, das Details dieser Mobilmachung und vor allem Konflikte im Rechtsalltag wegen Kompetenzkonflikten beim Namen nennt, so zwischen fortbestehenden preußischen Institutionen wie dem Landrat einerseits sowie der Partei und dem Militär andererseits. Darüber hinaus beleuchtet eine Erzählung die Saarlouis-Rodener Verhältnisse und die Schwierigkeiten der Einschulung, mit denen ab 1939 Behörden, Lehrer, Kinder und Eltern zu kämpfen hatten.

I. Kommunalrechtskonflikte

Das Kriegstagebuch des Landrats Dr. Franz Schmitt vom 13. August 1939 bis 14. Januar 1941 macht die Schwierigkeiten der Entscheidungsfindung auf kommunaler Ebene deutlich und ist daher eine wichtige und meines Erachtens nach editionswürdige Quelle, die sich im Kreisarchiv Saarlouis unter der Signatur I 377 befindet. Schmitt (1897-1945) verfügte über eine klassisch preußische Juristenausbildung; nach dem Assessorexamen in Berlin wurde er 1926 in Heidelberg mit einer Arbeit über „Die Auftragsangelegenheiten im preußischen Kommunalrecht" promoviert.[3] Nachdem er von 1929 bis 1935 kommissarischer Landrat des Kreises St. Wendel gewesen war, übernahm er 1935 den Landkreis Saarlouis (fortan Saarlautern). Als Vorsitzender des „Freimachungsstabes" hatte Schmitt die Gesamtverantwortung für die Freimachung der „Roten Zone", ein Gebiet,

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1 Müller, Der Völkerbund als Treuhänder des Saargebietes, Würzburg 1931, S. 40 ff.; Geimer, Die völkerrechtliche Stellung des Saargebietes unter besonderer Berücksichtigung der ausländischen Literatur, Saarbrücken 1931, S. 64 ff.; Frank, Die staats- und völkerrechtliche Stellung des Saargebietes, Archiv des Öffentlichen Rechts (AöR) 43/1 (1922), S. 8 ff.

2 Gergen, Saarlouis – *Siège présidial* und Oberster Gerichtshof. Ein Blick auf die saarländische Rechtsgeschichte seit 1679. In: Falk/Gehrlein/Kreft/Obert (Hg.): Rechtshistorische und andere Rundgänge, Festschrift für Detlev Fischer, Karlsruhe 2018, S. 129-149. Der Stiftung für Kultur und Umwelt der Kreissparkasse Saarlouis sei für ihre Förderung der Forschung gedankt. Zu weiteren Schriften des Autors: http://www.fries-herrmann.de/kanzlei/thomas-gergen [15. 02. 2019].

3 XVI, 109 Seiten; zu Schmitts Vita siehe Johannes Naumann, Die Jahre der Völkerbundsverwaltung an der Saar, in: 150 Jahre Kreissparkasse St. Wendel, St. Wendel 2009, S. 83. Zusätzlich von Schmitt: Gutachten und Vorschläge zu dem vom tschechoslowakischen Ministerium für Land- und Forstwirtschaft herausgegebenen Referentenentwurf eines Gesetzes über das Wasserrecht, im Auftrag des Deutschen Wasserwirtschaftsverbandes in der Tschechoslowakischen Republik, Reichenberg, erstellt, Reichenberg 1937. Siehe bereits: Gergen, Politische Entscheidungsjahre 1815, 1935 und 1955. Zäsuren und Übergänge aus Sicht der Rechtsgeschichte. In: Gabriele B. Clemens (Hg.), Schlüsseljahre. Zäsuren und Kontinuitäten an der Saar 1815-1935-1955 (Veröffentlichungen der Kommission für Saarländische Landesgeschichte 49), Saarbrücken 2017, S. 51-88.

das sich links der Saar erstreckte und rechts der Saar bis zur Linie östlich Schwalbach, Hülzweiler, Dynamitfabrik Saarwellingen und Diefflen hinzog.

Schmitt war NSDAP-Mitglied. Trotz seiner Parteimitgliedschaft wird bei ihm die formaljuristische Seite deutlich, als es um einen Kompetenzstreit zwischen ihm und dem Militär geht. Schmitt schreibt am 29. März 1940:

Mit dem Intendanten des XXX. A.K.[= Armee Korps] führen wir seit Tagen einen Feder- vielmehr Telefonkrieg. Der Ortskommandant von Schmelz hat ein amtseigenes Verwaltungsgebäude für einen Artilleriestab beschlagnahmt. Wir fragen ihn schriftlich zurück, auf welchen Rechtstitel er seine Beschlagnahme stütze. Grosse Verlegenheit! Ib der Division [= Versorgungsoffizier, Quartiermeisterabteilung] *stützt den Ortskommandanten, auch der Intendant des XXX. A.K. Das Reichsleistungsgesetz lässt aber eine derartige Beschlagnahme nicht zu. Das sieht endlich auch das XXX. A.K. ein. – Dieser „Krieg" tat mir sehr leid – aber die Stäbe haben in der roten Zone soviel Gebäude zur Verfügung. Dass wir in der „grünen" zur Aufrechterhaltung der Verwaltung und Betreuung unserer Bevölkerung auch unsere wenigen Gebäude behalten müssen, leuchtet jedem ein, der die Kriegsaufgaben der Verwaltung kennt* […].

Rechtstexte und Rechtswirklichkeit entfernten sich also in Kriegszeiten zusehends voneinander, was die Entscheidungsfindung ab 1939 erschwerte. Beispielgebend aus der Rodener Geschichte[4] belegt dies ein Aufsatz, der die Jahre 1938 bis 1947 beschriebt,[5] beginnend mit dem Scharnierjahr 1939, dem Jahr der Mobilmachung.

II. Einschulung in Roden 1939

Am 1. 4. 1939 trugen wir alle das erste Ränzlein unseres Lebens auf dem Rücken –Einschulung[6]*. Der zahlenmäßig starke Jahrgang (71 Mädchen, 76 Jungen) wurde jeweils in die Klassen A und B aufgeteilt. In der „Rudolf-Heß-Schule"*[7] *der Jungen unterrichtete Herr Lehrer Meyer*[8] *ausschließlich die Klasse A, während die Klasse B ihren Unterricht wechselweise durch die Herren Lehrer Mohr, Trenz, Rektor Schmitt und Frl. Hau erteilt bekam. Nach dem Kriege bildeten A und B einen Klassenverbund unter Leitung von Herrn Meyer. In der „Dr. Frick-Schule"*[9] *wurden unsere Mädchen von Frl. Anna Groß, Frl. Elisabeth Groß, Frl. Hau und Frl. Hahn durch die Schulzeit geleitet.*

Seit Herbst 1938 galten laut Erlass des Herrn Reichsministers für Wissenschaft, Erziehung und Volksbildung vom 6. 8. 1938 neue Notenstufen für die Leistungen (Zensuren):

sehr gut	*1*	*Weit über gut hinausreichend*
gut	*2*	*Wesentlich über dem Durchschnitt stehend*
befriedigend	*3*	*Vollwertige Normalleistungen ohne Einschränkung*
ausreichend	*4*	*Ausreichende Leistungen, wenn auch nicht ohne Schwächen*
mangelhaft	*5*	*Nicht ausreichende Leistungen, jedoch Vorhandensein wesentlicher Grundlagen mit der Möglichkeit eines baldigen Ausgleichs*
ungenügend	*6*	*Völlig unzureichende Leistungen ohne sichere Grundlagen, Ausgleich nur schwer und erst nach längerer Zeit möglich*

Zwischenstufen sind nicht statthaft!

Frankreichfeldzug, rote Zone und erste Evakuierung

Schon wenige Monate nach der Einschulung wurde unsere Heimat zur roten Zone erklärt – der Frankreichfeldzug begann – wir wurden evakuiert. An vorgegebenen Sammelstellen warteten wir mit unseren Familien – meist ohne den Vater, der bereits zum Militärdienst eingezogen war – mit kleinem Handgepäck auf den Abtransport mit offenen Lastkraftwagen. Die Fahrt ging zunächst in den Großraum St. Wendel, von dort per Sonderzug nach Hessen, Franken und Thüringen. Im „Bergungsgebiet" suchte jeder seinen Kontakt in der ersten Klasse.

Der Frankreichfeldzug war sehr bald zu Ende und die Parole lautete: „Nix wie hemm!" In den heimischen Gärten war uns das Unkraut über den Kopf gewachsen. Unsere Bubenschule zeigte sich etwas verändert. Sie diente zeitweilig als Reservelazarett, und somit war das Dach mit einem riesengroßen roten Kreuz auf weißem Grund bemalt.

Die „Deutsche Schrift"

Als wir wieder fleißig die Rodener Schulbänke drückten und „rauf, runter, rauf, I-Pünktchen drauf" übten, wurde plötzlich un-

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Die Kriegssachschädenverordnung vom 30. November 1940, die nach dem Krieg im Saarland wieder in Kraft gesetzt und bis zum besonderen Lastenausgleichsrecht eine erhebliche Rolle spielen sollte, sowie die Reichsumlegungsordnung, auf der Neuordnungsmaßnahmen der Grundstücksumlegung beruhten, sind in diesem Kontext gleichfalls zu nennen; sie schufen infolge ihrer überhasteten Einführung viel Unsicherheit und erzeugten Widerstand in der Bevölkerung. Gerade die Abrisse unbeschädigter oder gar nur wenig beschädigter Häuser blieb Zeitgenossen wie Kommunalverwaltungen angesichts der existierenden Wohnungsnot und der nur zögerlichen Fortschritte des Wiederaufbaues vollends unverständlich: Wolfgang Laufer, „Wiederaufbau" und „Neuordnung" in der „Westmark" während des Zweiten Weltkrieges, in: Zeitschrift für die Geschichte der Saargegend 43 (1995), S. 247-258, insbesondere S. 252 und S. 256f.

4 Gergen, „Sie werden auferstehen" - Erinnerungsorte für Evakuierung und Kriegsopfer in Roden (1940-1963). In: Jahrbuch für Westdeutsche Landesgeschichte 44 (2018), S. 513-539; Ders., Über die 10 Geheimnisse Rodens. In: Historischer Zirkel für Roden (Hg.), Roden. Heimat, Schicksal und Vermächtnis, Saarlouis-Roden 2018, S. 71-74.

5 Die Handschrift wurde mir von Mathilde Espen, geb. Fontaine, der Schwester des verstorbenen Stadtarchivars (Saarlouis) Lothar Fontaine, zugeleitet. An die redaktionellen Richtlinien angepasst, kommentiert und mit Zwischenüberschriften versehen, steht er nunmehr als Primärquelle zur Verfügung. Obwohl bereits einem kleinen Leserkreis in Roden bekannt Der Text, wahrscheinlich von Hannes A(h)rweiler/Roden stammend, findet sich auch in der „Schulfibel Jahrgang 1932/33", Festschrift zum Jahrgangstreffen 1. bis 3. 10. 1983.

6 Zu Kindergarten/Kinderverwahrschule in Roden: Gergen, Von der „Kinderverwahrschule" zur KiTa-gGmbH. 95 Jahre Kindergarten in Roden. In: Unsere Heimat (Mitteilungsblatt des Landkreises Saarlouis für Kultur und Landschaft) Jg. 40 (2015). Heft 4, S. 140-146.

7 = Römerbergschule in der NS-Zeit.

8 Vgl. den Aufsatz von Gerd Meyer, Erinnerung an Oberlehrer Johann Meyer. In: Rodener Prisma (Saarlouis: Rodener Geschichtskreis), Bd. 2 (2014), S. 17-19.

9 = Donatusschule in der NS-Zeit.

sere bereits erworbene Schreibkunst durch eine neue Verfügung über Bord geworfen. Es wurde eine neue Schriftart eingeführt. Die „Deutsche Schrift" wurde von der „Lateinischen Ausgangsschrift" abgelöst. Die einzige Erinnerung an eine gemeinsame Feier von Mädchen und Buben ist unsere Erstkommunion 1942 unter Pastor Jakoby. Viele Jahrgangsmitglieder lernten sich untereinander gar nicht kennen. Hinzu kommt, dass „die ähnen aus em Onnerdorf, die annern aus em Ovvadorf unn da Rescht vahn da Siedlung komm senn".- Ab 1941 trugen wir die Uniformen von Jungmädel und Jungvolk. Wir kamen zu wöchentlichen Dienststunden, in denen man uns mit Gesang und Spiel und Bastelarbeiten zu begeistern versuchte. Einige Buben fanden auch bei den Messdienern ihren Platz. Im Jahre 1942 splitterte sich der Jahrgang auf, da von Mädchen und Jungen eine ganze Menge auf andere Schulen abwanderten, so z.B. auf die Oberschulen für Mädchen und Jungen, Mittelschule und die regimebezogenen Schulen, z.B. Adolf-Hitler-Schule. Mit der Fortdauer des Krieges verschärfte sich der Luftkrieg. Die nächtlichen Fliegerzahlen häuften sich, so dass es zu der Regelung kam: Fliegeralarm vor Mitternacht: Schulbeginn normal; nach Mitternacht: Beginn 9 Uhr. In der Nacht vom ersten auf den zweiten September 1942 erfolgte ein Bombenangriff auf Saarlautern, der sich aber in erster Linie auf Roden und Fraulautern konzentrierte. Es gab viele Tote und Verletzte zu beklagen, die Mittelstraße war sehr stark zerstört. In der Folgezeit war es so, dass wir oft halbe Nächte und mehr in Luftschutzkellern und Bunkern verbrachten.

Luftangriffe

Am 4. 10. 1943, morgens gegen 11 Uhr, erlebten einige von uns fernab von der Mama in den Luftschutzkellern der innerstädtischen Schulen einen weiteren Luftangriff, bei dem große Teile des Stadtkerns zertrümmert wurden. Es gab zahlreiche Tote, darunter auch Rodener Bürger.

Hocherfreut waren alle Schüler, wenn Rektor Schmitt genannt „Buffalo-Bill", durchs Schulhaus raste und verkündete: „Der Unterricht fällt aus, alle Klassen gehen Kartoffelkäfer suchen!" Ein anderes Mal waren von feindlichen Flugzeugen abgeworfene Flugblätter zu sammeln, und später stand das Sammeln von Heilkräutern auf der Tagesordnung.

Seit dem Angriff auf Roden wurde die Turnhalle der Knabenschule nicht mehr zum Turnen benutzt, denn dort wurde angekohltes Getreide aus der von Brandbomben zerstörten Kreuz-Mühle am Bahndamm ausgelagert, in der Hoffnung, es weiter verwenden zu können. Daraus wurde aber nichts. Die Landung der Alliierten in der Normandie am 6. Juni 1944 brachte uns die Front vor die Haustüre. Bedingt durch die näher gelegenen Landepisten, begannen die Jabos[10] *ihr übles Spiel. Es wurde aus der Luft geschossen, es detonierten Bomben ohne vorherigen Alarm, denn die „Vögel" waren zu schnell da. Hauptziel war in Roden immer die Gegend Güterbahnhof, da dort ständig deutsche Truppen verladen wurden.*

Zweite Evakuierung

In den großen Ferien wurde die Knabenschule zweckentfremdet. Hier waren die Pfälzer „Schanzer" untergebracht, Buben im Alter von ca. 14-15 Jahren, die auf der Rodener Flur[11] *den Panzergraben und Laufgräben bauten. In den folgenden Wochen und Monaten bis gegen Jahresende mussten unsere Mütter und Väter, sofern sie nicht an der Front waren, ebenfalls schanzen. Die Kampflinie rückte näher; im September hatten die Amerikaner schon Metz erreicht. In diesen Wochen und Monaten wurden wir mit einem neuen Phänomen konfrontiert: Ein senkrecht aufsteigender weißer Streifen zeigte sich bei schönem Wetter am blauen Himmel, und nach kurzer Zeit war sogar ein starkes Rauschen zu hören. „Watt es dann datt loo?" war die allgemeine Frage. Sehr bald verlautete, dass es sich dabei um den Abschuss von V-Waffen*[12] *handelte, die vom nahegelegenen Hunsrück und aus der Eifel auf England abgefeuert wurden. Aber auch diese Raketenwaffen brachten keine Wende. Viele erinnern sich gut daran, wie sie im Schatten der Nacht in Sonderzügen nach Bayern und anderen Gegenden Deutschlands wieder evakuiert wurden. Für lange Zeit gab es für niemanden mehr einen geregelten Schulunterricht.*

Straßenkämpfe und Heimkehr

Es gibt sogar Familien, die Roden nicht mehr rechtzeitig verlassen konnten und somit Zeugen der Straßenkämpfe wurden[13]*. Einer unserer Schulkameraden hat hier hautnahe Erinnerungen, wurde doch seine Familie später auf deutschen Panzern hinter die Kampfzone gebracht. In den unerbittlichen Straßenkämpfen wechselten Straßenzüge und einzelne Häuser ständig den Besitzer. Als Folge des anhaltenden Artilleriebeschusses, sowie der heftigen Straßenkämpfe fanden wir nach der Rückkehr aus der Fremde ein 90% zerstörtes Roden vor.*

Sicherlich erinnern sich die ersten Jahrgangsheimkehrer der Trampelpfade durch die Straßen, Bündel von Telefonleitungen deutscher und amerikanischer Herkunft, tote deutsche und amerikanische Soldatengräber von Gefallenen, die an Ort und Stelle begraben wurden, Tierkadaver, angeschossene Panzer, Blindgänger und Minen, riesige Trümmerberge beherrschten das Ortsbild. Es war ein Roden der Armut.

Am 8. Mai 1945 hatte der Spuk ein Ende: Der Krieg war aus! Für viele Rodener eröffnete sich die Möglichkeit, mit einem aus-

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[10] = Jagdbomber.

[11] Gergen, Roden, Rodenerbach, Ellbach: Zur Problematik von Entstehung, Kontinuität und landesrechtlicher Grundlage der Orts- und Gewässernamen. In: Jahrbuch für Westdeutsche Landesgeschichte 39 (2013), S. 7-29.

[12] = Vergeltungswaffen.

[13] Zum Kriegswinter 1944 siehe die Aufsätze im Rodener Prisma (Saarlouis: Rodener Geschichtskreis), Bd. 6 (2016). Ebenfalls: Gergen, Rodener Wegekreuze in Erinnerung an den Kriegswinter 1944/45. In: Unsere Heimat (Mitteilungsblatt des Landkreises Saarlouis für Kultur und Landschaft) Jg. 34, Heft 1 (2010), S. 38-46, sowie zu Kriegstagebüchern in der Region und allgemein: Ders., Der Krieg in Wadgassen und Überherrn im Winter 1944/45, nach einem Augenzeugenbericht von Fritz Goergen. In: Unsere Heimat (Mitteilungsblatt des Landkreises Saarlouis für Kultur und Landschaft) Jg. 39 (2014), Heft 1, S. 20-38 sowie Heft 2, S. 57-77; Ders., „Die Partei ordnete sofort die Räumung der Stadt unter dem Dröhnen der Granaten und Fliegerbomben an…" Drei Frauen führen Tagebuch über den Kriegswinter 1944/45 in Saarlouis. In: Jahrbuch für Westdeutsche Landesgeschichte 42 (2016), S. 463-539 sowie „Der Stollen in Lisdorf sollte geräumt werden, die Menschen konnten es einfach nicht mehr darin aushalten…" Ausschnitte aus dem Kriegstagebuch der Waldbreitbacher Franziskanerschwester Botwida aus der Saarlouiser Elisabeth-Klinik mit Bezug zu Lisdorf. In: Lisdorfer Heimatblatt 21 (2016), S. 9-12.

gedienten Pferdegespann der Wehrmacht die Heimreise anzutreten, ohne zu ahnen, welch wertvollen Besitz sie heimbrachten, ein Heim gab es nicht mehr. In Roden begann die Aufräumarbeit. Im Herbst 1945 wurde unter schwierigen und primitiven Umständen wieder der Schulbetrieb aufgenommen. Da die beiden Schulen zerstört waren, bezogen die Mädchen in der Schulbaracke „am Polizeiamt", heute Marktplatz mit Brunnen, ihr Quartier. Die Buben waren auf dem Bahnhof im „Hotel Zimmer", im benachbarten Gewerkschaftshaus und in den Räumlichkeiten der „Alten Post", heute Polizeirevier am Bahnhof[14]*, untergebracht. Alle entsinnen sich sicher noch, wie klein die Gucklöcher in den Fenstern, zum größten Teil mit Brettern zugenagelt, waren, denn Glasscheiben waren Mangelware und nur gegen Bezugsscheine zu haben. Auch die Öfen, die im Winter für Wärme sorgten, sind heute erwähnenswert.*

Nachkriegsalltag

Durch die teilweise erbärmliche Art der Unterbringung, Nahrungs-, Wasser- und Seifenmangel waren Krätze, Läuse und Flöhe an der Tagesordnung. Übrigens gibt es da noch eine tolle Geschichte: Zwei von unseren Buben und ein dritter, der zu diesem Zeitpunkt in Beaumarais wohnte, leisteten sich einen besonderen Lausbubenstreich. Wie viele andere hatten auch diese drei „(fast) perfekten Feuerwerker" im „spielerischen" Umgang mit Sprengkörpern und diversen „Pülverchen" ihren Erfahrungsschatz bereichert. Wenige Tage nach Unterrichtsbeginn in den weiterführenden Schulen von Saarlouis beschloss man mit anderen Klassenkameraden, die üblichen Wartezeiten auf dem Schulhof mit Kurzweil „auszufüllen", indem man eine leere Flasche mit gebündelten Pulverplättchen „auffüllte". Als die Flasche zu einem Drittel gefüllt war, brachte ein glimmendes Strohhalmende dieselbe zur Explosion: Ein gewaltiger Knall, Scheiben klirrten, Schüler stürzten in den Sälen an die Fenster, Lehrer quollen aus dem Gebäude. Eine sofort anberaumte Konferenz des Lehrkörpers kam nach eingehender Beratung zu folgendem Beschluss: Die drei Rodener (und zwei Fraulauterner) müssen ihren Hut nehmen. Ein vierter Rodener, der nicht direkt an der Sprengung beteiligt war, erhielt einen scharfen Verweis.

Aber zurück zur damaligen Schulmisere: Lehr- und Lernmittel hatten Seltenheitswert, ein Blatt Papier war eine Rarität; nicht selten wurden die freien Ränder der Tageszeitung zum Beschreiben benutzt. Kleider und Schuhwerk waren erbärmlich: In Schuhen mit durchgehender Holzsohle kann man bekanntlich nur sehr mühsam gehen, aber es gab zeitweilig keine anderen. In der wärmeren Jahreszeit „zierten" oftmals Sandalen aus „Gro.uwengummi"[15] *die zierlichen Füße der Mädchen. „Hamstern", ein Schlagwort der Nachkriegszeit, heute ein fast in Vergessenheit geratener Begriff. In überfüllten Zügen, teils auf Trittbrettern hängend, in offenen Waggons, fuhren Erwachsene und Jugendliche in Eifel, Hunsrück und Pfalz, um einzelne Kartoffeln oder irgendwelche Nahrungsmittel bei Landwirten zu erbetteln. Oftmals wurden auch Tauschgeschäfte mit Mangelwaren abgewickelt. Gerade bei uns Jugendlichen stellte die Unterernährung ein besonderes Problem dar, und so kam es zu der großangelegten Hilfsaktion, der sogenannten „Schweizer Kinderspeisung". Eine Kommission entschied in den Schulklassen über die Bedürftigkeit. Mit dem Kochgeschirr kamen die Auserwählten zur Schule und löffelten mit Heißhunger ihre Suppe. Die Geschichte vom Suppenkasper besaß damals keine Gültigkeit.*

Menkès-Plan zum Wiederaufbau 1947 in Saarlouis

Entsetzt reagierte eines Tages die Bevölkerung der Stadtteile Roden und Fraulautern: Der „Menkès-Plan" wurde aufgelegt[16]*. Bedingt durch die totale Zerstörung von Wohn- und Industriegebieten auf der rechten Saarseite sah dieser Plan eine infrastrukturelle Veränderung vor. Beide Orte sollten verschwinden, an ihrer Stelle Industrieansiedlungen, ein Flugplatz und eine Hafenanlage Platz finden. Die Bevölkerung sollte links der Saar angesiedelt werden. Nach einem eben verlorenen Krieg war ein Protest gegen die damalige Regierungsform undenkbar. Ein stiller Protest drückte sich lediglich darin aus, dass die Rodener versuchten, ohne Genehmigung, provisorische Wohnmöglichkeiten zu errichten; man wollte aus der primitiven Unterbringung, teils Kellerbehausung, heraus. Dies war kein leichtes Unterfangen; Zement und Steine gab es nur gegen Bezugsscheine. Großflächige Blechziegel auf schuppenähnlichen Bauten beherrschten in der Folgezeit das Ortsbild. Mit Erleichterung nahm man später zur Kenntnis, dass der Menkès-Plan verworfen wurde. Ab diesem Zeitpunkt blühte neues Leben aus den Ruinen. Das Jahr 1947*[17] *bedeutete für viele von uns den Beginn eines neuen Lebensabschnittes: Sie begannen ihren beruflichen Werdegang. Wir fanden Aufnahme in kirchlichen und kulturellen Vereinen und Verbänden.*

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[14] Hans Gergen (Saarlouis-Steinrausch) hierzu: Seit etwa 1988 ist dies kein Polizeirevier mehr. In diesem Gebäude befindet sich heute die „Oase", eine Unterkunft für Obdachlose, die von der Caritas betrieben wird. Ebenfalls arbeitet von dort ein Sozialbüro der Pfarrei Christkönig. Das Gebäude wurde vor ca. 5 Jahren renoviert, und im Obergeschoss wurden weitere Unterbringungsmöglichkeiten eingebaut.

[15] Wörtlich „Grubengummi" = geschichtete Gummiförderbänder.

[16] Gergen, Der Menkès-Plan und Roden. Die Umsetzung des Menkès-Plans hätte Roden nach dem II. Weltkrieg in ein einziges Industriegebiet verwandelt. In: Rodener Prisma 2 (2014), S. 12-13, sowie: Der Grafiker und Maler Joachim Pathen und sein Wirken in Roden. In: Rodener Geschichte(n) 2011, S. 219-224. Auch Ders., Eine Tür in eine andere Zeit. Der Grafiker und Maler Joachim Pathen und sein Wirken in Saarlouis-Roden. In: saargeschichte(n). Magazin zur regionalen Kultur und Geschichte 2 (2012), S. 30-35; Ders., Die schwerste Glocke des Saarlandes: Die Michaels-Glocke in Roden und das dortige „Griesbachersche Idealsextett". In: Unsere Heimat (Mitteilungsblatt des Landkreises Saarlouis für Kultur und Landschaft) Jg. 37 (2012), S. 35-38. Siehe obendrein: Volker Felten, Rodener Ansichten, Saarlouis 2011, Einleitung + 101 Postkarten, 1 Abbildung, hierzu unsere Rezension in: Unsere Heimat (Mitteilungsblatt des Landkreises Saarlouis für Kultur und Landschaft) Jg. 37, Heft 1 (2012), S. 42-44.

[17] Am 15. Dezember 1947 trat die Saarländische Verfassung in Kraft; zu dieser Epoche und dem Geschehen kurz danach: Gergen, Von der Saarprovinz zum Saarland. Die Vorgängerorganisationen des Saarlandes bis zu den Abstimmungen von 1935 und 1955. In: Saarländische Kommunalzeitschrift (SKZ, Saarländischer Städte- und Gemeindetag und Landkreistag Saarland) 9 (2005), S. 211-230; ders., Zwei Volksabstimmungen, die sich jähren: die Saar-Referenden von 1935 und 1955. In: Neue Juristische Wochenschrift NJW 42 (2005), S. X-XI (Hintergrund). Sowie: ders., Europäisches Statut für die Saar? Eine Erinnerung an die Volksabstimmung vom 23. 10. 1955. In: Juristen-Zeitung (JZ) 20 (2005), S. 994-995. Zur Rechtsadaptation danach: ders., Die Familienzulage als Besonderheit im Recht des Saarlandes zwischen 1947 und 1959. In: Historische Blicke auf das Land an der Saar. 60 Jahre Kommission für Saarländische Landesgeschichte und Volksforschung, Saarbrücken 2012, S. 437-446 (Veröffentlichungen der Kommission für Saarländische Landesgeschichte Bd. 45).

Die folgenden Jahre brachten uns wirtschaftlichen Aufschwung, und nach und nach verblassten die unschönen Erinnerungen an die unselige Kriegs- und Nachkriegszeit [18].

An dieser Stelle wird deutlich, dass der Zeitzeuge die Nichtumsetzung des Menkès-Plans dafür ursächlich hält, dass Roden wieder so aufgebaut werden konnte, wie es die heimkehrenden Bewohner wollten. Sicher muss eine Anders- oder Nichtdurchführung eines Planes keineswegs als „Scheitern" bezeichnet werden. Die Abänderung des Planes war aber doch für Roden und Fraulautern von grundlegender Bedeutung, weswegen das Wort „Scheitern" nach meinem Dafürhalten auch gebraucht werden darf und sollte. Für eine solche Sichtweise streiten geschichts- und politikwissenschaftliche sowie rechtswissenschaftliche Argumente.

a) Die Geschichtswissenschaft lehrt, dass alle Quellen in eine Beurteilung einbezogen werden müssen, d.h. neben einem Stadtratsprotokoll auch faktische Beschlüsse und Taten, wie die des Bauens ohne Bauplan, was in Roden geschehen war. Noch heute zeugen davon die Hinterhofbauten in Alt-Roden, die ohne Baugenehmigungen errichtet worden waren. Der hier abgedruckte Aufsatz steht pars pro toto für zahlreiche Zeitzeugen. Hinzu tritt der legendäre Aufruf des Pastors Karl Thiel [19] an Sylvester 1947 mit dem nachhallenden Satz „Wir bauen unsere Kirche wieder auf!" Dieser Wiederaufbau, d.h. das Schaffen von faktischem Baurecht, ist nicht expressis verbis in den Stadtratsprotokollen erwähnt, war indes augenscheinlich niemandem verborgen geblieben. Der politische Beschluss vermochte keinen anderen Weg zu wählen als die Suspendierung und das Absehen vom ursprünglichen Menkès-Plans. Dies erhellt aus dem Stadtratsprotokoll und der Rede des damaligen Saarlouiser Bürgermeisters Anton Merziger.

b) Das verwaltungsrechtliche bzw. bauplanungsrechtliche Argument sollte nicht beiseite geschoben werden. Der Stadtrat konnte sich auf die Rechtsanordnung 182 (Amtsblatt des Saarlandes 44/1947) stützen, wonach den Gemeinden das Recht zugestanden wurde, dringliche Aufgaben des Wiederaufbaues selbst zu regeln, woraus resultierte, dass die Gemeinden größere Projekte in Einzelmaßnahmen aufteilen und einen so genannten Neuordnungsplan aufstellen durften, der von der Regierung des Saarlandes in Zusammenarbeit mit Landrat und Architektenkammer geprüft wurde. Überdies besaß die Öffentlichkeit ein Einspruchsrecht, die Verwaltung hatte auf die Rechte der Grundeigentümer Rücksicht zu nehmen (heute würden wir von der Beteiligung der Träger öffentlicher Belange sprechen). Individuelle Besitzverhältnisse konnte und wollte der Menkès-Plan als Generalbebauungsplan gar nicht in Betracht ziehen, sodass der Generalbebauungsplan hinter dem Neuordnungsplan zurücktreten musste.

Diese Argumente dürfen nicht beiseite geschoben werden, sodass festgehalten werden kann, dass die Geschichte der Stadt in diesem Punkt wohl nicht neu geschrieben werden muss.[20]

18 Zum Nachkriegseuropa: Gergen, Das Redemptoristenkloster Heiligenborn (1949-2009) in Bous und die Idee der Europäischen Einigung an der Saar. In: Zeitschrift für die Geschichte der Saargegend 59 (2011), S. 173-214; ders., Die Gründungschronik des Redemptoristenklosters Heiligenborn in Bous - Edition und Kommentierung. In: Zeitschrift für die Geschichte der Saargegend 60 (2012), S. 127-202; ders., Tholey und Bous – Erwähnungen des Tholeyer Abtes Dr. Petrus Borne in der Chronik des Redemptoristenklosters Bous. In: Abtei Tholey (Hg.): Tholeyer Briefe 52 (2014), S. 18-21.

19 Zu Thiels Vita siehe Maximilian Hommens, Zur Geschichte von St. Bartholomäus Ayl, *Series pastorum*, Karl Thiel. In: Festschrift zum 110jährigen Stiftungsfest des Kirchenchores „Cäcilia", Ayl/Saar 1991, S. 89a-91. Pastor Karl Thiel ging von Roden nach Ayl und wirkte dort 1974-1978.

20 So Felten, Der Menkès-Plan. Le plan directeur du Grand-Sarrelouis, Saarlouis 2017, passim, in Sonderheit S. 456-457, der gegen die hier vertretene Position ist und die Stadtprotokolle dergestalt lesen möchte, dass daraus folgt, man müsse die Geschichte der Stadt Saarlouis „neu" schreiben. Felten tritt damit in Widerspruch gegen eine „Traditionskette". Zu dieser statt vieler: Lutz Hauck, Saarlouis nach der Stunde Null. Der Wiederaufbau zwischen Tradition und Moderne, St. Ingbert 1998 (Schriften des Landkreises Bd. 3), S. 29, 32, 39-40. Bedauerlicherweise setzt sich Felten nicht mit den hier vorgebrachten Argumenten von faktischem Baurecht und Bauplanung sowie der „oral history" auseinander.

Politisierte Beleidigungsprozesse in der Weimarer Republik

(Politicised Insult Proceedings in the Weimar Republic)

Malte Wilke, Stefan Segerling*

Abstract

This essay examines the decision-making practice of the criminal courts in politicised insult proceedings in the Weimar Republic. Initially, some criminal cases, such as the insult proceeding of President of the Reich Friedrich Ebert, are outlined. Subsequently, the decision-making practice of the courts is discussed on a large scale. The analysis of the rulings of the criminal courts shows that the judges have established anti-republican and anti-Semitic judgments in many cases. The courts often acquitted extreme right-wing defendants with flimsy arguments. To achieve this, the courts divested the defendant's insults of their contemptuous content. Accordingly, the jugdments of the courts often confirmed the picture of jurisprudence far-removed from any notion of lawfulness. The main reason for this unlawful decision-making practice was the anti-republican mentality of the judges. With reference to this decision-making practice a crisis of confidence in the judicial system has occurred in the public.

Keywords: *Weimar Republic; politicised insult proceedings; anti-republicanism of the judiciary; anti-Semitism of the judiciary; jurisdiction of the Imperial Court of Justice; insult proceeding of the President of the German Reich Friedrich Ebert; Helfferich-Erzberger proceeding.*

I. Einleitung

Das 100. Jubiläum der Gründung der Weimarer Republik bietet den gegebenen Anlass, sich mit einem häufig übersehenen Aspekt der politischen Strafjustiz der Weimarer Republik, den Gerichtsentscheidungen in politisierten Beleidigungsprozessen, auseinanderzusetzen. Otto Kirchheimer definierte diese in seinem Standardwerk über die „Politische Justiz" als Strafverfahren, in denen „zur Diskreditierung des politischen Gegners Delikte eigener Art herhalten müssen: Beleidigung oder Verleumdung, Meineid, Ungebühr vor Gericht."[1] Als interessant erweist sich an politisierten Beleidigungsprozessen v.a. der Gesichtspunkt, dass sie im Gegensatz zu Hoch- oder Landesverratsprozessen erstinstanzlich vor Amtsgerichten oder Landgerichten verhandelt wurden.[2] Abgesehen davon wurde eine große Anzahl politisierter Beleidigungsprozesse von den Gerichten der Weimarer Republik entschieden. Aus diesen Gründen gewährt ihre Analyse einen aussagekräftigen Einblick in die Spruchpraxis der Gerichte in politischen Strafverfahren unterhalb der Ebene des Reichsgerichts und des Staatsgerichtshofs zum Schutze der Republik.

II. Der Beleidigungsprozess von Reichsfinanzminister Matthias Erzberger (Zentrum) gegen den Reichstagsabgeordneten Karl Helfferich (DNVP)

A. Der Hintergrund des Strafverfahrens

Der Zentrumspolitiker Matthias Erzberger, der den Versailler Vertrag mitunterzeichnet hatte, trat am 21. Juni 1919 als Reichsfinanzminister und stellvertretender Reichskanzler in die Regierung des SPD-Politikers Gustav Bauer ein. Am 08. Juli 1919 kündigte er vor der Weimarer Nationalversammlung weitreichende Reformen des Finanz- und Steuerwesens an und warf dabei dem früheren Staatssekretär im Reichsschatzamt Karl Helfferich vor, der „leichtfertigste aller Finanzminister" gewesen zu sein.[3]

Aufgrund dessen startete der reaktionäre Monarchist Karl Helfferich am 01. Juli 1919 eine polemische Anti-Erzberger-Kampagne, in deren Verlauf er mehrere diffamierende Artikel veröffentlichte, die auf den Sturz des „Novemberverbrechers" Erzberger abzielten.[4] Die Anschuldigungen Helfferichs mündeten in der Veröffentlichung der Flugschrift „Fort mit Erzberger",

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1 Kirchheimer, O., Politische Justiz. Verwendung juristischer Verfahrensmöglichkeiten zu politischen Zwecken. Frankfurt a.M., 1981, S. 81.

2 Wilke, M., Staatsanwälte als Anwälte des Staates? Die Strafverfolgungspraxis von Reichsanwaltschaft und Bundesanwaltschaft vom Kaiserreich bis in die frühe Bundesrepublik. Göttingen, 2016, S. 63ff. über die Zuständigkeiten im Staatsschutzrecht in der Weimarer Republik.

3 Klein, A., Korruption und Korruptionsskandale in der Weimarer Republik. Göttingen, 2014, S. 76; Verhandlungen der Nationalversammlung, 50. Sitzung, Bd. 327, 8. Juli 1919, S. 1377 C.

4 Born, K. Helfferich, Karl Theordor, in Neue Deutsche Biographie. Berlin, 1969, S. 470 ff. Der Konflikt zwischen Erzberger und Helfferich lässt sich bis in das Kaiserreich zurückverfolgen. Erzberger war an der Aufdeckung der sog. „Kolonialskandale" beteiligt. Als diese aufgedeckt wurden musste Helfferich seine Tätigkeit in der Kolonialverwaltung aufgeben, vgl. Domeier, N., Der Prozess Erzberger Helfferich (1919 – 1920) S. 4, abrufbar unter http://www.lexikon-der-politischen-strafprozesse.de/wp-content/uploads/2015/09/ Prozess-Erzberger.pdf (abgerufen am 14. 11. 2018).

in der er dem Reichsfinanzminister u.a. vorwarf, dass dieser seine politischen Entscheidungen von den wirtschaftlichen Interessen der Fa. Thyssen abhängig gemacht habe, deren Aufsichtsratsmitglied er während des 1. Weltkrieges gewesen war. Helfferich sprach von einer „Vermischung politischer Tätigkeit und eigener Geldinteressen" Erzbergers, die der wahre Grund für dessen Wandel vom Annexionisten zum Verfechter eines Friedensschlusses mit den Alliierten gewesen sei.[5] Aufgrund dieser Anschuldigung erstatte Erzberger am 01. September 1919 Strafanzeige wegen Beleidigung und übler Nachrede gegen Karl Helfferich.[6]

B. Das Strafverfahren vor dem Landgericht Berlin

Das Strafverfahren gegen Helfferich, das vom 19. Januar 1920 bis zum 12. März 1920 unter Vorsitz von Landgerichtsdirektor Baumbach vor dem Landgericht Berlin I verhandelt wurde, fokussierte sich primär auf Helfferichs Vorwurf der politischen Korruption.[7] Die meisten von Helfferichs Anschuldigungen gegen Matthias Erzberger stellten sich dabei in der Gerichtsverhandlung als gegenstandslos heraus.

Aus diesem Grund verurteilte die Strafkammer Helfferich wegen „fortgesetzter übler Nachrede durch Verbreitung von Schriften in Tateinheit mit fortgesetzter wörtlicher Beleidigung" zu einer Geldstrafe in Höhe von 300 RM. Gleichwohl berücksichtigte die Strafkammer

die „vaterländische Gesinnung" des Angeklagten strafmildernd mit.[8] Aus den weiteren Entscheidungsgründen des Gerichts geht hervor, dass es Helfferich verurteilte, weil er für die meisten seiner Anschuldigungen den Wahrheitsbeweis schuldig geblieben war und er Erzberger zudem als „Krebsschaden" und „Reichsverderber" tituliert hatte.[9]

Auf der anderen Seite urteilte die Strafkammer, dass der Angeklagte in vier von sechsunddreißig Punkten, die sich auf seine Anschuldigungen, dass Erzberger seine „politisch-parlamentarische Tätigkeit mit eigenen Geldinteressen" vermischt habe, den Wahrheitsbeweis erbracht habe.[10] Aufgrund der Gerichtsentscheidung trat Matthias Erzberger am 13. März 1920 von seinem Amt als Reichsfinanzminister zurück.[11]

C. Die Entscheidung des Reichsgerichts

Sowohl Helfferich, als auch Erzberger, der dem Verfahren als Nebenkläger beigetreten war, legten gegen die Entscheidung der Strafkammer Revision ein. Infolgedessen wurde das Strafurteil am 17. Dezember 1920 vom Reichsgericht auf rechtliche Fehler überprüft. Das Reichsgericht konnte jedoch keine Revisionsgründe feststellen und wies die Einwände der Verteidigung und der Nebenklage als unbegründet ab.[12]

III. Der Landesverratsvorwurf gegen Reichspräsident Ebert

A. Der Magdeburger Schöffengerichtsprozess

1. Der Hintergrund des Strafverfahrens

Auch Reichspräsident Friedrich Ebert sah sich wiederholt antirepublikanischen Angriffen ausgesetzt, die in einer Verleumdungskampagne mündeten.[13] Am schwerwiegendsten wog dabei der Vorwurf, er habe während des „Munitionsarbeiterstreiks" im Januar 1918 Landesverrat verübt.[14] Ebert war dem Streik beigetreten, um diesen in geordnete Bahnen zu lenken und ihn zu beenden.[15] Seine Streikbeteiligung erwies sich jedoch während seiner Präsidentschaft als schwere Hypothek für ihn.[16]

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[5] Helfferich, K., Fort mit Erzberger. Berlin,1919, S. 1ff.; S. 31f., 37f., 81ff.; Klein (Fn. 3) S. 76ff.; Domeier (Fn. 4) S. 2; ders., Der Sensationsprozess Erzberger-Helfferich: Die Verquickung politischer und wirtschaftlicher Interessen in der Weimarer Republik, Haus der Geschichte Baden-Württemberg (Hrsg.), Matthias Erzberger: Ein Demokrat in Zeiten des Hasses. Karlsruhe, 2013, S. 158ff.; Williamson, J., Karl Helfferich 1872 – 1924: Economist, Financier, Politician. Princeton, 1971, 317ff. mit einer ausführlichen Erläuterung der Hintergründe.

[6] Gebhardt, C., Der Fall des Erzberger-Möders Heinrich Tillessen. Tübingen, 1995, S. 13; Klein (Fn. 3) S. 76; http://www.bundesarchiv.de/aktenreichskanzlei/1919-1933/1000/bau/bau1p/kap1_2/kap2_57/para3_9.html (abgerufen am 12. 11. 2018).

[7] Löwenstein, S. Der Prozess Erzberger-Helfferich: ein Rechtsgutachten. Ulm, 1921, passim; Williamson (Fn. 4) S. 312f. Helfferich ließ sich in dem Strafprozess von Prof. Max Alsberg, einem der renommiertesten Strafverteidiger der Weimarer Republik verteidigen, der u.a. Carl von Ossietzky in dem aufsehenerregenden „Weltbühneprozess" gegen den Vorwurf des Landesverrats verteidigte, vgl. Prick, G., Max Alsberg (1877 – 1933) – und kein Ende. In: Anwaltsblatt 2016, S. 878ff. und Wilke (Fn. 2) S. 85ff.

[8] Der Erzberger-Prozess - Stenographischer Bericht über die Verhandlungen im Beleidigungsprozeß des Reichs-finanzministers Erzberger gegen den Staatsminister a.D. Dr. Karl Helfferich (Berlin 1920) S. 995f., 1056; Klein (Fn. 3) S. 87. Jasper, G., Justiz und Politik in der Weimarer Republik, Vierteljahreshefte für Zeitgeschichte,1982, S. 185 weist darauf hin, dass Ministerbeleidigungen vor 1914 nicht unter einer mehrmonatigen Gefängnisstrafe geahndet wurden. Gleichzeitig konnte Japser dokumentieren, dass Beleidigungen des national-konservativen Reichspräsidenten Paul von Hindenburg von den Gerichten mit drakonischen Strafen abgegolten wurden. Eyck, E., Die Krisis der deutschen Rechtspflege. Berlin, 1926, S. 11ff. berichtet von Staatsanwälten die das öffentliche Strafverfolgungsinteresse bei Beleidigungen republikanischer Minister verneinten.

[9] Der Erzberger-Prozess (Fn. 7) S. 1053ff.; Klein (Fn. 3) 87.

[10] Siehe hins. der Einzelheiten Klein (Fn. 3) S. 76ff. die auch auf die weiteren Anschuldigungen Helfferichs dezidiert eingeht. Der Sitzungsvertreter der Staatsanwaltschaft, Oberstaatsanwalt Krause, hat sich mit dem Angeklagten in seinem Plädoyer solidarisiert, vgl. Williamson (Fn. 4) S. 323.

[11] Gebhardt (Fn. 5) S. 14; Williamson (Fn. 4) S. 314.

[12] Klein (Fn. 3) S. 88 mwN.

[13] Mühlhausen, W., Friedrich Ebert 1871 – 1925: Reichspräsident der Weimarer Republik. Braunschweig, 2007, S. 911ff.

[14] Ebermayer, L., Leipziger Kommentar – Reichsstrafgesetzbuch. 4. Aufl., Leipzig, 1929, vor § 80 Rn. 1 und Wilke (Fn. 2) S. 48f. über den Straftatbestand des Landesverrats

[15] Miller, S., Burgfrieden und Klassenkampf: die deutsche Sozialdemokratie im 1. Weltkrieg. Düsseldorf 1974, S. 374; Huber, R., Deutsche Verfassungsgeschichte Band V: Weltkrieg, Revolution und Reichserneuerung 1914 – 1919. Stuttgart, 1978, S. 437 und Witt, P., Friedrich Ebert 1871 – 1925. Bonn, 1980, S. 79.

[16] Mühlhausen, W., Friedrich Ebert und seine Partei 1919 – 1925. In Eberhard Kolb (Hrsg.), Friedrich Ebert als Reichspräsident – Amtsführung und Amtsverständnis Band 4. München, 1999, S. 93 und Besson, W., Friedrich Ebert – Verdienst und Grenze. Göttingen, 1963, S. 67.

Die gegen ihn gerichtete Verleumdungskampagne nahm ihren Anfang am 12. Juni 1922, als er von Dr. Emil Gansser auf dem Münchener Bahnhofsvorplatz als „Landesverräter" bezichtigt wurde.[17] Der Reichspräsident erstatte daraufhin Strafantrag gegen Gansser, woraufhin das Schöffengericht München eine Hauptverhandlung anberaumte. Auf Anraten seines Rechtsanwalts Wolfgang Heine, eines früheren preußischen SPD-Justizministers, zog Friedrich Ebert seinen Strafantrag jedoch noch vor der Eröffnung der Hauptverhandlung zurück.[18] Heine riet Ebert zu diesem Schritt, weil er Gansser kein Forum für weitere Agitationen gegen den Reichspräsidenten bieten wollte.[19] Aufgrund von Eberts Rücknahme des Strafantrages stellte das Schöffengericht München das Strafverfahren gegen Gansser am 5. Februar 1924 auch ein.[20]

Gansser widerholte seine Anschuldigungen jedoch bereits kurz nach der Verfahrenseinstellung in einem offenen Brief, den der Chefredakteur der „Mitteldeutschen Presse" Erwin Rothardt mit einigen eigenen Ergänzungen veröffentlichte.[21] Ebert, der sich durch die Veröffentlichung diffamiert fühlte, erstatte daraufhin erneut Strafantrag gegen Gansser und Rothardt.

2. Die Hauptverhandlung

Aus diesem Grund eröffnete das erweiterte Schöffengericht Magdeburg unter Vorsitz von Landgerichtsdirektor Bewersdorff die Hauptverhandlung gegen Erwin Rothardt wegen Beleidigung gem. § 185 Reichsstrafgesetzbuch (RStGB) und übler Nachrede gem. § 186 RStGB.[22] Friedrich Ebert wurde von dem Gericht als Nebenkläger zugelassen. Das Ermittlungsverfahren gegen Emil Gansser wurde von der Staatsanwaltschaft Magdeburg jedoch eingestellt, weil dieser sich seiner Strafverfolgung durch Flucht ins Ausland entzogen hatte. Er kehrte erst im Mai 1924 nach Deutschland zurück, nachdem er bei der Reichstagswahl vom 04. Mai 1924 für die Nationalsozialistische Freiheitspartei in den Reichstag gewählt worden war. Aufgrund seiner neu gewonnen Abgeordnetenimmunität musste er eine weitere Strafverfolgung nicht fürchten.[23]

Am ersten Verhandlungstag, dem 9. Dezember 1924, zeigte sich der Erwin Rothardt zunächst reuig, dass er den Artikel veröffentlicht hatte. Er änderte seine Taktik jedoch, als Ebert seinen Strafantrag nach seiner Einlassung aufrechterhielt. Rothardt versuchte nunmehr den Wahrheitsbeweis zu erbringen, dass sich Ebert während des „Munitionsarbeiterstreiks" der landesverräterischen Feindbegünstigung schuldig gemacht habe.[24] Der Reichspräsident sah in dieser Strategie der Verteidigung indes die Chance, den gegen ihn erhobenen Vorwurf des Landesverrats endgültig zu widerlegen. Wolfgang Heine, der die Dimension erahnte, die der Strafprozess nunmehr annehmen würde, riet dem Reichspräsidenten dazu Otto Landsberg, einen früheren Reichsjustizminister, als weiteren Prozessbevollmächtigten zu mandatieren.[25]

In seiner verantwortlichen Vernehmung erklärte Rothardt sodann, dass er von derRichtigkeit des veröffentlichten Schreibens überzeugt sei.[26] Im Anschluss an Rothardts Aussage wurden mehrere Streikteilnehmer vernommen, die jedoch keine Angaben zu Eberts Ansprache auf der Treptower Versammlung, die im Zentrum der Vorwürfe stand, machen konnten. Lediglich der Zeuge Otto Syrigs sagte aus, dass der damalige SPD-Vorsitzende Ebert ausgerufen habe: „Der Streik verkürzt den Krieg, Gestellungsbefehle werden nicht ausgeführt."[27] Der Reichspräsident widersprach dieser Schilderung und gab an, sich nie derart geäußert zu haben, woraufhin Syrig seine Zeugenaussage unter Eid bekräftigte.[28] Noch am selben Verhandlungstag präsentierte die Verteidigung ihren zweiten „Kronzeugen" Paul Gobert. Dieser äußerte sich dahingehend, dass der damalige SPD-Vorsitzende Ebert die Arbeiter aufgefordert habe, den Gestellungsbefehlen auf keinen Fall Folge zu leisten.[29] Allerdings gelang es Eberts Rechtsanwälten, die Aussagen von Syrigs und Gobert zu entkräften.[30] Einerseits deckten sie Widersprüche in Syrigs Aussage auf und andererseits gelang es Ihnen Gobert einen schlechten Leumund nachzuweisen, weil er mehrfach wegen Betruges vorbestraft war.[31]

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[17] Schumacher, M., Die Reichstagsabgeordneten der Weimarer Republik in der Zeit des Nationalsozialismus, politische Verfolgung, Emigration und Ausbürgerung 1933 – 1945. 3. Aufl., Düsseldorf, 1994, S. 143.

[18] Schumacher (Fn. 16) S. 323.

[19] Miltenberger, M., Der Vorwurf des Landesverrats gegen Reichspräsident Friedrich Ebert – Ein Stück deutsche Justizgeschichte. Würzburg, 1989, S. 9; Landsberg, O., Der Prozess Rothardt. In: Deutsche Richterzeitung 1925, S. 125, 126; Mühlhausen (Fn. 12) S. 939; Witt (Fn. 14) S. 188; Hirschberg, M., Das Fehlurteil im Strafprozess. Stuttgart, 1960, S. 141.

[20] Miltenberger (Fn. 18) S. 9; Mühlhausen (Fn. 12) 937f. und Maser, W., Friedrich Ebert. Der erste deutsche Reichspräsident: eine politische Biographie. München, 1987, S. 312.

[21] Brammer, K., Der Prozess des Reichspräsidenten. Berlin, 1925, S. 129; Miltenberger (Fn. 18) S. 10; Albrecht, N., Die Macht der Verleumdungskampagne – Antidemokratische Agitationen der Presse und Justiz gegen die Weimarer Republik und ihren ersten Reichspräsidenten Friedrich Ebert vom Badebild bis zum Magdeburger Prozess. Bremen, 2008, S. 344.

[22] Brammer (Fn. 20) S. 26 über die Strafrichter.

[23] Mühlhausen (Fn. 12) 939; Birkenfeld, W., Der Rufmord am Reichspräsidenten. In: Archiv für Sozialgeschichte 1965, S. 465.

[24] Wilke (n 2) S. 48 f. über den Straftatbestand der landesverräterischen Feindbegünstigung.

[25] Mühlhausen (Fn. 12) 947; Abmeier, H., Otto Landsberg. In: Historische Kommission bei der Bayrischen Akademie der Wissenschaften (Hrsg.) Neue Deutsche Biographie, Band 13. Berlin, 1982, S. 514 f. über Otto Landsberg.

[26] Brammer (Fn. 20) 26ff.; Albrecht (Fn. 20) S. 344.

[27] Zit. Nach Bramer (Fn. 9) S. 57.

[28] Brammer (Fn. 20) S. 57ff.; Albrecht (Fn. 20) S. 356; Mühlhausen (Fn. 12) S. 949.

[29] Brammer (Fn. 20) S. 71ff.; Mühlhausen (Fn. 12) S. 949.

[30] Brammer (Fn. 20) S. 66f.; Albrecht (Fn. 20) S. 358; Mühlhausen (Fn. 12) S. 949.

[31] Landsberg (Fn. 18) S. 127; Hirschberg (Fn. 18) S. 141; Brammer (Fn. 20) 66f.; Albrecht (Fn. 20) 358; Mühlhausen (Fn. 12) S. 949.

Als entscheidend für den Ausgang des Strafverfahrens erwies sich jedoch die Aussage des damaligen Streikvorsitzenden Hermann Müller.[32] Müller, ein KPD-Funktionär, gab in seiner Zeugenvernehmung an, dass Ebert an fünf Sitzungen der Streikleitung teilgenommen habe und weder dem Streik, noch der Veröffentlichung eines Flugblattes, das zu Demonstrationen aufgerufen habe, widersprochen habe.[33] Aufgrund der belastenden Aussage von Müller, sahen sich Heine und Landsberg gezwungen die Ladung weiterer Entlastungszeugen zu beantragen.[34] Als Entlastungszeugen traten u.a. der ehemalige SPD-Reichswehrminister Gustav Noske, der frühere SPD-Reichskanzler Philipp Scheidemann und der amtierende SPD-Vorsitzende Otto Wels auf, die dem Reichspräsidenten übereinstimmend eine patriotische Haltung während des Januarstreiks attestierten.[35] Überdies erklärte Ebert, dass er geholfen habe den Streik zu beenden und somit einen Beitrag zur Landesverteidigung geleistet habe.[36]

Am letzten Verhandlungstag beantragte der Sitzungsvertreter der Staatsanwaltschaft, den Angeklagten wegen tateinheitlicher Beleidigung und übler Nachrede zu verurteilen, weil er den Wahrheitsbeweis für seine Anschuldigung gegen den Reichspräsidenten nicht habe erbringen können.[37] Otto Landsberg schloss sich diesen Ausführungen an und versuchte den Landesverratsvorwurf gegen Ebert in seinem Plädoyer mit rechtlichen und tatsächlichen Argumenten zu widerlegen.[38]

3. Die Entscheidung des Schöffengerichts

Das Schöffengerichtsverfahren endete am 23. Dezember 1924 mit einem Schuldspruch gegen Rothardt. Das Gericht verurteilte ihn wegen einer Formalbeleidigung zu drei Monaten Gefängnisstrafe, sprach ihn jedoch vom Vorwurf der üblen Nachrede frei.[39] Den Straftatbestand der Beleidigung sah das Schöffengericht u.a. durch die Anrede des Reichspräsidenten mit „Fritze“ sowie das Werturteil von Rothardt, dass er Ebert Landesverrat zutraue, für verwirklicht an. Dessen ungeachtet entschied das Schöffengericht, dass der Angeklagte den Straftatbestand der üblen Nachrede i.S.v. § 186 RStGB nicht verwirklicht habe, weil der Angeklagte keine unwahre Behauptung kundgetan habe. Der damalige SPD-Vorsitzende Ebert habe sich der landesverräterischen Feindbegünstigung gem. § 89 RStGB strafbar gemacht, indem er an dem Munitionsarbeiterstreik teilgenommen habe.[40]

Im Anschluss an diese Entscheidung haftete dem Reichspräsidenten in antirepublikanischen Kreisen noch stärker als in der Vergangenheit der Makel an, ein „Landesverräter“ zu seien.[41] Ebert, der sich durch die Entscheidung diffamiert fühlte, legte gegen die Entscheidung Berufung ein.[42] Allerdings wurde die Entscheidung nie durch eine höhere Instanz überprüft, weil Rothardt einer Amnestieregelung unterfiel.[43]

B. Die *posthume* Rehabilitierung Eberts durch das Reichsgericht

1. Der Hintergrund des Revisionsverfahrens

1931 befasste sich das Reichsgericht als Revisionsinstanz erneut mit dem Vorwurf des Landesverrats gegen den 1925 verstorbenen Ebert. Dem Angeklagten, bei dem es sich um Emil Gansser gehandelt haben soll, wurde vorgeworfen Friedrich Ebert öffentlich als Landesverräter bezeichnet zu haben.[44]

Gansser wurde von der Staatsanwaltschaft explizit vorgeworfen, dass er § 5 Nr. 3 Republikschutzgesetz (RepSchG) vom 25. März 1930 verletzt habe, der u.a. die Beschimpfung oder Verleumdung eines verstorbenen Reichspräsidenten in Beziehung auf sein Amt unter Strafe stellte. Das erstinstanzlich zuständige Amtsgericht Weißenfels und das als Berufungsgericht zuständige Landgericht Naumburg folgten der Argumentation der Staatsanwaltschaft und sprachen Gansser wegen der Verletzung von § 5 Nr. 3 RepSchG schuldig.[45] Gansser stellte sich indes auf den Standpunkt, dass seine Äußerung wahr sei und er § 5 Nr. 3 RepSchG dementsprechend nicht verwirklicht haben könne. Er begründete seine Revision u.a. damit, dass sein Verweis auf das Strafurteil des Schöffengerichts Magdeburg vom 23. Dezember 1924 vom Landgericht Naumburg als für die Schuld- und Straffrage unerheblich abgewiesen worden sei.[46]

2. Die Entscheidung des Reichsgerichts

Am 20. Oktober 1931 fällte das Reichsgericht seine Entscheidung, die den ehemaligen Reichspräsidenten *posthum* von dem Vorwurf der landesverräterischen Feindbegünstigung freisprach.[47] Das Reichsgericht entschied, dass die in § 193 RStGB postulierte Güterabwägung bei Interessionenkollusionen auf

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[32] Müller, ein früheres SPD-Mitglied, war 1924 als KPD-Funktionär tätig, vgl. Mühlhausen (Fn. 12) 951.
[33] Brammer (Fn. 20) S. 39ff.
[34] Mühlhausen (Fn. 12) S. 951; Brammer (Fn. 20) S. 43ff.
[35] Brammer (Fn. 20) S. 83, 88; Mühlhausen (Fn. 12) S. 952.
[36] Mühlhausen (Fn. 12) S. 951.
[37] Brammer (Fn. 20) S. 103ff.
[38] Brammer (Fn. 20) S. 108ff.
[39] Das Urteil des Schöffengerichts ist bei Brammer (Fn. 20) S. 122 ff. abgedruckt.
[40] Siehe das Urteil des Schöffengerichts bei Brammer (Fn. 20) S. 123, 160 und Jasper (Fn. 7) S. 167, 184, der ausführt, dass Landgerichtsdirektor Bewersdorff sich dahingehend geäußert habe, dass „der Sattlergeselle [Friedrich Ebert] da oben verschwinden müsse.“
[41] Siehe exemplarisch Graf zu Dohna, A., Vorsatz bei Landesverrat. In: Deutsche Juristenzeitung 1925, Sp. 146f.
[42] Brammer (Fn. 20) S. 127f.; Maser (Fn. 19); Zechlin, W., Pressechef bei Ebert, Hindenburg und Kopf – Erlebnisse eines Pressechefs und Diplomaten. Hannover, 1956, S. 67.
[43] Sehr wahrscheinlich handelt es sich um das Amnestiegesetz vom 17. August 1925, vgl. hierzu Wilke (Fn. 2) S. 133.
[44] RGSt 65, 422 (423f.); Kaul, F., Kleiner Weimarer Pitaval. Ost-Berlin, 1959, S. 141; Miltenberger (Fn. 18) S. 15f.
[45] RGSt 65, 422 (423).
[46] Miltenberger (Fn. 18) S. 16.
[47] RGSt 65, 422ff.

§ 5 Nr. 3 RepSchG anwendbar sei. Allerdings verneinte das Reichsgericht das Vorliegen eines Rechtfertigungsgrundes i.S.v. § 193 RStGB zugunsten Ganssers.[48] Die Richter urteilten diesbezüglich, dass sich der damalige SPD-Vorsitzende Ebert der landesverräterischen Feindbegünstigung nicht strafbar gemacht habe, da er weder den objektiven noch den subjektiven Tatbestand der landesverräterischen Feindbegünstigung verwirklicht habe.[49] Hinsichtlich der Verwirklichung des objektiven Tatbestandes des § 89 RStGB müssten, so der Senat, neben dem eingetretenen Schaden für die äußere Sicherheit des Deutschen Reichs, auch stets die Vorteile, die sich aus der jeweiligen Handlung ergeben haben, mitberücksichtigt werden. Im Rahmen einer Gesamtabwägung habe das Reichsgericht jedoch keinen überwiegenden Schaden in der Streikbeteiligung des verstorbenen Reichspräsidenten feststellen können.[50] Abgesehen davon, habe Ebert zu keinem Zeitpunkt Vorsatz zur Verwirklichung einer landesverräterischen Feindbegünstigung aufgewiesen. Im Ergebnis rehabilitierte das Reichsgericht mit dieser Entscheidung Ebert *posthum*.

C. Die zeitgenössische Würdigung der Entscheidungen in den Medien und im juristischen Diskurs

1. Das Strafurteil des Magdeburger Schöffengerichts

Die Entscheidung des Schöffengerichts Magdeburg stieß in der Öffentlichkeit größtenteils auf Entrüstung.[51] Sie attestierte dem Gericht eine antirepublikanische Mentalität und eine weltfremde Attitüde.[52] Allerdings fand das Strafurteil in antirepublikanischen Zeitungen auch Zustimmung. So titelte die Deutsche Zeitung in ihrer Ausgabe vom 23. Dezember 1924 „Vorsätzlicher Landesverrat – Der Wahrheitsbeweis gegen Ebert erbracht". Gleichzeitig reüssierte der Autor des Artikels, dass der Reichspräsident „politisch erledigt" sei.[53] Demgegenüber konstatierte die Preußische Zeitung „Also doch Landesverrat", wohingegen die Deutsche Tageszeitung das Strafurteil als ersten Schritt eines politischen „Reinigungsprozesses" verstanden wissen wollte.[54] Die Medienkampagne der nationalistischen Presse zielte darauf ab den Rücktritt des Reichspräsidenten zu erzwingen.[55] So gab u.a. Adolf Stein eine Schrift mit einer Auflage von 100.000 Stück heraus, in der er Ebert scharf kritisierte und seine Anerkennung für das Schöffengerichtsurteil zum Ausdruck brachte und in der General Erich Ludendorff, die „Dolchstoßlegende" propagieren konnte.[56]

Auf der anderen Seite stieß die Magdeburger Entscheidung im juristischen Diskurs fast einhellig auf Ablehnung. Gustav Radbruch kritisierte u.a., dass das Schöffengericht Eberts Handlungen zweigeteilt habe. Es sei widersprüchlich, dass das Gericht festgestellt habe, dass sich Ebert für das Wohl des Kaiserreichs eingesetzt habe, aber gleichwohl den Straftatbestand der landesverräterischen Feindbegünstigung durch seine Streikbeteiligung als verwirklicht angesehen habe.[57] Weiterhin argumentierte Radbruch, dass das Schöffengericht verpflichtet gewesen wäre eine Gesamtbetrachtung des Geschehens vorzunehmen.[58]

Einen anderen Ansatz verfolgte der Strafrechtsprofessor und frühere DVP-Reichstagsabgeordnete Alexander Graf zu Dohna, der der Ansicht war, dass das Schöffengericht rechtsfehlerhaft den Vorsatz bei Ebert bejaht habe.[59] Das Gericht habe verkannt, so Graf zu Dohna, dass Ebert mit nach außen zu Tage getretener Schadensabwendungsabsicht gehandelt habe und dementsprechend nicht vorsätzlich gehandelt haben könne.[60] Diese Ausführungen wurden von Ludwig Traeger aufgegriffen, der indes argumentierte, dass ein eingetretener Schaden nicht durch Vorteile, die mit der schadensbegründenden Handlung einhergehen, ausgeglichen werden könne.[61]

Der ehemalige DDP-Reichsjustizminister Eugen Schiffer war der Ansicht, dass das Gericht verkannt habe, dass Friedrich Ebert gerechtfertigt gehandelt habe, da er geholfen habe, einen staatsgefährdenden Streik abzuwenden.[62]

Abgesehen von den unterschiedlichen rechtlichen Würdigungen waren sich die vorgenannten Autoren jedoch darin ei-

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[48] § 193 RStGB: „Tadelnde Urteile über wissenschaftliche, künstlerische oder gewerbliche Leistungen, ingleichen Äußerungen, welche zur Ausführung oder Verteidigung von Rechten oder zur Wahrnehmung berechtigter Interessen gemacht werden, sowie Vorhaltungen und Rügen der Vorgesetzten gegen ihre Untergebenen, dienstliche Anzeigen oder Urteile von Seiten eines Beamten und ähnliche Fälle sind nur insofern strafbar, als das Vorhandensein einer Beleidigung aus der Form der Äußerung oder aus den Umständen, unter welchen sie geschah, hervorgeht."

[49] RGSt 65, 422 (430ff.).

[50] RGSt 65, 422 (431).

[51] Albrecht (Fn. 20) S. 369ff.; Brammer (Fn. 20) S. 197ff. führt einige Beispiele an.

[52] Landsberg (Fn. 7) 132; Bovensiepen, Mangelnder Schutz des Reichspräsidenten gegen Verleumdungen. In Deutsche Juristenzeitung 1925, Sp. 574ff.; Liepmann, M., Bewertung des Magdeburger Urteils. In Karl Brammer (Hrsg.), Der Prozess des Reichspräsidenten. Berlin, 1925, S. 183, 191; Schiffer, E., Bewertung des Magdeburger Urteils. In: Karl Brammer (Hrsg.), Der Prozess des Reichspräsidenten, Berlin, 1925, S. 162ff.

[53] Deutsche Zeitung vom 23. Dezember 1924, S. 1.

[54] Preußische Zeitung vom 23. Dezember 1924, S. 2; Deutsche Tageszeitung vom 23. Dezember 1924, S. 2.

[55] Albrecht (Fn. 20) S. 373.

[56] Stein, A., Eberts Prozess. Berlin, 1925, passim; Mühlhausen (Fn. 12) S. 953.

[57] Gustav Radbruch, Bewertung des Magdeburger Urteils. In: Karl Brammer (Hrsg.), Der Prozess des Reichspräsidenten. Berlin, 1925, S. 169, 170; Kroner, W., Bewertung des Magdeburger Urteils. In: Karl Brammer (Hrsg.), Der Prozess des Reichspräsidenten. Berlin, 1925, S. 179, 180.

[58] Radbruch (Fn. 56) 169.

[59] Graf zu Dohna (Fn. 40) Sp. 147ff.

[60] Kahl, W., Bewertung des Magdeburger Urteils. In: Karl Brammer (Hrsg.), Der Prozess des Reichspräsidenten. Berlin, 1925, S. 176; Kroner (Fn. 55) S. 180; Liepmann (n 51) S. 191f.; Friedmann, Bewertung des Magdeburger Urteils. In: Karl Brammer (Hrsg.), Der Prozess des Reichspräsidenten. Berlin, 1925, S. 194; Nelson, H., Der Landesverrat. Köln, 1929, S. 44f.

[61] Traeger, L., Rechtsgutachten betreffend den Prozess des Reichspräsidenten. In: Der Gerichtssaal 1925, S. 435.

[62] Schiffer (Fn. 51) S. 162ff. Siehe auch Goldschmidt, H., Zur Interpretation des § 346 RStGB. In: Zeitschrift für die gesamte Strafrechtswissenschaft 1925, S. 416, 421.

nig, dass das Magdeburger Urteil die Vertrauenskrise der Justiz vertieft habe.[63] Vor diesem Hintergrund attestierten einige Autoren den Magdeburger Strafrichtern auch eine offen zu Tage getretene antidemokratische Haltung.[64]

2. Die Entscheidung des Reichsgerichts

Die Entscheidung des Reichsgerichts von 1931 fand im Gegensatz zu der Entscheidung des Schöffengerichts wenig mediale Aufmerksamkeit. Allerdings fand sie in der Strafrechtslehre Anerkennung.[65] Es gab nur ganz vereinzelte Stimmen, die die Entscheidung des Reichsgerichts kritisierten.[66]

Mit der Machtergreifung der Nationalsozialisten änderte sich dies jedoch. Beurteilte Otto Schwarz die reichsgerichtliche Entscheidung in seiner RStGB-Kommentierung von 1933 noch durchweg positiv, kritisierte er sie in der 3. Auflage seines Strafrechtskommentars von 1935 bereits als „bedenklich".[67] Einige Autoren nahmen nach 1933 auch explizit den Standpunkt des Magdeburger Schöffengerichts ein und argumentierten das Ebert ein „Landesverräter" sei.[68]

IV. Der Beleidigungsprozess von Reichsanwalt Paul Jorns

Joseph Bornstein, der Chefredakteur des „Tage-Buch" veröffentlichte am 28. März 1928 den Artikel „Kollege Jorns".[69] Der von Berthold Jacob-Salomon anonym verfasste Artikel kritisierte Reichsanwalt Paul Jorns, der 1919 für die Mordermittlungen in dem Ermittlungsverfahren gegen die Mörder von Rosa Luxemburg und Karl Liebknecht verantwortlich gewesen war. Der Artikel dokumentierte, dass Jorns die Strafverfolgung gegen die Mörder von Luxemburg und Liebknecht vereitelt habe und schlussfolgerte dementsprechend das Jorns als Reichsanwalt eine Fehlbesetzung sei.[70] Infolgedessen erstatten Jorns und Oberreichswalt Werner Strafanzeige wegen Beleidigung und übler Nachrede gegen Bornstein.[71]

Das zuständige Schöffengericht Berlin-Mitte sprach Bornstein jedoch frei, weil er den erforderlichen Wahrheitsbeweis erbracht habe.[72] Das Gericht sah es als erwiesen an, dass Reichsanwalt Jorns „1. Spuren die [zur Aufklärung der Morde an Luxemburg und Liebknecht] dienen konnten, nicht aufgenommen hat (…). 2. Spuren, deren Wichtigkeit er erkannt hatte, nicht verfolgte (…). 3. Spuren verwischte, indem er das Gegenteil des Ermittelten ins Protokoll aufnahm. 4. Zustände duldete, die, wie ihm bekannt war, geeignet waren, den Sachverhalt zu verdunkeln und das Ergebnis der Untersuchung zu gefährden."[73] Aufgrund dieser Fakten urteilte das Schöffengericht, dass die Schlussfolgerung des Artikels richtig sei, dass Paul Jorns „zu einer Tätigkeit im Verbande der Reichsanwaltschaft nicht geeignet (…)" sei.[74]

Gegen die Entscheidung legte Jorns Berufung ein, sodass sich eine Strafkammer des Landgerichts Berlin I erneut mit dem Sachverhalt befasste. Die Strafkammer verurteilte „Bornstein wegen Beleidigung gem. § 185 RStGB zu einer Geldstrafe von 100 RM (…)", weil er Jorns eine mangelnde fachliche Befähigung für das Amt eines Reichsanwalts attestiert hatte.[75] Ungeachtet dessen sah jedoch auch die Strafkammer den Wahrheitsbeweis für erbracht an, „dass Jorns die Mörder von Liebknecht und Luxemburg gedeckt habe (…)."[76]

Gegen das Strafurteil der Strafkammer legte Jorns, wie nicht anders zu erwarten, Revision ein. Das Reichsgericht hob die Entscheidung der Vorinstanz auf und verwies das Verfahren an das Landgericht Berlin III zur Entscheidung zurück.[77] Die reichsgerichtliche Entscheidung widersprach dabei in eklatanter Weise der Entscheidung, die das Reichsgericht in dem Strafverfahren gegen Karl Helfferich getroffen hatte. Im Verfahren gegen Helfferich hatte das Reichsgericht für die Erbringung des „Wahrheitsbeweis noch relativ großzügige Maßstäbe zugelassen (…)."[78] In dem Strafverfahren gegen Joseph Bornstein entschied das Reichsgericht indes, dass Jorns hätte nachgewiesen werden müssen, dass er die Ermittlungen absichtlich vereitelt habe. Diesen Wahrheitsbeweis blieb Bornstein nach Ansicht der Reichsrichter jedoch schuldig.[79]

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63 Landsberg (Fn. 7) S. 126; Schiffer (Fn. 51) 167; Sinzheimer, H., Bewertung des Magdeburger Urteils. In: Karl Brammer (Hrsg.), Der Prozess des Reichspräsidenten. Berlin, 1925, S. 183.

64 Hachenburg, in Deutsche Juristenzeitung 1925, Sp. 167; Fuchs, E., Professort Kohlrausch und das Magdeburger Eberturteil. In: Die Justiz 1925, S. 431f.; Bovensiepen (Fn. 51) Sp. 574.

65 Radbruch, G., Das Reichsgericht für Friedrich Ebert!. In: Die Justiz 1931, S. 281ff.; Miltenberger (Fn. 18) S. 17.

66 Kohlrausch, E., Strafgesetzbuch für das Deutsche Reich. 30. Aufl., München, 1932, § 91, Rn. 3.

67 Schwarz, O., Strafgesetzbuch mit Nebengesetzen und Verordnungen. 1. Aufl., München, 1933, § 89 Anm. 2; ders., Strafgesetzbuch mit Nebengesetzen und Verordnungen. 3. Aufl., München, 1935, § 91b Anm. 2b.

68 Göler von Ravensburg, B., Der Landesverrat und seine Entwicklung seit 1871. Tübingen, 1935, S. 81; Matl, K., Die Entwicklung der strafrechtlichen Bestimmungen über den Landesverrat seit 1870. Gießen 1937, S. 57.

69 Wilke (Fn. 2) S. 96.

70 Ibid. S. 96, 175f.; Hannover, H. und Drück-Hannover, E., Politische Justiz 1918 – 1933. Hamburg 1966, S. 201; Huber (Fn. 14) S. 927f.; Kreiler, K., Traditionen deutscher Justiz: große politische Prozesse 1914 – 1933. Ein Lesebuch zur Geschichte der Weimarer Republik. Berlin, 1978, S. 260ff.

71 Wilke (Fn. 2) S. 79ff., 96, 111ff.

72 Das Strafurteil des Schöffengerichts Berlin-Mitte ist in Der Justiz 1928/29, S. 593f. abgedruckt.

73 Ibid.

74 Ibid. Der Strafverteidiger von Joseph Bornstein hatte den Sitzungsvertreter der Staatsanwaltschaft in seinem Plädoyer aufgefordert, ein Ermittlungsverfahren gegen Reichsanwalt Jorns wegen des Anfangsverdachts der Strafverteilung im Amt gem. § 346 RStGB einzuleiten, vgl. Levi, P., Der Jorns-Prozess. Rede des Verteidigers Dr. Levi. Berlin, 1929, S. 22ff.

75 Wilke (Fn. 2) S. 97.

76 Ibid.; Godau-Schüttke, K., Rechtsverwalter des Reichs – Staatssekretär Dr. Curt Joel. Frankfurt a.M., 1981, S. 200.

77 Hannover und Drück-Hannover (Fn. 70) S. 210f.

78 RGSt 55, 129, 132ff.; Jasper (Fn. 7) S. 174.

79 Ibid.

Die Vermutung, dass die Reichsgerichtsräte ihre schützenden Hände über Jorns hielten, liegt nahe.[80] Das liberale Berliner Tageblatt kritisierte die Entscheidung dementsprechend auch scharf: „Nicht ein einziger von den Vorwürfen gegen Jorns, die in zwei Instanzen festgestellt worden sind, lässt das Reichsgericht gelten, und führt für seine Stellungnahmen teilweise Begründungen an, die völlig unverständlich sind.“[81]

Ungeachtet dessen verurteilte das Landgericht Berlin III den Angeklagten entsprechend den rechtlichen Ausführungen des Reichsgerichts wegen Beleidigung in Tateinheit mit übler Nachrede zu einer Geldstrafe von 500 RM. Die nunmehr von Joseph Bornstein eingelegte Revision wies das Reichsgericht mit der Begründung ab, dass sie offensichtlich unbegründet sei.[82]

V. Die Spruchpraxis der Gerichte – eine Synthese

A. Die Entscheidungen der erstinstanzlich zuständigen Gerichte

Die erstinstanzlich zuständigen Gerichte verhängten in politischen Beleidigungsprozessen grundsätzlich niedrigere Strafen gegen antirepublikanisch und rechtsradikal eingestellte An-geklagte, als gegen kommunistische Angeklagte.[83] So wurde der kommunistische Ausspruch „Räuberrepublik“ mit vier Wochen Gefängnisstrafe geahndet, während ein völkisch-nationalistischer Angeklagter für die Aussage „Judenrepublik“ zu einer Geldstrafe von 10 RM verurteilt wurde.[84] Auch wenn das Ergebnis, dass die Strafgerichte den Strafrahmen gegen antirepublikanisch gesinnte Angeklagte „trotz des Anschwellens der Hetze“ nicht ausschöpften, keine wirklich überraschende Erkenntnis ist, verdeutlicht sie doch die tiefe Abneigung, die viele Strafrichter der Weimarer Republik entgegenbrachten.[85]

Weitaus überraschender ist demgegenüber auf den ersten Blick, dass Strafrichter Beleidigungstatbestände bei antisemitischen Äußerungen in vielen Verfahren formalistisch zugunsten antisemitischer und völkischer Angeklagter auslegten.[86] An dieser Stelle sei nur an ein Strafverfahren erinnert, in dem der Angeklagte den Refrain „Schmiert die Guillotine ein mit Judenfett. Blut muss fließen. Judenblut“ sang. Der Angeklagte, der durch das Singen des Refrains eindeutig den Straftatbestand der Beschimpfung einer Religionsgemeinschaft i.S.v. § 166 RStGB verwirklicht hatte, wurde vom Gericht freigesprochen. Das Gericht führte aus, dass es sich bei dem Judentum um keine Religionsgemeinschaft i.S.v. § 166 RStGB handeln würde, sondern nur um eine „Rasse“, weswegen der Straftatbestand der Beschimpfung einer Religionsgemeinschaft von dem Angeklagten nicht verwirklicht worden sei.[87]

Der Antisemitismus, der in dem deutsch-nationalen Milieu der Justiz weit verbreitet war, war für diese formalistische und der Gesetzesintention widersprechende Auslegung verantwortlich.[88] Die antisemitische Grundhaltung eines Teils der Richterschaft trat in einigen Strafurteilen jedoch noch wesentlich deutlicher zu tage. So sprach das Amtsgericht Wernigerode einen Angeklagten der wegen eines Beleidigungsdelikts angeklagt war, mit der Begründung frei: „Das deutsche Volk erkennt mehr und mehr, dass das Judentum schwerste Schuld an unserem Unglück trage, und das erfassen immer weitere Kreise. An einen Aufstieg unseres Volkes ist nicht zu denken, wenn wir nicht die Macht des Judentums brechen. Nicht nur die Deutschvölkischen meinen das, sondern auch die Deutschnationalen, wie man in den Zeitungen der letzten Tage lesen konnte. Die Gedanken, welche die Angeklagten vortrugen, stellen keine Gefährdung unserer öffentlichen Ruhe dar (…).“[89] Das Landgericht Naumburg entschied sogar, dass das im „Stürmer“ veröffentlichte Gedicht

> „Drum Jude mach dich auf, Flieh aus deutschen Gauen,
> wenn du willst dein Vaterland lebend noch erschauen!“

den Straftatbestand des § 130 RStGB, der aufreizende Agitationen gegen Teile des Volkes unter Strafe stellte, nicht erfüllte.[90] Die Entscheidung der Strafkammer widersprach dabei der ständigen Rechtsprechung des Reichsgerichts, welche die Gefahr der Begründung von Gewalten für die Verwirklichung von § 130 RStGB für ausreichend erachtete.[91]

B. Die Revisionsentscheidungen des Reichsgerichts

Auch das Reichsgericht erwies sich gegenüber nationalistisch gesinnten Angeklagten nachsichtig. Der zuständige 1. Strafsenat des Reichsgerichts urteilte, dass der Ausspruch „Judenrepublik“ durch einen rechtsradikalen Angeklagten nicht strafbar sei. Die Richter führten aus, dass der Angeklagte die gesam-

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[80] So auch Hannover und Drück-Hannover (Fn. 70) S. 200ff.; Jasper (Fn. 7) S. 174; Wilke (Fn. 2) S. 98.

[81] Berliner Tageblatt vom 8. Juli 1930, S. 7; Wilke (Fn. 2) S. 98.

[82] Godau-Schüttke (Fn. 75) S. 201; Wilke (Fn. 2) S. 97f.; Kuhn, R., Die Vertrauenskrise der Justiz (1926 – 1928). Der Kampf um die Republikanisierung der Rechtspflege in der Weimarer Republik. Köln, 1983, S. 249ff.

[83] Radbruch, G., Offener Brief an Herrn Dr. Otto Liebmann. In: Die Justiz 1925, S. 193ff. skizziert zahlreiche erstinstanzliche Entscheidungen; Foerderer, Die „Judenrepublik“ in der Rechtsprechung. In: Die Justiz 1925, S. 519ff. und Jasper (Fn. 7) S. 185.

[84] Walter, M., Arenen politischer Justiz: Sondergerichtsbarkeit. In: Axel Görlitz (Hrsg.), Politische Justiz. Baden- Baden, 1996, S. 31, 68 und Jasper (Fn. 7) S. 185.

[85] Jasper (Fn. 7) S. 185 erwähnt ein Strafverfahren, in dem der Angeklagte die Reichsfarben als „Schwarzrot-scheiße“ verhöhnte. Der Angeklagte wurde in der ersten Instanz freigesprochen und von der Berufsinstanz zu einer Geldstrafe von 30 RM verurteilt. Der Strafrahmen des Gerichts betrug bis zu 5 Jahre Gefängnisstrafe. Gleichzeitig weist Jasper darauf hin, dass der Gesetzgeber als Folge dieser Spruchpraxis bei der Neufassung des Republikschutzgesetzes vom 24. März 1930 die Mindeststrafe für die Verunglimpfung der Republik gem. § 5 Abs. 1 RepSchG auf drei Monate Gefängnisstrafe erhöht wurde, „die nur bei Vorliegen mildernder Umstände unterschritten werden durfte.“ Jaspers Auswertung der Kriminalstatistik ergab indes, dass die Gerichte bei 829 Verurteilungen nur 14,2% der Angeklagten zu der gesetzlichen Mindeststrafe von drei Monaten verurteilten.

[86] Hannover und Drück-Hannover (Fn. 70) S. 264f.

[87] Ibid. 268.

[88] Gräfe, T., Antisemitismus in Deutschland 1815 – 1918: Rezensionen – Forschungsüberblick – Bibliographie. 2. erw. Aufl., Norderstedt, 2010, S. 211; Hannover und Drück-Hannover (Fn. 70) S. 263ff.; Wilke (Fn. 2) S. 73 ff. über die Mentalität der Strafjuristen in der Weimarer Republik.

[89] Hannover und Drück-Hannover (Fn. 70) S. 263.

[90] Hannover und Drück-Hannover (Fn. 70) S. 268 mwN.

[91] Ibid.

te Staatsform gemeint habe, deren politische Ordnung dem deutschen Volk durch ausländische und deutsche Juden aufoktroyiert worden sei. Ein strafrechtlich relevantes Verhalten des Angeklagten könne daher nicht festgestellt werden.[92] Der 1. Strafsenat rechtfertigte die Aussage des Angeklagten sogar mit der Erwägung, dass dieser nur auf „die übermäßige Macht und de[n] übermäßige[n] Einfluß, den die im Verhältnis zur Gesamtbevölkerung kleine Anzahl der Juden (…) ausübt", habe aufmerksam machen wollen.[93]

Ähnlich entschied der 1. Strafsenat auch in einem Strafverfahren, in dem der Angeklagte die Weimarer Republik als „hühnereigelbe Judenrepublik" verunglimpft hatte. Der Strafsenat sprach den Angeklagten entgegen der vorinstanzlichen Entscheidung frei, weil in seiner Äußerung nur ein „Angriff auf die Art wie die Verfassung hergestellt" worden sei, erblickt werden könne, nicht aber ein „Angriff auf die republikanische Staatsform und die Einrichtungen, die das Wesen der Republik ausmachten."[94]

Auch in diesen zwei Entscheidungen wird die latente antisemitische Mentalität von Teilen der Richterschaft deutlich. Die Argumentationslinie der Richter in diesen und ähnlichen Entscheidungen deutet dabei stets auf eine Akzeptanz der „Dolchstoßlegende", die dem „bolschewistischen Judentum" eine Mitschuld für den Untergang des Kaiserreichs gab, hin.

Gleichzeitig dokumentieren die reichsgerichtlichen Entscheidungen eine antirepublikanische Mentalität der Strafrichter am höchsten deutschen Gericht. So sprachen die Reichsrichter einen angeklagten Lehrer frei, der die Weimarer Republik vor seiner Klasse verunglimpft hatte. Das Reichsgericht verneinte, dass es sich bei der Schulklasse um eine Versammlung i.S.v. § 7 Abs. 1 Nr. 2 RepSchG vom 21. Juli 1922 handeln würde.[95] Auch die Entscheidung des 1. Strafsenats, dass die Bezeichnung der Reichsfarben als „Schwarz-Rot-Hühnereigelb" strafrechtlich irrelevant sei, weist auf den Antirepublikanismus der Reichsrichter hin.[96] Das Reichsgericht scheint von dieser Grundhaltung auch nur in extremen Einzelfällen abgewichen zu sein. So hob es die Entscheidung einer Strafkammer auf, die einen Angeklagten, der die Reichsfarben als „Überläuferfarben" bezeichnet hatte, „mit denen man die Front gemeuchelt habe", freigesprochen hatte.[97]

Anknüpfungspunkt für die Entscheidungen des Reichsgerichts war dabei stets die Frage, was unter einer Beschimpfung zu verstehen war. Das Reichsgericht knüpfte dabei an seine ständige Rechtsprechung zu § 166 RStGB an, wonach eine Beschimpfung „in besonders roher oder verletzender Weise die (…) Verachtung" dartun müsse.[98] Allerdings legte das Reichsgericht die Beleidigungstatbestände bei antirepublikanisch gesinnten Angeklagten restriktiver aus, als in sonstigen Strafverfahren. Diese politisch motivierte Subsumtionspraxis der Gerichte führte nicht selten zur Aufhebung von Schuldsprüchen der unteren Instanzen.[99] Aufgrund dessen sah sich der Gesetzgeber bei der Neufassung des Republikschutzgesetzes 1930 auch veranlasst, den Straftatbestand des § 5 Abs. 1 Nr. 1 RepSchG einzuführen, der eine Mindeststrafe von drei Monaten Gefängnis für das Beschimpfen oder die böswillige und überlegte Verächtlichmachung der republikanischen Staatsform in der Öffentlichkeit oder einer Versammlung androhte.[100] Allerdings führte auch die Einführung von § 5 Abs. 1 Nr. 1 RepSchG nicht zu einer feststellbaren Veränderung der Spruchpraxis der Gerichte.

Gustav Radbruchs Analyse, dass sich „unter dem Schutz der richterlichen Unabhängigkeit (…) in der deutschen Republik eine Justiz erhalten [hat], die als ein obrigkeitsstaatlicher Fremdkörper im sozialen Volksstaat darstellt" verdient daher im Kontext der politischen Beleidigungsprozesse teilweise Zustimmung.[101]

VI. Fazit

Der Gesamteindruck der Entscheidungspraxis der Gerichte in politischen Beleidigungsprozessen erweist sich als ebenso uneinheitlich wie der für den Zustand der Weimarer Republik selbst gewonnene. Einerseits trafen die Gerichte in vielen Verfahren „republiktreue" Entscheidungen. So rehabilitierte das Reichsgericht Friedrich Ebert in der Entscheidung RGSt 65, 422 posthum vom Vorwurf des Landesverrats. Auch die skizzierten Entscheidungen des Schöffengerichts Berlin-Mitte und des Landgerichts Berlin I in dem Strafverfahren gegen Joseph Bornstein dokumentieren eine rechtmäßige Entscheidungspraxis. Andererseits muss eine signifikante Anzahl von Gerichtsentscheidungen, die nicht als Einzelfälle abgetan werden können, als antidemokratisch, antirepublikanisch und antisemitisch

[92] RGSt 57, 209ff.; Jasper (Fn. 7) S. 190f.

[93] Jasper (Fn. 7) S. 191 mwN. Der frühere DDP-Reichsjustizminister Schiffer, E. Die Deutsche Justiz. Berlin, 1928, S.13f. kritisierte die Spruchpraxis des Reichsgerichts als „Methode übler Sophistik."

[94] RG, Urt. v. 01. 07. 1927, in Juristische Wochenschrift 1927, S. 2703 Nr. 23 – kein Angriff auf die Republik durch die Verunglimpfung der Weimarer Verfassung; Jasper (Fn. 7) S. 190.

[95] RG, Urt. v. 19. 10. 1926, in Juristische Wochenschrift 1927, S. 455 Nr. 22 – Beschimpfung der Republik vor einer Schulklasse.

[96] RG, Urt. vom 15. 01. 1929, in Juristische Wochenschrift 1929, S. 1148ff., Nr. 25 – „Schwarz-Rot-Hühnereigelb". Jasper (Fn. 7) S. 189 gibt die Argumentation des Strafsenats wieder, der ausführte, dass die Bezeichnung „schwarzrotgelb an sich, d. h. wenn sie ohne schlimme Hintergedanken geschieht, schon nicht beleidigend, geschweige denn beschimpfend sein kann. Sie ist es selbst dann nicht, wenn jemand jene Bezeichnung deshalb gebraucht, weil ihm erkennbarer Maßen infolge einer Abneigung gegen die Republik oder die in der Reichsverfassung bestimmten Farben die richtige Bezeichnung schwarzrotgold nicht über die Lippen will." Zu den Gründen für die Ablehnung der republikanischen Staatsform durch die Strafjustiz Wilke (Fn. 2) S. 73ff.

[97] Jasper (Fn. 7) S. 188 m.N.

[98] Ibid.

[99] RG, Urt. vom 15. 01. 1929, in Juristische Wochenschrift 1929, S. 1148ff., Nr. 25 – „Schwarz-Rot-Hühnerei-gelb".

[100] Japser (Fn. 7) S. 190.

[101] Zit. nach Majer, D., Blind auf dem rechten Auge. In: Die Zeit Nr. 8, 14. Februar 1986, S. 70. Der Zentrumspolitiker und langjährige Reichskanzler Wilhelm Marx teilte diese Sichtweise auf die Strafjustiz, weil er in einem Beleidigungsverfahren selbst negative Erfahrungen mit der antirepublikanischen Strafjustiz machen musste, vgl. Kißener, M., Zwischen Demokratie und Diktatur. Badische Richter 1919 – 1952. Konstanz, 2003, S. 12.

motiviert angesehen werden. Gerade Gerichtsentscheidungen, die reaktionären oder rechtsradikalen Angeklagten eine „vaterländische Gesinnung“ attestierten, dokumentieren die Abneigung der Demokratie durch einen Teil der Richterschaft.[102] Den antirepublikanisch gesinnten Richtern gelang dabei in ihren Strafurteilen das Kunststück, zwischen dem deutschen Staat, dem sie sich treu ergeben fühlten und der Demokratie, die sie ablehnten, zu differenzieren.[103] Diese divergierenden Entscheidungsmaßstäbe für ihre Strafurteile erreichten die Richter durch eine selektive Auslegung der Strafnormen mittels einer formalistischen Begriffsjurisprudenz, die wesentlich zu der Vertrauenskrise in die Weimarer Justiz beitrug.[104] So legte das Reichsgericht u.a. § 7 Abs. 1 Nr. 2 RepSchG dergestalt aus, dass „Sarkasmen, mehrdeutige Redensarten oder Beleidigungen (…) den Tatbestand der Beschimpfung“ nicht erfüllten, sofern „vaterländisch“ motivierte Angeklagte vor Gericht standen.[105] Auch die Amts- und Landgerichte interpretierten Sachverhalte nicht selten dergestalt, dass sie ihres verächtlichmachenden Charakters verlustig wurden. Die subjektivierte Auslegung des unbestimmten Tatbestandsmerkmals „Beschimpfung“ ermöglichte dabei diese antirepublikanische, der Gesetzesintention widersprechende Auslegung der Strafnormen in Kongruenz mit den antirepublikanischen und reaktionären Anschauungen vieler Strafrichter, die in ihrer Majorität mit den politischen Zielen der DNVP sympathisierten.[106] Diese antidemokratische und antipluralistische Grundhaltung vieler Richter wird in einer Stellungnahme des Vorsitzenden des Deutschen Richterbundes Johannes Leeb besonders deutlich:

> „Partei-, Klassen- und Bastardrecht. Gesetz ist Recht. Parteiherrschaft schafft Gesetze nach Maßgabe ihrer sittlichen, gesellschaftlichen und wirtschaftlichen Belange. Wo Parteigesetze, da Parteirecht. Treibt die Partei Klassenpolitik, so ist das Parteirecht, Klassenrecht, Klassenjustiz. Wo mehrere Parteien die Herrschaft üben, entstehen Kompromißgesetze. Sie stellen Mischlinge, Kreuzungen der Belange der herrschenden Parteien, stellen Bastardrecht dar. Jede Majestät ist gefallen, auch die Majestät des Gesetzes.“ [107]

Die Ablehnung der Weimarer Republik durch die Strafrichter hatte jedoch auch noch einen wesentlich trivialeren Grund, als den Antipluralismus der Richterschaft. Infolge der Hyperinflation von 1923 sanken die Gehälter inflationsbedingt um bis zu 60 Prozent und lagen 1931 noch immer 30 Prozent unter ihren Einkommen im Kaiserreich.[108] Dies dürfte die große Abneigung der Weimarer Republik durch die Richterschaft noch verstärkt haben.

Der Antirepublikanismus der Richterschaft ging dabei mit einem latenten Antisemitismus einher. So führte die subjektivierte Auslegung von § 166 RStGB, die die Gesetzesintention von § 166 RStGB mit abstrusen Argumentationen konterkarierte, zu zahlreichen Freisprüchen in Beleidigungsprozessen, denen antisemitische Sachverhalte zugrunde lagen. Es kann dabei vermutet werden, dass der Antisemitismus innerhalb der Strafjustiz durch den Untergang des Kaiserreichs noch verstärkt wurde. Die Strafrichter, die eine starke Affinität zum Militär aufwiesen und in Preußen regelmäßig Reserveoffiziere waren, vermochten den Makel der militärischen Niederlage nicht zu akzeptieren und waren nur allzu sehr bereit sich mit der „Dolchstoßlegende“ und der „jüdischen Weltverschwörung“ einer Selbsttäuschung hinzugeben.[109] Für den selbstverschuldeten Zusammenbruch des Kaiserreichs machten sie die „inneren“ und „äußeren“ Feinde Deutschlands verantwortlich, zu denen sie neben linksliberalen, pazifistischen und sozialistischen Politikern, v.a. „jüdische Bolschewisten“ zählten.

Zusammenfassend lässt sich festhalten, dass ein Teil der Richterschaft in Beleidigungsprozessen politisch motivierte Entscheidungen traf. Hieraus ergibt sich zugleich, dass neben der von Otto Kirchheimer ausgemachten Ebene der „Diskreditierung des politischen Gegners“ noch eine weitere Ebene der Politisierung existierte, die Ebene der justiziellen Politisierung durch die Gerichte.

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[102] Wilke (Fn. 2) S. 73ff. über die Gründe.
[103] Jasper (Fn. 7) S. 196.
[104] Ibid. S. 197; Kuhn (Fn. 82) passim.
[105] Jasper (Fn. 7) S. 187.
[106] Die DNVP wollte einen autoritären Staat errichten, die „staatliche Ordnung“ im Deutschen Reich wiederherstellen und mittels der Aufhebung des „Schandfriedens von Versailles“ die nationale Auferstehung einleiten. Siehe Angermund, R., Die geprellten „Richterkönige“. Zum Niedergang der Justiz im NS-Staat. In: Hans Mommsen/Susanne Willems (Hrsg.), Herrschaftsalltag im Dritten Reich: Studien und Texte. Düsseldorf, 1988, S. 304, 305f.; Rosenfeld, S., Justiz und Republik. In: Die Justiz 1930/31, S. 475f.; Kübler, K., Der deutsche Richter und das demokratische Gesetz. In: Archiv für civilistische Praxis, vol., 162, 1963, S. 104, 109ff. über die antirepublikanische Mentalität innerhalb der Strafjustiz. Wilke (Fn. 2) S. 74 Fn. 274 hinsichtlich der politischen Orientierung der Strafjuristen in der Weimarer Republik.
[107] Leeb, J., Politik und Recht. In: Deutsche Richterzeitung 1921, S. 130f.
[108] Wilke (Fn. 2) S. 76.
[109] Wilke (Fn. 2) S. 74.

Die norwegische Verfassung von 1814 in der deutschen Verfassungspublizistik des 19. Jahrhunderts

(The Norwegian Constitution of 1814 in German Publications of the 19th Century)

Martin Löhnig *

Abstract

The Norwegian constitution, the Grunnlov from May 17 1814, is, as the legal foundation document of the modern Norwegian state not very present in current German science of legal history. In German publications of the 19th century the perception of the Grunnlov was quite different. This paper will explore the emanation of knowledge of the Constitution as well as the understanding of how it worked in practice in Pre-March-Germany.

Keywords: *Norwegian Constitution; Pre-March Germany; 19th century; constitutionslism.*

I. Einleitung

Die norwegische Verfassung, das Grunnlov (Grundgesetz) vom 17. Mai 1814, als das juristische Gründungsdokument des modernen norwegischen Staates, für viele Beobachter ganz unerwartet errichtet in den nachnapoleonischen Wirren während des Interregnums zwischen dänischer und schwedischer Dominanz, ist in der gegenwärtigen deutschen Rechtsgeschichtswissenschaft wenig präsent.[1] Der 200. Geburtstag dieser bis heute güligen Verfassung hat hieran wenig geändert. In der deutschen Publizistik des 19. Jahrhunderts war die Wahrnehmung des Grunnlov durchaus anders.[2]

Dabei sagen die deutschen Einschätzungen des Grunnlov oftmals weniger über die zeitgenössische Situation in Norwegen aus, umso mehr jedoch über die deutschen Zeitumstände und die persönlichen verfassungspolitischen Auffassungen und Sehnsüchte des jeweiligen Autors im deutschen Verfassungsdiskurs. Hier kann die norwegische Verfassung von 1814 eine Folie abgeben, weil sich – aufgrund der Randständigkeit Norwegens – über die dortige Entwicklung anders schreiben ließ als über einen mitteleuropäischen Nachbarstaat, dessen Verhältnisse wohlbekannt waren. Liest man die Berichte deutscher Autoren über die Verhältnisse in Norwegen, so fragt man sich manchmal, ob dieses Land überhaupt existiert. Man könnte glauben, Norwegen sei nur eine andere Bezeichnung für das Utopia (oder Anti-Utopia) aus den zahlreichen fiktiven Staats- oder Reiseromanen, mit denen am Ende dann doch immer das eigene Land gemeint ist.[3] Man hat den Eindruck, Norwegen sei, so wie es heute Sehnsuchtsland vieler deutscher Touristen und Auswanderer ist, ein Sehnsuchtsland deutscher Verfassungspublizisten im Vormärz gewesen. Der Befund H. Arnold Bartons, daß die Norwegische Verfassung „the guiding star of Swedish

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1 Die Quellensammlung zur Europäischen Verfassungsgeschichte von Dietmar Willowit/Ulrike Seif [= Ulrike Müßig] (Europäische Verfassungsgeschichte, München 2003) übergeht das Grunnlov, anders dagegen die Sammlung von Dieter Gosewinkel/Johannes Masing/Andreas Würschinger (Die Verfassungen in Europa 1789-1949, München 2006). Wolfgang Reinhard geht in seiner Verfassungsgeschichte Europas (Geschichte der Staatsgewalt. Eine vergleichende Verfassungsgeschichte Europas von den Anfängen bis zur Gegenwart, München 1999) nicht auf die Verfassungsentwicklung in Norwegen ein, während Martin Kirsch in seiner Arbeit zur konstitutionellen Monarchie (Monarch und Parlament im 19. Jahrhundert. Der monarchische Konstitutionalismus als europäischer Verfassungstyp, Göttingen 1999) häufiger, wenn auch kursorisch hierauf verweist. Erwähnung findet die norwegische Verfassung auch in einigen Beiträgen des von Detlef Lehnert herausgegebenen Band zum Konstitutionalismus in Europa (Köln Weimar Wien 2014). Das Handbuch der europäischen Verfassungsgeschichte im 19. Jahrhundert widmet in den bislang erschienenen zwei Bänden (Werner Daum (Hrsg.), Handbuch der europäischen Verfassungsgeschichte im 19. Jahrhundert. Institutionen und Rechtspraxis im gesellschaftlichen Wandel, Bd. 1: Um 1800, Bonn 2006; Bd. 2: 1815-1847, Bonn 2012) der Entwicklung in Norwegen dagegen jeweils einen eigenen Abschnitt. Aufgrund der Auffächerung in einzelne Länderberichte droht in diesem Werk jedoch wiederum der Blick auf den europäischen Verfassungsdiskurs zu kurz zu kommen. Die jüngste deutschsprachige Arbeit zum Grunnlov, eine Monographie im Umfang eines Aufsatzes, datiert aus dem Jahr 1977 (Georg-Christoph von Unruh, Eidsvoll: Das norwegische Grundgesetz von 1814 als konstitutionelles Modell, Kiel 1977).

2 Ein kurzer Verweis auf diesen Umstand findet sich bei Detlef Lehnert, Europäischer Konstitutionalismus. Geschichte, Theorie, Perspektiven, in: ders. (Hrsg.), Konstitutionalismus in Europa, Köln Weimar Wien 2014, S. 9 ff. (hier S. 14); zu den Geschehnissen der Jahre 1848/49 in der Habsburger Monarchie setzt nun Karen Gammelgaard das Grunnlov in Beziehung, vgl. Karen Gammelgaard, Constitution as a transnational Genre: Norway 1814 and the Habsburg Empire 1848-1849, in: dies./Eirik Holmoyvik (Hrsg.), Writing Democracy: The Norwegian Constitution 1814-2014, New York Oxford 2015.

3 Hierzu Martin Löhnig, Die norwegische Verfassung von 1814 in der deutschen Publizistik des 19. Jahrhunderts, ZNR 37 (2015), S. 110 ff.

liberals und radicals“[4] geworden sei, läßt sich umstandslos auf deutsche Liberale und Radikaldemokraten übertragen.

Der Diskurs fand vor allem in der Reiseliteratur statt. In den Revolutionsjahren bedurfte es kurzzeitig nicht mehr dieses Genres, um sich zu staatstheoretischen Fragen oder Verfassungsfragen äußern zu können. Und Norwegen geriet deshalb verstärkt in den Blick, weil dort genau das geschehen ist, was auch die Deutsche Nationalversammlung in der Frankfurter Paulskirche anstrebte: Das Volk konstituierte sich, wählte sich einen Monarchen, der die Krone aus der Hand des Volkes, repräsentiert durch die Reichsversammlung, erhielt, der sein Amt also nicht aus Stand und Geburt, sondern aus der Verfassung ableitete und der zusagte, das Volk nach Maßgabe der von ihm beeideten Verfassung zu regieren. Norwegisches Volk und Monarch kamen also in einem beeideten Vertrag zueinander. Der preußische König Friedrich Wilhelm IV. hingegen weigerte sich 1849 dagegen, die Kaiserkrone aus der Hand des Volkes entgegenzunehmen. Er hatte die Deputation der Frankfurter Nationalversammlung nur durch den Lieferanteneingang seines Schlosses eingelassen und wollte bekanntlich keine „Krone aus der Gosse“, die aus „Dreck und Letten“ bestehe, entgegennehmen. Sein Nachfolger Wilhelm I. erhielt die Kaiserkrone 1871 dann in der Tat auf ganz andere Weise im Spiegelsaal des Schlosses Versailles nach der Niederlange Frankreichs im Deutsch-Französischen Krieg. „Nicht durch Reden oder Majoritätsbeschlüsse werden die großen Fragen der Zeit entschieden – das ist der große Fehler von 1848 und 1849 gewesen – sondern durch Eisen und Blut“, meinte Bismarck.

II. Warum Reiseliteratur, wenn es auch anders geht?

1. Der Auftakt: Rotteck/Welcker

Doch zurück in die hoffnungsvollen Jahre des Vormärz und der Deutschen Revolution. Den Auftakt einer ebenso unverblümten wie wohlwollenden Rezeption der norwegischen Verfassung markiert der Beitrag „Norwegen (Staatsverfassung) im Staats-Lexikon, das von Rotteck/Welcker heraugegeben wurde; er stammt aus der von „Munch-Röder (aus Christiania)“.[5] Die eingehende Beschreibung der norwegischen Verfassung beginnt mit den programmatischen Sätzen: „Die norwegische Constitution ist demokratisch=monarchisch. Die Volkssouveränität wird nicht nur als Gründerin der Verfassung anerkannt; sie ist auch das leitende Princip der Staatsverwaltung.“[6] Und weiter: „Da mithin die königliche Gewalt außerhalb des Grundgesetzes keinen Bestand […] hat, würde ein König, der sich herausnähme, die Verfassung für aufgehoben zu erklären, in demselben Augenblicke aufhören zu regieren.“[7] Der Verfasser betont jedoch sogleich: „Eine europäische Verfassung von solcher Art […] konnte nur unter außerordentlichen Umständen in’s Leben treten.“[8] Er hält die Verfassung nicht nur für bestens funktionsfähig, sondern bezeichnet sie auch als Grundlage für das Prosperieren des Landes.[9]

Als bemerkenswerte Einzelregelungen hebt der Verfasser das nur suspensive Vetorecht des Königs gegen Gesetzgebungsbeschlüsse der Parlaments hervor, welches zur Folge habe, daß Gesetze auch gegen den Willen des Königs zustande kommen können und dann „schlechterdings ohne Sanction gültig“[10] sind. Gerade aufgrund seiner Schwäche im Vergleich zu einem absoluten Vetorecht habe dieses königliche Recht jedoch auch praktische Bedeutung. Zu beachten sei jedoch, daß das Vetorecht des Königs in Norwegen nicht Ausfluß des monarchischen Prinzips sei, denn die Demokratie selbst regle die Einschränkungen, denen sie unterworfen sein will – „der König hat nicht mehr Rechte als ihm das Grundgesetz einräumt.“[11] Aber den König trage durch sein Vetorecht dazu bei, „sich vor den Fehlgriffen einer gewaltthätigen und unbesonnenen Demokratie“ zu sichern, „zwischen den Interessen zu vermitteln, zu versöhnen und die öffentliche Meinung zu läutern“.[12]

Als weitere Besonderheit stellt der Verfasser die Regelung des aktiven Wahlrechts dar, welches alle unbescholtenen Männer ab 25 als mittelbares Wahlrecht innehaben. „Der Wahlkörper ist sonach sehr groß, und die unteren Classen haben einen Einfluß von ganz außerordentlicher Ausdehnung erhalten.“[13] Daß passive Wahlrecht stehe unbescholtenen Männern ab 30 zu. So sei der „Intelligenz fast des ganzen Landes“ (Frauen haben derartiges auch in Norwegen nicht) Einwirkungsmöglichkeit auf die Staatsverwaltung gegeben. Dies nütze dem Staat und verhindere, daß Einzelne versuchen sich auf andere Weise „der Volksstimme zu bemächtigen“[14], während die Volksvertretung im Ansehen sinke.

Außerdem erwähnt der Verfasser das Zweikammersystem, bei dem der Storthing 25% seiner Mitglieder in die andere Kammer wähle, so daß zwei Kammern entstehen. Dies sei nur konsequent, denn eine echte Zweiteilung setze voraus, daß auch „zwei verschiedene politische Tendenzen“ vertreten seien, was aber in einem solchermaßen demokratisch verfaßten Staat nicht der Fall sein könne.[15]

Der Verfasser sieht den Einfluß der norwegischen Verfassung in den skandinavischen Ländern ebenso stark wie jenen der französisch-englischen konstitutionellen Ansichten im Süden; „und es ist vielleicht nicht einmal eine allzu kühne Behauptung, daß jenes dem Süden fast ganz unbekannte System, welches sich, außer seinen anderen Vortheilen, durch eine Reinheit

[4] H. Arnold Barton, Sweden and Visions of Norway: Politics and Culture, 1814-1905, Carbondale and Edwardsville 2003, S. XIII.
[5] Carl von Rotteck/Carl Welcker (Hrsg.), Staats-Lexikon oder Encyklopädie der Staatswissenschaften, Eilfter Band, Altona 1841, S. 584 ff.
[6] Rotteck/Welcker (Fn. 5) S. 584 f.
[7] Rotteck/Welcker (Fn. 5) S. 587 f.
[8] Rotteck/Welcker (Fn. 5) S. 585.
[9] Rotteck/Welcker (Fn. 5) S. 597.
[10] Rotteck/Welcker (Fn. 5) S. 588.
[11] Rotteck/Welcker (Fn. 5) S. 590.
[12] Rotteck/Welcker (Fn. 5) S. 596.
[13] Rotteck/Welcker (Fn. 5) S. 598.
[14] Rotteck/Welcker (Fn. 5) S. 599.
[15] Rotteck/Welcker (Fn. 5) S. 604.

und Klarheit seines Principes, wie durch eine Festigkeit seiner Folgerungen auszeichnet, […] zu einer thätigen Theilnahme an der Lenkung der öffentlichen, namentlich zum Einflusse auf die parlamentarischen Verhandlungen heranschreitet".[16] Darüber hinaus, aber das würde vermutlich auch nicht dem Selbstverständnis des Rotteck/Welcker entsprechen, enthält sich der Verfasser jeglicher vergleichender Empfehlung und vielleicht nicht von ungefähr werden zwar der europäische Norden und Süden, nicht aber Mitteleuropa erwähnt. Freilich konnte die bürgerliche Oberschicht, welche in der Regel Zugang zu einem Exemplar des Rotteck/Welcker hatte, sich nunmehr über die Vorzüge der norwegischen Verfassung informieren, denn in dieser Schicht war das Lexikon weitverbreitet; nicht von ungefähr wird der Rotteck/Welcker von Historikern als „Grundbuch des vormärzlichen Liberalismus" [17] angesehen. Daß ein derartig liberales Werk auf hohem Niveau trotz der Karlsbader Beschlüsse überhaupt Verbreitung finden konnte, liegt an der liberalen Handhabung der Zensur in Baden, wo Rotteck und Welcker politisch aktiv waren, während die Bände in Österreich und Preußen verboten waren.

2. Der Outlaw: August Theodor Brömel

Ein Jahr später, 1842, berichtete August Theodor Brömel[18] in einem bei Carl Benemann in Bergen in deutscher Sprache verlegten Werk über „Die freie Verfassung Norwegens in ihrer geschichtlichen Entstehung und weiteren Entwicklung". Die Verlagsbuchhandlungen Hoffmann & Campe (Hamburg) und Fleischer (Leipzig) vertrieben das Werk in Kommission.

Brömel war als Opfer der sogenannten Demagogenverfolgung, der restaurativen Unterdrückung von Freiheitsbestrebungen im Deutschen Bund, etwa 1825 nach Norwegen ausgewandert[19] und sah die Norwegische Verfassung als wichtige Inspirationsquelle an. Sein Bestreben war es, „den falschen Ansichten, die man noch so häufig in Deutschland über norwegische Verhältnisse hegt, den Todesstoß […] geben" [20] und zu zeigen, daß „Norwegen ein völlig unabhängiges Königreich ist, mit der freiesten aller Verfassungen um welche alle anderen Staaten unseres Erdkreises […] beneiden mögen".[21] Allerdings scheint nur der erste Band dieses Werkes erschienen zu sein, welcher allein die Vorgeschichte und das Verfahren der Verfassungsgebung schildert.

3. Rotteck/Welcker revisited

Während in der regulären Ausgabe des Rotteck/Welcker aufgrund eines Mißverständnisses[22] der Teil „Norwegen (historisch und statistisch)" noch fehlte, wurde dies im vierten Band der Supplemente[23] nachgeholt, welcher 1848 erschien. Dort geht Theodor Mügge erneut auch auf die Verfassung ein, welcher Norwegen „seine jetzige glückliche Lage zu danken" [24] habe. Das beruhe auf der Gleichheit aller Bürger unter Abschaffung der Vorrechte des Adels ebenso wie auf dem Wahlrecht, das eine „breite Basis der Vertretung des Volkes" bewirke; nirgendwo finde sich „ein Vorrecht der Zumeistbesitzenden oder der zumeist Steuer Zahlenden".[25] Neben der Abschaffung des absoluten Vetorechts des Königs hebt Mügge hervor, daß nach § 62 der Verfassung „kein Mitglied des Staatsraths und kein in dessen Bureau angestellter Beamter, keiner, der eine Hofbedienung hat oder vom Hofe Pension empfängt, in dem Strtthing sitzen kann¸ und überdies der König keinen Beamten entlassen, sondern nur suspendieren kann, während eine Entlassung nur auf Gerichtsentscheidung hin möglich sei; eine Versetzung gegen den Willen des Beamten sei unzulässig, allein der Stortthing kann Pensionen bewilligen." Durch diese Bestimmungen des Grundgesetzes beschützt, fühlen sich die Beamten in Norwegen nicht mehr als Diener des Königs, sondern als Diener der Nation." [26] Überdies hebt Mügge die Pressefreiheit hervor, „die in keinem Lande Europas durch Sinn und Denkungsweise der Nation so gesichert ist wie hier",[27] bei gleichzeitig hoher Alphabetisierungsrate. Daß Mügge mit diesem Beitrag beauftragt wurde, ist kein Zufall. Und hier verschwimmen nun die Genres, denn Mügge[28] hatte bereits 1844 seine „Reise durch Skandinavien" publiziert, in der seine verfassungspolitischen Auffassungen deutlich aufscheinen. Die Neue Deutsche Biographie weiß über Mügge: „Ein freiheitlicher Zug zog wie ein roter Faden durch sein Leben und Werk." [29] Sein Reisebericht kommt wesentlich weniger subjektivistisch gefärbt und wesentlich systematischer daher als viele andere Berichte.

„Welche Aufgabe für ein Volk, das zum ersten Male seit Jahrhunderten ohne Bevormundung, losgelassen von den Wickelbändern, die hundert Meilen weit über das Meer reichten, den Bau seines Glückes begründen soll! Welche doppelt schwierige Aufgabe für ein Volk ohne alle Erfahrungen, aus dessen Mitte bisher kaum einige wenige die Idee eines wohlgeordneten Staats-

16 Rotteck/Welcker (Fn. 5) S. 597.
17 Vgl. Dieter Langewiesche, Liberalismus in Deutschland, Frankfurt am Main 1988, S. 13.
18 August Theodor Brömel, Die freie Verfassung Norwegens in ihrer geschichtlichen Entstehung und weiteren Entwicklung, Bergen 1842.
19 Ivar Sagmo, Nach Norwegen! Zur politischen Reiseberichtserstattung und Publizistik der Biedermeierepoche, in: Michael Titzmann (ed.), Zwischen Goethezeit und Realismus, Tübingen 2002, S. 237 ff., 245.
20 Brömel (Fn. 18) S. I.
21 Brömel (Fn. 18) S. II.
22 Vgl. die Fußnote bei Rotteck/Welcker (Fn. 5) S. 584.
23 Carl von Rotteck/Carl Welcker (Hrsg.), Supplemente zur ersten Auflage des Staats-Lexikon oder der Encyklopädie der Staatswissenschaften, Vierter Band, Altona 1848, S. 36.
24 Rotteck/Welcker (Fn. 23) S. 36.
25 Alles bei Rotteck/Welcker (Fn. 23) S. 36.
26 Alles bei Rotteck/Welcker (Fn. 23) S. 37.
27 Rotteck/Welcker (Fn. 23) S, 37.
28 Theodor Mügge, Reise durch Skandinavien, Hannover 1844.
29 NDB Theodor Mügge.

organismus in sich aufgenommen hatten."[30] Mügge preist die „Köpfe und Herzen der einfachen Männer, welche zum ersten Male als Staatsbaumeister arbeiteten".[31] „Die Pfarrer sind die Führer der Patrioten, oft die heftigsten Gegner der Regierung, welche sie jedoch ihrer Gesinnung wegen weder verfolgen noch bestrafen kann, wie dies wohl in anderen Ländern der Fall sein würde. Hierin liegt die große Stärke der norwegischen Verfassung und der große Fehler aller anderen constitutionellen Monarchieen. In ihnen sind die Beamten, geistlich oder weltlich, nicht sowohl Diener des Staats wie des Staatsoberhaupts, der […] sie, sobald sie sich mißliebig zeigen, absetzen, versetzen oder pensioniren kann."[32] Nach Art. 22 der Verfassung können Beamte in der Tat nur aufgrund Richterspruchs belangt werden.

Mügge lobpreist die auf Grundbesitz basierende norwegische Verfassung,[33] sieht aber auch, daß ihre Mängel hervortreten werden, „je mehr der wohlhabende Bauer den Culturzuständen näher rückt, je mehr er seine politische Macht in Norwegen begreift, je mehr es ihm gelingt, seine Söhne auf Schulen zu schicken, sie in den Staatsdienst zu bringen, sie als Prediger, Richter, Lehrer, Offiziere in die Aristokratie der Bildung und des Beamtenstandes zu schieben, um so mehr werden auch die Mängel der norwegischen Verfassung hervortreten und die Kaste der Grundbesitzer sich sondern von den Proletariern."[34] Als Anhang des zweiten Bandes seiner Reise durch Skandinavien druckte Mügge eine vollständige deutsche Fassung der Norwegischen Verfassung ab.

4. Textausgaben

Die Revolutionszeit brachte zahlreiche Textausgaben des Grunnlov hervor: So erschien etwa 1849 im Verlag J. Bagel ohne Autorenangabe ein Werk mit dem Titel „Welche Verfassung ist die beste?", welches die preußische Verfassung mit den Verfassungen von Belgien, Norwegen, England, Frankreich und New-York vergleicht und besonders „den Deputierten zur Nationalversammlung in Berlin ein willkommenes Hülfsbuch"[35] sein möchte. Das Werk ist eine Synopse, welche der Gliederung der Preußischen Verfassung folgt und die als passend empfundenen Normen der anderen Verfassungen beiordnet. Diese Anordnung ist die einzige geistige Leistung des anonymen Autors, der gerade durch die Zerstörung des systematischen Gehalts der anderen Verfassungen ein sehr naives Verfassungsverständnis an den Tag legt. Freilich: Ein Vergleich Preußen/Norwegen fällt selbst auf Grundlage der solchermaßen fragmentierten Verfassung von 1814 nicht sehr schmeichelhaft für Preußen aus.

Ebenfalls 1849 erschien (und erlebte zwei Auflagen) ein von Traugott Bromme herausgegebener Band[36], welcher zahlreiche Verfassungen abdruckte (Vereinigte Staaten, Pennsylvania, Texas, Belgien, Schweiz Norwegen und England) „[z]ur Beantwortung der Frage: Ob Republik, ob konstitutionelle Monarchie". Für Bromme, der ansonsten vor allem durch Reise- und Auswandererliteratur hervorgetreten ist, war in seinem pathetischen Vorwort klar: „Der Deutsche Bund […] hat sich überlebt, durch das, was er seit mehr als dreißig Jahren nicht geleistet, sich selbst gerichtet."[37] Aber wie sollte ein deutscher Nationalstaat verfaßt sein, den das deutsche Volk, nicht so revolutionssüchtig und zur Anarchie geneigt wie die Franzosen,[38] auf gesetzlichem Wege erstrebe? „Um Republiken zu bilden, müssen wir erst Republikaner im wahren Sinne des Wortes haben, nicht aber Anarchisten, die allen Gesetzen Hohn sprechen, durch Blut und Verwüstung zur Freiheit führen wollen, und der Republik fluchen, ja sie zuerst wieder stürzen würden, wenn dieselbe sie nicht an's Ruder brächte."[39] Angesichts solcher „Republikaner" kommt für Bromme allein die konstitutionelle Monarchie in Betracht, denn allein diese entspreche der Bildungsstufe und auch den Sympathien der Mehrzahl der Bürger. Man fragt sich freilich, warum Bromme, wenn sich die Situation in dieser Weise für ihn darstellt, überhaupt seine Textsammlung vorlegt und nicht die von ihm favorisierte englische Verfassung bewirbt – denn alles, was die englische Verfassung Treffliches biete, sei deutschen Ursprungs.[40] Zur Norwegischen Verfassung ventiliert er lediglich den Eindruck, daß sie „ihrer Einfachheit und Bestimmtheit als besonders empfehlenswerth gerühmt" werde.[41]

Im gleichen Jahr erschien in Berlin eine „Einleitung in die Staatslehre durch tabellarische und vergleichende Darstellung von sieben neuern Verfassungen" (England 1787, Nordamerika 1787, Frankreich 1791, Spanien 1812, Frankreich 1814, Norwegen 1814, Belgien 1831), herausgegeben und kommentiert von August Arnold, dem jedoch zur Norwegischen Verfassung von 1814 nicht viel Erhellendes einfiel. Friedrich Wilhem Ghillany, Stadtbibliothekar zu Nürnberg, pries 1848 im Titel seiner deutschen Textausgabe allein der Norwegischen Verfassung „Die Verfassung des Königreichs Norwegen [als] bisher das freisinnigste constitutionell=monarcische Grundgesetz in Europa" und möchte diese „unter den gegenwärtigen politischen

[30] Mügge (Fn. 28) S. 70.
[31] Mügge (Fn. 28) S. 70.
[32] Mügge (Fn. 28) S. 180 f.
[33] Mügge (Fn. 28) S. 80 und 112.
[34] Mügge (Fn. 28) S. 410 f.
[35] N.N., Welche Verfassung ist die beste?, Düsseldorf 1849, Vorwort.
[36] Traugott Bromme, Die Verfassungen der Vereinigten Staaten von Nord-Amerika, der Frei-Staaten Pennsylvania und Texas, der Königreiche Belgien und Norwegen, die Bundes-Verfassung der Schweiz und die englische Staats-Verfassung. Zur Beantwortung der Frage: Ob Republik, ob konstitutionelle Monarchie?, 2. Aufl., Stuttgart 1849.
[37] Bromme (Fn. 36) S. VII.
[38] Bromme (Fn. 36) S. VIII f.
[39] Bromme (Fn. 36) S. XIII.
[40] Bromme (Fn. 36) S. XIV.
[41] Bromme (Fn. 36) S. XIII.

Verhältnissen dem deutschen Publicum zur Kenntnisnahme" vorlegen. Es ist freilich nur eine mit Vorwort versehene deutschsprachige Ausgabe, aber immerhin, denn, so der Verfasser im Vorwort, diese Verfassung sei bislang nur in größeren publizisitschen Werken enthalten, die „nur Wenigen zugänglich" seien. Metzler & Winther widmen ihre deutschsprachige Ausgabe im selben Jahr der „freien deutschen Nation". Der Abdruck einer deutschen Übersetzung war in der Tat bislang nur im Standardwerk von Karl Heinrich Ludwig Pölitz[42] erfolgt, welches erstmals 1817 erschienen ist. Doch wer besaß schon den dreibändigen Pölitz? Es handelte sich bei den Verfassungsdrucken also gleichsam um „Volksausgaben", die den populären Verfassungsdiskurs befruchten wollten.

III. „Die Norwegische Verfassung ein Vorbild für Preußen"

1. Der Verfasser

Die intensivste Auseinandersetzung mit der Norwegischen Verfassung enthält ein 1848 erschienenes kleines Werk des Hallensischen Privatdozenten Hugo Hellmar[43], geboren 1822 in Trebbin als Sohn eines Justizrates, das bereits den programmatischen Titel trägt: „Die Norwegische Verfassung ein Vorbild für Preußen".

Über Hellmar ist leider nicht allzu Viel in Erfahrung zu bringen. Er hat sich im Sommer 1846 im Alter von 24 Jahren an der Universität Halle habilitiert[44] und seither in Halle vor allem kirchenrechtliche Vorlesungen gehalten. 1848 beantragte er aufgrund seines angegriffenen Gesundheitszustands beim zuständigen Ministerium finanzielle Unterstützung, die am 22. Februar 1849 bewilligt wurde.[45] Die Hallenser Fakultät schilderte ihn 1848 in einer vom Ministerium erbetenen, befürwortenden Stellungnahme folgendermaßen: „Für das Kirchenrecht, dem der Dr. Hellmar vorzugsweise seine Kräfte widmet, hat derselbe sich bereits ein Auditorium zu bilden angefangen. Auch hat er durch kleinere Schriften in diesem Gebiete sich vortheilhaft ausgezeichnet. Es gehört dabei insbesondere einer Schrift ‚Die Zukunft der evangelischen Kirche vom rechtlichen Standpunkt aus beleuchtet. Halle 1848'. Die Schrift ist bemerkenswerth wegen der Klarheit der Gedanken und der practischen Auffassung der gegebenen Verhältnisse. Sie ist durchweg in dem ernsten und wissenschaftlichen Ton geschrieben, welchen man auch in. dem persönlichen Verkehr über wissenschaftliche Dinge mit dem Dr. Hellmar schätzen lernt."[46] Unter dem 16. Oktober 1848 gab die Hallenser Fakultät bekannt: „Auf Wunsch des Herrn Dr. Hellmar benachrichtige ich die geehrten Herrn Commilitonen, daß derselbe leider die Folge eines heftigen Bluthustens erheblich erkrankt ist und nachdem Rathe der Ärzte das Winterhalbjahr ohne alle und jede Anstrengung im väterlichen Hause (bei dem Herrn Justiz-Rathe Hellmar in Trebbin) zubringen soll."[47]

Unter dem 5. Juni 1849 teilte Hellmar der Fakultät mit, „daß an mich der Ruf ergangen ist, der Leitung einer für die westlichen Provinzen zu begründeten conservativen Zeitung zu übernehmen."[48] Offenbar hatte sich Hellmar in den Jahren 1848/49 nicht in einer Weise hervorgetan, die seinem Fortkommen schädlich war. Kein Wunder: Er hatte 1848 eine Schrift publiziert, in deren Titel er den „Untergang der Civilisation"[49] als Folge der Revolution brandmarkte. Auf einer am 4. August 1850 aufgestellten Tagesordnung des Hallenser Professoriums findet sich unter Ziffer 3 „Ein Gesuch des Herrn Dr. Hellmar um Wiederaufnahme zum Privatdocenten"[50], welches in der Sitzung bewilligt wurde.[51] Hellmar hatte mitgeteilt, er habe seinen Auftrag in Elberfeld erfüllt. Unter dem 19. September 1850 wurde Hellmar aufgefordert, seine Vorlesungen für das Wintersemester anzukündigen.[52] Damit endet die Überlieferung des Universitätsarchivs Halle. Nachdem auch die letzte ersichtliche Publikation Hellmars aus dem Jahre 1850 stammt, steht zu vermuten, daß Hellmar etwa zu dieser Zeit im Alter von 29 Jahren am Bluthusten verstorben sein dürfte.

2. Das Werk

In seinem Werk zur Norwegischen Verfassung verdammt Hellmar die kontinentaleuropäische Verfassungsentwicklung in Bausch und Bogen: „In geistloser Weise haben die Franzosen das Vorbild Englands mechanisch copirt, eine Volkskammer und eine erbliche Pärskammer geschaffen, weil England sie hatte. […] Die deutschen Staaten aber hatten nichts Eiligeres zu thun, als nachzuäffen, was Frankreich ihnen vorgethan. Nun hatte man ja Constitutionen, nun mußte doch das Volk befriedigt sein! Im Uebrigen regierten die Fürsten so unumschränkt wie vorher."[53] All diese Verfassungen trügen „das Gepräge der Lüge an der Stirn"[54], weil man nicht gesehen habe, was dort die Verfassung ausmache, nämlich daß Träger der Staatsgewalt die Volksvertretung sei. Das müsse bei den jetzigen Verfassungsgebungen beachtet werden. Auch wenn er die Revolution als Ver-

[42] Heinrich Ludwig Pölitz, Die europäischen Verfassungen seit dem Jahre 1789 bis auf die neueste Zeit, Dritter Band, S. 92 ff. dokumentiert sowohl die ursprüngliche Fassung als auch die zum 4. November 1814 erfolgten Veränderungen, dies sowohl in der ersten Auflage 1817 als auch der zweiten Auflage 1833.
[43] Hugo Hellmar, Die Norwegische Verfassung ein Vorbild für Preußen, Halle 1848.
[44] Universitätsarchiv Halle Rep. 23 Nr. 639 Fol. 1.
[45] Universitätsarchiv Halle Rep. 23 Nr. 640 Fol. 1.
[46] Universitätsarchiv Halle Rep. 23 Nr. 639 Fol. 1.
[47] Universitätsarchiv Halle Rep. 23 Nr. 639 Fol. 5.
[48] Universitätsarchiv Halle Rep. 23 Nr. 640 Fol. 2.
[49] Hugo Hellmar, Der Untergang der Civilisation eine Folge der Revolution, Halle 1848.
[50] Universitätsarchiv Halle Rep. 23 Nr. 644 Fol. 2.
[51] Universitätsarchiv Halle Rep. 23 Nr. 640 Fol. 3.
[52] Universitätsarchiv Halle Rep. 23 Nr. 644 Fol. 7.
[53] Hellmar (Fn. 43) S. 4.
[54] Hellmar (Fn. 43) S. 5.

nichter der Zivilisation brandmarkt: Ein Reaktionär ist Hellmar also keineswegs.

Aber es gebe eine Ausnahme: „In keinem anderen Lande hat man bisher das Wesen der englischen Constitution begriffen und practisch ins Leben geführt, als in Norwegen. Aber man hat nicht mechanisch übertragen, was man dort gefunden, sondern man hat die Idee der englischen Verfassung in sich aufgenommen und dem Zustand des Landes ihre Ausführung accomodirt“[55] Die Norwegische Verfassung als „geläuterte“ Variante der englischen Verfassung müsse nun Preußen zum Vorbild dienen, weil dort der König innig verehrt, die Finanzlage glänzend und der Umbau des Staates friedlich erfolgt sei.[56] Drei Punkte zeichnen für Hellmar die Norwegische Verfassung besonders aus: „1) das Wahlgesetz, 2) die durch einen Wahlact aus dem Volk hervorgehende Doppelkammer, 3) das suspensive Veto des Königs“.[57]

§ 57 der Norwegischen Verfassung beruhe auf dem Prinzip der indirekten Wahlen. Das zeige große Klugheit, denn direkte Wahlen seinen nur dann möglich, wenn man entweder die Wahlkreise sehr klein ziehe und dadurch die Zahl der Abgeordneten bedeutend vermehre, oder die Zahl der Wahlberechtigten deutlich verringere.[58] Ebenso klug sei die Bestimmung der § 57, 58 der Verfassung, daß die Wahlmänner entweder aus ihrer Mitte oder aus dem übrigen Wahlberechtigten des Stimmkreises den Abgeordneten ernennen müssen. „Da nun anzunehmen ist, daß das Volk die Besten in seinem Bezirk zu Wahlmännern gewählt hat, so fällt fast ausschließlich die Wahl der Abgeordneten auch auf einen Wahlmann des Bezirks.“[59]

Die hervorragende norwegische Doppelkammer funktioniere in der Weise, daß die Abgeordneten aus ihrer Mitte ¼ der Mitglieder wählten; diese bildeten die erste Kammer, die restlichen ¾ die zweite Kammer im Gesetzgebungsverfahren.[60] Es berate zunächst die zweite Kammer, dann die erste Kammer. Verwerfe die erste Kammer zweimal einen von der zweiten Kammer gebilligten Entwurf, so tagten beide Kammern gemeinsam und benötigten ein Quorum von 2/3. Dieses Verfahren schütze „das Bestehende gegen eine zu ungestüm vorschreitende Neuerungssucht“.[61]

§ 78, 79 der Verfassung gäben dem König das Recht, einem von beiden Kammern angenommenen Gesetzesvorschlag die Billigung zu versagen. Erst der nächste ordentliche Landtag dürfe ihn dann wieder aufnehmen. Versage der König erneut seine Billigung, könne sich der nächste ordentliche Landtag ein drittes Mal mit dem Gesetz befassen; werde es erneut unverändert beschlossen, so bedürfe es nun keiner Billigung durch den König mehr. Dem König steht hiernach also nur ein suspensives, kein absolutes Veto zu. Hellmar bekennt sich an dieser Stelle noch einmal ausdrücklich zur Volkssouveränität: „der entschieden ausgepsrochene Wille des Volks und seiner Vertreter [ist] unwiderstehlich“[62] Überdies sei das suspensive Veto in der Rechtswirklichkeit stärker als etwa das absolute Veto des englischen Königs, das dieser wegen seiner starken Wirkung niemals ausübe; übe ein Monarch das absolute Veto aus, „so ist die Constitution eine Lüge“.[63] Das suspensive Veto sei dagegen das vom norwegischen König häufig verwendete „vortreffliche Mittel, Uebereilung und Hast der Berathung zu hindern […]; es ist daher der sicherste Bürge der Ordnung“[64] und halte zu sorgfältiger Prüfung an.

3. Die Ernüchterung

Hellmars Büchlein endet freilich mit einer Nachschrift[65], die den Leser auf den Boden der Tatsachen zurückholt: „Der Verfassungsentwurf ist erschienen; der König hat nach ihm das absolute Veto; die erste Kammer besteht aus den Prinzen, und zu einem Theil vom König, zum anderen vom Volk aus dem Reichsten des Landes gewählten Personen! Gott gebe, daß der Landtag dies abändere, und wo nicht, daß die Könige Preußens stets den Willen haben, constitutionell zu regiren; denn in dieser Verfassung liegt keine Nöthigung dazu.“ Gott hat dies leider nicht gegeben, was sich am Preußischen Verfassungskonflikt in den 1860er Jahren allzu deutlich zeigt, und Hellmar war es nicht vergönnt, die Preußische Verfassungsentwicklung weiterhin zu begleiten.

IV. Schluß

Norwegen war im 19. Jahrhundert fest an den internationalen Verfassungsdiskurs angeschlossen. Johann Gunder Adler und Christian Magnus Falsen, die Hauptverfasser des Grunnlov, hatten die Ablösung von dreizehn britischen Kolonien in Nordamerika in der Unabhängigkeitserklärung der Vereinigten Staaten ebenso vor Augen wie die Verfassung der vereinigten Staaten und die als Bill of Rights bekannten ersten zehn Amendments dieser Verfassung. Auch die europäische Verfassungsentwicklung seit der französischen Revolution im Jahre 1789 war ihnen selbstverständlich geläufig. Der Diskurs war aber keine Einbahnstraße: Umgekehrt war die Norwegische Verfassungsentwicklung wichtige Inspirationsquelle während der Deutschen Revolution der Jahre 1848/49.

[55] Hellmar (Fn. 43) S. 7 f.
[56] Hellmar (Fn. 43) S. 8 f.
[57] Hellmar (Fn. 43) S. 9.
[58] Hellmar (Fn. 43) S. 11.
[59] Hellmar (Fn. 43) S. 16.
[60] Hellmar (Fn. 43) S. 24.
[61] Hellmar (Fn. 43) S. 31.
[62] Hellmar (Fn. 43) S. 35.
[63] Hellmar (Fn. 43) S. 38.
[64] Hellmar (Fn. 43) S. 36.
[65] Hellmar (Fn. 43) S. 39.

The Clementines Dispendiosam and Saepe Contingit and the Evolution of the Medieval Summary Procedure

Javier Belda Iniesta, Michela Coretti *

Abstract

This article intends to explore briefly the steps that lead to the appearance of the summary Rite on the medieval Ius Commune, highlighting the role of Canon law, and in particular the legislative interventions of Pope Clement V, in the conformation of this process, from the decretals Dispendiosam and Saepe Contingit up to the Bartolus de Sassoferrato's study about the Constitution Ad Reprimendum, well as its reflection on the italian statuti comunali.

Keywords: *Dispendiosam; saepe contingit; summary procedure; Clementinae; Ad reprimendum.*

1. Introduction

Judicial activity, and the resolution of the conflicts arisen among men, by those who received the mission of leading communities, has meant, since the origin of mankind, a continuous effort in order to answer to this social need, starting from the values that organised life at every particular moment and from the vision of every human group of their own reality. The *Historia Salutis*, also understood as the history of a group of people sometimes heterogeneous, but having a clear origin and destined to a common goal, was not alien to this need. In fact, since the calling of Abraham in Ur, many figures have exercised this power [1] in the name of God, the only Supreme Judge, something that not only will facilitate its exercise, but also its undeniable and mandatory obedience [2]. When in the plenitude of Time the complete Revelation comes and the light of the evangelical message enlightens the chosen people, they will be called to an expansion far beyond the known limits [3]. Then, the people of God will face the need of fulfilling a mission that, due to its own nature, implies an adaptation to the context in which it was developed -what is more, perfectly articulated for centuries- but without being separated from what has been received [4]. Therefore, it is necessary a new conception of justice, capable of take into account a new ideal, that is, the salvation of souls.

That is the reason why when Paul [5] told the faithful not to turn to pagan judges to solve disputes with other members of the community, but find themselves a solution coherent with the given Spirit, this did not imply a denial of the civil justice [6], but it meant a long process of adaptation between each other. Thus, since early stages, the task of procuring peace among the member of the community will fall on the Head himself, who will apply an evangelical justice, capable of building and not destroying those who are redeemed [7]. Therefore, when the Christianism abandons its secrecy and Constantine acknowledges this authority in the civil domain as well [8], giving the exercise of the *officium iudicis*, the bishop will be called to know any type of

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1 Jue 5, 9 and 15; 6,11; 13, 1; 1 Sam 1,1; 10, 1, etc.

2 Dt 16, 18-20.

3 Fulfilling the *norma missionis*, a normative core that, even referring to a transcendent event (salvation) and understood as a liberating object (characteristic of the slavery of the law), it is formulated and understood as a command: to go everywhere, announcing the Gospel and make disciples by the baptism and by teaching what they had received (Cfr. M. J. Arroba Conde, « Basi ecclesiologiche e limiti intrinseci di una rinnovata produzione normativa locale », *Folia Canonica* 10 (2007), pp. 155-157). This normative core makes sense of the existence of the Church as the witness of a salvation that, even called to a plenitude in eternal life, is built in this world, and at its service we find a mature discipline in order to be faithful to the essential contents of this announcement, to consolidate itself as a community and to face the challenges arisen through time, while this mission was accomplished (Cfr. M. J. Arroba Conde, M. Riondino, *Introduzione al Diritto Canonico*, Firenze 2015, p. 2).

4 J. Belda Iniesta, "El ministerio judicial del obispo hasta el surgimiento de la Lex Christiana" *(ss. I-IV)*, *Anuario De Derecho Canónico*, 4 (2015), pages 399-401.

5 1 Cor 6, 1-4.

6 Rm 13, 1-7

7 J. Belda Iniesta, "El ministerio judicial del obispo hasta el surgimiento de la Lex Christiana", p. 395.

8 C.Th. 1, 27,1, edita in *Codex Theodosianus* 1, T. Mommsen- P. M. Meyer (eds.), Hildesheim 1990, p. 62

lawsuit, applying the applicable law, understood in the light of the Gospel. We find ourselves in the origins of the *lex christiana*, the result of the combination of Roman juridical science and the teachings of Christ, something that will merge with great difficulties in the figure of the bishop, first, and the Roman Pontiff, later. This situation will be configured as the perfect way in which it will be settled in the reality of the moment, being capable of conjugating the missionary vocation with the preservation of what has been received in a world alien to the salvation that took place [9].

Thus, even though with the passage of time continuous tensions will arise between the Church and the world regarding who holds each power or which are the jurisdictional domains, the new concept of justice and its practical expression as a procedure will continue drinking from both sources disregarding who puts them into practice [10]. The roman-canonical procedure, in fact, constitutes an intersection area between the civil legal system and the one of the Church during Middle Ages, as a number of procedural rules and institutes inherited from Roman law, and adapted, even wisely elaborated, by the doctors of those schools of law that flourished from the XI century. This juridical heritage, considering that the way of doing justice in the *Christianitas* cannot ignore the teachings of Christ, will be enriched by the Decretals, traditions and sacred canons coming of the purely ecclesiastic institutions. They will be used not only to give it a bigger profundity, but also to make its content more accessible. The Roman component was flanked by the canonical one, and around this normative material a dense doctrinal elaboration will be knotted. This operation required the participation of jurists from one side and the other, creating an articulated *ordo iudiciarius solemnis*. This is a theory of the procedure shared by the century and the Church, and will finally be received by the tribunals in both systems.

2. The period before Clement V

Probably, the greatest merging point of both techniques was the *Decretum gratiani* [11], which adopted that the procedural rules coming from the *Hispana*, the *Libri synodalibus causis,* the *Decretum* de Burcardo and in the *Decretum* of Ivo de Chartres [12]. They fundamentally made reference to the roman procedure applied in ecclesiastic tribunals, modified and adapted to the exigencies arisen during the first centuries of the life of the Church [13]. However, the question of the procedure was not addressed in an organic and comprehensive way: Gratian only reproduces the rules of the procedure in a disorganised way [14]. The need to articulately recompose the canonical rules of the procedure made the canonical science take care of the procedural discipline, in order to obtain a more comprehensive elaboration of this branch of Law.

In an atmosphere of great interest in the rules of the roman procedure by the new canonical doctrine, the Church «*viene spinta ad elaborare […] una sua legislazione in materia, aggiungendo nuove regole a quelle che gi*ŕ *erano state assorbite dal diritto romano per completarlo, per adattarlo, per attenuarlo in modo da orientare tutto il processo del tribunale ecclesiastico secondo il suo spirito particolare*» [15]. Therefore, from the mid-XII century, the canonical legislator takes an active part in the development of the procedural discipline, paying special attention to the need of the practice, starting from the advices of an active doctrine. The popes do not develop general and abstract rules of the procedural *iter*, but they give and argument of authority instead of a mere advice or an abstract order, since their intervention is required. These interventions, unusual at the beginning, always go in the same direction: the simplification of the procedure formalities and the reduction of the lawsuits duration, especially the glebe ones [16], trying not to apply this principle of procedural economy to the detriment of the cognition of the lawsuits.

Thus, the long joint task of the canonical legislator and the doctrine from one and the other side implied the development of an alternative to the solemn procedure, the so-called summary procedure. The *Saepe contingit* represents its archetype, whereas the bartolian treaty on the constitution Ad Reprimendum means the moment of definitive scientific maturity. Until XV century -in the canonical system as well as in the civil ones- the tendency to the simplification and the reduction of the legal procedure will continue, and it will only be stopped when the ordo is reduced to its essential part, that is, if and when the instrument to know the truth is agile and practical enough. The abbreviated trail or summary procedure, appeared in these centuries, will be the base in which the modern procedure is built.

Thus, the origins of expressions such as *summatim*, *de plano* and other *clausolae diminuentes iuris ordinem* must be searched in Ro-

[9] J. Belda Iniesta, "El ministerio judicial del obispo hasta el surgimiento de la Lex Christiana", p. 401.

[10] J. Belda Iniesta, "La Iurisdictio Episcopalis entre el Imperio y la Christianitas: aproximación histórico-canónica a la aparición de la potestas sacra", *Ius Romanum*, 2 (2015), pp. 3-8.

[11] S. Kuttner, *Graziano, l'uomo e l'opera*, en *Studia Gratiana*, 1(1953), pages 15-29; S. Kuttner, *De Gratiani opere noviter edendo*, en *Apollinaris*, 21(1948), pages 118-28; J. Rambaud-Buhot, *L'étude des manuscrits du Décret de Gratien conservés en France*, en *Studia Gratiana*, 1(1953), pages 119-45.

[12] Cfr. P. Erdö, *Storia delle fonti del diritto canonico*, Venezia 2008; G. Austin, *Shaping Church Law around the year 1000: The Decretum of Burchard of Worms*, Bodmin (Cornwall), 2009; Sant'Ivo Di Chartres, *Opera Omnia*, Decreum, en P. L., t. CLXI, pp. 59 ss

[13] A. Padoa-Schioppa, *Il diritto canonico come scienza nella prospettiva storica: alcune riflessioni*, en *Le ragioni del diritto. Scritti in onore di L. Mengoni*, vol.3, Milano 1995, pp. 2065 e ss.

[14] F. Della Rocca, *Il processo in Graziano*, en *Studia Gratiana* 2 (1954), pages 281-303

[15] A. Campitelli, *Gli interventi*, cit., p. 28-29.

[16] G. Mollat, "Bénéfices ecclésiastiques", en *Dicionnaire d'histoire et de gèographie ecclésiastiques en Occident*, 7 (1934), pp. 1237-1270; Id., "Bénéfices ecclésiastique in Occident", en *Dictionnaire de droit canonique*, 2 (1937), pp. 406-449; A. Prosperi, "Dominus beneficiorum": *il conferimento dei benefici ecclesiastici tra prassi curiale e ragioni politiche negli stati italiani tra '400 e '500*, en P. Prodi- P. Johanek (curr.), *Strutture ecclesiastiche in Italia e in Germania prima della Riforma*, Bologna 1984, pp. 51-86; A.Santangelo Cordani, *Aspetti della procedura sommaria nella prassi rotale trecentesca*, en M. Bellomo – O. Condorelli, *Proceedings of the Eleventh International Congress of Medieval Canon Law*, Città del Vaticano 2006, pp. 699-713.

man law[17], seasoned with the canonical tradition. The objective of the popes -as it has been stated different times- is the abbreviation of the procedure without sacrificing the truth and the justice. The Christian tradition, consolidated in the *forma canonum* and in the *instituta Patrum*, constitutes, in this sense, a counterbalance of the arbitrium procedendi from which the judge is covered, once it is liberated of the formalities expected in the solemn rite.

3. The pontifical interventions before the clementinae

In this sense, the first pope that introduced the clause *diminuentes ordinem* in a Decretal is Alexander III (1100 ca.-1181), in particular in the *Dielcti filii*[18], in which he establishes that in the cases in which he takes part, there cannot be made the *subtiliter*, that is, according to the respect to the procedural formalities expected in the solemn rite, as it happens in civil procedures. On the contrary, a *pure et simpliciter* investigation has to be done, being that an expression that will be part of the decretal terminology used by his successors regarding procedural matters.

Some time later, in the Decretals of Innocent III, the use of these formulae will be much more frequent, and in particular the expression *de plano*: in the *Novit* the Pontiff orders that the archbishop of Bourges, appointed as his legate, can proceed *de plano* in the determination of the facts constituting the object of the complaint presented by John Lackland (of England) against Philip Augustus, king of the House of Capet[19]. In this known Decretal, whose analysis in depth leaves outside of our work, Innocent III confirms the principle by which secular matters must be subject to the jurisdiction of the Church whenever the dispute implies a serious sin[20]. Regarding the process of appearance of the summary rite, it must be pointed out that, being an agile instrument, it will soon find a wider application by the tribunals of the Church, ordered to judge *ratione peccati*, even on non-purely spiritual matters.

In the *Quoniam frequenter* of 1209, the Pope himself orders the abbreviated discussion of the possessory lawsuits[21], whereas the clause "*de plano*" appears, again, in the Decretal *Quum in tua* of 1212[22]. This Decretal belongs to a group of interventions of the canonical legislator in terms of diriment impediments of marriage. If the complaint about the impediment of consanguinity between the spouses comes from *persona gravis* and the fact ends up being true by public fame (or if the Tribunal can establish *de plano* the existence of the consanguinity), the oath of the relatives about the inexistence of the impediment will not be admitted. Therefore, in this case, the bishop can dissuade the parts of the marriage, always saving the possibility of admitting sworn evidence of the *propinqui* against the fame. For us, it is convenient to pause in the expression «*aut etiam per te ipsum possis certificari de plano*», that will be used in different occasions by the legislator: the procedure *de plano* opposes the *pro tribunali* one, it implies the possibility of proceeding also in holidays, with the consequent reductions of time and, more generally, the omitting some procedural rules of the *ordo iudiciarius*[23]. Moreover, Innocent III gives the judge the possibility of carrying out an investigation *de plano* in relation to the existence of the impediment. However, he does not impose it, but it depends on the free valuation of the judge.

In this sense, regarding the Fourth Council of the Lateran (1215), chaired by the same Pontiff, it is already established that, in the procedures participating an ecclesiastic, there will always be a reduction of the procedural formalities, especially when the canonical penalty for the illegal behaviour consists in the suppression of administrative assignments. Even though in this situation the *clausola diminuens iuris ordinem* is not specifically mentioned, the conciliar text probably makes an indirect reference to the form *de plano*[24].

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[17] V. Fairén Guillén, *Algunos fragmentos romanos sobre el summatim*, A. Cabanillas Sánchez (ed.), *Estudios jurídicos en homenaje al Profesor Luis Díaz-Picazo*, vol. 4 (Derecho civil: derecho de sucesiones, otras materias), Madrid 2003, pp. 6231; Ch. Lefebvre, *Les origines romaines*, pages 149-197. In particular, Fairén Guillén distinguishes the concept of true summariness from the summarisation in a wider sense. The first one is a procedure characterised by a not only accelerated cognition, but also incomplete, since the allegations or the evidences are limited, something that will affect the sentence. According to this author, the *Saepe contingit* does not introduce the true summariness, but simply prescribes an acceleration of the process, that is the reason why the aspiration of the Pontiff of a change inspired by the principle of procedural economy is frustrated.

[18] «Dilecti filii nostri prior et clerici de Guisenburnen. contra Eboracensem archiepiscopum apostolicae sedis legatum gravem admodum et difficilem nobis quaerimoniam transmiserunt. Provideatis attentius, ne ita subtiliter, sicut a multi fieri solet, cuismodi actio intentetur, inquiratis, sed simpliciter et pure factum ipsum, et rei veritatem secundum formam canonum et sanctorum Patrum instituta investigare curetis» (Cfr. X. 2. 1. 6, Corpus Iuris Canonici. Decretalium Collectiones (Pars secunda), (A. L Richtieri ed.), Lipsiae 1881, p. 241)

[19] «…ut idem abbas et venerabilis frater noster aprchiepiscopus Bituricensis de plano cognoscant, utrum iuxta sit querimonia, quam contra eum proponit coram ecclesia rex Anglorum, vel eius exceptio sit legitima…» (Cf. X. 2. 1. 13).

[20] O. Hagender, *Il Sole e la Luna. Papato, impero e regni nella teoria e nella prassi dei secoli XII e XIII*, M.P. Alberzoni (trad.), Milano 2000

[21] Cf. X. 2. 6. 5. The Decretal establishes that in the cases in which there are no real state, if the defendant is absent, the actor, if being dispossessed, can recover again the possession of the goods after a brief discussion on the matter, delaying the full knowledge of the facts to the principal procedure, that will be celebrated according to the norms of the solemn rite.

[22] «Quum in tua diocesi. Sane, quia contingit interdum, quod, aliquibus volentibus matrimonium contrahere, bannis, ut tuis verbis utamur, in ecclesiis editis secundum consuetudinem ecclesiae Gallicanae, ac nullocontradictore publice comparente, licet fama privatum impedimentum deferat parentelae, quum ex parte contrahentium iuramenta maiorum de sua propinquitate, ut suspicionis tollatur materia, offeruntur, quid tibi sit faciendum in casibus huiusmodi quaesivisti. Ad quod taliter respondemus, quod, si persona gravis, cuius fides sit adhibenda, tibi denunciet, quod hi, qui sunt matrimonium copulandi, se propinquitate contingent, et de fama vel scandalo doceat, aut etiam per te ipsum possis certificari de plano, non solum debes iuramenta parentum sponte oblata non reciprere, verum etiam eos, qui sic contrahere nituntur, si moniti induci nequiverint, compellere, ut a tali contractu desistant, vel contra famam huiusmodi secundum tuae discretionis arbitrium iuramenta exhibeant propinquorum. Alioquin, si persona denuncians non exstiterit talis, ut diximus, vel de fama vel de scandalo non poterit edocere, ad desistendum monere poteris, non compellere, contrahentes» (X. 4. 1. 27).

[23] Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, in H.K. Briegleb, *Joannis Faxioli et Bartoli de Sassoferrato De summaria cognitione commetarii*, Erlagen 1843, page 47, n. 12.

[24] «Hunc tamen ordinem circa regulares personas non credimus usuqequaque servandum, quae, quum causa requirit, facilius et liberius a suis possunt adiministrationibus amoveri» (Cfr. X. 5. 1. 24)

Following the trail of his predecessor, Honorius III reiterates that the inquisitive procedure in the lawsuits of the religious ones must not be developed following *ad unguem* the rules of the solemn rite. In a Decretal regarding the visits of the monasteries, the Pontiff uses the term «*absque iudiciorum strepitu*»[25].

In turn, in the Decretal *Olim*, Gregory IX (1170-1241) combines the terms "*de plano*" and "*absque iudiciorum strepitu*"[26]. In order to avoid delays in the reform of one of the monasteries affected by the complaints before the Holy See during the pontificate of Honorius III, the Pope orders that the excommunication or suspension sentences issued by the denounced abbot, or the judge acting in his interest, against the claimants must be annulated. The Pontiff also stipulates that the claimants must be restored to the consecrated life, being done so *de plano et absque iudiciorum strepitu.*

The Decretals mentioned up to now are some the historical antecedents of the clementinae *Dispendiosam* y *Saepe contigit*, that step by step will establish the way to the appearance of the summary procedure in Medieval Law. The Decretals in which the popes use the *clausolae diminuentes iuris ordinem* regulate matters of a fundamentally spiritual relevance, or related to priests or religious persons. However, the scope of this type of procedure will find an important expansion.

At the beginning, in fact, the Pope establishes rules for the ecclesiastic tribunals and the professionals of canon law. Nevertheless, given the production dynamics of procedural law, and of the *ius commune* in general, his decisions will have a much wider scope: sooner they will be a relevant source of development of the summary process, concluding in the only theory of the procedure that links both legal systems, civil and canon law, in which the new procedure will find a wider diffusion[27].

The *clausolae*, within the regulatory intervention of the popes, appears sometimes isolated, sometimes linked one another, but always attributing the judge a wider role than the one given to him by the ordinary procedure[28]. This *arbitrium* acknowledged to the judge is precisely the element that characterises the *verba diminuentes iuris ordinem* as well as the summary procedure in general. In fact, the numerous procedural formalities of the *ordo solemnis* will be reduced after the innovations introduced by the popes, leaving to the judge discretion the management of the lawsuit, always with views to a better knowledge of the truth, being not only formal outside.

Related to the specific sense of each one of the *clausolae* in the Decretals, the studies of Lefebvre cannot be avoided, being the one who investigated the Roman origins of the *clausolae*, trying to establish the evolution of their meaning[29]. As we have noted, especially from the papacy of Innocent III, the canonical legislator prescribes the use of the abbreviated procedure, especially regarding the spiritual causes or with religious participation. On the other hand, the Church has traditionally resorted to a simplified procedure in those cases related to spiritual matters. From the end of XII century, it starts using expressions from Roman Law, even though, «*l'apperence seule est romaine, la substance appartient au fonds canonique le plus certain*»[30]: therefore, the Roman origin of the summary or plenary procedure arisen in the XII century is only apparent, since the procedure, essentially, has some connotations alien to the procedural culture and markedly close to the ecclesial juridical sensitivity.

Thus, the terms appearing in old legal texts are used as recipients in which, eventually, the jurists will insert meanings different from the original ones. Once the words are emptied of their oldest meaning, the task of "filling" starts; therefrom the great doctrinal debate, for in the new sense that the *clausolae* must take jurists from one law and the other will participate.

Thus, the adverb simpliciter is initially used by the decretalists in order to indicate a reduction in the subtlest forms of the procedure, as it is developed in the civil tribunals. Lately, the expression is also used to describe the summary procedure itself, often instead of the word *summarie*[31].

The concept of the *de plano* procedure, however, insists on the fast character and, therefore, relatively superficial of this approach; take into account, for instance, the inquisition regulated by Innocent III in the decretals above mentioned. In these procedures, the *ordo iudiciarius* must not be fully observed: it is understood that normally the libel and the *litis contestation* can be omitted. In the commentaries of Vincenzo Giovanni Teutónico and Tancredi, the *de plano* procedure obtains a proper physiognomy and becomes an independent procedure, alternative to the solemn one[32].

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[25] «[…]Quod si abbas *aliquis* non exemptus fuerit a visitatoribus nimis negligens et remissus inventus, id loci diocesano denuncient sine mora et per illum detur ei fidelis et providus coadiutor usque ad capitulum generale. Si autem dilapidator inventus fuerit vel alias merito amovendus, per diocesanum, postquam hoc sibi a visitatoribus denunciatum fuerit, amoveatur absque iudiciorum strepitu a regimine abbatiae, ac monasterio provideatur interim administrator idoneus, qui temporalium cura gerat, donec ipsi monasterio fuerit de abbate provisu» (Cf. X. 3. 35. 8).

[26] «[…]Ne igitur reformatio monasterii valeat retardari, mandamus, quatenus, relaxatis excommunicationum seu suspensionum sententiis, si quas idem abbas protulerit vel per quoscunque iudices promulgari fecit post inceptum negotium in eos et adhaerentes eisdem, ac eis restitutis, quos idem abbas negotio ipso pendente contra iustitiam spoliavit, in negotio de plano et absque iudiciorum strepitu procedentes…» (Cf. X. 5. 1. 26)

[27] Cfr. Ch. Lefebvre, *Les origines romaines*, p. 150, n.6.

[28] Ch. Lefebvre, *Les origines romaines*, p. 160.

[29] Ch. Lefebvre, *Les origines romaines*, p. 170.

[30] Ch. Lefebvre, *Les origines romaines*, p. 192, n. 180.

[31] Ch. Lefebvre, *Les origines romaines*, p. 170.

[32] The meaning of the expression de plano in Roman Law is a procedure csrried out without "diligent inquisition", that is, a procedure characterised by a short cognition. In the papal decretals, however, the clause refers to a reduction of the solemn formalities that do not come against the full knowledge of the facts (Cf. Ch. Lefebvre, *Les origines romaines*, p. 177) who considers that the comments o f the Compilatio Tertia by Vicenzo, Hispana and Juan Teutónico are the base of some new elements of the summary procedure, such as *"non cum strepitu iudicii"* and *"non in forma iudicii",* as well as the meaning of the expression *de plano*, which not only refers to external form of the procedure, but also to its internal dynamic.

The problem of the identification of the formalities and procedural aspects of the solemn rite that can be omitted without affecting the validity of the sentence begins to be outlined. Vincenzo Ispano gives an interpretation to the clause *de plano* that implies an important innovation in the abbreviated procedure. When commenting the decretal *Novit*, the author explains the expression *de plano* with the terms *non cum strepitu iudicii in modum accusationis*. The expression *absque strepitu iudicii* will become an independent clause instead of an explicative one. In the comments to the same decretal, in his turn, Giovanni Teutónico uses the formula: sine figura iudicii. In this case, the formula is simply explicative of the expression *de plano*, although in the successive doctrinal elaboration it will also assume an autonomous character.

This last clause will be the object of debate within the doctrine, since Giovanni Fagioli until Innocent IV himself, including the Ostiense, Guglielmo Durante, Johannes Andreæ y others[33]. In fact, the term introduced by Teutónico can be the object of two interpretations: if the adjective s*olemnis* is understood in the formula *non in forma iudicii* (*solemnis*), it implies the reduction of the ordinary procedure formalities. This is probably the way in which the German author wanted to present the expression. If, on the contrary, its literal meaning is considered, the clause *non in forma iudicii* can mean the suppression of all merely procedural extrinsic formalities, with the attribution of judging an important discretional aspect in the management of the procedural *iter*.

Even though the debate regarding which rules of the solemn rite must be observed *ad validitatem* and which ones could be omitted in order to obtain a faster resolution of the controversy will be prolonged, as we will see, until the interventions of Clement V, these clauses will allow the jurist affirm that there are no compulsory formalities if they are not necessary to establish the truth[34]. The summary rite that we will see in the *Dispendiosam* is only the result of the addition of the verba diminuentes iuris ordinem that are applied together in his famous clementina: thus, an accelerated alternative to the solemn rite is created. Called to solve special and often urgent cases, the popes follow the steps of their forerunners and repeat in the text of the Decretals these *verba*, crystallised in a final way in the norms of Clement V. The goal is still the same: simplifying an excessively articulated process and reducing time and legal costs, without scarifying the knowledge of the facts. Boniface VIII, pope between 1294 and 1303, in the decretal *Statuta quaedam*, establishes that the inquisition regarding persons suspect of heresy can be developed in a summary way, that is, through a reduced procedure according the *verba diminuentes iuris ordinem*[35].

4. The so-called clementines

Clement V bears in mind that his collection of decretals may have the name *Septimum*, given that they are supposed to follow Liber Sextus of Boniface VII. The contemporaries of the Pontiff use in fact this denomination, although, the one prevailing has been *Clementinae*, used by Johannes Andreć. The clementinae continued in force, as well as the rest of the Corpus Iuris, until the promulgation of the Canon Law Code in 1917, but they produce some legal effect, even after its derogation, in the limits of the c.6.

If there is a clear date of derogation, the date of coming into force of this collection of decretals is not pacific at all. The issue was discussed by the jurists of that time. According to the version of Johannes Andreć and Gancelin de Cassagnes -and reported by the historian of law Mollat- the constitution of the Wien Council (1311-1312), chaired by Clement V, was considered with the force of law by the jurists of the period. However, it seems that the redaction of some of these constitutions was defective and the application of some others was problematic. Therefore, Clement V had ordered, under penalty of excommunication, the devolution of the constitutions to the Apostolic Chamber, so that they could be destroyed or burnt[36].

After the reconstruction of Mollat, some jurists, appointed by the Pope, start revising the conciliar constitutions and gather, in one volume, other normative measures promulged before and after the celebration of the Council. Later, this volume

[33] CH. LEFEBVRE, *Les origines romaines*, op. cit., p. 179.

[34] A.SANTANGELO CORDANI, *La giurisprudenza*, op. cit. p. 358.

[35] «Statuta quaedam felicis recordationis Innocentii, Alexandri et Clementis praedecessorum nostrorum, quibusdam declaratis et additis, recensentes, concedimus quod in inquisitionis haereticae pravitatis negotio procedi possit simpliciter et de plano, et absquae advocatorum ac iudiciorum strepitu et figura. Iubemus tamen, quod, si accusatoribus vel testibus in causa haeresis intervenientibus seu deponentibus propter potentiam personarum, contra quas inquiritur, videant episcopus vel inquisitores grave periculum imminere, si contingat fieri publicationem nominum eorundem, ipsorum nomina no publlice, sed secreto coram diocesano episcopo, vel eo absente, ispius vicario, quando inquisitores procedunt, quando vero procedit episcopus, coram inquisitoribus, si haberi commode possit copia eorundem, ac nohilominus, sive episcopus sive inquisitores processerint, aliquibus aliis personis providis et honestis iurisque peritis, quas hoc vocari, et eis per totum processum, super quo deliberandum est, seriose manifestari ac integraliter explicari, et de ipsum consilio ad sententiam vel condenationem procedi volumus, exprimatur, sicque, (non obstante, quod illis, contra quos huiusmodi deposuerunt, nomina ipsorum non fuerit publicata), adhibeatur ad cognitionem iudicisinstruendam plena fides depositionibus testium eorundem. Et ut eorundem accusatorium et testium periculis efficaciua occurratur, et cautis in inquisitionis negotio procedatur: praesentis constitutionis autoritate permittimus, quod episcopus vel inquisitores secretum possint indicere illis, quibus, (ut praemissum est), processum huiusmodi explicabunt, et in eos, si arcana consilii seu processus, sibi sub secreto ab eisdem epicopo vel inquisitoribus patefacta, praeter eorum licentiam aliis patefecerint, excommunicationis sententia, quam ex secreti violatione ipso facto incurrant, (si eis expedire videbitur) promulgare, sic tamen, quod inquisitores episcopum, vel episcopus inquisitores non excommunicent hac de causa, sed ipsi ex iniuncto ex nunc a nobis sub virtute sanctae obedientiae districto praecepto ad secretum huiusmodi teneatur. Cessante vero periculo supra dicto, accusatorum et testium nomina, prout in aliis sit iudiciis, publicentur. Ceterumin his omnibus praecipimus tam episcopos quam inquisitores puram et providam intentionem habere, ne ad accusatorum vel testiumnomina supprimenda, ubi est securitas, periculum esse dicant, nec in eorum discrimen securitatem asserant, ubi tale periculum immineret, super hoc eorundem concientias onerantes. Constitutiones vero, ordinationes et mandata alia praedecessorum nostrorum, in negotio haereticae pravitatis facta, concessa seu etiam ad consulta responsa, quae constitutionibus supra scriptis, super eadem editis pravitate, non obvient, in suo volumus robore permanere» (VI. 5. 2. 20).

[36] G. Mollat, "Les clementines", *Dictionnaire de Droit canonique*, (R. Naz, ed.) vol. IV, Paris 1949, p. 637.

would have been read by the Pope in public audience. However, some problems seem to have appeared regarding the value given to the read measures: some jurists have considered that, apart from some specified exceptions, after four months, the *Clementinae* would have obtained a compulsory character, due to a pontifical decision. On the contrary, some others have argued that the decretals, even after being read publicly, would not have come into force until they were sent to the university[37].

We know that an official promulgation of the text was made because of the consistory of Monteaux the 21 of march of 1314. Moreover, there is evidence of the papa bulls of delivery of the collection to the universities of Orleans and Paris, before the death of Clement. But the delivery process to the universities stopped, or at least was seriously obstructed with the death of the Pontiff. Only with the intervention of John XXII all doubts were dissipated: in 1317, after three years of incertitude between the jurists and the Curia[38], the Pope renews the promulgation and sends the *Clementinae* to the universities, something that will undoubtedly give them a juridical value in a definitive way[39].

Thus, the constitutions related to the summary trial that we will analyse are contained in a collection of decrees published long after their promulgations. This fact allowed many jurists to know them, even before their first publication, although not in the official version: this is the case, among others, of the *Dispendiosam*[40]. As we will see, the previous knowledge of the text of this constitution is the reason of the birth of the *Saepe contigit*[41].

5. The decretals of Clement V regarding the summary procedure

The first clementina regarding the summary process is the Dispendiosam, promulged in 1312. In it, there are indicated the number of causes, identified as ratione materiae, in which the judge has the possibility of choosing the summary rite, regardless of how it has been known.

These causes, as a group, represent a considerable part of those included within the jurisdiction of the Church, and they can be divided into six categories: causes related to elections; those inherent to dispositions and postulates; causes related to the assignation of benefits and ecclesial offices[42]; matrimonial causes; those of usury; and, finally, causes in appeal[43]. In these areas, following the dispositions of Clement V, the judge could proceed *sipliciter et de plano*, *ac sine strepitu iudicii et figura*:

«Dispendiosam prorogationem litium, quam interdum ex subtili ordinis iudiciarii observatione causarum docet experientia provenire, restringere in subscriptis casibus cupientes, stauimus, ut in causis super electionibus, postulationibus vel provisionibus, aut super dignitatibus, personatibus, officiis, canonicatibus, vel praebendis seu quibusvis beneficiis ecclesiasticis, aut super decimis, ad quarum etiam praestationem possunt, qui tenetur ad eas, praemoniti censura ecclesiastica coerceri, nec non super matrimoniis vel usuris, et eas quoquo modo tangentibus, ventilandis, procedi valeat de cetero simpliciter et de plano, ac sine strepitu iudicii et figura, volentes non solum ad futura negotia, sed ad praesentia, et adhuc etiam per appellationem pendentia hoc extendi»[44].

Probably the original text of the Dispendiosam anticipates the application of the summary procedure to the causes regarding elections, dispositions and postulates, and the assignation of ecclesiastic benefits. The final text extends the application in matrimonial aspects and in those related to usury and tithes[45].

The decision of the Pontiff begins with the acknowledgment of a great problem affecting the justice administration in ecclesiastic judges: the slowness of the procedure, due to the "subtle observance" of the *ordo iudiciarum*, also with negative consequences in economic terms. With the term "subtle observation" it must be considered the formalist application of procedural norms, proposed by the doctrine, and, especially, by some unscrupulously forensic practices, only interested in professional

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37 G. Mollat, "Les clementines", 637

38 Ibidem

39 La promulgazione è rinnovata con la bolla *Quoniam nullam* de 25 ottobre 1317.

40 Clem. 2. 1. 2.

41 Clem., 5. 11. 2

42 That is, *dignitates*, *personatus*, *officia*, *canonicatus*, *praebendae*, *beneficia*.

43 A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", *La giustizia dei mercati fra diritto particolare e modelli universali (sec. XIV- XVI). Atti del seminario di studi (Bologna, 24 marzo 2006)*, (P. Bonacini – N. Sarti, eds.) Bologna 2008, p. 14.

44 Clem. 2. 1. 2 The procces can be found in Title I of *iudicis* in Book II.

45 Cfr. C. Lefebvre, "Les origines romaines de la procédure sommaire aux XII et XIII *s.*", *Ephemerides iuris canonici* 1 (1956), p. 195; A. Santangelo Cordani, *La Giurisprudenza Nella Rota Romana Nel Secolo XIV,* Milano 2001, p. 359, n.436. In relation to the history of the procedure in matrimonial causes in ecclesial judges, vid. A. Errera, "La procedura nei tribunali ecclesiastici in materia matrimoniale: cenni di un'evoluzione storica", *Amicitiae pignus. Studi in ricordo di Adriano Cavanna*, (A. Padoa- Scioppa – G. di Renzo Villata – G.P. Massetto, eds.) vol. 2, Milano 2003, pages 965-995, in particular pages 969-973, where the author refers to the application of the summary procedure, with a marked inquisitive accent, in matrimonial causes, traditionally treated in accusatory form. Really, despite the oscillations through the History, none of the two procedure models -accusatory and inquisitive- have prevailed over the other. In Middle Ages, there a collision between them, because of the introduction of the summary rite and its posterior application to matrimonial causes: the accusatory techniques sometimes mix with the new ones, and, in some other occasions, are substituted by the new inquisitive techniques. In Modern and Contemporary Ages, they are definitively mixed «allorché le modifiche apportate solo ad alcuni istituti e non al sistema processuale nel suo complesso generarono il singolare connubio – tuttora esistente – tra gli elementi processuali di più recente introduzione, nuovamente vicini ai princìpi di indole accusatoria consoni al modello processuale romano-canonico, e il superstite retaggio delle tecniche giudiziarie di carattere sommario risalenti alla tarda età medievale, espressione di un sistema di tipo schiettamente inquisitorio» *Ibidem*, p. 973. Regarding the application of the summary process to marriage nulity causes, vid. G. Minnucci, «Simpliciter et de plano, ac sine strepitu et figura iudicii» (Cfr. "Il processo di nullità matrimoniale vertente fra Giorgio Zaccarotto e Maddalena di Sicilia (Padova e Venezia 1455-1458)", *I processi matrimoniali degli archivi ecclesiastici italiani* (S. Seidel Menchi – D. Quaglioni, eds.), Vol. 2, Bologna 2001, pages 175-197.

profit, at the expense of the client[46]. The observation of the *experientia*, that is, the practice in ecclesiastic tribunals, is what produces the canonical reaction and the pontifical intervention through the emanation of a *constitution*.

On the other hand, the constitution *Saepe contingit*[47], probably issued between May 1312 and March 1314, is a responde to the difficulties of interpretation and application crated by the previous constitution. The juridical science of the period had complaint about it, what made necessary an clarification of which processes could be permitted and which ones must be followed when a case is decided following the summary procedure[48].

An important question is referred to the promulgation date of the *Saepe contingit*[49], that we know comes after the Dispendiosam, as long as it refers to the text of the first one[50], but its inclusion in the official collection and its correspondent publication will come under the pontificate of John XXII. This situation will allow that, as we have seen, some unauthorised editions exits during some time, being not always equal as the final edition. Being the *Saepe contingit* almost a manual of application, the possible variation among the versions will obtain a special relevance.

The procedure observed by Clement for the promulgation of legislative texts is the same that his forerunners followed[51]: a first step, consisting in the promulgation of the legislative measure in the council; the subsequent modification activity and the adjustment of the text, by specialist in law and in special commissions; and, finally, the final version, which came into force by its publication or the delivery of the revised text to the universities. The compulsory character of the measures was suspended between the promulgation and the publication[52].

This procedure of normative production lasted for some years after the Wien Council, chaired by Clement V, what caused that some unauthorised versions of the collection started to appear whereas the post-council commission tasked with the revision of the measures was still doing so. Consequently, the workers of the field of Law of the period were conscious from the beginning of the content of the clementinae, although not in their final version[53]. The revisions were completed the 21st of March of 1314, when the Pope Clement V read publicly the normative text during the consistory of Monteux. However, the Eternal Father summoned Clement the 20th of April of 1314, before the publication through the distribution of copies of the collection to the university. The definitive publication was made by the Pope John XXII, three years later, in the habitual form, the delivery of the collection to the universities, after a new, but not very incisive revision[54], with the papa bull *Quoniam nulla* the 1st of November of 1317. But he did not solve the doubts among

[46] A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 16.

[47] Clem., 5. 11. 2, *Corpus Iuris Canonici. Decretalium Collectiones*, p. 1200: «Saepe contingit, quod causas committimus, et in earum aliquibus simpliciter et de plano, ac sine strepitu et figura iudicii procedi mandamus; de quorum significatione verborum a multis contenditur, et qualiter procedi debeat dubitatur. Nos autem, dubitationem huiusmodi, quantum nobis est possibile, decidere cupientes, hac in perpetuum valitura constitutione sancimus, ut iudex, cui taliter causam committimus, necessario libellum non exigat, litis contestationem non postulet, tempore etiam feriarum, ob necessitates hominum indultarum a iure, procedere valeat, amputet dilationum materiam, litem, quantum poterit, faciam breviorem, exceptiones, appellationes dilatorias et frustratorias repellendum, partium, advocatorum et procuratorum contentiones et iurgia, testiumque superfluam moltitudinem refrenando. Non sic tamen iudex litem abbreviet, quin probationes necessariae et defensiones legitimae admittantur. Citationem vero ac praestationem iuramenti de calumnia vel malitia, sive de veritate dicenda, ne veritas occultetur, per commissionem huiusmodi intelligimus non excludi.Verum quia iuxta petitionis forma pronunciatio sequi debet: pro parte agentis, et etiam rei, si quid petere voluerit, et in ipso litis exordio petitio facienda sive in scriptis sive verbo, actis tamen continuo, ut super quibus positiones et articuli formari debeant, possit haberi plenior certitudo, et ut fiat diffinitio clarior, inserenda. Et quia positiones ad faciliorem expeditionem litium propter partium confessiones, et articulos ob clariorem probationem usus longaevus in causis admisit: nos, usum huiusmodi observari volentes, statuimus, ut iudex, sic deputatus a nobis, nisi aliud de partium voluntate procedat, ad dandum simul utrosque terminum dare possit, et ad exhibendum omnia acta et munimenta, quibus partes uti volunt in causa, post dationem articulorum diem certam, quandocunque sibi videbitur, valeat assignare, eo salvo, quod, ubi remissionem fieri contingeret, pro testibus producendis possint etiam instrumenta produci, assignatione huiusmodi non obstante. Interrogabit etiam partes sive ad eaum instantiam, sive ex officio, ubicunque hoc aequitas suadebit. Sententiam vero diffinitivam, citatis ad id, licet non peremptorio, partibus, in scriptis, et, prout magis sibi placuerit, stans vel sedens proferat, etiam (si ei videbitur) conclusione non facta, prout ex petitione et probatione.Quae omnia etiam in illis casibus, in quibus per aliam constitutionem nostram vel alias procedi potest simpliciter et de plano ac sine strepitu et figura iudicii volumus observari. Si tamen in praemissis casibus solennis ordo in toto vel in parte non contradicentibus partibus observetur: non erit processus propter hoc irritus, nec etiam irritandus. Data Avinion. XIII.Kal.Decembr.Pont.nostri.Ao.II».

[48] The explicative carácter of the procedure was confirmed by the fact that the Saepe contingit is placed in title XI of the de verborum significationem in Book V, and it is the last clementina of the collection.

[49] This aspect has been studied by S. Kuttner, "The Date of the Consitution 'Saepe', the Vatican Manuscripts and the Roman Edition of the Clementines", *Medieval Councils, Decretals, and Collections of Canon Law: selected essays*, London 1980, pp. 427-452; D. Williman, "Summary Justice in the Avignonese Camera", *Proceedings of the Sixth International Congress of Medieval Canon Law* (S. Kuttner – K. Pennington, eds.), Città del Vaticano 1985, p. 438 e C. Lefebvre, "Les origines romaines de la procédure sommaire aux XII et XIII *s.*", 149-150, n. 3.

[50] According to the *Saepe contingit*: «*Quae omnia etiam in illis casibus, in quibus per aliam constitutionem nostram* […] *volumus observari*». The doctrine of the time, as well as modern historiography, presents no doubts about the fact that Clement V refers to the *Dispendiosam*.

[51] In particular, Innocent Iv was the one applied for the first time this way of "law-making" divided into two parts, promulgation and publication. Thus, the measures of the I Council of Lyon (1245) were promulged and published. Gregory X follows this way with the promulgation of the legislative measures of the II Council of Lyon in 1274 (Cfr. S. Kuttner, "The Date of the Consitution 'Saepe', the Vatican Manuscripts and the Roman Edition of the Clementines" p.428).

[52] G. Mollat, "Les clementines", p. 637. The autor also shows the passage of a manuscript found in Munich that, among other things, talks about the ceremonial observed by Clement V as the legislator of the Universal Church. In this manuscript, the Pontiff establishes that the not read constitutions must not be considered as published, and the fact of the publication does not make them come into force until they are not sent to the universities. In this sense, see E. Müller, *Das Konzil von Vienne, 1311-1312*, Münster 1934, pages 678 and 687.

[53] S. Kuttner, "The Date of the Consitution 'Saepe', the Vatican Manuscripts and the Roman Edition of the Clementines", p. 429

[54] Cfr. S. Kuttner, "The Date of the Consitution 'Saepe', the Vatican Manuscripts and the Roman Edition of the Clementines", p. 430.

the canonists, and even the Curia[55], about the juridical value of the collection during that period.

It is not clear in which moment through this process of normative elaboration the *Saepe contingit* was inserted in the Clementina, with the purpose of establishing -through a numerical declaration- what the summary procedure was, authorised in those cases referred by the *Dispendiosam* and in the rest of the normative. According to the historiographic reconstruction of Stephan Kuttner, the *Saepe Contingit* was included in the collection only in the last stage of its development[56], as is shown by the fact that this constitution is not included in in the Title *De iudiciis*, after the *Dispendiosam*, becoming then an explanation, but at the end of the clementina and under omni-comprehensive title *De verborum significatione*[57]. The only useful information about the genesis of the *Saepe contingit* is given by Johannes Andreć and his ordinary gloss to the Clementinae[58].

In the light of these observations, Kuttner states that the Saepe contingit must be dated between the 6th of May of 1312 -date of the third session of the Wien Council, in which the text of the Dipendiosam is read- and the 21st of March, 1314[59], date of the consistory of Monteux, when the text of the clementinae is read[60].

The adjective "summary", referred to the judicial procedures, is used in a polysemic way by the doctrine, the jurisprudence and the common legislator of the particular legal system of the period. A plenary or summary (*de plano*) procedure is understood as the one carried out by the abbreviated rite, that is, without accomplishing all the requirements established by the solemn procedure. The simplification of the procedure, in this case, will not affect the probationary system, preserving in all senses the full knowledge of the facts. But also, summary trial will be understood as the procedure of short cognition or *summatim*, which anticipates a reduction of the *ordo solemnis*, something that will also affect the regulation of the evidences. In this case, regarding the juridical decision, an incomplete evidence is enough (*semiplena*). The *Saepe contingit* disciplines the plenary procedure: in fact, by elemental exigencies of justice, the pope reduces the number of formalities of the rite, as well as the cost and time, but always by the exigency of the justice itself, prescribing that the full cognition of the facts, on which the pretension of the process is based, must prevail intact[61].

In the text of the constitution, the Pontiff points out the procedural elements that may be derogated, after the evaluation by the judge regarding their possible omission: thus, the *libello introductorio* could not be necessary (*necessario libellum non exigat*), and did not require *litis Contestatio* (*litis contestationem non postulet*). Regarding the timing, the judge could proceed even in holidays (if they are holidays authorised by the Law *ob necessitates hominum*, although not in the case of sacred days: *tempore etiam feriarum, ob necessitates hominum indultarum a iure, procedere valeat*). In general, the reduction of the timing was allowed (*amputet dilationum materiam, litem, poterit cuántica, breviorem faciam*) and, in particular, the judge could reject the merely dilatory and frustrating exceptions and appeals (*exceptiones, appellationes dilatorias et frustratorias repellendum*), reducing the reciprocal answers of the parts and the disputes they had among them, their advocates and barristers (*partium, advocatorum et procuratorum contentiones et iurgia* […] *refrenando*). At the same time, and always with the intention of the abbreviating and avoiding redundancy, the number of witnesses could be reduced to the essential ones (*testiumque superfluam moltitudinem refrenando*), assigning only one due date for the presentation of the positions and of the *articuli* (*statuimus, ut… iudex a dandum simul utrosque - positiones and articles - terminum dar possit*), and a second date in which all parts produce the actions and defences supporting their procedural aim (*a exhibendum et omnia et acta munimenta […] valeat assignare*); the judicial interrogation must have been done legal or at the request of the parts, according to what was suggested by equity (*Interrogabit etiam partes sive ad eaum instantiam, sive ex officio, ubicunque hoc aequitas suadebit*) and the *conclusio in causa* could be omitted (*etiam* […] *conclusione non facta*). Finally, the parts must have been appointed for the reading of the sentence (*citatis ad id* […] *partibus*), although the prescription was not compulsory (*licet non perentorio*), having the magistrate the possibility of deciding of pronouncing the sentence *stans sedens vel*.

Other procedural formalities and institutes, however, cannot be omitted, so that the judicial decision takes into account the truth, that could no doubt be affected if the right to defence is not granted. That is the reason why Clement V establishes the no derogation of the citation (*Citationem […] intelligimus no excludi*). The *petitio*, moreover, must be written, and if the elaboration of the libel was omitted, the public notary is the one who must verbalise the pretension of the actor expressed in oral form and it must be attached to the records (*petitio facienda siva en scriptis sive verbo, Actis tamen continuo*). The judge, in turn, must require the oath or the defamation of malice (that is, a promise of fighting with the certainty of being right and not with the intention of defaming the other part, and behaving loyally: *praestationem iuramenti de calumnia vel malitia* […] *intelligimus non excludi*), or the *veritate Dicenda* oath so that the truth

[55] G. Mollat, "Les clementines", p. 637.

[56] Cfr. S. Kuttner, "The Date of the Consitution 'Saepe', the Vatican Manuscripts and the Roman Edition of the Clementines", pages 429-430.

[57] Idem.

[58] We will address it in the next point. The canonist states that he is the intellectual father of the declaratory constitution, as long as it would have required the approbation when the text of the Dispendiosam became public. He does not reveal the source of the knowledge of the text of the Dispendiosam, simply doing a general reference to the Constitution in relation to the summary trial he knows that has been published by the Wien Council: probably the canonist had some access to one of the unauthorised copies of the collection that, shortly after the Council, started to appear among the professionals of justice.

[59] S. Kuttner, "The Date of the Consitution 'Saepe', the Vatican Manuscripts and the Roman Edition of the Clementines", p. 432, dove l'Autore, a proposito della datazione esatta della costituzione, aggiunge «probably closer to the later date»

[60] As well as it publication, three years later and adding some little changes by the John XXII.

[61] Cfr. E. Baluze, *Vitae paparum Avenionensium*, Paris, 1917, t. II, p. 169.

was not concealed (*ne veritas occultetur*). The judge, essentially, could not reduce the *lite* up to the point of not admitting the necessary evidence and self-defence (*Non sic tamen iudex litem abbreviet, quin probationes necessariae et defensiones legitimae admittantur*). The definitive sentence must be written (*in scriptis*) and must answer the question and agree with the results of the records (*prout ex petitione et probatione*).

These are, then, the procedural norms that the Pontiff wants to be observated any time the judge has to solve the controversy *simpliciter et de plano*, *sine strepitu ac figura iudicii*, for the application of the *Dispendiosam* as well as in other cases (*in illis casibus, in quibus per aliam constitutionem nostram vel alias*). In the cases established by the Dispendiosam, however, the judge cannot decide the application of the solemn rite, or the briefer procedure, as a whole or only a part (*ordo in toto vel in parte* […] *observetur*), if the parts do not oppose (*non contradicentibus partibus*).

The abbreviated procedure, even being different, stills remains in a position of necessary correlation and osmosis regarding the ordinary procedure, which indicates the fundamental structure to which an anthology of derogations is attached. The sum of them describes a new way of the procedure [62].

In the praxis followed by the canonical tribunals, it was common the distinction between two categories of causes: the cases identified as *ratione materiae* by the *Dispendiosam*, where the judge also had the chance of deciding which one was the ritual to proceed, selecting the summary procedure instead of the ordinary one [63]. The second one, the secular causes, in which the plaintiff could ask the Curia that justice was done only taken *facti veritate inspecta*, that is, the application of the shorter procedure. If they were causes not included in the lists of the *Dispendiosam*, the faculty of proceeding through a summary procedure was given by the Roman Pontiff, thanks to a grace measure that required a petition of the interested part. When the petition was accepted, the vice-chancellor added to the judicial petition the formula "*audiat talis et procedat summarie et c.*"; whereas, if it was not given, the motion of the party was fixed to the formula "*audiat talis et iustitiam faciat*" [64].

The *Dispendiosam* and the *Saepe contingit* share a common characteristic: none of them is a una *epistula decretalis*. They do not belong to the category of the most employed sources of Canon Law in the XII and XIII centuries, and, therefore, they do not answer to a particular case, and there are no judicial decisions or interpretations of a previous law. On the contrary, with these constitutions [65], the intention is the production of *ius novum*, so that it could be a more functional tool of the canonical procedure. In this sense, the two clementinae are an acid test of the maturity of Canon Law, that can already be considered as an extended and well established judicial organisation. It can count, on the one hand, on the juridical science, with schools of diverse origin and with a mature and reflexive doctrinal opinion, and, on the other hand, on a legislator ready to respond to the emergent demands of the practice and the doctrine [66].

6. The figure of the judge in the abbreviated procedure

By virtue of the dispositions of Clement V, and according to the current dispositions in the normative approach of his forerunners, the judge has more power to leave the way of the ordo *iudiciarius* modifying the *iter* of the procedure aiming to shorten the procedure, less expensive and, in short, fairer. The *arbitrium iudicis* represents the main product of the use of *verba diminuentia iuris ordinem* [67]; a power that, however, must be exercised taking into account the specific case of the trial.

The judge, directing the controversy with the form and time estimated as the more convenient one, omitting the accomplishment of some norms from the solemn rite, becomes the *dominus* of the procedure. He was enabled to admit or not the dilatory exceptions [68], decided which means of evidences were allowed, if a reduction of the number of witnesses was necessary [69], fixing it in what he thought reasonable (being always, at least, two) [70] and establishing when the investigation was completed and the step to the decisive stage was to be taken, avoiding unnecessary delays in the procedure [71].

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[62] A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio" p. 22. The autor defends that the finding of the exceptions in the ordinary legislation mean tan opportunity for the doctrine, called to go deeper in the procedural institutes already mentioned, with the result of a better elaboration of the theory of the ordinary procedure itself. The latter, in fact, keeps evolving: the ordo iudiciorum is a relative concept, not an absolute one. It is a *consensus in practica* that is constantly redifined, but still preserving some basic elements. (Cfr. L. Fowler-Magerl, *Ordines iudiciarii and Libelli de ordine iudiciorum (From the Middle of the Twelfth to the End of the Fifteenth Century)*, Turnhout 1994, p. 20.

[63] A. Santangelo Cordani, *La giurisprudenza*, p. 363 e "Aspetti della procedura sommaria nella prassi rotale trecentesca", *Proceedings of the Eleventh International Congress of Medieval Canon Law* (M. Bellomo – O. Condorelli, eds.), Città del Vaticano 2006, p. 705.

[64] A. Santangelo Cordani, La giurisprudenza, p. 363, e "Aspetti della procedura sommaria nella prassi rotale trecentesca", p. 705, donde cita la *Antiqua 10 de rescriptis*, in the *Novae de rescriptis*, especially in number 28: «Requiritur ad summarium processum, per quem tolluntur aliqua substantialia iuris, quod id expresse committatur, casibus in iure expressis duntaxat exceptis, in quibus lex dat potestatem et ordinem sic procedendi, ut in cle. dispendiosam. de iud. Quo denim requiratur expressio et specialis commissio ac mandatum Papale ad procedendum summarie, est tex. Clarus in cle. saepe. de ver. sig.» Rota Romana, *Decisiones Novae et Antiquae*, p. 38.

[65] In the case of the Saepe contingit, it is declared by the text itself. See note 47.

[66] A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 15.

[67] A. Santangelo Cordani, *La giurisprudenza*, p. 362.

[68] Cfr. *Saepe contingit*: «…exceptiones, appellationes dilatorias repellandum…», Clem., 5. 11. 2.

[69] Cfr. *Saepe contingit*: «…testiumque superfluam moltitudinem refrenando…», Clem., 5. 11. 2.

[70] Cfr. *Saepe contingit:* «…statuimus, ut iudex, sic deputatus a nobis, nisi aliud de partium voluntate procedat, ad dandum simul utrosque terminum dare possit, et ad exhibendum omnia acta et munimenta, quibus partes uti volunt in causa, post dationem articulorum diem certam, quandocunque sibi videbitur, valeat assignare…», Clem., 5. 11. 2.

[71] Cfr. *Saepe contingit:*«…amputet dilationum materiam, litem, quantum poterit, faciam breviorem…», Clem., 5. 11. 2.

The attribution of the role of *dominus*, or the one who discretionally manages the development of the trial, establishes the change from a privative conception of the procedure to a publicist one, at least regarding the causes in which the use of the abbreviated procedure was allowed[72]. In this sense, the fact that the *contingit Saepe*, in its literal interpretation, implied the participation of the parts in the election of the abbreviated procedure[73]. In fact, in the clementina, it can be read: «*si tamen in praemissis casibus solemnis ordo iudiciarius in toto vel in parte non contradicentibus partibus observatur, non erit processus propter hoc irritus nec etiam irritandus*»[74]. Therefore, according to the text of the constitution, the abbreviated procedure could be applied if the parts did not oppose the election of the judge.

The normative obstacle to the autonomy of the judge in the election of the rite to be observed in the cause, was surpassed by Johannes Andreć, in his gloss of the clementina[75]. The canonist, in fact, specified that when the election of the abbreviated procedure was under the authority of the judge, as it is the case, by the reasons exposed in the *Dispendiosam*, the decision of proceeding this way was left to his will: "«*quando sic procedere non est in iudicis potestate* […] *secus si sic procedere voluntati iudicis relinquatur ut in costitutionem Dispendiosam*»[76]. Next, Johannes Andreć distinguished the cases in which the election of the rite fell on the p*otestas iudicis* by express normative disposition -as it was the case of the reasons indicated in the *Dispendiosam*- from the rest of the causes, in which the election of the summary procedure was only possible without the opposition of the interested parts. In turn, in the gloss *Irritandus*, the canonist specifies that *sine figura iudicii* it cannot continue, that is, according to the summary procedure, when this faculty is not authorised by law or the commission of the cause, even if they expressly require treating the lite with the abbreviated rite: «*si in causis quae requirunt figuram iudicii proceduntur, non contradicentibus partibus, sine figura, non teneret processus: idem si expresse consentirent*»[77].

Therefore, according to Johannes Andreć, the eligibility of the summary rite was reserved to the legislator. When, later, the summary rite was permitted in the causes with a significant public relevance, like those enumerated in the *Dispendiosam*, only the judge had the faculty to appeal, after having considered the circumstances of the cause and the real possibility of knowing the truth. In this cases, the legislator considers appropriate not only accelerating the procedure, but also the fact of giving the judge a wider scope for action. In some other cases, however, the possibility of proceeding faster existed in order to benefit the particular interests of the parts: in these cases, the parts had the possibility of conditioning the election of the rite, given that the use of the abbreviated procedure is only possible if there is no contrary will of the parts (*non contradicentibus partibus*)[78].

The *arbitrium iudicis*, however, is not absolute at all: in fact, it remains linked to the exigencies of justice, truth and equity. In other words, the procedure, even being managed by the discretional opinion of the judge, must preserve its vocation to be the place in which justice is given[79]. This aspect is particularly shown in the comment of the *contingit Saepe* in the canonist doctrine. For instance, Francesco Zabarella, in his comment to the clementina, affirmed that in any case the judicial power can be exercised against justice and that «*potestas habens arbitrium potest illa tantum omittere quae respiciunt solemnitatem, non ea quae impediretur cognitio veritatis*»[80]: the *arbitrium iudicis* could only aim to the reduction of the requirements constituting the solemnity frame of the ritual, but the full knowledge of the facts was not dispensable. When commenting the same sentence of the *Saepe contingit*, Giorgio Natta says clearly: *potestas habens arbitrium in procedendo non potest iustitiam denegare*»[81]. The exercise of the *arbitrium* could not produce the denial of the justice. Finally, Johannes Andreć, in the explanation of the expression *defensiones legitimae* of the constitution, made clear that the attribution of the *arbitrium* does not remove the justice or the right to defence of the parts.[82]

7. The comments of Giovani d'Andrea to the *saepe contingit*

We have already mentioned the fact that the famous canonist realised, through the reading of the *Dispendiosam* in the third session of the Wien Council, that it was necessary the redaction of an explicative text, in which it was explained in a precise way the changes in the *ordo iudiciaris solemnis* when a cause could be judged *simpliciter et de plano*, *sine strepitu ac figura iudicii*:

«…hanc costitutionem verborum blanditiis non egentem, glossandam aggredior, de cui causa impulsiva pars fui. Ex quo enim scivi mandasse concilium Viennensem supra de iudiciis dispendiosam, existimans non tantum utile sed summe necessarium, verba de quibus hic loquimur declarari, dominos ac peritos curiae sollecitavi saepius pro constitutione declaratoria procuranda, quae desiderata se nunc exhibet. Et in summa determinat et declarat quod significent haec verba inserta in iudicialibus commissionibus, quae fiunt a principe vel a iure,

[72] M. Meccarelli, Arbitrium. *Un aspetto sistematico degli ordinamenti giuridici in età di diritto comune*, Milano 1998, pages 264.
[73] M. Meccarelli, Arbitrium. *Un aspetto sistematico,* p. 265.
[74] Clem., 5. 11. 2.
[75] M. Meccarelli, Arbitrium. *Un aspetto sistematic…o*, p. 265.
[76] Johannes Andreæ, *Constitutiones Clementis Quinti quas Clementinas vocant, diligenter et accurate recognitae, atque emendatae…*, Venetiis 1572, c. *Saepe*, tit. *De verborum significatione*, glo. *Non contradicentibus*, fol.184-185.
[77] Johannes Andreæ, *Constitutiones Clementis Quinti quas Clementinas vocant, diligenter et accurate recognitae, atque emendatae…*, Venetiis 1572, c. *Saepe*, tit. *De verborum significatione*, glo. *Non contradicentibus*, fol.184-185.
[78] M. Meccarelli, Arbitrium. *Un aspetto sistematico,* p. 266.
[79] Ibidem, p. 270, n. 39.
[80] F. Zabarella, *Francisci Zabarellae Patavini, card. Folorentini…In Clementinarum volumen commentaria*, Venetiis, 1579, c. *Saepae*, tit. *De verborum significatione*, § *Non sic tamen*, n. 5.
[81] G. Natta, *Georgii Nattae Egragia atque insignis admodum repetitio in Clementinam Saepe*, Bononiae 1584, § *Non sic tamen*, glo. in verbo defensiones, n. 6.
[82] Johannes Andreæ, *Constitutiones Clementis Quinti*, c. *Saepe*, tit. *De verborum significationem*, fol. 182

scilicet quod procedatur simpliciter et de plano, et sine strepitu et figura iudicii»[83].

Therefore, the glosser defines the *causa impulsiva* of the constitution he is ready to gloss. The constitution was asked to the experts of the Curia since it was necessary an explanation of the clausas *diminuentes iuris ordinem*: that, according to the exigencies coming from the jurist of Bologna, *determinat et declarant* the mening of the expressions of the commissions in the causes, sometimes by order of the prince, by virtue of the prescription of law. On the other hand, the canonist, in the same commentary, specifies that the measure must be classified as *constitution* and not as *sanction*, since there are no sanctions associated to the unfulfillment of the dispositions contained in itself[84].

This appeal to the legislator is new: medieval jurists, on the basis of Justinian juridical concepts and rules, used these instruments in order to develop a creative solution for the problems of interpretation and application of the law, fulfilling possible gaps and allowing the whole system to organically evolve and independently from the top[85]. In other words, the interpretation of the jurists, based on schemes, concepts and categories from the past and the model based on the changing needs of the society, was the principal responsible of the necessary evolution of the legal system of that time[86]. However, in this case, the famous canonist finds a gap that, in his opinion, can only solved with the intervention of the legislator[87]. In fact, the norms derived from Justinian and the texts of the canonical collections are not enough to clearly rebuild the meaning of all causes *diminuens iuris ordinem*. In particular, Roman Law, even though having given the basic terminology of the abbreviated procedure, has not known one single unitary summary procedure, but it only gives a plurality of abbreviations of the ordinary procedure in specific cases[88]. However, as some regulatory measures contained in the canonical collections, the clear intention of the legislator to conceive a new procedure can be deduced, different from the solemn one[89]. Although, the meaning attributed to each of the *verba*, far from the more general intention to reduce the cost and timing of the procedure, must be fully clear, and that is not easy to obtain from the *Dispendiosam*. Johannes Andreć considers that gap very wide regarding the requirements of the object of each clause, given that the legislator may leave this task of specification for doctrine: the canonist asks himself how the norm could be derived via interpretation, according to which the *libelo* and the *litiscontestatio* can be omitted without affecting the validity of the procedure, and its exclusion from the category *substantialia iudiciorum*. On the other hand, he asks how, on the basis of one single interpretation, we can make clear that the question of the oath of the opponents is nor revocable, or the writing of the sentence. Then, the doubts about the clauses can only be solved by the legislator who approved the *Dispendiosam*: «*ad eum enim promulgationem talium iurium vel rescriptorum hoc spectabat, cum* […] *sine dubio ad hoc dubium tollendum glossae non sufficiebant*»[90].

Following the comments of the *Saepe contingit*, Johannes Andreć clarifies some aspects of the new procedure, pointing which ones are the derogations of the *ordo solemnis*. In what is referred to the scope of the *constitution*, D'Andrea establishes the field of application of the clementina: it is only applicable if there is a *coniuncto* use of the *clausolae* or if the clauses, even different, are meant to be copulatively inserted in the *comissio* (application *disiunta pro coniuncta*)[91].

In the text of the *Saepe contingit*, there is a reference to the citation as one of the *subtantilia* ("*… citetionem intelligimus no*

[83] Johannes Andreæ, gl. *Saepe contingit*, ad Clem. 5. 11. 2, *De verborum significatione*, cap. II, *Saepe contingit*.

[84] *Ibidem*. Cfr. A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 17, n. 11.

[85] For Grossi, from XI century, the political power is considered as *iurisdictio*, understood as a synthesis of power, among which the judicial one has an important position. The prince and, in general, the vertex of the political power is firstly: *iudex*, whose role is mainly *dicere ius*, fulfilling a law whose existence is taken for granted. Therefore, the law must be produced from other sources, and in this evolution juridical science must have an important role. (Cfr. P. Grossi, *L'ordine giuridico medievale*, Roma-Bari, 2006, pages 130.)

[86] On the role of jurisprudence un the génesis of common law, vid. A. Cavanna, *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*, t. 1, Milano 1982, pp. 101 y ss. En síntesis, sostiene que «nel suo sforzo di adeguamento del testo normativo alla realtà sociale, l'opera interpretativa della giurisprudenza medievale si rivela […] non solo potentemente evolutiva, ma sostanzialmente creativa», *ibidem*, p. 102. Véase también M. Srbiccoli, *L'interpretazione dello Statuto. Contributo allo studio della funzione dei giuristi nell'età comunale*, Milano, 1969; A. Cavanna, "Il ruolo del giurista nell'età del diritto comune (Un'occasione di riflessione sull'identità del giurista di oggi)", *Studia et Documenta Historiae Iuris*, 44 (1978), pp. 95-130; A. Padoa-Schioppa, "Sul ruolo dei giuristi nell'età del diritto comune: un problema aperto, en Il diritto comune e la tradizione giuridica europea", *Atti del convegno di studi in onore di G. Ermini (Perugia, 30-31 ottobre 1976)* Perugia 1980, pp. 155-166.

[87] A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 18, n. 13 riporta le parole del giurista a questo proposito: Johannes Andreæ, *gl. Cupientes,* en *c. Saepe contingit*, Clem. *De verborum significatione* [Clem. 5. 11. 2]: «Ad eum enim promulgationem talium iurium vel rescriptorum hoc spectabat…cum suis concor. et sine dubio ad hoc dubium tollendum glossae non sufficiebant, sed necessaria erat constitutio, ut per inferiora patebit: quis enim glossando probare potuisset plus requiri, iuramentum praestari, vel sententiam in scriptis ferri, quam litem contestari; idem in similibus».

[88] From Roman Law, some procedures with an authentic summary character derive, having an example given by A. A. Díaz-Bautista Cremades, "La ejecución de sentencias dinerarias en las Partidas", *Revista General del Derechoh Romano* 19 (2012), pages 1-19.

[89] Cfr. A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 18; see also A. Lattes, *Studi di diritto statutario*, pages 10-11, where it is stated that the clauses *diminuentes iuris ordinem* were already present in the *Corpus Iuris Civilis*, but very often they refer to authentically summary acts, or *semi-plena cognition* due to the fact that in Roman Law, there is not a form procedure form that could called plenary or accelerated. Lefebvre shares this opinion: (Cfr. C. Lefebvre, "Les origines romaines de la procédure sommaire aux XII et XIII *s.*", p. 153; C. Lefebvre, "Juges savants en Europe, XII-XVI siécle. L'apport des jusistes savants au developpement de l'organisation judiciaire", *Ephemerides iuris canonici*, 22 (1966), p., 93).

[90] Johannes Andreæ, *gl. Cupientes,*

[91] Johannes Andreæ, *Constitutiones Clementi quinti quas Clementinas vocant,* Venetiis 1572, c. *Saepe*, tit. *De verborum significatione*, glo. *Et figura*, f. 180.

excludi"): the fact that the term "*citatio*" is found in singular, allows the canonist to affirm that only one citation is enough to grant the validity of the procedure, instead of the three ones prescribed in the ordinary procedure [92].

The gloss of Johannes Andreæ also gives a significative contribution to the clementine constitution in what refers to the reconvention [93], since the admission of the *reconvention* in the abbreviated procedure was a controversial topic at that time [94]. If the cause could be treated with the abbreviated rite *ratione materia,* then, the nature of the cause itself is the one that impedes the reconvention discussion through the summary process, so it must face the question in an independent trial. Nevertheless, if the cause itself is subject to discussion with the ordinary procedure, but the commission act allows the judge the knowledge with the ordinary procedure, the reconvention may probably be summarily treated in particular cases: that is, when the Pontiff has legally granted the summary processing of the cause, or if the part intends to renounce the ordinary knowledge of the reconvention [95].

In what concerns the exercise of the right to defence and the possibility of producing evidence in a trial to support a procedural position, the *Saepe contingit* says: "*No sic tamen iudex litem abbreviet, quin et probationes necessariae defensiones legitimae admittantur*" [96]. This disposition supports the conclusion that the clementina introduces an accelerated knowledge, but *pleno* does not sacrifices the plain evidence or the defence from the affirmations made in the trial [97]. In this sense, Johannes Andreć shows the criteria to distinguish the non-compulsory procedural acts and, therefore, the ones that are susceptible of derogation, and the essential documents for the validity of the procedure. The *acta causae* (or *acta litis*) cannot be derogated, but, on the contrary, the *acta iudicii* remains in the availability *dell'arbitrium iudicis*. *acta causae* or *litis* will be those acts related to the fact invocated in the trial, such as confessions, testimonies and the rest (many of them are inherent to the examining stage of the procedure) that *respiciunt factum* [98]. However, the *acta iudicii* are the strictly procedural ones, something closely linked to the dispute in questions, such as the citation (although it has a great importance in relation to the exercise of the right of defence) or the procedural bond. In the new simplified procedure, the judge has certain scope of action in comparison with these procedural acts, having to resolve the controversy *sine figura iudicii*, even though it is clear the necessity of the full evidence of the facts justifying the *petitum* in facts, as well as legally [99].

Although that is not a novelty introduced by the newborn procedure -given that they belong to a long practice dating from the times of Gregory IX [100]- in the gloss of Johannes Andreæ the *positiones* and the *articuli* play an essential role that reduce the search of the resultant facts, and, consequently, the concentration of the timing of the procedure. The *positiones* have exactly the objective of excluding from the investigation the facts that are affirmed by one part and not replied by the other: in other words, the pacific acts that raise the burden of evidence, having to proof the veracity of accusations denied by the other part. The *articuli*, however, are the questions in which the *thema decidendum* divides, requiring the proof of each one. This is a technique for the rationalisation of the in examining stage, avoiding it to be disperse and infructuous [101].

8. The constitution *ad reprimendum* and the relection of Bartolo de Sassoferrato

As we have seen, Johannes Andreć is the intellectual father of the *Saepe contingit*, and he made the wider commentary on the clementina in question. His contribution was taken by many jurists from one or another law, constituting the main basis of the study and deepening of the abbreviated procedure through the following centuries. In fact, the *Saepe contingit* soon attracts the attention of civil jurists because of an imperial constitution, that presents in the body of the text the clauses *diminuentes iuris ordinem*, from which the effective content [102].

In April 1313, Henry VII of Luxembourg is in the Tuscany, fighting the rebels of the League of the Guelphs. In this occasion, and precisely the 2nd of April, the emperor promulges two constitutions, one on the repression of the crime of treason, the

[92] Johannes Andreæ, gl. *Citationem*, en c. *Saepe contingit*, Clem., *De verborum significatione*.
[93] Johannes Andreæ, *glo. Si quid petere voluerit*, en *c. Saepe contingit*, Clem. *De verborum significatione*.
[94] Cfr. A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 23.
[95] Cfr. A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 23.
[96] Clem. 5. 11. 2.
[97] Fairén Guillén talks about a merely formal acceleration of the procedure, expressing his doubts about the fact that the new procedure could have had some effects in the procedural periods. (V. Fairén Guillén, "Algunos fragmentos romanos sobre el summatim", *Estudios jurídicos en homenaje al Profesor Luis Díaz-Picazo*, (A. Cabanillas Sánchez, ed.) vol. 4 (Derecho civil: derecho de sucesiones, otras materias), Madrid 2003, p. 6231).
[98] Johannes Andreæ, gl. *Defensiones legitimae*, en *c. Saepe contingit*, Clem. *De verborum significatione* [Clem. 5. 11. 2].
[99] A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 25.
[100] Ibidem, p. 26.
[101] Cfr. A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 27. Regarding the positiones, Cfr. M. Vallerani, "I fatti nella logica del processo medievale. Note introduttive", *Quaderni storici* 3 (2001), pp. 665-693. Regarding the medieval logic in the Roman-canonical procedure, A. Giuliani, *El concetto di prova. Contributo alla logica giuridica*, Milano 1961; Id., "L'élément "juridique" dans la logique médiévale", *Logique e Analyse*, N.S., 6 (1963), pp. 540-570.
[102] Cfr. A. Engelmann, *A History of continental civil procedure*, New York 1969, p. 791., underlining how the clementinae *Dispendiosam* e *Saepe contingit* are a model of the practical application of the *Ad reprimendum*: «*The two decretals were welcomed in the civil practice and formed a model for the Constitution "*Ad Reprimendum" *of Henry VII*».

Edictum de crimine lesae maiestatis, that is constitution *Ad Reprimendum* [103].

The new criminal procedure [104], immediately applicable in special cases- that is, when it can be proceed against persons charged with treason- it is established that the judge can act *per accusationem*, *inquisitionem*, or *denunciationem*, following an abbreviated procedure ((*summarie et de plano, sine strepitu et figura iudicii*). When the person accused, appointed by a message, letter or a public edict, does not appear in person or legitimately within the established time, the judge can act in absence, something that anticipates the collection of testimonial evidences, their publication and the fulfilment of procedural acts after the definitive sentence and its possible execution.

Soon after, the 26th of April, a condemnatory sentence of deposition and death will be pronounced against Robert d'Anjou, king of Naples, vicar of the Pope in the Romagna and the captain of the Guelphs: of course, the sentence comes after a process celebrated in the absence of the accused person. The 24th of August of the same year, Henry VII dies and the 14 of March of 1314, in the consistory of Carpentras, Clement V will declare annulated the sentence, pronounced by a civil tribunal, by the decretal *Pastoralis cura* [105]. The nullity of the sentence comes from the citation error, what is translated into the absence of the defence right, as well as the application of a (summary) procedure regarding such an important crime as treason. In fact, the Pope Clement states that the trial against Robert d'Anjou was celebrated in the ghibelina Pisa, that hates the king; moreover, during the process the emperor himself, with his army, is present in the city of the Tuscany. Therefrom the legitimate fear of the king to travel to Pisa to be judged, and his decision of not defending himself in the trial, as he was in a real danger of being killed *per violentam iniuriam, non-per iustitiam inferendam* [106]. Beyond the reasons justifying the absence of the accused in the trial, the citation, according to the Pontiff, is corrupted, given that Robert d'Anjou was far from the borders of the Empire, in the kingdom of Sicily, *notorie ac continue* during the trial against him [107]. Finally, even though the citation was received by the king outside the Empire, it was still corrupted, being him *extra imperium constitutum*: there is, therefore, absence of jurisdiction [108].

On the basis of the previous considerations, Clement V will declared the imperial sentence as annulated, in the exercise of the *imperium* given Christ Himself to Saint Peter, as the power by which, *vacante imperio*, the Pontiff is the one who follows:

«.nos tam ex superioritate, quam ad imperium non est dubium nos habere, quam ex potestate, in qua vacante imperio imperatori succedimus, et nihilominus ex illius plenitud potestatis, quam Christus Rex regum et Dominus dominantium nobis, licet immeritis, in persona beati Petri concessit, sententiam et processus omne praedictos et quicquid ex eis secutum, est vel occasionem ipsorum, de fratrum nostrorum consilio declaramus fuisse ac esse omnino irritos et inanes, nullumque debere ac debuisse sortiri effectum seu nocumentum, vel notam afferre cuiquam, vel quomodolibet attulisse…» [109]

The evolution of the relation between the Papacy and the Empire, mainly playing in the distribution of the *iurisdictio* as

[103] *Edictum de crimine lesae maiestatis* (Heinrici VII imp. Constitutiones), en *Monumenta Germaniae Historica*, vol. 2, p. 544: «Heinricus septimus divina favente clementia Romanorum imperator et semper augustus, ad perpetuam rei memoriam. Ad reprimenda multorum facinora, qui ruptis tocius debite fidelitatis habenis, adversus Romanum imperium, in cuius tranquillitate totius orbis regularitas requiescit, hostili animi armati conantur nedum humana, verum etiam divina precepta, quibus iubetur quod omnis anima Romanorum principi sit subiecta, sceleratissimis facinoribus et assiduis rebellionibus demoliri: ne ex eorum absentia, in detestando lese maiestatis crimine processus et sententia retardentur, et tanti sceleris nefanda temeritas remaneat impunita, hac edictali, Deo propitio, perpetuo valitura lege sanctimus, ut in quocunque lese maiestatis crimine, et maxime ubi contra Romanorum imperatores vel reges aliquid, quod dictum crimen tangat, asseratur commissum, possit procedi per accusationem, inquisitionem, seu denunciationem summarie et de plano, sine strepitu et figura iudicii, prout illi, qui iurisdictionis preest, videbitur expedire. Ad hoc, si qua communitas, corpus, vel collegium, vel alia quevis persona, cuiuscumque status, dignitatis vel condicionis existat, super dicto crimine per nuntium vel per litteras, seu etiam per edictum publice propositum citata, vel citatum, neglexerit in termino personaliter vel legitime comparere: contra ipsam, vel ipsum, perinde ac si personaliter omnibus interesset, vel lis foret legitime contestata, tam ad recepcionem testium, eorum publicacionem, et sequentia, quam ad diffinitivam sententiam et eius executionem procedatur; legibus et consuetudinibus non obstantibus quibuscumque. Hanc autem generalem legem nostram extendi volumus ad preterita, presentia et futura; quam ex nunc absque alterius temporis expectatione trascursus, suum integrum vigorem decernimus obtinere. Amen». La constitución *Ad Reprimendum* está comentada al detalle en E. Cortese, *Il diritto nella storia medievale. Il Basso Medioevo*, vol. 2, Roma 1995, p. 372 y ss. e in K. Pennington, "Due Process, Community and the Prince in the Evolution of ordo iudiciarius", *Rivista internazionale di diritto comune*, 9 (1998), pp. 9-47.

[104] The same text of the constitution expected some time of *vacatio legis* (*ex nunc absque alterius temporis expectatione trascursus, suum integrum vigorem decernimus obtinere*).

[105] Clem. 2. 11. 2.

[106] «Notorium quippe ac indubitatum existit, quod grandis exercitus tempore dictorum processorum et sententiae, continue imperatori assistens, reges ipsum et suos prosequebatur, odio capital, Pisanaque civitas, in qua lata fuit memorata sententia, regem capitali habebat odio notorio et antiquo. Esto igitur, quod rex ipse alias ad praemissa fuisset legitime per imperatoris citatus: numquid venire debuit a iudicem, exercitu feroci ad grandi, ipsique citato, (ut praemittitur,) odioso stipatum? Numquid etiam debuit comparere in loco admodum populoso, multum potenti, ac praefato in eum odio provocato? Quis enim auderet, vel qua ratione audere aliquis tenetur consistorii talis subire iudicium, et se in hostium sinu reponere, ac ad mortem per violentam iniuram, non per iniustitiam inferendam, ultroneum se offrire? Haec quidem iure timentur, haec de more vitantur, haec humana fugit ratio, haec abhorret natura», Clem. 2. 11. 2,

[107] «Despiret igitur, qui citationem huiusmodi saperet arctasse citatum. Ut illud tamquam notissimum, nullatenus omittamus, quod regem extra districtum imperii, in regno scilicet Siciliae, notorie ac continuae tempore supra dicto morantem, citare non potuit imperator», Clem. 2. 11. 2,

[108] «…imperator in ipsius personam nullam ratione terrarum huiusmodi, nisi ex natura feudorum, debitam superioritatem habebat. Quodsi punitio criminis, infra districtum imperialem commissi, ad imperatorem forsan pertinuisse asseratur: verum est quidem, si in eodem districtu fuisset inventus delinquens, vel ad illum de more remissum», Clem. 2. 11. 2

[109] Clem. 2. 11. 2

well as in the speculation about its origin and emission, is not the objective of this investigation. However, it must be pointed out that the validity *in utroque* of the clementina *Saepe contingit,* as the precedent *Dispendiosam*, find their roots precisely in the concept of power during the time in which the constitutions were promulgated [110].

Coming back to the topic of the summary procedure, when Clement V writes the decretal *Pastoralis cura* (14th of March of 1314) the constitution *Saepe contingit* was already elaborated (probably), or, at least, written as a draft, since it will be publicly read only a week later in Monteux [111], but the *Pastoralis cura* does not mention the *Saepe contingit*. In turn, Johannes Andreć, in his gloss to the *pastoralis cura*, it does not make reference to the imperial constitution *Ad reprimendum*, or the declarative constitution of the Pope regarding the summary procedure [112]. Whatever the case may be, what is true is that the corruption of the citation and its consequent violation of the defence right, justifying the nullity of the summary procedure in a civil tribunal, are not in contradiction with the spirit or the dispositions of the *Saepe contingit*.

Such was the case that, when the great civil expert Bartolo de Sassoferrato comments the imperial constitution *Ad Reprimendum* [113], not only uses the *Saepe contingit* and the gloss of Johannes Andreć to clarify the meaning attributed to each one of the *verba diminuentia iuris ordinem*, but also refers to the cancellation of the condemnatory sentence of Robert d'Anjou by Clement V as an eloquent example, in order to show that some formalities must be observed when the cause is treated by the abbreviated procedure [114].

In fact, the Bartolian treaty [115] on the imperial constitution *Ad Reprimendum* does not restricts himself to the criminal law questions and to the special procedure introduced by the legislator for the repression of treason. It is a wider work, that delimits a general theory of the procedure (civil and criminal), taking into account the precious contribution of Canon Law and juridical science developed around it. In other words, the work of Bartolo de Sassoferrato revolves around the institutions of procedural law, considered as absolutes values, far beyond it practical application in the field of criminal or civil law [116].

We will briefly see [117] the importance that must be attributed to each one of the *diminuentes iuris ordinem* clauses according to the famous jurist. The first of the *verba* that we will examine is "*summarie*": the Emperor inserts in the text of the Constitution *Ad Reprimendum* this adverb, frequently used by civil lawyers [118], preferring it instead of the term "*simpliciter*", frequently used by the Pontiffs [119]. The term *summa¸* Bartolo affirms¸ means *brevis*, as well as *antes*: the word *summa¸* refers to the concept of brevity, but also means *"what comes first"*. Therefore, the adverb *Summarie* has a double sense: on the one hand, it means *breviter* (briefly) and on the other hand *primarie*, that is, in the first place (that is, based on the first impression: *prima facie*) [120]. This distinction, made by the jurist in the first part of his treaty, is not a mean for mere erudition, but it will be the basis of some of his interpretations and, subsequently, the foundation of specific juridical solutions [121].

Therefore, proceeding summarily could mean, above all, judging the controversy reducing the time as much as possible, but without implying the omission of those non-revocable for-

[110] Vid. J. Belda Iniesta, *El dictatus papae y la donatio constantini como hitos de las relaciones Iglesia-Estado*, Valencia 2012.

[111] As we have stated, on the basis of the studies of Kuttner, the *Saepe contingit* can be dated bewtween the promulgation of the *Dispendiosam*, read in the Wien Council the 6th of May of 1312, and the promulgation of the Collection of clementinae in the consistory the 21st of March of 1314, in which the examined constitution already appears.

[112] D. Williman, "Summary Justice in the Avignonese Camera", p. 440.

[113] Bartoli a Saxo Ferrato, *Tractatus, et primo super Constitutione Extravaganti, Ad Reprimendum. Quomodo in crimine laesae maiestatis procedatur*, en Id., *Consilia, Quaestiones et Tractatus, Cum Adnotationibus sane non vulgaribus Thomae Diplovatacij, Bernard. Land. Et aliorum in utraque censura iurisperitorum*, Venetiis 1570. Una parte del tratado lo vemos en Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, en H.K. Briegleb, *Joannis Faxioli et Bartoli de Saxoferrato De summaria cognitione commetarii*, Erlagen 1843, pp. 29-61. A esta segunda edición haremos referencia.

[114] *Ivi*.

[115] Bartolo de Sassoferrato ellaborates the treaty on the imperial constitution in the middle of XIV century. In order to date the work vid. F. Calasso, *Bartolo da Sassoferrato*, en *Dizionario Biografico degli Italiani*, vol. 6, Roma 1964, p. 659 and E. Betti, "La dottrina costruita da Bartolo sulla Constitutio «Ad reprimendum»", *Bartolo da Sassoferrato: studi e documenti per il VI centenario*, vol. 2, Milano 1962, p. 39

[116] Cfr. A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 28. The autor points out the differences between the Treaty and the comments of Johannes Andreæ to the Saepe contingit and the Bartolian treaty about the *Ad Reprimendum*; the first one is a comment faithfully following the text of a *constitutio declaratoria* issued by the Pontiff with the intention of fulfilling a significant gap of the canonical system, whereas Bartolo de Sassoferrato Sassoferrato «esaminando una costituzione imperiale che cita clausole derogatorie tutto sommato poco studiate dai civilisti, appronta una ricostruzione specifica del loro significato, avvalendosi sia di uno strumento basilare quale la linguistica e l'etimologia, sia, talvolta, di categorie di matrice aristotelico-tomista, sia dell'armamentario tecnico-giuridico elaborato dalla scienza giuridica medievale sulla base del diritto romano» (*ibidem*, p. 29). Therefore, the comment on the constitution *Ad Reprimendum* is an study on the meaning attributed to the *verba diminuentia iuris ordinem*, with the correspondent effort of searching in Justinian sources the "validity cases" and the necessary authority supporting the scientific speculation, following the procedure in the interpretation of the law, the jurists of that period did (Cfr. P. Grossi, *L'ordine giuridico medievale*, p. 154-160).

[117] For a wider comment, E. Betti, "La dottrina costruita da Bartolo sulla Constitutio «Ad reprimendum»"; K. Pennington, "Due Process, Community and the Prince in the Evolution of ordo iudiciarius", and A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", pp. 28-36.

[118] For the meaning of the expression summary in Roman Law and in the glossers C. Lefebvre, "Les origines romaines de la procédure sommaire aux XII et XIII s.", *passim*;

[119] Cfr. *Dilecti filii* de Alejandro III (X. 2. 1. 13), *Sicut olim* di Innocenzo III (X. 5. 1. 24) y *Statuta quaedam* de Bonifacio VIII (VI. 5. 2. 20). Para la expresión "sumario", *Quoniam frequenter* de Innocencio III (X. 1. 6. 5).

[120] «Summarie. Summa, id est brevis; vel summa, id est prima; et sic summarie id est summatim, vel breviter, vel primarie, ut ostendam», Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Summarie*, ed. Briegleb, p. 31, nn. 1-3.

[121] A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 29

malities [122], that is, the *substantialia iudicii*. In this case, the velocity of the rite does not deny the *plena probatio* exigency, or the full manifestation of the fact founding the alleged pretensions in the trial: the judge decides on the basis of the *plena fides*, that is to say, when reaching the full conviction on the decision that must be taken. This way of proceeding, Bartolo affirms, does not differ from the abbreviated procedure expected in the *Saepe contingit*, applied when the *verba diminuentia iuris ordinem iunguntur simul* [123] is used in a copulative way.

Proceeding summarily, however, can also mean judging, even though the full evidence of the facts is not reached, considering enough a lesser degree of conviction of the judge regarding the normally required one in order to consider the cause as mature, and issuing the judicial issue [124]. In these cases, the conviction degree considered as sufficient so that the judge can decide is the *suspicio* or *opinio* [125].

The second clause addressed in the Bartolian treaty is "*de plano*", «*Planum est oppositum alto*» [126]. With "*alto*" the place is referred, but also the style (that may be elevated, worthy, solemn). Thus, "*de plano*", opposed to "solemn", means *velociter*, accelerated [127]. The jurist defends that in vile causes he proceeds de plano, that is, with less value, or about accusations of a vie nature, or in the causes among peoples of low social level [128]. The derogatory capacity of this clause acts in two directions: on the one hand, when he proceeds de plano, the judge does feels himself *pro tribunali «et sic non in loco alto»* [129], and does not interrupt the procedure during holy days [130]. On the other hand, when the style of other trials is not followed, he proceeds *de plano*, but the truth is already known, omitting the *libel* and other formalities [131].

On the other hand, the explanation of the clause *sine strepitu iudicii* is open with the indication of the different measures of the Pontiffs, in which it is inserted [132]. According to the Pontiffs, by *strepitum* must be understood all solemnity of the trial searching order in itself, better than the search of the truth. Bartolo substantially confirms that with this definition: by *strepitus* the rumour is understood, the rumour itself, but also "what makes noise". Given that through the expression *de plano* the *altitudo vocum et declamatio* is reduced, or the "volume of the rumour" that produces the procedure [133]. Therefore, in the causes in which he must proceed *sine strepitu*, if one of the parts asks the judge to come closer to tell him something secretly, the judge must allow it. However, this right is not recognised to the part in the procedure established by the constitution *Ad Reprimendum*, in whose text it is established that the judge can -but he is not obliged to- allow this possibility [134]. In a more general way, Bartolo thinks that this clause is used as support of the other ones: «*hoc verbum ad maiorem expressionem apponatur*» [135].

Even more than the explanation of the meaning of the rest of the clauses, all considerations on the expression *sine figura iudicii* are based on the scientific premise of the *Saepe contingit* and its gloss [136], although the opinion of Bartolo diverts much mora from the one of Giovanni D'Andrea, results original in relation to the text of the canonical law and the civil text.

Bartolo starts from the definition of the *forma* and *iudicium* in order to, next, go to the *figura iudicii*. The figure is, firstly, the apparent form of a material object (*apparens facies forma vel*), attributing such meaning in the gloss to the Saepe contingit [137]. However, when we talk about an immaterial thing, according to him, the word "figure" represents the *nature* [138] instead.

In turn, the term *iudicium*, is mainly attributed the meaning of exam and decision of a cause [139]. Then, the *figura iudicii* (that is, the nature of the trial) is possessed when each part of

[122] Cfr. Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Summarie*, ed. Briegleb, p. 31, nn. 9-12: «De primo intelligere debemus circa ordinem procedendi summarie, id est breviter. Et hoc, quod dico breviter, non intelligitur diminutive, sed ita, quod totam substantia comprehendat…». Aggiunge poi il giurista: «Non ita potest abbreviari, ut probationes legitimae pereant», *ibidem*, p. 32, nn. 13-14.

[123] «Non obstat praedictis Extra de verborum significatione cap. *saepe*, quia tota haec glossa [Bartoli] procedit, quando summarie tantum debet procedi, ibi [in casu clementinae *saepe*] quando omnia illa verba iunguntur simul…», Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Summarie*, ed. Briegleb, p. 34, nn. 3-7.

[124] A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 29-30. Sul significato della parola *summarie* secondo Bartolo Cfr. A. Lattes, *Studi di diritto statutario*, p. 11.

[125] Cfr. Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Summarie*, ed. Briegleb, p. 36, nn. 2-4: «Et ista probatio dicitur facta summarie, hoc est primarie, quasi ad primum gradum probationis pervenerit, scilicet ad suspicionem vel opinionem».

[126] Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *De plano*, ed. Briegleb, p. 47, n. 3.

[127] Cfr. Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *De plano*, ed. Briegleb, p. 47, nn. 3-6.

[128] Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *De plano*, ed. Briegleb, p. 47, nn. 9-10.

[129] Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *De plano*, ed. Briegleb, p. 47, n. 12.

[130] A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 33.

[131] Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *De plano*, ed. Briegleb, p. 47, n. 12-14. Sul significato dell'espressione *de plano* secondo Bartolo Cfr. A. Lattes, *Studi di diritto statutario*, p. 11-12.

[132] The autor quotes *Olim* by Gregory IX (X. 5. 1. 26); la *Ea quae* de Honorio III (X. 3. 35. 8); de Bonofacio VIII la *Indemnitatibus* (VI. 1. 6. 43) y la *Statuta quaedam* (VI. 5. 2. 20); and the clementinae *Dispendiosam* (Clem. 2. 1. 2) y *Saepe contingit* (Clem. 5. 1. 2). Cfr. Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Sine strepitu*, ed. Briegleb, p. 50, nn. 15 ss.

[133] Cfr. Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Sine strepitu*, ed. Briegleb, p. 51, n. 2-5. Bartolo indicates that sometimes the formula appears in its wider versión: *absque advocatorum et iudiciorum strepitu et figura*.

[134] Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Sine strepitu*, ed. Briegleb, p. 51, nn. 7.

[135] Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Sine strepitu*, ed. Briegleb, p. 51, n. 18. For the meaning of the clause *sine strepitu* Cfr. A. Lattes, *Studi di diritto statutario*, p. 12.

[136] A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 33.

[137] Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Et figura*, ed. Briegleb, p. 51, nn. 22 y ss.

[138] «Rei vero incorporalis figura dicitur eius natura», Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Et figura*, ed. Briegleb, p. 52, n. 5

[139] Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Sine strepitu*, ed. Briegleb, p. 52, n. 16.

the same process is observing all norms related to eh *ordo* of the proper evidence. From this figure, Bartolo writes, the nature of the trial has its existence and essence, only if the figure is not found, since the ordo was not observed, the trial is invalid [140].

According to Johannes Andreć, *sine figura* means without the *substantialia iudicii* following what is suggested by the words themselves. Therefore, in principle, it would be possible to judge without respecting the *Substantialia*, even though the *Saepe contingit*, regarding the discussion of the causes, saves some undeniable formalities, since they are related to the self-defence and the evidence of the facts. The canonist, in fact, is still linked to the text of the law. Bartolo, in turn, does not agree with this interpretation: once that some elements related to the essence are erased from the trial, what is left is not strictly a trial *cum res non est perpetua sine eius substantia* [141]. The summary procedure, nevertheless, is no doubt a trial, although extraordinary [142].

Then, it is necessary the identification of a criterion that allow the distinction *substantialia iudicii* -the one that cannot be denied if a trial must be celebrated- of the rest of the formalities, that could be omitted when the legislator has atuhorised the judge the knowledge of the cause *sine figura iudicii*. The solution of Bartolo is the next one [143]: when the judge is allowed to proceed *sine figura iudicii*, the formalities introduced by the *ius civile* can be omitted, but it cannot omit what is derived from the *ius Gentium*, that is, the *naturalis ratio.*

Bartolo does not agree with the distinctive criterion underlined by the canonist Johannes Andreć in his gloss, by which the inalienable formalities established by the *Saepe contingit* are those belonging to the *figura facti, negotii vel causae*, whereas the revocable formalities include the *figura iudicii*. In fact, the judgement criterion between the revocable and non-revocable forms must be based, according to the famous author, on divine right, or on the natural one or on the *ius gentium*.

For the application of the new category of the natural right *substantialia*, Bartolo enumerates all formalities that must be included in a trial, even being the abbreviated one [144]. In this revision, the differences from the *Saepe contingit* are numerous: the constitution is mentioned sometimes as a proof showing the nature of divine or natural right of some institutes, and, in some other occasions, in order to confirm that compulsory formalities are not always accomplished the criterion that the jurist is experiencing.

It is observed, for instance, the reasoning of the jurist on the citation institute. Bartolo asks himself whether it is necessary for the celebration of a trial, even if it carried out through an abbreviated procedure. The answer, of course, is yes:

«Quaero igitur, utrum sit necesse, quod pars citetur? Respondeo: sic; ut in hac lege innuitur; item quia hoc est de iure naturali, nam primum hominem delinquentem citavit Deus, dicens: Adam ubi es? Hoc etiam probatur de re iudicata c. *pastoralis* in Clementinis, ubi sententia domini imperatoris Henrici, qui fecit hanc legem et postea damnavit Robertum regem Jerusalem et Siciliae, cassa fuit ex eo; et probatur in dicto cap. *saepe*» [145].

The citation is needed, first of all, because it is designated as such by the *Ad Reprimendum*, being that the object of the Bartolian treaty. But it is especially necessary because it is demanded by natural law: in fact, God, before judging Adam, calls him: "*Adam, ubi es*?" [146]. The fact that the citation belongs to the category of the *substantialia* of natural law also comes from the *Pastoralis cura* of Clement V. Finally, the origin of the citation natural right is shown by the fact that it is expected as compulsory in the *Saepe contingit*.

However, when it comes to the terms *ad probandum*, Bartolo not always considers that the rules established by the Pontiff are applicable to the *Saepe contingit*: the norms of natural law will be also applied only in the cases the *Ad Reprimendum* consider so, not in the cases coming from the canonical practice. Therefore, the prescription of the *Saepe contingit* belong to the natural equity, by which the process should not be so brief that stops the parts from legitimately defending themselves, having to give them an *ad hoc* period. However, the assignation of a double period (one *ad faciendus positiones et articulos*, and the other one *ad producendum omnia*) belongs to the praxis of canonical law:

«…hoc tamen non est de iure naturali nec civili, cum sufficiat dari in causa ad probandum unam dilationem, ut ff. de feriis l. finali [L. 10, D. 2, 12], unde in hoc foro civili non est servanda ista decretalis». [147]

Given that the assignation is not a natural right, but a canonical one, this rule is not applicable according to the author

[140] Figura ergo iudicii est, quod partes iudicii sint factae secundum ordinem debitum et debitam probationem seu propositionem. Et ex ista figura iudicium accipit suum esse et suam substantiam; quod patet, quia, si ordo non servatur, iudicium est nullum», Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Et figura*, ed. Briegleb, p. 52, n. 16 y ss.

[141] Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Et figura*, ed. Briegleb, p. 52 n. 25.

[142] Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Et figura*, ed. Briegleb, p. 52 n. 28-29.

[143] «Solutio: tolluntur substantialia iudicii iure civili introducta, non autem ea, quae sunt naturalia, iure naturali seu gentium inducta naturali ratione, ut infra in multis ostendam. Item advertendume est, quod Joannes Andreae in dicto cap. *Saepe* super verbo *non exigit* dicit, quod iudex non adstringitur hoc casu ad aliquas formas, regulas vel figuras iudiciorum, nisi in quantum in dicto capitulo exprimitur, et illa expressa magis respiciunt figuram facti negotii vel causae, quam iudicii, secundum eum. Tu dic, quod iudex per haec verba relevatur ab omni forma et figura iudicii inducta a iure civili et tenetur observare omnem figuram et formam iudicii inductam de iure gentium vel naturali ratione…», Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Et figura*, ed. Briegleb, p. 52-53, nn. 30.

[144] Bartolo bases the reasons supporting the *substantialia naturalia* in different parts of the Bible: God calls Adam before condemning him (Gen. 3, 9); the *petition* in the judge of Salomon (1 Re 3, 16-28); the oath of the witnesses, their secret audience and the *publicatio testium* of the trial of Daniel in the process of Susana (Dan. 13, 1-64). Cfr. A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", p. 35.

[145] Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Et figura*, ed. Briegleb, p. 53-54 nn. 30 y ss.

[146] Gen. 3, 9.

[147] Bartoli a Saxo Ferrato, *Commentarius de summaria cognitione*, § *Et figura*, ed. Briegleb, p. 57, nn. 25.

to fulfil the gaps of civil law and, in this case, in the simplified process regulated by the imperial constitution.

In this case, it is possible to intuit the role that juridical science may have attributed to the *Saepe contingit*: in the frame of the unique theory of the process that both systems, civil and canonical, have shared for centuries, the papal constitution is the model of the abbreviated process par excellence, by which -inevitably- the reflections of the doctors in law as well as in the abbreviated processes gradually appearing in civil legal systems must be measured, especially in the local statutes of the Italic peninsula. Then, the *Saepe contingit* is the point of reference of the whole Bartolian treaty on the summary process, given that there is no treaty on this type of rite that could disregard its architype, even when commenting an imperial constitution.

In any case, the Bartolian idea of basing the so-called general theory of the summary process on natural law will be successful, and it will be recuperated by the procesalists by the trial lawyers of the *utrumque ius*[148], still engaged in the perfection of a procedural law science that at the time of Bartolo had advanced so much, showing a part of its enormous potential[149].

The natural law criterion, for instance, was also used by jurists of Castile, where there was no equal legislation to the *Saepe contingit*, and the regulation of the new summary process was a task done by jurisprudence, that is, the judicial practice and doctrine[150]. In XIV century Castile, only the prince, who does not recognise superior *in temporalibus*, has the right to raise to the judges the respect for the solemn process, ordering them to judge without the figure of the trial. Since the only one who can do that, it is not necessary to accomplish the positive rules regulating the process, except in the limits of the *urbanitas* and of the *decentia in funiculo*[151]. Therefore, the judges, called to judge without the figure of the trial, can know the truth as the sovereign himself: "*este modo de juzgar equiparaba a todos con el príncipe*"[152]. However, the simplifications of the right given by the prince could only refer to the positive right, not to the divine one, even the natural one, for they require a group of binding rules for all, even for the sovereign himself[153].

9. The clementinae and the summary procedure in the municipal statutes

Once the elaboration of the *ordo iudiciarius* has reached a certain degree of complexity, in civil systems, as well as in the canonical one, there rises the necessity of the reduction of the ordinary process, that, due to its fatiguing exigencies and its characteristic slowness, was likely to frustrate sometimes the exigencies of justice[154]. In the midst of the end of XII century and the beginning of XIII century[155], the abbreviated processes appear in the local systems[156], something we know thanks to the decisions of that time[157]. However, the forensic practice undermined the simplification effeorts, introducing in the abbreviated process some formalities taken from the speculations of juridical science and from the practice of the ecclesiastic forum.

Then, it is soon necessary a more radical reform: in the statutes elaborated in the middle of XIII century, the clause *diminuentes iuris ordinem*, already discussed within the doctrine, and the times the Pope used it in the decretal are remembered[158]. In fact, the new local normative, when requiring that some disputes are to be solved faster, uses "technical" expressions such as *summarie*, *de plano*, *sine strepitu* y *sine figura iudici*[159].

The final goal of the local legislator is the introduction of the faster and briefest process, that sometimes will be called "extraordinary" or "summary". It is a procedure unknown by ancient jurists, given that Roman Law, as it has been usually said, only knew acts of true and proper summary cognition (or *semiplena cognitio*), that do not merge into a process similar

[148] AS it is shown in the study of Marchissello on the Works of the canonists of the end of the *Trecento* Giovanni da Legnano, Pietro D'Ancarano and Francesco Zabarella, who, commenting the clementinae, not only refer to Johannes Andreæ, but also follow the line established by Bartolo de Sassoferrato. Cfr. A. Marchisello, "Ordinata celeritas: il rito sommario nel trecento tra lex e interpretatio", page 38.

[149] Cfr. A. M. Stickler, see Ordines iudiciarii, p. 1140.

[150] M. Paz Alonso Romero, "El solemne orden de los Juicios. La lentitud como problema en la historia del proceso en Castilla", *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* 5 (2001), pages 23-53, in particular page 42.

[151] S. De Dios, *El absolutismo regio en Castilla durante el siglo XVI*, en *Ivs fvgit*, 5-6 (1997), pages 53-236.

[152] M. Paz Alonso Romero, "El solemne orden de los Juicios. La lentitud como problema en la historia del proceso en Castilla", p. 43.

[153] M. Paz Alonso Romero, "El solemne orden de los Juicios. La lentitud como problema en la historia del proceso en Castilla", p. 43.

[154] Surely, the widest and most complete study on the plenary process in the common statutes is A. Lattes, *Studi di diritto statutario*, en P. Sella, *Il procedimento civile nella legislazione statutaria italiana*, Milano 1927, pages 216-267. For a deeper image, G. Salvioli, "Storia della procedura civile e criminale", *Storia del diritto italiano (*P. Del Giudice, ed.), vol. 3, t. 1, Milano 1927, pages 327-346. Some interestings reflections on the summary process in Italian statutes can also be read in Solmi, *Storia del diritto italiano*, Milano 1930, pages 608-609. On the summary processes in modern time, see A. Dani, *Il processo per danni nello Stato della Chiesa (secoli XVI- XVIII)*, Bologna 2006. Finally, Emanuela Fugazza, in her comment to the piacentino statute, refers to the summary process in the statute of 1323 (Cfr. E. Fugazza, *Diritto, istituzioni e giustizia in un Comune dell'Italia padana. Piacenza e i suoi statuti (1135-1323)*, Padova 2009, pp. 312-314).

[155] A. Lattes, *Studi di diritto statutario*, p. 6.

[156] G. Salvioli refers to the process applied in Milan, where the constitutions of 1216 expects that: «gli atti si svolgono *voluntate consulis*, che il contumace è posto, alla prima domenica seguente alla citazione, *in concione in blasmo*, che sia *in arbitrio consulis* richiedere il *libellus conventionis qui continet causam certam* per le liti inferiori a 5 sol., nelle quali quando *nihil in personam actoris obiectum fuerit*, sia discussa la causa, senza giuramento di calunnia, lasciando *arbitrio consulis* di ammettere testi e di concedere non più di tre dilazioni per questo fine…», G. Salvioli, "Storia della procedura civile e criminale", pages 327-328.

[157] Cfr. G. Salvioli, "Storia della procedura civile e criminale", p. 328.

[158] According to A. Lattes y G. Salvioli, the plenary process was introduced in the statutes in a second stage of simplification of judicial processes, as a posterior acceleration of all of them, or, at least, of some of them, after having verified the failure of the simplification attempts of the beginning of XIII century. (Cfr. A. Lattes, *Studi di diritto statutario*, p. 6; G. Salvioli, *Storia della procedura civile*, p. 328).

[159] Cfr. A. Lattes, *Studi di diritto statutario*, p. 10.

to the summary or the plenary one, that is, in an abbreviated process[160]. That is the reason why, at least initially, the new extraordinary rite was, at the start, rejected by civil law doctors. Tancredi, for instance, states that the sentence pronounced without the due respect to the *ordo iudiciarius* is completely invalid. However, Azzone, Pillio and Ugolino admit some cases in which it is possible to know the facts invocated backing the *Summatim* unique judicial reclamation, in which a *levis probation* is enough. Nevertheless, according to the opinion of some jurists, this extraordinary way of *cognition* must stand within the application limits already expected in Roman Law[161].

In any case, the interventions of the local legislator decidedly go in the direction of the rationalisation of the process: for instance, in the statutes of Pistoia (1296), Parma (1255) and Peter II of Savoy, and in many others, it is `prescribed to proceed *summatim et breviter*, eliminating unnecessary formalities, that is, it is forbidden to appeal interlocutory sentences, and the judge is required to decide the cause by a definitive sentence[162]. Some statutes allow, in case of failure to appeal of the demanded part, to discuss the cause, even before the *litiscontestazio*, emptying the sense of the procedural institution and reducing it to a purely formal act. After the citation, it is expected a unique period *ad respondendum et excipiendum* extendable by the judge; he is given the right to omit the injury oaths and to concentrate the different procedural moments of the *positiones* and of the production of evidences[163].

According to historian of Law Giuseppe Salvioli, the new process that the local legislator wanted to introduce would have not progressed much, but it would have found the pontifical legislation at the same time[164], given that the massive use of the *verba diminuentia iuris ordinem* by the popes exceeded the initial doubts on the possibility of introducing, through the positive law, an alternative process to the solemn rite. On the other hand, the constitution *Saepe contingit*, that resolves the conflicts of the doctors regarding the revocable formalities of the plenary process in the ecclesiastic tribunals, ends up in exercising a significant influence on civil law, in both doctrinal and legislative aspects. The *constitutio declaratoria*, in fact, by solving a great gap- the revocable formalities in the abbreviated rite- referring to one law and the other, became the model of the summary process, a source that inspires local legislators in order to reform the solemn *ordo iudiciarius*[165], without prejudice to the specificities of each local statute.

In summary, the abbreviated process in canon law has a profound impact in the XIV century civil laws, as it is shown by the similarities between the local statutes and the clementina *Saepe contingit*: it is, in fact, the origin of all the accelerations accepted later, although the local statutes will finally accept even bigger abbreviations[166]. Such was the case that, some statutes extend the rules of the clementinae to all causes, even the ordinary ones; some others follow the text to the letter, as a whole or partially, without quoting it[167].

In the civil statutes of Pavia, it can be read: *quod verba summarie de plano etc. comprehensa in statutis Communis intelligatur secundum Clem. Saepe extra de verborum signif*»[168]. According to the text of the norm, in this case we would find a "canon law civilisation", that is, a reference to another system going beyond the mere reproduction of the words of the clementina.

Although it is evident the direct influence in some of the local laws of that time, A. Lattes considers that two facts of general character reduce the practical importance of the influence of canon law with civil systems. The first one is the action of Roman Law, exercised by the doctors: they, often called to cooperate with civil authorities in the redaction of statutes, use the principles of Roman Law, forming the backbone of their preparation and the tools of their job as lawyers, something that made them use the treaty of Bartolo. And it was based, as all his works do, on Roman Law[169]. Secondly, always following Lattes, the creators of the statutes often copy the content and the form of the rules of other municipalities. This imitation process allows to infer that the verified propagation of canon law is due to the mere transcription of previous statutes, not being the compilators conscious of the first and older source.

However, the position of Lattes was not followed by the majority of the scholars who studied the reception of the canonical process in civil systems, but it seems that there is a prevalence of the hypothesis of a clear influence -at least regarding this matter of the plenary process- exercised by the legal system of the Church in local systems and, in general, in the civil system[170]. The issue deserves an investigation in a different study.

Nevertheless, in the light of the general observations seen in previous pages, a final reflection can be done. We can imagine that the preparation of the jurists, called to cooperate with the civil authorities in the redaction of the local statute, exercised a notable influence in the creation of the normative body. The education of the jurist in the procedural frame is given to the

[160] A. Lattes, *Studi di diritto statutario*, pages 10-11.
[161] Cfr. G. Salvioli, "Storia della procedura civile e criminale", p. 331.
[162] G. Salvioli, "Storia della procedura civile e criminale", p. 329.
[163] *Ivi*.
[164] G. Salvioli, "Storia della procedura civile e criminale", p. 331.
[165] Cfr. G. Salvioli, "Storia della procedura civile e criminale", p. 333.
[166] A. Lattes, *Studi di diritto statutario*, p. 51.
[167] Numerous are the statutes quoted by Lattes in this sense: the one of Casale and the one of Amadeus VII of Savoy, the one Voghera, the one of Milano or the one of Monza. Cfr. A. Lattes, *Studi di diritto statutario*, pages 51-52.
[168] The so-called Statuto di Pavia of 1393(A. Lattes, *Studi di diritto statutario*, p. 52).
[169] A. Lattes, *Studi di diritto statutario*, p. 53.
[170] Crf. G. Salvioli, "Storia della procedura civile e criminale", p. 333; A. Solmi, *Storia del diritto italiano*, Milano 1930, pages 608-609; C. Lefebvre, "Les origines romaines de la procédure sommaire aux XII et XIII *s.*", *passim*; Id., "Juges savants en Europe, XII-XVI siécle. L'apport des jusistes savants au developpement de l'organisation judiciaire" *passim*; M. Meccarelli, Arbitrium. *Un aspetto sistematico, passim*; E. Fugazza, *Diritto, istituzioni e giustizia,* p. 312.

Ordines iudiciarii, as well as to the different treaties belonging to the literary genre of XII century. These works are, no doubt, the result of the Roman Law and the works of Justinian, from which the terms, principles and rules that give shape to the *ordo iudiciarius* derive. But the medieval juridical science does not only rely on in the Romanistic one, but also on the creative interpretations of the jurists, as well as on the interventions of the canonical legislator. They are numerous in the field of the abbreviated process, and they form the common patrimony of the juridical science or one and the other law, and also in the preparation manuals of future jurists, independently of the forum in which they were destined to exercise their profession. This consideration allows us to suppose that the preparation of the experts on civil law, called to collaborate in the redaction of the statutes, must not be isolated from a deeper knowledge of the contributions of canon law, especially regarding the abbreviated process. On the other hand, in the treaty of the imperial constitution *Ad Reprimendum*, as it has been previously seen, Bartolo himself compares it with the *Saepe contingit*, taking it as a model of the summary process, understood in absolute terms, that is, independently of it canonical origin. In fact, the reference to the *constitution declaratoria* is always present in the explanation of the *verba*, regarding the "evidence" of the new *substantialia naturalia* criterion.

That allows us to suppose that the work of the civil lawyers in the redaction of the statutes may have constituted an additional channel through which the reflections of canon law in civil law are projected. Of course, the hypothesis must be verified with a deeper study of the statutory texts.

Conclusions

Concerning what has been exposed up to now, it is possible to educe which one has been the role of the clementinae, and the *Saepe contingit* in particular, in the elaboration of the summary or plenary process constituting the backbone of the current one. Before its promulgation, the doctrine (specially the canonical one) was divided regarding the value of the clause *sine figura iudicii*, related to the formalities that could not be omitted in any abbreviated process, and the actual possibility of having trial ignoring these terms. In this sense, the normative gap the doctrine could not fill, directly reached the tribunal practice, being necessary the identification of the formalities that could not be revoked under penalty of the nullity of the sentence. The urgency and the sensibility of the matter, as it was admitted by Johannes Andreć, did not allow the use of the usual interpretation method of the jurists, for, given its nature, it required some time for the solution to create the necessary consensus.

The *Dispendiosam* (1312) formalised the creation of an alternative process to the *ordo iudiciarius solemnis* emanating from the copulative use of the *verba diminuentia iuris ordinem*: from that moment, the resolution of some disputes was done through a newer, simpler process, that allowed the justice not to be confined in tedious and not much efficient formalities. Then, the *consitutio declaratoria*, will reap the fruits of the scientific speculation in relation with the derogative clauses of the solemn judicial order. But a clear rupture with the past does not happen, but it is revealed the best ideas of the jurists that studied the emergent alternative to the *ordo solemnis*.

On the other hand, such constitution unties the knots that the doctrine had left unresolved through the indication of process rules that cannot be revoked, becoming the abbreviated process an agile instrument of investigation, regulated in detail and, consequently, immediately usable by law professionals in the ecclesiastic tribunals. That is the reason why the *Saepe contingit* may have attracted the attention of civil jurists, since it solved a problem that closely affected them, ad they were called to apply in the imperial tribunals the abbreviated process established in the constitution *Ad Reprimendum* (1313) for criminal causes related to lese majeste.

Given the intrinsic authority accompanying the pontifical decision in the last phase of the papal theocracy, the process described by Clement V will soon become the reference point that delimits the doctrine, practice and posterior legislation in one law and the other. It constitutes the new group of extension of the *ius comune*. In fact, it clarifies not only the content of the clauses and indicates the limits of the *arbitrium iudicis*, filling the legal gap and the silence of the jurists, but it is also a measure emanating from the holder of the *plenitudo potestatis*, being that a historical moment in which the Roman Pontiff exercised the *potestas* of the emperor during the periods of *vacatio imperii*. Clement V himself, a week after the promulgation of the *Saepe contingit*, annuls the decision dictated in the conclusion of the summary process of Robert d'Anjou based on «*tam ex superioritate, quam ad imperium non est dubium nos habere, quam ex potestate, in qua vacante imperio imperatori succedimus*».

Within the peculiar system of common law, the Clementina constitutes the abbreviated process par excellence. Although it was not directly applied to particular legal systems, the pontifical constitution, in the juridical environment of the time, became an essential reference for doctors of one Law and others in their scientific speculation, even the legislators in civil systems specially municipalities. That is the reason why the comments of the distinguished author Bartolo de Sassoferrato on the imperial constitution *Ad Reprimendum* is summarised in a reconstruction of the real content of the four clausolae *summarie*, *de plano*, *sine strepitu ac figura iudicii,* presented parallel to the dispositions of the *Saepe contingit*. Even in the most innovative part of the Bartolian Treaty, when the author puts into practice the new policy of *substatialia* confrontation of Natural Law with the *constitutio declaratoria*, this similarity and the constant reference to the *Saepe* is evident: the last one is frequently recalled as an ulterior proof of the demonstration of the nature of the divine or natural right of diverse institutes. Some other times, however, it resubmits the same constitution when assuring that the compulsory formalities do not fully respond to the new criterion that the jurists is experiencing. It seems, therefore, that no elaboration on the summary rite, even though in the context of the commentary on an imperial constitution, could disregard the archtype established in the *Saepe contingit*. The work of Bartolo will have a great success among civil and canon lawyers, and represents the moment of maturation of the theory of the summary procedure.

On the other hand, the formation of the jurists of the time in *utroque*, at least in procedural matters, is based on the study of the works of systematic character and written by authors of both Laws. With these works, called *Ordines iudiciarii*, the jurists

were instructed in the principles and institutions they shared with both systems, civil and canonical ones, in order to develop this wealth of common knowledge within their personal scope of activities, whether it was judicial, municipal or in the university. That is why the abundant use of the *verba diminuentia iuris ordinem* in the municipalities let us imagine that the practice of the civil tribunals, with their logical differences as they come from different origins and experiences, was nurtured by the unique theory of the summary procedure, thanks to the *Saepe contingit* and, in general, Canon Law.

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Two Divergent Approaches to Comparative Legal Studies in Europe and Their Implications for Legal History

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Abstract

Comparative legal studies have established themselves as the reaction of legal scholarship towards the legal diversity of our shrinking world today and in the past. Despite their potential, such studies occupy a marginal place in legal curricula and practice across Europe. This unhappy situation has brought about debates within the community of comparatists about possible causes and eventual remedies. In this paper, I look at this debate as the incarnation of the century-long confrontation among 'erudite' and 'pragmatic' legal scholars; the former group identify with the agenda of Rodolfo Sacco and the latter are led by Basil Markesinis. My aim is to draw implications from this debate for comparative legal history. In order to do so, I begin by introducing the main tenants of the two 'schools'. Secondly, I investigate the main stumbling blocks of the debate between them: Eurocentrism, the selective scope of research, interdisciplinary and cultural studies. Thirdly, I contemplate the implications of the debate for legal history and a possible synthesis of the two approaches suggested by Uwe Kischel. My main point here is to encourage legal historians in two respects: (1) to engage in cooperation with comparatists in order to enhance our understanding of the context(s) and the paradigm(s) of European legal culture in the face of the ongoing internationalisation of law and legal studies and, (2) to pursue the task of revealing the hidden factors that slow down the transformation of positive law when the changing world calls for it, as is the case with acknowledging new kinds of legal subjects.

Keywords*: comparative legal history; legal scholarship; methodology; post-modern cultural studies; Eurocentrism; contextual comparison; hidden legal formants.*

'[C]ertain doctors[…] tried to treat our science [of law] in a syllogistic, sophistic, and dialectical manner… [It] had its origin with the ultramontane doctors of whom some […] were more subtle than useful though some were of great excellence and knowledge. In our science, when it is a question of chopping someone's head off, to argue about formed and form, substance and accident, and in similar ways […] is not well founded. Nor was this style followed by our old fathers and doctors[…]. This disease, indeed, has crept into the science of theology for the modern preachers forsake sacred scripture for figures, philosophers, poets, and fables[…].' [1]

This passage goes back to the mid-14th century and is early evidence of the debate between legal scholars who inclined to either more formalistic or more rhetorical approaches to legal studies. It was one of the confrontation lines that animated the history of European legal scholarship through the centuries: *mos italicus* vs *mos gallicus*, German *usus modernus* vs Dutch elegant school, Pandectists vs sociological jurisprudence and revived jusnaturalism etc. In our age of cross-cultural contacts and the progressive internationalisation of law, the divide has also marked comparative legal studies.

The border between the two camps has never been a Great Wall. Some scholars began their carrier in one camp but switched sides in their later years, as was the case with Andrea Alciato or Rudolph Jhering. I suggest considering these camps as Weberian ideals which are supposed to be the starting point of research. Another, more important reason to attend to this split is the sense that academic debates often become hotbeds of innovative ideas.

Until now, legal historians have not engaged in active dialogue with comparatists. The communication stumbles over several stereotypes about comparative law as the great unifier (while legal history is to cherish diversity) or a potential threat to the autonomy of legal history as a discipline. Earlier, in volume 9(2) of this journal, I tried to show that most of such convictions turn out to be stereotypes based on outdated comparative methodology. Those few scholars who practice comparison in contemporary and older law call for mutual support and understanding between the two disciplines.[2]

In this paper, I would like to survey what insights legal historians may expect for their discipline from the dispute between

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1 Albericus de Rosate, *Commentaria*, proemium (cited after Gordley J., The philosophical origins of modern contract doctrine (Oxford; New York : Clarendon Press, 1991), p. 35; in his later book '*The Jurists: A Critical History*' (see below) James Gordley attributes the authorship of these words to Richardus Malumbra).

2 Gordley J. 'Comparative law and legal history', in: Reimann M., Zimmermann R. (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2008), p. 768–772.

the two camps of comparatists, which I here call 'elegant' and 'pragmatic'. The former is represented by Rodolfo Sacco, the patriarch of Italian comparative law; the latter by Basil Markesinis who, despite his Greek origins, assumed the pragmatic mentality of common law.[3] I focus on the ideas that shaped the corresponding didactic literature and which are likely to reach a wider readership of young comparatists and law students.

Critical legal studies teach us that there is no neutral observer in any academic community. My viewpoint is determined by the East European context. It is a valuable vantage point in the face of the disputed Eurocentrism and the fashionable cultural pluralism in (not only) legal scholarship. So, occasionally I feel invited to make remarks as an outsider as to the relevance of the two camps of Western legal scholarship for the other part of Europe.

This paper consists of three parts. First, I introduce the positions of the two rival groups of comparatists. Secondly, I present the stumbling blocks in their debate and discuss the implications for (comparative) legal history. Thirdly, I contemplate the eventual balance between the rivals in the form of contextualized comparison and suggest implications for legal history.

1. The elegant vs the pragmatic approach in comparative law

Comparative law is surely the fruit of the western legal tradition where the two great branches of civil law and common law are more visible than the Nordic or East European offshoots. The substantial divide between those branches is believed to be nested in the mentality of lawyers. This discrepancy might be the reason for the two types of comparatists.

The age-old metaphor of knowledge as (divine) light has been inspiring European intellectuals since the revival of legal studies. Irnerius, the founder of the law school in Bologna, was nicknamed '*lucerna iuris*'. Guillaume Budé, perhaps the first French legal humanist, was said to transfer the light of knowledge across the Alps. These and other examples illustrate (another light-inspired word) the significance of learning and knowledge in forming a better individual. 'Learn everything and you will see later: it was not in vain; limited studies are weary' ('*Didascalicon de studio legendi*', VI, 3). These words of Irnerius' contemporary, Hugues de Saint-Victor, could be taken as the motto of the 'elegant' school of comparative law.

In the words of Rodolfo Sacco, the task of legal comparatists is to pay attention to all 'factors present today which determine how cases will be resolved in the near future".[4] This ambitious task reveals the concession of the continental scholar to the advances of legal realism and case law studies, but on the other hand, it sticks to an agenda of learning foreign law and culture in order to reveal three groups of factors ('legal formants'):

(1) principal formants, such as legislation, case law and legal doctrine;

(2) additional formants, which are perceived but not quoted as the principle argument, that is, principles, standards, rules of argumentation, ideology or policy;

(3) hidden formants, or cryptotypes, which exercise their impact as part of common sense (part of the general culture and intellectual background – cultural values, basic assumptions of legal solutions and stereotypes).

Such an erudite perspective treats legal studies as a 'science'. It goes back to Friedrich Savigny's concept of professional law as *Rechtswissenschaft,* introduced to comparative law in the early 20th century by Ernst Rabel. His saying about the purpose of comparative law as 'science' (*Wissenschaft*) is even more ambitious than Sacco's agenda. Rabel suggested studying:

'*everything that affects the law, such as geography, climate and race, developments and events shaping the course of a country's history[…]. Ideas of every kind have their effect, for it is not just feudalism, liberalism and socialism which produce different types of law; legal institutions once adopted may have logical consequences, and not least important is the striving for a political or legal ideal. Everything in the social, economic and legal fields interacts*.'[5]

The cultural turn(s) of the second half of the 20th century (see below 2.3) reinforced the perception of law as part of culture and set the purpose of comparison as a fuller understanding of law (both foreign and domestic). This essentially hermeneutical task facilitated setting-up the framework to investigate the pluralism of law, its conceptualisation, and the methods of legal studies.

The most 'popular' fruit of this transformation is the refurbished didactic literature on comparative law. Unlike René David's *opus magnum*, Sacco's and Gambaro's textbook on '*The law of the West and elsewhere*' presents a meaningful methodological introduction and allows more space for non-Western law.[6] The approach is especially appealing to comparatists focusing on the law 'elsewhere', that is, in Asia or Africa[7], but also in Eastern Europe.[8] In addition to general books on legal comparison, the same agenda can be set for each branch of law, including constitutional law where the researcher has to overcome national isolationism.[9]

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[3] Comparatists prefer to call the two divergent approaches 'cultural' and 'functional' with the focus on the main method. In this paper I prefer to underline comparatists' attitude towards theoretical knowledge.

[4] Sacco R., "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)", in *American Journal of Comparative Law*, 39 (1991), p. 23.

[5] Rabel E., ‚Aufgabe und Notwendigkeit der Rechtsvergliechung', in: *Recueil des travaux suisses présentés au Congrès international de droit comparé* (cited after Zweigert K., Kötz H., *An Introduction to Comparative Law*, (Oxford : Oxford University Press, 1998, 3rd ed.), p. 32.

[6] Gambaro A., Sacco R., Vogel L., *Le droit de l'Occident et d'ailleurs : traité de droit comparé* (Paris : LGDJ, 2011; after Italian edn. of 2008).

[7] Menski W., *Comparative law in a global context: the legal systems of Asia and Africa* (Cambridge: Cambridge University Press, 2009, 2nd edn.).

[8] Lafitcki V.I., *Comparative jurisprudence in the images of law* (Moscow: Statute, 2010, 2 vols., in Russian); Slyschenkov V.A., Methods of comparative law: significance for post-Soviet jurisprudence, in: Slyschenkov V.A. (ed.), *Problems of post-Soviet theory and philosophy of law: collected papers* (Moscow: Yurlitinform, 2018), p. 224-270 (in Russian) (with further references), available at: https://msses.ru/download/conferences/Проблемы%20постсоветской%20теории%20и%20философии%20права%20-%20Сборник%20статей.pdf (last accessed on 1 March 2019).

[9] Frankenberg G., *Comparative constitutional studies: between magic and deceit* (Edward Elgar Publishing, 2019). On the difficulty of constitutional comparison see the introduction to: Rosenfeld M., Sajó A. (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford : Oxford University Press, 2012).

The influence of the elegant school is now challenged by pragmatically thinking comparatists led by Basil Markesinis, a Greek-British barrister and legal scholar who lectured in over 25 universities and was knighted in 2005 for services to international legal relations. In his words, the purpose of comparative law should be to assist judges and lawyers in solving particular cases, not to entertain law students with stories about exotic legal orders. He is very determined to understand comparative law in terms of its practical usage: 'Our hunch is that there, as well, concrete, focused, detailed and practically relevant studies are used rather than work which looks at the past or at other areas of human knowledge *unless it can be shown to have a close bearing on the subject under scrutiny*' (emphasis in the original – D.P.).[10]

This pragmatic attitude must be shared mostly by practitioners, legal advisers for the government and private companies who engage with foreign law in various *travaux préparatoires* and memoranda, but the comparison of those lawyers is not presented in the form of academic papers.[11] Those who do, do not insist on identifying themselves as comparatists. On the contrary, academic writers are less inclined to follow in the footsteps of pragmatism. And this is where Markesinis sees the actual problem of rescuing the discipline from its current isolation. The last remark brings us directly to the collision between the two camps.

2. The stumbling blocks of the debate

The two camps of comparatists are divided by their goals (understanding the law vs assistance in the solving of actual cases) and approaches (immersion into various legal transplants vs the study of legal materials proper). The divergent views on these two key elements of research produce disagreement on other issues of the debate between the advocates of intellectual elegancy or pragmatism: how to promote comparative legal studies; how to evaluate Eurocentrism, the selective scope of research, the impact of post-modernism, and interdisciplinary interaction. All of them ultimately revolve around two perennial questions: who is to blame and what to do to promote comparative studies?

2.1 The isolation of comparative law: who is to blame?

Although comparatists claim to have overcome the Cinderella complex, the discipline is still believed to be located on the fringe of the legal profession as the majority of lawyers remain 'professionally parochial'.[12] That brings all the concerned parties directly to the question – who is to blame? The elegant school deplores the overall erosion of theoretical disciplines in legal curricula and the collapse of the grand (legal) narrative in post-modern times. In the context of Eastern Europe, one adds the legacy of socialist jurisprudence, which brought about the progressive isolation of lawyers from international legal scholarship and cemented a formalistic legal mentality.[13]

In contrast, pragmatically thinking scholars tend to believe that this is a self-generated ghetto that comparatists get into 'by ignoring reality and the needs of the professional community'. On the top of their list of wrongs is engaging with outdated law (Roman law, primitive law), mixing the study and comparison of advanced legal systems with less developed ones, and flirting with post-modernity and interdisciplinary studies.[14] This confrontation cannot be understood, let alone resolved, without addressing the main points of disagreement.

2.2 Eurocentrism – a blessing or curse for legal scholarship?

During the long 19th century Western culture used to have 'a big mouth and small ears' (an African saying). Since the mid-20th century, many western comparatists have deplored the lack of knowledge about non-European legal cultures. Advances in this direction have recently been well presented in the textbooks by Werner Menski and Patrick Glenn.[15] But until now the bulk of comparative legal knowledge remains oriented towards the West. Even Sacco's textbook, which aims at presenting law 'elsewhere', gave more than 300 pages to European and North American law, while the rest of the world got only a hundred pages; the same proportion as in the standard textbook by René David.

In the face of this inertia, the advocates of legal diversity should probably sprinkle ashes upon their heads. However, the pragmatic comparatists see the situation very differently. Basil Markesinis evaluates the bias positively. First, Europe radiates 'practically relevant' ideas and is producing practical and relevant rules. The state of learning in Europe is enviable. Otherwise why do many other countries – such as China, South Korea, and the former Eastern European bloc – invest so much in studying these major Western European and American systems and try to import their notions and institutions.[16] Secondly, we have to be selective as reading time is 'a sharply limited commodity'. This is a warning which applies equally to the legislator, judges and academics who could not immerse themselves deeply enough into different legal cultures to understand and learn from them.

In Eastern Europe, one can imagine the debate of 'Westerners' and 'nationalists' revived. The camp of Westernizers includes legal historians (Andrei Meduschevski, Dmitry Dozhdev), legal theorists and constitutionalists (Mikhail Antonov),

[10] Markesinis B., Feldtke J., *Engaging with Foreign Law* (Oxford : Hart publishing, 2009), p. 110.

[11] One should look for such a comparison in the *travaux preparatoires* of the lawmakers or the rulings of higher courts. For constitutional courts see: Troitskaya A., Khramova T., 'Usage of foreign experience by bodies for constitutional supervision', in: Gosudarstvo i pravo, 8 (2016), p. 5–22. (in Russian), available at: http://www.eastview.com (last accessed on 1 March 2019).

[12] Siems M., *Comparative Law* (Cambridge : Cambridge University Press, 2018, 2nd edn.), p. 1.

[13] See Antonov M., 'Considerations on teaching theoretical jurisprudence in post-Soviet Russia', in: *Problems of post-Soviet theory and philosophy of law* (cited above, n. 9), p. 4-23 (in Russian).

[14] Markesinis B., Feldtke J., *op. cit.*, p. 33-46.

[15] See Menski W., *Comparative law in a global context: the legal systems of Asia and Africa* (Cambridge : Cambridge University Press, 2009, 2nd edn.); Glenn H.P., *Legal traditions of the world : sustainable diversity in law* (Oxford : Oxford University Press, 2014, 5 edn.).

[16] Markesinis B., Feldtke J., *op. cit.*, p. 47.

civil law scholars (Eugeny Sukhanov) who face the harsh reality of post-soviet relics in positive law and the formalism of legal doctrine. One can find parallels in other post-socialist countries. In the case of Central Eastern Europe, one can refer to the divergent views of the Romanists Tomasz Giaro or Wojciech Dajczak and the network of critical legal studies led by Adam Sulikowski and Rafał Mańko. The former deplore the legal backwardness of Eastern Europe. The latter warn against the large-scale importation of western law as unfit for many particular needs of the nations driven to the 'periphery of the West'.

Legal historians did not escape the temptation of Eurocentrism which sunk deep roots in the metaphor of the *Sonderweg* of (Western) Europeans, their legal tradition is marked by anthropocentrism, legalism, and intellectualism which stemmed from the synthesis of Roman law, Christianity, and ancient philosophy in the late medieval universities.[17]

Other scholars intend to overcome this bias via global history[18], or local (legal) histories from a global perspective. Most notably, the Max Planck Institute of European Legal History has become a forum for 'local perspectives on global histories, and for the need to be aware of the translations these transnationally circulating ideas and models underwent, once they began to be put into action.'[19]

With this intricate combination of local and global, legal historians aim at newly designed research which does away with projecting a national agenda on the whole course of European history and, at the same time, protects the discipline from the dominant discourse of global comparative studies. This agenda drives the criticism of such projects as *The Oxford International Encyclopedia of Legal History* (2009). Its editors decided to describe European legal history under the entry 'Medieval and post-medieval Roman law' as one among many other traditions, such as African law, Chinese law, English common law, Hindu, Islamic, South Asian, Latin American, and Anglo-American common law. Thus, due to today's global agenda, 'the entry on Germany covers five columns, while the editors have allotted 130 columns and many subentries to China and the Chinese law.'[20] Another reason for discontent is the reduction of European legal diversity to the reception of Roman law when local studies bring in more evidence of legal pluralism and the limited influence of *jus commune*.[21]

2.3 The selective scope of research – is it normal or abnormal?

The range of jurisdictions studied is closely linked with Eurocentrism. Academics from the elegant camp understand the undeniable focus on some 'leading' systems only as another birth-mark of comparative law. One can easily ascribe it to the 'big mouth' of ideological imperialism and a tool to impose and maintain the 'centre-periphery' perspective of the leading Western powers and the rest of the world. This is no longer regarded as normal in post-modern academia. Rodolfo Sacco praises comparative studies for presenting a wide range of alternative models to organize societies according to their needs (e.g. the existence of law without the lawmaker, lawyers, or even the state).[22] Günther Frankenberg, one of the leading critical comparatists of constitutional law, calls attention to '*other-constitutions*', that is not 'textbook hegemons' but lessor known ones, because 'almost each one has a story to tell, showing a wider range of transformations'. His publication is about selection, not encyclopedic comprehensiveness, and it is to be treated as a workbook, written to stimulate a transnational, comparative constitutional conversation.[23]

The pragmatic scholar sees nothing wrong with focusing on the constantly changing (but not closed) group of 'influential systems'.[24] The choice is not motivated by reasons of political correctness, or intellectual curiosity. Although the comparatist should not lapse into 'cherry picking', that is, collecting only those foreign solutions which are in line with his or her views and values while concealing the other ones. The comparatist has to take into account at least two points. First, less developed systems are studying the way more advanced systems organise markets or devise laws, and the list of such sources of inspiration is limited. Secondly, broadening one's search to include all legal systems makes it even more superficial. Therefore, engaging with foreign law requires relevance *ratione materiae* and the need to ponder 'where borrowing may be viable and where it is better avoided'.[25]

The narrative of legal history is also selective and its biases are often criticised. The advances of comparative legal history enable contemporary scholars to claim that truly European legal history is yet to be written.[26] It is more difficult to justify why such authors as Randall Lesaffer or Antonio Padoa Schi-

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[17] Wieacker F., 'Foundations of European Legal Culture', in: *The American Journal of Comparative Law*, 38(1) (Winter, 1990), pp. 1-29. For a similar thesis on the foundations of Europe see the Polish textbook on Roman law: Giaro T., Dajczak W., Longchamps de Bérier F., *Prawo rzymskie : u podstaw prawa prywatnego* (Warszawa : Wydawnictwo Naukowe PWN, 2018), p. 39.

[18] Conrad S., *What is global history?* (Princeton : Princeton university press, 2016).

[19] Duve T., 'Entanglements in Legal History. Introductory Remarks', in: *Entanglements in Legal History: Conceptual Approaches* (Frankfurt am Main : Max Planck Institute for European Legal History, 2014), p. 19; Idem, 'Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive', in: *Rechtsgeschichte–Legal History*, 20 (2012), p. 18–71.

[20] Duve T., 'German Legal History : National Traditions and Transnational Perspectives', in: *Rechtsgeschichte–Legal History*, 22 (2014), p. 32.

[21] Donlan S.P., Heirbaut D., 'A Patchwork of Accommodations': Reflections on European Legal Hybridity and Jurisdictional Complexity', in: SSRN Electronic Journal (2014), available at: https://www.ssrn.com/abstract=2477325 (last accessed on 1 March 2019).

[22] Gambaro A., Sacco R., Vogel L., *op. cit.*, p. 17-19.

[23] Frankenberg G., *op. cit.*, p. ix-x.

[24] Markesinis B., Feldtke J., *op. cit.*, p. 49.

[25] Ibidem, p. 50-52.

[26] Pihlajamäki H., 'Comparative Contexts in Legal History: Are We All Comparatists Now?', in Adams M., Heirbaut D. (eds.), *The Method and Culture of Comparative Law. Essays in Honour of M. Van Hoecke*. (Hart, Oxford, 2014), p. 127.

oppa in their textbooks tacitly substitute European legal history with the Western European one, or, like Uwe Wesel, attempt to present pan-European legal history from the point of view of the 'core lands' of Italy, France, and Germany. This perspective has to do with the legacy of Paul Koschaker, Franz Wieacker, and Helmuth Coing, not with the implementation of the ideas of legal pluralism and critical investigation of the ideologies behind legal histories.

This is not to say that the narrative of European legal history from an East European perspective is a meaningful alternative. In the face of scarce studies in this domain, the perception of a pan-European legal past is shaped by western literature, while national legal history enjoys an autonomy that breeds a sense of national peculiarity.

2.4 Should legal studies be linked with neighbouring disciplines?

The formal and professional institutionalisation of law in Europe suggests that law is to a large extent autonomous and translates impulses from society into its own normative language. But do legal scholars need assistance from economists, sociologists, anthropologists or the like in such a translation? The answer tends to be negative. Franciscus Accursius answered in his *Glossa ordinaria* that law students should not study theology because legal science incapsulated 'the sufficient goal in itself' and entirely rests on the *Corpus juris civilis*.[27] The motive of disapproving 'extra-legal' arguments remained part of academic debates ever since (see the opening quotation above). Dogmatic jurisprudence of the 19th century also tended to isolate legal discourse. In the words of Bernhard Windscheid, issues of politics, morals, religion, or economics should not be the concern of lawyers. This view lived on through the 20th century thanks to the scholars who, like Alan Watson, claim that legal changes are controlled internally, within the legal system and by its (professional) elites.[28]

Early comparative law, or comparative legislation, shared a similar viewpoint. Yet, the post-WWII critique of legal formalism in combination with cultural turn(s)[29] paved the way for 'post-modern' comparative law which seeks a fuller understanding of foreign law via a plurality of methods and approaches. Contacts or clashes of civilizations and technological innovations challenge many legal conventions and require comparatists to reflect on the cultural or paradigmatic foundations of both foreign and domestic law. Such ambitious objectives cannot be achieved with the regular toolbox of legal scholarship and motivate comparatists to look at:

- *legal philosophy,* to reveal the limits of law, its ideals, basic assumptions and the like,[30]
- *sociology*, to explore conflicting social interests which shape the law within society, 'law-in-action',
- *anthropology*, to study the relics of primitive mentalities in our societies and to shed new light on the mythical background of contemporary law, family structure and blood relationships, alternative methods of dispute resolution,[31]
- *legal history*, to identify the hidden factors of legal solutions in the common sense of lawmakers, judges, and lawyers because law is understood as the complicated combination and outcome of the mentality, legal style, and morphemes of each nation rooted deep in its past.[32]

However, the post-modern programme of interdisciplinary comparative legal studies has never been fixed in a coherent manifesto. Its advocates often argue with one another, exposing themselves to a pragmatic counter-attack. Basil Markesinis accuses such an approach as being not properly 'packaged' without a clear legal aim in mind, which makes it closer to humanities than to law. Another concern is its high level of abstraction and the lack of 'applied research' which prevents practitioners from ever consulting the results or taking them as a good starting point to handle any legal problem.[33] The link between legal scholarship and particular neighbouring disciplines also deserves its share of criticism for being utterly impractical and alien in any European courtroom.

The cultural turn had a strong impact on legal history. The team of contributors of a recent work of reference, *'The formation and transmission of Western legal culture'* (2017), swear by it and present the whole legal history of Europe as cultural legal history.[34] The moral duty of legal historians to cooperate

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[27] 'Iuris sola scientia habet caput et finem' (*Glossa* ad Inst. 1.1).

[28] Watson A., *Legal transplants : an approach to comparative law* (Athens, London : University of Georgia Press, 1993, 2nd edn., 1st end. University Press of Virginia, 1974).

[29] Till today cultural (interpretive, performative, reflexive) turn(s) have exercised a considerable impact in the humanities and social sciences. One of the main implications being the vision of social world as composed not of people but of meanings ascribed to those people, their actions and things. The actions are being constantly transformed into signs which makes culture the social texture. 'social actions are constantly being translated into signs so that they can be ascribed meaning'. See: Bachmann-Medik D., *Cultural Turns: New Orientations in the Study of Culture* (Berlin : De Gruyter, 2016), p. 49 (with further references to Hayden White, Clifford Geertz, Michel Foucault, Pierre Bourdieu, Julia Kristeva et al.).

[30] Ewald W., 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"', in: *American Journal of Comparative Law*, 46 (1998), p. 701–707; Gordley J., *The Jurists: a Critical History* (Oxford : Oxford University Press, 2013); Valcke C., 'Reflections on Comparative Law Methodology – Getting Inside Contract Law', in: Adams M., Bomhoff J. (eds.), *Practice and Theory in Comparative Law* (Cambridge : Cambridge University Press, 2012), p. 22–48.

[31] Rouland N., *Antropologie juridique* (Paris : Presses Universitaires de France, 1988) (building on theory he suggests to conduct this study on the basis of M. Alliot's theory of coexisting archetypes or modes of though in the societies); Fikentscher W., *Modes of Thought* (München : C.H. Beck, 2012, 2nd edn.); Moore S.F., 'Doctrine as Determinism: A New Old Grand Theory' (review of Fikentscher, Modes of Thought), in: *Rechtshistorisches Journal*, 15 (1996), pp. 447–461.

[32] See, for example, references to the publications by James Gordley above.

[33] Markesinis B., Feldtke J., *op. cit.*, p. 54.

[34] 'Law is culture' is the first phrase of the general introduction. See: Dauchy S., Martyn G., Musson A., Pihlajamäki H., Wijffels A., *The formation and transmission of Western legal culture: 150 books that made the law in the age of printing* (NY : Springer, 2017), p. 1.

in interdisciplinary research has been voiced more than once (although with rare specific projects until now).[35] As a result, the thematic field and approaches to doing legal history have expanded spectacularly.

Despite all that, interested scholars repeatedly raise complaints about historical knowledge being squeezed out from law faculties under various pretexts. The pragmatic critique is especially harsh for legal history. Markesinis' claim in this regard is clear: 'our agendas, unlike our dreams, must be shaped in the light of the current financial condition of European law faculties…' Changing the real world is the 'reason why legal history in general and Roman law in particular have lost and, more importantly, *deserve* to lose their decisive grip over comparative law' (emphasis in the original – D.P.).[36]

On the other hand, even pragmatic minds among lawyers do not go as far as to discard legal history altogether. Richard Posner is among those who acknowledge law's dependence on the past in terms of the genealogy of its concepts and the legitimacy of its normative models.[37] Perhaps, its major value lies in the accumulated range of possible legal solutions that could *inspire* us to seek new solutions.

I can explain these divergent opinions of these two pragmatic minds only by referring to different approaches to legal history. The first (I label it 'antiquarian') orients historians towards reconstructing the law as it was at a particular moment in time. The historian does his job well even if he does not trace the development of the old norms through to modern times. The second (I label it 'applicative') charges the historian with the task of keeping an eye on the law's development towards its contemporary form. Some historians oppose the latter as it reminds them of the subordinate position of legal history in times of the late Pandectists (*Magd der Dogmatik*). But the majority of lawyers and law students are interested in the issues relevant for today's realities. Perhaps legal history should not reject opportunities to empower dogmatic studies with historical depth.[38] The key issue here is to establish a coherent approach.

3. Contextualized comparison as possible synthesis

The debate between the elegant and the pragmatic approach to legal comparison reveals pros and cons on each side. Many academic scholars do a lot to raise lawyers' awareness of the legal diversity of the world, which becomes more relevant in the face of cross-cultural contacts. Yet, a plethora of knowledge about law as culture is not always helpful for solving cases in the courtroom.

To give an example, one can think about the sensitive issue of recognizing the legal capacity of robots with more or less sophisticated artificial intelligence (AI). AI can cause robots to act in a way that their developers could not envisage. It raises the very practical issue of legal liability for eventual damages. There are several models of allocating legal liability but this purely practical issue can hardly be resolved without theoretical justifications. The debates about the European Parliament resolution of 16. 02. 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)) revealed the unwillingness of the legal advisors involved, let alone the politicised MPs, to acknowledge robots as subjects in legal relationships.

Recently, two Russian authors claimed that the reasons for this unwillingness are the confusion of legal and philosophical discourses about persons.[39] The mainstream conception identifies subjects with personalities, that is individuals, or at least entities controlled by them (legal persons). Such an identification goes back to Savigny's modern Roman law, which diverged from the strict separation of *persona* (legal mask) and *homo* (human being) in ancient Roman jurisprudence. The confusion of the 19th century was due to the philosophy of the Enlightenment and the conceptualistic approach to legal definitions. The Pandectist jurisprudence (*Begriffsjurisprudenz*) notably emphasised defining the 'essence' of legal concepts as if they were a kind of thing in legal reality. It is the legacy of 19th century jurisprudence that still causes many lawyers to put forward emotional arguments against recognizing robots as subjects of the law: one should not give equal rights to individuals and insensate robots; one should not provide legal grounds to transform humans into slaves of those robots; one should preserve the humanitarian foundations of the law in EU member states. In other words, the issue of the legal status of robots cannot be resolved without prior investigation of the basic assumptions of such a discourse which, in turn, belongs to a legal culture or paradigm.

The cited article on robots as legal subjects reminded me of the recent attempt to marry the 'elegant' and the 'pragmatic' in the textbook of Uwe Kischel.[40] He has written an impressive volume with the ambition to replace Rabel's functional method with the contextual approach to comparison. He draws a distinction between 'context', 'legal culture', and 'legal family' from a methodological point of view. First, 'legal family' (*Rechtskreis*) serves as a Weberian ideal type and this is the starting point of comparative research. Secondly, using basic information about the law of a given legal family and its historical background, the student should be able to develop an appropriate research design by asking the right questions and avoiding typical mistakes. Thirdly, the student is supposed to start his or her immersion into the context with all its complex interplay of histori-

[35] See, for example: Heirbaut D., 'Exploring the law in medieval minds : non-written law', in: Musson A., Stebbings C. (eds.), *Making legal history : approaches and methodology* (Cambridge : Cambridge University Press, 2012), p. 118–130.

[36] Markesinis B., Feldtke J., *op. cit.*, p. 69.

[37] Posner R., *Frontiers of legal theory* (Cambridge, Mss. : Harvard University Press, 2001), p. 6, 145 f.

[38] Some recent textbooks on Roman law give a good example of a historical approach to the genealogy of contemporary concepts and normative schemes. See, for example: Waelkens L., *Amne adverso : Roman legal heritage in European culture* (Leuven : Leuven University Press, 2015); also Giaro T., Dajczak W., Longchamps de Bérier F., *op. cit.*

[39] Gadzhiev G., Voinikanis E., ‚Could Robot be a Legal Subject?', in: Pravo–Zhurnal vysshei shkoly ekonomiki (4) 2018, p. 24-48. The resolution is available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0051+0+DOC+XML+V0//EN (last accessed on 1 March 2019).

[40] Kischel U., *Comparative law* (NY : Oxford University Press, 2019; 1st German edn. C.H. Beck, 2015).

cal, economic, political, cultural, and phycological factors. This kind of immersion into the context of foreign law is limited by the research goal, available data, and human abilities.

Kischel's textbook seems a remarkable combination of the 'elegant' and the 'pragmatic' visions of comparison. It possesses about 1000 pages with extensive methodological explanations (ca. 240 pages) in the first part; the second part is dedicated to legal families of the world, which goes beyond purely pragmatical needs. On the other hand, the focus on Western law is undeniable and is barely explained in academic terms with a short reference to practical considerations.[41] Despite its unavoidable imperfections, the textbook provides a more appropriate springboard for comparative studies in our times, when the new technical and cross-cultural realities of the contemporary world challenge most legal conventions and call for wider expertise to resolve even quite practical issues, like the legal status of robots.

Conclusion

The renewed debates between 'elegantly' and 'pragmatically' minded comparatists are likely to mark legal scholarship in Europe for years to come. The vast jurisprudential horizon of legal research with several clear outlooks into anthropology, cultural studies, economics, philosophy, political science, sociology and many others will always be 'obstructed' by the facades of actual national parliaments, public offices, courts of law, and other elements of reality. After all, law 'rules' only when humans act upon it in real life. The observers and the participants of the clash between rival academic schools can benefit from this by looking into the relevant problems of jurisprudence.

Among other things, this debate raises the issue of 'making' legal history in the 21st century. Information about a law's past is still present in any solid textbook on comparative law and helps to clarify the legal diversity of contemporary jurisdictions on the macro-level, as well as the variety of legal concepts, principles, and institutes on the micro-level. On the other hand, the usage of historical data can be very schematic, superficial, and limited by the illustrative needs, while the wealth of deep historical knowledge is often discarded as irrelevant to the current legal issues and fossilised by the passage of time.

The advances of comparative studies highlight the growing divide between the cumulative knowledge of the legal cultures of our shrinking world and the progressive marginalisation of theoretical and historical disciplines in legal curricula across Europe in the face of collapsing 'grand narratives' and multiplying challenges to age-old conventions and traditions.

Debates within the community of comparatists highlight a curious paradox of legal history today. It is widely believed to be helpful, even indispensable, for identifying the hidden formants (Sacco's cryptotypes) in professional legal culture(s). And yet the potential of legal history for comparative law remains by and large locked. While comparatists do not go deeply into the waters of legal history, legal historians stick to their particular agenda which excludes current legal issues due to the fear of subduing law's past to its present.

Such concerns are understandable but not helpful in promoting legal history in comparative legal studies. In this paper I mentioned the issue of recognizing robot's legal personality. It is a clear example of how scholars can engage with legal history to reveal the hidden formants which prevent the majority of lawyers in Europe from accepting new kinds of legal subjects. It is also a good illustration of the much needed reflection on the context(s) and the paradigm(s) of European legal culture, its present and past, in the face of the ongoing internationalisation of law and legal studies. Hopefully, legal historians will play their role in this uneasy research.

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[41] So, the diversity of the continental legal family is presented from the point of view of the West European models (French and German) while other jurisdictions are analysed as deviations from the standard. Russian law is curiously presented as a stand-alone context (?) within the continental context and allowed only five pages dominated by the leitmotiv of legal nihilism and without references to major works on Russian law by the leading Russian scholars (discarded as nihilists?). See Kischel U., *op. cit*., p. 586–590.

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Registration of Civil Status in the Second Polish Republic (1918 – 1939)

Bartosz Kamil Truszkowski *

Abstract

After years of non-existence the Polish country has regained its independence in 1918. The Second Polish Republic consisted of territories taken back from the three past invaders, which resulted in huge differences in law in each of the new districts. One of the best examples of such heterogeneity was the registration of civil status. Apart from varying Prussian, Russian and Austrian regulations, we could also distinguish separate provisions in the lands of the former Kingdom of Poland and the little area of Spis and Orava, what created the mosaic of five different legal orders in that field in one state. Only two of them were fully secular, the other three based to a greater or lesser extent on the religious parish records of births, marriages and deaths. The author outlines the five registration systems by presenting the provisions of the basic legal acts that were functioning in each of the five specified regions.

Keywords: *Civil status registration; registry office; vital records; the Second Polish Republic; interwar period; law diversity.*

1. One state, five systems

In the pre-partition Poland registration of births, marriages and deaths was carried out solely on the basis of internal church regulations. Foundation of its implementation can be traced to the resolutions of the Council of Trent (1545-1563) and the Roman Ritual of 1614[1]. It is estimated that parish registers were implemented in the Polish lands in the second half of the 16th century, although cases of similar censuses were known even before the Council[2]. However, most of the time, church records were not public and legal documents, and the state did not interfere in its preparation, which began to change only towards the end of the 18th century[3].

The Polish-Lithuanian Commonwealth ceased to exist in 1795. Its territories were divided between the Russian Empire, the Kingdom of Prussia and the Austrian Habsburg Monarchy. The fully independent Polish state has risen after years of non-existence in 1918, and each of the united territories brought into the common legal order the legislation of individual partitioned lands, including the provisions on civil status registration. That is why we could distinguish as many as five different registration systems in the territory of the Second Polish Republic[4]:

- religious registration with secular elements in the Kingdom of Poland (the so-called Congress Poland - a non-sovereign state in a personal union with Russia, created by the decision of the Congress of Vienna in 1815),
- fully religious registration in the territories previously belonging to the Russian Empire,
- mixed registration (with religious and secular elements, but with predominance of the first ones) in Galicia (the Austrian Partition),
- fully secular registration in the Prussian Partition,
- fully secular registration in Spis and Orava (Hungarian legislation).

Huge diversity resulted not only of the solutions contained in particular regulations, but also from the years of their coming into force. The basis for registration in the south of the country was the Austrian imperial patent from 1784, in the east the Russian Digest of Laws from 1832, in the west the German law from 1875, in the area of Spis and Orava the Hungarian law from 1894. In the central provinces we should have looked into the Civil Code of the Kingdom of Poland from 1825, which reproduced some of the solutions developed in 1792 in France[5], because many of them were implemented in the Napoleonic

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5 POMIANOWSKI, P., Funkcjonowanie francuskiego modelu rejestracji stanu cywilnego w Polsce. In: *Czasopismo Prawno-Historyczne*, vol. LXVII, Nr 1, 2015, p. 95.

Code taking effect in the Duchy of Warsaw in 1808[6]. The French code established an entirely secular registration of civil status, which was the first non-denominational form of drawing up vital records in the Polish lands[7]. However, it has never been fully implemented due to the lack of qualified clerks, functions of the registrars were usually still performed by the local priests[8]. In 1825, the religious registration was re-established, but with preservation of some of the Napoleonic solutions.

This large discrepancy between registration systems was of great importance both for the state, for which civil status records should be one of the main sources of information about its citizens, as well as for the citizens themselves. A civil status is a determination of the individual position of a person in the society, guarantees the certainty of status and protects against the abuse of rights by other people[9]. In many regulations, including those of the 18th and 19th centuries, parish records or civil status records were the only evidence of birth, marriage and death for particular persons[10].

Lack of universality and homogeneous protection of these rights due to different solutions in each district caused chaos and significant prolonging of simple matters in the administration system. In extreme cases, even an utter impossibility of registering a birth, marriage or death[11]. Problems with their usage have been widespread due to their non-adaptation to the needs of a modern state, the problems with access to the texts of legal acts, as well as a multitude of often mutually exclusive provisions. In total, in this field there were about 120 legal acts in force, of which 62 in the Austrian Partition itself, with 30 of them being nowhere published circulars.

2. The central voivodeships - the former Kingdom of Poland

In the central provinces, which have been the territory of the former Kingdom of Poland, registration of civil status was regulated by the Civil Code of the Kingdom of Poland from 1825 (entered into force on January 1, 1826). The provisions on civil status records were placed in articles 71-142[12]. It was established that for people of Christian denomination, civil registry records were to be combined with parish books of births, marriages and deaths. A priest, head of a parish, was to obey both church and civil regulations. He was to be a civil registrar in relation to the persons to whom he gave a religious rite.

The record was to be written down immediately after completion of the rite and inscribed in two separate books[13]. One of them had the status of parish book and was to be remained in place, it had to be filled up to the lack of space. Books of births, books of marriages and books of deaths were in the form of separate notebooks. The second copy was to be transferred to the archives in the justice of the peace court, it consisted of three parts intended for specific events and was to concern the ones from a given year. At the end of each calendar year, the books should have been closed (in the case of the parish book, new records should have been separated from the previous year) and provided for inspection to a designated person from the Government Commission of Justice. Then the second book should have been passed to the archives.

If religious rite was not associated with the civil status record, or if it was not necessary according to the rules of religion, the record was to be inscribed in two books immediately after a testimony of the parties. Such situations concerned, for example, adoption, recognition of a child or baptism in adulthood. In each record, the registered data was to include the year, day and time of admission and the name, age, occupation and place of residence of persons mentioned in the record. No additions or explanations have been permitted. Two male witnesses were required at the time of registration, each had to be at least 21 years of age[14]. Noteworthy is the distinction between a status of applicant and witness, also a single mother or a midwife could be the applicant. Keeper of the books was obliged to read the record to the applicant and the witnesses, sign it, and collect their signatures. In the case of an obstacle in signing the record by one of the obligated to do it, the reason for it should have been included.

The records were to be written without empty spaces, all expressions were to be in full form, without abbreviations, and numbers were to be written in words. Applicants and witnesses were to sign all cross-references, and if the record did not fit on one page, signature was demanded on each page on which it was located. Everyone was entitled to request extracts from the books, both from the parish one and the one in the archives. They were of official character, and thus were to be considered to be certified true copies until they were appealed.

Civil registry records or parish records of births, marriages and deaths written down before a registrar other than the local one, should have been, after the request of interested parties, drawn into the books appropriate for their place of residence. In the case of need to make changes or corrections due to changes taking place after drawing up of the record, the keeper of books

[6] CZUBATY, J., *Księstwo Warszawskie (1807-1815)*. Warszawa 2011, p. 169-172.
[7] *Kodex Napoleona z przypisami. Xiąg trzy* (published in Drukarnia XX. Piarów), Warszawa 1810, p. 13-33.
[8] JEMIELITY, W., Akta stanu cywilnego w Księstwie Warszawskim i Królestwie Polskim. In: *Prawo Kanoniczne*, Nr 1-2 (38), 1995, p. 165-166.
[9] STAROŚCIAK, J., *Prawo administracyjne*. Warszawa 1977, p. 533. CHODYŃSKI, S., Akta Stanu Cywilnego, In: *Encyklopedia Kościelna* (red. NOWODWORSKI, M.). Vol. I, Warszawa 1873, p. 101-104.
[10] DOBKOWSKI, J., Preponderacja aktów stanu cywilnego. In: *Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego*, Nr 2, 2011, p. 15-17.
[11] Central Archives of Modern Records (Archiwum Akt Nowych), File: Ministry of Religious Denominations and Public Enlightenment (Ministerstwo Wyznań Religijnych i Oświecenia Publicznego), Unit: 641, cards: 309-315. An example is the situation of a child born in the former Kingdom of Poland and baptized in the area of the former Prussian Partition. The parish priest refused to inscribe the data into the parish book, because the child was baptized outside his parish, and the civil registrar refused to write down the birth record, because was not born in his circuit. In this situation, the child was utterly beyond the registration system.
[12] Kodex Cywilny Królestwa Polskiego (Dz.Pr.K.P. Tom X, Nr 41), p. 41-84.
[13] It was a change in relation to the provisions of the Napoleonic Code, which required to draw the record prior to making a potential rite.
[14] Under the rule of the Napoleon's Code also the women could have been witnesses.

was to make reference to the judgment or record on the edge of original record.

A military chaplain was competent for keeping the books for the persons serving in the army, even for the ones of a different religion than the clergyman belonged to. In this case he has been writing down just the civil records, without the accompanying religious certificates of rite. For non-Christian and Christian denominations, for which there was no organized parish in their place of residence, the Government Commission of Justice had to designate the appropriate persons to draw up their records. Same as above, when the nominees did not have the right to perform the rites, or if the rites were not required at all, only the civil registration was to be carried out. However, it was stipulated that separate provisions should be issued for people of the Mosaic faith due to their previous evasion of registration [15]. In such a system, functions of the civil registrars were held by the parish superiors for the Roman Catholic, the Greek Catholic, the Orthodox, the Evangelical of Augsburg Confession and the Evangelical reformers. For non-Christian and Christian denominations (such as the Baptists, the Bible Students, and the Seventh-day Adventists) it was a duty of superiors of rural or urban municipalities (*wójts* – the elected mayors of rural communes, the mayors in towns and the presidents in cities), alternatively of the specially established civil registrars [16].

Every child should have been presented to the keeper of books in order to draw up a birth record within 8 days of birth, even if a potential religious rite was postponed for a later period. Birth should have been reported by the father, and in his absence by the doctor, the surgeon, the midwife or the other person present at birth. In addition to the day, time and place of birth of the child, as well as his names and gender, the keeper was to write down personal details of the parents of child. The father of an illegitimate child could have been enrolled in the record only if he has been present at the time of its drawing up and has acknowledged the child. An eventual subsequent act of recognition was to be written on the edge of the birth record. A similar mention could be made in the case of adoption, but only after request of the interested party. In the case of finding a child, it was necessary to present it to the superior of any parish, along with the items found with it and to explain all the circumstances of finding. The priest had to write them down in the record, as well as the data of person or institution accepting the child for upbringing.

Before writing down a record of death, the keeper of books should have checked the death of a person with his own eyes, and if he has not been the supervisor of a parish, he should also give out the free of charge burial permit (but not earlier than 48 hours after death). In addition to the personal details of the deceased and the time and place of death, it was necessary to register his marital status, personal details of his parents and eventual spouse. In the case of death of a person staying in a hospital, prison or other public institution, an administrator of the facility should have provided the above data to the registrar. In the case of a violent death, the data established by the officials examining its circumstances was to be entered into the record. Regardless of the manner or cause of death, it could not have been written in the record. In the case of a loss or destruction of books, death of the given person was to be confirmed by the documents and testimonies of witnesses.

The rectification of civil status records could have happened by the way of a judgment of the land court competent for interested parties, but only at their request and after hearing the prosecutor's conclusions. Note about the judgment was to be inscribed on the edge of amended record in the local register of civil status.

The provisions on marriage records from the Civil Code of the Kingdom of Poland have been tacitly repealed and replaced by regulation of this issue in the law on marriage of 1836 [17]. Before the marriage ceremony, the priest was required to demand birth certificates of the future spouses and a death certificate of the previous spouse in the case of a widow or a widower. In the case of problems with obtaining them, the testimony of two witnesses wasto be sufficient. After completing the wedding ceremony, the priest who kept the register of civil status was to draw up the record in which he should have written down the personal details of prospective spouses, as well as their parents, witnesses, and the information about parents' permission (if required), the place and date of announcement, the details of marriage contract and the statements of priest and witnesses. In addition to the Catholics, similar provisions were in force in relation to the Greek Catholic, the Orthodox and the Evangelicals. The believers of other religions, after the marriage before the priest, were to go with him to the civil registrar who was to draw up the record according to the information given to him. The marriage record was supposed to be the proof of its conclusion. The verdict of the court regarding the annulment of marriage, divorce and separation was to be inscribed on the edge of marriage record.

The religious registration of civil status was widely criticized after regaining the independence. In practice, the books were often kept by the uneducated organists or the churchwardens, what generated a huge number of errors and inaccuracies in the records [18]. The signatures from applicants and witnesses were often picked up in blank, on a blank page in the book, and the text was later filled in with the data from notes or even from a memory. "Presenting the child" to the registrar also turned out to be a fiction, most often its data has been inscribed only on the basis of testimonies. The uncertainty of entered data was so great, that the records could not really provide full evidence of the information therein contained, and the courts were full of cases for rectification [19]. In addition, a big group of

[15] WALEWSKI, J. (red.), *Kodeks Cywilny Królestwa Polskiego (Prawo z r. 1825). Objaśniony motywami do prawa i jurysprudencyą. Księga I*, Warszawa 1872, p. 53. Such provisions were issued in the form of a decision of the Administrative Council on September 7, 1830.

[16] LITWIN, J., op. cit., p. 26.

[17] Wypis z protokołu Sekretaryatu Stanu Królestwa Polskiego. O małżeństwie (Dz.Pr.K.P. Tom 18, Nr 64), p. 275-283.

[18] SAŁACIŃSKI, B., Martwe Dusze. In: *Współczesna Myśl Prawnicza*, Nr 4, 1938.

[19] ŚWIĄTKOWSKI, H., Z manowców naszego niezunifikowanego prawa w dziedzinie prawa małżeńskiego i aktów stanu cywilnego. In: *Głos Prawa*, Nr 9, 1934.

non-denominational persons and the members of unrecognized denominations did not have the opportunity to obtain the civil status record at all.

3. The eastern voivodeships – the former Russian governorates

The entirely religious form of registration was in force on the territories belonging once the Russian Empire, which was regulated by the articles 1559-1625 of volume IX of The Digest of Laws of the Russian Empire of 1832 (in version published in 1857)[20]. Proper clergymen were the keepers of vital records for the Roman Catholic, the Orthodox, the Evangelical-Augsburg, the Mosaic and the Mohammedan denominations[21].

For the members of Orthodox Church, the civil records were to be written down in the parish record books kept in two copies. At the beginning of each year, the consistory offices or other offices of denominational authority were to prepare such books for each church in a form of a notebook, consisting of three parts for births, marriages and deaths. The records were to be drawn up immediately after the baptism ceremony (or the prayer at birth), the marriage or the funeral. A military chaplain was responsible for writing down the records for persons serving in the army.

All inscriptions in the books were to be made only by the superior of parish, the deacon or the churchwarden. Any erasures were forbidden, in the case of errors, they should have been marked and the correct information should have been further entered correctly. After the end of year, it was necessary to summarize the book by recording the number of individual registered events and then to secure it in the sacristy. In the first month of next year, the second book should have been handed over to the consistory or to the denominational authority. Then it was to be passed to the consistory archive.

Each parishioner had the right to inspect records concerning his person or a member of his family. Birth, marriage and death certificates were to be issued for a fee by the consistory, everyone could have got written confirmation of the events connected with his person, his child or the child in his care. Eligible persons could have also receive data from the records in a form of extracts directly from the clergyman. Such documents, however, could not replace the consistory certificates and were to serve only as a document that substantiates certain facts.

Analogous rules functioned for other religions. Only the priests were to draw up the records of the Roman Catholic denomination (but in practice, the churchwardens often undertook these duties), and the copies of them were to be sent to the consistory, which were to keep them in the diocesan archives. In the case of members of the Evangelical of Augsburg Confession denomination, the registration was more extensive as to the number of the recorded events. It was kept in the form of lists of: born and baptized; confirmated; persons receiving communion; betrothed, marriage announcements and newly married; buried. After the end of year, the evangelical clergyman also were to hand over the copy of list to the consistory.

In the case of Islamic records, it was allowed to create them in the Tatar language, and the imams were to submit the second copy of the book to the county (Polish *powiat,* Russian *yézd, uyezd*) police authorities. Then it was to be sent to the denominational authorities. In the Jewish record books we could distinguish the division into four kinds of sheets. In the first one the inquiries about the ceremony of circumcision for all boys and the names of all girls were to be written down, the second and the third sheet should have contained all the marriages and divorces, and the fourth was to include the funerals of deceased. At the beginning of year, the rabbis were to hand over one book to the city authorities, from where it should have been sent to the archives.

Despite extensive regulations, the church books of born, married and deceased were not public documents, and the state authorities did not interfere in their conduct. The only secular element of this type of registration was the establishment of provincial and municipal offices as the subjects storing copies of the books[22]. Registers were characterized by a very large inaccuracy, which was caused by a vast freedom in writing down the data by clerics. Often not all the events were inscribed or were mixed up in one book, and marital records were being downsized to the notes on the edge of birth records.

4. The southern voivodeships - Galicia in the Austrian Partition

In the areas of former Austrian Partition, the legal foundation of registration of civil status was the imperial patent from 1784 on baptism, marriage and death certificates[23]. The established registry characterized with a religious character, as each parish priest has been obliged to keep three separate books for births, marriages and deaths. The books were to be divided into the three forms of separate sheets, for each of the three types of recorded events, the models of which were attached at the end of imperial patent.

The first sheet concerned marriages and it was to include a date of its conclusion and the personal details of new spouses and witnesses. The priest and the witnesses should have submitted their own signatures under the prepared record. In the case of illiteracy, they should have made a mark next to their name written by another person.

The second sheet was to contain the data of newborn - a date of coming into the world, a name of the baptized child (what was the inseparable link between a birth record and a rite of baptism)

[20] Svod zakonov Rossiyskoy imperii, poveleniyem gosudarya imperatora Nikolaya Pavlovicha sostavlennyy. Tom devyatyy. Zakony o sostoyaniyakh (Свод законов Российской империи, повелением государя императора Николая Павловича составленный. Том девятый. Законы о состояниях), Sankt Petersburg 1857, p. 303-316.

[21] LITWIN, J., op. cit., p. 26.

[22] HRYNICKI, W., op. cit., p. 363.

[23] X. Patent vom 20. Februar 1784, *Die Tauf-, Ehe- und Sterbregister betreffend,* p. 28-29. Polish text: *Uniwersał Względem Metryk, Chrztu-Slubów y Pogrzebów z* 20 Lutego 1784, p. 30-31. Both versions from: Continuatio Edictorum, Mandatorum et Universalium in Regnis Galiciae et Lodomeriae a Die 1. Januarii ad Ultimam Decembris Anno 1784. Emanatorum. Kontynuacya Wyrokow y Rozkazow Powszechnych w Galicyi y Lodomeryi Krolestwach od Dnia 1. Stycznia aż do konca Grudnia Roku 1784. Wypadłych (published by J. Pillerowa), Lwów 1786.

and its sex. It was also necessary to note the personal details of parents and godparents. The data of illegitimate father was to be written down only when he himself has admitted to the child.

The third sheet was destined for the death records and should have contained the date of death and the personal details of deceased. If the corpse could have been examined by the doctor, the reason given for death and the possible name of illness were to be written down as well.

The diocesan bishops were to supervise the process of keeping books of born, married and deceased through the regular inspections. The circular officials should have had the additional supervision in terms for the compliance with legal regulations[24]. Analogous three registers were to be run by the local rabbis for the Jews, taking into account the divergences of their rites. If there was no local rabbi established, the records for the individual families and persons were to be kept by the rabbi nearest to their place of residence.

At the end of each year, the parish priests and the rabbis keeping the books should have prepared an annual summary of the all the three registers. The summed up list should have been sent to the circular office and the military representative in the given circulate until January 15th. The regulations on the combined birth, marriages and death certificates and civil status records were successively enriched with various legal acts throughout all the 19th century and the beginning of the 20th century. From 1813 appeared the separate section of the date of baptism (apart from the date of birth), as it was possible to baptize infants twice – in the traditional way and from the water in the case of danger to life[25]. In the same year, the book keepers (including the Jewish ones) were required to explain whether the person registered as the child's mother was her in fact (the mother's credibility was confirmed by the midwife who from 1825 also was to be noted in the record), whether the man given as the father of child was married to the mother of child for at least 6 months and whether the given parents' names are true[26]. The father was to be registered on the basis of his declaration, the testimony of two witnesses and the marriage record. In special cases, the father's identity was to be explained by the political authority, which was also proper to make all decisions on rectifying the civil status records[27].

The right and the obligation to keep the books of vital records have been gradually granted to the priests of other faiths. By the act of May 25, 1868, the legal gap in the registration of many groups of citizens has been liquidated. Members of non-registered denominations and persons of irreligious beliefs also became included in the registries[28]. For them, the function of registrar was held by the *starosta* (*powiat* administrator) or the mayor of city. In the regulation of 1875, the rabbis were prohibited to keep the birth, marriage and death records. The special officials were appointed to register these events for the people of Mosaic religion, one in each district[29]. The *starostas* were to provide them with books and to supervise keeping the records. From the technical point of view, the records prepared by the Jewish registry offices did not differ from those prepared by the religious parish offices. The language of the Jewish books was German with the translation of the sections into Polish or Rusian[30].

By the regulation of the Austrian Ministry of the Interior of September 16, 1875, the language of Catholic books of civil records was to be Latin[31]. Such a status was maintained throughout the whole of the Second Polish Republic, which was extremely burdensome and caused many difficulties for those who did not know this extinct language. In October 1919, a part of the Greek Catholic ordinaries broke off, and ordered to draw up the records in Ukrainian, which further complicated the difficult situation regarding the coherence of register books[32]. The matter was repeatedly dealt with in courts, which clearly protected the coercion of writing down the records in Latin[33].

5. The western voivodeships – the Prussian partition

In the lands of former Prussian district, the first state-run and fully secular civil registry offices were organized on the basis of the Prussian Act of 9 March 1874 on keeping of civil status registers and marriages[34]. The following year it was replaced by an analogous legal act designed for the entire territory of the German Reich - the law of February 6, 1875 on registration of civil status and marriage (entered into force on January 1, 1876)[35]. Part of its provisions on the form of marriage and marriage records were replaced by the German Civil Code BGB of 1896 (entered into force in 1900)[36].

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[24] Circulate (Latin: circulus, German: Kreis) - in the years 1772-1867 the basic unit of the local government administration in Galicia. Later, it was replaced by the *powiat*, which also functioned in inter-war Poland.

[25] SZULC, Z., Przepisy prawne dotyczące prowadzenia ksiąg metrykalnych w Galicji. In: *Prace Historyczno-Prawne*. Vol. III, Rzeszów 1995, p. 31.

[26] Ibidem, p. 32.

[27] Zbiór Ustaw i Rozporządzeń Administracyjnych w Królestwie Galicyi i Lodomeryi z Wielkiem Księstwem Krakowskim Obowiązujących z Wyciągiem Orzeczeń c. k. Trybunału administracyjnego (red. J. Kasparek, futher: ZUiRA), vol. V, Lwów 1885, p. 3540.

[28] Ustawa z 25 maja 1868 roku o przywróceniu ustawodawstwa i sądownictwa świeckiego w sprawach małżeństw i o warunkowej możliwości zawierania małżeństw wobec władz świeckich, ZUiRA, vol. V, p. 3546-3559.

[29] SZULC, Z., op. cit., p. 37-38.

[30] Ibidem, p. 40-41.

[31] LITWIN, J., op. cit., s. 29.

[32] WOLFENBURG, T., O język urzędowy katolickich ksiąg metrykalnych. In: *Gazeta Administracji i Policji Państwowej*, Nr 11, 1933.

[33] J. M., Prowadzenie ksiąg metrykalnych na terenie województw południowych. In: *Gazeta Sądowa Warszawska*, Nr 47, 1935.

[34] *Preußisches Gesetz über die Beurkundung des Personenstandes und die Form der Eheschließung: vom 9. März 1874*, „Deutsche Gemeinde-Zeitung", Berlin 1874. Polish version from: *Wiarus. Pismo Dla Średniego Stanu Polskiego*, Nr 61-63, 65-66, 1874.

[35] (*Nr. 1040.) Gesetz über die Beurkundung des Personenstandes und die Eheschließung. Vom 6. Februar 1875*, „Deutsches Reichsgesetzblatt" 1875, Nr 4. Polish version: PODWOJSKI, F., *Podręcznik dla Urzędników Stanu Cywilnego byłej dzielnicy pruskiej*. Toruń 1926.

[36] *(Nr. 2321.) Bürgerliches Gesetzbuch. Vom 18. August 1896.*, „Reichsgesetzblatt" 1896, no 21. Polish version: LISOWSKI, Z. (red.), *Kodeks cywilny obowiązujący na ziemiach zachodnich Rzeczypospolitej Polskiej*. Poznań 1933.

Recording of births, marriages and deaths was to be carried out only by the civil registrars nominated by the higher administrative authority, who were to inscribe certain data in specially prepared registers. In single-circuit communes in which such an official was not appointed, the president of municipality (Polish *gmina,* German *Gemeinde*) was to perform the function of book keeper, but he could entrust these duties to another municipality official. The municipality authorities could also appoint a separate civil registrar, and then the *gmina* board appointed him with the permission of higher administrative authority. Regardless of who held this function, he had to have at least one appointed deputy. To underline the secularity of the system, it was explicitly forbidden to entrust this function to clergy and other religious servants.

The circuits of civil registry offices were being established by ordinances of a higher administrative authority. They could have consisted of one or more municipalities, larger municipalities could also have been divided into more circuits. Supervision over the activities of civil registry officers was the responsibility of a lower administrative authority, and in higher instance of the higher administrative authority.

Every civil registrar was obliged to keep three registers: births, marriages and deaths. It was forbidden to use abbreviations and leave empty spaces inside hem, the unoccupied ones were to be marked with a continuous line. Records made on the basis of verbal reports were to include the place and date of recording, mentioning of persons arrived, what proofs of their identity have been presented, confirmation of readout of the record to the gathered and the signature of them and the official. If the signing was impossible, a manual mark should have been made and the registrar was to note the reason for it.

Each inscription in the register should have been entered on the same day in the side register. After the end of each calendar year the registrar was to close it, summarize and transfer to the supervisory authority. After the inspection, such a register was placed in the court of first instance. Civil status records were to be the evidence of events inscribed therein, such a status was also granted to the extracts drawn up from them and confirmed by the official's signature.

The birth of child had to be reported to the civil registrar competent for the place of nascence within a week of birth. This duty laid on several people in the following order: the father, the midwife present at the confinement, the doctor present at the confinement, all other witnesses and the mother (when she was able to do it). In the case of doubts as to the reliability of a given report, the official had the right to examine the situation more closely for sufficient assurance.

The applicant's personal details were to be noted in the birth certificate, as well as place, day and hour of birth, gender and names of the child and its parents' personal details. If the name of child at the time of notification was still unknown, it had to be filled in within two months on the edge of the record. The dead birth was to be written down no later than on the second day, but only in the death register. The paternity of an illegitimate child was recorded only in the case of its acknowledgment before a civil registrar or in a document drawn up before a court or notary.

Finding a child had to be notified to the police authority no later than the second day after the incident. After carrying out the necessary activities, the police was to refer to the civil registrar competent for the circuit of finding. The registrar was to draw up the birth certificate containing information about time, place and circumstances of finding, description of things found with the child, marks on its body, alleged age, sex, and data of the person or institution, which agreed to take it to upbringing.

A delay in reporting a birth lasting over three months was to result in an obligation for the supervisory authority to examine its circumstances. After that, the record could have been written only with the consent of this authority. Changes in the child's legal situation after drawing up the birth record (such as recognition of paternity or adoption), were to be inscribed on the edge of the record at the request of interested persons and after the confirmation with the proper documents.

The only way for validly getting married was to make a declaration by the future spouses before the civil registrar, competent for the place of residence of one of them. The presence of two adult witnesses was required, the religious rites were allowed only after conclusion of the civil marriage. The engaged persons should have presented their birth certificates and permit from the persons required by law. The registrar should have not paid any attention to the minor mistakes, such as the different spelling of names or surnames, if their identity has been sufficiently confirmed. If he was sufficiently convinced about certain facts he could have resigned from requiring particular documents. The registrar was to inscribe the data in the marriages register and to immediately issue a confirmation of its conclusion. The marriage record should have contained the personal details of new spouses, as well as their parents and witnesses. In the case of divorce or marriage annulment, a mention of it was to be made on the edge of marriage record.

All deaths needed to be reported to the civil registrar of given circuit where the demise occurred, no later than the next day. This responsibility laid on the head of the family in the first place, and secondarily on the person in whose flat or house the death took place. Death in a public institution was to be reported by its administrator, and the registrar could have always examined the situation in the case of doubts as to the truth of the received data. If any state authority undertook activities related to the incident of death, it was its duty to report it to the registrar.

Data about the deceased were to be recorded in the death register along with the place, date and time of death. The record should have also included the personal details of his spouse, parents and applicant. The burial could have taken place only after drawing up the death certificate. If the burial was carried out without this document, writing down of the record could have been concluded only after examining the case and issuing permission by the supervisory authority.

A rectification of civil status record could have taken place only by the court order, both at the request and ex officio at the initiative of the supervisory authority. The text of correction was to be recorded on the edge of record and could not have affected the persons who did not appeal for its change.

The German civil status registration system was widely regarded as the best of all those operating in the Second Polish Republic[37]. Both its transparent and modern regulations were appreciated, as well as the professional organization of clerical staff, thanks to which the record of data on civil status was carried out in an efficient and orderly manner[38]. The parish register books were still being kept, but the status of public documents was taken away from them, which made them only private church property.

6. Spis and Orava

A small part of the Nowy Targ *powiat* in the Kraków Voivodeship (a separate Spis-Orava *powiat* between 1920 and 1925) near the border with Czechoslovakia could have boasted of another civil status registration system based on the Hungarian Act XXXIII of 1894[39]. It was the second utterly secular system in the interwar Poland, after the Prussian/German one. Civil weddings were the only available form of getting married with legal effects[40].

The public registers of births, marriages and deaths were to be kept by the state offices that operated within the determined circuits. In each circuit operated one civil registrar and his possible deputy. Delimiting circuits and appointing officials was responsibility of the minister of internal affairs after consulting the local authorities. Most often, one of the municipal officials was appointed to this function, but it could also have been a person specifically appointed for this purpose. Supervision over their work was conducted by the administrative authority and the minister of internal affairs.

Births and deaths were to be reported to the registrar in the circuit, where the particular event occurred. Applications after three months from them were to be clarified and could have been registered only after notifying the supervisory authority. The three registers were to be kept in separate books in two copies and with an alphabetical list of contents. Entries were to be made in accordance with the order of applications, blank spaces were to be filled with a continuous line, the numbers were to be written in words. Nothing could have been removed or crossed out from the records. Corrections were to be made by marking the wrong fragment and writing the correct information on the edge of sheet, it was necessary to submit a separate signature next to it. Each inscription was to contain the time and place of its completion, names of the gathered, note about the identity verification of arrivals, their signature or the reason for its absence, and the signature of registrar. In the case of doubts as to the veracity of the reported data, the official was entitled to examine them. Each entry was to be made in two books, the second book had to be transferred after the end of the year to the supervisory institution, which should have placed it in the municipal archives.

The registers were public documents and were to be the official confirmation of information therein contained. The registrar issued extracts from the records, which could contain information only included in the record. Everyone could have viewed the records free of charge under the supervision of the civil registrar.

Oral notification of birth had to take place no later than one week after the nascence of child. Such responsibility laid in the following order: the father, the midwife, the doctor, the birth witnesses, the owner of flat in which the child was born, the child's mother. Births in the institutions like prisons and hospitals were to be reported by the administration of these establishments. The record should have contained the personal details of applicant and parents of the child; the place and the date of birth of the child; the gender and the name of child. If, at the time of writing down the data, the name was not yet given to the child, it was necessary to notify it at the latest within two months. Dead birth should have been reported the same day or the following one. A person who found a child had to inform the administrative authority also at the latest the next day, which should have examined all the circumstances of finding and passed them to a civil registrar to draw up a birth record. Inscribing the father of an illegitimate child was possible only if he himself recognized the child before the registrar or through an appropriate official document.

Future spouses had to submit their birth certificates, eventual consent of the parent or legal guardian, any evidence of dissolution or annulment of the previous marriage or death certificate of the consort, and any other documents required in the Marriage Act of 1894. If some information was widely known or known to the registrar, he may have given up the requirement to present certain documents. The official was obliged to immediately draw up a marriage record in the register and to write down a marriage certificate, which he should have handed over to the new spouses. The record included personal details and the function of the registrar; the data of new consorts, their parents and witnesses; statements of the parties about their will and the official's statement. Information on separation and the dissolution or annulment of marriage should have been later added to the record.

All deaths should have been reported to the competent registrar no later than the next day. This duty laid on the head of the family, and then successively on other family members, the owner of the apartment in which the death occurred, the owner of the house in which the deceased lived. Death in public institutions was to be reported by the administration of the establishment. At the time of notification, a death record should have been inscribed in the register and presented to the applicant. The record was to include: the applicant's personal details; place and time of death; personal details of the deceased, his

[37] KOLEDA, K., *130 lat urzędów stanu cywilnego w Wielkopolsce (organizacja, zasób, warunki przechowywania)*, State Archive in Poznan (Archiwum Państwowe w Poznaniu), https://www.archiwa.gov.pl/images/docs/referaty/krzysztof_koleda.pdf (access: 14. 03. 2019).

[38] HRYNICKI, W., op. cit., p. 362-363.

[39] 1894. évi XXXIII. törvénycikk az állami anyakönyvekről (Szentesítve: 1894. XII. 9. Kihirdetve: 1894. XII. 18), https://net.jogtar.hu/getpdf?docid=89400033.TV&targetdate=&printTitle=1894.+%C3%A9vi+XXXIII.+t%C3%B6rv%C3%A9nycikk&referer=1000ev (access: 17. 03. 2019).

[40] ALLERHAND, M., *Prawo małżeńskie obowiązujące na Spiszu i Orawie*. Lwów 1926, p. 1-2.

eventual spouse and parents, and the cause of death. Death was also to be noted on the edge of birth record of the deceased. In the case of registration by the registrar other than competent for the deceased, he should have informed the proper official for the place of residence. Before the death record was drawn up, the funeral could have taken place only with the permission of municipal authorities.

Rectification of the civil status record was to be carried out by a civil registrar, ex officio or on demand. The application in this case had to be submitted to the supervisory authority, which could have conducted the investigation. It was also possible to demand it in court. The correction was to be noted on the edge of the act.

In 1922 the Polish legislator extended the force of marital Austrian regulations to Spis and Orava, including those enabling to get married in a religious form [41]. Since then, both legal orders were functioning there simultaneously, and secular marriage records were being drawn up for both those who got married in a civil and religious way. The registration system from Spis and Orava characterized with similar efficiency to Prussian/German solutions, however, due to the little area where it was in force, it played a marginal role in the legal order of the Second Polish Republic.

7. Conclusion

The above mosaic of various, mutually exclusive and outdated provisions was completely inadequate to the needs of state and its citizens. The lawmakers of the Second Republic were aware of that problem, so the attempts to unify and modernize registration were numerous and quite frequently debated on interministerial level. The most serious of these was Codification Committee draft of 1931 [42], the proposition of unification the regulations throughout the country and the organization of completely secular state civil registry offices. The bookkeeping activities would have been performed individually by the qualified civil registrars, other employees of the office would be an auxiliary staff [43]. However, the draft was associated with another Commission proposal introducing civil marriages and re-establishing the possibility of divorce, which aroused a great opposition of the Church and deep divisions in society. For these reasons, both projects have never come into force. Provisions of individual partitioners were the basis of drawing up civil status records until the end of existence of the Second Polish Republic. However, the Commission's draft was used in development of the post-war decree - Law on civil status records from 1945 [44], which established homogeneous and secular civil registry offices for the whole country.

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Criminals and Criminality on the so–called Recovered Territories (Poland) after the End of WW II (1945 – 1950) in the Light of Judicature of the Selected Polish Regional Courts

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Abstract

This paper will be the result of research and query in the state archive in Zielona Góra. I want to present criminals and criminality after WW II on the western territory of Poland, which before 1945 was a part of Germany (Northern Silesia). On those territories there was an displacement of population after the war ended. The Germans were deported to Germany within its new borders and the Poles, in turn, arrived from Central and the former Eastern Poland which was annexed by the Soviet Union. After WW II those people started a brand new life on the so - called Recovered Territories. This paper will analyse judicature of two regional courts in Zielona Góra and Głogów based in Nowa Sól (Northern part of the former Prussian province of Silesia). The author of this paper will present the situation connected with criminality on those territories based on criminal cases and published diaries by Polish settlers living in that part of Silesia. That will include not only registered criminality but also crimes 'undetectable' for the statistics – unregistered crimes, whose victims were not reported to the police. Information about crimes committed on those territories was very often mentioned only in the diaries of those settlers. The main aim of this article is to depict characteristic of criminality and criminals when the population changed its place and social bonds were disintegrated. The author would like to ask some important questions: Who were the criminals? Were they average or maybe demoralized persons? What were the motives of the crimes they committed? What crimes were the most common? Criminal (e.g. robbery, rape, murder) or perhaps political ones?

Keywords: *Recovered territories (Poland); criminal; penal law; polish regional courts; Poland.*

The end of WW II resulted in crucial territorial changes in the area of Central and Eastern Europe. As a matter of fact, that change also concerned Poland which lost Wilno, Nowogródek, Polesie, Wołyń, Lwów, Tarnopol and Stanisławów voivodeships to the Union of Soviet Socialist Republics[1]. After the end of WW II the territory of Poland was reduced by approximately 20% to the benefit the USSR where very important cultural and scientific cities such as: Wilno (Vilnius) and Lwów (Lviv) were[2]. Old German territories of Silesia, East Brandenburg, Western Pomerania and East Prussia were given by allies to Poland as a compensation for territorial losses in the East[3].

Indeed the changes of borders in Central and Eastern Europe were connected with population migrations. 1.3 million Poles were deported from former eastern voivodeships which were incorporated to the USSR. The Poles settled mostly on the newly incorporated areas which used to belong to Germany before WW II[4]. In contrast, almost 3 million Germans were deported from former German areas which has been part of Poland since 1945 (so called Recovered Territories)[5]. It should be noted here that deportations of both Germans from so called Recovered Territories and Poles from former Polish eastern voivodeships happened in extremely adverse and inconvenient circumstances. Let us take the example of transport: frequently, there were no enough suitable passenger wagons so as a result freight wagons were used as a method of transport. Other example is lack of appropriate medical aid[6]. Transports with Polish migrants were moving extremely slowly, e.g.: a transport of migrants from Buczacz (Buchach) covered only 250 kilometres within 21 winter days in 1945[7].

The population, including migrants, were victims of numerous crimes, mainly against assets which were in their possession. Other frequent crimes were against their life and sexual freedom. Women, in particular, were highly exposed to rapes on a regular basis[8]. Criminal threat was at a very high level long

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1 *Od niepodległości do niepodległości. Historia Polski,* [red. A]. Dziurok, M. Gałęzowski, Ł. Kamiński, F. Musiał, Warszawa 2010, p. 206.
2 *Ibidem*, p. 206.
3 *Ibidem,* p. 206.
4 J. Holzer, *Europa zimnej wojny*, Kraków 2012, p. 47.
5 *Ibidem*, p. 38.
6 *Ibidem*, p. 38.
7 *Ibidem*, 45, also B. Halicka, *Polski Dziki Zachód. Przymusowe migracje i kulturowe oswajanie Nadodrza 1945-1948*, Kraków 2015, p. 174 – 175.
8 *Ibidem*, p. 45, M. Zaremba, *Wielka trwoga. Polska 1944 – 1947*, Kraków 2012, ps. 330 – 334, also B. Halicka, *Polski Dziki Zachód…, p.* 147-150.

after the end of WW II, wherein precise determining the range and size of criminality phenomenon after the war on so called Recovered Territories seems just impossible, given the insufficiency of law enforcement agencies and also judicial authorities. As a result, all documents made by these institutions do not really reflect the exact scale of the above mentioned phenomenon. Diaries of migrants may turn out to be a helpful tool as far as determining the exact size of criminality after the WW II but nevertheless, a considerable number of crime such as: rapes, theft or crime against life and health was never reported by victims or their families, what is more no information can be found in other sources. As a result, the analysed picture of the post-war criminality will be undoubtedly incomplete due to the objective causes mentioned above.

The research on criminality concerns the area which before the end of WW II was part of the Province of Silesia, Region of Legnica (Liegnitz) (northern part of Region of Legnica) and also the Province of Brandenburg (south-eastern part of the province). The most significant towns of that area were Zielona Góra, Głogów, Świebodzin and Sulechów. They were relatively small towns, the biggest of which was Głogów with the population slightly above 30.000 inhabitants in 1939[9]. On the other hand after the WW II ended due to almost total destruction of Głogów, the biggest town on the area of research was Zielona Góra with the population of 15.788 at that time[10]. Nonetheless, that town witnessed a rapid population growth and on 31st August 1947 the population was 31.889[11]. The majority of inhabitants was newcomers from the area of Wielkopolska, the migrants from former eastern voivodeships were, in turn, 30% of the population of Zielona Góra at that particular time[12]. It shall be noted that, Głogów within the period right after the end of WW II was populated solely by 1681 residents[13]. Destruction of that town was so considerable that the regional court having jurisdiction over the region of Głogów was moved to Nowa Sól. The area of jurisdiction of the Regional Court in Zielona Góra in 1946 was populated by 87.099 residents in total[14] whereas the area of jurisdiction of the Regional Court in Głogów with its seat in Nowa Sól was populated in 1946 by 132.337 residents in total[15]. Therefore, the common summary census of the whole area being the subject of the research was 219.436 residents in 1946.

At the present moment, the area of jurisdiction of both courts, namely the Regional Court in Zielona Góra and Regional Court in Głogów with its seat in Nowa Sól constitutes the southern part of the Lubusz voivodeship and the northern part of of the Lower Silesian voivodeship.

From 1945 the validity of Polish legal regulations extended onto the area of the so called Recovered Territories, including those of the Polish penal code of 1932. Nevertheless, after communists came to power in Poland in 1944, they began restructuring the criminal legal system, e.g.: legal acts were issued including a new type of prohibited acts, very often based on the Soviet criminal law[16], which minimized the pre-war penal code. The most comprehensive one was an act of 13th June of 1946 on serious criminal offences during the period of restoration of the country[17] which was commonly called a small penal code. The small penal code had 72 articles included in five chapters, three of which: "offences against public safety", "offences against public order" and "offences against national business interests" included the types of prohibited acts, in 23 cases the penal code provided for the death penalty, the 12 of which were included in the I chapter belonged to jurisdiction of military courts[18]. It was one of the most severe acts of communistic penal law and its main target was to intimidate the society and to fight against political opposition using this disposable military judiciary.

After the II World war criminal offences as opposed to the most serious, political acts were part of jurisdiction of the common courts. Serious crime cases such as: murder, sexual offences, theft were examined by regional courts.

In the National Archive in Zielona Góra there were 29 criminal proceedings provided for by the penal code from 1932 examined by the Regional Court in Głogów with its seat Nowa Sól within the years 1945 – 1950. These cases preserved in the archival fonds concerned such offences as e.g.: murder (3 cases), paedophilia (3 cases), abortion (1 case), infanticide (1 case), affray (1 case), violation of body integrity (1 case) and theft (4 cases). On the other hand in the archives of the Regional Court in Zielona Góra there were inter alia records of cases which concerned offences such as: theft, actions to detriment of public interest, inflicting grievous bodily harm.

As it was mentioned before, the court records cannot constitute full source material which would be the base for formulation of general conclusions concerning post-war criminality on so called Recovered Territories. However, they provide a new perspective of criminal offences and as such allow us to evaluate the way the then judicial authorities would react to crime. The subject of the analysis of this work is going to be selected criminal cases examined by the Regional Court in Zielona Góra and Regional Court in Głogów with its seat in Nowa Sól.

The criteria of an offence were depicted in the penal code art. 225 of 1932. The penal code of 1932 did not provide any distinction concerning killing a person categorized either as murder or manslaughter. It provided solely one type of an activity which purpose was a premeditated killing a person, and as

[9] http://www.verwaltungsgeschichte.de/glogau.html#stadtkreis [access 1. 03. 2018]
[10] *Common summary census of 14th February* 1946, Warszawa 1947, table no. 3, p. 51.
[11] H. Kurowska, *Liczba mieszkańców Zielonej Góry w latach 1945-2010*, „Studia Zachodnie", 2013, vol. 15, p. 145.
[12] *Ibidem*, p. 146.
[13] *Common summary census of 14th February 1946 r., Warszawa 1947, table no. 3, p*, p. 52.
[14] *Ibidem, p*. 5
[15] Common summary…, table no. 2, p. 17 – 18.
[16] Cf. A. Lityński, *Prawo Rosji i ZSRR 1917 - 1991 czyli historia wszechzwiązkowego komunistycznego prawa (bolszewików). Krótki kurs*, Warszawa 2010
[17] Dz. U. 1946, no. 30, position 192
[18] G. Jakubowski, *Sądownictwo powszechne w Polsce w latach 1944-1950*, p. 186 - 187

a result it was regarded as a murder - the act always thought to be committed deliberately[19].

One of a murder cases which could be found in the archival fonds of the Regional Court in Głogów with its seat in Nowa Sól is a case of J.D., a 32-year-old carpenter who in June 1946 in the village of Kielcz killed F.D. by stabbing him with a knife right in the victim's chest. The suspect claimed that F.D. was threatening him and his family regularly and many times, was shooting a revolver right by the windows of his house just because J.D. had been elected to a position as the soltys (a village administrator). On the day of the murder J.D. met F.D. on the street and they had an argument during which F.D. put a hand to his pocket. When J.D. noticed that gesture he immediately thought that F.D. was trying to produce a revolver out of his pocket, so as a result in the act of self-defence he stabbed F.D. to death with a knife[20]. The indictment against J.D. was filed to the Regional Court in Głogów with its seat in Nowa Sól on 28th February 1947[21]. The trial took place before the court on 16th April 1947 and on the same day the Regional Court found the defendant J.D. guilty of alleged charges of murder and sentenced him to 15 years of imprisonment. Then the court decision was reduced to 10 years on the basis of the Amnesty Act of 22nd February 1947[22]. In the substantiation the court claimed that there was a conflict between the perpetrator and victim since J.D. did not want F.D. to be a soltys in the village of Kielcz[23]. The court did not give credence to the explanations of the defendant claiming that the evidence hearing did not indicate the fact that the defendant was first attacked by the victim and as a result the defendant's action did not constitute a self-defence act whatsoever[24]. After the verdict of guilty had been brought, the convict fled while he was being transported to prison. An arrest warrant was issued. J.D. was finally captured in January 1954 so almost after 7 years since he had been found guilty. In the end J.D. served 2/3 of his sentence i.e.: 10 years of imprisonment and by the Voivodeship Court judgement in Olsztyn of 11th August 1960 he was released on parole[25].

The motive of action of the above mentioned case was a personal and ambition conflict. It must be pointed out that during difficult post-war time both sides of the conflict used measures which in stable social structures would be normally regarded as unlawful. Both the perpetrator and victim threatened each other which resulted in killing F.D. by J.D. who felt threatened. At the same time it is to be noted that the above mentioned case is an example of indolence of law enforcement centres at that time since the convict who was sentenced to 10 years of imprisonment for murder of J.D. fled while he was being transported to prison, and thus, avoided serving his sentence for another seven years.

Another murder case is a case of a 25-year-old J.M. and 21-year-old R.W. suspected of murder of M.K. Both suspects found out that M.K. sold livestock and equipment and probably may be in possession of a considerable amount of money.

Suspect J.W. pleaded guilty to the charge affirming that on 15th March 1949 he killed M.K. whom he knew in order to rob her. He hit her head twice by an axe[26]. Also R.W. pleaded guilty to the accomplicity in the alleged murder offence. The perpetrators killed M.K. while the woman was sleeping and then dug her body in manure. As they both admitted, after they had killed the woman and searched the whole house, they were not be able to find any money.

The indictment against J.M. and R.W. was filed to the Regional Court in Głogów with its seat in Nowa Sól for committing murder by both of them[27]. The lawsuit took place on 4th May 1949 before the regional court and on the same day the court passed a sentence finding them guilty of the crime and sentencing J.M. to life imprisonment, whereas, R.W. was sentenced to a 15-year of imprisonment[28]. The Regional court justified its position by stating that the acts committed by the perpetrators J.M., in particular, were caused by financial motives, as he was unemployed and needed money. He was even selling out movable goods which were property of his lover. Consequently, J.M.'s lover threatened him to report this affair to the militia if he did not give her back the money he got for the sold goods which in reality belonged to her[29].

As a result of an appeal lodged by a prosecutor, the Court of Appeal in Wrocław aggravated the above mentioned penalty towards J.M., and thus, sentencing him to the death penalty[30]. The Court of Appeal justified its position by claiming that J.M. is a type of criminal who lacks any moral compass and even the longest imprisonment sentence does no guarantee the society prevention from his criminal instincts. That is why, his complete elimination from the society seems necessary measure[31]. On a final note, the President's decision pardoned J.M. and the death penalty was changed into life imprisonment again.

The above mentioned case showed that the perpetrators were undoubtedly extremely violent acting from most despicable motives, namely the financial gain. It is to be noted that both of them knew their victim before, as M.K. was

[19] J. Makarewicz, *Kodeks karny z komentarzem*, op. V, Lwów 1938, p. 515.
[20] Record of interrogation of the suspect F.D., National Archives in Zielona Góra [Further: AP ZG], ref.no.89/576/4.
[21] Indictment of J.D., AP ZG ref.no.89/576/4.
[22] Sentence of the Regional Court with its seat in Nowa Sól of 16th April 1947, K 55/47, AP ZG, ref.no.89/576/4
[23] *Ibidem*.
[24] *Ibidem.*
[25] Decision of the Voivodeship Court in Olsztyn concerning parole of J.D., AP ZG, ref.no.89/576/4.
[26] Record of interrogation of the suspect J.M. ref.no. AP ZG 89/576/6.
[27] Indictment of J.M. and R.W., AP ZG, ref.no. AP ZG 89/576/6.
[28] Sentence of the Regional Court in Głogów with its seat of 4th May 1949, IV K.18/49, AP ZG, ref. no. AP ZG 89/576/6.
[29] *Ibidem.*
[30] Sentence of the Court of Appeal in Wrocław of 3rd June 1949, AP ZG, ref.no. AP ZG 89/576/6.
[31] *Ibidem*.

a mother of J.M.'s friend so she opened the door for the perpetrators.

Another murder case is a case of a 23-year-old Italian woman Ch.K. suspected of attempted murder of her husband on 5th September 1947. During the hearing the suspect said that she committed the act as charged because her husband committed adultery[32]. The indictment was filed to the Regional Court in Zielona Góra on 8th October 1947 charging her with attempted murder[33]. The verdict of the Regional Court in Zielona Góra of 3rd December 1947 found her guilty of attempted voluntary crime of passion and she was sentenced to 2 years of imprisonment[34]. Justifying its position the Regional Court acknowledged that a mitigating circumstance which had been taken into consideration was a highly volatile temper of the suspect and also the fact that her husband contributed to their marriage breakdown by committing adultery. Another mitigating circumstance may also be the fact that perpetrator did not have any close relatives in Poland whatsoever.[35] All in all, the above mentioned circumstances made her commit the act of revenge on her unfaithful husband.[36] As a result of an appeal lodged by a defence attorney, the Court of Appeal in Poznań changed the penalty and sentenced her solely to 1 year and 6 months of imprisonment.

The motive of the above mentioned offence committed by the suspect was a revenge on her husband who had an intimate relationship with other woman. Undoubtedly, the penalty was not severe at all as the court regarded the act as a crime of passion.

A 29-year-old J.K. was brought to the trial in the Regional Court in Zielona Góra for facilitation of a murder. She helped the perpetrators of W.T.'s murder by leaving the door open of the W.T.'s house and giving them a sign for action. The defendant did not plead guilty of the crime.

The perpetrators of the above mentioned offences were young people who were less than 30 years old. Their actions which were reduced to radical reactions to a personal conflict, matrimonial conflict or greed may indicate that the value of a human life decreased a lot after the end of the war.

To the group of serious crimes whose perpetrators were brought to trail before the Regional Court in Zielona Góra and Regional Court in Głogów with its seat in Nowa Sól belong to the group of those perpetrators who committed crimes against sexual freedom. One of such cases was a case of a 58-year-old M.C suspected of a crime under art. 203 of the penal code of 1932 i.e.: paedophilia. The victim was a 14-year-old daughter of the perpetrator. On 8th September 1948 the Regional Court in Zielona Góra found M.C. guilty of the offence under art. 203 of the penal code and sentenced him to 2 years of imprisonment[37].

The above mentioned case is complex because it was very difficult to establish the real motivation of the perpetrator. Nevertheless, the perpetrator must have known that he was doing the wrong thing because according to the victim testimony he did not allow her to talk about the incident.

Another example can be the case of F.M. who committed a similar crime. He was suspected of attempts to rape his two stepdaughters: a 14-year-old Teresa and 11-year-old Józefa[38]. Both victims were threatened by their stepfather. As a result, they jumped out of the window of an apartment located on the first floor. The indictment was filed to the Regional Court in Zielona Góra on 10th of July 1948. F.M. was accused of committing acts of paedophilia in 1944 when he still lived in Wilno.[39] The court found the perpetrator guilty as charged and sentenced him to 1 year and 6 months of imprisonment. In this case it is also difficult to find a reasonable motive that the perpetrator might have had. Nonetheless, as the victims testified, the perpetrator acted in the above mentioned manner when the girls' mother was away for a long time.

Another example of a crime under art. 203 of the penal code was a case of a 20-year-old servant E.S., suspected of a rape of a 4-year-old daughter of his employers[40]. The Regional Court in Zielona Góra found the perpetrator guilty as charged and on 28th July 1948. He was sentenced to 1 year of imprisonment[41]. It is to be noted that the suspect did not undergo any examinations connected with a sexual disorder he undoubtedly might have had. And last but not least, it must be admitted that the above mentioned penalty against E.S. may seem extremely lenient.

The above mentioned cases which were brought up here have one thing in common. The perpetrators were mostly close friends and relatives or people living in the same place with victims. Additionally, it it is to be noted that the penalties for acts of paedophilia were extremely lenient as they did not exceed 2 years of imprisonment, whereas the legal regulation of art. 203 of the penal code of 1932 allowed to sentence perpetrators to up to 10 years of imprisonment. It seems difficult to estimate whether it was conduct characteristic of solely one particular court or broader tendency in the penal policy of that time.

Among other cases characteristic of judicature of that time in in the above mentioned courts are also crimes against property including thefts and assaults and robberies. One of such cases worth mentioning was the case of a 25-year-old A.B. who was a barber. He was suspected that on 26th October 1946 he committed a robbery with use of a sabre to the detriment of a local

[32] Record of interrogation of the suspect Ch.K. AP ZG, ref.no. 89/433/82.
[33] Indictment of Ch. K., AP ZG, ref.no. 89/433/82.
[34] Sentence of the Regional Court in Zielona Góra of 3rd December 1947, II K 257/47, AP ZG ref. no. 89/433/82.
[35] *Ibidem.*
[36] *Ibidem*.
[37] Sentence of the Regional Court in Zielona Góra of 8th September 1948., ref. no. II K 250/48, AP ZG, ref. no.89/433/80.
[38] Public note concerning F.M., AP ZG, ref. no. 89/433/78.
[39] Indictment of F.M., AP ZG, ref. no. 89/433/78.
[40] Indictment of E.S., ref. no. AP ZG 89/433/77.
[41] Sentence of the Regional Court in Zielona Góra of 28th July 1948, ref. no. II K 199/48, AP ZG 89/433/77.

resident C.T. from whom he appropriated a women's watch and 550 zlotys[42]. The indictment was filed to the Regional Court in Zielona Góra on 4th January 1947. The main trial took place on 11th January 1947. On the same day the Regional Court in Zielona Góra found C.T. guilty as charged and sentenced him to 10 years in prison[43].

A 23-year-old J.C. was a suspected of committing a robbery to the detriment of a German woman F.D. The case records indicated that J.C accompanied by an unknown individual entered the apartment where F.D. and her children lived and then he closed her and her children in a wardrobe and began to rob the apartment. However, he did not achieve his goal because when F.D. noticed the distraction of perpetrators she immediately decided to call for help[44]. On 29th March 1947 the Regional Court in Zielona Góra found J.C. guilty as charged and sentenced him to 2 years of imprisonment[45].

The above mentioned cases show that the motives of perpetrators may not have been solely the result of willingness to obtain private financial gain but also the result of common post-war hostility towards Germans including those who were not displaced from the western territories[46]. As it seems, the hostile attitude of Poles who were settling down on so called recovered territories to Germans who had not been displaced was the reason why they became victims of crimes including the crimes against property.

The research concerning the post-war criminality on so called Recovered Territories indicate that perpetrators were mostly young people who very often were less than 30 years old. The contemporary literature emphasises that a characteristic feature of post-war banditism occurring not only on so called recovered territories was young males who lacked education, profession and prospects[47]. There can be no doubt about the fact that war demoralization including decrease of the human life value had a considerable influence upon the post-war criminality. That lack of respect for property resulted from war conditions that people had to deal with and also the motives connected with the above mentioned offences that perpetrators had, such as solving personal conflicts by violent assault, revenge, strong urge to gain some financial assets. Furthermore, it should be borne in mind that indolence of social structures and social control not to mention loosening of moral code had a tremendous influence upon those perpetrators who committed an act of paedophilia. Thus, as already mentioned it seems impossible to determine a full picture of post-war criminality on so called recovered territories, because due to indolence of judicial authorities which above all, resulted from the fact it had be constructed on the newly incorporated areas from scratch. It shall be noted that also loosening or lack of social bonds among migrants was the reason why plenty of perpetrators were not held responsible for their acts. Another separate issue is crime committed on displaced Germans or also Polish settlers right after the end of the war by Russian soldiers[48]. A certain percentage of criminality constituted so called political crime which mainly involved critical opinions or statements expressed by residents of those territories which referred to the new communistic power. An offence so called "a-word-of-mouth" i.e.: propagating fake information and rumours of anti-state character was carried a penalty pursuant to so called small penal code[49]. Moreover, that type of offence was mostly committed by older people, aged 35 – 50[50].

[42] Indictment of C.T., AP ZG, ref. no. 89/433/41.
[43] Sentence of C.T., AP ZG, ref. no. 89/433/41.
[44] Indictment of J.C., AP ZG, ref. no. 89/433/45.
[45] Sentence of J.C., AP ZG, ref. no. 89/433/45.
[46] M. Zaborski, *Wielka*..., p. 561.
[47] Ibidem, p. 327.
[48] Ibidem, p. 158-161.
[49] Cf. Karol Siemaszko, *Orzecznictwo Sądu Okręgowego w Głogowie z siedzibą w Nowej Soli w wybranych sprawach o przestępstwa szczególnie niebezpieczne w okresie odbudowy państwa w latach 1946-1950*, „Czasopismo Prawno-Historyczne", t. LXVII, r. 2015, z. 1, v. 1.
[50] *Ibidem*, p.217-218.

Die Kodifikationsentwicklung des Zivilrechts in Serbien – insbesondere über den Vorentwurf des Bürgerlichen Gesetzbuches und über das neue Handelsgesetzbuch der Republik Serbien

(The Development of Codification of Civil Law in Serbia – Particularly about the Draft Proposal of the Civil Code and about the New Commercial Code of the Republic of Serbia)

József Szalma *

Abstract

The aim of the paper is to analyse the evolution of codification of Serbian civil and commercial law. The codifications from 19th and 20th century were so-called partial codifications, i.e. they regulated only certain areas of private law. A notable exception is the 1844 Civil Code that regulated all classical branches of civil law (family law, law of obligations, proprietary law and inheritance law) and bears the signs of the influence of the Austrian General Civil Code. The law-maker however decided at the time to regulate commercial law in a separate act (1863). In the period of the first Yugoslavia (1918-1941), aiming at centralisation of competencies, just as in the period of second Yugoslavia (1945-1999), aiming at decentralisation of competencies, either on federal or on the level of federal units, the approach to create partial codification was more present then the opposite one, supporting the idea of a whole codification. At the level of Federation, the most notable act is the 1978 Law on Obligations, which shows the influence of the 1911 Swiss Law on Obligations. Not long after Serbia became a unitary state in 2006, the preparatory works on a draft of a civil code began in 2007, with the purpose of drafting a civil code embodying the whole area of civil law. The work of the codification committee ended in 2015 by publishing the first normative draft of the Civil Code of Republic of Serbia. The draft does not contain rules on the legal status of business organisations, unlike to the solution adopted in Swiss law. However, in the part pertaining to the law of obligations, besides classical types of contracts, envisages rules on specific commercial contracts. On the other hand, in 2011 the new Law on Business Organisations came into force that has been amended several times since then. Therefore, the evolution of codification of private law in Serbia demonstrates that the process of codification is expected to be achieved in two separate legislative acts: regulating the field of classical civil law, according to its pandectist division, in a civil code, and the matter of legal status of business organisations in a separate act. Thus the Serbian legislator adopts the dualistic approach to the codification of civil law, whereby both acts would certainly be harmonised in terms of general principles (freedom of contract and freedom of entrepreneurship).

Keywords: *Civil law; Commercial Law; Serbia.*

1. Tendenzielle Entwicklung der Zivilgesetzgebung in Serbien

In der ersten Hälfte des XIX. Jahrhunderts, im Jahre 1844, entstand das serbische Bürgerliche Gesetzbuch (SBGB) als eine gekürzte, nicht immer einwandfreie Übersetzung des österreichischen Allgemeinen Bürgerlichen Gesetzbuches aus dem Jahre 1811, mit Besonderheiten auf dem Gebiet des Familienrechts und (landwirtschaftlichen) Genossenschaftsrechts, wo die eigenen serbischen Gewohnheitsrechte zum Ausdruck kamen. Dieses Gesetzbuch (SBGB) enthält nur die Regelung über die bürgerrechtlichen Rechtsverhätnisse im engeren Sinne des Wortes, bzw. es bleibt ohne eine handelsrechtliche Regelung. Somit nahm der Verfasser (Jovan Hadžić) die Auffassung über den doppelten Charakter des Zivilrechtes an, wo einerseits die zivilrechlichen Verhältnisse zwischen natürlichen Personen (Familienrecht, Obligationenrecht, Erbrecht), andererseits die zivilrechtlichen Verhältnisse der Rechtspersonen, insbesondere die Rechtsstellung (Status) der Handelsgesellschaften und ihre spezifischen Rechtsgeschäfte stehen. Damit vertrat er die Besonderheiten des Handelsrechts. In Folge dessen entstand im Jahre 1863 das serbische Handelsgesetzbuch als Sondergesetz, welches doch nur die Rechtstellung der Handelsgesellschaften regelte, ohne einzelne (besondere, typische) Handelsgeschäfte. Diese Kodifikationsauffassung war jedoch seinerzeit in Europa üblich, weil in vielen Ländern, Staaten neben den Zivilkodexen, wie in Deutschland (BGB, 1896)[1], Österreich (ABGB,

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[1] Nach eine von der Kommentare des BGB-s (Hanns *Prütting*, Gerhard *Wegen*, Gerd *Weinreich*, BGB Kommentar, Luchterhand, Wolters Kluwer, Neuwied, 2007, S. 3, Rn. 15): „Kennzeichnend für das Bürgerliches Recht ist der Grundgedanke eines Allgemeines Privatrechts, das jeden Bürger betrifft. Dem stehen Sonderbereiche für Kaufleute, Arbeitnehmer und andere Privatpersonen gegenüber, deren spezifischen Rechtskreis nur dort angesprochen ist, wo das privatrechtliche Verhalten gerade in seiner Sondereigenschaft vor sich geht. Daher trennt man zwischen dem Bürgerlichen Recht als dem allg. Privatrecht und den Sonderprivatrechten (Handelsrecht, Gesellschaftsrecht, Arbeitsrecht, Wettbewerbsrecht, Gewerbliche Rechtsschutz, Privatversicherungsrecht, Urheberrecht, Kartellrecht, usw.)“.

1811)[2], Frankreich (Code civil, 1804)[3] usw., das Handelsrecht während der zweiten Hälfte des XIX. Jahrhunderts eine gesonderte, eigene Kodex-Regelung (Handelsgesetz, Code de Commerce) erhielt. Doch diese Sonderregelung, „Sonderstellung" des Handelsrechts bewahrte viele Verknüpfungen mit den Kodexen des Bürgerlichen Rechts, z. B. im Bereich der gemeinsamen Grundprinzipien (beispielsweise: Treu und Glauben, Vertragsfreiheit). In den gesonderten handelsrechtlichen Kodifikationen kamen die Besonderheiten zum Ausdruck, insbesondere auf dem Gebiet des Statusrechts (Rechtsstellung der Handelsgesellschaften). Aber in diesem Zeitraum entstanden auch solche Kodifikationen wie in der Schweiz, mit dem Obligationengesetz (1881,1911), als Teil des schweizerischen ZGB (1907, 1912)[4], bei denen die sogenannte integrierte Kodifikations-Konzeption und des Zivilrechts zum Ausdruck kam und der Status- und der dynamische Teil des Handelsrechts befindet sich im selben Kodifikations-Corpus.[5]

In den ersten Jahrzehnten des XX. Jahrhunderts, während des Bestehens des ersten Jugoslawien (Königreich der Serben, Kroaten und Slowenen – zwischen 1918/20-1941), das am Anfang im verfassungsrechtlichen Sinne bis zum Jahre 1929 eine relative, parlamentarische Monarchie war, aber nach der Aufhebung des Parlaments wurde zu einer absoluten Monarchie. Während der Dauer der parlamentarischen Monarchie wurde ein einheitlicher Kodifikationsentwurf (Predosnova za Građanski Zakonik - Vorgrundlagen des Bürgerlichen Gesetzbuches) für das ganze Zivilrecht vorbereitet. Aber dieses ist jedoch nicht in Kraft getreten, auf der Ebene des ganzen Staates, trotz erheblichen Zentralisierungstendenzen. Einerseits wegen damaliger verfassungsrechtlicher, andererseits wegen parlamentarischer Gründe. Aufgrund der Verfassungsregel dieses Königreiches war nämlich für das Inkrafttreten von wesentlichen Gesetzen die Zustimmung, das Einverständnis aller konstitutionellen Teile (Serben, Kroaten, Slowenen bzw. ihre parlamentarische Vertreter) des Staates unentbehrlich. Für diesen Entwurf des einheitlichen Zivilgesetzbuches, mit dem Geltungsbereich in ganzen Staatsgebiet, wollten aber nicht alle konstitutionellen Teile des Königreiches ihre Zustimmung geben (Kroaten und Slowenen). Die weiteren Ereignisse bzw. die dekretmäßige (seitens des Königs Karađorđević) Auflösung und Entlassung des Parlaments (1929) führten auch zur entgültigen Beendigung der weiteren einheitlichen Kodifikationstätigkeiten mit dem Ziel der Einführung in allen Regionen und allen Bereichen des Zivilrechts. Allerdings scheint es, dass die tieferen Hauptursachen für die Kodifikationshemmung in den verschiedenen Rechtstraditionen der Konstituenten liegen (bzw. einige Regionen verfolgten die österreichische Rechtstradition und das Rechtquellen-Erbe, andere die ungarische, insbesondere aus dem Zeitraum der Dauer der Österreich-Ungarischen Monarchie zwischen 1867-1918).

Nach diesen Erfahrungen zeigten die Tendenzen während des zweiten Jugoslawien (1945-1999), welche nur anfangs föderal waren, aber in der weiteren Entwicklung, insbesondere nach der jugoslawischen Verfassung aus dem Jahre 1974, die Dezentralisierung der Gesetzgebungs-Angelegenheiten unterstützten, mehr konföderale Elemente, Eigenschaften. Auf der Ebene der Föderation entstanden Teilkodifikationen nur in den wichtigsten Teilen des Zivilrechtes (Obligationenrecht, Zivilprozessrecht). Es entwickelten sich auch keine vollständigen Kodifikationen auf Ebene der Teilrepubliken, bzw. keine vollständigen zivilrechtlichen Kodifikationen, sondern nur gesonderte Teilkodifikationen. Das heißt, die Teilrepubliken (6) und die autonomen Provinzen (2), welche schon ihre Gesetzgebungszuständigkeiten erhielten, verfassten keine eigenen vollständigen Zivilrechts-Kodifikationen, aber sie regelten Teile des Zivilrechts, wie Familienrecht, später Erbrecht, Vormundschaftsrecht. Dass heisst, nach dem Jahre 1974 entwickelten die Teilrepubliken ihre eigenen partiellen Kodifikationen, wie im Bereich des Familienrechts, Vormundschaftsrechts usw. Das Erbrecht war zwischen 1957-1974 als einheitliches föderales Gesetz in Kraft und seine Geltung erstreckte sich, nach teritorielle Anwendung, auf den ganzen damaligen Staat. Dieses Gesetz widerspiegelte zum größten Teil die Erbrechtsregelung des österreichischen ABGB. Nach der Verfassung aus dem Jahre 1974 wurde die erbrechtliche gesetzliche Regelung den Teilrepubliken und autonomen Provinzen zugeteilt, aber nach der Konzeption und inhaltlich ohne wesentliche Änderungen, bzw. es blieb der österreichische Regelungs-Einfluss. Auf dem Gebiet des Sachenrechts im Zeitraum ab 1974 war das föderale Gesetz über Eigentumsrecht in Kraft. Aufgrund der Regelung vom „konstitutiellen Wert" (Zakon o nevažnosti, 1946) galten mit den neuen (jugoslawischen) Gesetzen bei nicht geregelten Zivilrechts-Verhältnissen die alten „Rechtsregeln" (z. B. ABGB, ungarisches Präzedenzrecht)[6], mit „sinngemäßer" Anwendung

[2] Für österreichisches Recht, über die Teilung des Privatrechts, und Unterschiede zwischen allgemeines Privatrechts und Sonderprivatrechte, insbesondere Handelsrecht, siehe, z.B. Koziol-Welser/Kletečka, Bürgerliches Recht, Band I Allgemeiner Teil. Sachenrecht, Familienrecht, 14. Auflage, Manz, Wien, 2014, S. 9. Rn. 31.

[3] Siehe zB. Code civil, Cent-deuxiéme édition, rédigée par Alice *Tisserand*, Georges *Wiederkehr*, Francois *Jacob*, Xavier *Henry*, Guy *Venandet*, Paris, Dalloz, 2003, Livre premier, Des pesonnes, S. 37-60, Cc., art. 8; Code de commerce, Ord. No 2000-912, du 18. sept. 2000, S.1830.

[4] Siehe näher, Theo *Guhl*, Das schweizerische Obligationenrecht, 9. Auflage, Bearbeitet von Alfred *Koller*, Anton K. *Schnyder*, Jean Nicolas *Druey*, Schulthess Verlag, Zürich, 2000, S.1-6.

[5] Siehe, Theo *Guhl*, Das schweizerische Obligationenrecht, 9. Auflage, Bearbeitet von Alfred *Koller*, Anton K. *Schnyder*, Jean Nicolas *Druey*, Schulthess Verlag, Zürich, 2000, S. 653 -892, Drittes Buch, Gesellschaftsrecht, S.653-858, Allgemeines Handelsrecht, S.859 -892.

[6] Siehe, József *Szalma*, Mađarsko građansko pravo – od precedentnog do kodeksnog prava (razvoj i novi kodeks) /Ungarisches Bürgerliches Recht – von der Präzedentien bis Kodexrecht –Entwicklung und das neue UBGB/, in: Podjetje in delo, Revija za gospodarsko, delovno in socijalno pravo – Company and Labour – A Journal for Commercial, Labour and social Law, Ljubljana, Mednarodno in evropsko pravo, Slovenien, Nr. 2/2018/XVLIV. -,S. 336-360. mit slowenische und englische Zusammenfassungen.

und „Ordnungskontrolle“. Während des zweiten Jugoslawien wurde das Privateigentum begrenzt, zum größten Teil aufgrund der unengeltlichen Nationalisierung (1945-1960). Damit es funktionierten nur staatliche (sogenannte gesellschaftliche) Wirtschaftsorganisationen (bzw. Betriebe, aber nicht in Sinne und Aufgrund Privateigentum), mit zentralen oder lokalen „planwirtschaftlichen“ oder „Selbstverwaltungs“-Elementen, aber ohne Eigenschaften der privaten Handelsgesellschaften. Dadurch wurden die alten Regeln über Handelsrecht ausgeschlossen.[7]

Wie schon bemerkt, vom Anfang des zweiten Jugoslawien (1945) wurden auf der ehemaligen föderalen (Bundes) Ebene, noch zwei wichtige Gesetze entwickelt: 1. Gesetz über Obligationenverhältnisse (1978) und 2. Zivilprozessordnung (1952, 1976). Das erste wurde von Professor Mihailo Konstantinović (Rechtswissenschaftliche Fakultät der Universität in Belgrad) vorbereitet (sogenannte Skizze für das Obligationengesetz, Belgrad, 1969), unter dem Einfluss oder vielmehr als adaptierte Übersetzung des schweizerischen Obligationengesetzes (Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches, fünfter Teil: Obligationenrecht, vom 30. März 1911). Das Gesetz über die Zivilprozessordnung zeigte eine adaptierte Widerspiegelung der österreichischen Zivilprozessordnung aus dem Jahre 1906. Während der Dauer des zweiten Jugoslawien, bis zu seinem Zerfall (1999/2000), erlebten beide Gesetze mehrere Änderungen, insbesondere die Zivilprozessordnung. Nach der Auflösung der Konföderation zwischen Serbien und Montenegro (2006) gelten aufgrund des serbischen Grundgesetzes aus dem Jahre 2006 beide oben genannte, vorher föderale, Gesetze in Serbien auch weiterhin, als serbische Gesetze, aber hinsichtlich der Zivilprozessordnung mit bestimmten Änderungen.

Seit dem Jahre 2007 bis heute besteht aufgrund der Entscheidung der serbischen Regierung die Kommission (Ausschuss) zur Kodifikation des Bürgerlichen Gesetzbuches der Republik Serbien, unter Leitung von Akademiker Slobodan Perović (emeritierter Professor für Obligationenrecht an der Rechtswissenschaftlichen Fakultät der Universität in Belgrad), mit dem Ziel, ein vollständiges Zivilgesetzbuch zu schaffen.[8] Hinsichtlich der *Kodifikationsprinzipien*, ist das Ziel der Kommission, eine *vollständige* Zivilrechtskodifikation zu schaffen (mit Teilen über allgemeine Prinzipien, Familienrecht, Obligationenrecht, Sachenrecht, Erbrecht, d. h. ohne Handelsrecht - statusrechtlicher Teil). Das Ziel war auch, die inzwischen mehrmals geänderten partiellen oder Sondergesetze über Familienrecht, Obligationenrecht und Erbrecht in den Kodex zu *inkorporieren*, mit weiteren nötigen Adaptationen. Ein weiteres Ziel war auch die *Harmonisierung* bzw. Annäherung des Zivilrechtes mit den Ergebnissen der gemeinsamen europäischen Regeln (aquis communautaire) und innereuropäischen Kodifikationen.[9] Das Ergebnis der Tätigkeit des Kodifikationsausschusses war die erste normative Fassung des offiziellen Kommissions-Entwurfs, entstanden und veröffentlicht im Jahre 2015.[10] Die Kodifikationstätigkeit begleiteten wissenschaftliche und fachliche Diskussionen, insbesondere bei den Tagungen der Kopaonik-Schule für Naturrecht, und über Veröffentlichungen der Referat-Ergebnisse in Fach- und wissenschaftlichen Zeitschriften des Juristenverbands Serbiens – Pravni život (Rechtsleben).

Dieser Entwurf, oder eher Vorentwurf, enthält nach der *pandektistischen Systematisation* das Ganze des Zivilrechts, mit einer relativ selbständigen *Buch-Struktur* (diesbezüglich ähnlich wie das neue UBGB aus dem Jahre 2013), gewidmet den Teilen des Zivilrechtes, wie Familienrecht, Obligationenrecht, Sachenrecht, Erbrecht. Im besonderen Teil des Obligationenrechts enthält der Entwurf neben *klassischen Verträgen* (Kauf, Miete, Schenkung, usw.) spezielle *handelsrechtliche Verträge* (z. B. Fracht, Forfaiting, Franchising usw.). Somit wurde im Bereich der *Verträge* die monistische Konzeption über die *Kodifikationseinheit des Zivil- und Handelsrechts* vertreten, d. h. im Bereich des dynamischen Teil des Obligationenrechts. Aber im Bereich des statischen Teils, d. h. der Rechtstellung der Handelsgesellschaften, vertrat die Kommission die Auffassung über die dualistische Kodifikations-

[7] Nach dem Wandel, in den Jahren 1999-2006, dominierte in Serbien die sogenannte „spontane Privatisierung“, ohne Entschädigung oder Restitution für das im vorherigen System nationalisierte Eigentum, s. z. B. József *Szalma*, Enteignungen in Serbien nach dem zweiten Weltkrieg und der Stand der Restitutionsgesetzgebung, in: Hrsg. Gornig, G.H., Detlef Horn, H. Murswiek, Eigentumsrecht und Eigentumsunrecht, Analysen und Beiträge zur Vergangenheitsbewältigung, Teil, 2. Duncker u. Humblot, (Wissenschaftliches Konferenzbuch von der internationalen wissenschaftlichen Tagung, mit der Teilnahme von Zivilisten, Professoren aus mehreren Umwandlungsländern), Berlin, 2009, S. 173-195.

[8] Siehe, Vlada Republike Srbije (Regierung der Republik Serbiens), Odluka o formiranju Komisije za izradu Građanskog Zakonika (Beschluss über die Formierung der Kommission zur Ausarbeitung des Bürgerlichen Gesetzbuches), Službeni Glasnik RS (Amtsblatt der Republik Serbien) Nr. 2006/104,2006/110, 2009/85.

[9] Siehe näher: Jožef *Salma* (Szalma József), O prvom potpunom normativnom Nacrtu Građanskog Zakonika Republike Srbije (Über der ersten vollständigen normativen Text -Vorentwurf - des neues SBGB), Pravni život (Wissenschaftlicher Zeitschrift des serbischen Juristenbundes), Tematische:Auflage, Pravo i društveni imperativi (Recht und gesellschaftliche Erwartungen), Nr. 2016/10. Band II., S. 365-380. *Szalma* József, A szerb Ptk. 2015. évi első normatív tervezetéről (Über den ersten vollständigen normativen Text des serbischen Zivilgesetzbuches), Fontes Iuris, Fachzeitschrift des ungarischen Justiz-Ministeriums, Red.: Prof. Dr. Trócsányi László, Budapest, Nr. 2016/1, S. 34-43.

[10] Siehe, Vlada Republike Srbije (Regierung der Republik Serbiens), Komisija za izradu Građanskog Zakonika (Ausschuss zur Ausarbeitung des Bürgerlichen Gesetzbuches), Građanski Zakonik Republike Srbije (Bürgerliches Gesetzbuch der Republik Serbiens), Radni tekst pripremljen za javnu raspravu sa alternativnim predlozima (Text in Arbeit, vorbereitet für die öffentliche Diskussion), Belgrad, 29. Mai, 2015, S. 681.

Theorie, und dieser Teil wurde zum Sondergesetz (Handelsgesetz) überlassen.[11]

Der Kodifikationsentwurf (mit 2800 Artikeln), welcher noch immer im Fachbereich bleibt, wurde seitens des serbischen Parlaments noch nicht (2018) diskutiert. Charakteristisch ist, dass neben dem Haupttext der Entwurf hinsichtlich von einzelnen Rechtsinstituten eine größere Anzahl von Alternativen (über 480) enthält, welche nach öffentlichen und Fachdiskussionen, schon vor der zukünftigen, noch ausstehenden parlamentarischen Debatte, die Weiterführung des offiziellen Kodifikationsprozesses bedeuten kann.

Nach den Regelungsmethoden verfolgt dieser Entwurf die Prinzipien der Vollständigkeit (Fassung aller Teile des Zivilrechts), der Inkorporation (der Teilkodifikationen), die normative oder Regulations-Methode. Dieser Entwurf vertritt nicht das Monismus-Prinzip des Zivilrechts, d. h. die vollständige Einheit des Privatrechts zwischen dem klassischen bürgerlichen Recht und dem Handelsrecht (wie beim schweizerischen Zivilrecht oder im neuen ungarischen Bürgerlichen Gesetzbuch aus dem Jahre 2013). Der vollständige Kodifikations-Monismus vertrat nämlich die Auffassung, dass die Regelung über die bürger- und handelsrechtlichen Verhältnisse in einem einheitlichen Kodexkörper enthalten sein soll, obwohl mit gesonderten Regeln des Handelsrechts (im Statusteil und im dynamischen Teil, besondere Regeln über Handelsgeschäfte). Der Entwurf steht auf dem Standpunkt des partiellen Monismus (welchen z. B. auch das österreichische ABGB verfolgt), das heißt, auf dem Gebiet des Statusrechts – also die Regelung über die Rechtsstellung der Handelsgesellschaften – sollte man die Sonderkodifikation über Handelsgesellschaften inkorporieren, aber im sog. dynamischen Teil, Obligationenrecht, besonderer Teil, auf dem Gebiet der Rechtsgeschäfte, sollte der Zivilkodex auch die Handelsverträge inkorporieren. Nach der Teilung verfolgte der serbische Kodexentwurf die sog. Buchteilung, welches auch das neue UBGB (Ungarisches Bürgerliches Gesetzbuch aus dem Jahre 2013) vertrat. Das heißt, die einzelnen Teile (wie z. B. Familienrecht, Obligationenrecht, Sachenrecht, Erbrecht) in gesonderten Bücher haben ihren Platz, doch unter den gemeinsamen zivilrechtlichen Prinzipien, wie z. B.: Gleichstellung der Parteien des Zivilrechtes, Treu und Glauben, Vertragsfreiheit, rechtlicher Weg zur Lösung von Rechtskonflikten usw. Auf dem Gebiet des Vertragsrechts enthält der Entwurf dispositive Normen, im Einklang mit dem Vertragsfreiheits-Prinzip, mit der Begrenzung des guten Glaubens und imperativen Normen.

2. Reform der Handelsgesetzgebung: Tendenz zur Europäisierung

Mit dem neuen *Gesetz über Handelsgesellschaften* vom 25. Mai 2011, welches am 4. Juni 2011 in Kraft getreten ist, mit der Verzögerung der Anwendung der Bestimmungen dieses Gesetzes bis zum 1. Februar 2012, bzw den 1. Januar

[11] Siehe, die Arbeiten (Forschungen) des Autors über die Kodifikationsentwicklung in Serbien, mit der näheren serbischen und andersprachigen Literatur: József *Szalma*, Reformtendenzen in der Zivilgesetzgebung Serbiens, in: Hrsg. Rudolf *Welser*, Privatrechtsentwicklung in Zentral- und Osteuropa, Veröffentlichungen der Forschungsstelle für europäische Rechtsentwicklung und Privatrechtsreform an der Rechtswissenschaftlichen Fakultät der Universität Wien, Manz'sche Verlags- und Universitätsbuchhandlung, Wien, 2008, S. 159-183.; József *Szalma*, Der Einfluss des ABGB auf Serbien, in.: Berger, E. Hrsg. Österreichs Allgemeines Bürgerliches Gesetzbuch (ABGB), Eine europäische Kodifikation, Bd. 3, Das ABGB außerhalb Österreichs, Verl. Duncker und Humblot, Berlin, 2010, S. 399-412; József *Szalma*, Das ABGB in der Woiwodina, in, Berger, ABGB, Bd. 3, Duncker und Humblot, Berlin, 2010, S. 399-412.; József *Szalma*, Serbische und kroatische Übersetzungen des ABGB-s, in: Rechtssysteme im Donauraum, Hrsg. Ellen Bos, K. Pócza, Nomos Verlag, Baden-Baden - Budapest, 2014, S. 98-119.; *Szalma* József, Az ABGB (OÁPtk) továbbélése a Monarchia utódállamaiban (Weiterleben des ABGB-s in den Nachfolgestaaten), in: Rácz L. (Hrsg.), A német-osztrák jogterület klasszikus magánjogi kodifikációi (Die klassischen Kodifikationen des Privatrechtes im deutsch-österreichischen Rechtsraum), Martin Opitz Kiadó (Verlag Martin Opitz), Budpest, 2010, S. 103-108.; József *Szalma*, Geltung und Bedeutung der Kodifikationen Österreichs, Serbiens, und Montenegros im ehemaligen Jugoslawien, Zeitschrift für neuere Rechtsgeschichte, Wien, Nr. 1994/4. S. 341-349.; *Szalma* József, Jugoszlávia magánjogáról (Über das Privatrecht Jugoslawiens), in: *Barzó* Tímea, (Hrsg). Polgári jogi kodifikáció és jogharmonizáció (Kodifikation des Privatrechtes und Rechtsharmonisierung), tanulmánykötet (Studien), Novotni Alapítvány (Novotni Fondation zur Entwicklung des Privatrechts), Miskolc, 1999, S.175-192.; *Szalma* József, Rész- és teljes kodifikációk (volt) Jugoszláviában (Vollständige und Teilkodifikationen im ehemaligen Jugoslawien), in: *Bíró* György (Hrsg), A magyar magánjog az európai jogfejlődés áramában (Privatrecht Ungarns im Lichte der europäischen Entwicklung), Miskolci Egyetem ÁJK, Jubielumi Konferenciájának kiadványa (Jubiläumskonferenz), Miskolc (Universität Miskolz), 2000, S. 220-254.; *Szalma* József, Jedinstvo ili dvojstvo građanskog i trgovinskog prava /Über die (Kodifikations-) Einheit oder Verschiedenheit des bürgerlichen und des Handelsrechts), in: Harmonizacija srpskog i mađarskog prava sa pravom Evropske Unije (Harmonisierung des serbischen und ungarischen Zivilrechts mit dem Recht der europäischen Union – Harmonisation of Serbian and Hungarian Law with the European Union), Ranko Keča (Hrsg), Novi Sad-Újvidék, Pravni fakultet (Fakultät der Rechtswissenschaften der Universität Novi Sad (tematisches Konferenzbuch), Centar za izdavačku delatnost (Fakultätsverlag), 2013, S. 29-49; *Szalma* József, A polgári és kereskedelmi jog kapcsolata az új magyar Ptk. fényében (Das Verhältniss zwischen dem bürgerlichem und Handelsrecht im Lichte des neuen UBGB-s), in: Miskolczi Bodnár Péter, Grad-Gyenge Anikó (Hrsg.), Megújulás a jogi személyek szabályozásában (Erneuerung der Rechtstellung auf dem Gebiet der Rechtspersonen), Károli Gáspár Református Egyetem ÁJK (Rechtswissenschaftliche Fakultät der Universität Károli Gáspár), Budapest, 2014, S. 34-60.; *Szalma* József, Szerződéskötési autonómai az európai és a magyar magánjogban (Vertragsfreiheit nach europäischem und ungarischem Recht, Szegedi Egyetem ÁJK, Polgári Jogi Tanszék, bilaterális nemzetközi tudományos tanácskozás konferenciakötete (Újvidéki Egyetem JK - Szegedi Egyetem JK), - Bilaterale wissenschaftliche Tagung der Universität - Fakultät der Rechtswissenschaften, in Szeged, und Rechtswissenschaftliche Fakultet der Universität Novi Sad, Lehrstühle für Zivilrecht), Szeged, ÁJK, 2005, S. 9-59. *Szalma* József (József Szalma), *Umsetzung des Europäischen Verbraucherrechts in Serbien*, in: Die Umsetzung der Verbraucherrechte-Richtlinie ind den Staaten Zentral- und Osteuropas, Hrsg. Ord. Univ Professor, Dr. Hc. Dr. Rudolf Welser, Veröffentlichungen der Vorschungsstelle für europäische Rechtsentwicklung und Privatrechtsreform an der Rechtswissenschaftliche Fakultät der Universität Wien, Bd. X, Manz'sche Verlags- und Universitätsbuchhandlung, Wien, 2015, 187-210.

2014[12], wurde das frühere Gesetz über Handelsgesellschaften aus dem Jahre 2004 abgelöst, wobei das neue Gesetz die Tendenz zeigt, dass hinsichtlich der Rechtsformen, Rechtspersönlichkeit und Haftung von Handelsgesellschaften das europäische Konzept angenommen wird.[13]

3. Regelungen über die Haftung der verschiedenen Gesellschaftsformen für Obligationen

Was die *materielle Haftung* dieser Gesellschaften betrifft, sieht das Gesetz vor, dass sie im Prinzip für Schulden mit ihrem *gesamten Vermögen* haften, mit der Ausnahme von Handelsgesellschaften mit begrenzter Haftung, bei welchen das Haftungsmaß nach dem Wert des Grundkapitals bestimmt wird.

In der Literatur wird kritisiert, dass bei diesen Gesellschaften das Gesetz das minimale Grundkapital zu niedrig bestimmt hat (nur 100 Dinar).[14] Aber das Gesetz über Handelsgesellschaften sieht für Gesellschaften mit begrenzter Haftung eine Ausweitung (Durchbruch) der Haftung über das untere Limit des Gründungskapitals vor, wenn es sich um einen *Missbrauch der Regeln über die begrenzte Haftung* handelt.[15] In folgenden Fällen liegt ein Missbrauch (des Kommanditisten als Mitglied der Gesellschaft mit begrenzter Haftung, des Aktionärs, sowie des gesetzlichen Vertreters dieser Rechtsperson, wenn die Geschäftsfähigkeit dieser Person vorgetäuscht wurde) vor: 1. wenn eine dieser Personen die Gesellschaft zur Erzielung eines sonst verbotenen Ziels nutzt; 2. wenn eine dieser Personen über das Vermögen der Gesellschaft verfügt, als ob es ihr persönliches Vermögen wäre; 3. wenn eine dieser Personen die Gesellschaft oder ihr Vermögen mit dem Ziele der Schädigung der Gläubiger der Gesellschaft nutzt; 4. wenn eine dieser Personen im Ziele des Erzielung eines Gewinns das Vermögen der Gesellschaft vermindert, oder wenn sie wusste oder wissen musste, dass die Gesellschaft ihre Verpflichtungen nicht erfüllen kann.[16] Der Gläubiger der Gesellschaft kann eine Klage beim zuständigen Gericht gegen die angeführten Personen einreichen, innerhalb von sechs Monaten ab der Erkenntnis über den Missbrauch, und spätestens fünf Jahre ab dem Tag des Missbrauchs.[17] Wenn es zum Missbrauch gekommen ist, haftet *gegenüber Dritten der Kommanditist/Aktionär, bzw. der gesetzliche Vertreter*, welcher die Regel über die begrenzte Haftung *missbraucht* hat, persönlich mit seinem Vermögen.

Bei *Aktiengesellschaften* ist das Grundkapital 3.000.000 Dinar (ca 24.500 €), was in der Literatur als bessere Lösung erachtet wird, denn es entspricht den europäischen Normen hinsichtlich des Minimalkapitals nach den europäischen Richtlinien, was 25.000 € beträgt.[18]

4. Handelsgesellschaft als juristische Person

Nach dem neuen serbischen Gesetz über Handelsgesellschaften wird eine „Handelsgesellschaft" als eine *juristische Person* betrachtet, die ihre (Unternehmens-) Tätigkeiten zwecks der Erzielung eines *Gewinns* verwirklicht.[19] Die Gesellschaft erhält die Eigenschaften einer Rechtsperson durch die Registrierung,[20] im Einklang mit dem Gesetz, welches die Registrierung von wirtschaftlichen Subjekten regelt.[21] Die Gesellschaft hat eine *überwiegende Tätigkeit,* die im Einklang mit dem Gesetz über Registrierung registriert wird, und sie kann auch alle anderen Tätigkeiten ausüben, die gesetzlich nicht verboten sind, unabhängig davon, ob sie durch ein Statut bestimmt sind.[22]

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[12] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften), Službeni glasnik RS (Amtl. Bl. RS), Nr. 36/2011 vom 27. 05. 2011, 99/2011 vom 27. 12. 2011, 83/2014 vom 5. 08. 2014 – novi Zakon (neues Gestetz) und 5/2015 vom 20. 01. 2015, und zuletztlich 44/2018.
Wichtige Modifikationen des neuen Handelsgesetzes traten im Jahre 2014 und 2015 in Kraft. Der neu geordnete Text wurde am 15. Mai 2015 veröffentlicht in: Službeni Glasnik RS (Amtsblatt der Republik Serbien, Nr. 2015/5).
Zu einzelnen Fragen, die auch mit dem Handelsrecht, oder Handelsrechtsregelung in Serbien verbunden sind, siehe. z. B.:József *Szalma*, Die Hypothek als Mittel der Kreditsicherung unter besonderer Berücksichtigung der Rechtslage in Serbien, in: Hrsg. *Welser*, R. Das Recht der Kreditsicherung in Zentral- und Osteuropa, Manz Verlag, Wien, 2014, S. 199-204.; József *Szalma*, Haftung bei ber Veräußerung von Wertpapierrrechten in Serbien, in: Rechtsfragen bei der Veräußerung von Wertpapieren nach den Rechten der CEE-Staaten, Forschungsstelle für europäische Rechtsentwicklung und Privatrechtsreform, Rechtswissenschaftliche Fakultät der Universität Wien, 2015; József *Szalma*, Umsetzung des Europäischen Verbraucherrechts in Serbien, in. Hrsg. R. *Welser*, Die Umsetzung der Verbraucherrechte-Richtlinie in den Staaten Zentral- und Osteuropas, Manz Verlag, Wien, 2015, S. 187-210.

[13] Siehe z. B., *Vasiljević* Mirko., Trgovinsko pravo (Handelsrecht), Beograd 2011; *Vasiljević* M., Kompanijsko i trgovinsko pravo (Unternehmensrecht und Handelsrecht), Priručnik za polaganje pravosudnog ispita (Handbuch für Justiz-Prüfung), Beograd, 2013.

[14] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 145.

[15] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 18. Abs. 1.

[16] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 18 Abs 2 Punkt 1-4.

[17] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 18 Abs 3.

[18] Siehe z. B. *Stefanović*, Z., Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften), predgovor (Vorwort), JP Službeni glasnik, Beograd 2015, 7-12. Auf dem Gebiet der Wertpapierrechte verweist die serbische Literatur unter anderem auf die folgenden EU-Normen: Commission, Directive 2006/73/EC of 10. August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, Official Journal, L 261, 2. 9. 2006, Art. 16; im serbischen Gesetz über den Kapitalmarkt wurde diese EU-Regelung in Art.168 übernommen; Directive 2004/39/EC of the European Parliament and of the Council of 21.April 2004 on markets in financial instruments amending Council Directives 85/611 EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repearing Council Directive 93/22/EEC (MiFID), Official Journal, L 145, 30. 4. 2004, Art. 13 (7) (8); das serbische Gesetz über den Wertpapiermarkt hat diese EU-Regeln in Art. 161 Abs. 1 übernommen. Siehe auch: Zakon o tržištu kapitala (Gesetz über den Kapitalmarkt), Službeni glasnik RS (Amtl. Bl. RS), Nr. 31/2011.

[19] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 2.

[20] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 3.

[21] Siehe Zakon o registraciji privrednih društava (Gesetz über die Registrierung von wirtschaftlichen Gesellschaften), Službeni glasnik RS (Amtl. Bl. Serbiens) Nr. 99/2011.

[22] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 4.

5. Arten von Handelsgesellschaften

Die verschiedenen *Rechtsformen von Handelsgesellschaften* sind: 1. Gesellschaft bürgerlichen Rechts; 2. Kommanditgesellschaft; 3. Gesellschaft mit begrenzter Haftung; 4. Aktiengesellschaft.[23]

Die *Mitglieder* der Gesellschaft haften für die Verpflichtungen der Gesellschaft im Einklang mit den Bestimmungen des Gesetzes über wirtschaftliche Gesellschaften, welche die rechtlichen Formen der Gesellschaften bestimmen.[24] Als Mitglieder der Gesellschaft werden erachtet: 1. in der Gesellschaft bürgerlichen Rechts: die Partner; 2. in der Kommanditgesellschaft: die Komplementäre und Kommanditisten; 3. in der Gesellschaft mit begrenzter Haftung: die Mitglieder der Gesellschaft; 4. in der Aktiengesellschaft: die Aktionäre.[25]

6. Gründungskapital, Anteilsübertragung, Sorgfaltspflichten der Mitglieder, Haftung bei verschiedenen Arten von Gesellschaften

Das *Gründungskapital* kann eine Bareinlage oder eine Sacheinlage sein.[26] Die Personen, die mit dem Gründungsakt oder auf eine andere Weise die Verpflichtung angenommen haben, dass sie ein entsprechendes Gründungskapital einbringen, haften gegenüber der Gesellschaft für die Realisierung dieser Verpflichtung, und sie sind zu *Schadenersatz* verpflichtet, für den Schaden, den die Gesellschaft wegen der Unterlassung oder Verzögerung dieser Verpflichtung erlitten hat.[27]

Im Falle der *Übertragung des Anteils* bzw. von Aktien, haften der Übertragende und der Erwerber solidarisch gegenüber der Gesellschaft für Verpflichtungen des Übertragenden bezüglich des Gründungskapitals, die bis zur Übertragung entstanden sind. Dies gilt im Einklang mit den Bestimmungen des Gesetzes für jede einzelne Gesellschaftsform.[28]

Wenn Wertpapiere oder Instrumente des Finanzmarkts das Gründungskapital als Sacheinlage bilden, so wird der Wert dieses Gründungkapitals spätestens 60 Tage vor dem Tag der Einbringung dieses Gründungskapitals bestimmt.[29]

Das Gesetz schreibt besondere *Sorgfaltspflichten* seitens der Mitglieder gegenüber der Gesellschaft vor.[30] Unter diesen Sorgfaltspflichten wird verstanden, dass die Mitglieder ihre Tätigkeit gewissenhaft ausüben müssen, mit der *Sorgfalt eines redlichen Wirtschafters*, und mit der vernünftigen Überzeugung, dass sie im besten Interesse der Gesellschaft handeln.[31] Die Gesellschaft kann eine gerichtliche *Schadenersatzklage* gegen ein Mitglied der Gesellschaft erheben, wenn der Schaden durch eine *Verletzung der Sorgfaltspflichten* entstanden ist.[32]

Unter der *Gesellschaft bürgerlichen Rechts* versteht das Gesetz eine Gesellschaft von zwei oder mehreren Partnern, die unbegrenzt und solidarisch mit ihrem ganzen Vermögen für die Verpflichtungen der Gesellschaft haften.[33] Keine Wirkung hat die Bestimmung des Gründungsvertrags, mit der die Haftung eines Partners gegenüber Dritten begrenzt wird.[34]

Die *Kommanditgesellschaft*[35] ist eine Handelsgesellschaft, die mindestens zwei Mitglieder hat, von denen mindestens ein Mitglied für die Verpflichtungen der Gesellschaft unbegrenzt haftet (Komplementär), und mindestens ein Mitglied haftet begrenzt bis zur Höhe seines eingebrachten Gründungskapitals (Kommanditist).[36]

Die *Gesellschaft mit begrenzter Haftung*[37] im Sinne des Gesetzes über Handelsgesellschaften ist eine Gesellschaft, in der ein oder mehrere Mitglieder der Gesellschaft Anteile am Grundkapital der Gesellschaft halten, und die Mitglieder der Gesellschaft haften nicht für Verpflichtungen der Gesellschaft, außer im Falle des Missbrauchs durch die Mitglieder.[38]

Die *Aktiengesellschaft*[39] im Sinne des Gesetzes über Handelsgesellschaften ist eine Gesellschaft, deren Grundkapital in Aktien geteilt ist, welche einer oder mehrere Aktionäre besitzen. Die Gesellschafter haften nicht für die Verpflichtungen der Gesellschaft, außer im Falle des Missbrauchs durch die Gesellschafter. Die Aktiengesellschaft haftet für ihre Verpflichtungen mit ihrem gesamten Vermögen.[40]

7. Vertretung

Das Gesetz über Handelsgesellschaften regelt für jede Gesellschaftsform die Frage, von wem sie *vertreten* wird. Die Gesellschaft muss mindestens einen gesetzlichen Vertreter haben, der eine natürliche Person ist.[41] Außer den gesetzlichen Vertretern können die Gesellschaft auch Personen vertreten, die durch ei-

[23] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 8 Abs 1 Punkt 1-4.
[24] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 17.
[25] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 9. Abs. 1 Punkt 1-4.
[26] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 45-48.
[27] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 46 Abs. 1.
[28] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 49 Abs. 1.
[29] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 57.
[30] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 61-62.
[31] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 63 Abs 1.
[32] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 64.
[33] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 93 Abs 1.
[34] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 93 Abs 2 und Art. 94 Abs. 1-3.
[35] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 125-138.
[36] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 125.
[37] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 139-244.
[38] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 139.
[39] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 245-469, Art. 474-477 (Rechte von nicht zustimmenden Aktionären).
[40] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 245 Abs. 1-2.
[41] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 31 Abs. 1 und 3.

nen *Beschluss* des zuständigen Organs der Gesellschaft zur Vertretung der Gesellschaft *ermächtigt* wurden.[42] Der Vertreter ist verpflichtet, im Rahmen seiner Befugnisse zu handeln, welche durch die zuständigen Organe der Gesellschaft festgelegt werden.[43] Es können auch bevollmächtigte Personen als *Angestellte* der Gesellschaft bestehen. Diese Personen üben Tätigkeiten aus, die auch die Schließung oder Erfüllung von bestimmten Verträgen oder die Erledigung von rechtlichen Handlungen beinhalten. Sie sind bevollmächtigt, Verträge zu schließen oder zu erfüllen und zwar innerhalb der Grenzen ihrer Tätigkeit.[44] Die *Prokura* ist eine rechtsgeschäftliche Vollmacht, mit welcher eine oder mehrere natürliche Personen (Prokuristen) ermächtigt werden, im Namen und für Rechnung der Gesellschaft Rechtsgeschäfte zu schließen und andere rechtliche Handlungen zu erledigen.[45] Die Prokura wird auf Grund der Entscheidung der Gesellschafter, der Kommanditisten und Komplementäre bzw. der Versammlung der Aktionäre erteilt, wenn im Gründungsakt oder Statut nicht anders bestimmt ist. Der Prokurist wird gemäß dem Gesetz über Registrierung registriert.[46] Das Gesetz sieht auch die *Begrenzung der Prokura* vor, so dass der Prokurist ohne eine besondere Ermächtigung folgendes nicht erledigen kann: 1. Rechtsgeschäfte hinsichtlich des Erwerbs, der Veräußerung oder Belastung von Liegenschaften abzuschließen; 2. Übernahme von Wechselverpflichtungen und Bürgschaftsverpflichtungen; 3. Schließen von Darlehens- und Kreditverträgen; 4. die Vertretung der Gesellschaft in Gerichtsverfahren oder vor Schiedsgerichten.[47] Das Gesetz über Handelsgesellschaften sieht generelle Bestimmungen über die Haftung und die Begrenzung für Vertreter, bevollmächtige Angestellte und Prokuristen vor, nach denen diese für den *Schaden haften*, welchen sie der Gesellschaft durch die *Überschreitung ihrer Befugnisse* verursachen.[48]

8. Unternehmer

Das Gesetz über Handelsgesellschaften regelt auch die rechtliche Lage und die Haftung des *Unternehmers*. Im Sinne des Gesetzes ist ein Unternehmer eine geschäftsfähige natürliche Person, welche die unternehmerische Tätigkeit im Ziele der Erzielung von Gewinnen ausübt, und die als solche im Einklang mit dem Gesetz über Registrierung registriert wurde. Die natürliche Person, die in ein besonderes Register eingetragen wurde, welche die Tätigkeit eines freien Gewerbes, das durch eine besondere Vorschrift geregelt wird, ausübt, wird gemäß diesem Gesetz als Unternehmer erachtet. Ein *individueller Landwirt* ist im Sinne dieses Gesetzes kein Unternehmer, außer ein besonderes Gesetz bestimmt etwas anderes.[49] Ein Unternehmer wird auf unbestimmte oder bestimmte Zeit registriert.[50]

Der Unternehmer *haftet für alle Verpflichtungen, die auf Grund der Ausübung seiner Tätigkeit entstanden* sind, mit seinem *gesamten Vermögen*.[51] Der Unternehmer kann alle (Handels) Tätigkeiten ausüben, die von Gesetzes wegen nicht verboten sind und für die er die vorgeschriebenen Bedingungen erfüllt.[52] Der Unternehmer kann durch eine schriftliche Vollmacht die Geschäftsführung auf eine geschäftsfähige natürliche Person übertragen.[53] Der Geschäftsführer muss in einem ständigen Arbeitsverhältnis beim Unternehmer stehen.[54]

9. Zusammenfassung

Im ersten Teil widmet sich diese Arbeit der tendenziellen Kodifikations-Entwicklung, insbesondere der Kodifikationsmethode des Zivilrechtes in Zeitraum des XIX. und XX. Jahrhunderts in Serbien. Eine Analyse der tendenziellen Entwicklung der Zivilrechtkodifikation in Serbien zeigt, dass in der zweiten Hälfte des XIX. Jahrhunderts die sogenannte gesonderte Regelung des Zivilrechtes vorherrschte: einerseits durch die Kodifikation des engeren Zivilrechts (1844), andererseits in der Kodifikation des Handelsrechts (1863). Während des XX. Jahrhunderts d. h. im I. und II. Jugoslawien, entstand kein vollständiger Zivilkodex, sondern nur Teilkodifikationen, teilweise auf föderaler (wie das Obligationengesetz, 1978), teilweise auf Teilrepublik-Ebene (wie Familienrecht, Erbrecht, Vormundschaftsrecht). Nach der Emanzipation der Teilrepubliken, einschließlich Serbiens, begann im Jahre 2007 die Kodifikation des ganzen Zivilrechts, mit dem Ergebnis in Form des ersten normativen Entwurf-Textes aus dem Jahre 2015. Aber dieser Text wurde vom Parlament bis Herbst 2018 noch nicht diskutiert. Hinsichtlich des Dilemmas über die integrierte oder sondergesetzliche Regelung des Zivil- und Handelsrechts wählte der Kodifikationsausschuss den Weg der Sonderregelung des Handelsrechts, d. h. die Stellung der Handelsgesellschaften durch einen gesonderten Kodex zu regeln. Der Entwurf des Zivilgesetzbuches hat jedoch im besonderen Teil des Obligationengesetzes neben den klassischen Verträgen auch die besonderen Handelsverträge inkorporiert, und damit wurde die Theorie über die relative Kodifikationseinheit des Zivil- und Handelsrechts angenommen.

Der zweiter Teil der Arbeit ist dem Inhalt, bzw. Grundprinzipien des schon in Kraft getretenen Handelsgesetzes gewidmet, im Lichte der europäischen Rechtsharmonisierungs-Erwartungen. Dieser Teil der Arbeit enthält eine kurze Übersicht über die wichtigsten Stellen bzw. Rechtsintitute, insbesondere Han-

[42] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 32 Abs. 1.
[43] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 33 Abs. 1.
[44] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 34 Abs. 1.
[45] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 35 Abs. 1.
[46] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 36 Abs. 1-2.
[47] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 38 Abs. 1. Punkt 1-4.
[48] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 41 Abs. 1.
[49] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 83 Abs. 1-3.
[50] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 84.
[51] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 85 Abs. 1.
[52] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 88 Abs. 2.
[53] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 89 Abs. 1.
[54] Siehe Zakon o privrednim društvima (Gesetz über wirtschaftliche Gesellschaften) Art. 89 Abs. 3 und 5.

delsgeselschften-Arten des neuen serbischen Handelsgesetzbuches aus dem Jahre 2011/14,15,18. Es lässt sich keine vollständige Bewertung des Gesetzes geben. Nämlich das Gesetz nur eine kurze Zeit in Kraft ist, inzwischen mehrmals modifiziert und damit ist es zu früh, über die Erfahrungen der Rechtsanwendung zu berichten. Doch die Literatur verweist darauf, dass der Gesetzgeber anstrebt, hinsichtlich der verschiedenen Arten von Gesellschaften, Rechtspersonen und ihrer Haftung für Obligationen, die europäische Regelungstradition und gegenwärtige Regelungs-Erfahrungen zu verfolgen. Die serbische wissenschaftliche Literatur auch in concreto erwähnt, dass der Gründungsbetrag bei Gesellschaften mit begrenzter Haftung zu niedrig ist, und dadurch wird die Haftung für Obligationen mehr begrenzt als die üblichen Lösungen. Aber das Gesetz ermöglicht eine besondere Klage gegen missbräuchliche Handlungen oder Klauseln hinsichtlich des Gründungskapitals. Im Gegensatz zu Handelsgesellschaften wurde beim Einzelunternehmer die Haftung für die übernommenen Obligationsverpflichtungen durch das Gesetz auf sein ganzes Vermögen erweitert.

The Dating of Last Wills in the Territory of the Czech Lands from the 19th to the 21st Century*

*Pavel Salák***

Abstract

The paper follows the development of the legal regulation of dating last wills as one of the essential elements required for a last will in the territory of the Czech lands from the 19th to 21st century. It focuses not only on applicable regulations but also on legislative proposals that finally never came into force. Similarly, tangential references have been made to the legislations playing their role as a source of inspiration – in particular the legislations of Austria, Germany and Hungary. In addition to the legal regulation, the paper also follows its interpretation and the reasons for different approaches to this issue. In substance, the liberal approach, which places the emphasis on the autonomy of will, alternates here with the approach preferring formality. These aspects had an impact on the provisions of Act No. 89/2012 Sb., the Civil Code, concerning dating last wills. As can be observed, the studied legal regulation is a compromise between the two trends, albeit not an entirely happy one.

Keywords: *Last Will; Date; Formal Requirement; ABGB; BGB; Czechoslovak and Czech Law of Sucession.*

I. Introduction

The issue of the indication of a date as one of the essential elements of last wills is quite closely related to the holographic will. The fact that a testator can make a holographic will himself or herself without any cooperation required from another[1] person poses a risk that the awareness of when a last will came into existence may be lacking.[2]

In its own way, the legal regulation of a date as one of the essential elements of last wills can illustrate a conflict between the two principles that meet here – the principle of formality and the principle of autonomy of will. Although the following text focuses on the Czech or rather Czechoslovak legal regulations, it is fitting to first pay attention to the Austrian, German and Hungarian legal regulations because they had their own respective impact on the subsequent development of law in the territory of Czechoslovakia and the Czech Republic.

II. German, Austrian and Hungarian Law

The above mentioned conflict, including its consequences, becomes clearly apparent when the respective holographic wills in the Austrian ABGB and the German BGB are compared, even though both legal codes nowadays regulate the dating of last wills in the form of a recommendation rather than an obligation. The legal courses for the two laws were however different, even if das Allgemeine Landrecht für die Preußischen Staaten (1794, hereinafter referred to as the ALR) was reflected in both of them in its respective manner.

The stand of the ALR on the holographic will as such was negative. Although the holographic will is very often perceived as one of the contributions of the Romans, reality is somewhat more complex. The holographic will originated in the times of ancient Rome; nevertheless it is a legal institute dating back to the later Post-Classical Era.[3] In a way, it may be said that, unlike the other institutes of the law of succession, the holo-

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1 This is the case in Czech, German, Austrian, Swiss and Polish law, and also the law of other countries. On the contrary, Hungarian law required two witnesses to be present also in the case of holographic wills.

2 With respect to notarial wills, it is possible to keep to a notarial record, while for allographic wills there must be witnesses present.

3 *Novella Valentiniani* 21.2 dated 26th December 446 in Ravenna. For details, including the outline of the later development in the Middle Ages, see: BÉRIER, Fr. Longchamps de, *Law of Succession. Roman Legal Framework and Comparative Law Perspective*. Warsaw: Wolters Kluwer Polska, 2011, p. 164an. For the details on the holographic will in the Roman law, including the text of the respective constitution, (in German) compare KURYŁOWICZ, M., Testamentum holographum. In: *Krytyka Prawa* vol. 7 Nr. 1, 2015, p. 219-227. [online] [accessed 2018. 01. 25], retrieved from: http://www.krytykaprawa.pl/api/files/view/59482.pdf.

graphic will played quite a marginal role. After all, this institute was not adopted by the Emperor Justinian's codification.[4] And so the Prussian ALR[5] recognized holographic codicils but not testaments.[6] In Martini's draft of the Civil Code of Austria, which resulted in Bürgerliches Gesetzbuch für Galizien (1797, hereinafter referred to as the GBGB) it was admitted that even a last will might be made in the holographic form,[7] however, according to the model of the ALR that it followed,[8] the draft subjected the holographic form of a last will to the obligation of marking the date on it.[9] The Austrian Civil Code of 1811 (hereinafter referred to as the ABGB) however derogated from this concept and the final form of the law transformed the requirement to mark last wills with a date – similarly to Codex Theresianus[10] – into the form of a mere recommendation.[11] The role of the main author, F. von Zeiller, in the genesis of the provisions of Section 578 is however somewhat inconsistent. As is evident from records, his stance on the holographic will was originally negative.[12] He took the view that there was a high risk of testament falsifications. However, he was alone in pursuing this view in the commission and so the holographic will remained in the ABGB, however the wording of the provision corresponded to the form stipulated in the GBGB and the indication of a date and place was an obligatory essential element. During the meeting on 17th August 1807, F. von Zeiller however, somewhat surprisingly, proposed transforming the date requirement to the level of a recommendation,[13] which was also finally reflected in the wording of Section 578 of the ABGB. This provision applied expressly both to last wills and codicils.[14]

The course taken in Germany was different. The original draft of the BGB was based on the concept that had already been pushed in the ALR – by its very nature, the holographic will was inadmissible and the preferred form was the notarial will.[15] A separate regulation of the holographic will was not included in the wording of the BGB until in the third draft of the bill.[16] However, the overall scepticism towards it did not disappear; therefore the legal regulation of the form of holographic will in the BGB was quite strict.[17] It was not only the date (day) of the last will and testament that was required to be stated but also the place of its dating. The fact itself would not have been so problematic, after all the ABGB also recommended the place to be specified but the problem was actually the fact that the date as well as the place had to be written in the testator's own hand. While the date was usually written in the testator's own hand, there were a lot of last wills for which testators used their own headed paper containing their address. However, a pre-printed address could not be considered as an indication of the place made in the testator's own hand, and so the last will was auto-

[4] This type of a last will was allowed only between parents and their children (as heirs) – so called *testamentum parentum (parentis) inter liberos*, BÉRIER, Fr. Longchamps de, *Law of Succession. Roman Legal Framework and Comparative Law Perspective*. Warsaw: Wolters Kluwer Polska, 2011, p. 169.

[5] Title XII, Section 162 of the ALR: *Zur Gültigkeit einer solchen Disposition ist jedoch die Beyfügung des Jahres und Tages, wo sie errichtet worden, nothwendig.* - So that such a disposition would be valid, it is necessary to also state the year, the date and the place where it was made.

[6] The provision of Title XII. Section 161 mentions only codicils – in one's own hand, it was possible to make only a bequest, through a codicil, but it was absolutely not possible to appoint somebody as an heir. When a testament is mentioned, this naturally means the ordinary testament, not the privileged testament.

[7] The holographic form as an ordinary form of a testament was also allowed in Codex Theresianus, although here for example Azzoni also took the view that it should be only a privileged testament. The essential requirements in this case were that a testament be handwritten in a testator's own hand, signed and sealed (Codex Theresianus Teil II., Caput XI., § VII.69-76). HARRASOWSKI P. Harras von, *Der Codex Theresianus und seine Umarbeitungen*. Vol. I-IV. Vienna, 1883-1886, retrieved from: http://repertorium.at/ns/codex_theresianus_inhalt.html.

[8] With respect to the ALR, Martini expressed his opinion metaphorically, saying that it was difficult to write Odyssey after Iliad.

[9] Section 373 of the GBGB: *"Wer schriflich und ohne Zeugen testiert will, der muß das Testament oder Codicill eigenhändig schrieben, den Tag, das Jahr, den Ort seines gegenwärtiggen Aufenthaltes darunter setzen, sich mit seinem Vor- und Geschlechtsnahmen unterzeichnen, und sein Petschast, Siegel oder anderes Zeichen beydrücken."*

[10] Codex Theresianus Teil II., Caput XI., § VII,100.

[11] As is evident from the provision, the date is not required, though is nevertheless expressly recommended. This paragraph may serve as an illustration of the fact that the ABGB is sometimes described as a law written in such a manner so that it could be understood by a common – legally uneducated – user.

[12] During the meeting on 23rd January 1803; see OFNER, J., *Der Ur-Entwurf und die Berathungs-Protokolle des oesterreichischen Allgemeinen bürgerlichen Gesetzbuches*. I. vol. Vienna: Alfred Hölder, 1889, p. 345-347.

[13] However, the genesis of Section 578 is more complicated. Not only did Haan, the chairman of the committee, agree with it, he even proposed that the holograph should be absolutely informal. Just to draw it up would suffice, not even a signature was to be required (after all, under Roman law a text written in one's own hand without a signature was considered to be a holograph). Only on 30th November 1809 did Pratobevera manage to push through, even against Haan, the wording that required a signature as an essential element. Svoboda p. 260, 261, note 19) OFNER, J., *Der Ur-Entwurf und die Berathungs-Protokolle des oesterreichischen Allgemeinen bürgerlichen Gesetzbuches*. II. vol. Vienna: Alfred Hölder, 1889, p. 538-539.

[14] The essence of the provision of Section 578 of the ABGB did not change, not even after ErbÄn 2015 (effective from 1st January 2017). However, the explicit references to a testament and codicil disappeared and were replaced with the term "letztwillige Verfügung!", which comprises both types of dispositions in itself.

[15] Interestingly, it was the Justinian law that was taken into account as an argument for refusing the holographic will in the BGB. See HELLER, Hans-Detlef. *Die Zivilrechtsgesetzgebung im Dritten Reich: die deutsche bürgerlich-rechtliche Gesetzgebung unter der Herrschaft des Nationalsozialismus. Anspruch und Wirklichkeit*. Münster: MV Wissenschaft, 2015, p. 300.

[16] MUGDAN, B. (ed.), *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich (Erbrecht)*. V. vol. Berlin: R. v. Decker's Verlag, 1899, p. 893 (at the very bottom) et seq. [accessed: 2018. 16. 10] Retrieved from: https://archive.thulb.uni-jena.de/collections/servlets/MCRFileNodeServlet/HisBest_derivate_00010712/Band%205.pdf

[17] The original wording of the provision of Section 2231 (2) of the BGB was: *"Ein Testament kann in ordentlicher Form errichtet werden… durch eine von dem Erblasser unter Angabe des Ortes und Tages eigenhändig geschriebene und unterschriebene Erklärung."*

matically invalidated subsequently.[18] Even Adolf Hitler, when he executed his first testament in the spring of 1938, made the same mistake.[19] This was perhaps the reason why he initiated the idea that the date and place in the amendment then being prepared, which was supposed to adapt the law of succession to Nazi requirements to a greater extent, should be (and finally were) regulated as optional essential components of a last will.[20] The different regulations of the BGB and the ABGB surely played their role and were likely to give rise to some problems after the Anschluss of Austria. In any case, a date also became an optional essential element of a last will after 1938 and it is still the case today. This can be considered to be one of the few effects that the ABGB had on the BGB.

Although Hungarian historical law was not substantially influenced by Roman law, it also preferred testaments in the form of deeds. The issue of essential elements of the last will in the law of Hungary, which was rather common law in its nature, was regulated in Law No. XVI/1876. Being true to its local tradition, the Law allowed for the holographic will, however its essential elements were determined in a manner that was even stricter than in the BGB as not only did it require the date and place to be indicated,[21] but also the signatures of two witnesses to be attached. Therefore, one of the main benefits of the holographic will – keeping a last will or its content confidential from anybody – could somewhat lack purpose.[22]

III. The Dating of Last Wills in the Interwar Period

With the establishment of Czechoslovakia in October 1918, the legal norms then valid in its individual constituent territories (Act No. 11/1918, Section 2) were adopted, although the role of the BGB was only marginal. It was applicable only within the small territory of the Hlučín region[23] and was very soon substituted by the ABGB there. From the beginning of the 1920 s, the differences between the Austrian and Hungarian laws led to efforts to concurrently unify and update the law.[24]

So that the new regulation could be completed as soon as possible, a decision was taken to amend the ABGB to some extent instead of new codification – the ABGB was to be translated into Czech,[25] everything out-dated was to be revoked, and the law applicable in Slovakia and Carpathian Ruthenia (Hungarian law) was to be taken into account. The work was divided among several subcommittees that gradually submitted their proposals by 1924.[26]

The subcommittee for the law of succession, which was headed by Emil Svoboda, adhered quite rigidly to the intention of revoking that which was out-dated, and in truth only oversaw the translation of the text of the ABGB into Czech. Nevertheless, they did introduce several amendments to the law. One of them was a new wording of the provision on formal essential elements of the holographic will. The equivalent to Section 578 of the ABGB as proposed by the subcommittee according to the Explanatory Memorandum *"in accordance with Hungarian law…"* introduced the date as an obligatory essential element.[27] Accordingly, it was proposed that any last will and testament comprising more than one sheet should have all the sheets affixed to each other or that each of the sheets should be signed.[28]

Unfortunately, it is not possible to discover the underlying reasons for this decision taken by the subcommittee from the subcommittee's documents as the subcommittee for the law of succession was the only one that did not take minutes of their

[18] It is reported that the formal deficiencies concerning the date and place of a last will and testament caused that in the first half of the 20th century up to 30% of holographic testaments in Germany were declared invalid. This is also reported by J. F. Stagl at the end of his study, see STAGL, J. F., Das "testamentum militare" in seiner Eigenschaft als "ius singulare". In: *Rev. estud. hist.-juríd*. [online]. Valparaíso, 2014, vol. 36, p. 129-157 [accessed 2015. 06. 10]. Retrieved from: http://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0716-45520140001000004&lng=es&nrm=iso

[19] HELLER, H. D., *Die Zivilrechtsgesetzgebung im Dritten Reich: die deutsche bürgerlich-rechtliche Gesetzgebung unter der Herrschaft des Nationalsozialismus. Anspruch und Wirklichkeit*. Münster: MV Wissenschaft, 2015, p. 301.

[20] Interestingly, although the stances of the Ministry of the Interior, the Ministry of Culture, and also of SS-Reichsführer Himmler were sceptical as regards the holographic will, the legal regulation was enacted. In addition, it was explicitly expressed in connection with it that it is the *"Führerswunsch"* (Führer's wish). HELLER, H. D., *Die Zivilrechtsgesetzgebung im Dritten Reich: die deutsche bürgerlich-rechtliche Gesetzgebung unter der Herrschaft des Nationalsozialismus. Anspruch und Wirklichkeit*. Münster: MV Wissenschaft, 2015, p. 303.

[21] It is worth noting that the above mentioned law used the term *"időpont"*, and this term can be translated as a date or a certain moment of time. However, the truth is that Hungarian courts construed the term *"időpont"* in the manner that the day, month and year (or the year, month and day in the Hungarian usage) should be indicated, for example 1892. augusztus 5. I would like to express my thanks for this piece of knowledge to prof. Sáry.

[22] It was Zeiller who presented the fact that the holographic will best enabled keeping its content in confidence as one of the arguments for the holographic will. ZEILLER, F. von, *Commentar über das allgemeine bürgerliche Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie. Part II.* Head 8. Vienna: Geistingers Verlagshandlung, 1812, p. 384-385, p. 452-453. Although it is true that the Hungarian regulation did not require the wording of a last will to be known to witnesses, the fact that there were witnesses meant that there was at least some awareness that a testator had written a last will and testament.

[23] A part of Czechoslovakia from 4th February 1920 (The Treaty of Versailles).

[24] Consideration had already been given to the updating of the ABGB before the First World War, nevertheless the war led to a cessation of these efforts.

[25] It must be noted that the text of the ABGB was first translated into Czech in 1812, with several more translations following, nevertheless none of the translations were official, and so the German wording remained the only official wording of the law until the termination of the effect of the last provisions of the ABGB in the territory of Czechoslovakia (repealed by the Labour Code – Act No. 65/1965 Sb.).

[26] For the most recent paper (in German) on the subject of unification of the civil law see SALÁK, P., Tschechoslowakei: Rekodifizierung des Bürgerlichen Rechts. In: Martin Löhnig, Stephan Wagner. *"Nichtgeborene Kinder des Liberalismus"? Zivilgesetzgebung im Mitteleuropa der Zwischenkriegszeit.* Tübingen: Mohr Siebeck, 2018. p. 91-147.

[27] SVOBODA, E. (the committee reporter), *Dědické právo. Návrh subkomitétu pro revisi občanského zákoníka pro Československou republiku*. [The Law of Succession. The Proposal Submitted by the Subcommittee for the Review of the Civil Code for the Czechoslovak Republic.] 2nd Edition, Prague: Ministerstvo spravedlnosti, 1924, p. 21.

[28] This also was based on Hungarian law.

meetings.[29] However, the papers written by Emil Svoboda, who headed the whole committee, can furnish some clues because he quite clearly expressed his opinions[30] against the existing Section 578 of the ABGB, the weak formal essential requirements of which he said posed a risk. However, his negative stance focused not only on the holographic will but also the allographic will, where he perceived both of them to be prone to forgery.[31] It can be expected that the notaries among the members of the subcommittee took his side because they were materially interested in the matter to some extent, and so perhaps were the judges for whom a higher level of essential elements would make decision making easier. Accordingly, the above mentioned approximation to the Slovak law may more be considered to have been a suitable pretence.[32] Svoboda himself had previously been forthcoming[33] about his inspiration gained from Swiss law.[34] Nevertheless, the wording of the proposed paragraph is clearly based on the original wording of the ABGB,[35] only the form of recommendation is transferred to the obligatory level.[36]

In the second half of the 1920 s, the proposals submitted by individual subcommittees were passed to the supra-revision committee,[37] which was assigned the task of consolidating the whole text.[38] As part of their discussions, the supra-revision committee abandoned the subcommittee's proposal or more precisely returned the date requirement back to the level of a mere recommendation as was provided for in the ABGB. Following the example of law applicable in Slovakia, the idea that individual sheets of a last will should be affixed to each other was also adopted, however also in the form of a recommendation. This was the form that the provision on the holographic will had in the drafts of the Civil Code both in 1931 and 1937, when the bill was finally put before Parliament. The text of the Explanatory Memorandum is basically the same for both bills, starting with the following sentence: "Taking into account the previously taken stand, the committee hereby returns to…"[39] This previously taken stand was directed towards the idea of the whole recodification – as a matter of fact, only to amend the ABGB. Not only here but also in other parts, it is apparent that the wording of Draft 1931 and Draft 1937 returned to the original wording of the ABGB.[40] As in the ABGB, also here the provision was common for the last will and codicil, which it expressly stated.

IV. Developments after 1948

Due to the events of February 1948 Czechoslovakian society embarked on a different path. For a society that was supposed to head towards communism, the bill based on the ABGB was completely unsuitable. During 1949-1950, the Communists accomplished what had never been successfully achieved during the whole era of the First Republic – law in the territory of Czechoslovakia was finally unified. However, this unification corresponded to the requirements of the Communist Party. The new legal regulation of the civil law – Act No. 141/1950 Sb. (Civil Code, hereinafter referred to as the CC 1950) – was drafted in the manner enabling transformation of the capitalist society into a socialist society.[41]

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[29] Národní archiv Praha, fond Ministerstvo spravedlnosti v Praze 1918-1953, sign Oz11, box 303, file 1924-1926. Only the minutes of the first meeting, where a resolution was passed not to take any further minutes, are contained here.

[30] SVOBODA, E., Problém vůle v rakouském právu dědickém. [The Matter of Will in the Austrian Law of Succession.] In: *Právník* vol. LI, 1912, predominantly on p. 261-262., SVOBODA, E., *Právo dědické*. [The Law of Succession.] Prague: Vesmír, 1921, passim.

[31] SVOBODA, E., *Právo dědické*. [The Law of Succession.] Prague: Vesmír, 1921, p. 32-35.

[32] Ibid.

[33] SVOBODA, E., Problém vůle v rakouském právu dědickém. [The Matter of Will in the Austrian Law of Succession.] In: *Právník* vol. LI, 1912, p. 261.

[34] Art.505 ZGB (the original wording of 1907): The holographic last will and testament must be written by a testator in his or her own hand from beginning to end, with the location, year, month, and day marked and the testator's signature attached at the end of the last will and testament… The amendment of 1995 (effective from 1996) revoked the obligation to indicate the location.

[35] It is obvious in particular from the German translation of the proposal submitted by the subcommittee. See *Das bürgerliches Gesetzbuch für die Čechoslovakische Republik: Übersetzung des Entwurfes der Komission für die Revision des ABGB Herausgegeben vom Justizministerium der Čechoslovakischen Republik.* Reichenberg: Gebrüder Stiepel, 1925, p. 147.

[36] Cf. Art.505 ZGB (the original wording of 1907): "Die eigenhändige letztwillige Verfügung ist vom Erblasser von Anfang bis zu Ende mit Einschluss der Angabe von Ort, Jahr, Monat und Tag der Errichtung von Hand niederzuschreiben, sowie mit seiner Unterschrift zu versehen.
Section 578 of the ABGB (the wording of 1811): Wer schriftlich und ohne Zeugen testieren will, der muss das Testament oder Kodizill eingenhändig schreiben und eingenhändig mit seinem Namen unterfertigen. Die Beisetzung des Tages, des Jahres und des Ortes, wo der letze Wille errichtet wird, ist zwar nicht notwendig, aber zu Verřmeindung der Streitigkeiten rätlich.
The proposal submitted by the subcommittee (German translation – Section 585): "Wer schriftlich ohne Zeugen verfügen will, muss das Testament oder Kodizill eingenhändig schreiben, das SChriftstück eingenhähndig mit der Angabe des Ortes, Tages, MOnates und Jahres der Niederschrift wie auch am Ende mit seiner Unterschrift verseen. Besteht die Anorderung aus mehreren Blättern, müssen sie entweder so verbiunden sein, dass keine Gefahr einer Unterschiebung bestheht, oder muss jedes Blatt besonders unteschrieben sein."

[37] The supra-revision committee was formed from the reporters of all the subcommittees

[38] Because, among other things, some of the subcommittees (in particular the subcommittee for the rights in rem) interpreted the phrase "to revoke what was out-dated" in a very extensive manner and the resulting respective parts of the code were considerably different.

[39] *Zákon, kterým se vydává všeobecný zákoník občanský. Návrh superrevisní komise. Díl I. (Tekst zákona), Díl II. (Důvodová zpráva)*. [The Act Enacting the General Civil Code. The Draft Proposed by the Supra-revision Committee. Part I (The Text of the Act), Part II. (The Explanatory Memorandum).] Prague: Ministerstvo spravedlnosti, 1931, p. 163, *Sněmovní tisk 844. Vládní návrh zákona, kterým se vydává občanský zákoník*. [Document 844 for Discussion at a Sitting. The Government Bill of the Act Enacting the General Civil Code.] (The Explanatory Memorandum) Prague: Státní tiskárna, 1937, p. 289.

[40] This line was followed up also in Draft 1946, which was based on Draft 1937, incorporating the comments arising from the legislative procedure.

[41] BLÁHOVÁ, I. et al. *Právnická dvouletka: rekodifikace právního řádu, justice a správy v 50. letech 20. století.* [The Juridical Two-Year Plan: Recodification of the Body of Laws, Judiciary and Administration in the 1950 s.] Prague: Auditorium, 2014, passim.

Therefore, although the law retained a number of classical institutes, their form was however adapted to the new conditions, and so a number of institutes disappeared – in the law of succession this was for example the inheritance contract and also the codicil.[42] Although the bequest was retained, it was significantly confined. The last will remained in its public notarial form and also in the private, holographic or allographic, form. In the CC 1950, the holographic will was regulated in Section 542, which however stipulated only a testator's obligation to write and undersign a last will in his or her own hand. The matters related to the marking of wills with a date were regulated in Section 541 (2), which applied to all last wills: "The day, month and year when a last will was written shall be obvious from every last will." The law therefore stipulated the date as an obligatory essential element of any last will – the holographic, allographic (Section 543, 544) last will and the last will made in the public notarial form (Section 545). The explanatory note to that stated the following: *"The other formality, that is the indication of the place where the last will was written, was abandoned because it suffices that there is an exact date stated in a last will in order for disputes to be prevented."*[43] Therefore, at first sight it seems that simplification was achieved through abandoning the necessity of indicating the place where a last will and testament was made. However, this applied only to Slovakia. The reasons why the obligatory date was enforced may be pursued in two directions. Primarily, the effort to protect "ordinary citizens"[44] is reflected in the law, on the other hand, a similar form could equally well serve another interest, specifically the effort to limit as much as possible the freedom of testation. The attitude of the communist ideology to the law of succession as such must be taken into consideration. The intended goal of the law of succession was not to accumulate properties but to strengthen family ties. This circumstance was manifested both in the structure of the code[45] and in the concept of the law of succession, which clearly preferred intestate succession.[46] Although the legislator did not express this intention directly, efforts were exerted to somewhat complicate the making of last wills.

This line was followed up also in Act No. 40/1964 Sb., the Civil Code (hereinafter referred to as the CC 1964).[47] The objective of this paper however, is not to describe this legal regulation in detail. Suffice it to say that with its "socialist" attitude it surpassed in many respects even the model of the Civil Code used for individual republics of the USSR. Its passing also aroused quite negative reactions in neighbouring countries. The provisions that seemed to be the most problematic from the point of view of practice of law (but by no means all of them) were finally revoked by the major amendment of 1982 (Act No. 131/1982 Sb.).[48] This amendment however did not bring any changes as regards matters related to the law of succession. Neither did the transformation after 1989 much change the concept of the law of succession. In comparison with the CzCC 1950, after having been amended, the CC 1964 knew only the holographic will and the notarially recorded will.

The law newly related the dating only to holographic wills; in Section 476 (2) of the CC 1964 (in its original wording) the requirement of the obligatory indication of a date was expressed in the following words: *"The validity of a last will and testament made in a testator's own hand requires the testator to sign it and state the day, month and year when he or she signed it."* In comparison with the wording of the CC 1950, there were two major amendments to the CC 1964. The text of the CzCC 1964 was not content with the requirement that the date should be evident; it expressly required the date to be indicated. The second change was the fact that the date was not bound to the drawing up of a last will, but to its undersigning.

The change in the political circumstances in 1989, the abandonment of the idea of socialism and the return to a market economy naturally triggered changes also in the system of law. The most significant among the amendments of the civil law was the amendment by Act No. 509/1991 Sb., when the requirement of a date was extended to all last wills and testaments. This was a response to the fact that the allographic will was reintroduced in addition to the holographic and notarial will. Among other things, here it is also apparent that it was in particular the CzCC 1950 that served as a source of inspiration for this amendment.[49] The law was valid in this form in the territory of the Czech Republic until the end of 2013, while in the territory of the Slovak Republic it is still valid basically in this form to this day.

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[42] The CzCC 1950, the following civil code, cancelled the institute of codicil and this institute did not appear in law again until the civil code of 2012 was enacted. Here, the form of an addendum (codicil) is not expressly regulated, nevertheless the provision of Section 1498 says: *"…provisions on testaments shall apply to testamentary clauses on legacy as appropriate."*

[43] See the Explanatory Memorandum to Section 541 of the CzCC 1950. *Občanský zákoník*. [The Civil Code.] Prague: Orbis. 1950, p. 304.

[44] This attribute is also apparent in the subsequent CC 1964, also after 1989.

[45] Within the structure, the law of succession was already not behind the rights in rem (as in the ABGB), but at the end of the code. This was also a way how to express the separation of the law of succession from the rights in rem.

[46] It is also expressed in Section 512 of the CC 1950: A person is entitled to inherit by law, by last will and testament or for both reasons (a contrario the Roman law (Gai II.99) or the ABGB (Section 533) that put the last will before the intestate succession. For details see for example SALÁK, P., HORÁK, O. et al., *Law of succession in the Middle-European area*. Cracow: Spolok Slovákov v Poľsku - Towarzystwo Słowaków w Polsce, 2015.

[47] For this law cf. in English for example ELISCHER, D. et al., Recodification of Private Law in the Czech Republic. In: Rivera Julio César (ed.) *The Scope and Structure of Civil Codes*. Dordrecht: Springer Netherlands, 2013, p. 118an. Or RUDZINSKI, Aleksander W., New Communist Civil Codes of Czechoslovakia and Poland: A General Appraisal, *Indiana Law Journal*. Vol. 41 (1965), Iss. 1, n. 3, p. 37-47. Retrieved from: https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3619&context=ilj

[48] The objective of this paper is not to describe this legal regulation in detail. As a matter of interest, it can be stated that it was not before this amendment when for example the institutes of possession and acquisitive prescription returned to the text of the CzCC 1964.

[49] Originally, even the amendment proposal contained the word "written" as in the CzCC 1950, which was substituted later during the amendment procedure.

There is a legal regulation on the one hand, and its interpretation on the other. Like the amendment of the legal regulation itself, which did not go through any major changes even after the change of the political conditions in 1989, the interpretation of these provisions basically continued as well. The considerable rigidity of courts was manifested in a number of cases. A last will with a date stated in the form of a stamp was judged invalid. The argument of the legatee was that the amended Act No. 509/1991 Sb. required only that a last will should be written and signed in a testator's own hand (Section 476a CzCC 1964 as amended by Act No. 509/1991 Sb.) and the requirement for a date to be identified is set forth for all last wills and testaments in the provision of Section 476 (2) CzCC 1964 as amended by Act No. 509/1991 Sb., where the requirement for a last will to be written in a testator's own hand is already missing. The court therefore ruled to the contrary. *"Also after the amendment of the Civil Code by Act No. 509/1991 Sb., it is still stipulated that the form of a last will written in a testator's own hand has been adhered to only when the date of the last will as its integral content component within the meaning of Section 476 (2) of the Civil Code has also been added in the testator's own hand. It is not possible to infer from the provisions of Section 476a of the Civil Code that the sufficient requirement for a last will to be valid is that its text and the signature be written in a testator's own hand, while the date can be indicated in another manner."*[50] Just for comparison, the Polish law (Kodex Cywilny 1964 – hereinafter referred to as the KC), the provisions of which will be discussed herein under,[51] allows for the possibility of using mechanical means for the indication of the date in the holographic will.[52] It is true that the wording of the provision is not entirely identical with the wording of the CzCC 1964 after its amendment of 1991, nevertheless the date is mentioned here (contrary to the Czech regulation) together with writing in one's own hand under one provision. The formulation of the text of Art. 949 § 1 of the KC would also rather suggest otherwise.[53] Additionally, it seems that the Slovak judiciary practice admits an interpretation for the same regulation that the date can also be written using other technical means.[54]

Another example may also be stated when an allographic will that was signed, with a date that was indicated as part of the authentication of a testator's signature, was declared invalid.[55]

While it is possible to agree with the arguments of the court in both of the above mentioned cases, the text of the Extensive Academic Commentary on the Civil Code from 2008 gives a somewhat absurd impression: *"The manner of how these data* (the author's note: i.e. the day, month and year) *will be stated in a last will, is not prescribed. The requirement is met when the data are stated for example in the following forms: "23. leden 1998" (23rd January 1998), "23. 1. 1998" (23/1/1998), "23. 01. 1998" (23/01/1998), "dvacátého třetího ledna roku tísícího devítistého devadesátého osmého" (the twenty-third of January, 1998), and also "23. 1. 98" (23/1/98). However, it must be insisted on that a day (in a month), month and year be always indicated. It is necessary to consider the provision of Section 476 (2) to be so rigorous that the identification of the date of a last will by means of another piece of information from which it would be possible to establish the day, month and year when the last will was written (for example "I wrote this last will on the day of my sixtieth birthday", "on Christmas Eve of 1999", etc.) is insufficient and would lead to the annulment of the last will."*[56] This Czech attitude sounds somewhat ludicrous, as if it got stuck in the period before 1989. Suffice it to compare how the older legal regulations that considered the date to be obligatory addressed similar issues. Both the interpretation of the BGB,[57] and the construction of the Hungarian law[58] admitted such dating as valid. After all, in Slovakia, where the same provision has been in force to this day, the interpretation is not so rigid, and such identification of a date would most probably be allowed.[59]

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[50] Městský soud v Praze, 24 Co 181/97. In: *Ad Notam*, Nr. 5, 1997 p. 114.

[51] The Polish Civil Code is also from 1964

[52] PIETRZYKOWSKI, K.(red.), *Kodeks cywilny. Tom II. komentarz. Art. 450–1088*, Warsaw, C. H. Beck, 2015, comments on Art. 949, Para. 27

[53] Art. 949 § 1 KC § 1. *Spadkodawca może sporządzić testament w ten sposób, że napisze go w całości pismem ręcznym, podpisze i opatrzy datą.*
– The testator can make a last will by writing and signing it in his or her own hand and marking it with a date.

[54] The ruling of the Supreme Court of the Slovak Republic of 25 November 2008, file ref. 5 Cdo 264/2007: *"…The indication of the day, month and year of the signing of a last will in a manner (technique) different from the manner (technique) in which the last will is executed could be of importance for validity only if there are any doubts of whether it is the date when the last will was signed or a different date.*

[55] The Supreme Court, 30 Cdo 1190/2004, In: *Ad Notam* Nr. 6 vol. 2005, p. 210.:
"1. In the allographic will, the date (i.e. the day, month and year) when the last will was undersigned must be stated in the text of the last will in such a manner that the whole text would make up a logical whole.
2. Also in the case when a notary authenticated that a testator undersigned a last will before him or her, the details of the date when the last will was undersigned as they are stated in the signature authentication deed cannot substitute the date missing in the text of the last will or correct the date in the text of the last will that is not the date when the last will was really written."

[56] MUZIKÁŘ, L., in: ELIÁŠ, K. (ed). *Občanský zákoník: velký akademický komentář : úplný text zákona s komentářem, judikaturou a literaturou podle stavu k 1. 4. 2008*. [The Civil Code: The Extensive Academic Commentary: The Full Text of the Law with Comments, Judicature and Literature According to the State as of 1 April 2008.] Volume 1, Sections 1-487. Prague: Linde, 2008, p. 1238.

[57] STAUDINGER, 2nd edition, S. 533 (§ 2231 BGB V C.4)

[58] *The date of a last will does not necessarily always have to be a calendar date; it is sufficient to state the year and an identification such as «on Easter Sunday», on «St. Michael's Day»"* (Kúria No. 1492/1908) see FAJNOR, V., ZÁTURECKÝ, A. in: Rouček, Fr., Sedláček, J. (edd.). *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi*. [The Comments on the Czechoslovak General Civil Code and the Civil Law in Force in Slovakia and Carpathian Ruthenia.] Vol. III. Prague: V. Linhart, 1935, p. 121.

[59] One of the comments says that a rigorous interpretation is inappropriate and the date can be indicated in a manner allowing the date to be inferred from it – which means also for example "Easter Monday in 2014". A reference is made, among others, also to the above specified Kúria ruling 5527/1905. FEKETE, I., *Občiansky zákonník: veľký komentár*. [The Civil Code: The Extensive Commentary.] 3. zväzok, Dedenie, záväzkové právo - všeobecná časť: (§ 460 to § 587). [Volume 3, Inheritance, the Obligation Law - The General Part: (Section 460 to Section 587).] 2nd updated and extended edition. Bratislava: Eurokódex, 2015., p. 138. The other commentaries that the author was able to work with do not explicitly deal with this issue, nevertheless, no interpretation as rigid as in Czech commentaries appears in them either.

V. The Dating of Last Wills in the New Civil Code (No. 89/2012 Sb.)

Domestic circumstances changed fundamentally in 1989. However, not even all of the amendments of CzCC 1964 were sufficient to revoke the residues of the period before 1989. Therefore, the law remained rooted with its concept in the previous period. From the 1990 s there had already been several initiatives to create a completely new codification, nevertheless, they all failed until success was finally achieved by the team of professor K. Eliáš.[60] The result of their work is Act No. 89/2012 Sb. (hereinafter referred to as the CzCC 2012) with effect from 1st January 2014. Its objective was to return the law back to the family of traditional European codes (CC, ABGB, BGB) and thus fully accentuate the contractual freedom, autonomy of will and private ownership. It was the Austrian ABGB that served as the main source of inspiration, besides the inter-war bills.[61]

Despite this fact, the first draft bills still provided for the obligatory indication of the day, month and year, as had been the case until then in Section 476 of the CzCC 1964 as later amended, however not to the full extent.

The legislator first had to cope with the fact that the CzCC 2012 allowed also for verbal forms of a last will. In this case, the requirement to indicate the date was naturally meaningless, which means that only the last wills in written form were subject to the requirement. As in CzCC 1964, this was required for all types of written last wills. On the contrary, as in CzCC 1950, the date was to be related to the time of the making of a last will, not to its signing. Additionally, the bill did not require the date to be written, nevertheless the date of the day, month and year had to be "unquestionable". This wording occurs in the individual versions of the law, while these versions vary only in the section number.[62] The fact that the change occurred at the last minute is illustrated, among other things, also by the failure of the "consolidated" Explanatory Memorandum for CzCC 2012 to reflect this change. While there is no mention of the matter of the date with respect to the provision of Section 1494 (1) of CzCC 2012, although it was this Section where the date of a last will was mentioned, it is with respect to Section 1532 where the Explanatory Memorandum refers to it,[63] however the Section does not contain anything about the date.[64] This is not the only error in the "consolidated version" and this fact certainly cannot be considered to be the legislator's intention, as one of the comments tried to conclude.[65] It is the duel between the two different concepts, two different ideas that gave rise to the chaos. The wordings of all the drafts of the bill were not in accordance with the concept that the authors of the bill made efforts to push through. The cited provision was a concession made to legal practitioners – in particular notaries and the judges of the Supreme Court. Although the authors of the law had been aiming towards the optional date from the beginning, they did not manage to push it through over the long term. Finally, they managed to do so at the very last moment by convincing some of the deputies from the Constitutional Committee[66] to propose the change.[67]

These circumstances most likely also contributed to the fact that the final wording of Section 1494 (1) is a compromise. (1) A testament is a revocable expression of will whereby a decedent personally leaves to one or several persons at least a share in the decedent's estate and also legacy, where appropriate, to be received upon his death. If the day, month and year the testament was made is not clear and if the decedent made several contradictory testaments, or if its legal effects otherwise depend on the determination of the time it was made, the testament is invalid.[68]

Therefore, despite the fact that the website established to provide information about the new Civil Code pretends that

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[60] The work on this project started in 2000 and the draft bill was approved by the Government in April 2001. There were two of the previous proposals – one of them dating as far back as to the period of Czechoslovakia. It was supposed to become a basis for recodification in Slovakia after 1993, but was refused there in 1997. In 1996, the second proposal appeared in the Czech Republic, but it was not successful either. The reasons for the refusal lay in particular in the political plane. There were no connections between the proposal submitted by professor Eliáš and both previous projects. For more details on this see the Explanatory Memorandum for the new Civil Code.
ELISCHER, D. et al., Recodification of Private Law in the Czech Republic In: Rivera Julio César (ed.) *The Scope and Structure of Civil Codes*. Dordrecht: Springer Netherlands, 2013, s. 128an.

[61] In the area of the law of succession, about 70% was inspired by it. However, it must be noted that these had been the inspirations by the wording of the ABGB before it was recently amended and it was the very area of the law of succession that the amendments applied to. It is Familien-und Erbrechts-Änderungsgesetz (2004), in particular Erbrechts-Änderungsgesetz (2015)

[62] For the original Section 1391 of the bill see ELIÁŠ, K., HAVEL, B., *Osnova občanského zákoníku, osnova zákona o obchodních korporacích*. [The Bill of the Civil Code, the Bill of the Business Corporations Act.] Plzeň: Aleš Čeněk, 2009, p. 124. It was submitted (April 2011) to the Legislative Council of the Government under Section 1502; in the last version, it was intended to be Section 1532. For the individual versions see the Laws and Opinions, Legislative Process [online]. 2012 [accessed 2018. 10. 25].: http://obcanskyzakonik.justice.cz/index.php/home/zakony-a-stanoviska/texty-zakonu

[63] *"The provision of Section 1532 is common for all forms of a last will. The existing wording of Section 476 (2) of the current Civil Code is adopted here, although the traditional regulation understood the essential elements of the dating of the signature (equally with the indication of the place of signing) only as a non-essential element of the last will and testament)."* The Explanatory Memorandum to CzCC 2012 (the consolidated version) dated 3rd February 2012 [online]. 2012 [accessed 2018. 1. 12]. Retrieved from: http://obcanskyzakonik.justice.cz/tinymce-storage/files/Duvodova-zprava-NOZ-konsolidovanaverze.pdf. For the older versions of the wordings of the laws and explanatory memorandums see: http://obcanskyzakonik.justice.cz/index.php/home/zakony-a-stanoviska/texty-zakonu

[64] Section 1532 of the CzCC 2012: The last will requires written form unless it has been made with reliefs.

[65] The goal was to use this as an argument explaining why the date should be an obligatory part of all last wills also in CzCC 2012, see FIALA and BEEROVÁ In: FIALA, R., DRÁPAL, L. et al. *Občanský zákoník: komentář IV., Dědické právo (§ 1475–1720).* [The Civil Code: Comment IV., The Law of Succession (Sections 1475–1720)]. 1st edition. Prague: C. H., 2015, p. 94.

[66] This happened during joint discussions before the bill was submitted to the Chamber of Deputies.

[67] This information was given to the author by one of the authors of the codification, who however did not wish to be named.

[68] For the English text of the provision see http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf

the dating of a last will is optional,[69] this is not entirely true. It is apparent that in a case when there are more last wills that are mutually incompatible or if this could be of importance for the consequences of a last will, the testament must contain the date. This also led to differing attitudes in the comments. One of them started to enforce the point that the date remained as an obligatory essential element despite this wording of the law.[70] Although the other comments adopted a negative attitude to this,[71] this fact also shows that the formulation of the wording of the law has not been selected entirely appropriately, because among other things, it appears at first glance that the date is not an essential element, however if the circumstances expected in Section 1494 (1) of the CzCC 2012 arise, a non-dated last will (or last wills) is (are) nullified. From this point of view, the wording of the Polish Civil Code seems to be much more favourable. Although it understands the date to be an obligatory essential element of a last will (art. 949 s. 1 of the KC), Section 2 of the same article concurrently sets forth that the absence of the date will lead to annulment only when there are doubts about whether a testator was legally capable at the time of the making of a last will or doubts about the content of the last will and if there is more than one last will.[72]

However, the provision of Section 1494 (1) led to one more question – whether the date is an essential formal or content requirement for a last will.[73] In so far as it was a formal requirement, any rules of interpretation would have to be laid aside and they could not be applied. Fortunately, all the comments concur on this matter, concluding that the marking of wills with a date is not a formal, but content requirement for a last will.[74] Because Section 1494 (1) of the CzCC 2012 also stipulates that the day, month and year should be "obvious", it can be expected that it will no longer be possible to apply the above mentioned judicial decisions with this wording.[75] Also the comments are inclined to the interpretation that with respect to this wording there should be no more problems with the dating that uses anniversaries (on the day of the 60th birthday) or with the dating according to religious holidays – "on Christmas Eve…".[76] The question is what stand the judicature would take on the dating in the form of "in the autumn of 2018" when the law does not use the summarizing and also polysemous word "date", but the traditional formulation "day, month and year". Certainly, the dating when only the month and year or the period of a year is indicated could be sufficient. The law definitely does not require "unitas actu" when a last will is made, and so it is quite possible that a last will would be made gradually over a longer period of time. Then, it would not be surprising if a testator dated it not as of a specific day, but as of a longer period of time.[77] None of the comments addresses this issue, nevertheless, taking into account the concept and the interpretation provision in Section 2 (2) of the CzCC 2012, it can be expected that this dating should also be in accordance with this legal regulation.

VII. Conclusion

In 1918, two concepts of attitudes towards the law of succession conflicted in the territory of the newly established Czechoslovakia. The difference can be very well demonstrated by the question of whether the date and place of a last will should or should not be its obligatory essential element. The Austrian liberal concept (adopted in Bohemia and Moravia) preferred more the autonomy of will and so the formal essentials of last wills and testaments were minor – for the holographic will, it was sufficient when it was written in a testator's own hand and signed by him or her. On the contrary, the Hungarian law adopted in Slovakia and Carpathian Ruthenia had more formal essentials, which were intended to ensure the seriousness of such last wills on the one hand, and a higher legal safeguard on the other hand. Therefore, this legal regulation required that the holographic will be written in a testator's own hand and signed by him or her, but also dated, and in addition signed by two witnesses.

Although in the 1920 s, as part of the then recodifications, considerations were given to the possibility of adopting in the

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[69] "According to the regulation of the new Civil Code, the dating of last will is not an essential element of a last will." See Specific changes – the last will [accessed 30/ 9/ 2018]. Retrieved from: http://obcanskyzakonik.justice.cz/index.php/dedicke-pravo/konkretni-zmeny/zavet

[70] FIALA and BEEROVÁ In: FIALA, R., DRÁPAL, L. et al. *Občanský zákoník: komentář IV., Dědické právo (§ 1475–1720).* [The Civil Code: Comment IV., The Law of Succession (Sections 1475–1720)]. 1st edition. Prague: C. H. Beck, 2015, p. 94, Para. 16.

[71] For the most comprehensive among the arguments see MUZIKÁŘ, In: PETROV, J. et al. *Občanský zákoník*. [The Civil Code: Comments.] Prague: C.H. Beck, 2017, p. 1473-75, briefly nevertheless similarly ŠEŠINA-WAWERKA In: ŠVESTKA, J., DVOŘÁK, J., FILALA, J., *Občanský zákoník: komentář*. [The Civil Code: Comments.] Volume IV, The Law of Succession (Sections 1475 to 1720), including the interpretation of succession proceedings. Prague: Wolters Kluwer, 2014, p. 75.

[72] Art. 949 s. 2 of the KC: *"Jednakże brak daty nie pociąga za sobą nieważności testamentu własnoręcznego, jeżeli nie wywołuje wątpliwości co do zdolności spadkodawcy do sporządzenia testamentu, co do treści testamentu lub co do wzajemnego stosunku kilku testamentów."*

[73] NĚMCOVÁ, D., Závěť a její datace. [The Last Will and Its Dating.] In: *Časopis pro právní vědu a praxi*. Nr. 4, 2017, p. 717-737.

[74] Although it must be noted that one of the commentaries mentions this fact in the chapter titled "Formal Essential Requirements of the Last Will" – see FIALA and BEEROVÁ In: FIALA, R., DRÁPAL, L. et al. *Občanský zákoník: komentář IV., Dědické právo (§ 1475–1720).* [The Civil Code: Comment IV., The Law of Succession (Sections 1475–1720)]. 1st edition. Prague: C. H. Beck, 2015, p. 94.

[75] It is necessary to mention here that in a number of cases the provisions of the CzCC 2012 were directly aimed at the established case-law of the Supreme Court. In response to this, the Supreme Court tries to interpret these provisions also within the meaning of its established case-law.

[76] ŠEŠINA-WAWERKA In: ŠVESTKA, J., DVOŘÁK, J., FILALA, J., *Občanský zákoník: komentář*. [The Civil Code: Comments.] Volume IV, The Law of Succession (Sections 1475 to 1720), including the interpretation of succession proceedings. Prague: Wolters Kluwer, 2014, p. 75.

[77] As a matter of interest, at the time when the date was an obligatory essential element of the BGB, it was required (with respect to the wording of Section 2231 of the BGB, which used the word "Tag" – day) that the date be legally related to the respective day, that is the period of 24 hours at most. When it was dated with more than one day (even if it was a last will written at night from one day to the next, such a date was considered invalid. HIPPEL, F. von. *Formalismus und Rechtsdogmatik: dargestellt am Beispiel der „Errichtung" des zeugenlosen Schrifttestaments (eigenhändiges Testament; testament olographe)*. Hamburg: Hanseatische Verlagsanstalt, 1935, p. 48.

new Civil Code the requirement for obligatory indication of the place and time of the writing down of a last will, finally the committee accepted the Austrian concept during their suprarevision meetings and left the addition of the date and place only at the level of a recommendation, however not as an obligatory essential element of a last will.

After the communists came to power in 1948, domestic political and social circumstances changed fundamentally. The law of succession was no longer supposed to serve for the accumulation of properties, but in particular to strengthen family ties. The last will was therefore a possible, but not preferred disposition mortis causa. The legislator therefore enforced in CzCC 1950 that the date be an obligatory element of every last will – not only the holographic will, but also allographic and notarial wills.

Also the next law – CzCC 1964 – insisted that the date be the obligatory essential element, albeit only for the holographic will. Not even the change of domestic circumstances after 1989, or when the Civil Code was considerably amended in 1991, brought about any changes to this situation. The date remained an obligatory essential element, and once again not only for the holographic, but also other types of last wills. In this form, the Civil Code was still valid in the territory of Slovakia. As the CzCC 1964 stipulates that the "day, month and year" must be written in the text of a last will, the case law settled on not only the date being obligatorily indicated directly in the text of a last will and being written in a testator's own hand, but also on being indicated exactly in this form, and the date in the form of "on Christmas Eve of 1999" being an invalid dating taking into account the text of the law.

This rigid interpretation, among other things, led the authors of the new Civil Code to strive for the return to the date as an optional essential element. However, this was opposed by notaries and the judges of the Supreme Court who required the existing state to be preserved. At the last moment, a compromise solution was finally successfully pushed through by politicians. According to this solution, the date is not required in testaments (last wills or codicils). However, if there is more than one last will that is contradictory or if the date is decisive for the validity of the respective last will and the last will is not dated, such a last will shall be deemed invalid. Unfortunately, the wording of the provision is not formulated really intelligibly for a common user who is not educated in law. Compared to the CzCC 1964, the date does not any more have to be "written". It will be sufficient if it is "obvious". Taking into account this wording and the rules of interpretation for the CzCC 2012, it can be expected that the existing rigid interpretation of the case law regarding the dating of last wills will be abandoned.

The Ancient Roman Pollicitatio and a Similar Hungarian Legal Institution

Pál Sáry*

Abstract

Undertaking obligation for public interest is a peculiar institution of the Hungarian civil law. This institution is very similar to the ancient Roman pollicitatio. This paper, at first, gives an outline of the classical Roman rules of pollicitatio, and after that it compares the ancient rules with the remarkably similar Hungarian regulations of today.

Keywords: *Roman law; pollicitatio; summa honoraria; gift; unilateral promise to a town; enforceable offer; Hungarian private law; undertaking obligation for public interest; improper foundation.*

1. *Pollicitationes* in the letters of the Younger Pliny

Before the analyses of the rules which can be found in the Justinianic Digest, it is worth illustrating the Roman practice of *pollicitatio* by some literary examples. From this aspect, the letters of the Younger Pliny are excellent sources.[1]

Pliny himself promised, in many cases, to fulfil free financial services for purposes of public interest. For examples, he undertook (1) to pay five hundred thousand sesterces for alimentation of free-born boys and girls,[2] (2) to erect a temple in a public area at his own expense,[3] (3) to make a considerable monetary contribution to hire a teacher for the schooling of the youngsters of his hometown.[4]

Pliny played extremely fair in the case of the last will of Pompeius Saturninus. Saturninus, in his last will, made Pliny his heir, and left four hundred thousand sesterces for their common hometown as a *legatum per praeceptionem*. This legacy was void, since a *legatum per praeceptionem* could be left only for a heir,[5] and a town could not be instituted heir.[6] Pliny, however, offered the four hundred thousand sesterces for the town, carrying out, in this way, the testator's wish.[7]

In the letters of Pliny we can read about other persons' munificent undertakings of obligations, too. For example, we can be informed about the liberality of the old Calpurnius Fabatus who is praised by Pliny with these words: „Thank you for your letter telling me about your dedication of a handsome public colonnade in your own name and that of your son, followed on the next day by your promise of a sum of money (*pecuniam promisisse*) for the decoration of the doors, thus making your second act of generosity the consummation of the first."[8]

From another letter we can come to know that Caninius Rufus offered money to his native town (Comum) to pay the cost of an annual feast.[9] According to a further letter of Pliny, in Nicaea some private persons made promises to erect a colonnade on either side of their theatre under construction, and to build a gallery above the auditorium, at their own expenses.[10]

Finally, it is worth mentioning the letter in which Pliny asks the emperor Trajan whether all persons elected local senators in every town of Bithynia should be obliged to pay a sum of money as entrance fee to the public funds.[11] In his answer the emperor pointed out that in the lack of a general rule the safest course was to keep to the local law of each city.[12]

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1 Cf. DUNCAN-JONES, Richard, 'The Finances of the Younger Pliny', *Papers of the British School at Rome*, vol. 33, 1965, 184 ff.

2 Pliny, *Ep*. 7,18,2: *„Nam pro quingentis milibus nummum, quae in alimenta ingenuorum ingeniarumque promiseram…"* Cf. Pliny, *Ep*. 1,8,10: *„annuos sumptus in alimenta ingeniorum pollicebamur…"*

3 Pliny, *Ep*. 10,8,2: *„ego statim decurionibus scripseram, ut assignarent solum in quo templum pecunia mea exstruerem…"*

4 Pliny, *Ep*. 4,13,5: *„paratus sum… tertiam partem eius quod conferre vobis placebit dare."*

5 Cf. Gaius, *Inst*. 2,217: *„Sed nostri quidem praeceptores nulli alii eo modo legari posse putant nisi ei, qui aliqua ex parte heres scriptus esset."*

6 Cf. Ulpian, *Reg*. 22,5: *„Nec municipia nec municipes heredes institui possunt quia incertum corpus est…"*

7 Pliny, *Ep*. 5,7,4: *„deinde subiungas nos quadringenta milia offerre, sicut praeceperit Saturninus."*

8 Pliny, *Ep*. 5,11,1 (tr. Betty Radice).

9 Pliny, *Ep*. 7,18,1: *„pecunia, quam municipibus nostris in epulam obtulisti…"*

10 Pliny, *Ep*. 10,39,3: *„Huic theatro ex privatorum pollicitationibus multa debentur, ut basilicae circa, ut porticus supra caucam."*

11 Pliny, *Ep*. 10,112,3: *„Superest ergo, ut ipse dispicias, an in omnibus civitatibus certum aliquid omnes, qui deinde buleutae legentur, debeant pro introitu dare."*

12 Pliny, *Ep*. 10,113: *„Honorarium decurionatus omnes, qui in quaque civitate Bithyniae decuriones fiunt, inferre debeant necne, in universum a me non potest statui. Id ergo, quod semper tutissimum est, sequendam cuiusque civitatis legem puto…"*

From this answer of Trajan we can conclude that in the beginning of the second century it was not compulsory in every city the persons elected *decuriones* to pay money to their town. This situation, however, later changed when the duty of payment became general.[13] Besides the senators, the local magistrates and priests also were obliged to pay a certain sum of money for their office (*summa honoraria*) to the municipal treasury.[14] The municipal laws determined a minimal sum of which payment was obligatory (*summa legitima*). For example, according to the law of Urso (*lex coloniae Genitivae Iuliae*, or *lex Ursonensis*) every *duovir* and *aedilis* had to pay at least 2.000 sesterces for the cost of the public games.[15] We are informed by the epigraphical sources that the magistrates usually paid from their own pockets much more for public purposes than the legal minimum, and besides the payment they often undertook obligations to erect a building for the local community, or to decorate their city with a statue, on account of the office which was obtained by them (*ob honorem decurionatus / aedilitatis / duumviratus / triumviratus / quinquennalitatis / auguratus / pontificatus / flaminatus* etc.).

2. The rules of *pollicitatio* in the Digest

In course of compilation of the Digest, the lawyers of Justinian edited the text fragments containing the rules of *pollicitatio* under a separate title.[16] In what follows, we outline the essence of this short Digest title composed of 15 fragments.[17]

Pollicitatio was a unilateral promise. As Ulpian writes, *„pactum est duorum consensus atque conventio, pollicitatio vero offerentis solius promissum."* Namely, while a pact was an agreement and convention of two people, a *pollicitatio* was the promise only of the person who made it.[18]

Pollicitatio was free from formalities.[19] It is very likely that those who wanted to undertake some pecuniary obligation for their city made their statement before the municipal council (*curia*) where this act was recorded in the minutes (*acta*).[20]

The Digest distinguishes three kinds of *pollicitationes* on the basis of the different motives of the *pollicitatores*: (1) offer made on account of the grant of a municipal office (*ob honorem*),[21] (2) offer made on account of a fire or earthquake or collapse of a public building (*propter incendium vel terrae motum vel aliquam ruinam, quae rei publicae contingit*),[22] in other words, offer made on account of a damage happened to the town as a result of *vis maior* (*ob casum, quem civitas passa est*),[23] and finally (3) offer made without a special reason (*sine causa*).[24] Among the rules of the *pollicitatio ob honorem* the followings are remarkable: (1) such offer could be made not only on account of an already obtained office but it was also possible on account of an applied office,[25] (2) such offer could be made also by women,[26] (3) such offer could be made on account that an other person (usually a relative) had obtained some office.[27] The motive of the *pollicitatio sine causa* was commonly the desire for glory and moral recognition.

The unilateral obligation created by a *pollicitatio* was enforceable only in the case when the offer had been made *ob honorem* or *ob casum*;[28] a *pollicitatio sine causa* created only a *naturalis obligatio*.[29] If the *pollicitator* had performed the service offered *sine causa*, he later could not claim it back as an unjustified enrich-

[13] See Isidor, *Orig*. 9,423: *„non est decurio qui summam non intulit."* Cf. ABBOTT, Frank Frost and JOHNSON, Allan Chester, *Municipal Administration in the Roman Empire*. Princeton, 1926, p. 87; GARNSEY, Peter, 'Honorarium decurionatus', *Historia*, vol. 20, 1971, p. 313.

[14] Cf. DUNCAN-JONES, Richard, 'Costs, Outlays and Summae Honorariae from Roman Africa', *Papers of the British School at Rome*, vol. 30, 1962, pp. 65 ff.; IDEM, 'An Epigraphic Survey of Costs in Roman Italy', *Papers of the British School at Rome*, vol. 33, 1965, pp. 226 ff.; GARNSEY, Peter, 'Taxatio and Pollicitatio in Roman Africa', *Journal of Roman Studies*, vol. 61, 1971, p. 116.

[15] Lex Urs. 70–71. Cf. ABBOTT and JOHNSON, op. cit., p. 142; GARNSEY: 'Honorarium decorionatus', op. cit., p. 313.

[16] D. 50,12: *De pollicitationibus*.

[17] On this topic, see VILLERS, Robert, 'Essai sur la «pollicitatio» ad une «res publica»', *Revue historique de droit français et étranger*, vol. 18, 1939, pp. 1–32; ROUSSIER, Jules, 'Le sens du mot «pollicitatio» chez les juristes romains', *Revue internationale des droits de l'antiquité*, vol. 3, 1949, pp. 295–317; HAYASHI, Nobuo, 'Die »pecunia« in der »pollicitatio ob honorem«', *Klio*, vol. 71, 1989, pp. 383–398; LEPORE, Paolo, *«Rei publicae polliceri». Un'indagine giuridico-epigrafica*. 2nd edn., Milano, 2012; WACKE, Andreas, 'Proagonaler Euergetismus. Privates „Sport-Sponsoring" nach römischen Rechtsquellen'. In HALLEBEEK, Jan et alii (eds.), *Inter cives necnon peregrinos. Essays in honour of Boudewijn Sirks*. Goettingen, 2014, pp. 774 ff.

[18] Ulpian D. 50,12,3 pr.

[19] *Pollicitatio dotis* was a formless dowry promise (C. 5,11,6).

[20] See GARNSEY, 'Taxatio and Pollicitatio in Roman Africa', op. cit., p. 116, n. 4; WACKE, op. cit., p. 779. Cf. Pliny, *Ep*. 1,8,16.

[21] Ulp. D. 39,5,19 pr.; Ulp. D. 50,12,1,1; Ulp. D. 50,12,3 pr.; Ulp. D. 50,12,6 pr.; Ulp. D. 50,12,6,2; Mod. D. 50,12,9; Mod. D. 50,12,11; Papir. D. 50,12,13 pr.; Pomp. D. 50,12,14.

[22] Marci. D. 50,12,4.

[23] Paul. D. 50,12,7.

[24] Ulp. D. 50,12,1,1–2. 5.

[25] Ulp. D. 50,12,1,1: *„Si quidem ob honorem promiserit decretum sibi vel decernendum…"* As Johnson writes, „it was not illegal nor unusual for candidates to promise money for public works, games, banquets, or other entertainments, but it was forbidden to canvass for office by gifts or dinners to private individuals" (ABBOTT and JOHNSON, op. cit., p. 87).

[26] Ulp. D. 50,12,6,2: *„Non tantum masculos, sed etiam feminas, si quid ob honores pollicitatae sunt, debere implere sciendum est…"* The women elected priestesses often made pecuniary offers for public interest. Cf. HEMELRIJK, Emily A., 'Priestesses of the Imperial Cult in the Latin West: Benefactions and Public Honour', *L'Antiquité Classique*, vol. 75, 2006, pp. 85–117.

[27] Pomp. D. 50,12,14: *„Si quis sui alienive honoris causa opus facturum se in aliqua civitate promiserit…"* Instead of the women elected priestesses, in many cases, their father, mother, or husband made an offer for the town. Cf. HEMELRIJK, op. cit., p. 97.

[28] Ulp. D. 50,12,1,1: *„Si quidem ob honorem promiserit… tenebitur ex pollicitatione"*; Ulp. D. 50,12,3 pr.: *„si ob honorem pollicitatio fuerit facta, quasi debitum exigatur"*; Ulp. D. 50,12,6,2: *„si quid ob honores pollicitatae sunt, debere implere sciendum est"*; Marci. D. 50,12,4: *„Propter incendium…, si quis promiserit, tenebitur"*; Paul. D. 50,12,7: *„Ob casum…, si quis promiserit se quid facturum…omnimodo tenetur…"*

[29] Ulp. D. 50,12,1,1: *„sin vero sine causa promiserit, non erit obligatus…"*; 50,12,1,5: *„Qui non ex causa pecuniam rei publicae pollicentur, liberalitatem perficere non coguntur."*

ment. As Ulpian writes, „If anyone wishes to claim back from his *municipes* something which he had handed over as a result of an undertaking, his petition is to be rejected; for it is fairest if intentions of this kind once evinced toward communities are not abandoned as a result of second thoughts."[30]

The natural obligation created by a *sine causa pollicitatio* became enforceable if the *pollicitator* had commenced the performance of his promise (for example, by paying a part of the promised sum, or by beginning the building process),[31] or if the town had begun to build something in consequence of the promise.[32] Not only laying of the foundations but also designation of the building site at the request of the promiser, or clearing of the site was already regarded as a beginning of the building process.[33]

The object of the obligation could be two kinds of services: (1) to make a certain work (*opus*) at own expense (for examples, to erect a new building, to renovate or complete an old one, to erect a statue), or (2) to pay a certain sum of money (*pecunia*).[34] The monetary service could be a single or a regular performance. The regular monetary service could be performed in such a way that the promiser periodically paid a stated interest (*usuras*) of a capital (*sors*) for a certain public purpose.[35]

The promiser could attach a condition to his service, but the condition could not harm the interests of the town. The condition had not to be observed if its fulfilment could have caused damage to the community. So, for example, the condition which obliged the town to relieve a tax burden was void. Only such conditions could be stipulated, which were hallowed by ancient custom.[36]

In connection with the break of the promise two main questions could arise. One of these questions was whether the promiser was liable for interest in case of his delay. Ulpian answers this question with yes, with reference to an imperial rescript.[37] The other question was whether the *pollicitator*, who promised to erect a building on account of an office, could be forced in case of non-performance to contribute money instead. Papirius Justus answered this question with no, also with reference to an imperial rescript.[38] Consequently, the *pollicitator* could be compelled to perform only the offered service.

Of course, the obligation was terminated by the fulfilment of the offer. For this reason, if the completed building later suffered some damage caused by *vis maior*, the *pollicitator* could not be compelled to do anything.[39] However, from this we can conclude that if a semi-finished building suffered damage or destroyed by *vis maior*, the damages were sustained by the *pollicitator*, who was obliged in such cases to repair the construction, or to build it up again.

During the existence of the obligation the circumstances of the *pollicitator* could substantially change. How did these changes affect the obligation? Two Digest fragments deal with this question. According to Modestinus, the *pollicitator* whose financial conditions significantly declined after the beginning of the building process could be freed from the obligation by transferring of the fifth part of his patrimony.[40]

An other relevant case was told by Ulpian. Statius Ruffinus promised to build a *proscaenium* for the people of Gabii. After the beginning of the building process, however, Ruffinus was relegated by the urban prefect for three years. Therefore, the question arose whether Ruffinus was bound to complete the building. According to an imperial rescript, Ruffinus was obliged to complete the construction by an agent of him.[41] Consequently, relegation did not exempt the *pollicitator* from his obligation.

The obligation created by a *pollicitatio* was not terminated by the death of the promiser; the obligation passed to his heirs. The liability of the heirs was regulated in detail. The *pollicitatio*

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[30] Ulp. D. 50,12,3,1 (tr. Alan Watson). In Latin: „*Si quis quam ex pollicitatione tradiderat rem municipibus vindicare velit, repellendus est a petitione: aequissimum est enim huiusmodi voluntates in civitates collatas paenitentia non revocari.*"

[31] Ulp. D. 50,12,1,2: „*Item si sine causa promiserit, coeperit tamen facere, obligatus est qui coepit*"; Ulp. D. 50,12,3 pr.: „*Sed et coeptum opus, licet non ob honorem promissum, perficere promissor eo cogetur, et est constitutum*"; Ulp. D. 50,12,6,1: „*Si quis pecuniam* (*non*) *ob honorem promiserit coeperitque solvere, eum debere quasi coepto opere imperator noster Antoninus rescripsit*."

[32] Ulp. D. 50,12,1,4–5: „*Sed si non ipse coepit, sed cum certam pecuniam promisisset ad opus rei publicae contemplatione pecuniae coepit opus facere: tenebitur quasi coepto opere. Denique cum columnas quidam promisisset, imperator noster cum divo patre suo ita rescripsit: »Qui non ex causa pecuniam rei publicae pollicentur, liberalitatem perficere non coguntur. Sed si columnas Citiensibus promisisti et opus ea ratione sumptibus civitatis vel privatorum inchoatum est, deseri quod gestum* (*coeptum*) *est non oportet.«*„

[33] Ulp. D. 50,12,1,3: „*Coepisse sic accipimus, si fundamenta iecit vel locum purgavit. Sed et si locus illi petenti destinatus est, magis est, ut coepisse videtur*." Cf. Pliny, *Ep*. 10,8,2.

[34] Ulp. D. 50,12,1 pr.: „*Si pollicitus quis fuerit rei publicae opus se facturum vel pecuniam daturum…*"

[35] According to Modestinus, „Septicia promised a show to her community by promising on condition that the capital remained with her and she herself paid six percent interest for the prizes of the contestants…" (D. 50,12,10; tr. Watson). In Latin: „*Septicia certamen patriae suae pollicendo sub hac condicione pollicita est, uti sors apud eam remaneat et ipsa usuras semissales ad praemia certantium resolvat…*"

[36] Papir. D. 50,12,13,1: „*Item rescripserunt condiciones donationibus adpositas, quae in rem publicam fiunt, ita demum ratas esse, si utilitatis publicae interest: quod si damnosae sint, observari non debere. Et ideo non observandum, quod defunctus certa summa legata vetuit vectigal exerceri. Esse enim tolerabilis, quae vetus consuetudo comprobat.*"

[37] Ulp. D. 50,12,1 pr.: „*sed si moram coeperit facere, usurae accedunt, ut imperator noster cum divo patre suo rescripsit.*"

[38] Papir. D. 50,12,13 pr.: „*Imperatores Antoninus et Verus Augusti rescripserunt opera exstruere debere eos, qui pro honore polliciti sunt, non pecunias pro his inferre cogi*."

[39] Ulp. D. 50,12,1,6: „*Si quis opus quod perfecit adsignavit, deinde id fortuito casu aliquid passum sit, periculum ad eum qui fecit non pertinere imperator noster rescripsit*."

[40] Mod. D. 50,12,9: „*Sed et ipsum donatorem pauperem factum ex promissione operis coepti quintam partem patrimonii sui debere divus Pius constituit*."

[41] Ulp. D. 50,12,8: „*De pollicitationibus in civitatem factis iudicum cognitionem esse divi fratres Flavio Celso in haec verba rescripserunt: Probe faciet Statius Ruffinus, si opus proscaeni, quod se Gabinis exstructurum promisit, quod tandem adgressus fuerat, perficiat. Nam et si adversa fortuna usus in triennio a praefecto urbis relegatus esset, tamen gratiam muneris, quod sponte optulit, minuere non debet, cum et absens per amicum perficere opus istud possit*."

ob honorem facta had to be performed by the heirs.[42] The only exception was the case when the *pollicitator* died before obtaining the office: in such a case the heirs were not obliged to perform the offer unless the building process was begun by the *pollicitator* or by the community while he was alive.[43]

If the *pollicitator* had made an offer to erect a building *ob honorem*, but after his death it turned out that the patrimony was insufficient to complete the work, an heir outside the family was liable to a fifth part of the estate of the deceased, his children to one-tenth (*deminutio pollicitationis*).[44] If the *pollicitator* had made an offer to erect a building not on account of an office and had begun it, the heirs could choose: they either completed the work, or gave the above mentioned parts of the estate to the community.[45]

3. Was *pollicitatio* a type of *donatio*?

Kaser wrote in the first edition of his manual of Roman law that *pollicitatio* in the classical era was not a *donatio*;[46] in the second, revised edition he wrote that *pollicitatio* must be distinguished from *donatio*.[47] I do not entirely share this opinion of Kaser. I think *pollicitatio* was a special type of *donatio*; it had some special rules, and some general rules of *donatio* were not applied to it. For examples, it is very likely that *pollicitatio* was not restricted by the *lex Cincia*, and neither an *actio Pauliana* nor a *querela inofficiosae donationis* could be employed against a town. The public interest was more important than the private one.[48]

I can support my opinion by the following arguments. As Benedek writes, the *donatio* in the classical era was not an independent contract type but a character and an abstraction: every complimentary financial allowance was qualified as a *donatio*.[49]

In some Digest fragments *pollicitatio* is expressly named as *donatio*. Ulpian writes the following: „when a question arises about a gift in the context of public affairs, consideration will be given only to whether or not the donor made an undertaking or promise to the *respublica* for good cause…"[50] Papirius Justus names *pollicitationes* as gifts made to a community.[51] A *pollicitator* is named by Modestinus as a *donator*.[52]

I do not think that all of these fragments are interpolated, as Pringsheim believes.[53] For this reason, I do not agree with Kaser who writes that *pollicitatio* was placed only in the Justinianic era into the broader circle of *donatio*.[54]

Liberalitas was a central element of *donatio*.[55] We can meet the word *liberalitas* in the sources about *pollicitatio*, too.[56] It also shows for us that *pollicitatio* was essentially a *donatio*.

As the *pollicitatio* also was a gift promise, we can state that the informal gift promise was enforceable already in the classical era in a special case: if it was made for a town *ob iustam causam* (namely, *ob honorem*, or *ob casum*). It seems very likely for me that the enforceability of the *pollicitatio ob iustam causam* was extended by Justinian to every informal gift promise.[57]

4. A comparison of *pollicitatio* and a Hungarian legal institution

In Hungary the institution of „undertaking obligation for public interest" was introduced by the socialist Civil Code (Act IV of 1959).[58] It replaced the „bourgeois" institution of foundation which was absent in the socialist Hungarian law.[59] It follows from this that undertaking obligation for public interest shows many similarities to foundation. The undertaking obligation for public interest which is not limited in time, and which is related to a regular service, creates an improper (dependent)

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[42] Ulp. D. 50,12,6 pr.: *„Totiens locum habet deminutio pollicitationis in persona heredis, quotiens non est pollicitatio ob honorem facta. Ceterum si ob honorem facta sit, aeris alieni loco habetur et in heredem persona non minuitur*"; Mod. D. 50,12,9: *„Ex pollicitatione, quam quis ob honorem apud rem publicam fecit, ipsum quidem omnimodo in solidum teneri: heredem vero eius ob honorem quidem facta promissione in solidum…*"; Pomp. D. 50,12,14: *„Si quis sui alienive honoris causa opus facturum se in aliqua civitate promiserit, ad perficiendum tam ipse quam heres eius ex constitutione divi Traiani obligatus est*."

[43] Mod. D. 50,12,11: *„Si quis ob honorem vel sacerdotium pecuniam promiserit et antequam honorem vel magistratum ineat, decedet, non oportere heredes eius conveniri in pecuniam, quam is ob honorem vel magistratum promiserat, principalibus constitutionibus cavetur, nisi forte ab eo vel ab ipsa re publica eo vivo opus fuerit inchoatum."*

[44] Mod. D. 50,12,9: *„ob id vero, quod opus promissum coeptum est, si bona liberalitati solvendo non fuerint, extraneum heredem in quintam partem patrimonii defuncti, liberos in decimam teneri divi Severus et Antoninus rescripserunt*."

[45] Pomp. D. 50,12,14: *„Sed si quis (non) ob honorem opus facturum se (in) civitate aliqua promiserit atque inchoaverit et priusquam perficeret, decesserit: heres eius extraneus quidem necesse habet aut perficere id aut partem quintam patrimonii relicti sibi ab eo, qui id opus facere instituerat, si ita mallet, civitati, in qua id opus fieri coeptum est, dare: is autem, qui ex numero liberorum est, si heres exstitit, non quintae partis, sed decimae concedendae necessitate adficitur. Et haec divus Antoninus constituit."*

[46] KASER, Max, *Das römische Privatrecht*. 1. Abschnitt, München, 1955, p. 504: „Keine *donatio* ist in klassischer Zeit die *pollicitatio*…"

[47] KASER, *Das römische Privatrecht*. 1. Abschnitt, 2. Aufl., München, 1971, p. 604: „Von der *donatio* wird die *pollicitatio* unterschieden…"

[48] Cf. Pliny, *Ep*. 7,18,5: *„oportet privatis utilitatibus publicas… anteferre*".

[49] BENEDEK, Ferenc, 'A iusta causa traditionis a római jogban' ['The iusta causa traditionis in Roman Law'], *Studia Iuridica Auctoritatae Universitatis Pécs Publicata*, vol. 8, 1959, p. 12.

[50] Ulp. D. 39,5,19 pr. (tr. Watson). In Latin: *„…ut in rebus publicis, cum de donatione quaeritur, illud solum spectetur, utrum ob causam aliquam iustam rei publicae promittat quis vel polliceatur an non…*"

[51] Papir. D. 50,12,13,1: *„Item rescripserunt condiciones donationibus adpositas, quae in rem publicam fiunt…*"

[52] Mod. D. 50,12,9: *„Sed et ipsum donatorem…*"

[53] Cf. KASER, *Das römische Privatrecht*. 2. Abschnitt, München, 1959, p. 291, n. 43 (= 2. Aufl., 1975, p. 400, n. 61).

[54] KASER, *Das römische Privatrecht*. 2. Abschnitt, op. cit., p. 291: „Das einseitige Versprechen an die Gemeinde, das technisch *pollicitatio* heißt, wird von der östlichen Doktrin in den weiten Rahmen der Schenkung einbezogen" (= 2. Aufl., 1975, p. 400).

[55] Cf. Jul. D. 39,5,1; Ulp. D. 39,5,2.

[56] Cf. Ulp. D. 50,12,1,5; Mod. D. 50,12,9.

[57] Inst. 2,7,2: *„Perficiuntur autem, cum donator suam voluntatem scriptis aut sine scriptis manifestaverit…*"

[58] Cf. RIXER, Ádám, *Civil Society in Hungary: A Legal Perspective*. Passau, 2015, p. 47.

[59] The establishment of foundation became possible again due to the modification of the Civil Code in 1987.

foundation. All of these can be said also about *pollicitatio*, since the institution of a proper (real) foundation was absent also in classical Roman law.

Undertaking obligation for public interest is a unilateral legal statement by which the declarant undertakes an obligation to perform a financial service without compensation for a public purpose of his choice. According to the new Hungarian Civil Code (Act V of 2013), this statement is not bound by formal restrictions.[60] *Pollicitatio* also was a unilateral and informal legal statement by which the *pollicitator* undertook an obligation to perform a financial service without compensation for his town. A *pollicitatio* could contain a *modus* (in such a case the *pollicitatio* was a *donatio sub modo*) by which the *pollicitator* could determine the purpose of his pecuniary service (for example, for alimentation of poor children).

Today in Hungary the offered contribution can be any kind of service which has a financial value. In case of a *pollicitatio* the *pollicitator* undertook to pay a certain sum of money or to make a certain work. So today the circle of the service is theoretically wider, but in practice the offered services are usually monetary ones. Similarly to the Roman rules, today the service can be single or regular.

According to the former Hungarian Civil Code, the obligor could stipulate a condition that his contribution should be made for the specified purpose by indicating his name.[61] Although the new Civil Code does not contain this regulation, such an indication is possible also today, as we can read about it in the ministerial argument of the act. The indication of the benefactors' names was a customary practice also in Rome. Callistratus writes the following: „If someone undertook to decorate a building erected by someone else with marble or to do it in some other way according to the will of the people, with his name to be included in the inscription and the inscriptions to remain of the earlier benefactors who had erected the building, the senate decreed that the project should go ahead. And if private individuals add some money from their own resources for buildings which are being erected from public funds, it is laid down in the same mandates that they should organize the inscription in such a way as to record the sum which they had contributed for the building."[62]

Today in Hungary the obligor can appoint a body to appropriate the contribution for the specified purpose; in lack of this, the body can be appointed by the court, on the bases of the public prosecutor's petition.[63] The designated body can be a state organ, an association, a foundation, or a commercial company. In Rome, there was a different situation: if the *pollicitator* had contributed a sum of money, the sum was managed by the *quaestores* or other financial officers of the town.

In Hungary, if the appointed body fails to appropriate the contribution for the specified purpose, the obligor himself or the public prosecutor can enforce the claims arising therefrom.[64] In the age of Pliny such a regulation did not exist, and this is why abuses could easily happen. Caninius Rufus puts the following question to Pliny: how to secure the money he has offered and wishes to donate to their native town for an annual feast? In his answer Pliny points out that the solution is not simple: „It is an honour to be consulted, but difficult to give an immediate opinion. You might hand over the capital to the town, but there is a danger of its being dissipated. Or you might make a gift of land, but it would be neglected as public property always is. Personally I can think of no better plan than the one I adopted myself."[65] After these Pliny describes his solution to the problem of founding his own alimentary program: „I had promised a capital sum of 500.000 sesterces for the maintenance of free-born boys and girls, but instead of paying this over I transferred some of my landed property (which was worth considerably more) to the municipal agent, and then had it reconveyed back to me charged with an annual rent payable of 30.000 sesterces. By this means the principal is secured for the town, the interest is certain, and the property will always find a tenant to cultivate it because its value greatly exceeds the rent charged."[66]

Two further important differences can be pointed out between the ancient Roman and the actual Hungarian rules. First, today an undertaking obligation for public interest can be withdrawn.[67] A *pollicitatio*, however, was irrevocable; as Ulpian writes, „*pollicitatio recusari non potest*".[68] Second, today an undertaking obligation for public interest ceases upon the obligor's death.[69] The death of the *pollicitator*, however, did not terminate the obligation: as it was mentioned above, his heirs, disregarding exceptional situations, had to perform the offered service.

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[60] According to the former code, the obligation could be undertaken only in writing; see Act IV of 1959, section 593, subsection (1).

[61] Ibid.

[62] Call. D. 50,10,7,1 (tr. Watson). In Latin: „*Si quis opus ab alio factum adornare marmoribus vel alio quo modo ex voluntate populi facturum se pollicitus sit, nominis proprii titulo scribendo: manentibus priorum titulis, qui ea opera fecissent, id fieri debere senatus censuit. Quod si privati in opera, quae publica pecunia fiant, aliquam de suo adiecerint summam, ita titulo inscriptionis uti eos debere isdem mandatis cavetur, ut quantam summam contulerint in id opus, inscribant.*"

[63] Act V of 2013, section 6:590, subsection (1).

[64] Act V of 2013, section 6:590, subsection (2).

[65] Pliny, *Ep*. 7,18,1–2 (tr. Radice).

[66] Pliny, *Ep*. 7,18,2–3 (tr. Radice). Cf. BOURNE, Frank C., 'The Roman Alimentary Program and Italian Agriculture', *Transactions and Proceedings of the American Philological Association*, vol. 91, 1960, p. 62; DUNCAN-JONES: Richard, 'The Purpose and Organisation of the Alimenta', *Papers of the British School at Rome*, vol. 32, 1964, pp. 129 f.

[67] Act V of 2013, section 6:591.

[68] Ulp. D. 50,4,6,1.

[69] Act V of 2013, section 6:592, subsection (1), paragraph (a).

Judicial Robe. The Insignia of the Judicial Profession

Dr. Kinga Beliznai Bódi *

Abstract

„The fashion of the judicial gown is nice and smart, because this gown always warns the judge that whilst practising his profession he is obliged to leave behind all one-sidedness and all biases, as well as all prejudices and all subjective aspects."

Section 104 of Act 54 of 1912 on the implementation of the Code of Civil Procedure (Act 1 of 1911) authorized the Minister of Justice „to order by decree the wearing of specific attire for the judges". Between 1869 and 1912 a number of enthusiastic or less eager opinions was expressed in daily newspapers, law journals, and discussed among lawyers and jurists relating to the judicial dress. Devotees of standardized judicial attire regarded the introducing of such a uniform as a token of judicial authority.

Keywords: *Judicial robe; judicial symbol; 19-20th century; legal tradition; Hungary.*

„The attire: the outward appearance of the justice, fitting the individual character of each State, and a couturier of justice may well read from it: what it holds, who it covers, what is the State that had it sewed, whether it is cultivated, free, of national character, or democratic." – written by Zoltán Mandel attorney in 1912.[1]

1. Judicial Robes in Europe

Judges in Medieval Europe adjudicated usually in a knee-length robe or even as long as falling to the ankles, which was fastened with a belt at their waist, and wearing a cap of the same colour as their robe. Judicial dress was far from being uniform, neither in colour nor in cut. Whilst a Welsh judge would wear a green robe, a count in the Kingdom of Germany in the 13th century would wear a tightly fitting yellow garment and a cap adorned with yellow and red ribbons when deciding a case in his own countship.[2]

In the 14th and 15th centuries judges and lawyers started wearing an attire similar to the long cassock of the clergy. In their understanding, the simple garment was a token of their profession, as they put it, a judge or lawyer – similarly to a priest – „fulfils a function without any ostentation", and „it is becoming that this solemn simplicity" should be reflected in the clothes they wear. Such simple dress was also considered appropriate as secular clothing enabled „too much finery and personal vanity", when „the calm and reserved representative of the immutable law could not be a man of fashion". Such uniform also helped those seeking legal services as judges and lawyers were easily distinguishable from clients by their clothing.[3]

The judges (*gens de robe longe*) of the highest judicial forum of France, the Parliament of Paris, were among the first who following the fashion of the royal court started wearing full-size long-sleeved robes with an ermine collar. In the late Middle Ages every person having graduated in law was wearing a gown symbolizing their erudition. The judges of different ranking were distinguished by the fabric, colour, quality and adornment of their respective gowns. From the 15th century the colour of the gown was mainly black, but the judges of the towns having „the privilege of the glaive" (jus gladii), that is the right of imposing and carrying out the execution of a death penalty wore a scarlet gown whilst adjudicating. In 1476 in Cologne a municipal judge dispensed justice wearing a blue knee-length robe with buttons *(tabbertz*) and a similarly blue sleeveless cape (*heucke*) reaching mid-shin.[4]

In some countries (for instance, Switzerland or Italy) the black gown – in Spanish style – was decorated with a white ruff.[5] The Spanish-style black cloth garment came into fashion all across Europe in the 16th century among the high aristocra-

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1 MANDEL, Z., Jegyzetek a francia igazságszolgáltatás köréből. Ünnepélyesség, nyilvánosság, egyenlőség a törvény előtt. (Notes on the French justice. Solemnity, publicity, equality before the law.), In: *Jogtudományi Közlöny (Jurisprudential Bulletin),* vol. 47, Nr. 25, 1912, p. 219.

2 WERKMÜLLER, D. (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte* (*HRG)*, vol. IV, Berlin, 1990, p. 1044.

3 (d.): Ügyvédi és bírói uniformis (The uniform of attorneys and judges). In: *Pesti Hírlap (Pest News),* vol. 34, Nr. 186, 1912, p. 6.

4 ARLINGHAUS, F.-J., Gesten, Kleidung und die Etablierung von Diskursräumen im städtischen Gerichtswesen (1350–1650), In: BURKHARDT, J., WERKSTETTER, Ch. (Hrsg.), *Kommunikation und Medien in der Frühen Neuzeit*, München, 2005, p. 472.

5 *HRG,* vol. IV, p. 1093.

cy. Sumptuous and colourful garments were replaced by Spanish austerity, fabrics of dark colour, very high collars slightly trimmed with frills. Even though the 17th century favoured the French style, Spain was the last allowing colourful silks and loose clothing. Philip IV King of Spain insisted on simple wear to such extent that he only met a foreign envoy if he appeared before him adhering to the „prescribed black garment".[6] However, they bid farewell to the rigid dress code at the end of the 17th century, and judges of the Spanish Royal Court wore a closed purple gown decorated with velvet stripes on the front, and the heads of lower courts adjudicated in a yellow toga like pallium.[7]

The English judicial dress is also rich in traditions and symbols. There were no strict rules in the early Middle Ages as to the colour or fabric of judicial attire. It was only customary that judges' winter robe were lined with fur and summer robes finished with taffeta. By the beginning of the 15th century the colour of winter garments was violet, green during summer, and red on ceremonial occasions. The *Judges' Rules* set out elaborate guidelines for the dressing of judges in 1635, however they failed to introduce any novelties; they only summarised the practice established by the 17th century. The judges of Westminster Hall[8] wore black or violet gowns during sittings accompanied with a cape and hood of the same colour. Their headwear consisted of a skullcap made of linen, covered by a round velvet clerical cap, and finally a rectangular hat. For ceremonial occasions they were dressed in a scarlet robe trimmed with silk or ermine depending on the season.[9] The fabrics were traditionally bestowed on the judges by the monarch.

The wig embodying judicial authority and honour came into use by French influence[10] during the reign of Charles II (1660–1685). Until the beginning of the 18th century wigs were made of black horsehair, which required constant care, perfume and hair-powder. The ointments and powdering corroded the material of the expensive judicial gowns, thus the end of short wigs were tied in small black rosettes or dress bags. To reduce the constant need to maintain wigs, Humphrey Ravenscroft in 1822 patented the curly judicial wig made of white horsehair, which did not require any further frizzing, curling or powdering.[11]

Owing to modernisation endeavours concerning judicial dress judges hearing civil and family law cases were no longer required to wear old-fashioned wigs in England and Wales since 1 October 2001. In 1868 it was Sir Robert Collier who first urged the abolition of wigs. Similar reform ideas also popped up at the beginning of the 20th century, though according to English public law „a judgement delivered bald or sitting down may not be good or fair".[12] However, unusually hot weather in London upset traditions on a number of occasions, for instance in 1934, when a judge took off his wig – in the middle of a trial – and „eventually wiped off his forehead dripping with sweat."[13]

In January of 1849 in Germany[14], it was made mandatory for judges, prosecutors, trainee judges and attorneys to wear a long black woollen robe with baggy sleeves, a white tie and a black beret completed the official outfit. The gown was adorned with one or two gold or silver braids depending on the ranking of the judge.

2. The judicial gown in Hungary

„The fashion of the judicial gown is nice and smart, because this gown always warns the judge that whilst practising his profession he is obliged to leave behind all one-sidedness and all biases, as well as all prejudices and all subjective aspects."[15]

Section 104 of Act 54 of 1912 on the implementation of the Code of Civil Procedure (Act 1 of 1911) authorized the Minister of Justice „to order by decree the wearing of specific attire for the judges". In Hungary judges previously did not wear an official uniform dress. Our judges before 1849 heard a case in their national dress, and at the regional courts they only girded their sword, which was more of a sign of their nobility and not as a symbol of adjudication.[16]

According to the reasoning of the Act: „The issue to introduce an appropriate judicial attire has been raised several times. It is true that neither would it be beneficial for the honour of the justice nor for the dignity of the courts if members of the courts or the prosecution wore bright colours or some ostentatious clothing whilst practising their profession before an audience, therefore this proposal allows for the regulation of the judicial attire by decree. The proposal does not contemplate a uniform or a gown as is the case at foreign courts, but a kind

[6] BRAUDEL, F., *Anyagi kultúra, gazdaság és kapitalizmus, XV–XVIII. század. A mindennapi élet struktúrái (Civilization and Capitalism, 15th–18th Centuries. The Structures of Everyday Life).* Budapest, 1985, p. 320-321.

[7] KENGYEL, M., *Perkultúra – A bíróságok világa, a világ bíróságai (The Culture of Litigation – The World of Courts, Courts around the World).* Budapest–Pécs, 2010, p. 252.

[8] The predecessor of the High Court (1873/75. Judicature Acts)

[9] KENGYEL 2010, p. 252-253.

[10] Louis XIV of France was compelled to wear a wig because of some hair illness; it is just a matter fact that no court person could have been imagined without wearing a wig. Such fashion therefore derived from the covering up of a physical imperfection.
RÁTH-VÉGH, I., Királyok divatjától a divatkirályokig (From the Fashion of Kings to the Kings of Fashion), In: HATVANY, L. (Hrsg.), *Öltözködés és divat (Dressing and Fashion)*. Budapest, 1936, p. 50.

[11] http://legal.edeandravenscroft.co.uk/EvolutionOfLegalDress.aspx [1 June, 2018].

[12] Paróka nélkül (Without a wig). In: *Népszava (Word of People),* vol. 62, Nr. 150, 1934, p. 7.

[13] Ibid.

[14] *Rechtsverordnung des Preußischen Justizministeriums* vom 2. und 3. Januar 1849 (*Decree of the Prussian Ministry of Justice,* 2-3 January, 1849)

[15] Bírói ítélet (Judicial judgement). In: *Világ (World),* vol. 15, Nr. 146, 1924, p. 1.

[16] The connection between justice and sword is nonetheless indisputable, let us consider the sword held in the hand of Lady of Justice, Justitia for instance, which refers to the adjudication, primarily to the power of the judge to impose a punishment.

of dress, which conforms to the solemnity of their function while retaining their Hungarian character and also taking convenience into consideration."[17]

Between 1869 and 1912 a number of enthusiastic or less eager opinions was expressed in daily newspapers, law journals, and discussed among lawyers and jurists relating to the judicial dress. Devotees of standardized judicial attire regarded the introducing of such a uniform as a token of judicial authority, but there were others who stressed that maintaining the dignity corresponding to the judicial profession has more to do with the individual character of a judge, his qualification, knowledge and sense of justice rather than wearing a uniform.

In the summer of 1869 the participants at the inaugural session of the court of cassation of the reorganized Curia (Supreme Court) were seriously engaged in the issue of what to wear at public sittings. The judges eventually agreed that at public sessions „they are to appear wearing a Hungarian suit and their sword."[18]

The issue of the judicial or counsels' attire arises „every ten years on average" in newspapers, „which is then discussed here and there, considered form left and right, only to be extinguished – until the next resurrection". Elek Győri was one of the first to discuss this issue at a meeting for lawyers, who proposed a national dress „as a uniform for the men protecting and dispensing justice". However, this proposal remained just a plan, inter alia because among the judges and attorneys „there were quite a few who were obese and who did not want to press their pot bellies into a tight Hungarian dress designed for young men. The tight trousers, boots, an »atilla«[19] or doublet are not meant for an elderly, ill person, and it would also require an hour preparation before and after a trial […] Not mentioning the hot summer weather, when it is a real torment to wear a Hungarian dress".[20]

At the beginning of 1885 the *Ügyvédek Lapja (Paper of Attorneys)* discussed this issue with poignant criticism. According to the author of the article, „such pointless intent, which is absolutely against our traditions and costly, therefore harmful must be nipped in the bud". The uniform as a distinguishing insignia was considered reasonable in the case of customs officers, at post and telegraph offices, at the railways and the gendarmerie, where service is rendered day by day „to a considerable number of people and often outside official buildings […] However, these factors are not particularly applicable to members of the courts. The number of people coming and going in these buildings is never such that the parties concerned would not be able to find the judge they are seeking".

At the same time it is absolutely necessary for the sake of preserving the solemnity and ceremonial nature of trials that the judges (and defence attorneys or the prosecution) „should not allow themselves to wear tasteless and unbecoming clothing. It would indeed be bizarre if members of the court: the prosecutor, scrivener, counsel would appear in haphazard garments of diverse colours and fabric as some colourful genre figures. A pair of patent leather shoes here, boot and spur there, grey coat, braided wamus, checked paletot and cantankerous trousers, a red tie should not make the forum of the court look like a miscellaneous society, an ethnographic collection".[21]

The following anecdote like scene may convince the reader on the necessity of the judicial uniform, which happened at a district court in the 4-10th district of Budapest. The judge exclaiming, „Some room please!" stepped out of his room into the hall full of waiting litigants. He received the following answer to his request: „Stop pushing Mr., if we don't have enough space, then you shouldn't be so comfortable either. Keep out of the way, like everybody else!" The judge remained silent of course, but maybe thought to himself that such dialogue would not have occurred if he had been recognized by everyone at first glance from his judicial attire.[22]

Ferenc Székács, the Vice-President of the Royal Court of Budapest argued in favour of the gown in 1889 as follows: „This confers some priest-like feature upon the judge, the characteristics of a scholar, covers any physical irregularities and lifts the judge's personality even if the very features which would incline them to rise above others were missing. […] the gown may be put on in a convenient manner, under which any kind of clothes may be worn, thus the judge may go to his workplace in ordinary clothes without any need to change, only the gown is put on".[23]

Lajos Farkas judge of the Royal Court of town of Komárom intended to save „the dignity of our Justitia from decline, the diverse fanciful clothes of judges, prosecutors and counsels, sometimes dressing like harlequins, or in chequered garments, which would perhaps be appropriate in the salons but in the sanctuary of the courts they are rightly deemed as being distasteful. […] Initiative steps must be taken as soon as possible in order to eliminate such exotic style of clothing. […] moreover, it would be even more desirable if the so called black salon clothing would be introduced in the courtrooms, that is long black coats with trousers of the same colour, and they would become general practice. However, such wish may only be required rightfully, if […] the urged increase of the remuneration of judges, which may no longer be postponed takes effect. Without such

[17] *Képviselőházi irományok (Papers of House of Representatives).* 1910, vol. XI, 280-347, XXXI–XXXVII, Nr. of papers 1910-330, p. 325.

[18] MÁTHÉ, G., *A magyar burzsoá igazságszolgáltatási szervezet kialakulása 1867–1875 (The Development of the Hungarian Bourgeois Judicial System).* Budapest, 1982, p. 99.

[19] The „atilla" is an elaborately braided Hungarian shell-jacket or short coat, decorated with lace and knots. Historically it was part of the uniform of the Hungarian cavalry known as hussars (huszárs). It was a part of the everyday wear of rural men as well as members of the nobility and officials.

[20] (d.): Ügyvédi és birói uniformis (The uniform of attorneys and judges). In: *Pesti Hírlap (Pest News),* vol. 34, Nr. 186, 1912, p. 6.

[21] Biráink egyenruhában (Our judges in uniform). In: *Ügyvédek Lapja (Paper of Attorneys),* vol. 2, Nr. 48, 1885, p. 1-2.

[22] A bírói egyenruha (The judicial uniform). In: *Jogtudományi Közlöny (Jurisprudential Bulletin),* vol. 23, Nr. 33, 1888, p. 276.

[23] SZÉKÁCS, F., A bírák egyenruházata kérdéséhez (To the issue of the judicial uniform). In: *Ügyvédek Lapja (Paper of Attorneys),* vol. 6, Nr. 51, 1889, p. 3. In 1897 he said: „Even if we are obliged to sit on the sedes curulis in ordinary cloaks being void of a judicial gown, it does not mean that we are to wrap our judgements in ordinary robes."

due increase it would seem rather unlikely to oblige a judge who solely makes a living on his salary and being blessed with several children to acquire a stylish salon wear for himself just for the purposes of his official capacity simply for the sake of the solemnity of his official position".[24]

The *Jogtudományi Közlöny (Jurisprudential Bulletin)* provided food for thought on the exuberant colourful nature of the courtrooms in 1892. At one of the hearings of the Royal Court of Budapest „the president was ruling wearing a grey sacco suit, a more fashionable judge due to vote a yellow jaquet suit, the other voting judge a brown double-breasted coat and blue trousers. The royal prosecutor represented the State in a yellow-black checked clothing. Such colours orgy was somewhat dimmed by the black coat of the defence".[25]

Attorney Imre Páyer said the following on wearing a gown: „[…] the least that may be required is that representatives of the justice system should be dressed in black during open public trials. They are compelled to do so by good taste, as well as by the sacred nature and solemnity of the venue. […] my ideal is the national dress, because I do not know a more ceremonial attire. Only if the implementation of the latter causes considerable difficulties, I would rank the gown as first, the salon wear second. I am on the opinion […] that the judiciary, prosecutors and counsels should have identical clothing, only differing in some slight marks that would allow for a distinction among the branches.

The advantages of the gown are that it is one of the most ornate garments, it has a priestly feature, covers the imperfections of the body, as well as plain and tasteless clothing. It is convenient to handle, not costly and good over a long period of time. It is suitable to convey the differences in rank, and does not depend on the whims of fashion. At lower courts it could be black, for the justices of the Curia it could be of a purple colour".[26]

It is indisputable that seeing judges in motley clothing does not evoke respect toward the judge neither in the litigants nor in the audience present at the court.

In the chamber of the House of Representatives Soma Visontai urged the introduction of a uniform judicial attire on 11 September, 1896 when participating in the debate of the Bill on criminal procedure. „As you may all know, in the whole civilised world, not only in Western Europe, but also in the Eastern States, where there is an open public trial, the dignity of judges and the important mission of counsels is also expressed in their attire. […] true, […] that at the final trial […] judges and counsels appear in an ordinary grey outfit, which fails to enhance the solemnity of the proceeding […]. I would only like to draw the attention of the Honourable Minister of Justice [Sándor Erdély] if he agrees with my proposal to consider the issue by inserting a section […] at least in the implementation statute, if not in the same manner as in Austria, […] where they appear in a uniform, or not by introducing the gown as it is endorsed in Western Europe and other parts of the world, which does not conform to our traditions, but at least to adapt our national dress and to solve this issue by making it mandatory to appear in such attire at public trials for judges and all collaborators: royal prosecutors and counsels for the defence. This is just a formality, but it is supported by examples that there is something to this formality […], which evokes respect in the parties involved."[27]

In Austria the ministerial decree issued on 9 August, 1897 (Verordnung RGBl. Nr. 187/1897) rendered the wearing of an official attire mandatory. Accordingly, as of 1 January, 1898 every judge and prosecutor, as well as all expert lay judges were obliged to wear the official dress consisting of a black gown and beret at trials and when making their oaths (except for the oaths made by witnesses and experts). The gown reaching until the ankles was made of a light woollen cloth, „thickly plaited" and buttoned on the front. The neckline was made from violet velvet, the sleeve of the gown was ornamented with black and violet silk stripes. The attire was supplemented with a bow tie made of glossy black silk and a white shirt. The decree specified in detail how many buttons, of what size and type were to be sewn on the gown, and where should the pocket be placed. The beret had to be worn when delivering judgements and making oaths. On the neck of the gown and the beret there were six different signs denoting ranking. The gown of the President of the Supreme Court *(Oberster Gerichtshof)* was ornamented with a twelve centimetres wide ermine[28] collar, and his beret also had a violet velvet stripe, the attire of the Vice-President only differed in that his ermine collar was only six centimetres wide. There were three categories to distinguish the ranks of prosecutors. Members of the *Generalprocurator* had no ermine collar, but otherwise their gown was much the same as that of the President of the *Oberster Gerichtshof*.[29]

„Thus the gown has arrived at the borders of Hungary. Now this issue will be more frequently discussed here too." – informed the *Jogtudományi Közlöny (Jurisprudential Bulletin)* in January 1898[30], and just so, a few months later a long debate ensued among our renowned lawyers as to what should the official attire look like in the Hungarian courts (gown or „atilla"), and whether it should be compulsory only for the judges or also

[24] FARKAS, L., A bírói egyenruha kérdéséhez (To the issue of the judicial uniform). In: *Jogtudományi Közlöny (Jurisprudential Bulletin),* vol. 25, Nr. 12, 1889, p. 91.

[25] SZAKOLCZAI, Á., „Minima" („Minim"). In: *Jogtudományi Közlöny (Jurisprudential Bulletin),* vol. 27, Nr. 39, 1892, p. 310.

[26] PÁYER, I., Külsőségek a jogszolgáltatásban (Formalities in dispensing justice). In: *Jogtudományi Közlöny (Jurisprudential Bulletin),* vol. 30, Nr. 18, 1895, p. 142-143.

[27] *Képviselőházi napló (Journal of House of Representatives).* 1892, vol. XXXIV, 3 September – 3 October, 1896, Sittings 1892-652, p. 134-135.

[28] The ermine is the symbol of power and authority. Wearing a robe or cloak made of ermine or padded with ermine was the privilege of kings and as well as of noble families.

[29] Judicial robe – black gown and beret – of defense attorneys and clerks in Austria was regulated by the *Decree of the Minister of Justice,* 17 June, 1904 (Verordnung RGBl. Nr. 59/1904).

[30] A talár (The gown). In: *Jogtudományi Közlöny (Jurisprudential Bulletin)*, vol. 33, Nr. 1, 1898, p. 8.

for the prosecutors and attorneys. In July 1898 many jurists of distinction expressed their opinions in the *Országos Hírlap (National News)* edited by the famous novelist and member of the House of Representatives, Kálmán Mikszáth.

According to the arguments of Leó Zsitvay, the President of the Royal Criminal Court of Budapest: „Let us beware of exaggerations, which regards the Hungarian judges as Hungarian men who are all soldier-like, a born horse rider, like a hero, and wanting him to wear a full-size tight apparel with shiny trimmings. […] let us consider the modern Hungarian man who toils day in day out and only straightens up with difficulty under a heavy workload to give the impression of a somewhat attractive figure, and let us also consider that we do have good judges who may hardly be able to be impressive wearing some 'festive dress' due to their less fortunate appearance. So, maybe because of the cut of the judicial attire the presidents of regional courts will look like old-fashioned hussar colonels, who competing will only recruit others based on an impressive figure."[31]

Jenő Hammersberg, Chief Royal Prosecutor of Budapest, did not find it necessary or reasonable to introduce a special official attire: „Our courts have had to date and still have the required respect and dignity, and I do not believe that a gown or any kind of special attire would be able to enhance such respect or the public trust vested in their adjudication. The source of a judge's dignity should not be derived from his attire or other formalities, but from his moral and intellectual characteristics, his conscientious carrying out of his duties, his serious conduct, and the fairness of his judgements."[32]

According to the opinion of Dezső Márkus, a judge at the Royal Court of Budapest, „Though the salon suit is beyond doubt the best option, it may not be made mandatory as it is rather costly, and even though I believe it to be the most suitable and because of its simplicity the most elegant solution for any work carried out in public, I would choose the gown from the two proposals for the judicial uniform, because I find it more expedient for the following reasons: the gown is cheap, comfortable, it equalises, covers any physical imperfections, and provides a solemn and dignified appearance for the trial – we are well aware of the fact that every uniform is impressive. The Hungarian national dress is not practicable because: it is expensive; tight trousers, boots, a sword – are not really comfortable for everyday wear, and it is not as easily put on and taken off at the office as the gown, consequently it should be worn all throughout the day; it calls for different degrees of ornamentation, from the least to the most ornamented make, with swords equally ornamented or not, which may be rather inconvenient […] when considering that a great number of people judge you by the appearance; finally, it highlights the physical imperfections, let alone that the Hungarian dress with all its accessories is not advantageous for all Hungarian men, even if fair and sound. And as far as our national character is concerned: let us not take pride in the fact of preserving our national character by our national dress! The English, French, Belgians, Italians, Germans all take pride in their national character, still they have all endorsed the gown for their justices."[33]

The Bar Association of Budapest also urged the introduction of the gown in 1898. According to the standpoint of the Bar, the gown as the symbol of dignity and gravity enhances the solemnity of a trial, and is an effective method against „the currently prevailing edgy mood during a trial". However, „ we do not want to deceive ourselves and believe that by the gown, the outward appearance of severity, an adequate serious inner spirit will be renewed and come to life like by a magic touch, but it is nonetheless true that it is a significant factor in the awakening of an adequate attitude".[34]

In 1908 Imre Kabók[35], an assistant archivist, made two gown designs upon the request of a district judge in Szeged, István Somlyódy. One concept was: „Atilla and a collar over it, which is similar to the ecclesiastical mozetta", which is fastened by a buckle to the neck. The Hungarian style was rendered by the braiding and buttoning. The mozetta-like collar was designed with differing lengths, arm's length, two-third's length, elbow's length, with an opening „ trimmed as usual and ornamented with braiding and buttoning. The trimming may be barrel-roofed or frogged as well." The colour of the attire is black, „lightweight and comfortable, black alapin, reps and silk". To distinguish the ranks on the sleeve of the „atilla" and at its opening „the first will have an ornament with three rings and a spearhead, the second will be the same but with two rings and the third rank with one ring". The other design was much more comfortable and may be worn without a collar, a loose knee-length Zrínyi cloak[36]. The dress would have been supplemented with a simple, black velvet cap, which should have only been worn by the judge when delivering judgement.[37]

Somlyódy's plan was not welcomed unanimously by the judiciary. One of the judges formulated his opinion on this issue in *A jog (The Law)* journal. There is no need for a gown according to him, „it is all about arrogance. Discriminating parade, finery." To protect judicial dignity „all we need is a personal warning from the Minister of Justice addressed to the presidents of the courts of appeal, and from there down to the presidents of regional courts that at public trials the judges are to

[31] Talárt a bíráknak (Gown for the judges). In: *Országos Hírlap (National News),* vol. 2, Nr. 189, 1898, p. 4. http://epa.oszk.hu/00200/00242/00231/pdf/00231.pdf [5 April, 2018]

[32] Ibid.

[33] Ibid. p. 7.

[34] Különfélék. A talár (Miscellaneous. The gown). In: *Jogtudományi Közlöny (Jurisprudential Bulletin),* vol. 33, Nr. 13, 1898, p. 164.

[35] Imre Kabók was an expert of the Hungarian-style braiding and buttoning craft. KABÓK, I., *Magyar zsinórdíszítés (The Hungarian-style braiding; manuscript).* 1898; GYÖRGYI, K., Kabók Imre: Magyar zsinórdíszítés (Imre Kabók: The Hungarian-style braiding). In: *Magyar Iparművészet (Hungarian Applied Arts),* vol. 2, Nr. 4, 1899, p. 161-164.

[36] The denominating of „Zrínyi" or „Zrínyi-cloak" was probably the dress-designer, Adam Kostyal. In 1837, he designed this kind of cloak for the main character of Theodor Körner's play about the Croatia-Hungarian military leader, statesman and poet, Miklós Zrínyi (1620–1664).

[37] Magyar bírói talár (The Hungarian judicial robe). In: *Pesti Hírlap (Pest News),* vol. 30, Nr. 93, 1908, p. 16-17.

wear a black coat! And a wardrobe in the judicial offices where these coats can be kept."[38]

Somlyódy district judge discussed the issue of judicial dignity on the columns of *Pesti Hírlap (Pest News)* in September, 1912. His opinion on the judicial uniform was that judges „did not wish" to wear a gown, as „it is well known from experience Hungarian people are not keen on uniforms. They are aversive to it, anyone in a uniform is suspected and regarded as an alien, someone giving orders, an oppressor." However, he also referred to the fact that the judiciary did not dismiss the introduction of the gown altogether, the „awakening reform endeavours". In his view the gown must be such that „it should naturally harmonise with the feelings and thinking of our people, so if it will not be a Hungarian dress, at least it should be Hungarian like […]". In order to select the most appropriate attire for the judges he proposed the Minister of Justice „to invite open applications for the Hungarian artists who are currently not so busy anyway, and he will be glad to see how ingenious the Hungarian mind is and what creative powers it has".[39]

3. Application for the design of the judicial cap and gown (1912)

The Ministry of Justice authorized by Act 54 of 1912 announced an application in September 1912 for the design of a judicial cap and gown. The Hungarian Association of Applied Arts was called upon to be in charge of the application; apart from members delegated by the association to the committee assessing the applications two further members were nominated by the Minister of Justice.

The call for application complied with the new administrative regulations required due to the new Code of Civil Procedure and related organizational changes. According to the draft judicial service regulation the judicial uniform would lack all superfluous ornaments. The gown made of black cloth and the same at all levels of courts would only have to be worn by the judge (as well as by scriveners and apprentices) at public trials. The attire of judges serving at different levels in the court hierarchy would only be distinguished by an ornament of the crown of St Stephen: „the enamelled crown" would be placed on a shield-shaped base of altering colours depending on the type of court, whether at the district court, regional court, court of appeal or the Curia. No crown is placed on the gown of scriveners. The cap supplementing the judicial attire would have to be worn in the courtroom only when pronouncing judgement.

The general reasoning of the proposal in relation to the procurement of the gown said that „it would be desirable to have them made by a sole contractor for the sake of uniformity, and set the price under a contract. Costs would be borne by each party concerned, and the State would only contribute by a lump sum to facilitate the first procurement of a gown for the newly appointed employee obliged to wear such gown, just like in the army when an officer is first appointed." However, any costs related to any improvements made to the gown or any further changes would at all times be borne by the respective employee.[40]

Pursuant to the call for application: „A small-scale coloured design is required of the judicial (prosecutors, scriveners included) gown, a full-size design of the judicial insignia, and a small-scaled design of counsels' cap and gown which is of the same cut as the judicial cap and gown but still easily distinguishable. The applicant must take into consideration that the Hungarian judicial dress may not be an imitation of some foreign judicial attire in any way, and it must feature the necessary solemnity and have an individual character; finally, the gown must be able to cover the ordinary clothes fully. St Stephen's crown is the most suitable as a form of insignia as being the source of the Hungarian judge's power."[41]

Népszava (Word of People) commented the publication of the application as follows: „Now they are inviting application for the design of the cap and gown? Artists will compete for the creation of the best patterns. We have one recommendation to make: pigtails must not be left out when designing the two characteristic pieces of the attire. The Hungarian judge […] can only be recognized this way at best, and what happiness it will be if men in gowns sentence us to imprisonment or to be hanged, what happiness!"[42]

The applications were evaluated by the assessment committee on 25 January 1913, whose chairman was Ignác Alpár the Vice-President of the Hungarian Association of Applied Arts, and its members were Dr Gyula Rickl, ministerial advisor delegated by the Minister of Justice, and Dr János Marschalko, justice of the Royal Court of Appeal, Elek K. Lippich, ministerial advisor delegated by the Hungarian Association of Applied Arts, and Jenő Kéméndy, painter, costume designer and scenist, Chief Scenist of the Opera. The rapporteur of the assessors' panel was Kálmán Györgyi director, the editor of the *Magyar Iparművészet (Hungarian Applied Arts).*

Forty-four applications were submitted. The 1st prize of 1,200 crowns was awarded to Nándor Honti, lithographer and graphic designer, the 2nd prize of 500 crowns went to Jenő Jeney, painter, and the 3rd prize of 300 crowns was awarded to János Böhm, stamp designer. The assessment committee suggested to buy the applications coded „Friday" and „Gown" as well for 250-250 crowns each. The winning designs were submitted to the Minister of Justice by suggesting that before making the final decision, the gowns designed should be made by the tailor's workshop of the Hungarian Royal Opera, and only subsequently should the choice be made as to which gown design would be ultimately used as the official attire for judges, prosecutors, scriveners and counsels.[43] The applications designs were

[38] Magyar bírói talár (The Hungarian judicial robe). In: *A jog (The Law),* vol. 27, Nr. 17, 1908, p. 1.
[39] SOMLYÓDY, I., A bírói tekintélyről (On judicial dignity). In: *Pesti Hírlap (Pest News),* vol. 34, Nr. 217, 1912, p. 21.
[40] Igazságügyi szolgáltatási rendtartás (Judicial service rules). In: *Jogtudományi Közlöny (Jurisprudential Bulletin),* vol. 47, Nr. 32, 1912, p. 277.
[41] The detailed call for application, „Application for the design of the judicial attire (gown) and cap" was published in the journal *Magyar Iparművészet (Hungarian Applied Arts)*, vol. 15, Nr. 6, 1912, p. 236.
[42] Legjobb az egyenruházkodás (The uniform is the best). In: *Népszava (Word of People),* vol. 40, Nr. 66, 1912, p. 8.
[43] Pályázatok (Applications). In: *Magyar Iparművészet (Hungarian Applied Arts)*, vol. 16, Nr. 2, 1913, p. 65-66.

put on display in the rooms on the ground floor of the Museum of Applied Arts at the end of January in 1913.

According to the winning design of Nándor Honti: „The fabric of the gown is black lustre, the collar and cap is made of black moiré. The President, judge and prosecutor is distinguished by a medal of St Stephen's crown hanging from the neck on a chain or golden braid. The clerk wears the medal as a badge without a lace pinned over his heart. Counsels do not have a badge. The cut of the gowns are the same, the gown of the President of a superior court is red from the inside, and that of the President of a lower court is blue inside, as for all the others it is all fully black."[44]

Gown design of Nándor Honti
[*Vasárnapi Ujság (Sunday News),* 9 February, 1913]

Though the competing designs were submitted in 1913, and from 1914 a decree issued by the Minister of Justice obliged the judges, prosecutors, scriveners and counsels to wear a cap and gown, the introduction of the gown was dropped as „the war came and its misery did not allow our judges to wear gowns". In the summer of 1914 the daily newspapers still reported on the new judicial gown, which would be „a loose, robe-like black domino, with the Hungarian crown and a cap. The administrative staff would be wearing a black-frogged uniform with a purple lapel. The civil servant being in the 11th salary class will have a rosette on the lapel, the chief clerk two rosettes, and the office clerk three rosettes, The director of the office will have a silver collar on his uniform".[45]

4. The judicial uniform between the two World Wars

Emil Ruhmann, judge of the Royal Court of Budapest, a judicial clerk of the Curia in 1927, expressed his thoughts on the judicial gown in the *Budapesti Hírlap (Budapest News).* The solemn judicial attire in his opinion not only gives prominence to the judge placing him above the parties and the courtroom audience, but also warns the judge that in exercising his role he must „rise above being an ordinary person by putting aside all his political, societal or other biases, […] he must overcome his subjective self. Therefore, he should regard the judicial gown as a device which protects him from his subjective inclinations".[46]

On 10 May, 1928 the Parliament had a detailed debate on its agenda on the 1928/1929 annual budget of the Ministry of Justice. Albert Váry who was deputy crown prosecutor between 1921 and 1926 also touched upon the issue of the judicial gown in his comment. Instead of a gown he insisted on a solemn, dark attire for the judges. As he said, „I am not an advocate of the judicial gown, as I cannot trace it back to any tradition in the past, and I think that if today, in the 20th century, judges and prosecutors would come and join modern, enlightened people wearing a gown, this would seem just a bit awkward."

He considered the issue of adequate judicial offices and courtrooms much more urging than that of the judicial attire, and to provide for the official outfit of court clerks. „As we enter a court building, first we come across a court clerk, who greets parties often wearing plain, usually ragged clothes, shabby looking […]. I call upon the attention of the Honourable Minister of Justice [Pál Pesthy] to this circumstance, because I intend to emphasize that court clerks should wear an appropriate uniform, so when a party enters, it should be clear at once that a member of the administration of justice is standing in front of him or her […]." He also mentioned that solving this problem became increasingly difficult as perks for clothing for court employees was eliminated. He considered it paramount „to draw the attention of the Minister of Justice to the fact that first of all a court house should be built for the civil court of justice. Not mentioning that it is also impossible to have the judges of the royal court of appeal and the Curia placed somewhere that – as having no official rooms of their own – they cannot work in the offices but are bound to take the files home. It is purely by chance that none of these files have been lost so far while carrying them around."[47]

No single viewpoint developed on the introduction of a uniform judicial dress at this time, and though for the most part it was not considered to be the right time to discuss this issue, still there were some who regarded it as important. Ottó Hubert, a judge of an administrative court, presented a motion to the Budapest section of the National Association of Judges and Prosecutors in the spring of 1932 to render the wearing of the gown compulsory for the judges. It was discussed under the chairmanship of Géza Töreky[48]. The comments made it clear

[44] A bírói talár (The judicial robe). *Vasárnapi Ujság (Sunday News),* vol. 60, Nr. 6, 1913, p. 115.
[45] A bírósági tisztviselők egyenruhája (The uniform of the judicial staff). In: *Esztergom és Vidéke (Esztergom and its Region),* vol. 36, Nr. 50, 1914, p. 3.
[46] RUHMANN, E., A bírói talár (The judicial robe). In: *Budapesti Hírlap (Budapest News),* vol. 47, Nr. 121, 1927, p. 5.
[47] *Képviselőházi napló (Journal of House of Representatives).* 1927, vol. XII, 2-16 May, 1928, Sittings 1927-168, p. 288.
[48] At that time he was the president of the Royal Criminal Court of Budapest, he became the President of the Curia in 1937.

that whilst judges „are to uphold the dignity of the judiciary and the order of the procedures with great effort in rooms of unpainted walls and broken windows" it is „out of place" to raise such an issue. Thus it was removed from the agenda.[49]

On 7 April, 1938 Parliament discussed the Bill on provisions related to the justice system. Ödön Mikecz, the Minister of Justice said in connection with the judicial uniform that it may not be introduced, on the one hand due to financial and budgetary reasons, and on the other, because the environment in which the trials are held „are often not suitable to express the judicial dignity that normally they ought to. Nevertheless, the Ministry of Justice shall consider […] introducing the wearing of the gown during trials […] for the panels of higher courts".[50]

5. The judicial dress in the second half of the 20th century

A judge wore a dark suit and a tie as an everyday apparel in Hungary between the two World Wars, however at trials of greater publicity something more solemn had to be worn. By the beginning of the 1950 s this „required elegance" vanished, judges who remained (were left) in their position, and the newly qualified people's cadre of judges who just finished the one-year judicial academy all endeavoured to meet the requirements of the days.

The appearance of women judges brought about a new situation as far as dressing is concerned. The elegance expected in the courtroom was dependent on the prevailing fashion trends in their case. The first bigger shock happened when the mini skirt appeared in the end of the sixties. According to the wording in the second half of the eighties the judge „ should dress in a manner worthy of his or her position", that is „ women judges are not to adjudicate in miniskirts, or shorts, and men judges are not to wear short-sleeved shirts without a tie" when delivering decisions.[51] According to another opinion the judge wearing a gown „becomes more impersonal", and „it facilitates for women judges to retain their dignity in hot summer days: it is at hand to cover what clothing fails to, as well as boldly open apparel".[52]

In the spring of 1990 the justices of the Constitutional Court appeared in a dark blue gown in public. Nearly a year later the justices of the Supreme Court were dressed in a black gown.[53] Pál Solt, the President of the Supreme Court at the time announced on 10 December, 1990 at their full session that the justices of the Supreme Court will be wearing a gown henceforth.[54] The first judges to deliver judgements in a gown – as of 27 September, 1993 – were the judges of the Komárom-Esztergom County Court[55]. After Komárom-Esztergom County, judges of some other counties[56] also joined in wearing a gown, however in different forms. The National Judicial Council provided for the general introduction and wearing of an official judicial attire in 1999 in its regulation, thus as of 1 June, 2000 wearing a black gown with violet trimmings became mandatory for all judges.[57]

The gown to date „conveys judicial dignity, which enhances the respect of the courts. This has to be expressed in the attire of a lay judge and of the recorder participating at a hearing, or of a junior judge conducting such procedure." – as Directive No. 9/2012 (8 May) of the President of the National Office for Judiciary sets forth.

The National Office for Judiciary announced an application in September 2016 for the students of Moholy-Nagy University of Art and Design Budapest (MOME) to design a new judicial gown. The assessment of the thirteen designs submitted was carried out by members of the Gown Committee[58] as well as of the judiciary. According to a preliminary survey the judges still prefer the black colour for the judicial gown, and found no reason to distinguish between the gown of women and men judges.

Students taking part in the application presented their sample gowns in the autumn of 2016 for the first time, which were later improved and changed both in their fabric and ornamentation based on the observations of the judges.

The announcement of the winning design took place on 28 June, 2017. The most successful applicants received an award and a certificate of merit.[59]

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[49] Nem kell bírói talár (There is no need for the judicial gown). In: *Ujság (News),* vol. 8, nr. 116, 1932, p. 10.

[50] *Felsőházi napló (Journal of Upper House).* 1935, vol. III, 26 October, 1937 – 18 August, 1938, Sittings 1935-60, p. 127.

[51] KENGYEL, M., Talárban és talár nélkül. Öltözködési kultúra a bírósági tárgyalóteremben (With or without a gown. Dressing culture in the courtroom). In: *Bírák Lapja (Paper of Judges),* vol. 3, Nr. 3-4, 1993, p. 4.

[52] D. I.: A humor és a bírói tekintély (Humour and judicial dignity). In: *Dunántúli Napló (Transdanubian Journal),* vol. 45, Nr. 10, 1988, p. 5.

[53] KENGYEL 1993, p. 3.

[54] Ezentúl talárban (In a gown hereafter). In: *24 óra (24 Hours),* vol. 1, Nr. 209, 1990, p. 2.

[55] Bírák – talárban… (Judges – wearing a gown…). In: *24 óra (24 Hours),* vol. 4, Nr. 244, 1993, p. 1.

[56] As of October 1993 members of the Veszprém County Court started wearing a gown, whose only ornament was a purple velvet overlay on the collar. Új bírói talár (The new judicial gown). In: *Petőfi Népe (Folk of Petőfi),* vol. 48, Nr. 230, 1993, p. 1.
Judges started wearing gowns at the Somogy County Court as of January 1994, and as of 1 May 1994 at the Bács-Kiskun County Court.

[57] Júliustól minden bírónak kötelező a talár (The gown is mandatory for all judges as of July). In: *Népszabadság (People's Freedom),* vol. 58, nr. 108, 2000, p. 6.

[58] Members of the Gown Committee were: the President of the National Office for Judiciary, the President of the Curia, the President of the National Judicial Council, presidents of the courts of appeal and the regional courts, artists and myself.

[59] The students having received an award and a certificate of merit: Eszter Béla, Júlia Ilona Horváth, Alma Vetlényi and Noémi Gyimóthy. The designs and a detailed description of the project are available in the 2016. yearbook of the MOME, as well as on the website of the National Office for the Judiciary. http://birosag.hu/media/aktualis/lezarult-talarpalyazat [27 September, 2017].

Some Newer Views to the Problems of the Hungarian Holy Crown and Holy Crown-Doctrine. (Considerations from Historical and Legal Historical Aspects)

Jenő Szmodis *

Abstract

The Hungarian Holy Crown doctrine involves lot of legal values. Among others such values, which was later relatively similarily expressed in Bodin's sovereignty theory. The ideas about an abstract, supreme power became commonly accepted in the West in the 16-17th centuries. Because the ancient Hungarian constitutional thoughts gradually have been projected on the Holy Crown, therefore it is important the age of the Holy Crown. The writing tries to find the first European crown that resembles the shape of the Holy Crown. The probably first cross-strapped, closed crown was Theodahad's property AD 6th century. This Italian ruler is closely connected with the former Hun Empire through his uncle, Theoderic the Great. The writing refers a story of the Eastern Huns from BC 3th century, which is closely related to one of the important thoughts of the Holy Crown-doctrine.

Keywords: *Hungarian Holy Crown; constitution; sovereignty; Italy; Theodahad; Theoderic the Great; Hun Empire.*

1. Some preliminary notes to our problems

For nearly a thousand years, the Hungarian Holy Crown-doctrine has been a prominent idea of Hungarian public law thinking. However, certain elements of the Holy Crown-doctrine, as we shall see, are relatively independent of themselv the Holy Crown (as an object). Concerning the Holy Crown problem is particularly complicated, because this crown itself as a princely jewel has a very vague origin, and the conclusions of various researches show almost a thousand years of difference in the creation of this object. I try, therefore, to clarify some of the anomalies which are related to the origin of the Holy Crown, and on the other hand, I try to introduce those elements of the Holy Crown-doctrine which probably come from a previous times than the age of the creation of that object.

The Hungarian law, of course, accepted many European values, Roman law's institutions and legal principles, values of Christian morality, but abstained from any exaggeration that appeared in Europe in these. Thus, the formalism of Roman law, Western religious impatience and exclusivity demand did not a find a place in Hungarian legal thinking.[1] This Hungarian legal thinking thus have filtered these western ideas, namely through its own old, original values. It only accepted what was consistent with his nature.

The Holy Crown was the source of all rights in Hungarian common opinion until the middle of the 20th century. The Holy Crown was not just an object but an idea that was closely related to statehood. The law, on the one hand, meant ancient customs, and on the other hand, royal decrees that are in line with ancient freedoms. The king received his (not unlimited) power by crowning by the Holy Crown, and thus the source of his legislature was the Holy Crown.

First of all, it is necessary to state that the Holy Crown-doctrine was dominant in the Hungarian public law tradition until the Act I of 1946 was. According to this, the Holy Crown is a person. It is not the same as the ruler. It is the embodiment of supreme power (or sovereignty). Thus, the Holy Crown is the antecedent of the modern state concept, which have evolved

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1 The peculiarity of Hungarian legal thinking probably has ancient origins. The essence of this is a definite striving for harmony with the equal consideration of various values. I suspect, it is similar to that, which is mentioned in study of professor Hitara: „The justice demands concretization and the transparency of the criterion, and the criterion requires exclusion of arbitrariness. It can be classified with the exclusion of arbitrariness in „equity," "spirit of harmony," „efficiency," „rationality of dispute resolution," „fairness," „equality" and „appropriation."" Or this: „„Harmony" has a very deep meaning. The means of the law is an argument and persuasion to premise „harmony." It prescribed that the Seventeen-Article Constitution (year 604) considered being the Japanese first constitution should depend on an argument not military power about the solution of the dispute in a clear provision. „The spirit of harmony" can be classified in „agreement," „The trust deserves protection," and „general dispute solution."" HIRATA, Hayato, Balance of Various Values in the Conciliation. *Jogelméleti Szemle* 2017/3. p. 112-117. especially p. 114. There is a very interesting similarity in the Hungarian viewpoint and in the Japanese thinking relating to religion. As professor Mitoma point out: „Most Japanese do not have a strong sense of religion and often call themselves "irreligious." However, the Japanese are not necessarily atheists. They are spiritual and actually participate in many religious rituals including Buddhism, Shintoism, Hinduism, and Christianity." MITOMA, Tamio, Japanese Behavioral Patterns and Groupthink. *Jogelméleti Szemle* 2017/3. p. 134-139. especially 135. This attitude is likely to provide effective protection against religious impatience.

only in sixteenth century in Europe on the basis of Jean Bodin's teachings.

2. The question of the origin of the object

For the understand why the Holy Crown could become the symbol[2] and embodiment of Hungarian sovereignty and constitutionality, we must be aware of the ancient origins of the Holy Crown. According to certain Hungarian traditions, the Holy Crown was sent by the Pope to the first Hungarian king, because the Hungarians were entitled to it, because of the virtue of their monarch.[3] It is said by some legends, that in the 10th century, the Polish prince (Mieszko) asked for a crown from the pope, but the pope got a miracle dream. An angel advised him to give the Holy Crown to the Hungarian delegates, who will be coming the next day. The Polish Mieszko began his reign in c. 960 A.D., and he was baptized c. 964, and he was probably crowned in c. 970. If the crown was really sent from Rome, then it could be in c. 970 when King Stephen was born and whose father Géza Prince also got the name of Stephen in baptism. Until the end of the 19th century that was not doubt that the Holy Crown is the same which arrived from Rome one-thousand-years ago. On the basis of three, obviously subsequently equipped pictures (Emperor Michael, Emperor Kon (sic!), Turkish King Geobitzasz), which are on the lower part of the crown, some people assumed that the lower part of the crown was created after King St. Stephen, and the origin of the upper part is surrounded by much more guesswork.[4] Some researchers of the crown believe that the type of so-called closed crown (kamelaukion) was used and worn first time by the Byzantine Comnenos Imperial family in the 11-12., and the Hungarian kings only imitated that form by the joining the „lower crown" and „upper crown".[5]

Many things contradicts this „deconstructive" theory. First of all, the earliest known kamelukions were made of textile and merely decorated with metal fibers and some pearls or gems. It is unlikely that a copy of a textile cap will be made of gold with mostly cloisonné (including pictures of St Kozma and Damjan) and richly decorated with pearl ropes. Secondly, Patriarch Michael Anchialos encouraged the Byzantine Emperor Manuel Byzantine in 1166 to occupy Fehérvár (the city where the Holy Crown was preserved) and obtain the Holy Crown.[6] However, it is unlikely that the Byzantine emperor would have wanted a war in order to acquire the imitation of his own crown. There is therefore no real evidence that the Holy Crown as an object did not exist or could not exist in the 10th century. It is also a huge mistake that the closed crown appeared first time in Byzantium in 10-12th century by the Komnenos dynasty. In the western culture circle (and presumably in the whole world) the first known representation of the closed crown turns up in 6th century A.D. coin[7] of the Italian king, Theodahad. This crown is just as cross-strapped, closed crown like the Holy Crown, and the pearls are well visible on it. The latter fact also makes the crown of Theodahad similar to the Holy Crown.

Theodahad's crown, which is fairly schematic on his coin, can be connected with the territory of today's Hungary from the historical aspect. Theodorad obtained the Italian throne, in such a way, that his cousin Amalasuntha chosed him for co-ruler.[8] Amalasuntha ruled Italy after the death of her father, Theodoric (Theodoric the Great; reign 475-526), but only as a Regent in the name of her son, Athalarich (516-534; cf name of Attila). After the early death of Athalarich she chose Theodahad for co-ruler in order to consolidate her power.

Two years later, Theodahad allegedly killed Amalasuntha. This was an excuse for Emperor Justinian to intervene in Italy's affairs. After the Commander of Justinian (Belisar) occupied Rome, Theodahad was allegedly killed by his own men. It is certain that Theodahad did not have any interest in killing his cousin. According to some hypotheses, Justinian's Italian legate, Patriarch of Thessaloniki, Peter[9] could have played a part in the events,[10] though it is difficult to dispel the mist over the crime after more than a thousand years. It seems more likely that the murder was committed on the order of Emperor Iustinianus alone to create an excuse for the intervention. Ac-

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[2] Professor Hayashi points out the political significance of the traditions and the symbols. HAYASHI, Kanichi, The local political system and symbolic politics in Japan. *Jogelméleti Szemle* 2017/3. p. 118-125.

[3] KARTHAUZI Névtelen: Bódogságos Szent István királnak innepéről. In. SZIGETHY Gábor (ed.), *István király intelmei*, Budapest, Magvető Kiadó, 1982, p. 63-75. especially p. 69. Karthauzi Névtelen took the history of crown-sending from the St. Stephen-legend of bishop Hartvik (it was written in beginning of 12th century). It is strongly doubted whether the motif of crown-sending was contained in Hartvik's original text or not.

[4] The research in end of the 18th century sought to identify Emperor Michael as Michael Dukas, „Con" as Constantine co-emperor and Geobitzast as Géza I Hungarian king. Éva Kovács and Zsuzsa Lovag's 1980 monograph (KOVÁCS Éva – LOVAG Zsuzsa, *A magyar koronázási jelvények*. Budapest, Corvina Kiadó, 1980.) with Károly Szelényi's excellent photographs made known many details of the Holy Crown for the widest circles of the readers. Thus, it became obvious in this circle that, those three rulers, especially picture of the so-called Michael Dukas, have got on the Holy Crown posteriorly, and so it became incredible and unacceptable the dating of the Holy Crown, because this pictures was considered the most solid point in the crown-dating. (Kovács – Lovag 18.)

[5] KOVÁCS – LOVAG 1980, p. 79.

[6] KOVÁCS – LOVAG 1980, p. 8.

[7] A picture of the coin is available at https://www.cngcoins.com/Article.aspx?ArticleID=194 (downloaded 02. 12. 2018.)

[8] VITIELLO, Massimiliano, *Theodahad: A Platonic King at the Collapse of Ostrogothic Italy*. Toronto, Buffalo, London, University of Toronto Press, 2014, p. 63-64.

[9] VITIELLO 2014, 12.

[10] „According to Procopius, Peter came to Ravenna with Justinian's instructions to confuse Theodahad and the Goths with Theodora's instructions on how to get rid Amalasuintha." Massimiliano Vitiello 100. „And despite the fact that the same Procopius in the Secret History does not know „by what arguments" Peter convinced Theodahad to order the crime, the implications behind the king's act were not entirely connected to Theodora's schemes or Justinian's intention. Theodahad's daily instructions were in primis his own doing, due to the reasons we have mentioned above and perhaps also to humour his wife Gudeliva, who was constrained by the anomalous co-regency to a secondary role in Amalasuinthas shadow." VITIELLO 2014, p. 101.

cording to Procopius Iustinianus hated the name of the name of „Goth" and wanted to erase it from the face of the earth.[11]

It is an important and interesting fact that Amalasuntha's father, Theoderic, was born in the kingdom of Huns, in Valcum (today Fenékpuszta in Hungary), around 453, in the year of Attila's death. Theodore's father, the „gothic" Theudemir (or Thuidemer) was a main responsitory Attila, but after Attila's death - according to the cronicle of Iordanes from 6th century - he got in conflict with the sons of Attila.[12] It should be emphasized that Iordanes asserts, that Goths originated from Scandinavia, and he writes that they settled in the Black Sea region, which is traditionally a Scythian-Hun sphere of influence. According to Iordanes, here the Goths have become dependents on Huns.

After the death of Attila, the Byzantine Emperor, Leó I. refused to pay the tax for the remnant of the Hun Empire. After this Theodoric's uncle ravaged Illiricum. When he concluded peace with Byzantium, Theodorik came in Byzantium as the hostage of the peace. When Theodoric became an adult, he conquered Italy on the basis of the mandate of the new Byzantine emperor, Zeno, and Theodoric ruled it as a monarch until his death, till 526.

An interesting datum emerges from this age, which is remarkable from the iconographical aspect relating to the age of the Holy Crown. Theoderic and Amalasuntha donated a part of the Romulus's temple and the Biblioteca Pacis for Pope Felix IV. in 526. These were united and converted into a basilica by the Pope, and were dedicated to St. Cosmas and Damian. According to the tradition, the miraculous healing of Emperor Iustinianus was attributed to these two saints and built a basilica in Kyrhos for their honor.[13] The same saints are also included among the pictures of the Holy Crown, though their honor was later resumed only in the 15th century again, and the beginning of the reverence started from the age of Emperor Theodosius in the 5th century Bc. The origin of the Holy Crown, on the one hand, is uncertain, but nothing precludes its existing in the 5. or 6. century, and the assumption, that it could be connected with Attila too.[14]

3. The nature of the power of Steppean rulers and the Holy Crown

The serious respect of the Hungarian Holy Crown is difficult to understand by rejecting the concept of Hun-Hungarian continuity. We must also know that, the rule of Attila was thought by the Huns as celestial. Chinese sources mention that King of Huns, T'ou-man was considered to be the „Son of Heaven"[15], and Attila was also called „Heaven's Son".[16] This title is similar to the title of the Chinese Emperor (Son of heaven, tience, 天子, from about the 11. century B.C.), which means also a celestial mandate,[17] and also similar to the title of the Japanese Emperor (Tenno; Son of Heaven, 天皇, from the 7th century A.D.).[18]

The word of „tien" and „ten", which mean heaven or sky, likely could be related to many Central Asian concepts. the Mongols call the „good forces" as „tengri"-s, their representants are the gods of the Sky, the Sun[19], the Moon, the Turkish peoples honored „Tengri" (Heaven/Sky), the main god, the „top of the world", where the Sun and the Moon are born every day[20], the Sumer's eight-star signs „dingir" or „an", which mean god or heaven/sky.[21]

The word „Isten" (God) in the Hungarian language presumably also preserve the old „Ten" concept, and the word „sea" in Hungarian refers to the lower waters, the sea, opposite the heavenly waters (sky). This sense of the word also appears in the Huns. Indeed, the meaning of the upper and lower waters is connected each other too. One of Attila's sons was called Dengizik. As Gyula Német writes: „Tengiz or dengiz means sea and wind from the sea in Turkish language. (This word is equal with the Hungarian „tenger" (sea), but the sea is from the Bulgarian-Turkish language, where is „r" in place of „z".)"[22] It is an interesting fact, that on the highest cloisonné-picture of the Holy Crown, next to head of the God astral symbols appear: the Sun (star?) and the Moon.

The celestial mandate of the Chinese emperor is expressed by the belief, that the loss of the heavenly trust become obvious for everyone by natural or social disasters.[23] Chinese sources

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[11] BOKOR János, Bevezetés Iordanes A gótok eredete és tettei című művéhez. In IORDANES, *A gótok eredete és tettei* (Középkori Krónikások, szerkeszti Dr. Gombos F. Albin) Brassó, Brassói Lapok, 1904, p. 5-21. especially p. 17.

[12] IORDANES, *Getica*. Budapest, L' Harmattan, Budapest, 2004, p. 96. (LII. 268-270.)

[13] ZALA Mária (ed.), *Szentek Lexikona* (translated: Bangha Katalin; lectored and completed Hungarian version: Dr. József Török József). Budapest, Dunakönyv Kiadó, 1994, p. 205. (Original German publication: JÖCKLE, Clemens: *Lexikon der Heiligen*. I. P. München, Verlagsgesellschaft, International Publishing, 1994.)

[14] On the basis of the archeological findings of the Carpathian Basin and South Ukraine, Lajos Csomor believes that, the applied goldsmith technique on the Holy Crown originated from the age of Huns, it is at the latest from the end of 5th century. MAJER Tamás, A Szent Korona egyik története: örmények és hunok készítették? (interjú Csomor Lajossal) *FEEOL Fejér megyei hírportál* 2018. 01. 14. (downloaded 04. 04. 2018. https://www.feol.hu/kozelet/helyi-kozelet/szent-korona-egyik-tortenete-ormenyek-es-hunok-keszitettek-2189073/

[15] DÜMMERT Dezső, *Az Árpádok nyomában*. Budapest, Panoráma,1987, p. 42-43.

[16] VÁCZY Péter, A hunok Európában. In NÉMETH Gyula (ed), *Attila és hunjai*. Budapest, Magyar Szemle Társaság, 1940, p. 61-142., 117.

[17] DAWSON, Raymond, *A kínai civilizáció világa*. Budapest, Osiris, 2002, p. 20-25.

[18] See also DULL, Jack, *The Evolution of Government in China. Heritage of China: Contemporary Perspectives on Chinese Civilization*. Berkeley, California, University of California Press.1990, p. 59.

[19] HUNYADY László, *A világ vallásföldrajza*, Budapest, Végeken Kiadó, 1995, p. 58.

[20] HUNYADY 1995, p. 59.

[21] ROAF, Michael, *A mezopotámiai világ atlasza*, Budapest, Helikon – Magyar Könyvklub, 1998, (DEZSŐ Tamás transl.) p. 70.

[22] NÉMETH Gyula, A hunok nyelve. In NÉMETH Gyula (ed.): *Attila és hunjai*. Budapest, Magyar Szemle Társaság, 1940, p. 217-226. 224. http://mtdaportal.extra.hu/books/nemeth_gyula_attila_es_a_hunjai.pdf (downloaded 02. 12. 2018.)

[23] DAWSON 2002, p. 20-25.

have noted about Oriental Huns, that their kangans ensure harmony between mankind and the universe. If this disintegrated, the catastrophes occur.[24] This Eastern form of domination is therefore not unlimited, just as the Hungarian royal power is not. This view is alien to the nature of the absolute monarchies in the West.[25]

It seems problematic that the pictures of the Hungarian Holy Crown, except for the astral references, are linked to Christian sacrality. However we must also know that the European Huns around 400 A. D. were in close contact with Christianity, so their sacred ideas were filled with Christian contents. The bishop of Tomi and Scythia province, Theotimus reported that, the Huns regarded him as the „god of the Romans from sky"; St. Jerome's (390-430 AD) writes in a letter that the Huns are studying The Psalms, according to Theodoretos, the Scythians (Huns) at the Danube are thirsty for salvation, Johannes Chrisostomos (398-403 A. D.) sends missionaries to them; Orosius counts the Huns among the converted nations around 417 A. D.[26] Taking these into consideration, it is not impossible at all that, the Holy Crown was made in the Hun Empire about 450 A. D., and after Attila's death it came to Italy by Theoderic. By accepting this assumption, the tradition gains deeper meaning that the Hungarians are entitled to Holy Crown.

The medieval European and Hungarian chronicle traditions regarded the Hungarians as a Hun-successor people and talk about their re-entry to Pannonia (Hungary).[27] This is supported by the latest genetic researches.[28]

4. An ancient Hungarian constitutional institution

At Anoymus (end of the 12th century), the arrival of Hungarians was preceded by the blood oath (blood contract).[29] The conclusion of an alliance in which the seven tribes' chief agree on the following. The leaders of the tribes and their descendants will always choose prince from the seed of Álmos, the leader of the Megyer tribe. What they gain, they all share. The electorate and their offspring will never be kept out of the council of leaders and the country's functions. The elector, or his offspring, who is unfaithful to the prince, or who provocates conflict between the prince and his relatives, will get death penalty. If any of the descendants of Álmos or the electorate want to break the sworn agreement, he will be damned perpetually.[30] The curse - as a special sanction - expresses the sacred, transcendent nature of the choice of prince, showing similarity to the sacred character of the Hun Royal function.

These rules (around 870/890. A. D.) can be considered one of the oldest known layers of the Hungarian constitution. The later coronations and the royal oath on the retention of the old liberties, essentially mean strengthening the ancient treaty. With the introduction of the coronation habit, the Holy Crown becomes the symbol and embodiment of the ancient constitution. As the Holy Crown stands above the king and the nobility, as the contract is above the parties of the contract. King St. Stephen in his moral advices for his son, lists, who are supporters of the king and crown and what virtues the king must possess. At the end of advices, he writes, among other things, „All what we have been said, composes the royal crown..."[31] Thus, in the interpretation of King St. Stephen, the Holy Crown, therefore, is a different entity from the king and the nation, and the ruler must become worthy of that.

According to István Werbőczy (who summarised the Hungarian law in 16th century), the right to the legislation was in the hands of the „captains" and the prince before Christianity.[32] With the inclusion of Christianity, all this has changed in such way that, the rights to legislation, to the giving of donations, to the jurisdiction, to the governance have been transfered on the crown,[33] but the king exercises his right to legislation in agreement with the nation.[34] The Holy Crown-doctrine is a specially modern idea, which has sharply distinguished the state and the ruler, and even applied the division of powers, although not along the power branches.

The Golden Bulla (1222) is also a confirmation of the old freedoms. According to this the nation has the right to resist

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[24] VÁCZY 1940, p. 61-142. 113.

[25] As Professor Mitoma points out, in the history of Japan, the emperors were rather spiritual governors than „dictators".„All over the world, it is not rare to distinguish power from authority. In Japan, while the emperor was the highest authority on spirituality, the political power was held by the Fujiwara family (Heian Period, 1794–1185), the shogunate (1192–1868), and the Meiji Restoration leaders (Meiji Period, 1868–1912). In general, the emperors have continued as religious-spiritual authority without seeking worldly power. The family tree of the Japanese Imperial Family dates back to the mythological age. Japanese Emperors have been akin to priests who prayed to the gods during the mythological age. The political leaders took official jobs within the central government. But, decision-making is neither an act of the leaders nor of the political fixer." MITOMA, Tamio, Japanese Behavioral Patterns and Groupthink. *Jogelméleti Szemle* 2017/3. p. 134-139. 138.

[26] VÁCZY 1940, p. 61-142. 128.

[27] KÁLTI Márk, *Képes Krónika*. Budapest, Osiris Kiadó, 2004, p. 26. (about 1360)

[28] BOLDOGKŐI Zsolt, According to geneticists the acestors of the conquerors were Huns and their language may have been Avar. *hvg.hu* 2017. szeptember 26. http://hvg.hu/tudomany/20170926_magyar_ostortenet_honfoglalas_hunok_avarok_nyelve_magyar (downloaded 02. 12. 2018.)

[29] Whether is no archeological evidence that the so called „blood oath" or „blood contract" was concluded, but Hungarian cronicle tradition containes it. This circumstance incite some researchers to state that, as a consequence the „blood contract" can not be a source of the Hungarian constitution as well. That is a huge theoretical and methodological question, whether the all historical statement needs archeological evidences, or is it enough if the unbroken historical and public legal traditionto support that. While we have no common opinion in this fundamental issue, we can hypothetically accept the statements of the chronic tradition.

[30] ANONYMUS, *Gesta Hungarorum*. Budapest, Magyar Helikon, 1977, p. 83.

[31] ISTVÁN, István király intelmei (De institutione morum ad Emericum ducem, c 1013.). In Szigethy Gábor (ed.): *István király intelmei*. Budapest, Magvető Könyvkiadó, 1982, p. 9-22. 22.

[32] WERBŐCZY István, *Tripartitum*. Budapest, Téka Könyvkiadó, 1990, Második rész (Part two) 3. cím 1. §, p. 283.

[33] WERBŐCZY 1990, p. 283. (Második rész 3. cím 2. §)

[34] WERBŐCZY 1990, p. 283. (Második rész 3. cím 3. §)

against the tyrannous ruler, which is a more modern sanction than the „everlasting curse" (in the blood oath). King Louis the Great reinforces the Golden Bulla in 1351 and explicitly states the principle of „one and identical nobility/liberty".[35] The noble estate could not be sold before too, and there were two kinds of inheritance. The ancient, originally acquired estate could be inherited within the genus. The estate received from the king for the military service only came from a father to a boy, and in the absence of a boy the estate returned to the Crown. The Act of 1351 declares that all of estate is ancient (aviticitas). So, all the estate could be inherited within the genus and was not be sold.[36] The institution of „aviticitas", which existed until 1848, effectively defended living conditions of the nobility and indirectly of the peasantry: the ancient estates were not obtainable for the debt, interest and usury. This served long-term family, national and community interests.

The tolerance and the patience have hade a great importance in Hungarian public legal thinking. According to St. Stephen's moral advices, the patience and true judgment are the fifth ornament of the crown.[37] This is not expressly religious tolerance, but obviously this means that too. This is indicated by the unperturbed presence of muslims and Israelites. Article 24 of the Golden Bulla in 1222 prohibited for them the public office, especially the wearing of financial offices, but did not contain any more severe provisions. However, the necessity of this provision points to the conditions that existed actually before. For comparison, it is worth mentioning that I. Edward banned Jews from England in 1290 after confiscating their property. Among other things, the principle of tolerance of the Holy Crown has allowed – althougs within certain limits[38] – to declarate of the principle of religious freedom in 1568 in parliament of Torda. For a comparison it should also be mentioned that, in France, thousands of Huguenots (protestants) was massacred with the knowledge of the Catholic King on the night of 23/24 August 1572 (St. Bartholomew's Night), and in England only 121 years later, in 1689 have been accepted the Toleration Act.

Patience, however, meant respect for the identity of other ethnic groups in the country, as they also live under the rule of the Holy Crown. This aspect of the Holy Crown-doctrine is related to the old Hun state concept. As Váczy writes: „An ancient rider-nomadic state-wisdom is that, should not humiliate the beaten opponent, but sould be make it companions. The Huns were thinking so too."[39] As the Germans could choose their own king under the rule of Attila, the Croats have had own prince (so called „bán") under the Hungarian kings.

Thus, the freedom, solidarity, religious and ethnic tolerance had a top priority among the values of Hungarian public law. These values, as we see, were characteristic of the steppe empires, and in the Hun empire there was an unknown the religion wars and the exploitation of the people. It is typical that a Greek merchant, who got captive in 441 at Viminacium's siege, after having redeemed himself he stayed in the Hun Empire, because he considered his destiny better than his previous life.[40] The living conditions were better in the Hun Empire, than in the Roman Empire, and this fact is supported by modern archeology. Namely, on the basis of Pannonian (Hungarian) bone-findings, the people fed more well better in the Huns' time than in under of Roman Empire.[41]

The reason for this was fundamentally that, the land was not a commodity in the steppean empires (so in the Hun Empire neither), but it was regarded a precondition for community existence. One of the main problems of the antique states was that, the treatment of land as a commodity, and in this context, the emergence of the debtor-slavery. This led to the incredible wealth differences and misery. According to the Hungarian Holy Crown-doctrine, the Holy Crown is the owner the territory of the country. The Hungarian language therefore insisted for a thousand years the the phrase of „land-holder", and not used the therm of „land-owner".

However, this point of the Holy Crown-doctrine did not necessarily evolve in Europe. This is an ancient social experience that has already been recognized by Asian Huns, and which have became part of the Holy Crown-doctrine around 1000 A.D. According to an ancient legend, when Mao-tun became the leader of the Asian huns in 3th century B.C., the neighbor nation, Tung-hu demanded the horse of Mao-tun's father. Counselors of the Prince resisted. The prince, however, issued the horse for the tung-hu, saying that a good neighborhood is worth more than a horse. When the Tung-hu demanded the prince's wife, the counselors were even more outraged, but Mao-tun again gave out that. The Tung-hu demanded thirdly the uninhabited land between the two countries. The uncertain advisers tended to fulfill the claim, saying that abandoned land can be given. The prince, however, was angry. „Land? Land, the

[35] HÓMAN Bálint – SZEKFŰ Gyula, *Magyar Történet.* II. kötet. Budapest, Királyi Magyar Egyetemi Nyomda, 1936, p. 204.
[36] HÓMAN– SZEKFŰ 1936, p. 203-204.
[37] ISTVÁN 1982, p. 16.
[38] It is true, the parliament of Torda in 1568 not generally declare the principle of religious freedom first time in the world, because this legal norm was accepted relating to certain churches (Roman Catholic, Lutheran, Calvinist and Unitarian Church), but it was a great step towards the recognition of this important principle.
[39] VÁCZY 1940, p. 124. This attitude characterized Attila too. As Iordanes writes about the great king of Huns: „His thinking was prudent, he softened towards who begged, and who have got once in his trust, he showed good emotion for him." IORDANES 2004, p. 96. (XXXV. 182.)
[40] VÁCZY 1940, p. 97-98.
[41] This is supported by recent research by Susanne Hakenbeck. KAPLAN, Sarah, Ancient Romans depicted Huns as barbarians. Their bones tell a different story. Washington Post 22. 03. 2017. https://translate.google.hu/translate?hl=hu&sl=en&u=https://www.washingtonpost.com/news/speaking-of-science/wp/2017/03/22/ancient-romans-depicted-huns-as-barbarians-their-bones-tell-a-different-story/&prev=search; see also http://www.cam.ac.uk/research/news/tiller-the-hun-farmers-in-roman-empire-converted-to-hun-lifestyle-and-vice-versa (downloaded 02. 12. 2018.)

country's foundation? Never! „He cried, and with his blood-thirsty army, he went against the Tong-hu.[42]

Probably, this is the earliest known wording of such idea, which led later to the quality of the Holy Crown's principal owner. Some views emphasize that, in England and France the crown began to appear as the owner of the royal estates in 13th century. However, here two things have to be pointed out. On the one hand, the Hungarian Holy Crown is not only the owner of the royal estates, but the owner of the territory of the country, and all the people as compared with the Holy Crown are only holders and not owners. On the other hand, in the 10th and later centuries Hungary was probably an example for England and France, on the basis of its strong central power and its solid state territory. As a reminder, the in 11th England suffered the Norman conquest (1066), and the power of the French kings do not extend beyond Paris (so called „Il de France) for some centuries.[43] Everything, which precedes these times in these countries, disappear in the mists of the legends. It should be emphasized that, the crown-property did not have antique Roman-Greek antecedents, so the Western monarchies could not take over that from there, however, as we have seen, there was such an antecedents of that in the steppean state thinking, namely in eastern kingdom of Huns.

5. Concluding Thoughts

In Hungary the 19th century brought significant changes. Within a few decades, it had to get from the feudal circumstances to the capitalist conditions. This meant not only technical modernization, but also serious social crises and significant social polarization. The medium of the 20th century brought a radical, formal and legal breaking with the millennial past in the countries. The great task for the 21th century that, we bring the technical modernity into harmony with our general welfare program and with our ancient traditions, that have preserved us for more than a thousand years. It is a good sign that the Hungarian Fundamental Law, which was created in 2011, again mentions the Holy Crown, which expressed, apart from the freedom, a special harmony of interests and values at all times.

[42] LIGETI Lajos, Az ázsiai hunok. In NÉMETH Gyula (ed.), *Attila és hunjai.* Budapest, Magyar Szemle Társaság, 1940, p. 31-60. and 39-40. See also ISHJAMTS, N., Nomads in Eastern Central Asia. In: HARMATTA, J – PURI, B. N. – ETEMADI, G. F. (eds) History of Civilizations of Central Asia: Volume II, The Development of Sedentary and Nomadic Civilizations (700 B.C. to A.D. 250). Delhi: UNESCO Publishing, 1999, p. 151–170. 153-154. see also https://en.unesco.org/silkroad/sites/silkroad/files/knowledge-bank-article/vol_II%20silk%20road_nomads%20in%20eastern%20central%20asia.pdf p. 146-164. and 149-150. (downloaded 02. 12. 2018.)

[43] Alldough we have no direct scientific evidence of the statement that Hungary was the example for England and France, but we can suppose this on the basis chronologic and logic consideration.

The History of the Hungarian Social Security Regulation until the Present Day

Árpád Olivér Homicskó *

Abstract

In my study I would like to present the History of the Hungarian Social Security System's development from the beginning till nowadays. The Hungarian social care system is built up of social security and other social care institutions. The theoretical basis of social law is the approach that the main requirement of the individual's subsistence is the continuous reproduction of resources. The essence of social care is that in case of subsistence problems the existence of the individual should be ensured. In the era of subsistence problems goods necessary for everyday livelihood should be ensured from sources other than individual production activities. An important part of this is making proper reserves, which may help surviving such situations. In different historical periods reserve making was diverse, its management was different in different times, but the need to institutionalise this procedure only emerged in the new era, with the establishment and spread of the capitalist production method. The features of the Hungarian workers' and social security system may be well shown by the development of the related legal regulations. In Hungary the origins of the social security system operated by the state may be found in the last decades of the 19th century, and are based on German and Austrian example.

Keywords: *Social security system; Accident insurance; Old age pension; medical care; child-raising allowance; Hungary.*

I. The History of the Hungarian Social Security System's development from the beginning till 1891

The evolution of the Hungarian labor- and social security system can be well traced by the description of the development of the legal regulations. The beginnings of the state operated social security system in Hungary – following German and Austrian examples – reaches back to the last decade of the 19th century. The development of the institutions of social care has begun in Hungary in the Middle Ages in the towns and industrial areas. In feudal Middle Ages caring for the poor was primarily the task of the family, relatives, towns, the communities of certain occupations or different bodies of the society (the church, charity organizations etc.). The regulation of the issue of the beggars was important to the enlightened absolutistic state primarily for police considerations. The first measures in caring for the poor that suggest the involvement of the state emerged in this era in Hungary. The system of social security primarily protected people free in their persons but employed in a dependent status.[1] Health and accident insurance among traditional mine workers was separated from the general worker- and social security – in the beginnings due to the elevated risk of the work, in the 19th-20th century for political motives.[2] The self-help endeavors of the miners started parallel with the capitalist transformation of mining, with the appearance of hired labor. There were organizations supporting miners even in 1224, and later in the mines of the Thurzós and the Fuggers from the Saxon town in Szepesség. Aid was their typical form of care, and its source was collected from alms given in compassion. Their donations were similarly ad-hoc and not regular. It gave them the opportunity to support one another in the case of loss of capacity to work, until regaining it, however, due to the ad-hoc nature of donations it was erratic, causing uncertainty. The concept of rights and claims was unknown.

A more progressive solution was the organization of the so called "mining-society-chests". The purpose of these chests was regular social benefit to those working in the mines (and their relatives), they became common practice first in the 18th-19th century only. Their mandatory organization was ordered in 1778 in the mines of the state's treasury. The organization of the chests became compulsory in the privately-owned mines from 1854.[3] Industrial workers were setting up laborers' associations on voluntary basis with the purpose of taking care of fellow workers in the case of sickness. The so-called specialized associations movement started in the 19th century and within its framework not only professional (tinman, shoemaker, hearth-maker, railway worker, wheelwright, prospector etc.) but areal and general health-support funds, associations and orga-

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1 Czúcz Ottó: Szocális jog I. UNIO Lap és Könyvkiadó. 2003. p. 63-64.

2 Homicskó Árpád Olivér: A magyar társadalombiztosítás szabályozásának alakulása 1950-ig. In: Acta Universitatis Szegediensis Acta Juridica et Politica, Tomus IV. Fasciculus 9. (Tóth Károly editor). Szeged, 2004., p. 283.

3 Homicskó. ibid. p. 284.

nizations emerged (e.g. First Hungarian General Female Health Support Association or the General Laborers' Health Support and Disabled Fund).[4]

Thus, in Hungary the preludes to the social security system were the mining-society-chests, the voluntary support associations and the company funds. The mining-society-chests gained strength at the end of the 15th century and the beginning of the 16th century. Such chests were created by the voluntary decision of the employers and employees, they were governed on an autonomous basis, and their financial fundaments were the levies collected from the miners and the contributions paid by the employers. This was the first health-care law in Hungary that raised sickness benefit to state level. It set out that the health support funds shall serve the function of providing aid. The protected persons were those falling under protection and the persons becoming protected by voluntary consent. Even though only a few articles of Act XVII of 1884 the so-called Industry Act set out rules on the insurance of laborers and journeymen, its provisions qualify as significant steps on progressing from laborers' insurance to the social security system.[5] The Industry Act regulated that among others it is the task of the association of craftsmen to set-up aid funds.[6] The setting-up of the funds were to be decided by the majority of the journeyman on the meeting convened to elect the journeyman members of the conciliation panel. On the basis of this decision the craftsmen and journeymen members of the conciliation panel decided on the charter of the aid fund in a meeting convened and chaired by the commissioner of the industry authority.[7] These charters were to set out from which funds and contributions the aid fund is to be created, and in which cases were the journeymen entitled to aid, as well as the highest amount of aid a journeyman may have claimed.[8] The contribution the journeymen were obliged to pay could not be more than 3 percent or their weekly wages. This levy was to be collected and paid by the craftsmen to the aid fund weekly. The craftsmen had to contribute to the aid fund as well for each of their journeymen, however, on the basis of the charter such contribution could not exceed one third of the levy to be paid by the journeymen.[9] In the case of scheming for lock-out the aid fund was not to hand out aid to the journeyman participating in the scheme – with the exception of justified sickness – during the lock-out.[10] Craftsmen and journeymen participated in even numbers in the operation of the aid fund. The chairman of the management committee of the aid fund was the chairman of the association of craftsmen.[11] The aid funds could not have been regarded as cooperatives.[12]

II. The History of the Hungarian Social Security System's development from 1891 till 1950

The elaboration of the state operated social security system commenced by Act XIV of 1891 on aiding industrial and factory workers in the case of sickness. On the basis of the legal regulation the following funds were tasked with supporting the ill:

1. district sickness benefit funds;
2. sickness benefit funds of employees of corporations and factories, including the sickness benefit funds of transportation companies;
3. sickness benefit funds of employees of construction companies;
4. sickness benefit funds of the associations of craftsmen
5. mining-society-chests;
6. voluntary mutual sickness benefit funds.[13] As regards the evolution of social security the next step was Act XIX of 1907 on the healthcare of industry and commerce employees in the case of sickness and accident, the most important element of which – from the subject point of view of this paper – was that it created the insurance for occupational accident for the first time in Hungary.[14] The purpose of the insurance was to reimburse the damage resulting in injury or death, caused by the occupational accident to the insured person. For accidents resulting in physical injury, the insured person was entitled to the following benefits:
   1. free medical care, medicine, medical accessories – starting from the eleventh week following the accident;
   2. benefit for the term of the loss of capacity to work or reduced capacity to work, starting from the eleventh week, or if the payment of the sickness benefit ceased earlier, then from the date of the ceasing of the sickness benefit payment.[15]

The next important stage was Act XXI of 1927 on the compulsory sickness and accident insurance.[16] This act further extended the personal scope of those covered by the compulsory insurance. It further strengthened organizational centralization and increased the sphere and amount of benefits. In the case of sickness medical care was due from the first day of sickness for a year and even after that for the period of the sickness benefit. The patient was entitled to medicine, health spa, hermal water

[4] Homicskó. ibid. p. 285.
[5] Homicskó ibid. p. 285.
[6] Art. 126 (d) of Act XVII of 1884 on the Industry Act.
[7] Art. 142 of Act XVII of 1884 on the Industry Act.
[8] Art. 142 of Act XVII of 1884 on the Industry Act.
[9] Art. 143 of Act XVII of 1884 on the Industry Act.
[10] Art. 144 of Act XVII of 1884 on the Industry Act.
[11] Art. 145 of Act XVII of 1884 on the Industry Act.
[12] Art. 146 of Act XVII of 1884 on the Industry Act.
[13] Homicskó. ibid. p 290., moreover Art. 28 of Act XIV of 1891 on aiding industrial and factory workers in the case of sickness.
[14] Dr. Homicskó. ibid p. 295.
[15] Art. 70. of Act XIX of 1907 on the healthcare of industry and commerce employees in the case of sickness and accident.
[16] Homicskó. ibid p 306.

care and the medical accessories needed (e.g. glasses, abdominal belt, hernia truss, wound dressing, crutch, orthotic insole and other less expensive medical accessories) from the first day of the sickness for one year and event after that for the period of the sickness benefit. The patient was entitled to sickness benefit if the sickness caused loss of capacity to work and it lasted for more than three days, calculated from the fourth day of the incapacity to work. Provided that the incapacity to work lasted, the benefit was due from the first day of the incapacity to work for one year at 60% of the insured person's daily average of the actual wage or daily average wage.

Medical care, medicine, health spa, thermal water and the necessary medical equipment could be prescribed to the family members from the first day of the sickness for one year. Pregnant patients were entitled to the necessary obstetric and medical care, pregnancy benefit for the last six weeks of the pregnancy in the full amount of the insured person's daily average of the actual wage or daily average wage. The confinement benefit was awarded from the day of giving birth for six weeks in the full amount of the insured person's daily average of the actual wage or daily average wage. Nursing benefit was due for twelve weeks following the termination of the confinement benefit to those insured women who nursed their children, in the amount of 60 Fillérs per day. On the basis of the above legal regulation obstetric assistance and medical care, moreover pregnancy benefit for the last four weeks of the pregnancy, the confinement benefit for six weeks following birth and the nursing benefit for twelve weeks following the ceasing of the confinement benefit were due to the wife of the insured person as well. The wife was entitled to the pregnancy and confinement benefit in the amount of 40 Fillérs daily and the nursing benefit in the amount of 30 Fillérs daily. Funeral benefit was due in the amount of thirty times of the insured person's daily average of the actual wage or daily average wage.[17]

The next significant step is connected to the retirement benefit scheme, it was included in Act XL of 1928, and covered compulsory insurance for old age, disability, widowhood and orphanhood.[18] The same companies were obliged to provide insurance in the case of old age, disability, widowhood and orphanhood, that were covered by the scope of the sickness insurance obligation, with the exception of the state, the municipalities, the offices of the cities and towns and the institutions, agencies, companies and factories financed or operated by them. Those entitled to be covered by voluntary sickness insurance could be insured voluntarily in the case of old age and disability as well, irrespective of sex and nationality. On the basis of the act four types of benefits were awarded: old age benefit, disability benefit, widowhood benefit and orphanhood benefit. There were three conditions for the payment of the benefit for each type: existence of the insured event (old age, disability, death) expiry of the waiting period and the integrity of the entitlements (right to compensation for service), meaning that if in either year the contribution was paid for less than 13 weeks, the entitlement of the insured person lapsed. For the purpose of the old age benefit the age limit of retirement was set to be 65 years of age. A person was considered disabled if he/she lost 2/3 of the capacity to work (for those under the remuneration levels) or half of the capacity to work (for those above the remuneration levels). The waiting period for the entitlement to old age pension was 400 weeks and for the rest of the benefits 200 weeks of contribution. The old age and the disability benefit consisted of 2 parts, a benefit body (fixed amount) and a progressing benefit (proportionate to income).[19]

Act XII of 1938 introduced compulsory old age insurance for economic workers. A person was considered male economic worker, if he reached 18 years of age and fell under the insurance obligation for old age. The insurance was managed by the National Agricultural Insurance Institute. On the basis of this act economic workers were those falling under the scope of Act II of 1898, meaning: unskilled workers, day laborers, forestry workers and day laborers, tobacco gardeners, economic domestic workers, mechanic temp workers, and those employed at water associations (embayments) or the ministry of agriculture for works in their own management, provided that they did not fall under the scope of a separate legislation (retirement rules for associations) for the purpose of old age benefit and/or insurance.[20] The scope of compulsory insurance did not cover those economic workers who were owners of such lands the straight cadastral income of which was exceeding 20 Koronas and its area two cadastral acres, those whose other income usually exceeded the income from the employment as economic worker, the spouses, relatives in the ascending or descending lines, adopted children, step-children, siblings of the employer and the spouses of either of the aforementioned persons, provided that they lived in the same household with the employer. The same applied to those enjoying old age benefits on the basis of the act or other legislation and those who could not reach the waiting period even by reaching sixty-five years of age – or in case of fire-fighters sixty-three years – and calculating the relevant years, unless he/she requested to be included in the compulsory insurance scheme.

On the basis of this piece of legislation the services of the insurance were old age benefit and death benefit. A person was entitled to old age benefit if he/she reached the age of sixty-five – in case of fire-fighters sixty-three – and had a waiting period of at least fifteen years, provided that his/her benefit reserves were not transferred to another institute. The old age benefit consisted of a benefit body, an auxiliary benefit body and a progressing benefit. The death benefit was due in the case of the death of the person entitled to old age benefit and in the case of the death of a person not entitled to old age benefit, who reached the fifteen years of waiting period and even without the latter, in the case of the death of a person who had for him/her yearly fifteen weeks of contribution paid up in the

[17] Art. 30-31 of Act XXI of 1927 on compulsory insurance for sickness and accidents.
[18] Homicskó. ibid. p. 312.
[19] Homicskó. ibid. 313.
[20] Art. 2 of Act XII of 1938 on the compulsory old age insurance for economic workers.

five year preceding his/her death in at least two calendar years on the basis of the insurance obligation. Following the expiry of the compulsory insurance the person whose main occupation continued to be economic work could pursue the payment of the insurance voluntarily (voluntary continued insurance). However, the person who entered into an employment (service) relation that was covered by the scope of other type of social security legislation on old age insurance could not continue his/her insurance by voluntary continued insurance. On the basis of the act the employee covered by compulsory insurance could increase his/her old age benefit by voluntary payments (voluntary surplus insurance). Act XVI of 1939 was linked to this legislation, which provided for the benefits to the widows of the economic employees insured under Act XII of 1938. On the basis of this act, the widow of the economic employee could become entitled to widowhood benefit if she reached sixty years of age and the waiting period of fifteen years had already lapsed for her deceased husband or he was entitled to old age benefit. The widowhood benefit was paid by the National Agricultural Insurance Institute as a service of the compulsory old age insurance branch. The amount of the widowhood benefit was half of the old age benefit the deceased husband was entitled to or was his future entitlement.

The woman who married a man entitled to old age benefit or who was married to her husband for less than two years or who – as decided by a final court judgement – willfully caused the death of her husband was not entitled to widowhood benefit. However, the widow was entitled to widowhood benefit even if the marriage lasted less than two years, if a child was born from the marriage or the husband legalized his child born out of wedlock by the marriage. The woman legally divorced from her husband without remarrying or who lived separated from her husband for over a year immediately before his death was only entitled to widowhood benefit if she received alimony from her husband or the final judgement of the court obliged the husband to pay alimony. If there was a widow entitled to the widowhood benefit as well as a divorced wife entitled to the benefit, the widowhood benefit was divided between them equally. The payment of the widowhood benefit was suspended if the widow remarried. If the remarried widow became a widow again, and she was entitled to the widowhood benefit with respect to the husband who died later as well, the benefit with the higher amount was payable to her and the payment of the benefit with the lesser amount was suspended.

An important stage in the history of the Hungarian social security was Act XXXVI of 1938 on the child-raising allowance of industrial (commercial), mining and metallurgy employees.[21] Child-raising allowance was due to day-laborers, laborers, attendants (non-commissioned officers), moreover – with the exception of the commercial journeyman – to industrial journeyman and other employees, with respect to their own or their spouses' children, whether legal or legalized, adopted or born out of wedlock, if he/she was obliged to support the child and provided for the child's support. Child-raising allowance was due to the grandparent obliged to support the child, if the grandparent supported the child. Only one person could claim the allowance for the same child for the same period, in the case of married couples living in the same household, primarily the husband.[22] The entitled person in an employment relationship had a claim for the child-raising allowance from the point in time when the provisions of the act became effective regards the relevant employer pursuant to the implementation regulation. Otherwise the child-raising allowance was due from the first day of the next month following the commencement of the employment. The father could only claim child-raising allowance for his child born out of wedlock if he recognized the child as his own, this was entered in the civil register and he provided for the support of the child. In this case the allowance was due from the first day of the next month following the registration of the recognition into the civil register.[23]

The child-raising allowance was monthly 5 Pengős for each child. For the coverage of the child-raising allowance the industrial (commercial) as well as the mining and metallurgy companies were obliged to pay to the family fund the amount determined by the multiple of the average headcount of the previous year of the day-laborers, laborers, attendants (non-commissioned officers), moreover – with the exception of the commercial journeymen –industrial journeymen and other employees and the contribution unit, quarterly, until the fifth day of the first month of the quarter, in equal portions, in advance. For late payment of contributions, late payment interest was due. However, it was not allowed to subtract the contribution and the late payment interest from the wage.[24] The family fund paid the child-raising allowance to those entitled monthly – possibly via the Hungarian royal post office savings bank. The surplus from the contributions remaining after the payment of the child-raising allowance was paid by the professional family fund to the National Industrial and Mining Family Fund.[25] The professional family funds set-up with the competence for certain branches of the industry (commerce), mining and metallurgy were responsible for determining the entitlement to the child-raising allowance, for the payments of the child-raising contributions and the child-raising allowance.[26] The professional funds were legal persons. The head of the fund was the board of directors.

The members of the board were appointed by the relevant minister, from the relevant employers and employees and other professionals in one-third proportions for a period of three years. The relevant minister had the right to remove the members of the board before the expiry of the three-year term. Their

[21] Act XXXVI of 1938 on the child-raising allowance of industrial (commercial), mining and metallurgy employees.
[22] Art. 1 of Act XXXVI of 1938 on the child-raising allowance of industrial (commercial), mining and metallurgy employees.
[23] Art. 2 of Act XXXVI of 1938 on the child-raising allowance of industrial (commercial), mining and metallurgy employees.
[24] Art. 7 of Act XXXVI of 1938 on the child-raising allowance of industrial (commercial), mining and metallurgy employees.
[25] Art. 8 of Act XXXVI of 1938 on the child-raising allowance of industrial (commercial), mining and metallurgy employees.
[26] Art. 10 of Act XXXVI of 1938 on the child-raising allowance of industrial (commercial), mining and metallurgy employees.

positions were honorary. In order to maintain the financial balance of the professional family funds, to supervise the operations of the professional and company family funds and to perform the tasks of the professional family fund with respect to the employees transferred to it, the National Industrial and Mining Family Fund was set-up with its seat in Budapest.[27] The National Industrial and Mining Family Fund was supervised by a supervisory board.[28] The supervisory board oversaw the daily operations and upon the request of the minister for industry, commerce and transportation it gave its opinion and had the right to put forward proposals on issues related to the child-raising allowance to the minister for industry. The daily operations of the National Industrial and Mining Family Fund were run by state officers and other employees. The daily operations were managed by the director.[29] The social security system in Hungary between the two World Wars definitely followed the Prussian patterns, however no insurance scheme for the unemployed was put in place.

Due to the war operations system set-up on 1 September 1939, the social-policy development of Hungary halted with its participation in WWII. As the war progressed most of the social-policy achievements were suspended.[30] The devastation of the war caused the destruction of 45% of the national assets in Hungary. The country lost 30% of its industrial productive capacity. In 1945 a mere 10% of the factories operated.[31] One-fifth of the reserve assets from the retirement contributions was invested in real estates (healthcare facilities, apartment houses) one out of ten of those was destroyed or perished. 20-25% of the reserve assets kept in cash lost its value and the remaining 50-60% of the assets extended as state and public loans could be considered as reserve only formally. The headcount of the insured (contribution paying) individuals decreased to one-third and the willingness to pay was minimal, inflation depreciated the amounts paid.[32] On its meeting on 22 December 1944 in Debrecen, the temporary National Assembly set-up the Ministry of Welfare. It was responsible for caring for the poor, the refugees, providing for the prisoners of war and those deported returning home, it was responsible for housing issues, social security, child protection, care for war victims and healthcare administration. The organization and tasks of social policy administration was regulated by Regulation No. 6300/1945 ME.[33] By adopting the 3-year plan in 1947 Hungary entered the path of the planned economy.[34] It was considered the social welfare task of the 3-year plan through the healthcare and social policy bodies to assist in a regulated manner those unable to provide for themselves without social care due to sickness, age, war injury or loss of their provider.[35] The centralization of the different institutions of social security began in 1948. By Law Decree 36 of 1950 social security became controlled by the unions and the Social Security Center of the Unions was established. The budget of social security became a separate appropriation within the central budget. The government declared transition from the entitlement coverage scheme to the pay-as-you-go scheme in old age insurance from 1 January 1947.[36]

III. The History of the Hungarian Social Security System's development from 1950 till nowadays

From the 1950 s the socialist state on the economic basis of the principles of socialism and society ownership was being formed.[37] The care of the socialist state covered services to the workers in the case of sickness, which the state furnished to the worker from the national income, irrespective of the amount and quality of the work done, for the purpose of providing livelihood.[38] In the socialist era the majority of the economy became state-owned, and it was established that the social policy of the socialist state is inseparable from the socialist labor law, occupational safety and it is intended to be implemented within this scope.[39] Regarding the pension scheme the main steps of development after 1950 were the following: Law Decree 30 of 1951 (the first uniform pension law), Law Decree 28 of 1954 (the second uniform pension law) and Law Decree 40 of 1958 (the third uniform pension law).

Act II of 1972 on Healthcare prescribed that medical care and curative-preventive services are due to all residents of the country on the basis of citizenship, and so from then on healthcare services became benefits due as subjective rights and the right to treatment was no longer based on an insurance relationship. The social security services were regulated thereafter in a uniform way, in a code by Act II of 1975, this was necessary for the consolidation of all social security rules previously adopted. The act covered four insurance branches, thus regulated sickness and maternity services, child support benefit, retirement benefits and accident benefits. Childcare benefit was introduced by Decree 3/1985 (I.17.) MT in Hungary. In 1989 so-

[27] Art. 16 of Act XXXVI of 1938 on the child-raising allowance of industrial (commercial), mining and metallurgy employees.
[28] Art. 17 of Act XXXVI of 1938 on the child-raising allowance of industrial (commercial), mining and metallurgy employees.
[29] Art. 19 of Act XXXVI of 1938 on the child-raising allowance of industrial (commercial), mining and metallurgy employees.
[30] Csizmadia Andor: Általános szociálpolitikai tevékenység (szociális gondoskodás) néhány elvi kérdése és történeti vázlata, 1963, Budapest, Fővárosi Nyomdaipari Vállalat, p 45.
[31] Csizmadia Andor. ibid. p. 49.
[32] Homicskó. ibid. p. 315.
[33] Csizmadia Andor. ibid. p. 50.
[34] Csizmadia Andor. ibid. p. 55.
[35] Csizmadia Andor. ibid. p. 56.
[36] Homicskó. ibid. p. 316.
[37] Csizmadia Andor: Az általános szociálpolitikai tevékenység /szociális gondoskodás/ története és elvi kérdései /jegyzet/, Fővárosi Nyomdaipari Vállalat, Budapest, 1961. 5-6.
[38] Csizmadia Andor. ibid. p. 6.
[39] Csizmadia Andor. ibid. p. 58.

cial security was separated from the central budget. In 1990 the child support benefit – that until then was regulated within the framework of social security – became a benefit due as subjective right, and its place in the social security scheme was filled with healthcare services on social security basis. In 1991 decision was made on the municipal administration of social security. A new system for occupational policy was introduced by Act IV of 1991 on advancing employment and on the unemployment benefits. In 1993 Act III of 1993 on social administration and social benefits was adopted – which act is considered the basis of the Hungarian aiding system. In 1997 social security municipalities were terminated and the new foundation of the post-transition social security scheme was laid down. In this framework Act LXXX of 1997 on the persons entitled to social security benefits and private pensions and the coverage of said services, Act LXXXI of 1997 on social security pension, Act LXXXII of 1997 on compulsory private pensions and private pension funds, and Act LXXXIII of 1997 on compulsory health insurance benefits were adopted. The next year Act LXXXIV of 1998 on supporting families was introduced.

An act adopted by the Parliament in 1997 established the fully-funded pillar, at the same time maintaining the decisive role of the pay-as-you-go pillar, and limiting the bearing of the fully-funded pillar to the fourth of the pension scheme – expressed in deposits. In the compulsory fully-funded pillar the persons newly entering the labor market (from 1 July 1998) had to participate unconditionally, the rest of the employees had the opportunity to decide whether they wanted to change to the new fully-funded pillar or remain in the old scheme. Following multi-stage changes the compulsory two-pillar pension scheme returned to a one-pillar scheme between 2010-2012. In 2012 in principle – with some exceptions – retirement before the age limit ceased to exist. As a result of the changes the Hungarian compulsory pension scheme became a one-pillar scheme in 2012. The private pension scheme continues to operate on a voluntary basis.

Another major change of 2012 was the termination of managing disability risks with the tools of the pension scheme. This benefit system became part of the health insurance scheme. These changes – among other goals – are primarily meant to provide for the long-term sustainability of the pension scheme. Sustainability is becoming of utmost importance due to the epical demographic progression, the low number of children born and the increase in life expectancy. In Hungary the age limit for old age pension was permanent for a long time, 60 years of age for men and 55 for women. In the first half of the 1990 s, decision was made on the progressive increase of the age limit for old age pension and uniformization between the two sexes, on the basis of which the age limit for men increased in 1998 and in 2000 with 1-1 year, thus reaching 62 years of age. The age limit for women was increased by 1 year in every other year until 2008. Parallel to the increase of the age limit the so-called flexible retirement scheme was introduced. It meant that persons with long occupational service records could claim the so-called early retirement. The precondition for the early retirement to apply were 60 years of age for men upon its introduction as well as in 2011, and for women 55 years up until 2000, which increased to 56 in 2001, 57 in 2003 and by 2009 it increased to 59; the first age group of women for the rules to apply was born in 1952. Starting from 2008 the act determined another condition for claiming early retirement and reduced amount early retirement: the claimant had to terminate his/her legal relationship serving as a basis for the insurance.

From 1 January 2010 the termination of the legal relationship serving as a basis for the insurance is not only a precondition for claiming early retirement, but in the case of old age pensions for reached age limit and exceeding it as well. This condition applies to those in a relationship in the EEA states and in states with bilateral agreements with Hungary. The theoretical starting point of the change in 2012 was that from 2012 it is not possible to claim old age pension before reaching the age limit. There is one permanently remaining, systematical exception: old age pension without any age limit for women, introduced in 2011 for those, who have a so-called eligible occupational record of at least 40 years. The early old age pensions awarded before 2012 for the persons not reaching the age limit until 1 January 2012 – for a temporary period until reaching the age limit – were transformed into social benefit. Their amount remained unchanged and the rules on the regular increase of pensions apply to them as well. However, the person receiving this benefit was not considered retired until reaching the age limit, meaning the he/she is not entitled to certain allowances applicable to pensioners. Upon reaching the age limit, these so-called pre-age limit benefits "retransform" to old age pensions. In the first half of 2009 the Parliament adopted an act on increasing the age limit for old age pension from 62 to 65 years of age, and on the progressive increase of the age requirement for early retirement to 63 years of age, starting in 2012. As a rule of thumb increase means an increase by a half year for each vintage year of birth. The payment of the old age pension to persons who have not reached the age limit and the payment of the social benefit transformed for pre-age limit pension shall be suspended if the income reached in a calendar year in excess of the benefit exceeds 18 times the minimal wage. The suspension expires at the end of the calendar year and recommences in January of the next year. (In the case of social benefits from the pension awarded before 1 January 2008 the above rule applies to the income achieved after 1 July 2012). After reaching the age limit achieving income along with the pension is not sanctioned. Pension and social benefits introduced after 2012 are tax free.

As of 1 January 2012, the Hungarian benefit scheme for the disadvantaged and disabled workers was transformed. The possibility of awarding disability pension ceased. The new rules are included in Act CXCI of 2011 on the benefits to disadvantaged and disabled workers. The Parliament adopted a law already in 2007 on the rehabilitation based on enhancing remaining abilities and reintegration into society of those who suffered health related harm and on supplementary income for the period of rehabilitation. This was Act LXXXIV of 2007 on rehabilitation benefits, starting the transformation of the disability benefit scheme in Hungary. Health related harm meant – considering the body as a whole – adverse change in the structure or functions of the body due to sickness, injury or congenital malfor-

mation. The person was entitled to rehabilitation benefit, who suffered health related harm of 50-79 percent, and related to the harm, without rehabilitation, he/she was incapable to be employment in his/her current or previous (before the harm) job and/or in a job matching his/her qualifications, did not pursue income generating activities or his/her income, salary was at least 30 percent lower than the average of four months of income or salary before the health related harm, moreover he/she was considered fit for rehabilitation and achieved the period of occupational service record matching his/her age.

The relevant provisions of Act LXXXI of 1997 on social security pension regarding the period of occupational service record for disability pension had to be applied mutatis mutandis on the determination and verification of the period of occupational service record necessary for the entitlement, however the period of disability pension, accident-related disability pension had to be taken into account when calculating the period of occupational service necessary for the entitlement. The amount of the rehabilitation benefit – irrespective of private pension fund membership – equaled 120% of the disability pension (disability group III). The minimum amount of the rehabilitation benefit equaled 120% of the minimum amount of the disability pension (disability group III). The person entitled to rehabilitation benefit was obliged to cooperate with the state occupational body for the success of the rehabilitation, where a written rehabilitation agreement had to be concluded between them and the person had to perform those set out in the rehabilitation plan, which formed an annex to the rehabilitation agreement. The rehabilitation agreement included the statement of the person receiving rehabilitation benefit that he/she undertakes to comply with the cooperation obligation and accepts the appropriate workplace offered as well as the free of charge training opportunities. Moreover, it included the independent forms of seeking employment by the person receiving the benefit, and the rehabilitation services to be provided by the state occupational body to those receiving the rehabilitation benefit, the regularity of check-ins by the person receiving the rehabilitation benefit at the state occupational body as well as the forms of contact. Rehabilitation benefit could be awarded from the day the conditions for the benefit occurred, but no sooner than the day the claim was submitted. Rehabilitation benefit could be awarded for the period necessary for rehabilitation, but for a maximum of 3 years. If the benefit's period of less than 3 years had expired but the rehabilitation was not yet concluded, the period could be extended once, for the purpose of successful rehabilitation however, the full period could not exceed 3 years even in this case.

On the basis of the changes in 2012 the previously awarded disability pensions transformed into healthcare benefits – either disability of rehabilitation benefit. The – from 2012 – newly awarded rehabilitation benefit – meaning the benefit not transformed from the disability pension – is subject to pension insurance contribution, thus its payment term is calculated into the length of the period of occupational service of the old age pension. The changes made in the social- and healthcare schemes gradually terminated the form of benefit introduced in 2008 for the disadvantaged and disabled workers, meaning the rehabilitation benefit. Starting from 1 January 2012 this benefit is not awarded any more.

Healthcare insurance was laid new foundations by Act LXXXIII of 1997. Act CLIV of 1997 (Healthcare Act) served as important background legislation to the above. From the point of view of providing healthcare services Act II of 2000 on independent medical services was an important milestone. Pursuant to the act family medical services – including pediatric medicine – and dental services have to be provided within the framework of the independent medical services. The act sets out the principle of area-based care and independent medical services are regulated among primary care services.

The adopting of Act CXVI of 2006 regulating healthcare insurance supervision was linked to the private healthcare insurance planned to be introduced in 2008. As a "whereas" to the privatization of healthcare insurance it was established that the vulnerability of the players of healthcare, including the patients and the workers is getting stronger, and thus their discontentment is increasing and their trust in the system is decreasing. At the same time the currently existing healthcare system is unable to effectively exploit the economic opportunities, corruption and gratuities show a growing trend. The Hungarian healthcare system does not provide for the possibility to empower – in a regulated manner – patients to pursue individual claims, self-care and individual responsibility indispensable to health. The direct state-controlled system is unable to react to the new requirements of the era, the changed healthcare needs of the aging society, the exploding expansion of the curative techniques and the cost of their application, the fast and spontaneous growth of the private healthcare market induced by the increasing, health-conscious individual needs. Therefore, the act on private healthcare insurance would have had the purpose of creating a legal basis for the modern and effective healthcare and healthcare insurance system. The act would have decreased the state's role as operator and service provider – without limiting its responsibility in community healthcare – and at the same time would have increased the state's role as transparent and neutral regulator and controller.

The act regulated the common decision scheme of the stakeholders for the purpose of reducing state bureaucracy and prevailing the rights and responsibilities of the players. In order to protect the insured, the act would have prescribed a strict quality control system and would have provided for its compulsory framework. The right of the insured to make informed decision would have been guaranteed by the act by prescribing the publicity of healthcare data and quality indicators. The act would have given space to a regulated market in the sphere of which the insured could have decided on the level of self-care according to their individual values and could have chosen from among the higher quality services corresponding their needs. Thereby the act could have induced such a competition among healthcare insurance companies and healthcare service providers where the source of financial success does not mean more patients, but better health and efficient, successful curative help. Besides maintaining the solidarity-based social security system, the goals were to create the opportunity for the implementation of self-care needs, the expansion of responsibil-

ity and freedom of decision for the participants of healthcare and decreasing and progressively eliminating the inequalities in the healthcare system by balancing and coordinating public and private investments. The concept of creating private healthcare-funds would have been based on the principles of a nationally uniform social security scheme. Beside the primary responsibility of the funds, the underlying responsibility of the state regarding financial coverage for securing the benefits would have been implemented under the conditions set out in the act.

The principles of national risk-sharing, insurance and solidarity would have remained. Regarding the establishment of the funds there were three model possibilities. The 1st "areal" model would have split the country into 6-8 contiguous areas of roughly the same size, and split Budapest into the same amount of areas. The funds would have received at a draw two areas, one rural and one in Budapest. The 2nd "leopard print" model would have split the regions into 6-8 contiguous areas and at the draw each insurance company would have received one piece from each region. The 3rd "striped" model would have split the country into 3 big (vertical) stripes and the draw would have allocated 2-2 funds to each stripe that would have competed for the given area. Even though the act was adopted twice by the Parliament (following the first vote the President sent the act back to the Parliament, and the Parliament voted in favor of it for the second time as well) due to the social referendum, it never entered into force.

The Last Three Decades of Capital Punishment in Hungary: The Process of Abolition between 1961 – 1990

Zoltan J. Toth *

Abstract

The present paper reviews the course by which capital punishment has been abolished in Hungary during the late state socialist era. In the first chapter, it introduces the regulations of the first complete Hungarian Criminal Code (Act no. V of 1961) following Code of Csemegi with which, after a one-and-a-half decade interval of extraordinary penal law, the consolidated criminal law have come to prevail again. In the second chapter, it analyses the modifications that was introduced into the Hungarian legal system by the legislator in Act no. IV of 1978 (Hungary's previous penal code) as regards of the death penalty. In the end, in the third and last chapter, this essay reviews the measures and process by which capital punishment has ceased to exist in Hungary for good and all.

Keywords: *Capital punishment/death penalty; criminal law; abolitionism; era of state socialism; Hungary.*

1. Capital Punishment in the 60's and 70's

The year of 1961 was not only a turning point in the history of criminal law in Hungary because extraordinary jurisdiction was terminated once and for all this year,[1] but also because after 80 years (following the Code of Csemegi)[2] the second coherent and comprehensive Criminal Code (Act no. 5 of 1961) of Hungary was created[3], which now (for the first time in the history of Hungary) regulated the full range of crimes (including crimes against the state and military crimes).[4] This comprehensive nature also meant that with the entry into force of the new Criminal Code (with one exception)[5] all those legislations were overruled, which pronounced certain conducts punishable in separate laws, and also set out criminal sanction for any act, while after this, with the exception of the Criminal Code, substantive criminal legislation was never again constituted in Hungary.

The new Criminal Code, due to the circumstances of the period, did "naturally" know the death penalty (Article 35(1)), but never ordered it as an absolute sanction. For every special case that involved the death penalty for its execution, the alternative

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1 For the history of capital punishment in Hungary, see, e.g.: Tóth J., Zoltán: A halálbüntetésre vonatkozó anyagi jogi szabályok a feudalizmus Magyarországán. (Substantive criminal regulations in Hungary during the feudalism.) Jogtörténeti Szemle, 2007/4., pp. 30-50.; Tóth J., Zoltán: A halálbüntetés írottjogi szabályozása Magyarországon a felvilágosodástól a Csemegi-kódexig. (Staturoy regulation of capital punishment from the Enlightenment to the Code of Csemegi.) De Iurisprudentia et Iure Publico, 2008/3., pp. 81-101.; Tóth J., Zoltán: Rendkívüli büntetőjog és halálbüntetés az 1910-es évek Magyarországán. (Extraordinary criminal law and the death penalty in Hungary in the 1910 s.) Themis, June 2007., pp. 49-62.; Zoltán J. Tóth: Statutory Regulation of Capital Punishment in Hungary during the Horthy Era and World War II. Journal on European History of Law, Vol. 6, 2015, No. 2, pp. 23-28.

2 The Act V of 1878 on the Hungarian Criminal Code is widely known as Code of Csemegi. This denomination refers to the name of the main codificator of this act, Károly Csemegi, the famous criminal lawyer, who was state secretary and Member of Parliament at the time of the codification.

3 This course of creation resulted in a rather long process. In 1950 already, at the establishment of the General Part of the Criminal Code, there was a need for a brand new criminal code containing the rules corresponding to the spirit of socialism, however, the process of creating the new codex only began in 1953, when Decision no. 514/15/1953 of the Council of Ministers provided to set up a government committee led by the Minister of Justice, for the establishment of the socialist Criminal Code. The committee started its activity in January 1954, but their work was interrupted for one year by the events of 1956. The first draft was finally completed by June 1959, and following the comments made by the requested experts, a new committee of theoretical and practical lawyers completed the second revised version in 1960. This draft was subjected to a public debate by Government Decision no. 3131 of 1960, and by considering the ascertainments and using the results of this debate, the Minister of Justice presented the final version to the Parliament. [Cf.: Békés, Imre: A magyar büntetőjog fejlődése (The history of the criminal law in Hungary), p. 45. In: Békés et al.: Magyar büntetőjog (Hungarian penal law), BM Könyvkiadó, Budapest, 1980, pp. 34-38.]

4 The law was published on December 22, 1961, and entered into force on July 1, 1962 by Law-Decree no. 10 of 1962.

5 The only exception was Act no. 7 of 1945, more precisely, PM Decree no. 81 of 1945 (February 5) signed into law by the law, and some of its provisions on war crimes and crimes against the people remained in force with the comment that the original forced labor for life and life imprisonment, would no longer be applicable. (Law-Decree no. 10 of 1962 Article 2(3)).

punishment was imprisonment from ten up to fifteen years.[6,7] The Criminal Code argued for the justification for the most severe sanction in a very similar method to that of the General Part of the Criminal Code, namely: "Socialist criminal law, for theoretical reasons in perspective, advocates against death penalty. However, as long as there is a direct and indirect harmful effect of the capitalist environment, a state building socialism can not lack the most severe tool of criminal law."[8] The same conclusion is drawn in the preamble when it discusses the purposes of punishment. Based on Article 34 of the Criminal Code "the purpose of the punishment is to apply the penalty set out by law for the crime in order to protect society, to improve the behavior of the offender, and to prevent the members of society from committing crimes". The ministerial reasoning explains all these as follows: "If the purpose of punishment is not only retaliation, but also correction, the proposal may only apply exceptionally retaliatory punishment…" However, "among the act endangering society… there are those the abstract danger of which, makes threatening by death penalty justifiable, considering the significance of the legal interest that needs to be protected. These legal interests are the state (our social, political and economic order), the life, the social property, as well as the discipline and fighting capacity of the armed forces. Therefore, the proposal recognizes death penalty as a form of punishment. However, when imposing penalty, when it comes determining the degree of danger of the specific crime to society, it sets out for the judge: <<death penalty… can only be imposed if the purpose of punishment can not be achieved with another punishment>> (Article 64(2))."

The exceptional nature of capital punishment was, in principle, applicable to several levels as well: in the regulation of Article 64 cited above as justification, which urged the judge to ponder the aggravating and attenuating circumstances,[9] and allowed imposing such a sanction only if it was the exclusive way of fulfilling the purpose of the punishment (general prevention and, thus, the protection of society)[10]; in the formulation of certain specific partial facts that regulated death penalty as an alternative punishment without exception (alternatively with imprisonment of 10-15 years); in the right to modify death penalty to imprisonment of up to 20 years, as an act of mercy (Article 36(4)); and in the provision that "death penalty may only be imposed on a person who had reached the age of twenty when the offense was committed"[11] (Article 36(1)).[12] Finally, we have to mention in the context of the General Part the limitation of the punishability of the crimes punishable by death, as well as the limitation of the enforceability of the imposed death penalty, both of which periods were provided as twenty years (Article 31(a) and Article 58(1)(a)).

The Special Part of the Criminal Code of 1961 set out[13] death penalty as an imposable punishment for 31 crimes[14]: 9 of these were crimes against the state, 2 crimes against humanity[15], 12 military crimes and 8 common crimes. Accordingly, crimes against the state (Chapter 9) should be punished by death if those are considered[16] certain cases of

[6] The Criminal Code did not recognize life imprisonment (with one exception); the ministerial reasoning explained this by the fact that if the offender could not be improved, the offender would have to be condemned to death as an exceptional punishment, but if the offender could be improved, it would be unjustified to deprive the offender of his/her freedom for the rest of his/her life. (This is also the reason why the Criminal Code usually did not include punishment for an undetermined period.) Even in the case of aggregated and cumulated sentence, the law (Article 37) provided twenty years as the maximum period of imprisonment, and it also set out twenty years for the cases when death penalty was modified due to mercy (Article 36(4)). The only exception in which life imprisonment (as an intermediate alternative between 10-15 years of imprisonment and death penalty) was among the special factual situations of the Criminal Code, was one of the cases of mutiny, set out in the second phrase of Article 316(4).

[7] The Criminal Code, similarly to the General Part of the Criminal Code, did not distinguish between the different types of imprisonment, therefore, imprisonment (or "custodial sentence" as worded in the special part) had to be applied for everyone (which did not mean that prisons could not or did not use different rules on those who committed different crimes regarding their method of detention and guarding, their possibilities to act within the prison, etc.).

[8] Detailed reasoning for Article 36

[9] "The punishment, by considering its purpose (Article 34), should be imposed under the conditions set out by law in a way that it remains consistent with the danger to the society imposed by the crime and the offender, the degree of guilt, as well as other aggravating and attenuating circumstance." (Article 64(1))

[10] As it can be seen from the wording of Article 34, special prevention in not generally assumed by the Criminal Code among the purposes of punishment, but it merely aims to valorize one of its modes, the so-called "moral education", that is the correction of the offender (but not the deterrence, the so-called "legal education" of the offender, nor rendering the offender harmless; the latter one can only be deduced from the purpose of the indirect protection of society in the context of individual prevention, while the latter is only considered by the Criminal Code from the aspect of general prevention.

[11] This provision, however, did not apply for the people qualifying as soldiers (see Article 103(3)).

[12] Even more specific rules apply to juveniles than this provision; who had already reached the age of sixteen, but not the age of eighteen, could be sentenced to imprisonment of maximum ten years, while those who had already reached the age of fourteen, but not the age of sixteen, could be sentenced to imprisonment of maximum five years (Article 93); and, of course, no other legislation could impose more severe penalties to juveniles. (If we compare these conditions of punishments with the Hungarian law in force, we can see, somewhat surprisingly, that the Criminal Code of 1961 set out much lighter punishment for the crimes committed by juveniles than the present criminal code).

[13] The delimitation of crime and offense still does not exist, therefore, I will avoid the use of these *termini technici* in respect of Act no. 5 of 1961, except for when the Criminal Code itself (showing some inconsistency) uses the term "offense" as the synonym of "crime".

[14] Since the use of the death penalty, as stated earlier, was never mandatory, we have to ignore the reference to the fact that a total of ten years to fifteen years of imprisonment could be imposed on the person committing all facts as an alternative punishment (instead of death penalty).

[15] The meanings of the concept of "*humanity*" or "*humanité*" included in the Criminal Code of 1961 and of 1978 did not conform to the category of "humanness" used today and generally accepted as its correct, but they used the concept of "humanity" as the totality of the peoples of the Earth.

[16] Conspiracy is an activity "aiming to overthrow, undermine or weaken the state, social or economic order of the Hungarian People's Republic" (Article 116(1)).

conspiracy;[17] the qualified cases of rebellion[18;19] damage resulting serious disadvantages, committed during the war[20] (Article 124(2)); destruction resulting in particularly serious disadvantages, committed by endangering the public during the war[21] (Article 125(2)); assassination;[22] high treason with serious consequences, by making use of state service or official mandate, committed during the war[23] (Article 129(2)); supporting the enemy;[24] the qualified cases of committing espionage;[25] and all these acts even if they were not committed against the Hungarian People's Republic but another socialist state.[26] Those who committed crimes against humanity (Chapter 10) would also have been sentenced to death if they were guilty of the qualified cases of the offences of genocide[27] or war atrocity[28], however, no such acts were carried out in Hungary, fortunately, neither under the Criminal Code of 1961, nor the current one.

The Criminal Code provided death penalty for 12 types of military crimes (Chapter 17). Such sanction could be applied for crimes against the obligations of military service if those were considered absconding during the war[29] (Article 312(2)(b)), cases of absconding abroad,[30] and the delict of "abdication from performing military service"[31] (Article 315(1)). Among the factual situations of insubordination, certain cases of mutiny[32] could be punished with capital sanction;[33] the offender of "insubordination to order" who disobeyed the war command out of service commands (Article 317(3)); and the offender of "violence against the superior and environment of service"[34] who committed this crime in a war situation, and also carried

[17] The initiator and leader of the conspiracy could be punished with death if they committed another crime in connection with conspiracy, which was punishable by imprisonment of more than eight years if the conspiracy seriously endangered the state, social and economic order, and if the conspiracy was committed armed or during the war (Article 116(3)). The same sanction could have been applied to the participant or supporter of the conspiracy "if the offender committed another crime in connection with conspiracy, which was punished by law with imprisonment of more than eight years" (Article 117(3)).

[18] In accordance with Article 120(1) of the Criminal Code, rebellion is committed by someone "who organizes or leads a civil disturbance aiming to overthrow or weaken the state or social order of the Hungarian People's Republic".

[19] Thus, rebellion was punishable by death if it led to the serious disturbance of public order, and if it was committed armed or during the war (Article 120(2)).

[20] In accordance with Article 124(1), the delict of damage was committed by someone "who, in order to undermine or weaken the state, social and economic order of the Hungarian People's Republic, with their activity related to their official duties, services or public services, as well as by the failure to comply with or inadequate performance of their obligations, causes a significant disadvantage".

[21] The person "who, in order to weaken the state, social and economic order of the Hungarian People's Republic, destroys, renders unusable or damages public utility, a facility of production, public transport or communication, public building or edifice, stock of production or crop, war material or other property with the same importance", commits the crime of damage against the state (Article 125(1)).

[22] Death penalty can be imposed for assassination on a person "who kills a member of state body, a person in a leading position at a state body or social organization for their activity carried out in the interest of socialism" (Article 126(1)), and who causes lethal bodily injury to one of such people (Article 126(2)).

[23] High treason is committed by the Hungarian citizen who, "in order to violate the independence, territorial integrity, political, economic, defense or other important interest of the Hungarian People's Republic, interacts, forms an alliance or cooperates with a foreign government or foreign organization, or their agent" (Article 129(1)).

[24] "The person who, during the war, in order to weaken the military force of the Hungarian People's Republic, interacts with or helps the enemy, or causes disadvantage to their own armed force or the ones belonging to their allies, can be punished with imprisonment of ten up to fifteen years or death penalty." (Article 130(1))

[25] The person "who obtains, collects or discloses data that can be used to the disadvantage of the Hungarian People's Republic, in order to provide them to a foreign government, foreign organization or the agent of these" (Article 131(2)), is punishable by death if they committed the crime in relation to state secrets, regularly, as the member of a spy organization or during the war (Article 131(3)).

[26] Crimes against other socialist state (Article 133 of the Criminal Code)

[27] Article 137(1): "The person who, in order to partially or completely exterminate a national, ethnic, racial or religious group, a) kill the member of the group, b) forces the group into living conditions that threaten the group or some it members with destruction, c) takes measures that aim to prevent births within the group, d) drags away the children of the group to another group, can be punished by imprisonment of ten to fifteen years, or death penalty."

[28] The offenders of "war atrocity" were those "who during the war, by violating international legislation, treated inhumanly defenseless civilians, refugees, the wounded, the sick, members of the armed forces who had already laid down their arms, as well as prisoners of war" (Article 139(1)). This act was punishable by death if the crime caused death (Article 139(2)).

[29] Absconding is committed by the person "who in order to abdicate from performing military service, deliberately leaves or stays away from their station" (Article 312(1)).

[30] Accordingly, death penalty could be imposed on the person who deserted abroad armed, together with other soldier, by making use of their actions of service or during the war (Article 313(2)).

[31] According to Article 315(1), this crime is committed by the person "who, by mutilating their body or damaging their health, make themselves completely unable of performing military service, and who, in order to abdicate from performing military service, feigns illness or uses other fraud".

[32] According to Article 316(1) mutiny is committed by the person "who, together with more soldiers, is involved in an open opposition to the service order of their superior, or against service order or discipline in general".

[33] Death penalty could be imposed on the initiator, organizer and leader of mutiny if the resisting had particularly serious consequences (Article 316(3)(a)); on the participant of mutiny, who, through his acts committed during the mutiny, caused the death of someone or had other particularly serious consequences (Article 316(3)(b)); on any offender of the mutiny during battle (a simple participant as well), and on the initiator, organizer and leader of mutiny committed during the war, who, during the mutiny, committed a violent act against a superior or another person opposing the resisting (Article 316(4)).

[34] This factual situation is carried out by someone "who uses violence or threatens of doing so, or shows physical resistance against a superior, guard or other environment of service" (Article 318(1)).

out intentional killing with this act (Article 318(4)). Death penalty was imposed for two crimes of service: the (deliberate) violation of the instructions of the guard,[35] if that was committed in battle, and it resulted in a specifically great disadvantage (Article 326(3)), and the (deliberate) violation of the rules of standby duty,[36] under the same conditions (Article 327(3)). Finally, the crimes threatening fighting capacity could have been punishable by death as well, in the case of "misconduct on behalf of the commander in battle";[37] the delict of "abdication from performing battle obligations"[38] (that is the factual situation named "cowardice" at the time); the classified cases[39] of endangering of battle station;[40] and it could be imposed on the offender of violence against a military attaché who killed the military attaché or their accompanying person (Article 338(2)).

Lastly, we may divide common criminal offenses punishable by death into two groups. One of the groups (the smaller) includes the offences that are directly or indirectly against human life (or the important personal assets/physical integrity, freedom, etc. of others), while the other group includes the actions that primarily attack and endanger social property as a particular form of property in socialism. The previous category may include, on the one hand, killing, the legal subject of which is directly the human life, and the classified cases of which[41] may be punishable by death, on the other hand, the classified cases[42] of prison mutiny[43], the offender of which attacks directly the social interest related to the order of prison and detention (executing the punishment imposed on criminals), while also endanger indirectly life, freedom, etc.

The other category only includes action that violate the existing order or property and the socialist form of collective property. The explanation of this particular protection was formulated in the ministerial reasoning of the Criminal Code: "In the process of building socialism, the assets under social property have a special role. The social property of productive assets ensures production without exploitation, socialist accumulation, expanded reproduction, and the production of consumer goods in a quantity that allows for the distribution of consumer goods based on the laws of socialism, and later communism; the social property of consumer goods, beyond the distribution of the goods based on the laws of socialism and communism, allows for the proportionate distribution of national income for the construction of socialism."[44] As a result, the Criminal Code of 1961 did not consider threatening with death penalty serious, because it classified these acts that damage social property as the most dangerous act given the nature of protected legal interest, by placing them on the same level, from the aspect of their abstract danger, with the crimes against the state, life and military crimes, as we have seen. Thus, Article 295(3) of the Criminal Code imposed death penalty as an alternative sanction (in addition to the "regular" imprisonment of ten to fifteen years) on theft,[45] embezzlement,[46] fraud[47] and misappropriation[48] damaging social property[49] if the offender committed

[35] The violation of the instruction of the guard is committed by the person "who violated the general or extraordinary provisions related to the performing of service during guard service" (Article 326(1)).

[36] According to Article 327(1), this delict is carried out by someone "who violates the provisions relating to response, police, emergency, courier or other standby services".

[37] Based on Article 331: "The person who, by violating their obligations of commander, a) surrenders or lets to be captured the armed force under his command, b) destroys the battle position, equipment, weapon or other war material delegated to him, or surrenders it to the enemy in a usable state, or c) does not carry out resistance against the enemy to the extent of his possibilities, can be punished by imprisonment of ten to fifteen years or death penalty."

[38] "The person who abdicates from performing battle obligations a) by the arbitrary abandonment, concealment of or running away from their station, b) by deliberately causing, pretending the incapacity to participate in battle or by other deceit, c) by losing, destroying or failing to use their weapon, d) by the arbitrary surrender to the enemy, or e) by other serious violation of their service obligations, is punishable by imprisonment of ten to fifteen years or death penalty." (Article 331)

[39] Accordingly, death penalty could be imposed on someone who endangered the battle station during war or in a situation of battle if the crime caused particularly great disadvantage on service (Article 334(2)).

[40] According to Article 334(1), this crime is committed by the person "who directly endangers the battle station of the force, by neglecting to provide the necessary weaponry, battle equipment or other war materials, or to preserve these stocks, while violating service obligations", as well as by "unlawfully destroying, rendering unusable or withholding in other way from their purpose objects of weaponry or other battle equipment, or other important war material".

[41] All classified cases of killing are punishable by death if they were committed with particular cruelty, premeditatedly, endangering the lives of many, for profit, for other vile reasons and aims, against an official person during or because of their official procedure, targeting multiple people, or as recidivist (Article 253(2)).

[42] Prison mutiny is committed by the prisoner "who, together with others, participates in an open opposition against the order or discipline of the prison" (Article 186(1)).

[43] Death penalty can be imposed, in the first place, on the initiator, organizer and leader of prison mutiny if the opposition had a particularly serious consequence, on the other hand, on the participator of the prison mutiny, whose action during the mutiny caused the death of another person, or had other particularly serious consequence (Article 186(3)).

[44] The foundation of this is provided by the following quote (from the ministerial reasoning as well): "The higher ethical principles in the socialist society, the socialist living conditions require members of society to behave differently than the bourgeois society addresses itself to its members. In the criminal evaluation of certain conducts, these changed higher requirements should be taken into account."

[45] "The person who takes away a foreign property from someone else to unlawfully posses it, commits theft." (Article 291)

[46] "The person who unlawfully takes away or disposes of as his/her own the property entrusted to him/her, commits embezzlement." (Article 292)

[47] "The person who uses deceit, deception, or trickery for unlawful financial gain, and thereby causes damage, commits fraud." (Article 293)

[48] "The person entrusted with the management of foreign property, and who caused damage to this property by violating their obligations resulted from this assignment, commits misappropriation." (Article 294)

[49] According to the provision attached to Chapter 16 of the Criminal Code "the increased criminal law protection for social property includes the assets of the state, the cooperatives, the social organizations and the associations, as well as the foreign properties under their use, treatment or disposition, including the social property of other socialist countries that are on the territory of the Hungarian People's Republic" (Article 311(1)).

these act within a criminal organization or as a recidivist, causing particularly great damage. Article 299(4) provided the same sanction for robbery,[50] if it caused a particularly great damage to social property; finally, under the aforementioned condition, the person committing reckless endangerment[51] was also punishable by death (Article 190(2)(b)).

The substantive regulations of the Criminal Code of 1961 were supplemented by Law-Decree no. 8 of 1962 on the criminal procedure,[52] which, on the one hand, set out the method of execution, enforcing the existing rule that "the death penalty should be executed in a closed space, with a rope or by a firing squad" (Article 309), on the other hand, it provided the regulations of pardon. Among these latter, as the most important warranty provision, it set out that any death penalty can only be executed after the rejection of the petition for mercy, and that the procedure of mercy had to be carried out in all cases (even if the convict did not ask for mercy). With regard to the submission of the petition for mercy and the decree on mercy, the Criminal Code of 1962 did not add a lot to the previous regulation, however, its merit was that, by arranging the chaotic state of the previous years and decades, it cleared and summarized the relevant rules in one singe paragraph. According to this (Article 310), after the final judgment, the president of the judges' council asks the defendant whether he/she wants mercy, and requests from the defense counsel to file a petition for mercy on behalf of the defendant (even in spite or regardless of his/her will). After obtaining the opinion of the prosecutor, the court making the final judgment will take a position on whether the convict is recommended for mercy, and then the Supreme Court (unless they were the ones to make the final judgment) proceeds similarly after asking for the opinion of the general prosecutor, and sends all these recommendations, petitions and opinions together with the case files to the Minister of Justice in order to present them to the Presidential Council of the Hungarian People's Republic.[53] The decision on mercy (regardless of the above mentioned opinions) is made by the Presidential Council of the Hungarian People's Republic itself. If the Presidential Council of the Hungarian People's Republic pardons the person sentenced to death, then, in accordance with Act no. 5 of 1961 Article 36(4), the death penalty is modified to imprisonment of up to twenty years (thus, even of a shorter period); but if it does not pardon the convict, the decision in this regard has to be published by the court in the first instance (even if it did not impose death penalty), in the presence of the defendant, defense counsel and prosecutor in the first instance, and the sentence will be executed on the next day. Another important element of legal certainty was the rule that a decision rejecting mercy could not be communicated to (and death penalty could not be executed on) a pregnant woman and a mentally ill person prior to their "recovery", and death penalty imposed on an absent defendant could only be executed on the basis of a final order concluded during the retrial. (With a slightly different wording, but essentially the same provisions were repeated a decade later by Act no. 1 of 1973 Article 399 on criminal procedure, therefore, since they are in line with the previous provisions, we do not discuss these regulations of the Code of Criminal Procedure.)

However, the Criminal Code of 1961 started to become obsolete over the years, so in the early seventies, a comprehensive reform of the socialist Criminal Code was introduced.[54] From the aspect of our subject, the most important measures of Law-Decree no. 28 of 1971[55] were that the general conditions for the application of death penalty were changed, as well as the fact that certain factual situations of the general part ceased to be punishable by death (however, new crimes punishable by death were introduced). In regard of the general provisions, perhaps the most important change was that life imprisonment was included among sanctions, and it could have been imposed as an alternative punishment when the law, as the punishment for a certain crime, ordered[56] death penalty or imprisonment of ten to fifteen years (or twenty years in the case of aggregated or cumulative sentences)[57].[58] The ministerial reasoning explained this by the fact that there was an irrationally wide gap between the longest period of imprisonment (15, respectively 20 years) and death penalty,[59] therefore, there was a need for an intermediate sanction, which can be imposed on those who seem to be unfit for reintegrating into society, but the possibility of their improvement is not completely excluded, and which can be used as a deterrence beyond individual prevention in order to achieve the general

[50] "The person who unlawfully takes away foreign property by using violence against someone, or threatens the life or physical integrity of someone, or places someone in an unconscious or defenseless state…" (Article 299(1)) "It is considered robbery when the thief caught in act, in order to keep the property, uses violence, or directly threatens life or physical integrity." (Article 299(2))

[51] The crime of reckless endangerment is committed by someone "who causes public danger by arson, causing flood, or by producing the effect of explosive, radiant or other destructive material or energy", and "who obstructs the prevention of such a public danger, or the mitigation of its consequences. (Article 190(1))

[52] The Law-Decree was entered into force by Decree no. 4 of 1962 of the Ministry of Justice (June 14), on July 1, 1962.

[53] The Presidential Council was Hungary's collective presidency during the state socialist era (between 1949 and 1989) which consisted of 21 members (including the president, the two vice presidents and the secretary of this body). It was a common practice that the president of the Presidential Council decided individual cases on the merit in deed, and the other members of the Council only formally signed the resolution.

[54] Cf.: Nagy, Ferenc: A magyar büntetőjog általános része. (Special part of the Hungarian criminal law.) Korona, Budapest, 2001, p. 50.

[55] It was published on November 4, 1971, and entered into force on January 1, 1972.

[56] The term "offense" defined in Act no. 5 of 1961 Article 2(1) was officially replaced by "crime" (see Law-Decree no. 28 of 1971 Article 92(1)).

[57] The unity of imprisonment was also abolished, and it had to be executed, based on the nature of the crime and the conditions of committing it, in maximum security prison, medium security prison or minimum security prison.

[58] Act no. 5 of 1971 Article 91(2)

[59] General reasoning 1(b)

preventive goal of punishment.[60] By introducing life imprisonment, the regulation on mercy was obviously changed as well (Article 36(4) of the Criminal Code); accordingly, from that point on, death penalty could not only be modified to imprisonment of up to twenty years, but also to life imprisonment (depending on the discretion of the Presidential Council of the Hungarian People's Republic). Finally, tightening the penalties applicable for juveniles can also be seen as a substantial modification; in the case of crimes punishable by death penalty, a juvenile who had reached the age of sixteen, but not the age of eighteen, the maximum time of imprisonment became fifteen years compared to the previous ten, and in the case of juveniles who had reached the age fourteen, but not the age of sixteen, the maximum imposable imprisonment became ten years compared to the previous five.[61]

Among special factual situations (only regarding death penalty), there were two significations modifications. The most important of these was the fact that the punishability by death of offences committed against social property was abolished, and the social property as a legal interest protected (with some justified exceptions) ceased to exist in general. Thus, Article 295 on theft, embezzlement, fraud and misappropriation damaging social property was completely annulled by the Novella,[62] while it also abolished the cases of robbery that caused serious damage to social property[63] and reckless endangerment[64] (and, of course, the threat imposed by death penalty).[65] A new factual situation punishable by death was introduced in Article 192 of the codex: the seizure of aircraft.[66] Based on the Novella (and on the Criminal Code after January 1, 1972), this is committed by the person "who unlawfully gains or practices control over the aircraft by violence, threat or placing someone in an unconscious or defenseless state on the board of the aircraft" (Article 192(1)), this act was punishable by death if the offender caused the death of others with this act (Article 192(2)). With all these modifications, after the entry into force of the Novella, the number of crimes previously punishable by death, namely 31, was reduced to 26.

2. The Act no. IV of 1978

In 1978 (as the result of a four-year codification work), instead of piecing out the existing codex, an entirely new criminal code was adopted (Act no. 4 of 1978),[67] which significantly changed the legislation on death penalty. At its entry in force, it set out death penalty (as an alternative sanction) to 26 crimes (Article 38(1)(1)), 9 of these were crimes against the state, 4 crimes against humanity, 10 military crimes and 3 common crimes.[68] Despite the fact that a relatively large number of factual situations included the most serious legal consequence, the preamble of the law did not defy the traditions of decades of the socialist criminal law ideology, and the constant dichotomy of Marxist-based criminal science[69], namely, the permanent difference between the vocal theoretical declarations and real praxis was reflected in Act no. 4 of 1978 as well. Although the preamble acknowledged to a certain extent that the complete elimination of criminality is impossible even in socialism, therefore, the goal may (and should) be to reduce it;[70] however, the

[60] The same as stated by the ministerial reasoning: "The Criminal Code ignored the punishment of life imprisonment, because it argued that if the protection of society does not require the imposition of death penalty, the educating purpose of the penalty can still be realized. The achievement of the purpose was only possible by imprisonment for a determined period, based on its considerations. The Plan moves beyond this approach… The possibility of a choice between death penalty and imprisonment for a determined period… caused difficulties for the court of there are significant reasons for the permanent exclusion of the convict from society, but it can still be assumed that there is hope for improving the sentenced person. In such borderline cases, imposing both death penalty and imprisonment for a determined time, may be problematic, and ultimately it jeopardizes achieving the purpose of punishment. The Criminal Code in force only examined the institution of life imprisonment from the aspect of individual education. However, the need for general retention must also be considered, which is clearly in favor of the application of this institution. In order to resolve these contradictions within the system of penalties, the Plan introduced life imprisonment. In cases where, considering the purpose of punishment, the permanent exclusion of the offender from the society seems justified, but the possibility of re-education is not completely excluded, only this penalty provides a satisfactory solution. If the hopes related to re-education are fulfilled, the convict can regain freedom by conditional release. Therefore, in the cases that do require it, the imprisonment does not last until the end of the convict's life." (Detailed reasoning Article 5)

[61] The rule that (with the exception of soldiers) death penalty could only be applied to those who had reached the age of twenty at the time of committing the crime, did not change.

[62] More precisely, it aggregated it with Article 296. (Law-Decree no. 28 of 1971 Article 67)

[63] Law-Decree no. 28 of 1971 Article 70

[64] Law-Decree no. 28 of 1971 Article 42

[65] In the ministerial reasoning, all these were explained as follows: "The Plan, in line with the law in force, sustains death penalty only for the most serious crimes as an exceptional form of penalty. The socialist development of law is undoubtedly moving towards the narrowing and, ultimately, abolishing the application of death penalty. The Plan recognizes that this form of penalty is no longer needed for the crimes against property…" (Detailed reasoning in Article 42) "In today's socio-economic conditions… sustaining death penalty as an exceptional form of punishment is no longer justified among the crimes against property." (Detailed reasoning in Article 67) (The same applies for the ministerial reasoning on reckless endangerment.)

[66] Law-Decree no. 28 of 1971 Article 43

[67] The Criminal Code was published on December 31, 1978, and entered into force on July 1, 1979.

[68] The Criminal Code introduced again the dichotomous division of crimes, thus the codex differentiated again crime and offense (Article 11).

[69] In principle, Marx was opposed to death penalty, although, he acknowledged its practical necessity, especially against the enemies of the proletariat and thus, of the "progress"; this approach strongly influenced the whole Soviet-Communist criminal law (including Hungary).

[70] "The efforts made to modernize criminal law are based on the scientific finding that criminality is not automatically reduced in the societies building developed socialism, however, the conditions for its gradual suppression are provided. The socialist system can eliminate crime as a detrimental legacy of the past only over a longer historical period. In the current phase of social and economic development, when we have not completely overcome the harmful, and especially mental heritage of the past, when socialist consciousness is still emerging, when our society is not yet free from certain contradictions and has unresolved problems, and not least, when the fundamentally positive implications of development (urbanization, industrialization, population growth, re-stratification and mobility of the society, scientific and technical development) may be criminogenic and cause an increase in the number of crimes, under certain conditions, only the limitation and reduction of crime can be determined as a realistic task." (General reasoning 2.1)

remarks on sustaining death penalty suggest that the legislator still could not (or did not want or dare to) get rid of the theorem saying that "in communism, criminality will be removed at some paint, and thus penalties, including death penalty will not be needed". This is also reflected in Part 3 of the General reasoning by the explanation that "the socialist development of law is moving towards the gradual overshadowing and, ultimately, abolishing of death penalty, however, the removal of the penalty *is currently not timely*[71]"; moreover, the remark for the detailed reasoning of Article 39 highlights the same issue with a less sharp edge. The latter reads as follows: "Sustaining or abolishing death penalty is one of the most controversial issues of criminal law… The justification of sustaining it, is primarily based on whether it is unavoidable for individual and general prevention. In the cases of the most serious crimes against life, the state and military crimes, the acts of terrorism that are multiplying on an international level, the protection of society *currently*[72] can not lack death penalty."[73]

The ministerial reasoning places a special emphasis on the exceptional nature of death penalty, with the same arguments as the preamble of Act no. 5 of 1961. The first and most important of these, based on Article 84, is that "death penalty may be imposed exceptionally and only if, by considering the particular danger of the crime and offender on the society, and the specifically high degree of guilt, the protection of society can only be ensured through the application of this punishment".[74] An additional argument to the exceptionality of the capital punishment is the "limited number of crimes punishable by death penalty";[75] "that in the Special Part death penalty is always presented as an alternative punishment,[76] along with the lighter punishment of imprisonment[77]";[78] that "death penalty can only be imposed on someone who had reached the age of twenty when he/she committed the crime";[79,80] and that there is always the opportunity of exercising mercy, in which case the law does not determine the nature and degree of the punishment that will replace death penalty, because "there is no need for the Criminal Code to limit the exercise of the right of pardon",[81] so in exercising its right of pardon, the Presidential Council of the Hungarian People's Republic can impose the lightest punishment of the lowest degree instead of death penalty. Finally, within the analysis of the general provisions, we must mention the punishability of the crimes punishable by death as well, and the limitation of the enforceability of the imposed death penalties, which, based on Act no. 4 of 1978, similarly to the regulation of the Criminal Code of 1961, would occur in twenty years;[82] the only exception being, as a new rule, war crimes and crimes against humanity (Chapter 11 of the Criminal Code).[83]

When analyzing the special factual situations, we see that there were several changes compared to the Criminal Code of 1961 (namely, its form in force since January 1, 1972)[84]. Although both allowed death penalty for 26-26 crimes, the basic acts and the classified cases were not the same for all crimes. The least of the changes were probably made in the cases of crimes against the state (Chapter 10) as both Criminal Codes imposed death penalty for the same nine offences, though not necessarily under the same circumstances. Out of these nine crimes, only the delict of supporting the enemy (Article 146)[85] was similar to the previous regulation, and in the case of the other crimes, some of the elements of the basic factual situation, or the range of classified cases punishable by death were the ones to be modified. Thus, the mere participant of conspiracy (Article 139) could no longer be punished by death, while the initiator and leader could only be sanctioned with this penalty if the act was committed armed or during the war

71 Emphasis added – T.J.Z.

72 Emphasis added – T.J.Z.

73 Interestingly, in addition to the theoretical disapproval of death penalty, in order to justify sustaining this sanction, the preamble of the Criminal Code is willing to contradict itself as Part 3 of the General reasoning describes the results and achievements of the socialist criminal law as follows: "In Hungary, the evolution of criminality has been characterized by decreases and increases in the past one and a half decades, but overall and essentially it has not risen, as opposed to the majority of the developed capitalist countries in which there is a large, even rapid, increase in criminality. It is a positive phenomenon that in Hungary, the vast majority of the crimes committed are of little weight, and the dangerous forms such as organized criminal underworld, drug trafficking, terrorism and kidnapping do not occur essentially." Thus, while terrorist acts and similar crimes are unknown in Hungary, yet, among other things, "terrorist acts multiplying on the international level" are the ones to justify the sustaining of death penalty, based on the ministerial reasoning.

74 This provision was similar in content to the regulation set out in Act no. 5 of 1961 Article 64(2): "death penalty… can only be imposed if the purpose of punishment can not be achieved with another punishment".

75 Detailed reasoning for Article 39

76 The alternative to any special factual situation that also recognizes the legal consequence resulting in the taking of life, is imprisonment of ten to fifteen years or life imprisonment.

77 The former four types of imprisonment proved to be too many, therefore, the legislator removed restricted prison by Act no. 4 of 1978; thus, since then there are three degrees of this penalty: maximum security prison, medium security prison and minimum security prison.

78 Ibid.

79 Criminal Code Article 39(1)

80 Soldiers were the only exception; they could still be sentenced to death, based on Article 126, if they had reached the age of eighteen, provided that the crime seriously offended the military interests. (However, compared to Act no. 5 of 1961, this rule can be considered a guarantee, as the previous Civil Code did not even set out this minimum limit of 18 years for the punishability of the people who were soldiers.)

81 Detailed reasoning for Article 39

82 Article 33(1)(a) and Article 67(1)(a)

83 Article 33(2)

84 In the following, I will compare the current Criminal Code (Act no. 4 of 1978) and the Criminal Code of 1961 based on the version in force at the publishing of the former, and version after 1972 of the latter.

85 In the following, the cited paragraphs always mark Act no. 4 of 1978.

(Article 139(3)).[86] The organizer and leader of the rebellion (Article 140) could now be sentenced to death only for committing such act armed or during the war (Article 140(4)), while earlier, the armed and serious disturbance of public order by rebellion could result the same penalty. The classified cases of damage (Article 141) punishable by death did no longer include the causing of a particularly serious damage, and only the case of committing it during the war was punishable by death (Article 141(3)). The subjects of destruction (Article 142) did no longer include the stock of crop, thus, its destruction, rendering it unusable or damaging it were not punishable as a crime against the state even with the presence of a motivation against the state (only if these could not be considered "assets of similar importance"); while the method of committing this crime by causing public endangerment was no longer included among the classified cases punishable by death, and it could only be sanctioned by death if it caused particularly great damage, or it was committed during the war (Article 142(2)). The concept of assassination (Article 143) has slightly changed compared to the previous one; thereafter, the offender of assassination was someone "who, as a member of a representative body, caused grievous bodily injury to a person in a leading position at a state body or social organization for their activity carried out in the interest of socialism" (Article 143(1)), and the assassinator could have only been sentenced to death if he/she killed the person with the above characteristics for their activities carried out in the interest of socialism (Article 143(2)), thus, causing "only" lethal bodily injury was no longer a reason for imposing death penalty. The conditions of high treason (Article 144) that could lead to death penalty, basically remained the same as previously (Article 144(2)),[87] and only the definition of the method of committing the basic factual situation changed;[88] the classified cases of espionage (Article 147) punishable by death did no longer include regular committing (but those carried out in relation to a state secret, as a member of an spy organization, or during the war remained) (Article 147(2)). Finally, Act no. 4 of 1978, as its predecessor, ordered the same penalties for the offences against state that were committed not to the detriment of Hungary, but other socialist state ("crimes against other socialist state", Article 151).

The range of crimes against humanity (Chapter 11), as opposed to those against the state, was modified compared to the state of the Criminal Code after 1972; now, death penalty could be imposed for four crimes instead of two. Genocide (Article 155(1)) is the only delict that remained the same as it was previously, and continued to be punishable by death. The crime of war atrocity ceased to exist, but, among the acts punishable by death, "violence against the civilian population"[89] (Article 158), previously regulated among military crimes, as well as the "criminal warfare" (Article 160) that had not existed before 1978, were included. In accordance with Article 158(1) of the Criminal Code, the former is committed by the person "who, on a military or occupied territory, uses violence, inhumane treatment against a civilian or prisoner of war[90] or abuses their power in a serious way", and the action is punishable by death if the offender caused death (Article 158(2)). Article 160 provided on criminal warfare as follows: "The military commander, who, by violating the international legal rules of warfare, a) carries out a military operation that causes serious damage to the life, health and properties of the civilian population, the cultural assets protected internationally, and the facilities of dangerous powers, b) attacks an unprotected place or demilitarized zone, commits a crime punishable by imprisonment of ten to fifteen years or life imprisonment or death penalty." Finally, the fourth crime against humanity punishable by death that was previously regulated among military offences (listed as a crime violating international military law) and was punishable by death even then, was "violence against a military attaché" (Article 163), while its factual situation and case remained unchanged.[91]

Instead of the former twelve types of military crimes, the Criminal Code of 1978 threatens with the most sever legal consequence in the case of ten crimes; the most important modifications compared to the regulations of Act no. 5 of 1961 are described in the following. First, the violence against a military attaché was transferred to crimes against humanity, so it did not cease, and also continued to be punishable by death, but no longer as a military crime. Secondly, the delict of absconding abroad was ceased, more precisely it merged in the factual situation of absconding; thirdly, the crimes of "violation of the instructions of the guard", and of "violation of the rules of standby duty" were abolished; finally, fourthly, the offences of "denial of service" and "misconduct in service" were introduced as new factual situations. The offenders of these two new crimes: the person who refused military service during war (Article 347) could be punished by death; and the person who violated "the regulations related to the execution of guard, standby or emergency services" (Article 348(1)) was punishable by this sanction as well, if the above misconduct was committed during

[86] Thus, it is not applicable if the offender committed another crime in connection with conspiracy, which was punished by law with imprisonment of more than eight years; nor if the conspiracy seriously endangered the state, social and economic order.

[87] Causing serious disadvantage (according to the wording of the Criminal Code of 1961: "if the crime led to serious consequences"); or by using state service or official assignment, and the crime being committed during war.

[88] While according to Act no. 5 of 1961, high treason could have been realized (in the case of the existence of a motivation against the state) by engaging, forming and alliance or cooperating with foreign governments, foreign organizations or their agent, Act no. 4 of 1978 simplified the method of committing this crime to engaging in a relation with a foreign government or a foreign organization.

[89] This is regulated by the Criminal Code of 1961 among the crimes violating international military law, in Article 335.

[90] According to the interpretative provision in Article 158(3), "inhumane treatment, in particular, involves the settlement of the civilian population of the occupying power to the occupied territories or the resettlement of the population of the occupied territory, the deprivation of the civilian population and prisoners of war from their right to be judged in a regular and impartial trial", as well as "the unjustified postponement of the repatriation of prisoners of war and civilian people".

[91] According to this, the most serious legal consequence for committing this delict was imposed on those who killed the military attaché or their accompanying person (Article 163(2)).

war, and it resulted in a particularly great disadvantage (Article 348(3)).

Based on the above, a total number of eight military crimes were punishable by death based on both the Criminal code of 1961 and the Criminal Code of 1978. Among these, the crime of absconding (Article 343), as we mentioned, now included the previous delict of "absconding abroad"; after this, absconding[92] may have resulted in capital sanction, on the one hand, if the absconding abroad was committed armed, in a group, while serving an important task, by using the service, or by using violence against a person, on the other hand, if the absconding (either domestic or abroad) was carried out during war (Article 343(4)). The name of the crime of "absconding from performing military service" from the Criminal Code of 1961 was simplified to "absconding from service" (Article 346), the basic factual situation was reformulated,[93] but it did not contain essential modifications compared to the previous one, and it continued to be punishable by death only if the act was committed during war (Article 346(1)). The name of "misconduct on behalf of the commander in battle" was also simplified (the new name was "misconduct of the commander", Article 364), but the crime itself remained the same as previously. Finally, the same can be said about other military offences punishable by death, such as mutiny (Article 352), insubordination to order (Article 354), the crime of "violence against a superior[94] or the environment of service" (Article 355), the delict of "abdication from performing battle obligations" (Article 365) and the endangering of battle station (Article 363).

Finally, several modifications were made to the common criminal offenses punishable by death penalty. First of all, prison mutiny was excluded from these offences: the new Criminal Code set out the punishment of this crime (now called "mutiny of prisoners", Article 246) as imprisonment of five to fifteen years for the most serious cases. Secondly, the terrorist act was regulated as a new factual situation. In accordance with Article 261(1), this was committed by the person "who deprives another person from their personal freedom, or acquires significant financial properties, and makes the release of the person, as well as the preservation and return of the properties dependent on the fulfillment of a demand addressed to a state body or social organization"; while the most severe sanction could be imposed if the offender caused with these actions death or other particularly severe disadvantage, or if these were committed during war (Article 261(2)). Finally, thirdly, death penalty continued to be imposable for the "seizure of aircraft"[95] (Article 262) and killing (Article 166), basically, in the cases mentioned in the previous regulation.[96]

Table no. 1
The comparison of the offences punishable by death penalty (as well) in Act no. 5 of 1961, Law-Decree no. 28 of 1971 and Act no. 4 of 1978

Act no. 5 of 1961 (original)	Act no. 5 of 1961, from January 1, 1972 (Law-Decree no. 28 of 1971)	Act no. 4 of 1978
Crimes against the state	**Crimes against the state**	**Crimes against the state**
Conspiracy (Article 116(3), Article 117(3))	Conspiracy (Article 116(3), Article 117(3))	Conspiracy (Article 139(3))
Rebellion (Article 120(2))	Rebellion (Article 120(2))	Rebellion (Article 140(4))
Damage (Article 124(2))	Damage (Article 124(2))	Damage (Article 141(3))
Destruction (Article 125(2))	Destruction (Article 125(2))	Destruction (Article 142(2))
Assassination (Article 126(1)-(2))	Assassination (Article 126(1)-(2))	Assassination (Article 143(2))
High treason (Article 129(2))	High treason (Article 129(2))	High treason (Article 144(2))
Supporting the enemy (Article 130(1))	Supporting the enemy (Article 130(1))	Supporting the enemy (Article 146(1))
Espionage (Article 131(3))	Espionage (Article 131(3))	Espionage (Article 147(2))
Crimes against other socialist state (Article 133)	Crimes against other socialist state (Article 133)	Crimes against other socialist state (Article 151)

[92] Absconding is committed by the person "who in order to abdicate from performing military service, deliberately leaves or stays away from their station" (Article 343(1)). This concept was almost similar to the previous definition of absconding.

[93] Accordingly, this crime is committed by the person "who, in order to abdicate from performing military service, mutilates their body, damages their own health, or presents fraudulent conduct" (Article 346(1)).

[94] In Act no. 5 of 1961, the word "and" figured instead of the word "or".

[95] The legislator of the Criminal Code of 1978 omitted the criterion of "unlawful" from the name of the delict of "unlawful seizure of aircraft" included in Article 192 of the Criminal Code of 1961 by Law-Decree no. 28 of 1971, given that the concept of crime *ab ovo* includes unlawfulness, and in its absence, we can not even talk about crime.

[96] The attitude of committing the seizure of an aircraft was defined by the new Criminal by different words compared to the previous one: while according to the former, the crime was committed by acquiring and practicing unlawful control of the aircraft, the latter claimed that it was performed by taking possession of the control of the aircraft. In addition, among the classified cases of killing (that may result in death penalty) those committed as a recidivist were modified to killing by a special recidivist (Article 166(2)(h)), where, in accordance with Article 166(5), assassination (Article 143(2)) and voluntary manslaughter (Article 167) were considered similar crimes from the aspect of special recidivism.

Crimes against humanity	**Crimes against humanity**	**Crimes against humanity**
Genocide (Article 137)	Genocide (Article 137)	Genocide (Article 155)
War atrocity (Article 139(2))	War atrocity (Article 139(2))	Violence against the civilian population (Article 158(2))
		Criminal warfare (Article 160)
		Violence against a military attaché (Article 163(2))
Common criminal offense	**Common criminal offense**	**Common criminal offense**
Prison mutiny (Article 186(3))	Prison mutiny (Article 186(3))	Killing (Article 166(2))
Reckless endangerment (Article 190(2))	Unlawful seizure of aircraft (Article 192(2))	Terrorist offence (Article 261(2))
Killing (Article 253(2))	Killing (Article 253(2))	Seizure of aircraft (Article 262(2))
Theft (Article 291), embezzlement (Article 292), fraud (Article 293), misappropriation (Article 294) damaging social property (Article 295(3))		
Robbery (Article 299(4))		
Military crimes	**Military crimes**	**Military crimes**
Absconding (Article 312(2))	Absconding (Article 312(2))	Absconding (Article 343(4))
Absconding abroad (Article 313(2))	Absconding abroad (Article 313(2))	Abdication from service (Article 346(1))
Abdication from performing military service (Article 315(1))	Abdication from performing military service (Article 315(1))	Denial of service (Article 347)
Mutiny (Article 316(3)-(4))	Mutiny (Article 316(3)-(4))	Misconduct in service (Article 348(3))
Insubordination to order (Article 317(3))	Insubordination to order (Article 317(3))	Mutiny (Article 352(3))
Violence against a superior or the environment of service (Article 318(4))	Violence against a superior or the environment of service (Article 318(4))	Insubordination to order (Article 354(3))
Violation of the instruction of the guard (Article 326(3))	Violation of the instruction of the guard (Article 326(3))	Violence against a superior or the environment of service (Article 355(5))
Violation of the rules of standby duty (Article 327(3))	Violation of the rules of standby duty (Article 327(3))	Compromising battle station (Article 363(2))
Misconduct on behalf of the commander in battle (Article 331)	Misconduct on behalf of the commander in battle (Article 331)	Misconduct on behalf of the commander (Article 364)
Abdication from performing battle obligations (Article 332)	Abdication from performing battle obligations (Article 332)	Abdication from performing battle obligations (Article 365)
Endangering battle station (Article 334(2))	Endangering battle station (Article 334(2))	
Violence against a military attaché (Article 338(2))	Violence against a military attaché (Article 338(2))	

The execution of death penalty applicable in the cases set out by the Criminal Code, was regulated by Law-Decree no. 11 of 1979,[97] and Decree no. 8 of 1979 of the Ministry of Justice (June 30) on the Policy of the Enforcement of Criminal Sanctions. The first one provided that "the death penalty, on the day following the rejection of the penalty for mercy, should be executed in a closed space, with a rope or by firearm" (Article 17(1)), however, in practice, the firing squad was never applied,

[97] The complete title: Law-Decree no. 11 of 1979 on the implementation of punishments and measures. This Law-Decree was published on May 14, 1979, and it entered into force together with the Criminal Code and Decree no. 8 of 1979 (June 30) of the Ministry of Justice on the Policy of the Enforcement of Criminal Sanctions, on July 1, 1979.

the only method was hanging; furthermore, it provided who should be present at the execution,[98] and also regarding the burying of the body.[99] Decree no. 8 of 1979 of the Ministry of Justice provided details on the method of implementing death penalty; for example, it provided that after the rejection of the petition for mercy was published, the convicted person had to placed in a separate room (so-called "death cell") with increased security, where a close relative (who had to be informed unless the convict did not want to be visited) could visit the sentenced, and where the convict could write letters or make a written provisional will during the last afternoon and night (Article 152(1)-(3)), and, of course, prepare for the execution of the next morning.

In the Hungarian legal system, these (Criminal Code, Law-Decree on the Enforcement of Criminal Sanctions, Policy on the Enforcement of Criminal Sanctions) were the last norms on the application of death penalty; thereafter, the process of abolition has the main role. Partly, Law-Decree no. 28 of 1971 and Act no. 4 of 1978 could be adapted in the process of abolition as these laws reduced the possibility of imposing death penalty and, consequently, the extent of the practical application of this sanction;[100] however, the above norms had not yet formulated the need that death penalty should be, once and for all, in regard of all crimes, completely erased from the Hungarian legal system. Although Tibor Horváth had already prepared an expert opinion for the Criminal Code from 1978, which proposed the full or partial elimination of the most serious legal consequence from criminal sanctions, this remained unnoticed to the extent that during the codification work, they had not even been discussed it. The first major step was taken in 1983, when the Criminal Law Committee of the Hungarian Lawyers Association, on December 12, held a debate entitled "Death penalty and its future in Hungarian criminal law", where, being led by Tibor Horváth, theoretical and (mainly) practical criminal lawyers shared their opinions and views on the above topic.[101] Although the majority of the speeches (especially since the theoretical experts and defense lawyers favoring abolition[102] represented a minority at the conference compared to the prosecutors and judges) continued to support death penalty, however: from that point on, the idea of abolition was rooted in the Hungarian criminal and general intellectual thinking of the time, which provided a good basis for both criminal lawyers and the wider public opinion to familiarize with and perhaps accept all the reasons that encouraged abolitionists to disapprove of this punishment.

3. The end time of the death penalty in Hungary: Two steps of the abolition in 1989/90

In the question of the existence or non-existence of death penalty, the turning point came during the regime change. At the beginning of 1989, with the aim of abolishing death penalty, being led by Tibor Horváth as president, the Anti-Death Penalty League (Habel) was established, which was joined by hundreds of intellectuals in the coming months. The League wished to introduce the arguments against the most severe sanction to the public opinion, and to convince politics to represent the issue of abolition. The former was only partially successful (the majority of people were in favor of death penalty at the time), while the latter goal was completely unsuccessful. One of the reasons for this was that politicians were engaged in creating and debating the laws that prepared the regime change the and created the new socio-economic-political system, and another reason can be that the parties and their politicians simply did not dare to make a decision which would have obviously had a huge uproar among people, thus, which would have resulted in a radical decline in popularity so important to politicians.

This, of course, did not apply to crimes of a political nature; in the unique atmosphere of the change of regime, it was a general demand that nobody should ever use criminal law as an instrument for achieving their subtle political goals. As a result, the Minister of Justice at the time Kálmán Kulcsár, presented a bill that aimed to abolish death penalty from the penalties of all crimes committed against the state; this was accepted by the last but already transitioning socialist Parliament, and it was codified as Act no. 16 of 1989. The law itself consisted of only two paragraphs: Article 1 provided that "the imposable punishment for the crime of initiating or leading a conspiracy that seriously endangers the state, social or economic order, committed armed or during the war (Article 139(3) fourth phrase of the Criminal Code), the crime of organizing or leading a rebellion committed armed or during the war (Article 140(4) third phrase of the Criminal Code), the crime of damage committed

[98] According to this, in addition to the convict and the executor, the prosecutor (in the first instance), the appointed judge (also from the council of the first instance), the registrar, the doctor, the commanding officer of the prison and the guards securing the execution must have been present at the execution as well; however, the Minister of Justice may have authorized others (for example, the defense counsel and relatives of the convict, or the relatives of the victim of the crime) to be present at the execution as well (Article 17(2)).

[99] The corpse of the executed person had to be buried in a public cemetery by the prison (Article 18(1)-(2)), in a marked grave (Decree no. 8 of 1979 of the Ministry of Justice (June 30) Article 153(2)-(3)), just like any other citizen).

[100] While in the 1960 s, the number of death penalties imposed was 129, out of which 79 were given by civilian courts and 50 by military courts, this number was reduced to 47 (34, respectively 13) in the 1970 s, and to 32 (29, respectively 3) in the 1980 s. (The last execution took place on July 14, 1988 when Ernő Vadász who committed intentional killing, qualified multiple times, was executed by hanging, while the last death sentence, obviously, unexecuted, was imposed in 1989.)

[101] The full text of the official minutes of the debate is accessible to anyone. See: Death penalty and its future in Hungarian criminal law (A halálbüntetés és jövője a magyar bünetőjogban). (A Magyar Jogász Szövetség Büntetőjogi Bizotságának vitaülése.) In: Jogász Szövetségi Értekezések (Studies of Lawyers' Association), no. 1984/1.

[102] Lawyers, in general, are against death penalty due to their procedural status. This is also the case today: out of the 13 defense counsels of today's famous and acknowledged criminal cases, interviewed by Judit P. Gál in her book, 9 are clearly against it, while only 4 of them support it to a lesser or greater extent. (Cf: P. Gál, Judit: The lawyers of devils (Ördögök ügyvédei). Alexandra Kiadó, Pécs, 2003, p. 21, 40-41, 64, 84-85, 94-95, 118-119, 135-136, 168, 187, 213, 251-253, 271, 287-288)

during the war (Article 141(3) of the Criminal Code), the crime of destruction resulting in a particularly serious disadvantage or committed during the war (Article 142(2) of the Criminal Code), the crime of assassination committed by killing (Article 143(2) of the Criminal Code), the crime of high treason with serious consequences, by making use of state service or official mandate, committed during the war (Article 144(2) of the Criminal Code), the crime of supporting the enemy (Article 146(1) of the Criminal Code), and the crime of espionage committed in regard of the state secret or as the member of a spying organization, during the war (Article 147(2) of the Criminal Code), is modified to imprisonment between ten and fifteen years or life imprisonment"; while Article 2 provided that "this law enters into force on the day of its publication."[103] Due to this, the punishment by death of political crimes (against the state) was definitively abolished in Hungary.

However, for the reasons mentioned above, this could not be expected of the Parliament in relation to common crimes (and other, non-political offences), which is why the Habel (Anti-Death Penalty League) started an independent action. Because the Constitutional Court[104], previously unknown in Hungarian legal system, set up by Act no. 32 of 1989 (Law of the Constitutional Court), was given the right to annul the legislation or legal provisions that are contrary to the Constitution through the subsequent abstract norm control. However, in order for the League to succeed in the case of death penalty, something else was needed, namely the radical transformation of the Constitution (Act no. 20 of 1949), which was achieved by Act no. 31 of 1989. On the one hand, because Article 34 introduced the right to life and human dignity[105] in the text of the Constitution (precisely, in Article 54), on the other hand, Article 2 of the law incorporated in Article 8(4) of the Constitution the provision which prohibits, inter alia, that the right to life and human dignity can be limited in any way.[106] As a result, the legal conditions were ready for the Constitutional Court to determine the unconstitutionality of death penalty. The petition in this regard was submitted by Tibor Horváth in the name of the Habel (Anti-Death Penalty League), in January 1990. The petition itself was not even one full page[107], but the study attached to it, which presented the history of abolition, and described the legal, moral and practical arguments against death penalty, was approximately seventy pages long. In order to determine the validity of the petition, the Constitutional Court requested three experts, and asked for the opinions of the president of the Constitutional Court, the general prosecutor and Minister of Justice.

One of the three experts, József Földvári, professor of criminal law at the Janus Pannonius University (today: University of Pécs), did not take a position on the issue of death penalty regarding its constitutionality or unconstitutionality, but he only approached the problem from a criminal law aspect. He explained that although death penalty is not acceptable neither from the aspect of individual prevention (since an individual can be prevented from committing new crimes by imposing other, lighter punishments, such as life imprisonment as well), nor from the aspect of general prevention (the impact of a punishment on others can not be measured), the continuation of this form of punishment must be considered by the legislator,

[103] The date of publication and entry in force of Act no. 16 of 1989 on the modification of Act no. 4 of 1978 on the Criminal Code, was June 15, 1989.

[104] Although, since 1984 there had been a body named Constitutional Council, which was established by Act no. 1 of 1984, and which actually came into existence on June 6, 1984, but it was only body of 11-17 members operating as the special committee of the Parliament (the majority of them being members of the parliament, while the rest were external members), which had a rather limited competence, which was not even used too much during its existence. For example, the Constitutional Council could in principle monitor the unconstitutionality of any legislation or legal guideline, and contribute to the interpretation of the provisions of the Constitution (Act no. 1 of 1984 Article 2), however, in the context of the former, it could only suspend the implementation of normative decisions on a lower level, but not the implementation of law, law-decree, or the directive and decision in principle made by the Supreme Court (Article 18); in these cases, it was allowed to send the decision containing its opinion (as a form of raising awareness) to the competent authorities (Article 20). Thus, it can be seen based on the above that the Constitutional Council did not have a significant substantive competence (and the one it had was not used in practice), therefore, it can not be regarded as the predecessor of the Constitutional Court, nor as a body similar (in its content) to the Constitutional Court.

[105] "In the Hungarian Republic, every person has the inherent right to life and human dignity, which can not be arbitrary deprived." (Constitution Article 54(1))

[106] Accordingly, these fundamental rights were not allowed to be limited or suspended in a state of emergency, emergency or situation of risk either. However, the final text of Article 8(4) was not determined by Act no. 31 of 1989, but Act no. 40 of 1990 Article 3(2). Accordingly, the text in force since June 25, 1990 is as follows: "Exercising the fundamental rights in a state of emergency, emergency or situation of risk – except for the fundamental rights set out in Article 54-56, Article 57(2)-(4), Article 60, Article 66-69 and Article 70/E – can be suspended or limited." Act no. 15 of 1990 Article 3(1) (also with effect from June 25) modified Article 8(2) of the Constitution as well (which will also be important in relation to the Decree of the Constitutional Court on the abolition of death penalty), the effective text of which reads as follows: "In the Republic of Hungary the rules of fundamental rights and obligations are set out by the law, but the essential content of fundamental rights may not be limited." (Article 8(3) was annulled by Article 51(1) of this law.)

[107] The text of the statement signed on January 17, 1990, by Tibor Horváth as president of the Anti-Death Penalty League, was the following: "Honourable Constitutional Court, In the name of the Anti-Death Penalty League, I make a constitutional complaint against the criminal law imposing death penalty, and I ask for the subsequent declaration of the unconstitutionality of these laws. Article 54(1) of the Constitution amended by Act no. 31 of 1989 provides that << In the Hungarian Republic, every person has the inherent right to life and human dignity…>> and that << No one can be subjected to torture, cruel, inhuman and humiliating treatment or punishment…>>> (*This latter one was actually provided by Article 54(2) – emphasis added /T.J.Z./*) The League considers that the provisions on death penalty of the criminal legislations in effect do not comply with the above quoted provisions of the Constitution as they violate human rights. Death penalty as the remainder of the principle of jus talionis can not be justified ethically, is incompatible with human right, irredeemable and irreversible, it is an unsuitable and impractical means of punishment for preventing serious crimes or deterring others from committing crimes punishable by death. Instead of death penalty, the protection of the society can be adequately served by imposing life imprisonment or imprisonment for a determined long period – twenty or twenty-five years – for any crime committed. The detailed reasoning of the position of the League can be found in the attached expertise."

therefore, its recognition or continuation is not a matter of a legal, but a moral-political decision.

Criminologist and criminal statistician László Korinek analyzed the deterrent-preventive effect of death penalty, in relation to which, he pointed out that the beginning of his expertise that there is not a period long enough through which all the relevant data (except for the existence of death penalty) would remain unchanged. The abolition of death penalty typically implies other social transformations, regarding which it can not be safely decided whether the potential reduction or increase of criminality was caused by the abolition or restitution of death penalty, or the political and economic change that has also led to this decision; "thus… in the debate surrounding death penalty, statistics can not provide absolute conclusive evidence."[108] Nevertheless, "it is highly probable… that the growth or decline of homicidal crimes in a certain state is more likely the result of stable socio-cultural effect such as education and urbanization rather than whether the given legal system recognizes or rejects death penalty. Which in turn also implies that the growth or decline of the crimes around the abolition of death penalty may only coincide with this legislative act."[109] After this, László Korinek examines the different types of criminals (acting against life), and notes that death penalty only has a deterrent effect on a small group of murderers (and only a part of them), who are coldly considering the consequences of their acts; the behavior of other types of criminals is not affected by this sanction (and, of course, other punishments). Finally, he concludes that "after the abolition of death penalty… there has not been an avalanche-like increase in criminality, because the existence of absence of death penalty does not affect the totality of crimes, but the attitude towards crime among the population (fear and revenge)";[110] thus, according to Korinek, death penalty does not have a preventive-deterrent function, but only one that comforts the society, and satisfies people's sense of justice.

Finally, András Sajó expresses his opinion as opposed to death penalty from every aspect. He argues that it is arbitrary firstly, because "similar crimes in the same country and in the same period may be subject to different judgment";[111] but this also results that imposing a death penalty depends on the decision of the prosecutor; that the body or person evaluating the petition for mercy makes a decision based on their own considerations; that the "exceptional" phrase of the Criminal Code is objectively uninterpretable, and that the other conditions of application (the outstanding danger to society of the offender and the crime, the particularly high degree of guilt) are also indefinite and irrelevant;[112] that when imposing the sentence, it is never possibly to state with one hundred percent certainty that the protection of the society can only be ensured through death penalty; that "in the case of death penalty, the legal system institutionalizes the irredeemable judicial error, which, as a mistake, is undoubtedly arbitrary in its content";[113] that this sanction may be used for political reasons to eliminate their opponents by keeping up the appearance of legality; that the hanging used in Hungary is cruel; and that waiting for the execution also means suffering for the relatives of the convict. In the second place, Sajó considers this punishment unconstitutional because its application violates human dignity since, during execution, the person is treated as a mere object. He explains that "dignity is not the inherent right of a person, but an endowment that can not be eliminated",[114] and exactly because of that,

[108] In: Horváth, Tibor (ed.): The end of the death penalty in Hungary. Case-book. (A halálbüntetés megszüntetése Magyarországon. Dokumentumgyűjtemény.) Halálbüntetést Ellenzők Ligája (Anti-Death Penalty Leage), Miskolc, 1991, p. 77.

[109] Loc. cit. p. 84.

[110] Loc. cit. p. 89.

[111] Loc. cit. p. 91.

[112] However, the latter two arguments do not apply. Since if we were to accept that a punishment (even death penalty itself) could be unconstitutional *for the reason* that the law provides for the consideration of the judge on the imposition of the law, we should also realize that *the same reason* would lead to unconstitutionality in the case of other penalties as well (because if a situation, namely the possibility of the consideration of the judge, is unconstitutional, it must be unconstitutional in all its forms of implementation). However, if we accepted this, we would have to annul our whole criminal law system, every special factual situation of the Criminal Code, as well as the Criminal Code itself for unconstitutionality, given that these allow for such judicial discretion for each specific crime. (It may be quantitatively different from the dilemma of death penalty or imprisonment, however, qualitatively there is a consistency if the judge /in a András Sajó's words *arbitrarily*/ ponders about the imprisonment of two up to eight years imposable usually for robbery, and one of the judges decides to give a punishment of only two year /or one year – Article 87(2)(c) of the Criminal Code/ or a even suspended sentence /as the execution of an imprisonment of two years at most can be suspended/, in the same case, another judge can apply imprisonment of four or five years, which, of course, had to be executed.) It is a similar situation with the right to pardon. If we acknowledge at all the right to exercise individual pardon without a preamble (and currently, we acknowledge it), we also acknowledge the lawfulness of arbitrariness; however, this arbitrariness does not differ in its characteristics in the cases of different crimes. In other words, if the modification (mitigation) of death penalty out of mercy or its complete abolition *ad absurdum* is unconstitutional (since it is arbitrary), the exercise of individual pardon should be considered unconstitutional in the case of every other punishment (since they would be arbitrary as well). In my opinion, András Sajó's moral perception was so much of an opponent to death penalty, and he was so inclined to demonstrate with all possible and feasible arguments that this sanction was not against the Constitution that he did not pay attention to these logical consequences, although, by applying *argumentum ad absurdum,* it is easy to see that the use of the above reasoning could lead to dangerous and undesirable consequences (no one can, for example, want the judge to be able to apply absolute categorical sanctions in all cases, and individualization to be done prior in the law / in several thousand of paragraphs due to the almost infinite number of aggravating and attenuating circumstance / by the legislator itself). Of course, this does not change anything about the assessment of the constitutionality of death penalty, since all the other arguments are available to keep this legal consequence unconstitutional; or in other words: the fact that *one* of the arguments *justifying* the given statement have proved to be wrong says nothing about the truthfulness of the *statement itself*.

[113] Loc. cit. p. 92.

[114] Loc. cit. p. 95.

the person can not be deprived from it (death penalty, among other things, is unconstitutional because it terminates the objective condition of the development and expression of human dignity). Finally, in the third place, death penalty is opposed to the purpose of punishment of the rule of law, and the purpose of punishment to the requirements of the rule of law, which set out that the purposes of punishment should be carried out with the least possible impairment (and there are lighter sanctions than death penalty that have the same effect),[115] and in accordance with which, the punishment will not be considered constitutional due to its "practical necessity".[116]

The expert opinions were completed by February 1990, and the Minister of Justice sent a written statement to the Constitutional Court in March. Herein, he stated that he considered that the death penalty was unconstitutional since it was antihumane, morally unjustifiable and did not serve the purpose of punishment or did not serve to a greater extent than other penalties. The Constitutional Court set the date of the trial on the issue of death penalty on October 16, 1990. (At that time) this was a public hearing where those interested could be present, and even Tibor Horváth could have spoken as an applicant.[117] At this plenary meeting, the previously mentioned expert opinions were presented, and the representative of Minister of Justice[118] spoke, as well as the President of the Supreme Court and general prosecutor Kálmán Györgyi. The former considered that death penalty in general and in the present historical situation in Hungary was unjustifiable and thus unconstitutional in both legal and moral terms. The latter, on the one hand, stated that he was personally a supporter of abolition and, on the other hand, also drew attention to the fact that, contrary to the request of the petition, Article 54(1) alone does not allow to pronounce the unconstitutionality of death penalty, because it does not exclude the possibility of non-arbitrary taking of life, but for this purpose (to determine unconstitutionality), this must be interpreted in relation to Article 8(2), because this is only way to exclude that the term "arbitrary" mentioned in Article 54(1) does not imply the permissibility of death penalty.

Subsequently, members of the Constitutional Court had one week to make their decision, to justify it, and to write their parallel or separate opinions. The life-altering decision was made on October 24, 1990, when the Constitutional Court decided in a 8:1 ratio that death penalty is unconstitutional. The Decision entered into force on its day of publication in the Magyar Közlöny (Hungarian Official Gazette), on October 31 (Decision no. 23 of 1990 of the Constitutional Court (October 31)), and as from this date, all legislation that previously set out the conditions of the application of death penalty, were overruled.[119] The preamble of the Constitutional Court provided that "…in Hungary, the right to life and to human dignity… is the inherent, inviolable and inalienable right of every person. The primary obligation of the Hungarian state is to respect and protect the right to life and human dignity… According to the effective provisions of Article 8(2) of the Constitution <<in the Republic of Hungary the rules of fundamental rights and obligations are set out by the law, but the essential content of fundamental rights may not be limited>>. The Constitutional Court considered that the provisions on death penalty of the Criminal Code and relevant legislation contradict the restriction of the essential content of right to life and human dignity. The provisions on the deprivation of life and human dignity by death penalty do not only limit the essential content of the fundamental right to life and human dignity, but also allow the complete and irrevocable termination of life and human dignity, as well as of the right ensuring these. Therefore, it stated their unconstitutionality and annulled them." Thereby, the possibility of executing anyone in Hungary in an official procedure, within state controlled framework legitimated by the state, was definitively ceased. And although, isolated attempts have been

[115] "The constitution does not authorize the legislator to introduce death penalty into the law. As a democratic constitution of the rule of law, it can not do so. The adopted system of penalties must define the minimum sanction required to ensure the right and obligations from the Constitution, which is then determined by the court in accordance with the proportionality principle during the imposition of penalties." (Loc. cit. p. 96)

[116] András Sajó sums up the reasons that make death penalty unconstitutional: "Death penalty is unconstitutional, as it is inevitably arbitrary in its imposition in the absence of a legal definition, but in addition, by the very nature of the sentencing procedure, and due to its execution, it is a cruel punishment; since it is incompatible with human dignity and the inalienable nature of human dignity, it contradicts the idea of rule of law set out in the Constitution, and extends the power to punish of the state beyond inevitable necessity, without explicit constitutional mandate". (Loc. cit. p. 98)

[117] Later, the rules of procedure of the Constitutional Court prohibited this, and from that time on the constitutional judges decide only on the basis of written documents.

[118] At that time, the Minister of Justice was no longer Kálmán Kulcsár who drew up the opinion and held this position from June 1988 to May 1990, but István Balsai, the representative of the ruling party MDP (Hungarian Working People's Party), which gained power through democratic elections.

[119] Thus, the Constitutional Court declared unconstitutional and annulled as from the date of publishing (October 31) Act no. 4 of 1978 of the Criminal Code Article 38(1)(1), Article 39 and 84, Act no. 1 of 1973 of the Code of Criminal Procedure Article 399, Law-Decree no. 11 of 1979 (Law-Decree on the Enforcement of Criminal Sanctions) Articles 17 and 18, Decree no. 8 of 1979 of the Ministry of Justice (June 30) Articles 151, 152 and 153 on the Policy of the Enforcement of Criminal Sanctions), furthermore, it abolished the provisions set out in Article 155(1), Article 158(2), Article 160, Article 163, Article 166(2), Article 261(2), Article 262(2), Article 343(4), Article 346(1), Article 347, Article 348(3), Article 352(3) and (4), Article 354(3), Article 355(5), Article 363(2), Article 364 and Article 365 of the Criminal Code, which, in defining the penalties imposable, indicated the sanction of "death penalty" as applicable penalty.

made to restore death penalty through a referendum,[120] and there still are disputes over its adequacy or inadequacy, necessity or redundancy, expediency or impracticability,[121] but in the political context it seems that in 1990, the epoch of death penalty in Hungary, after a whole millennium, ended for good and all.

[120] These attempts to reintroduce it can mainly be linked to the former mayor of Sárszentmihály, Tamás Tóth, who became one of the most dedicated supporters of the reintroduction of death penalty after the assassination of his son from 1992. To this end, he began collecting signatures in 1997 in order for the Parliament to issue a referendum on the reintegration of the most severe sanction. He sent signatures of citizens on November 26, 1997, for the first time, and then on several other occasions, but the National Election Committee (NEC) did not examine these. On October 6, 1998, Tamás Tóth sent new signatures to the NEC, and repeatedly asked them to examine these, but his request was declined by Decree no. 88 of 1998 of the NEC (November 20) on two formal motives. One of them was that the petitioner had not submitted in advance a copy of the signature sheet and the questions it contained (in practice, a question on the issue of referendum did not even exist), while, based on Act no. 3 of 1998 on the national referendum and people's initiative, this was a compulsory formal requirement. The other reason was the expiry of the four-month deadline for initiating a referendum, which was introduced in the Constitution by Act no. 48 of 1997 Article 4 (Act no. 20 of 1949 Article 28/E) being effective from October 31, 1997, and which was applied to cases in progress from October 31 as well, through Article 6(3) of the same law. Since, on the basis of this, the time available for the initiator expired on February 28, 1998, therefore, the authorization (of a basically non-existent "question) was not possible for exceeding the time limit as well. By making use of the experiences included in the preamble of this Decree, and by not giving up his goal, on December 22, 1998, Tamás Tóth asked the NEC to authorize the copy of the signature sheet initiated for the reintroduction of death penalty, as well as for a referendum, which included the following sentence: "I ask the Parliament to create the legal circumstances necessary to temporarily reintroduce death penalty?" This motion was assessed by the NEC on their meeting from January 14, 1999, and it was rejected through Decree no. 1 of 1999 of the NEC (January 14), this time for reasons related to its content. The first and most important substantive reason was that the issue itself is prohibited by the Constitution according to Article 28/C(5)(b): "there can not be held a referendum on the obligations arising from an international treaty, nor on the content of the laws that contain these obligations." Since the Parliament has ratified both the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on November 4, 1950 (European Convention on Human Rights) and its additional Sixth Protocol of Amendment on the abolition of death penalty, and the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to ban death penalty for common criminal offenses (Act no. 31 of 1993 and Act no. 2 of 1995), the referendum on restoring death penalty would be unconstitutional. The second, less significant argument related to content emphasized the lack of enforcing the requirement of clarity, because, according to the NEC, based on the "yes/no" options that the question could have been answered with, it is not possible to determine the true intention of the majority of people, since sentence from the signature sheet does not provide precise guidance as to what the obligation of the Parliament would be after the referendum. As it is explained in the Degree: "If a referendum on the reintroduction of death penalty could be held, in the case of answering the question on the signature sheet with <<yes>>, the Parliament could decide to terminate international treaties in force, but it could also decide to reintroduce death penalty based on the limited provisions set out in the international agreements. However, there is a possibility in both cases that the citizens participating at the referendum will take a decision contrary to their true will that remains unable to be expressed within a referendum." Finally, the third, also substantive, reason for the rejection of the application was that the sentence on the signature sheet can not be considered a question, but rather a request in terms of its content, therefore, it could only serve as the base of a people's initiative. The applicant, by considering those set out in Decree no. 1 of 1999 of the NEC, tried to modify his proposal, and issued it again to the National Election Committee for authorization. He attached the copies of six different signature sheets to this proposal, with six questions that were formulated differently, but were similar in their content, the aim of which was to make the Parliament to create the legal conditions for the temporary restoration of death penalty against the offenders of serious crimes against life. The NEC evaluated this proposal in Decree no. 8 of 1999 of the NEC (March 29), and it rejected Tamás Tóth's proposal again. The reason of the rejection was, on the one hand, once again that the issues were inconsistent with Article 28/C(5)(b) of the Constitution, because the aforementioned international treaties, which are part of the legal system of the Republic of Hungary, prohibit the punishment by death of those common criminal offense against life, for which the initiator proposed the temporary reintroduction of death penalty. These conventions allow the application of death penalty only for the most serious crimes committed during war, but the application did not aim the punishability by death of such crimes. The other, less significant (as it can be easily removed) error that served as the basis of rejection is that Tamás Tóth did not ask for the authorization of one specific question, but he issued several potential questions from which the NEC should have chosen the one that could be authorized. In this regard, the NEC stated that they did not have the right to do so; the formulation of the specific question to be asked at the referendum was the task of the applicant, while the NEC could only decide on the legality of this particular question, and whether it was admissible for a referendum. However, the case of death penalty did not end with these Decrees of the NEC, because, by making use of the options provided in Act no. 100 of 1997 Article 130 on the election procedure, Tamás Tóth filed a plea to the Constitutional Court in regard to the Decrees of the NEC both no. 1 of 1999 and no. 8 of 1999. At that time, the plea could be made within three days after the publication of the decision (Article 130(3)), with the condition that within those three days, the plea had to arrive at the NEC (who would have sent it to the Constitutional Court) (Article 78(1)). (This deadline today is 15 days (Article 130(1)).) Since the objection against Decree no. 1 of 1999 of the NEC arrived after the deadline to the Central Register and Election Office (also) serving as the office of the NEC, the Constitutional Court rejected this objection without a substantive evaluation through Order no. 2 of 1999 of the Constitutional Court (March 3). As it was explained in the preamble, the petitioner personally present at the meeting on January 14, who received the decree right after its publication, should have filed the objection early enough so it would have arrived to the NEC by January 17 at the latest, however, this arrived only on January 19. And since according to the law and the relevant practice of the Constitutional Court (see Decree no. 28 of 1998 of the Constitutional Court (June 16)), in such cases, the objection can not be judged for formal reasons, the Constitutional Court rejected it for being delayed. (It is worth mentioning here the opinion of László Kiss who explained, as the spokesman of common sense contrary to the bureaucracy of the Constitutional Court, that it was impossible to expect the submitted motion to arrive within three days, as the person filing the petition has no influence on the speed of delivery. In this specific case, for example, Tamás Tóth mailed the letter of objection on the following day of the decision, on January 15, but it arrived only on January 19. As László Kiss pointed out: in order for the objection to arrive on time, it would have been necessary for the applicant to send it via a courier service, or – given the lead time of the post office – to mail it before (!) the day of the decision; it is obvious that none of these can be expected, therefore, according to László Kiss, it is "absurd" to hold accountable anyone for respecting these legal conditions.) However, the objection against Decree no. 8 of 1999 of the NEC arrived within this three-day limitation period, thus the Constitutional Court finally had the opportunity to substantively evaluate the constitutionality of the petition on the restoration of death penalty, which was also intended to take a final position on whether death penalty can ever be re-institutionalized in the current legal environment. Decree no. 11 of 1999 of the Constitutional Court (May 7) clearly concluded that it can not be restored, confirming the preamble of the NEC, namely that reintroducing death penalty would mean the violation of international treaties in force, therefore, a referendum on the matter can not be hold. And this also meant an irrevocable conclusion of the fact that under the present circumstances, death penalty in Hungary can no longer be applied in any form or to any extent.

[121] For the arguments pros and cons about the necessity of capital punishment, see, e.g.: Toth J., Zoltan: The Capital Punishment Controversy in Hungary: Fragments on the Issues of Deterrent Effect and Wrongful Convictions. European Journal of Crime, Criminal Law and Criminal Justice, Volume 21, Issue 1, 2013, pp. 37-58.

*"You cannot put women and men on an equal footing, it is against nature."** A Review of the Evolution of Women's Rights since the Establishment of the Republic of Turkey

Katalin Siska**

Abstract

In 1985, Turkey ratified the CEDAW, in 2012 The Council of Europe Convention on preventing and combating violence against women and domestic violence. The ratification document noted that the Turkish State did not refute its obligation to implement the Convention. The Turkish government tries to eliminate discriminatory practices and traditions against women and girls but yet did not succeeded to ensure the total equal participation and opportunities in all spheres of life since the Turkish government expressed its concern that certain aspects of the Convention contradicted relevant clauses of the Turkish Civil Code and Constitution regulating marriage and family life.

In my paper I focus on the laws and policies adopted for the implementation of the Convention analyzing what results were realized from the obligations undertaken both legislative and practical levels.

Keywords: *CEDAW; human rights; Turkey; gender; discrimination; EU.*

1. Introduction

The United Nations in Turkey renewed its commitment to scaling-up work on gender equality in Turkey and shared results of recommendations to implement the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) at a meeting held last month in Ankara. The Inter-agency UN Results Group on Gender, chaired by UN Women, brought together 40 representatives from bilateral and international organizations as part of its efforts to carry out and monitor gender-related activities within the UN Development and Cooperation Strategy 2016-2020.

In 1985, Turkey ratified the CEDAW, in 2012 The Council of Europe Convention on preventing and combating violence against women and domestic violence (more commonly known as the Istanbul Convention). These international conventions together with the stand-alone sustainable development goal on achieving gender equality and empowering all women and girls are meant to galvanize the government to eliminate discriminatory practices and traditions against women and girls and to ensure equal participation and opportunities in all spheres of life.

In 2014, the Turkish government submitted the 7th Periodic Report of the National Commission regarding the progress made in the implementation of the CEDAW Convention. In July 2016 the committee published its closing comments after the formal dialogue with the Turkish delegation. Zeliha Unaldi, a Gender Specialist in the Resident Coordinator's Office in Ankara, discussed the work of UN Turkey on gender equality and women's empowerment, and presented a summary of more than 60 CEDAW recommendations under 25 subtopics to Turkey while emphasizing the need to work together for results: "The international community's support to the Turkish government and civil society organizations' roles are important in achieving implementation of the UN's CEDAW recommendations.[1]

Among others, the CEDAW Committee recommended that Turkey:

- Adopt measures to achieve equal and full participation of women in political life at local and national level.
- Establish a clear timeframe to finalize and adopt the draft National Action Plan to implement UN Security Council Resolution No. 1325 (2000) on women, peace and security;
- Implement the prohibition of child marriage and strengthen sensitization efforts on the harmful effects of child marriage on a girl's health and development;
- Implement temporary special measures to accelerate substantive equality of women and men in all areas where women are underrepresented or disadvantaged, particularly in education, labour market, political and public life;

* Recep Tayyip ERDOĞAN, BBC News, *"Turkey president Erdogan: Women are not equal to men"*, 2014. November 24. Isztambul. http://www.bbc.com/news/world-europe-30183711.

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[1] UN takes stock of CEDAW recommendations to Turkey. http://eca.unwomen.org/en/news/stories/2016/09/un-takes-stock-of-cedaw-recommendations-to-turkey

Ingibjorg Solrun Gisladottir, UN Women Regional Director for Europe and Central Asia and Representative to Turkey, said in her opening remarks that the UN in Turkey is willing and committed to scaling up its work on gender equality. "The United Nations has a dual approach on gender, aiming to achieve not only gender-specific outcomes, but also gender mainstreaming," she said.[2]

In my paper I will study the laws and policies adopted for the implementation of the Convention analyzing what results were realized from the obligations undertaken both legislative and practical levels.

2. The CEDAW

2.1 The brief history of CEDAW

At international level the various governmental and non-governmental organizations began to deal with the women's rights in the early 20th century, although these documents[3] solely focused on the protection of women and not create the legal background of the equal opportunities for women. The women and men equality principle first formulated by the United Nations Charter, and in 1946 the Committee on the Status of Women was established in 1976 drafted a legally binding international document. Finally the draft of the UN General Assembly in New York with 130 votes and 10 abstentions was adopted (The Convention on the Elimination of All Forms of Discrimination against Women, CEDAW[4]) on 18th December 1979. The CEDAW at the Copenhagen conference, on 17 July 1980, had signed by 64 states, but ratified by only two. The Convention came into effect on 3th September 1981 and by October 2004, 179 countries have ratified. This represented 90 per cent of UN member states. The Convention has imposed a social policy to be followed by States Parties with the aim of changing prejudices and attitudes against women and ensuring equal economic, social and political conditions.[5]

Despite Turkey's poor human rights records the Turkish government supported the CEDAW since its inception. On 15th January 1975 voted yes for the UN General Assembly's No. 3521 decision, which requested drafting of the text of the Convention, as well as for the decision 34/180 was taken at 18th January 1979, which deals with the publication of the Convention.[6] Turkey before ratifying the CEDAW internationally stood for the women's rights. On 22th December 1966 ratified the International Labour Organization Convention No 100, which aim was to overcome with significant wage gaps existing between men and women, thereby facilitating that the remuneration received for work cannot be discriminatory, which could improve the labor market situation of women. Pronounced implicitly equal treatment in terms of pay later helped the predominance of the principle of equal treatment on other areas so it really can be labeled as a first step toward equal treatment for men and women.[7]

Turkey has signed and ratified CEDAW soon after it came into force, but significant changes did not occur in this context. For the changes had to wait until the 90's. Reforms on women's rights before the 90 s were limited in nature and the regulations for implementation were lacked. The Turkish women's organizations were active in the 80 s and used the CEDAW for achieving significant changes. In 1985 Turkey adopted the CEDAW Convention, in 2002 its Optional Protocol. As according to the Article 90[8] of the Turkish Constitution international law is part of the Turkish Constitution and takes precedence over Turkish national law, the Convention became part of the Turkish constitution.

The preamble refers to women's rights in relation to the documents which had already been approved, and shows that the objectives of the Convention in order to achieve full equality between women and men, gender roles must change the social and cultural attitudes. Article 1 defines the concept of discrimination against women. According to this it shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. Article 2 states that the Parties agree on to pursue a policy that eliminates discrimination against women, and then from Article 5 to Article 16 details these obligations.[9]

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2 UN takes stock of CEDAW recommendations to Turkey http://eca.unwomen.org/en/news/stories/2016/09/un-takes-stock-of-cedaw-recommendations-to-turkey

3 e.g. Hague Guardianship Convention 1902., 1904 International Agreement for the Suppression of the White Slave Traffic, League of Nations, 1910 International Convention for the Suppression of the White Slave Traffic, League of Nations.

4 http://www.un.org/womenwatch/daw/cedaw/

5 KOVÁCS Krisztina, *A nemek közötti megkülönböztetés tilalma*. In: HALMAI Gábor-TÓTH Gábor Attila, *Emberi jogok*. Osiris Kiadó. Budapest, 2003. 368-374.

6 Feride ACAR, *Turkey*. In: Marilou MCPHEDRAN, Susan BRAZILLI, Moana ERICSON, Andrew BYRNES (ed.) *The First CEDAW Impact Study: Final Report, Toronto, Center for Feminist Research*, New York University and International Women's Right's Project, 2000.

7 ZACCARIA Márton Leó, *Az egyenlő munkáért egyenlő bér elv megjelenése és alkalmazása az Egyenlő Bánásmód Hatóság gyakorlatában, tekintettel az európai bírósági és kúriai joggyakorlatra*, Az Egyenlő Bánásmód Hatóság 10 éve" című pályázat keretei között elkészült tudományos pályamunka Debrecen, 2015, 5. http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/5519181185fc04821a2b9de90fc1dafe/Zaccaria_M%C3%A1rton_Le%C3%B3_p%C3%A1lyamunka.pdf

8 International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail. https://global.tbmm.gov.tr/docs/constitution_en.pdf

9 For example, they are obliged to ensure equality for women before the law, the same rights to citizenship or education. Remarkable the Article 4 of the Convention, that aimed to take temporary special measures to accelerate de facto equality between men and women that shall not be considered discrimination against men and women that provides an opportunity for positive discrimination.

With regard to the Articles of the Convention, States Parties ratified it with reservations placed on Article 28 or Article 116.[10]

According to Article 17 of the Convention for the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women, which initially had only 18, later 23 members. The first meeting took place in April 1982. Under Article 20, the Commission normally meets annually for a period not longer than two weeks, but the General Assembly in 1996 decided to increase the sessions due to a sharp increase in the number of States Parties. The Commission's main task was to negotiate the governmental reports submitted by States parties. According to the Article 21 of the Convention, the Committee can put forward suggestions and general recommendations based on reports and information received from the States Parties to examine. The recommendations have no binding legal effect, so that the States parties were not obliged to take them into account. With the recommendations the Commission declared its aims to interpret the important sections of the Convention broadly, in and thereby influence the government policy.

The Article 28[11] the CEDAW allowed for countries that ratify the Convention with the reservations. The reservations cannot be incompatible with the object and purpose of the Convention. The states can present reservations only in relation to the specific provisions that are contrary to their national rights, traditions, religion, or their cultures.

CEDAW is a living document, and its text changes as a result of the general opinion and submissions of the Committee. Number of important issue which is not regulated have been added during the time to the basic document by Optional Protocols. Turkey ratified CEDAW in 1985 with fulfillment of the obligations in January 19, 1986. The Optional Protocol was signed 8th September 2000 and ratified on 29th October 2002.

2.2 CEDAW Optional Protocol

The idea relating to the establishment of a complaint mechanism was first proposed in the early 1990 s. Even though the development of an Optional Protocol was on the agenda as early as 1993, the CEDAW Committee adopted only in 1999. On 12th March the Commission already finished a draft, which was approved 6th October 1999 by the UN General Assembly, came into force 22th December 2000.

Prior to the adoption of the Protocol, the governmental reports of States Parties were the only way of implementation of the Convention. With the Optional Protocol that was adopted 6th October 1999 by the UN General Assembly (and came into force on 22th December 2000) there was possible to submit individual complaints. According to the Optional Protocol[12] after exhaustion of domestic remedies individual or collective complaints („notification") was possible to submit to the Commission.

The Protocol has contributed to a better implementation of the Convention, has contributed to the development of effective national and local legal remedy mechanisms, indicated, however, that discrimination based on sex should be judged similarly with racial discrimination. According to Article 2 individuals as well as other groups and other persons acting on their behalf under the jurisdiction of States Parties may apply in writing to the commission in case that all domestic remedies have been exhausted. The committee decides in closed session and forward its opinion to the parties. The State party must respond of any action taken in this regard by informing the Committee.

2.3 Implementation of the CEDAW

Turkey ratified the Convention with reservations placed on Article 15 (par. 2 and 4) and Article 16 (par 1 c, d, f, g). Paragraph 2 in Article 15 of the CEDAW stipulates: States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.[13] Paragraph 4 grants women equality "with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile. The paragraphs of Article 16, on which Turkey placed reservations, grant women equal rights "during marriage and at its dissolution, "in matters related to children, and "same personal rights as husband and wife, including the right to choosing a family name, a profession and an occupation.

The Turkish government expressed concern that certain aspects of the Convention contradicted relevant clauses of the Turkish Civil Code regulating marriage and family life. The Turkish Civil Code of 1926, which was still in effect, stated the following:

1. The husband has the legal standing to represent the conjugal union (Article 154).
2. The husband chooses the domicile and duly provides for the maintenance of wife and children (Article 152/2).
3. The wife acquires the husband's surname (Article 153/1).
4. The wife to the extent of her ability, must assist the husband by word and deed in his effort to maintain the home. The wife is responsible for household management (Article 153/2).
5. Both parents share parental authority over children but in the case of dispute, the husband's view prevails (Article 263).

The ratification document noted that the Turkish State did not refute its obligation or intention to fully implement the Convention with regard to substantive issues and at no instance attempted to invoke its reservations as an argument or excuse

[10] From 11 States more than 90 reservations.
[11] http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article25.
[12] The Optional Protocol was signed by 68 states and ratified by 23 states.
[13] http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article1

to implement any article of the Convention.[14] Thus all the reservations were removed on 20 September 1999, and a number of important steps were taken toward the full implementation of the Convention. The CEDAW has contributed to improving the status of women in Turkey and will continue to do so because of the institutions, laws, and policies that have been adopted within the framework of the Convention.

3.Women's Rights in Turkey

Turkish governments supported women's rights since the beginning of the Republic in 1923. Mustafa Kemal Atatürk wanted to modernize and westernized Turkey. Women1s rights were an integral part of this process. Ziya Gökalp an intellectual who set the tone for the modernization of Turkey in his writings argued that women's rights were actually indigenous to Turkish culture because pre-Islamic Turks in Central Asia had considered men and women equal. He contended that „women could become a ruler, a commander of a fort, a governor and an ambassador."[15] He noted that emancipation of women should be thorough, including socioeconomic life, education and legal treatment.[16] As a result of such attitudes, there were revolutionary changes regarding women's right in Turkey.

Islamic law was abolished in 1926 and replaced by a new civil code derived from the Swiss system. Religious marriages were made illegal, civil marriage became compulsory, and polygamy was abolished. Men and women were given equal shares in inheritance and equal rights in custody over children. Women gained the right to vote and run in parliamentary elections as a constitutional right in 1934. Turkey therefore became the model of a secular Muslim country in which women could have many of the same rights as men.[17]

Despite women in Turkey have been far from equal to men. The sexist and patriarchal family structure has remained in place. As a result the importance of *namus* (sexual purity) is used by society as a control mechanism over women's freedom.

Gender biases disadvantage girls in educational access. Most rural and urban lower-class women are not educated beyond primary school. In the past few decades 28 percent of women still cannot read and write. Women were underrepresented in decision-making posts and politics. During the 1935 elections – the first in which women were allowed run for the parliament - 18 women were elected into the Grand National Assembly, comprising 4,6 percent of the entire parliamentary body.[18, 19]

Gender segregation exists in the workplace as well as in family life. The majority of housework is still performed by women. Although women have advanced in some professions as physicians, university professors and public civil servants, only 15,5 percent of Turkish women (and 23,1 percent of men) were enrolled in institutions of higher education.[20] According to the official labour statistics 70 percent of the female workforce in Turkey is employed in the agricultural sector, 10,6% in industry and 19,4 percent in services.[21] These figures underestimate women's work in the informal sector and in rural areas, where women work as unpaid family workers, and the female participation rate in the labour force is 43,7 percent.[22] Women who migrate to the cities from the countryside are also usually employed in the informal sector as domestic help. The life expectancy rate for women in Turkey is 71,5 years (for men it is 66,9).[23]

4. Programs and Institutions

In the Fifth Five-Year Development Plan (1985-1990) the Directorate General on the Status and Problems of Women (DGSPW) was established as the national mechanism on women's affairs on 25 October 1990 (Law No. 3670). The establishment of this body was necessary to fulfill the requirements of the CEDAW. The DGSPW became the part of the Ministry of Labor and Social Security on 27 November 2002 that was attached to the prime minister's office. The Directorate's objectives include improving the status of women in Turkey in social, political, economic and cultural spheres of life. The body coordinated the activities of various governmental and nongovernmental agencies working toward women's equality.[24] In 1987 the Committee for Policies for Women was established within the State Planning Organization and a Women's Unit was established at the premises of the Ministry of labor in 1989. Under the aegis of the DGSPW and co-sponsored by the United Nations Development Program (UNDP) the National program

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[14] Feride ACAR opt cit. 4.

[15] Arat YESIM, *From Emancipation to Liberation: The Changing Role of Women in Turkey in Turkey's Public Realm*. Journal of International Affairs 54, no.1, 2000, 107.

[16] Katherine Elisabeth FLEMING, *Women as Preserves of the Past: Ziya Gökalp and Women's Reform*. In Zehra F. KABASAKAL (ed.): *Deconstructing Images of the Turkish Women*, St. Martin Press, New York, 1998. 127-138. 128.

[17] Müftüler-Bac MELTEM, *Turkish Women's Predicament*. Women's Studies International Forum 22, no 3. 1999/May/June 303-315.

[18] By the time of the 1995 election, it dropped to 2.4%, 13 women out of 550. By 2002, the figure was 4.4% in 2011 14% (79 women representative out of 471), in 2015 17% (96 women out of 454). https://www.theguardian.com/world/2015/jun/08/record-number-women-elected-turkish-parliament

[19] There was very interesting the position of the women voters on this issue: 73% of female voters believed that a woman can be a good major, 64% of them believe that women can be successful prime minister, while 79% of them did not want her daughter be politically active. Abadan-Unat NERMIN: Movements of Women and National Liberation. In: Abadan-Unat NERMIN (ed.), *Women in the Developing World: Evidence from Turkey*. Monograph Series in World Affairs 22. Denver, Graduate School of International Studies, University of Denver, 1986. 11-25.

[20] In 2015 this figure is 30,3%. Müftüler-Bac MELTEM, *Turkish Women's Predicament*. Women's Studies International Forum, Vol. 22, No. 3, pp. 303–315, 1999. http://yoksis.bilkent.edu.tr/pdf/files/10.1016-S0277-5395(99)00029-1.pdf

[21] http://data.worldbank.org/indicator/SL. TLF.CACT.FE.ZS

[22] Müftüler-Bac MELTEM opt. cit. 23.

[23] Population and Development Indicators http://pdfproc.lib.msu.edu/?file=/DMC/African%20Journals/pdfs/social%20development/vol2no2/jsda00200 2010.pdf

[24] Replies of the Turkish Delegation to the Question of the Pre Session Working Group of the Committee on the Elimination of Discrimination to Turkey. United Nations New York. 17 January 1997., http://www.die.gov.tr/CIN/women /cedawpr.htm#REPLIES

for the Enhancement of Women's Integration in Development Project was launched in 1992 and extended until the end of 1998. The object of this program was to change the negative images of women in all fields of life and to integrate women's issues into development plan.

5. Legal and Constitutional Reforms

According to the Article 10 of the Constitution, everyone is equal before the law, regardless of their race, gender, religion or ethnicity. Acknowledging that this does not guarantee equality for women, the Directorate General on the Status and Problems of Women proposed adding a paragraph to Article 10 that would make the equality clause stronger.[25] Although the initial attempts to amend Article 10 failed, it was finally changed in May 2004[26] to add a paragraph stating, "Women and men have equal rights. The state is obliged to realize this equality in life."

Article 90 was also amended to have international human rights treaties supersede Turkish laws in case of conflict. An equality clause was also added to Article 41 of the Constitution on 3 October 2001. Referring to family as the foundation of the Turkish society, Article 41 now specifies that family is based on equality between husband and wife.

The Constitutional Court has also assumed a progressive stand. Two verdicts of the court on the legal equality of men and women actually referred to the CEDAW.[27] On 19 November 1990 (Constitutional Court Decision No. 1990/31) the provision of the Civil Code, Article 159 which necessitated a husband's permission for his wife's professional activity, was annulled. In 1996, the court also annulled Articles 440 and 441 of the Turkish Penal Code on the grounds that they defined the adultery of married men and women differently, thus violating the principle of equality before the law and the principles outlined in the CEDAW.[28] As a result of these annulments adultery is no longer defined as a crime under the law only a reason for divorce.

Article 438 of the Turkish Penal Code[29] which reduced the sentence of a rapist by one-third if the victim was a prostitute, was also annulled by the Grand National Assembly in 1990 for violating the equality principle.

Some legislative amendments followed the court decisions. A change in Article 153 of the Civil Code passed in May 1997, allowed women to retain their maiden names along with their husband's names if they wish to do so. An amendment to the Tax Law in 1998 permitted women to declare their income independently of their husband's.

A significant development for women's rights in Turkey was the adoption of the new Turkish Civil Code on 22 November 2001. Women's fight to change the Civil Code had a long history. Finally the Ministry of Justice set up a commission composed of civil law professors to draft a gender-sensitive bill to bring Turkish laws in closer harmony with the European countries civil law. With the bill the Turkish government aimed to improve Turkey's prospect to join the European Union as a member and address Turkey's obligations to meet the gender equality provisions in international treaties including CEDAW. The draft bill for the civil law was announced on 17 February 1998 and included several progressive changes.

Article 152 of the 1926 Civil Code[30] had deemed the "the head of the conjugal union" to be the husband.[31] While on the one hand obligating the husband to perform certain responsibilities placed the wife in a subordinate position in the marriage contract. It also raised and equalized the minimum age of marriage for men and women and introduced a more egalitarian matrimonial property regime.[32] The new Civil Code stipulates that each spouse represents the conjugal union and that each shares an equal part in determining the conjugal home. Women are granted the right to use their maiden name before the husband's name as well as the right to work without seeking any permission from the husband, the right to work without seeking any permission from the husband, and the right to share equally the property acquired during the marriage.

In the early days of the Republic when the Turkish Civil Code was adopted on 17 February 1926, the concept of separate ownership was accepted as the legal property regime. United ownership was accepted as a choice (however it was never applied). According to the separate ownership regime each spouse kept the property they previously owned or those they acquired during marriage. In the case of divorce the spouse who did not have his/her name on the property had no right to the property. Since tradition dictated that most property would be registered in the husband's name wives could not have any legal claim over property in the case of divorce. According to the new regime, the unpaid work of women at home is recognized by stating that the added value of all property acquired during marriage shall be shared equally if the marriage is terminated. Accordingly spouses are considered to be partners in the property they acquired during their marriage. They cannot claim

[25] Zehra F. KABASAKAL (ed.), *Introduction. Politics of Representation and Identity. In Deconstructing Images of The Turkish Women*, St. Martin Press, New York, 1998. 1-34.

[26] The text of the present Turkish Constitution. https://global.tbmm.gov.tr/docs/constitution_en.pdf

[27] Feride ACAR, *Turkey*. In The First CEDAW Impact Study: Final Report, Centre For Feminist Research, York University and International Women's Rights Project, 2000.

[28] According to Article 440 women can commit adultery if she has sexual intercourse with another man who was not her husband. According to Article 441 the male adultery is defined as follows: when the man continued, marriage-like relationships with another woman. These different definitions was named the same adultery but had different penalties.

[29] Turkish Criminal Code 1926 (Act. No. 765.) http://www.wipo.int/wipolex/en/details.jsp?id=3872

[30] Turkish Civil Code http://www.tusev.org.tr/usrfiles/files/Turkish_Civil_Code.pdf

[31] NGO Report on the Implementation of CEDAW 1997. Prepared by Women for Women's Human Rights and presented to the United Nations Committee for the Elimination of all Kinds of Discrimination against Women at the Periodic Review of Turkey. New York, 1997 January. http://wwhr.org.

[32] Yakin ERTÜRK, *15 years of The United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences.* 2002. 24-25. http://www.ohchr.org/Documents/Issues/Women/15YearReviewofVAWMandate.pdf

ownership to property owned prior to the marriage or that acquired by inheritance. The objective is to have equal access to the property acquired by inheritance.

Turkey's National Action Plan regarding equal gender rights was published in 1997.[33] it highlighted eight out of twelve critical areas of concern stated on the Fourth World Conference on Women: 1. education and training of women; 2. the rights of the girl-child; 3. and health; 4. violence against women; 5. women and the economy; 6. women in power and decision making; 7. institutional mechanism for the advancement of women; 8. women and the media.

In line with the Action plan in 1998 the Grand National Assembly formed a special parliamentary investigative commission for gender discrimination. It was the report of this commission that "recommended that Turkey withdraw its reservations to CEDAW; that gender mainstreaming be integrated in all policies; that temporary special measures be taken in education, labor and politics to ensure equality."[34]

The violence against women became a priority issue for the women's groups in the 1990's and led to the legislation of a new law. The Law on the Protection of the Family (Law No. 4320), which entered into force on 17 January 1998, was the first legislation that addresses the issue of domestic violence in Turkey. This act requires the state to take action to protect women from human rights abuses committed by family members. It regulates the punishments for domestic abusers and seeks protection for the women and children who are victims of domestic abuse. The law states that the perpetrators of the violence should be removed from their homes for a certain period of time and, if the law is violated again there should be a jail sentence imposed. Unfortunately this law was not sufficient to address many types of violence against women.

Significant progress on this issue came with the drastic alteration of the 1926 Turkish Penal Code on 26 September 2004. The Turkish Penal Code had been in violation of several paragraphs in Article 2 of the CEDAW. New Penal Code includes more than thirty amendments to advance gender equality and protection of sexual and bodily rights of women and girls in Turkey.[35] Article 102/2 of the new Penal Code criminalizes marital rape and broadens the definition of rape.[36] Rapists will no longer get reduced sentences for offering to marry their victims. Various forms of domestic violence are addressed. The new Penal Code recognizes domestic violence as a crime that should be penalized by incarceration (Article 96/2). It also increases sentences for sexual crimes. It attempts to root out patriarchal concepts embedded in Turkish society that threaten the well-being of Turkish women and girls, such as chastity, morality and abolishes previously existing discriminations against non-virgin and unmarried women.[37]

In addition to the changes in laws, some new programs have been developed to assist women. Starting in 1993, there have been special programs that grant small credits to women and promote women's entrepreneurship. Recognizing the illiteracy problem and educational gaps by the end of 1999 231000 women had taken part in literacy training courses.

Beside the exact results the CEDAW contributed to bringing the topic of women's rights to the forefront. Starting in the 1980's feminist authors, journalists, academicians and politicians became vocal about championing women's rights and publicized issues such as discriminatory articles in laws, sexual harassment and bride price.

The term "sexual harassment" entered the Turkish lexicon for the first time, and the attention to the issue has been sustained through public protests and mass campaigns. In 1996, the World Bank sponsored a project by the DGSPW to research gender based discrimination and sexual harassment in the workplace. Also in 1996 the Confederation of Turkish Labor Unions (*Türkliye Isci Sendikalari Konfederasyonu*) the largest labor union in Turkey published a guidebook on sexual harassment. Due to the programs the new Turkish Penal Code has made sexual harassment at the workplace a crime punishable by law.

6. Challenges for the Future

Despite the significant improvements that have been made toward the implementation of the CEDAW in Turkey, there are certain areas that have not been addressed, or are in need of further attention.

According to the UN Shadow Report Summary (2015)[38] Turkey should achieve improvements during the implementation of CEDAW and reaching equality between the sexes in six topics: 1. stereotypes and harmful traditions (e.g. avoid overemphasizing women's moral, chastity[39], ban the categorisation of homosexuality and trans identities as "illnesses" and "abnormalities[40]). 2. Participation in political and public life. 3.

[33] The national mechanism should operate regarding informing women about new rights and new circumstances in relation to the change.

[34] Feride ACAR opt.cit. 34.

[35] Ikkaracan PINAR - Liz AMADO, *Reform of the Turkish Penal Code and Sexual Rights*. Challenging Fundamentalisms: A Web Resource for Women's Human Rights. www.whrnet.org/fundamentalisms.

[36] Zehra F. KABASAKAL opt.cit.22.

[37] Ikkaracan PINAR - Liz AMADO opt.cit. 45.

[38] TURKEY: Shadow Report Summary for the 64thPre-Sessional Working Group of the Committee on the Elimination of All Forms of Discrimination against Women submitted by the Executive Committee for NGO Forum on CEDAW-Turkey www.ilga.org/wp-content/uploads/2016/02/Turkey-Report-for-the-64th-Pre-Sessional-Working-Group-of-CEDAW-.pdf

[39] Speaking during an Eid el-Fitr meeting in 2014, Deputy Prime Minister Bülent Arınç said that "…[The woman] will know what is haram and not haram. She will not laugh in public. She will not be inviting in her attitudes and will protect her chasteness." (Hürriyet Daily News, "Women should not laugh in public, Turkish deputy PM says", 29 July 2014, available at:http://www.hurriyetdailynews.com/women-should-not-laugh-in-public-turkish-deputy-pm-says-.aspx?pageID=238&nID=69732&NewsCatID=338.

[40] In a 2011 speech on terrorism, former Minister of the Interior Idris Naim Sahin spoke disparagingly of "an environment in which there are all sorts of immorality, indecency and inhuman situations –from pork meat to… homosexuality".(Kaos GL, "LGBT Organizations Demand the Resignation of Interior Minister", 30 December 2011, available at: http://kaosgl.org/page.php?id=10241)

Popularizing female employment[41]. 4. Education (e.g. improve the quality of education, particularly in respect of girls whose mother language is not Turkish. In 2012, 8 years compulsory uninterrupted primary education was replaced by the so-called "4+4+4 (years)" Compulsory Education System. Because of the new system in education, the schooling rates of girl children have dropped after the first 4 years.[42]). 5. Violence[43] 6. Women in rural areas[44]

According to Article 19 of the Turkish Citizenship Law, "a Turkish women married to alien, if her husband' national law permits and if she notifies the relevant authorities that she decides to choose her husband's citizenship, loses her Turkish citizenship." This is opposed to the 9 Article of the CEDAW that however says " State Parties of the Convention should ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband."[45]

Another significant violation of the CEDAW is the practice of "honor killings", in which girls and women are killed by male relatives if their actions are deemed to bring shame to a family honor. This practice is more common in eastern and southern Turkey. This practice violates the CEDAW's preamble as well as Article 1f (on discrimination) and 14 (on rural women). The new Penal Code does not recognize honor killings as a separate category of crimes. It does however include "custom killings" and murder of parent, child, or spouse as "special cases" that should be punished with life imprisonment with hard labor. It remains to be seen whether th new measures will reduce the number of honor killings in Turkey.

Another area of contention concerns women's reproductive rights, which are addressed in Article 15 of the CEDAW, but without referring the word "abortion". Although abortion during the first 10 weeks of gestation became legal in Turkey, provided it is not used as a method of birth control, the law requires a married woman to seek the consent of her husband and a minor must get parental permission.

Turkey by signing and ratifying the CEDAW, the state committed itself to bringing about gender equality. The recent legislation and institutional arrangements have created a formal framework that can lead to important changes toward advancing women's rights in Turkey. In addition to the legislative reforms, however, actual improvements in women's lives require major shifts in public attitudes and values.

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Arat Yesim: From Emancipation to Liberation: The Changing Role of Women in TUrkeyin TUrkey's Public Realm. Journal of International Affairs 54, no.1, 2000, 107.

[41] President Recep Tayyip Erdoğan keeps repeating his call to Turkish families for having at least three children. Speaking at the International Family and Social Policies Summit in 2013, the President said that "the strength of a nation lies in its families and the strength of families lies in the number of their children." (Hürriyet Daily News, "Turkish PM Erdoğan reiterates his call for three children", January 3, 2013, available at: http://www.hurriyetdailynews.com/turkish-pm-erdogan-reiterates-his-callfor-three children.aspx?pageID=238&nid=38235).

[42] In addition, school textbooks and in-class training materials prepared by the authority of the Ministry of Education have sexist discriminatory elements that deepen the gender-based discrimination. According to a EU funded study conducted between 2013-2014, "…the textbooks continued to be dominated by the mentality that attributes to women only the role of motherhood, defines men with roles outside the home and women with roles in the home, and that even supports the idea that changes in gender roles could lead both to individual unhappiness and social disorder. The study was conducted by the History Foundation in collaboration with the Centre for Sociology and Education Studies at Istanbul Bilgi University as part of the EU funded "Promoting Human Rights In Textbooks -III-" project, 2014, available at: http://tarihvakfi.org.tr/media/documents/16_6_2015_17_20_35698e.pdf

[43] According to the official information provided by the Minister of Justice in 2009, murders of women increased by 1,400% during the period 2002-2009, and no data has been disclosed to the public containing statistics after that period. Despite the fact that there is a lack of official data on instances of violence against women throughout the last 5 years, the number of incidents is estimated to be far higher. According to the statistics collected between 2010-2014 by the Bianet, an independent communication network, 1134 women were murdered, 735 women were raped, 986 women were sexually assaulted and 1395 women were wounded. Moreover, as also reflected in the media, there appears to be a high level of abuse/rape of women with disabilities, in particular women with mental disabilities, and physical/sexual violence against and/or murder of trans women. Murder a fact of life for women in Turkey, Daily News with Radikal | 2/20/2011. http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=women-murder-victims-increase-snowballing-in-turkey-2011-02-20; Bianet, "Erkek Şiddeti Çeteresi", 2010-2014, http://bianet.org/bianet/erkek-siddeti/161582-erkek-siddetinin-2014-grafigi.

[44] According to the formal data provided by the KSGM in 2012, the rate of women working in rural areas or employed as unpaid family workers without any social security was 80.5% in 2011. Yet no regulations laws have been developed to cater to the situation of women in rural areas, who also have very limited access to education.

[45] CEDAW text http://www.un.org/womenwatch/daw/cedaw/cedaw.htm

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Pedagogy and Punishment: Distinguishing Between Erudire and Iniuria in Roman Education and Law

Barbara Ellen Logan*

Abstract

Both Quintilian and Martial joke about the schoolboy's horror of the virga magistri.[1] *While erudire*[2] *includes forcing out "rudeness" in its etymology, this paper seeks to examine when, where, and why accepted methods of physically disciplining free-born children tipped over into inuria*[3] *and delict.*[4] *The dignitas*[5] *of a citizen was understood to guarantee protection from physical assault of any kind; consequently allowances for the beating of children as part of education is fraught with social and legal significance.*

Keywords: *Pedagogy; Roman Law; Erudire; Inuria; Dignitas; Delict.*

This paper is intended as a brief investigation into the issues on the use of physical punishment in ancient Roman education/*erudire* in the context of social and legal bans on abusing or defaming/*iniuria* the persons of free Romans. While young boys and adolescents (the education of girls and women is a separate topic that a short paper cannot adequately address) were not themselves citizens nor *sui iuris* (or separate legal entities), their persons were legal extensions of their fathers and *potestas*/power or authority of their fathers.

In the role of *paterfamilias*/ father of the family, the Roman citizen's *dignitas*/dignity and *integritas*/soundness (which can also be understood as the right to not be molested or otherwise interfered with) symbolically extended into the bodies of his slaves and children. Thus, an act against the slave or child could be interpreted as an act against the *paterfamilias* under whose *potestas* the child or slave lived. For the distinction between violence against the state and violence against persons, Roman law also includes a basic separation between *crimina publia vs. delectica privata* (public crimes and private delict).[6] Homicide was the only crime against an individual that that state addressed; otherwise, the magistrates only addressed "public" crimes: electoral irregularities such as bribery, threats, or other attempts at interfering with elections; provincial extortion; rioting; forgery; theft of public property; and treason. All other acts against others, including theft, rape, failure to uphold contracts, property damage, assault, and insult fell into the broad category of *"delict"* or "unlawfulness." For both public crime and private *delict,* many have noted a basic tripartite division of Roman law when it addresses an individual and the possibility of culpability or punishment: 1) free or unfree; 2) citizen or non-citizen; and 3) *paterfamilias* or *filius familius* (son of the family).[7] (Some scholars include crimes against class – such as failure to show the proper *obsequium*/deference to one's social superiors alongside these divisions – and class concerns, which will be discussed later in the paper.)

The first question that needs to be answered is how common physical discipline was in education. The second is how severe that discipline could become before it tipped into the realm of *delict.* Both Quintilian and Martial joke about the schoolboy's horror of the *virga magistri.*[8] St. Augustine recounts praying to God so as not to be beaten at school and how he was laughed at by his parents despite his fears.[9] There is a wealth of literary, philosophical, and artistic evidence to support the case that physical punishment was regarded as both necessary and normal in education. J.J. Eyre asserts that "school discipline was harsh, the normal punishment being a caning on the hand or, for greater offences, on the back. Primary schools were the worst, but the notorious Orbilius, whom Horace calls Plagosus,

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1 The teacher's rod.

2 To educate.

3 Injury or insult.

4 Legal fault.

5 Dignity, but also social standing, and to be worthy of deference.

6 R.D. Melville, *A Manual of the Principals of Roman Law,* Edinburgh: W. Green and Sons, 1915, 421.

7 Rudolf Sohm, *The Institutes of Roan Law,* Trans. James Crawford Leddie, (Oxford: Clarendon), 1940, 168.

8 The teacher's rod.

9 "*quemadmodum parentes nostri ridebant tormenta, quibus pueri a magistris affligebamor*" In the way in which our parents laughed at our torments, which we suffered from our teachers.

was a grammarian. Quintilian was in a minority in condemning corporal punishment as servile and insulting."[10] However, while *erudire*[11] includes forcing out "rudeness" in its etymology, this paper seeks to examine when and where accepted methods of physically disciplining free-born children might have tipped over into *iniuria*[12] and *delict* by answering the second question.[13] The *dignitas*[14] of a citizen was understood to guarantee protection from physical and verbal assault of any kind. The Lewis and Short Dictionary defines *iniuria (ae, f)*as*: "an injustice, wrong, outrage, injury, insult;* In law, *unlawful violence, assault, trespass;* In language, *an insult, affront, abuse; A damage, harm, injury."* While the Romans did not necessarily regard *iniuria* as severe a crime as the Greeks regarded *hybris* (best known from Demosthenes' denouncement against Conon[15]) the definitions are strikingly similar. Liddell Scott defines **ὕβρις: "***wanton violence,* arising from the pride of strength or from passion, *insolence; lust, lewdness;* of animals, *violence; an outrage; an outrage on the person,* esp. *violation, rape;* in Law, a term covering all *the more serious injuries done to the person; a violent, overbearing man."*

This situation surrounding pedagogy and punishment is complicated even further during the late Republic/early Empire when one considers that the *magister*/teacher might even have been a slave, a freedman, or a foreigner. Martin Bloomer addresses this:

> Quite often, perhaps even the majority of the time, the Roman school was run by an ex- slave. The slave or ex-slave looms far larger in Roman than in Hellenistic education. A slave retinue from pedagogue to capsarius-book-bag holder-accompanied the well-to-do Roman on his way to and from school. The slave could be a highly trained expert (doctor, cook, pottery maker, surveyor) and resentment of his economically potent skill and his transmission of this was constant. In addition to these economic fears, elite talk about slaves and slavery also attracted anxieties about foreigners, social subordinates, and rival men within the house. Thus, the teacher at Rome made a suspect figure: in him could cluster cultural ambiguities about social mobility and social change. Curiously, he drew to himself prejudices about Greek intellectual and cultural superiority and his own inferiority of class and ethnicity. Perhaps, too, Romans could settle their ambivalent feelings about the social mobility made possible by literacy and education on this one figure. Awareness of status must have been high in the classroom.[16]

Eyre generally concurs with Bloomer's view of Roman anxieties regarding social class in the classroom, but allows for special circumstances when the *magister*/teacher is a free person, of great renown, or teaching young men debate and speech skills as a *rhetor* in preparation for their entering law or public life/politics:

> The teaching profession in general was despised and poorly paid, though the teacher's status depended on the age of pupil he taught. Juvenal quotes Quintilian as receiving 2,000 sesterces per pupil per year, or four times as much as a grammaticus earned. Quintilian, admittedly, was a man of high repute, but one can estimate from this that a rhetor would earn at least twice as much as a grammaticus. From the time of Caesar, who enfranchised teachers of the liberal arts, the government favoured education: Vespasian, for example, allowed grammatici and rhetors exemption from municipal munera-they did not have to provide billets for troops. Public opinion, however, was not so favourable, though Suetonius' account of the growth of the grammar schools goes against the general impression we get from Roman writers. This was not only because of the unreal curricula, but because teaching was largely in the hands of freedmen and Greeks, generally despised classes.[17]

Clearly, allowances for the beating of children as part of education was fraught with social significance. It is perhaps because of the fraught nature of placing the bodies of citizen boys under the power of non-elites that the records that we have include very few examples that address *iniuria* as a result of *erudire* on a free body. The notable exception to the lacunae is within the Justinian Code's (early 6th century CE) discussion of the *Lex Aquilia* (late 3rd century BCE). The case is discussed in a dialogue format between Ulpian and a jurist called Paul:

> If a teacher kills or wounds a slave during a lesson, is he liable under the Lex Aquilia for having done unlawful damage? Julian writes of a man who had put out a pupil's eye during the course of instruction and was held liable under the Lex. There is all the more reason therefore to do the same if he kills him. Julian also puts this case: a shoemaker, he says, struck at the neck of a boy with a last (a freeborn youngster) who was learning under him because he had done badly what he had been teaching him, with the result that the boy's eye was knocked out. On such facts, says Julian, the action for insult does not lie because he struck him not with the intent to insult, but in order to correct and teach him; he wonders whether there is an action for breach of the contract for his services as the teacher, since a teacher only has the right to administer reasonable chastisement, but I have no doubt that he is liable under the Lex. (Paul) For excessive brutality on the part of the teacher is blameworthy. (Ulpian) And in this action the father will recover the amount of his loss of his prospective profits from his son's services of which

[10] J.J. Eyre, "Education in the Late Republic and Early Empire." *Greece & Rome*, Second Series, Vol. 10, No. 1 (Mar., 1963), 56.
[11] To educate.
[12] Injury or insult.
[13] Legal fault.
[14] Dignity, but also social standing, and to be worthy of deference.
[15] Demosthenes, *Against Conon,* Translation by Norman W. DeWitt, Ph.D., and Norman J. DeWitt, Ph.D. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1949 http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999. 01. 0080%3Aspeech%3D54
[16] Bloomer, W. Martin. "Schooling in Persona: Imagination and Subordination in Roman Education." *Classical Antiquity,* Vol. 16, No. 1 (Apr., 1997): 57-78. http://www.jstor.org/stable/25011054, 61.
[17] J.J. Eyre, "Education in the Late Republic and Early Empire." *Greece & Rome*, Second Series, Vol. 10, No. 1 (Mar., 1963), 56.

he is deprived from the eye being damaged and also expenses incurred for medical attention.[18]

This famous example of pedagogical violence complicates the issue somewhat because while the beating/death of the slave is clearly understood as *iniuria/delict* the case of the free pupil is more ambiguous. The father of the free child is only considered worthy of recompense for the medical bills and a possible future loss of earnings due to his son's blindness. The crux of the issue is intentional insult: "because he struck him not with the intent to insult, but in order to correct and teach him." At first glance, the interpretations should be reversed: despite both pupils being extensions of the *paterfamilias,* it is only the body of the free that can be insulted, so the slave's case should only include compensation whereas the free child's should be considered *iniuria.* In fact, Ulpian had asserted earlier in the text that *delict* is independent of intention; "Therefore we can interpret *iniuria* for present purposes as including damages caused in a blameworthy fashion, even by one who did not intend the harm."[19] That much is a given when the language is repeated about the teacher: "For excessive brutality on the part of the teacher is blameworthy."

Insult/*opprobrium/contumelia* is clearly at the root of the apparent contradiction between the slave and free pupils' bodies. Because the slave is a slave, a mortal object/*res mortalis,* any blow towards him would be assumed to intend *opprobrium.* I would argue, however, that the body of the citizen under physical discipline is subject to insult only through distinctions (which undoubtedly varied somewhat depending on time and location) regarding who strikes whom, where, how, and with what instrument. The whip, the *flagellum*, was reserved for the body of slaves. When Cicero spoke against Verres in his famous oration, one of the especially despicable crimes that Cicero accused the former governor of having committed was to have had a citizen publicly whipped.[20] This outrage was especially *hybristic* because by law, only the rod/*virga* was to be used against the bodies of citizens. The *fasces* (the symbol of the power and authority of the Roman state) was an axe bound with *virgae/rods;* as a symbol of citizenship, its threat was not inherently demeaning so much as it was meant to mark the difference from the *flagellum.*

Intriguingly, a similar conundrum exists in the discussion of physical discipline and *iniuria* for another free group under the authority of others: the free, citizen, Roman legionnaire. The Roman Legion was reputed to be run with the harshest of disciplines. Tacitus tells the story of a Centurion nicknamed *Cedo Alteram* (bring me another) because of his tendency to break rods made of vine (*vitis*) on the backs of his recruits. To be a citizen, and to be subjected to such intentional violence publicly would, in theory, be the height of insult and *iniuria.* The question about the *opprobrium* associated with such beatings is so great that Eugenia Kiesling has suggested that modern interpretations of ancient Roman military punishment must be exaggerated or incorrect:

> According to this dominant account, Rome's citizen army tolerated a style of physical suasion repugnant to the Greeks. But Romans and Greeks shared the notion that vulnerability to beatings distinguished the slave from a free man. Indeed, Roman laws, the *Lex Valeria de provocatiorxe* (c. 300 BCE) and the *Lex Portia* (198 or 195 BCE), protected Romans from floggings by civilian magistrates and made such protection a defining element of Roman citizenship. Flogging with the lictors' virga, a normal preliminary to execution, not only rendered the proceedings more degrading to a man of dignitas, but served as visual demonstration of his expulsion from the citizen body of Rome. Any difference in military practice suggests a remarkable difference in mentalities, and we are faced with the failure of modern scholarship to address the conundrum that the Roman legionaries upon whose backs the vitis fell should have found such treatment unbearably shameful.[21]

However, the *virga*/rod and *vitis*/vine were not used indiscriminately in the legions. When a unit was deemed to have displayed cowardice and/or insubordination it was not normally the most craven or rebellious who were sought out for punishment/decimation (the execution of 1/10 of the *legio*), the recipients of the beatings or death were chosen by lots. On the one hand, the collective nature of the discipline points to the legions as being understood as a faceless mass, which undermined the individual *dignitas* of each soldier. On the other hand, it also suggests that because the punishment was not personal it could have been deemed as less humiliating, as no one soldier was purposely singled out for *opprobrium*. The *dignitas* of the entire cohort stood in for the *dignitas* of each individual soldier. Rather than gathering *opprobrium* for being beaten with the *vitis,* the ritual discipline—meted out only by the Centurion and only with the *vitis*—the beating of one body symbolically expiated the fault/*culpa* or *contumelia* of the entire unit. It was intended to remove insult, not to offer it. The "who, whom, where, how, and with what implement" changed the meaning of physical discipline.

The Roman curriculum was already designed around an elaborate set of imaginary/symbolic roles because much time was spent on *controversia*/dispute of imaginary cases and "declamations" of outlandish instances. (For instance, a young soldier on leave is drugged by his stepmother so that he cannot return to his unit; he is then charged with desertion and his stepmother with poisoning. However, the soldier did not intend to desert, and the stepmother only acted from love to delay his return to his dangerous assignment.) The role playing involved in Roman education is as symbolic as the beating of the legionnaire. Martin Bloomer argues for the role of the student as a stylized train-

[18] Justinian. *Digest of Roman Law.* Translated by C. F. Colbert, NY: Penguin, 1979, 73.

[19] Justinian. *Digest of Roman Law.* Translated by C. F. Colbert, NY: Penguin, 1979, 72. Justinian. *Digest of Roman Law.* Translated by C. F. Colbert, NY: Penguin, 1979.

[20] Cicero, *Contra Verres.* Reportedly, the poor citizen kept repeating "Su*m civis Romanum,"* as if the statement of his citizenship could proect his body or *dignitas*.

[21] Eugenia Kiesling, "Punishment in the Greek Phalanx and the Roman Legion: Modern Images and Ancient Realities" *Historical Reflections / Réflexions Historiques*, Vol. 32, No. 2 (Summer 2006), 235.

ing in the "persona" or *fictio personae* of an elite male in general and, in particular, in the role of the student's elite father:

> The rhetorical education of the late republic and the empire was a process of socialization that produced a definite subjectivity in its elite participants. In Roman declamation and in exercises in bilingual composition the student took on the speaking role of his father. The boy plays at an adult's role, but this is not a simple impersonation. He speaks like a patron or paterfamilias speaking on behalf of and speaking as his social subordinates. In declamatory cases he might speak for the freedman accused of ingratitude, the son accused of rape or patricide, the stepmother accused of poisoning, the military hero accused of desertion. In addition to learning how to think categorically, the young man considered the various plots that could trouble the home or the city, the breaches of loyalty of social or familial order.[22]

The free pupil cannot be believed to have accrued *opprobrium* for portraying a woman, a poisoner, a freeman, or a military deserter. Instead, it is likely that the schoolroom was understood as a liminal location in which the bodies of the free were subject to roles and discipline that would never be allowed outside of this environment, much in the same way that the free soldier's body was subject to discipline under enlistment that would in any other situation be *delict.* Thus, the connection between *erudire* and *iniuria* precluded *delict* unless first the discipline itself was especially severe (such that permanent physical damage occurred); secondly, if it involved a whip (the mark of slavery); third, if it took place in public (outside of the schoolroom); or fourth, if the punishment included a speech act that singled out the recipient for a personal insult. In all other cases, the necessary fiction of the neutral nature of physical punishment as an impersonal and obligatory part of education was allowed to stand.

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Le concile de Charroux (989) et les coutumes du comté de la Marche: A la recherche des mécanismes de règlement de conflits

(The Council of the Peace of God Hold in Charroux in 989 and the Customary Law of the Counts of the March: Research of the Mecanism in Conflict Management)

Thomas Gergen *

Abstract

The article builts up the link between the Council of Peace from Charroux in 989 and the customary law that applied in situ in the 12th and 13th centuries. Moreover, it intents to furnish the proof of an organic increase of law at that time. Public and ecclesiastical law were living together, side by side, without any separation in the medieval legal world, above all in a « France without government » (P. Geary).

Keywords: *Charroux; Peace and Truce of God; count of the March; customary law; rules of conflict.*

Hommage à Rainer NOMINE

L'auteur consacre cet article à son collègue et ami Monsieur Rainer NOMINE qui fête ses 60 ans le 7 mars 2019. Ad multos annos!

Le doctor iuris Rainer NOMINE est magistrat à la cour des affaires sociales de Cottbus (État de Brandebourg, et située en Basse-Lusace) et auteur de la monographie intitulée „Der Königlich Preußische Literarische Sachverständigen-Verein in den Jahren 1838 bis 1870", Berlin 2001, thèse de droit soutenue sous la direction du professeur Elmar WADLE à Sarrebruck. Se trouve sous presse actuellement sa grande étude « Schelling gegen Paulus, Leske und Complizen: Aktenmäßige Darstellung des Streits um den Nachdruck der in Berlin gehaltenen Vorlesung über die Philosophie der Offenbarung » qui va paraître en 2019 dans Thomas Gergen (éd.), Vom Reichshofrat zur Reichsfilmkammer.

De nombreux articles de Rainer NOMINE portent sur l'histoire de la propriété intellectuelle, et sont les suivants: „Der Königlich Preußische Literarische Sachverständigen-Verein 1838 bis 1870. Ein Wegbegleiter des deutschen Urheberrechts im Spiegel der Akten des Geheimen Staatsarchivs Preußischer Kulturbesitz", Berlin, UFITA (= Archiv für Urheber- und Medienrecht) 2001/II, 497-533; „Der Entwurf eines preußischen Gesetzes über den Verlagsvertrag (1838-1846). Ein gescheiterter Versuch zur Neuregelung der vertraglichen Stellung von Urhebern", in UFITA 2003/II, 365-397; „*Vestigia terrent* - Zur Entstehung des sächsischen Gesetzes den Schutz der Rechte an literarischen Erzeugnissen und Werken der Kunst betreffend, vom 22. Februar 1844", in UFITA 2007/II, 481-514; „Dühring gegen Wagener – Die Arbeiterfrage vor dem preußischen Richter in Urhebersachen", in *Chiusi, Tiziana J./Gergen, Thomas, Jung, Heike (Hrsg.)*, Das Recht und seine historischen Grundlagen, Berlin 2008, 819-848; „Mer lasse d'r Dom en Kölle". Der Kampf der preußischen Staatsregierung gegen die ungenehmigte Herausgabe von Dombau=Werkzeichnungen" (1868 bis 1870), in *Dohna, Inge Gräfin/Olenhusen, Albrecht Götz von (Hrsg.),* Im Dienste des Architekten-, Bau- und Urheberrechts. Festschrift für Klaus Neuenfeld zum 80. Geburtstag, Hamburg 2016, 267-280; *„Plus valet favor iudicis quam omnes leges codicis?* Schelling gegen Paulus: Aktenmäßige Darstellung des Streits um den Nachdruck der in Berlin gehaltenen Vorlesung über die Philosophie der Offenbarung, in: *Olenhusen, Albrecht Götz von/Gergen, Thomas (Hrsg.),* Kreativität und Charakter. Recht, Geschichte und Kultur in schöpferischen Prozessen, Festschrift für Martin Vogel zum siebzigsten Geburtstag, Hamburg 2017, 149-180.

Parmi les comptes rendus de la plume de Rainer NOMINE nous aimerions mentionner comme suit: *Kawohl, Friedemann*, Urheberrecht in Preußen 1820-1840, 2002, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, 121. Band (2004), Germanistische Abteilung, 866-870; *Gergen, Thomas*, Die Nachruckprivilegienpraxis Württembergs im 19. Jahrhundert und ihre Bedeutung für das Urheberrecht im Deutschen Bund, in UFITA, 2010/III, 898 ssq.; *Deazley, Roman/Kretschmer, Martin u.a. (Hrsg.)*, Privilege and Property. Essays on the History of Copyright, Cambridge 2010, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, 129. Band (2012), Germanistische Abteilung, 510 ssq.

* Prof. Dr. iur. Dr. phil. Thomas Gergen, Maître en droit, L'auteur est titulaire de la chaire de droit civil et économique, droit comparé et international, ainsi que droit de la propriété intellectuelle auprès de l'Institut Supérieur de l'Économie, ISEC Université Luxembourg; l'article reprend une conférence que l'auteur a donnée pour la Société des Antiquaires de l'ouest à Poitiers le 17 novembre 1999. Thomas Gergen est auteur de l'ouvrage qui s'intitule « Pratique juridique de la paix et trêve de Dieu à partir du concile de Charroux (989-1250). Juristische Praxis der Pax und Treuga Dei ausgehend vom Konzil von Charroux (989-1250) », thèse en droit/juristische Dissertation Sarrebruck 2003; Francfort-sur-Main 2004 (Rechtshistorische Reihe 285). Dernièrement, il a publié l'article « Paix de Dieu, protection des pèlerins et le pèlerinage punitif: des vraies sanctions ou même une protection des criminels? », dans: Kritische Zeitschrift für überkonfessionelles Kirchenrecht 2 (2015), pp. 165-174.

De plus, Rainer NOMINE a témoigné sa faveur à l'encontre du droit canonique et de son histoire, dont nous soulignons l'article „LER in Brandenburg – aus der Sicht eines Prozessvertreters", in *Hartmann, Frank (Hrsg.),* Kirchenrechtsgeschichte und Gegenwart: was heißt und zu welchem Ende studiert man Kirchenrechtsgeschichte?, Leipzig 2008, 175-202. Voilà pourquoi notre article sur l'histoire du droit ecclésiastique est dédié particulièrement à Rainer NOMINE qui est, comme magistrat et scientifique, toujours à la recherche des mécanismes du règlement des conflits.

I. Introduction et problématique

Le concile de Charroux qui a eu lieu le 1er juin 989 est considéré comme le premier concile de la Paix de Dieu en France. De nombreux conciles postérieurs ont suivi son exemple et ont adopté l'esprit et le contenu de ses canons. On peut citer p. ex. les assemblées de Narbonne, Anse, Le Puy, Limoges (toutes tenues en ou vers 994), Poitiers (1011-14), Beauvais (1023) ou celui de Bourges de 1038. Le concile de Charroux eut même un impact important sur toute l'Europe occidentale: la Paix de Dieu s'est étendue ainsi vers l'Allemagne (Cologne 1081) et vers l'Espagne, notamment la Catalogne (Toulouges 1027, Gérone/Barcelone 1064).

Dans l'histoire et l'histoire du droit, on n'a pas encore trouvé une définition complète de la Paix et de la Trêve de Dieu, si bien que de nombreux auteurs ont fait des recherches sur les causes et les conséquences de ce mouvement.

François-Olivier Touati, dans son V*ocabulaire historique du Moyen Age,* donne cette définition: La Paix de Dieu était une institution établie par l'Eglise, dans le but de restreindre les vengeances et les guerres privées. C'est le concile de Charroux en 989 qui l'a décrété pour la première fois; elle protégeait les femmes, les enfants, les marchands, les pèlerins et les clercs des guerres privées. La Trêve de Dieu était la suspension provisoire de toute activité guerrière pendant certaines périodes liturgiques. Elle était le volet complémentaire de la Paix de Dieu dans la foulée de la réforme clunisienne inspirée par l'abbé Odilon contre la violence anarchique.

La Paix de Dieu s'inscrit « dans une France sans Etat », pour reprendre l'intitulé d'un article de Patrick GEARY, à la recherche d'un nouveau système de règlement des conflits.[1] Et Charroux était vraiment un lieu conflictuel, un centre de pouvoir, situé aux frontières du Poitou, du Limousin et de l'Angoumois. Après la fin de la dynastie carolingienne qui garantissait sa « paix carolingienne », inspirée toujours par la *pax romana*, toute protection s'est perdue. La paix carolingienne avait assumé le rôle protecteur en faveur des immunités de l'Eglise et avait ordonné la protection des moniales, des veuves, des orphelins et des pauvres et de leurs biens. Grâce à cette paix et aux privilèges, Charroux, en tant qu' abbaye impériale, pouvait se développer très bien. J'évoque rapidement sa riche bibliothèque, ses reliques importantes dont celle de la vraie croix du Christ Sauveur, et le grand nombre de moines: Un demi-siècle après sa fondation qui s'était effectuée avant l'an 800, l'abbaye avait 84 moines.

Or, avec l'avènement de Hugues Capet en 987, le pouvoir central s'est divisé entre les comtes de Poitiers, d'Angoulême, Limoges. De plus, dès le milieu du Xe siècle, existait une principauté nouvelle, le comte de la Marche, qui s'interposait entre Poitou et Limousin et qui avait son centre à Charroux, d'où des relations souvent difficiles entre le comte de Poitou et celui de la Marche, des guerres privées et des « malae consuetudines », dont nous parlent les chartes poitevines autour de l'an mil. Comme les seigneurs se sont fait des guerres et qu'une puissance publique n'existait plus, les évêques ont pris l'initiative pour restaurer la paix en 989.

Après ce concile, les sources écrites sont silencieuses pour le lieu de Charroux même (sauf en 1028 un concile contre les manichéens a eu lieu). On ne trouve pas de répétition du concile à Charroux, mais seulement ailleurs, comme on a évoqué tout à l'heure.

Au XIe siècle les chartes nous renseignent sur des essais de restaurer la paix entre l'abbaye et les seigneurs. Et c'est seulement au milieu du XIIe siècle sont rédigées les coutumes des comtes de la Marche, coutumes qui ont été répétées et développées au XIIIe siècle. Les coutumes de Charroux datant avant l'an 1177, sont les plus anciennes dans notre région; nous avons celles de Bressuire de 1190 et de Poitiers de 1199. Dom Fonteneau a intitulé les coutumes de 1150 comme suit « Coutumes de la ville de Charroux sur les devoirs des habitans et les peines et amendes des criminels envers les comtes de la Marche – Seigneurs du lieu ».

Selon John Gilissen[2] les coutumes sont un ensemble d'usages d'ordre juridique, qui ont acquis force obligatoire dans un groupe socio-politique donné par la répétition d'actes publics et paisibles pendant un laps de temps relativement long. Les coutumes sont un mélange d'usages, de pratiques anciennes. Mais ils englobent aussi des décisions de justice et un ensemble de franchises, de règlements en domaine privé et public. L'auteur part du principe que la coutume naît parce qu'une communauté va répéter la même pratique d'une génération à une autre.

En lisant les coutumes de Charroux qui contiennent beaucoup d'éléments de droit pénal, on a l'impression que Charroux a retrouvé l'ordre et la justice, si j'ose dire les bonnes coutumes pour mettre en relief la différence avec les « malae consuetudines » que nous trouvons mentionnées dans les chartes.

En prenant en compte de plus les canons du concile de 989, qui voulait frapper les « mauvaises coutumes » d'anathème, on se rend compte qu'un certain nombre de clauses dans les coutumes sont similaires au règlement de la paix de Dieu. Certes, en 989 on a une seule peine, l'anathème, alors une peine ecclésiastique, tandis que les coutumes disposent d'un système pénal plus développé, de différentes amendes etc. Mais, dans les deux cas, il s'agit du droit pénal, instauré pour atteindre le même idéal: un minimum d'un état de droit et de justice.

Au demeurant, on peut se poser la question si les coutumes ont pris, en quelque sorte, la succession de la paix de Dieu. Autrement dit: s'ils représentent un prolongement. Est-ce que

[1] P. Geary, Vivre en conflit dans une France sans État: typologie des mécanismes de rčglement des conflits (1050-1200), in: Annales. Histoire, sciences sociales 1986, pp. 1107-1133.

[2] J. Gilissen, « La coutume », *Typologie des sources du Moyen Age occidental*, fascicule 41, 1982, p. 5-122 (20).

les coutumes marquent une évolution au bout de laquelle on trouve un mécanisme de règlement des conflits qui « se négocie » entre 989 et 1177?

Il y avait effectivement une période de chevauchement car la paix de Dieu n'avait pas de limites dans le temps et restait, par manque de concile contradictoire, en vigueur; elle était une paix éternelle. Les évêques écrivent: « Nous donc, spécialement assemblés au nom de Dieu, nous avons décrété ce qui est exprimé ci-dessous… »

Comme la philosophie de Charroux était fort connue en toute l'Europe, il convient de dire que son esprit était toujours présent à Charroux même.

Les coutumes, de l'autre extrême, ont déjà existé avant leur fixation vers 1177. Il faut noter qu'il n'est pas nécessaire qu'elles soient écrites, la forme orale suffit pour être connu. Elles devaient être, pour devenir coutumes, et cela par definition, consensuelles dans le groupe où elles s'appliquent, et pratiquées pour un certain temps. Elles sont – selon notre définition – de pratiques anciennes. Audebert, le seigneur de la Marche a rappellé dans le préambule que ses prédécesseurs les avaient déjà reconnues:

« Nous voulons que, par le présent et pour l'avenir, les dispositions suivantes soient observées, ainsi qu'Audebert, comte de la Marche, et ses prédécesseurs, les avaient reconnues, comme coutumes, avec leurs sujets de Charroux. »

Cette période de « chevauchement », alors entre 989 et 1177, est intéressante à analyser parce que c'était là où un système de « bonnes coutumes » s'est mis en place, tout en supprimant les mauvaises.

Nous étudierons donc chronologiquement ces trois phases: le concile de 989, le temps intermédiaire, càd la phase de transition, jusqu'à la fixation d'un règlement de mécanismes des conflits (les coutumes).

II. A la recherche des coutumes -- quelques étapes entre 989 et 1177: Remise de biens usurpés à l'abbaye et réparation pour les délits commis

Certes il n'y a pas de référence à la paix de Dieu dans les chartes que nous étudions, imprimées dans la collection de Dom de Monsabert. Une remise de biens, une réparation et des dommages et intérêts pour action illicite selon l'art. 1382, 1383 du Code civil ou pour enrichissement sans cause, une telle qualification juridique n'existe pas dans la pensée juridique de l'époque.

Mais le fait qu'il y avait une prise de bien non justifiée est reconnue par ceux qui les remettent, même s'il s'agit une restitution des prédécesseurs. En lisant les chartes nous constatons une déclaration des ayants cause d'être responsables d'un pillage, d'un vol et d'autres crimes.

Quelle est la base juridique pour cela?
Le droit romain ou canon – on n'est pas encore là.
Le droit coutumier? il n'existe plus.

Reste peut-être la paix de Dieu qui frappe d'anathème les pilleurs des églises et des usurpateurs des biens ecclésiastiques?

Prenons trois exemples de l'époque qui nous intéresse:

1. Entre 1021 – 1087

L'abbaye de Charroux avait fréquemment des difficultés avec la famille de Rochemaux. Entre 1021 et 1087, Audebert de Rochemeaux et sa fille Arsinde ont restitué des biens à l'abbaye, et ont fait de plus des dons à l'abbaye. Ils ont fait cela pour la rédemption de leurs âmes. De surcroît, ils se sont soumis à l'excommunication en cas de non respect des choses promises.

Certes, les chartes du XIe siècle, comme celle en question, foisonnent de « clauses comminatoires », càd, des clauses qui renferment le menace d'une peine en cas de contravention. La menace d'excommunication, peine spirituelle, est le signe d'une perte de puissance publique qui n'est plus capable de maintenir l'ordre. Autrement dit: une justice qui ne fonctionne plus

Mais Audebert et Arsinde ont reconnu cette sanction qui à cette époque signifiait la même chose que l'anathème d'un concile de la paix. Il est donc possible qu'ils ne voulaient pas être frappé d'anathème, et pour ne pas subir cette sanction, ils ont proposé cette réparation. Je rappelle la réserve du premier canon: L'exécution de l'anathème n'intervient que dans le cas où l'agresseur n'apporterait pas satisfaction.

Ainsi, la paix s'est peut-être restaurée, du moins sur le papier. Mais nous ignorons si les Rochemaux ont vraiment tenu cette paix car les difficultés entre leur famille et l'abbaye n'ont pas arrête.

2. En 1103

En 1103, Bertrand de Rochemaux, a remis au monastère des biens usurpés par ses prédécesseurs:

« Bertrand de Rochemaux reconnaissant que pour l'usurpation faite par ses prédécesseurs de certains biens et domaines appartenant à l'abbaye de Charroux et que pour la conservation des choses usurpées il s'était fait beaucoup de querelles, combats, guerres, rapines, incendies, meurtres, effusion de sang. Etant pénitent pour satisfaire en partie à tous ces désordres ledit Bertrand remit entre les mains de Pierre, abbé, et des moines de Charroux, tout ce que ses prédécesseurs abbés, Hugue, Foucault et Fouchard avaient contestés.

Il offre donc réparation. Et nous prenons connaissance des détails:

«…et spécialement la viguerie (vicaria) de toutes choses qui se vendent en la rue des vassaux et dans les bourgs dépendant de ladite abbaye avec des maisons nommées au Bredors depuis l'église Saint-Michel jusqu'à la porte de ladite abbaye du côté du champ clos, et le four proche de l'aumônerie et encore un poste proche de l'église Saint-Ambroise, la clôture de Viquaires et le Beaubois,

Il y a quand même une réserve pour quatre cas: le rapt, l'incendie, le vol et l'homicide « à la réserve toutefois de la dite

viguerie pour quatre cas en la rue des Vassaux, à savoir pour le rapt, l'incendie, le vol et l'homicide, le tout fait du consentement de Bertrand, Rorego et Guillaume, fils dudit Bertrand de Rochemaux, Agnes et Beatrix ses sœurs; et en reconnaissance de ce ledit Pierre abbé donna audit Bertrand 300 sols et à Rorgon 50 sols et à Guillaume un cheval."

Dans cette notice de 1103, recopiée par Dom Fonteneau, nous trouvons la reconnaissance de Bertrand d'être coupable de certains crimes, menaçant les personnes et biens protégées par la paix de 989. La paix de Dieu paraît être la seule base juridique pour la restauration des biens.

Au surplus, on trouvera les mêmes délits qui sont punis ici plus tard dans les coutumes, délits qui sont classés mauvaises coutumes!

3. Vers 1177

Une autre remise de biens est à rapporter: peu avant 1177, au moment de vendre son comté aux Anglais et de partir pour la Terre Sainte, Audebert IV, rendit à l'abbaye de Charroux les biens et les droits qu'il avait usurpés et reconnut dans certains cas la compétence judiciaire de l'abbé[3]:

Recognovit (comes) insuper quod rixa, contenciones facte in vico abbatis, arma, tracta et sanguis ad ecclesiam et abbatem pertinent, et quod injurie hujusmodi coram abbate debent terminari…

Il s'agit d'une reconnaissance de délits corporels et dirigés contre les biens ecclésiastiques, qui remplissent les conditions du canon 1 (violation et usurpation des biens ecclésiastiques) et canon 3: agressions contre le clergé.

La remise des biens remplit ce que revendique ces canons qui frappaient les délinquants de l'anathème. Pour enlever cette peine et pour finir ce conflit entre les seigneurs laïques et ecclésiastiques, il y avait remise des biens. Une fois plus nous avons affaire probablement avec une application des règles de la paix de Dieu.

Henri II, après avoir acheté le comté en novembre 1177, confirme les concessions faites à l'abbaye par Audebert, en réparation de ses injustices à l'égard de cette abbaye: « pro malis que fecerat ecclesie predicte ». A la fin il garantit que l'abbaye ait toutes ses libertés et coutumes « in pace, libere et quiete, integre et plene et honorifice ». (De Monsabert, p. 166)

Tout cela s'est déroulé immédiatement avant la fixation des coutumes auxquelles nous nous intéressons maintenant.

4. En 1247

La charte de Hugues XI de Lusignan, comte de la Marche, date de 1247. Hugues XI confirma et précisa les anciennes coutumes de Charroux, en langue vernaculaire[4]. Ayant 52 articles la charte fut rédigée « de concert » avec l'abbé et les bourgeois de la ville[5]:

« Conoguë chose seit à tos ceus qui sunt et qui serunt à venir que Audebers, li conts de la Marche, et si ancessor aviant itaus cosdugnes è uzages ob l'abé de Charros e ob les borzeis, è li reis Henriefs d'Engleterre et li reis Richart si filx les tenguirent, tant com il veyquirent et les firent jurar à lor baillis et à los prior de Charros par sagrament, les quaus li borzeis de Charros jurèrent tenir et garders deu commandement Audebert comte de la Marche, et en après, deu commandement au roy Henry et Richart son fil, et je Hugues de Lezignen, coms de la Marche, en après approcey è confirmey, lesdictes condugnes, les quaus sunt etaus. »

Et à la fin de la charte[6]:

« Et que les davant dites costumgnes seront fermes, estables et durables, je davant dit, Hugues de Lezignan, coms de la Marche, les ay scellées de mon sceau en l'an de l'incarnation de Jhesus Christ 1247. »

III. La lutte contre les « malae consuetudines »: le concile de Charroux de 989

Le « Seigneur et Sauveur Jésus Christ » est l'autorité pour les décisions des évêques qui disent: *Nos ergo in Dei nomine specialiter congregati decrevimus*. Le préambule se réfère à d'autres décrets synodaux antérieurs et se base sur la tradition des conciles carolingiens. Les six évêques soulignèrent l'urgence de la prise des décisions au nom de Dieu:

Gombaud, archevêque de Bordeaux,
Gilbert, évêque de Poitiers,
Hildegaire, évêque de Limoges,
Frotier, évêque de Périgueux,
Abbon, évêque de Saintes,
Hugues, évêque d'Angoulême.

„Au nom de notre Seigneur et Sauveur Jésus-Christ, forts des décrets synodaux de nos prédécesseurs, moi, Gombaud archevêque de la seconde Aquitaine, et tous les évêques de la province, nous nous sommes réunis, aux calendes de juin, en l'église qui depuis longtemps est appelée Charroux. Tant les évêques que les

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3 M. Garaud, Les châtelains de Poitou, pp. 127-128; P. Villard, Les justices seigneuriales, p. 35.

4 Sur les problèmes linguistiques: Pignon, Jacques, « La langue de la seconde coutume de Charroux », *Cahiers de Civilisation Médiévale* Xe-XIIe siècles, t. III, 1960, pp. 457-471; *Mémoires de la société arch. de la Charente*, 4e série, t. VIII, 1871-1872, pp. 389-397.

5 Soit chose connue à tous, à ceux qui sont et à ceux qui seront à l'avenir, qu'Audebert, comte de la Marche, et ses prédécesseurs, étaient convenus de ces coutumes avec l'abbé de Charroux et avec les bourgeois, et que le roi Henri d'Angleterre et le roi Richard, son fils, tinrent tant qu'ils vécurent, et les firent jurer solennellement à leur bailli et à leur prieur de Charroux, lesquelles coutumes les bourgeois de Charroux jurèrent tenir et garder, du commandement d'Audebert, comte de la Marche, et du commandement du roi Henri et de Richard, son fils, et que moi Hugues de Lusignan, comte de la Marche, ai, en après, confirmées et qui sont ainsi qu'il suit. De la Fontenelle, 29-30.

6 *Et pour que les coutumes ci-dessus soient fermes, stables et durables, moi susdit Hugues de Lusignan, comte de la Marche, les ai scellées de mon sceau, l'an de l'incarnation de Jésus-Christ 1247.* De la Fontenelle, p. 49.

religieux, les clercs et aussi les fidèles de l'un et l'autre sexe, nous avons imploré le secours de la divine bonté, afin que, nous qui savons combien le long ajournement de ce concile a fait longtemps chez nous de funestes moeurs, nous nous attachions, avec le concours de la grâce céleste, à arracher ce qui est nuisible et à planter ce qui est utile. Nous donc, spécialement assemblés au nom de Dieu, nous avons décrété ce qui est exprimé ci-dessous.

Si quelqu'un a violé une église sainte, ou en a arraché quelque chose par la force, à moins qu'il ne soit venu à satisfaction, qu'il soit anathème.

Si quelqu'un a dérobé à des paysans ou à d'autres pauvres, brebis ou boeuf ou âne ou vache ou chèvre ou bouc ou porc, sauf faute de leur part, et s'il a négligé de faire complète réparation, qu'il soit anathème.

Si quelqu'un a attaqué, ou capturé ou frappé un prêtre, ou un diacre, ou quelque autre clerc, qui ne portait pas d'armes tels que bouclier, épée, cuirasse, casque mais qui se déplacait simplement ou demeurait chez lui, sauf si une enquête de son propre évêque a montré que la victime avait commis quelque faute, que ce sacrilège soit tenu, s'il n'est pas venu à satisfaction, pour étranger à l'écart de l'église de Dieu ».

1. Le premier canon: les violateurs et usurpateurs des biens de l'Eglise

Le premier canon prononce l'anathème contre toute personne qui violerait une église, ou en enlèverait quelque bien par la force. Ce canon prend la suite de ces imprécations qui ont été nombreuses dès le IXe siècle contre les usurpateurs des biens de l'Eglise (*pervasores rerum ecclesiasticarum*). L'exécution de l'anathème n'intervient que dans le cas où l'agresseur n'apporterait pas satisfaction.

2. Le deuxième canon: les pilleurs des biens des paysans

Le deuxième canon s'adresse aux pilleurs des biens des paysans qui sont ici compris dans la catégorie des pauvres, càd des personnes socialement pauvres parce que dépendantes de quelqu'un d'autre.

Leurs biens comprenaient d'abord leur bétail; on notera l'énumération très concrète et détaillée des animaux, tels que bœuf, âne, chèvre etc.

Bien que les autres pauvres ne soient pas autrement énumérés, on y comptait aussi les veuves et les orphelins comme l'indiquent déjà les capitulaires de Charles le Chauve. La paix carolingienne qui se chargeait de protéger ces personnes n'était plus à même de garantir la paix, et, pour cette raison, avait besoin d'une reprise.

3. Le troisième canon: les agresseurs du clergé

Le troisième canon est lancé contre ceux qui captureraient ou frapperaient un diacre, ou tout autre membre du clergé, dès l'instant qu'il ne porte aucune arme, telle que le bouclier, l'épée, la cuirasse et le casque; qu'il soit simplement en déplacement ou demeure en sa maison. Néanmoins, il est prévu que l'évêque du lieu enquêtera pour savoir si la victime ne s'était pas, préalablement, rendue coupable de quelque délit. Sauf en ce cas, l'agresseur qui ne serait pas venu à résipiscence, serait frappé d'anathème. Soulignons que le canon ne vise pas les attaques contre les clercs armés, de sorte qu'il ne traite que les rencontres des hommes d'armes à l'égard de ceux sans défense de la société, à savoir les clercs et les paysans ainsi que leurs biens.

4. Le quatrième canon qui n'est à trouver que chez Pierre Delalande

(tome IV de la collection de Jacques SIRMOND), mais pas dans les collections ni de Labbé-Cossart, ni de Mansi, s'inscrit dans une autre logique. Robert Favreau a démontré l'arrière-plan grégorien et la lutte contre le nicolaïsme de ce canon qui ne fait allusion qu'au clergé et qui contient seulement une règle du droit intérieur de l'Eglise[7]. C'est pour cela je le mets de côte dans notre analyse.

IV. Rédaction des « bonnes » coutumes pour éviter et punir les « malae consuetudines »

Le texte, donné par Dom Fonteneau au XVIIIe siècle, précise les droits respectifs du comte, de l'abbé et des habitants (art. IX qui semble rajouter des coutumes, en deuxième série, tout en confirmant les précédentes):

« Nous confirmons la coutume qui existe entre le comte de la Marche et ses hommes de Charroux, et qui est que si le comte est attaqué, ses hommes le suivront en armes dans tout le comte, mais pas au-delà. »

Il s'agit d'une mise par écrit, une fixation des coutumes qu'Audebert, comte de la Marche reconnaissait à ses hommes de Charroux au cours du troisième quart du XIIe siècle, peu avant 1177, avant qu'il prenne la croix et qu'il vende son comté à Henri II qui, pour sa part s'empresse de confirmer ces coutumes encore une fois.

Pour le classement des différentes clauses, il y a plusieurs groupes de clauses à distinguer:

1. 9 sur 16 articles se réfèrent à la justice, càd droit pénal:

cas de violence, à main armée (a. I)
adultère avec une femme mariée (a. III)

[7] Le quatrième canon condamne prêtres et diacres qui vivent en concubinage ou ont en cachette des rapports sexuels avec des femmes. Il se réfère aux efforts pour réaliser la réforme contre le nicolaïsme. Ceux qui se rendent coupable de cette faute grave perdront donc leur rang et ne pourront pas **célébrer** l'office eucharistique:
De mulierum intromissione ad clericos.
Nullus presbyter neque diaconus foeminam in sua domo teneat, neque in cellario neque in secreto loco intromittat propter fornicationem; nam si facere tentaverit, sciat se omnem gradum perditurum, et cum aliis hominibus sacrum mysterium non celebraturum.
R. FAVREAU, « Le concile de Charroux », *BSAO*, 1989, 213-219.

viol (a. IV)
rixes (a. VII, XV)
marché passé et non exécuté (a. XIV)
vol (a. XVI), avec un système d'arbitrage
injure (a. XI)
fausses mesures (a. II)

2. quatre articles concernent le sujet des redevances et les impôts

le refus de payer péage (a. V)
droit de vente (a. VI)
maille, maletôte (a. VIII) = Il s'agit des impôts sur les transactions pour financer la guerre et enrayer l'insuffisance des rentrées fiscales.[8]
cens (a. XIII)

3. trois envisagent les droits et obligations des personnes

le service en armes dans les limites du comté, si le comte est attaqué (a. IX)
la protection des hommes de Charroux contre toute arrestation arbitraire (a. X)
la possession adquisitoire de biens: 20 ans et 1 jour valant titre (a. XII)

Dans la coutume du XIIe siècle, deux délits, se référant à l'intégrité du corps et de la personne, sont énumérés et punis. Une amende de 60 sous est prévue pour une violence à main armée (art. I) et pour le viol (art. IV), peine déjà connue et appliquée par les capitulaires carolingiens[9], défendu aussi par les conciles de la paix:

I. Quod si quis infra villam Karrofensem contra aliquem violentiam sua arma traxerit, Karroffensi Domino sexaginta solidos persolvat[10].

IV. Si quis alicui mulieri, illâ nolente, se commiscebit, sexagenta solidos etiam persolvat[11].

60 sous était une somme importante puisqu'elle était la sanction normale du ban du roi. Le ban était le droit d'ordonner, de contraindre et de punir. Ce pouvoir s'étend aux prérogatives politiques, judiciaires, fiscales et militaires. Les peines témoignent de l'existence d'une puissance publique.

Une bagarre sans armes mais avec effusion de sang (art. VII) appelle le dédommagement de 3 sous due à la victime si la blessure est apparente, 24 deniers si la blessure ne l'est pas. L'agresseur devra également 3 sous au seigneur (art. VII)[12]:

Si quis inter se sine armis verbera faciant, et sanguis inde fluat, verberatus trés solidos habeat, et si ictus manifeste non apparebit, verberatus viginti quatuor denar. inde habeat, et prenominatus Karroffensis Dominus tres solidos de illo que fecit forifactum habeat.

La coutume comprend un système d'arbitrage: si les habitants de Charroux décidaient de faire entre eux une mise (arbitrage) et qu'ensuite ils y renonçaient, le seigneur recevrait trois sous. En revanche, dans le cas d'un vol c'est le seigneur qui devait juger (art. 16)[13]:

Item si Karroffenses inter se pacti sunt facere misa, et postea pacificant ad invicem Dominus etiam tres solidos habebit, nisi causa de furto fuerit, quod Dominus juxta delictum judicare debet.

4. Les coutumes[14] ont fixé un système très important pour régler les conflits à Charroux entre les différents groupes de la vie sociale, idéal qui avait déjà inspiré la Paix de 989.

On a cherché de trouver une balance entre l'abbaye, le seigneur et les habitants. Et avant que ces règles, ces bonnes coutumes, ne tombent pas dans l'oublie ou que les « malae consuetudines » d'autrefois renaissent, on les a fixé par écrit plusieurs fois, et on les a même confirmé.

Quand, en 1247, on a fait le prochain pas vers un prolongement de la liste des coutumes, on a fait attention à ce que les coutumes qui étaient en vigeur, ne se perdent pas. On les a confirmé, ce que démontre le préambule.

Hugues de Lusignan a précisé notamment

1° les rapports du comte et de l'abbé et, ensuite, les droits d'intervention dans les bourgs l'un de l'autre;

2° les obligations de l'abbé relatives au service militaire dû par ses hommes au comte et

3° la condition des habitants, la faculté pour les femmes de se marier librement;

4° le douaire;

5° les règles de la succession du conjoint survivant;

6° le droit de saisie sur les biens du débiteur;

7° le droit des habitants de quitter Charroux sans perdre leurs biens, à condition d'assurer le service du seigneur;

8° l'exemption du droit de banalité;

9° la pression de l'emprisonnement et de la saisie préventive;

10° la procédure, le tarif des peines et des amendes;

11° la garantie contre l'arrestation pour dette;

12° l'exemption du service militaire pendant un an et un jour pour les nouveaux venus;

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[8] Maille – *med(i)alia*, demi (lat.) signifie monnaie de cuivre de faible valeur: 1 demi-denier (Touati, p. 168).
maletôte – anc. fr. de mal, mauvais et de tolte = imposition, lat. *Tollere,* signifie lever, alors un impôt sur des transactions.

[9] De la Fontenelle, 24 et 25.

[10] Si à Charroux, quelqu'un commet des violences à main armée, contre un autre individu, il payera 60 sous au seigneur de cette localité.

[11] Celui qui aura commis le crime de viol sera aussi passible d'une amende de 60 sous.

[12] Si des hommes non armés venaient à se battre, et partant qu'il y eût effusion de sang, le battu recevra 3 sous, et seulement 24 deniers, si la blessure n'est pas apparente. Le seigneur de Charroux aura 3 sous à percevoir de celui qui aura frappé. De la Fontenelle, 25-26.

[13] Item, si des habitants de Charroux conviennent entre eux d'un arbitrage, qu'ils renoncent ensuite au procès, le seigneur retiendra seulement 3 sous, à moins qu'il ne s'agisse d'un vol, délit pour lequel ce même seigneur devrait poursuivre. De la Fontenelle, 27-28.

[14] Pour en savoir plus sur les coutumes et la société contemporaine aux temps des coutumes cf. le mémoire de Maîtrise de Laurence Meyer, sous la direction de Georges PON, Bibliothčque du CESCM Poitiers.

Les droits mutuels du comte et de l'abbé sont soigneusement délimités. Une dizaine d'articles de la première coutume est reprise sans changement, d'autres clauses sont modifiées et précisées, de sorte que les libertés des habitants apparaissent beaucoup plus claires.

Les neuf premières coutumes de 1247 essayent de mettre en balance les droits et compétences du comte et de l'abbaye; ils concrétisent *grosso modo* ce que les canons no. 1 et 3 expriment en tant que règle cadre.

L'homme du comte qui ira habiter dans le bourg de l'abbé restera l'homme du comte pendant que l'homme de l'abbé qui ira habiter le bourg du comte restera l'homme de l'abbé (art. 1):

Si aucuns d'eus hommes au comte s'en avoeit ester on bourt à l'abé, et il lay seroit hom au comte, cum eret d'avant, et gité meyme se horie à li abes on bort au comte.

Si un homme du comte commet de graves méfaits envers le comte et s'il parvient à se réfugier dans le bourg de l'abbé, ce dernier pourra le protéger pendant quarante jours et intervenir en sa faveur auprès du comte, soit lui livrer aussitôt. La règle est applicable vice versa (art. 4):

Si li home au comte faziant meffait que il n'ozessant ester en son bort, e il se pognussent metre on bort à l'abé, è qui les tendroit quites l'abé XL jours, et entretandis parleret et fereit pais à eulx, si il poiet, si que no, il les conduret a sau conduit en leur seigneur, et quite mesme seignourie à li coms ons homes à l'abé en son bort.

L'abbé ne possède aucun droit sur les biens que ses hommes ont dans le bourg du comte. En revanche, le comte n'a aucun droit sur ce que possèdent ses hommes dans le bourg de l'abbé (art. 5):

Si li home à l'abé avant lor aveir ou bort au comté, l'abé ne le doit forcier lay, ne ly coms l'aver a ses homes ou bort à l'abé.

Si les hommes de l'abbé doivent suivre en armes le comte mais seulement jusqu'à la Vienne si l'abbé ne l'a pas commandé (art. 7):

Etau senhorie a li coms ob l'abé qui si home le devoict siegre, par son estober de si que a la Viangue et non pas oultre, si li abès no lo comandé. Et quant li aurant mestier partan estober, li commandemenz au comte doit venir à l'abé ou à son commandement, que face semondre ses hommes, et si negus en remaneit, li destreit est à l'abé.

Dans l'art. 8 qui montre bien la suzeraineté de l'abbaye envers le comte, on relève les délits suivants: meurtre/assassinat et homicide (I, VII, 35), larcin/vol (XVI), adultère (III, 32), viol (IV, 43), usage de fausse mesure (II, 36).

Ils sont tous, commis dans le bourg de l'abbé ou dans celui du comte, jugés par le comte en exclusivité[15]:

Plus a de senhorie li coms on bort à l'abé, quar o est sous li murtres, li larroucins, li avoitres, li homicide, la fame forcée et deu fausses mesures.

Il est intéressant de noter que la coutume de 1247 laisse encore de la place pour des conflits, c'est-à-dire elle ne veut pas les supprimer, mais les encadrer sans que le seigneur s'immisce:

a. 41
Si quelques habitants de Charroux se battent entre eux, et que plainte n'en vienne au seigneur, celui-ci n'a aucun droit à percevoir.

a. 43, qui reprend l'a. IV de la coutume du XIIe siècle:

Si un homme commet le crime de viol, et que plainte en vienne au seigneur, celui-ci se fera payer 60 sous angevins d'amende, et la femme a droit à une indemnité à fixer par les arbitres.

Un exemple clé pour cette liberté des bourgeois est le droit à la légitime défense, dans des rixes, que nous trouvons réglé précisément dans plusieurs clauses: L'individu peut se défendre avec les mains ou avec ce qu'il tient en sa main (a. 37). L'a. 28 précise que dans le cas où des personnes tirent des armes contre d'autres et que ces dernières portent plainte au sire en ayant des preuves, les coupables sont contraints de payer une amende de 60 sous et un denier d'Anjou au seigneur. Au cas où le conflit se ferait sans arme, si l'une des parties vient se plaindre au seigneur, les coupables doivent lui verser 3 sous et une indemnité aux victimes (a. 35).

La légitime défense est donc bien encadrée par des règles. Etant permise, elle fait partie des coutumes, càd des bonnes, de sorte que la violence faite en tant que légitime défense est légitime et plus « mala consuetudino ».

V. Conclusion

De manière générale, nos recherches s'inscrivent dans l'histoire du droit à Charroux et en Poitou. Cette communication a essayé de mettre en rapport deux choses différentes qui paraissent, de prime abord, avoir aucune relation.

En effet, bien qu'il existe un décalage chronologique entre le concile de Charroux et les coutumes du comté de la Marche nous constatons un certain rapport en ce qui concerne la politique de la paix dans ce comté.

Les donations qui ont été faites avant et même lors de la rédaction des coutumes et des privilèges pour l'abbaye représentent une réparation auprès de l'abbaye. Les seigneurs donateurs avaient pour but de régler un conflit avec l'abbaye, de réconcilier l'abbaye et de la dédommager pour restaurer la paix violée, brisée soit par les prédécesseurs, soit par les donataires eux-mêmes.

Les délits commis et reconnus par les donateurs rentrent dans le catalogue des personnes et biens protégés par la Paix de Dieu de 989 que nous avons pu identifier comme base juridique pour la remise des biens et comme motif des donations.

[15] Plus, le comte a seigneurie spéciale sur le bourg de l'abbé; car il a juridiction exclusive pour les délits suivants: les assassinats, les vols, les adultčres, les viols et les fausses mesures.
De la Fontenelle, p. 32-33.

Quant à elles, les coutumes étaient le droit appliqué et rédigé, la pratique dans la vie juridique contemporaine. Dans les préambules, elles font référence aux mauvaises coutumes pratiquées par les prédécesseurs du seigneur, donc aux injustices frappées d'anathème par les canons proclamés aux conciles de la paix.

Les coutumes du XIIe et XIIIe siècles, caractérisées et, entre autre, motivées par la volonté de trouver un *modus vivendi* entre l'abbé et le comte ainsi que la manifestation des libertés des habitants envers leurs seigneurs, témoignent d'une société qui cherche à déterminer les droits des différents acteurs de la vie sociale. Cela mène à un ordre intérieur, une communauté qui se fonde sur les principes de la paix et de justice: une communauté qui assure les droits des ayants causes de Charroux.

Ce besoin de rédiger ces droits se justifie d'autant plus que le seigneur, titulaire dorénavant de la puissance publique restaurée, prit la croix. Les habitants de Charroux ne savaient pas si, pendant l'absence duquel, leurs droits seront respectés ou non.

L'évolution de la Paix de Dieu vers les coutumes que nous avons retracée tout à l'heure, ne s'applique peut-être pas forcément à tous les lieux où nous avons connaissance d'un concile de paix; cela reste à vérifier. Mais nous sommes à même de dire qu'une évolution du droit vers un retour à un minimum d'exercice de puissance publique (comme avant avec la paix carolingienne) et vers une balance entre les habitants et les seigneurs, s'est mise en place. Cette évolution était susceptible – et je reprends l'intitulé de Patrick GEARY – d'organiser « des mécanismes de règlement de conflit ».

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Europäische Einigungsbestrebungen vom Mittelalter bis zur Gründung der Europäischen Wirtschaftsgemeinschaft (EWG) 1957 – Teil IV.

(The Dreams of Unifying Europe from the Middle Ages to the Foundation of the European Economic Community (EEC) in 1957 – Part IV.)

Diemut Majer, Wolfgang Höhne***

Abstract

The book deals with the ideas of Europe. Europe was on one hand the center of many crisis and wars, on the other hand a center of common cultural developments – from Christendom and Enlightment up to music, poetry and arts. The text goes back into history and shows that the visions of a common Europe did not only arise after World War II, but were already present in the Middle Ages. The theories of the ancient state-philosophers and other scholars show surprising similarities with the basic problems of the EU of nowadays. Theses visions were always combined with the deep desire and many appeals for a lasting peace in Europe – in former centuries an utopia, realized only in the second half of the 20th century.

Keywords: *European unification; European peacemaking; sovereignty of states vs European institutions as key question from the medieval ages up to the 20th century; European ideas in the medieval ages - federation of medieval princes; conquer of the holy land - Pierre Dubois; Flavio Biondo / Urban II.; Enea Silvio Piccolomini - Christian nature of the European countries; war against the Osman Empire; reform of the church; Erasmus of Rotterdam; dominance of France in Europe; principals of international law (Hugo Grotius); the European ideas of Nazi-Germany (greater germanic Empire); the propaganda review „Signal" in occupied Europe.*

7. Kapitel: Der Europäische Gedanke im NS-Staat. Die Zeitschrift Signal (1940-1945) als Sprachrohr der NS-Propaganda im besetzten Europa: Verbreitungsgebiet und politische Leitlinien

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

Signal war für das Ausland bestimmt. Die Zeitschrift wurde vom Oberkommando der Wehrmacht (OKW) im *Deutschen Verlag Berlin* herausgegeben, das sich damit ein eigenes Organ unabhängig von Staats- und Parteistellen schaffen wollte. Den besiegten Völkern sollten die deutschen Absichten für ein Großeuropa nahe gebracht werden und ohne Einmischung staatlicher Stellen (insbesondere des Reichspropagandaministeriums unter Joseph Goebbels) oder von Parteiinstanzen vermittelt werden. *Signal*, konzipiert in einem Kreis von Spezialisten,[3] der Ende 1938 in der Abteilung für Wehrmachtspropaganda im OKW tätig war, wurde in einer für damalige Verhältnisse sehr modernen Aufmachung herausgegeben, erschien 14-tägig und wurde durch die aufwendige Gestaltung[4] und das große Verbreitungsgebiet zur „führenden ausländischen Bilderzeitung" (so der Herausgeber). Verbreitung und Vertrieb von *Signal* begannen im April 1940, zunächst auf englisch, französisch, italienisch und deutsch, in mehreren zehntausend Exemplaren. Später (bis 1942) kamen Ausgaben in spanisch, bulgarisch, schwedisch, ungarisch, rumänisch, kroatisch, griechisch, finnisch, slowakisch, serbisch und russisch dazu. *Signal* war besonders in den Ländern des Balkans und des Mittelmeerraums, die bis dahin eine nur wenig entwickelte Presselandschaft kannten, populär. Die französische Auflage erreichte auf ihrem Höhepunkt 1943

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1 Vgl. insbesondere: Rutz, Rainer: Signal, eine deutsche Auslandsillustrierte, 2007; Moll, S.357ff.; Wilke, Massenmedien, S.180ff.

2 Im Besitz der Verfasser.

3 Dieser Kreis umfasste neben Werbefachleuten auch Abwehrspezialisten und Psychologen. In Kooperation mit der Presse- und Nachrichtenabteilung des Auswärtigen Amts hatte dieser Kreis schon Anfang 1940 diese Idee durchgesetzt. Zur Entstehungsgeschichte im Detail: Moll, S.359ff., Fn.5.ff.

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

eine Auflage von 800.000 von insgesamt 2,5 Millionen. *Signal* wurde nicht nur auf dem Kontinent, sondern auch im Nahen Osten, Südamerika, Japan und den USA (dort bis Kriegseintritt Ende 1941) verkauft. Über England wurde die Zeitschrift zu Propagandazwecken per Flugzeug abgeworfen. Die deutschsprachige Ausgabe erschien nicht im Reichsgebiet, sie war nur für Auslandsdeutsche sowie für die Schweiz bestimmt.[5]

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

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

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

Insgesamt sollte durch die Darstellung Deutschlands das Bild einer fürsorglichen Großmacht propagiert werden, die Ruhe, Ordnung und Wohlstand in Europa gewährleistete.[12] Die Kriegsberichterstattung zeigte Deutschland als Garanten der Sicherheit in ganz Europa. Der Abgrenzung gegen den „Feind" sind viele Polemiken gewidmet, wie z.B. der Diffamierung Englands und der USA und ihres „dekadenten Kapitalismus"; auch wurden ständig Schreckensvisionen des „russischen Bolschewismus" beschworen. Ferner sollten neue Ideen zum Wohle aller verwirklicht werden. („Europa – ein blühender Garten", wie es in einem Artikel heißt). Die Zeitschrift griff viele populäre Tendenzen und Projekte auf, die schon in der Weimarer Zeit aktuell waren (neue Formen des Städtebaus) und als Vorzeigeobjekte dienten (sog. Gartenstädte). Neue Pläne und Infrastrukturmaßnahmen, Eisenbahnstrecken und andere große

[5] Näher: Moll, S.359ff.

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

[7] Näher Wilke, S.182ff., 191ff.

[8] Ausführlich Rutz, S.148ff.

[9] Näher: Rutz, S.148ff.

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

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

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

Projekte wurden angekündigt,[13] die Arbeiter sollten besondere Förderung erfahren (z.B. durch Wohnsiedlungen in gelockerter Bauweise mit Grünflächen; Ausbau der öffentlichen Verkehrsmittel, damit kein Arbeiter länger als 15 Min. zu seiner Arbeitsstelle unterwegs sein müsse).

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

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

7.1 Die Pläne der NS-Propaganda im besetzten Europa anhand der Leitartikel in Signal

Bei den nachfolgenden Erörterungen muss berücksichtigt werden, dass die in der Presse verlautbarten europäischen Pläne des Regimes für die Zeit nach dem Krieg ambivalent waren. Zwar war die in der Öffentlichkeit verbreitete Linie, wie sie vor allem in *Signal* wiedergegeben wurde, eine Idee von Großeuropa, wie sie auch vom OKW und vom Auswärtigen Amt verfolgt wurde. Sie entsprach jedoch nicht der eigentlichen Absicht der NS-Spitze. Intern standen diese Stellen daher in ständigem Widerspruch zur Staatsführung. Hitler und Himmler waren, wie noch im einzelnen zu schildern ist, strikt gegen jedes europäische Projekt unter Beteiligung der europäischen Völker und verfolgten ausschließlich auf Gewaltherrschaft beruhende Ziele eines nicht näher definierten *germanischen Großraumes* (der von deutschen Völkerrechtlern seit 1939 wissenschaftlich „aufbereitet" worden war).[18] Das theoretische Gerüst für diese Konstruktion lieferte die später noch zu erörternde Abhandlung des bekannten Staatsrechtslehrers Carl Schmitt: Völkerrechtliche Großraumordnung und Interventionsverbot raumfremder Mächte, Wien 1939. Schmitt führte dort aus, dass das westliche Völkerrecht in dem vom Nationalsozialismus beherrschten Großraum (gemeint, aber nicht genannt war Osteuropa) keine Geltung habe und auch eine Intervention dritter Mächte (d.h. eine Invasion der Alliierten) ausgeschlossen sei. Im Großraum herrsche nur Deutschland wegen seiner „ordnungsstiftenden Kraft", die besiegten Staaten müssten deutsches Recht anwenden. Diese Überlegungen ließen alle besiegten und verbündeten Staaten im Ungewissen, wie ihre Stellung in dem neuen „Großraum" sein würde. Reduktion auf einen Satellitenstaat, föderale Mitwirkungsrechte, Verlust der Staatlichkeit insgesamt? Trotzdem klammerten sich die Verbündeten und die Verwaltungen der besetzten Gebiete[19] an diese in *Signal* veröffentlichten Bekundungen, während die eigentlichen Ideen Hitlers nie öffentlich erläutert wurden. Aufgrund dieses „Ideenvakuums" schossen europäische Ideen und Entwürfe vielfältiger Art wie Pilze aus dem Boden. Alfred Rosenberg wollte den Begriff der Nation in den Mittelpunkt der europäischen Überlegungen rücken[20]. Der italienische Faschismus hingegen stellte die europäische Kultur als entscheidend für das neue Reich dar: Europa solle die gesamte Vorrangstellung in der Weltzivi-lisation wiedergegeben werden.

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

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

[15] Moll, S.378.

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

[17] Das Werk befasst sich ausschließlich mit der Verfolgung und Ermordung der Juden. Die Mitwisserschaft des Amtes wurde dadurch gewährleistet, dass allen Armeeoberkommandos der besetzten Gebiete Vertreter des AA zugeteilt waren, die Material für Propaganda erfassen und die Militärs beraten sollten (Conze u.a., S.208f.). Im Frühjahr 1943 wurden diese Vertreter abgezogen, wohl deshalb, weil die Berichte der AA-Vertreter die ganze Brutalität der Besatzungsherrschaft zeigten (Conze u.a., S.211). Andere Aspekte der Gewaltpolitik (Zwangsarbeiter, Kriegsgefangene) werden in der Studie nicht berücksichtigt. Sie vermitteln auch keinen Überblick: Geschäftsverteilungspläne und Organisationsschemata fehlen völlig. Vgl. die Kritik von Hans Mommsen, in: Süddt. Zeitung, 27. 12. 2010 und Frankfurter Rundschau, 16. 2. 2011.

[18] Vgl. näher: Majer, Diemut: Die Perversion des Völkerrechts im Nationalsotialismus, S.139ff.

[19] Vgl. näher: Wette, S.311f.

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

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

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

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

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

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

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[21] Wette, S.139ff.
[22] Schmale, Geschichte Europas, S.117ff.
[23] Die Kollaboration in den verbündeten und besiegten Staaten verfolgte ebenfalls das Ziel eines vereinten Europas, aber ohne Aufgabe nationaler Identität, so in Frankreich, Belgien, Rumänien.
[24] Schmale, Geschichte Europas, S.120.
[25] Schmale, Geschichte Europas, S.123.
[26] Schmale, Geschichte Europas, S.123.
[27] Schmale, Geschichte Europas, S.128.
[28] Karl Reichard Ganzer: Das Reich als europäische Ordnungsmacht, zit. nach Foerster 1963, S.247ff. Der Autor war geschäftsführender Präsident des „Reichsinstituts für die Geschichte des neuen Deutschlands“.
[29] Ganzer, S.252.

7.2 Exkurs: Exzerpte aus Signal

Die Zeitschrift *Signal* wurde im Deutschen Reich nicht verkauft, sondern war nur für das Ausland bestimmt. Quellen dazu sind deshalb kaum verfügbar. Daher werden im Folgenden einige Auszüge wiedergegeben, um den Charakter dieser überaus einflussreichen Zeitschrift im besetzten Europa deutlich zu machen. Die Auszüge sind nach Sachgebieten geordnet, von militärpolitischen bis zu ökonomischen Problemen.[30] Alle Artikel haben das Ziel, ein Großeuropa unter deutscher Führung zu propagieren, das auch zum Vorteil der mittleren und kleinen Staaten sei.

In der Zeit bis zum Angriff auf die Sowjetunion Juni 1941 dominierten Themen zu einer gesamteuropäischen Infrastruktur (Verkehr, Baukultur etc.), sowie die allgemeine Polemik gegen Großbritannien, das seit der französischen Niederlage im September 1940 (bis zum Kriegseintritt der USA Ende 1941) als alleiniger Kriegsgegner den deutschen Angriffen ausgesetzt war.

Infrastrukturelle Projekte

In dem Artikel: *L'Europe sera un jardin luxuriant* (Europa wird ein blühender Garten sein),[31] schreibt der anonyme Autor 1941, dass *Signal* hier eine neue Serie vorstelle, die für ganz Europa interessant sei. Schon jetzt zeichne sich ein neues Europa mit besseren Wohnmöglichkeiten ab. Es sei ein Wunsch (der Menschen), dass sich ganz Europa in einen Blumengarten verwandle. Die Schrebergärten der früheren Jahre seien keine endgültige Lösung, man brauche „Gartenstädte", wie sie der Engländer Ebenezer Howard 1898 gefordert habe (Garden cities of tomorrow). Die Slums in England seien eine Schande; die Menschen brauchten menschenwürdige Wohnungen, in erreichbarer Entfernung zum Arbeitsplatz. Eine große Zeichnung in dem Artikel zeigt zweistöckige quadratische Wohnblocks mit begrüntem Innenhof, breite Straßen und großflächige Grünanlagen. Der Artikel erörtert weiter die Probleme der Landbeschaffung, der Infrastruktur sowie der Energieversorgung und kritisiert zahlreiche Autoren, die die Realisierung in Form von Kooperativen vorschlugen, die auf ihr Eigentum verzichten sollten, um die enormen Kosten zu decken. Dies seien jedoch „pseudo"-Gartenstädte. Man wolle hier alte Usancen fortsetzen und Gewinne machen. Man predige, dass der Mensch, der seine Arbeitskraft zwischen Arbeit und Garten teile, gesünder lebe, weil er näher an der Natur sei. Das aber habe nicht funktioniert, weil die Wege zur Arbeit zu weit gewesen seien. Daher müsse der Gesetzgeber eingreifen, aber nur, falls die Mehrheit (der Bevölkerung) eine solche Form der Existenz wolle. In Deutschland sei dies zum Teil geschehen, wie in Hellerau bei Dresden und im Hopfengarten bei Magdeburg – aber auch diese Siedlungen seien bisher nur Anhängsel der großen Städte. Wenn man an die vielen Mühen der letzten 20 Jahre denke, sei das insgesamt ein Misserfolg; nur Bankiers und rüde Unternehmer hätten gewonnen. Abhilfe komme von der Lebensmittelversorgung, die ganz erheblich verbessert werden müsse (1941).

Vorstellungen bezüglich eines Großeuropa von besetzten und verbündeten Staaten

In dem Artikel: *Decision européenne* (Europäische Entscheidung) [32] beschwört der Autor Max Clauss eine Europäische Union unter deutscher Führung. Mit der Niederlage Frankreichs sei in Europa die „deutsche Ära" angebrochen. Der Europäischen Union könne sich niemand entziehen, jeder müsse sich mit dem starken Willen Deutschlands alliieren. Dies sei eine Frage von Leben und Tod. Deutschland habe mit der Ideologie der Nationalstaaten in Europa Schluss gemacht und „Europa vom Krieg befreit" (!), weil sich England 1940 habe zurückziehen müssen.

Die derzeitige Reorganisation Europas habe Vorgänger: Die englische Blockade gegen Napoleon und der „deutsche Zollverein" von 1831. Auch andere Länder wie Spanien, sowie Ungarn, Rumänien und Bulgarien seien dabei, unter Überwindung der nationalen Gegensätze den Donauraum neu zu ordnen. Italien und Deutschland aber würden der Motor dieser Reorganisation während der „Feindseligkeiten" (gegen Europa) sein.

Die Niederlage „der Mächte des alten Europa" sei das Ergebnis der Aufrufe zur Ordnung, die die „revolutionäre Propaganda" Deutschlands und Italiens gefordert habe. Der Krieg gegen England habe Deutschland zur „Selbsthilfe" gezwungen, das fast seinen Glauben an sich selbst verloren habe. Die zwei Vierjahrespläne hätten Deutschland wegen der Blockaden durch England zur Autarkie gezwungen. Die Politik der deutschen Besatzungsmacht sei in den Ländern Belgien, Holland, Norwegen und Dänemark klar erkennbar und diene dem Wohl dieser Staaten: Erstens absolute Respektierung der ethnischen Gegebenheiten und zweitens absolute Entschlossenheit, feindliche Handlungen gegen Deutschland in dem westlichen Teil Europas nicht zu dulden. Der Autor hebt dann die Vorteile einer europäischen Gemeinschaft in wirtschaftlicher und sozialer Hinsicht hervor, die durch „die Umstände" herbeigeführt worden sei. Dies sei der wichtigste Faktor in dem gegenseitigen Verständnis zwischen Besatzungsmacht und Bevölkerung. Alle, der dänische wie der holländische Bauer, profitierten von einer engen Verflechtung (der Wirtschaften). Was in Schlesien und in Böhmen geschehe, werde in den Industriegebieten von Rhein und Mosel wiederkehren. Die Kriegsökonomie werde die Rationalisierung und Effizienz beschleunigen, die die deutschen Unternehmer ausgezeichnet beherrschten.

Der Autor wendet sich dann der deutsch-italienischen Achse seit 1936 zu, die er mit Lob überhäuft. Ökonomisch gesprochen habe der Achsenpakt die Autarkie beider Länder gestärkt. Es sei die Achse einer siegreichen Strategie, man habe in dieser Form eine „interpénétration" zweier Einheiten, animiert durch einen nationalen Willen. Dies sei ein „typisches Beispiel" einer zum äußersten getriebenen „supranationalen Gemeinschaft". Das Gemeinsame zwischen Führer und Duce sei „von kindlicher Einfachheit": Alle Reibungspunkte zwischen den Völkern zu beseitigen, „methodische Entfernung" aller schädlichen Rivali-

[30] Die Artikel orientieren sich an der meistgedruckten französischen Ausgabe. Die deutsche Ausgabe war nur für Auslandsdeutsche und für die Schweiz bestimmt und ist aufgrund ihrer geringen Auflage nur schwer verfügbar. Die Textstellen sind übertragen und zusammengefasst von den Verfassern.

[31] Signal Nr.10 / 1941, S.20ff.

[32] Signal Nr.15 / 1940, S.4ff.

täten, schließlich eine Verdoppelung der Anstrengungen beider Partner auf allen Gebieten (1940).

Militärpolitische Themen

Ab Juni 1941 wurden die Pläne zur Neuordnung Europas mit dem Kampf gegen den Bolschewismus gekoppelt. Es gehe nun, so Goebbels, um einen „Aufbruch Gesamteuropas" und um die Waffenbrüderschaft in einer europäischen Dimension.[33] Im Rundfunk hieß es, dass „Europas Soldaten" im Osten kämpften; ein weiteres Kriegsziel sei es, die Dauerkonflikte auf dem Balkan zu unterbinden.[34] Solange die Wehrmacht auf dem Vormarsch war, war diese Propaganda integrierend. Nach der Niederlage von Stalingrad im Januar 1943 entstand für die NS-Propaganda jedoch ein „machtleerer Raum", durch den sie erheblich an Wirkung einbüßte. Die anfänglich große Zustimmung, die die NS-Propaganda in den besetzten und verbündeten Staaten entfaltet hatte, beruhte zu einem nicht geringen Maß darauf, dass von einem „Großeuropa" die Rede war, die den mittleren und kleinen Staaten eine gewisse Autonomie belassen wollte. Während des gesamten Krieges wurden jedoch, wie allgemein in der NS-Propaganda, in *Signal* die wirklichen Kriegsziele nie benannt: Die Gründung eines „Germanischen Reiches deutscher Nation" (ohne Slawen). Alle nichtgermanischen Völker waren in dieser Strategie nur „Hilfsvölker"; von einer irgendwie gearteten Autonomie konnte nicht die Rede sein.[35] Der Gegensatz zu den Verlautbarungen der offiziellen NS-Propaganda konnte nicht größer sein.

Diese Propaganda wurde jedoch nicht müde, die Illusion eines Großeuropa auszubauen. Europa sei eine „Kampfgemeinschaft" („communauté de lutte").[36] So beschwor *Signal* die „Festung Europa" gegen die Sowjetunion, die, wie seinerzeit die Hunnen und die Mongolen, die europäische Zivilisation bedrohten.[37] 1944 beschwor G. Wirsing ein Europa des Friedens: *Pourquoi nous nous battons?* – Wofür wir kämpfen? *Pour mettre un terme ŕ ces guerres civiles et fratricides.* – Um all den Bürger- und Bruderkriegen der Vergangenheit ein Ende zu machen.[38] Ein gigantischer Prozess der europäischen Einigung, tönte es in *Signal*, sei im Gange; doch könne dieser nicht mit Gewalt, sondern nur mit Zustimmung aller Erfolg haben.[39]

Es heißt dann weiter: Europa sei aus der Kampfgemeinschaft der europäischen Völker entstanden. In einem Artikel: *L'Europe? Communauté de lutte* von Hans Bähr[40] wird aus „geschichtsphilosophischer Sicht" beschrieben, dass sich seit Jahrhunderten die Völker Europas als kulturelle Gemeinschaft verstanden hätten. Heute gehe es um kämpfen oder untergehen. Der Grundgedanke Europas, das Beharren *(conservation)* entwickele sich, genau wie das lebendige Universum – nur durch Kampf. Alles, was lebe, müsse kämpfen, auch der Mensch. Der zweite Grundgedanke Europas sei die Aufrechterhaltung der Rasse *(„maintien de la race")*. Beides seien „ewige Gesetze" und dieser Kampf sei ein „ewiger Krieg", sei auch für die Menschen ein „Naturgesetz", das zeige die Geschichte. In der Schlacht von Marathon und der Thermophylen sei Europa verteidigt worden. Die Römer hätten diese Fackel übernommen und sich Europa zugewandt. Die „Kampfgemeinschaft" der Völker Europas ziehe ihre Kraft aus zwei Polen: Aus dem Ganzen und aus seinen Gliedern. Der ewige Kampf in der Natur wiederhole sich im Kampf der Menschen gegeneinander. „Man müsse fest den ewigen Gesetzen anhängen, um die europäische Gemeinschaft aufzubauen. Die europäische Kunst leuchte wie ein magisches Licht in höchste Höhen." Wir (Deutschland) sind bereit, „aus der großen Völkerfamilie eine dauerhafte Gemeinschaft" zu bilden, dank derer unser Kampf erfolgreich sein wird (1942).

Sodann wird die Polemik gegen die Feinde entfaltet. In dem Aufsatz: *La Peur de l'Europe?*[41] prangert der (anonyme) Autor die Hilfe der USA für England als eine Aggression gegen Zentraleuropa an. Der Kapitalismus und Liberalismus traditioneller Art seien vorbei, stattdessen habe man nach fünf Jahren „New Deal" und zwei Jahren Aufrüstung in den USA einen „Staatskapitalismus" und eine vollständig dirigistische Wirtschaft (d.h. Kriegswirtschaft, Anm. d. V.). Dann geht der Autor zur Politik über und propagiert ein (allerdings nicht näher definiertes) „neues Europa"[42] (1942).

Einer verstärkten Polemik unterliegen auch die Allianzen der Alliierten. In einem Artikel von August 1942 des bereits oben erwähnten Max Clauss, *Sur l'Europe. Le pacte desespéré Churchill-Molotov*,[43] prangert der Autor die neue Allianz zwischen England und der UdSSR an. In fünf Geheimartikeln habe die Sowjet-Union alle gewünschten territorialen Zugeständnisse erhalten, die sie vor dem 22. Juni 1941 realisiert habe. Von Finnland bis zur Türkei habe man die Länder den „sowjetischen Garnisonen" überlassen und in Europa bezüglich der künftigen

[33] Zit. nach Wette, S.323.
[34] Wette, S.320.
[35] Wette, S.325.
[36] So die Überschrift eines Artikels in Signal Nr.5 / 1942, S.12ff.
[37] Sous la pression terrible venue des steppes orientales et de l'Atlantique, nos nations et notre entendement atteignent une maturité plus rapide. G. Wirsing: Nous autres, européens, in: Signal Nr.6 / 1943, S.21ff., 38.
[38] Signal Nr.2 / 1944.
[39] Wirsing, Giselher: Nous autres, européens, in: Signal Nr.6 / 1943, S.21ff., 38.
[40] Signal Nr.15 / 1942, S.12ff., 18 (Juli / August). Der Autor wird in einer Vorbemerkung der Redaktion als junger Philosoph aus Heidelberg vorgestellt, der zeige, wie sehr die Idee einer Europäischen Union im Denken der Menschen verwurzelt sei und in der Natur der Sache liege (S.12).
[41] Signal Nr.1 / 1942, S.2.
[42] Die Reaktionäre sähen nur das Trennende in Europas Ländern und nicht das gemeinsame Interesse und die Machtverhältnisse im alten Kontinent. Sie müssten anerkennen, dass der Verzicht auf die alten Ideen kein Antasten der Ehre (der besiegten Staaten) sei; ansonsten würden sie „ohnmächtige Zeugen" einer verschwundenen Welt. Das neue Europa werde nicht aus „einem Stück" entstehen, sondern es forme sich selbst.
[43] Signal Nr.16 / 1942, S.8; diese seien: Freie Durchfahrt im Kattegatt, in den Dardanellen und dem Persischen Golf. Art. 5 habe zugesagt, dass weder Großbritannien noch UdSSR territoriale Expansionen anstrebten, und sich nicht in die Politik anderer Länder einmischen würden. Roosevelt habe den Pakt nicht unterzeichnet, er sei nach seiner Ansicht eine Verletzung des Atlantikpaktes.

Westgrenze der Sowjet-Union Beunruhigung hervorgerufen[44] (1942).

In seinem Artikel: *Nous autres, Européens*, der im März 1943, nach der Niederlage von Stalingrad erschien, zieht Giselher Wirsing, damals Chefredakteur von *Signal*, erneut alle Register psychologischer und historischer Art, um das neue Europa zu beschwören.[45] Er beschreibt, wie er als Angehöriger des Stabes einer Panzereinheit im Herbst 1942 in einer kleinen Stadt einen jungen Russen getroffen habe, der im Auftrag der deutschen Verwaltung die gesamte, sehr komplizierte Milchversorgung der Bevölkerung organisiert habe. Er sei 1941 zu den deutschen Truppen übergelaufen, weil sein Fluchtweg durch das Niemandsland ihn in Richtung Europa geführt habe.

Millionen Ukrainer, Russen, Weißrussen, fühlten ähnlich, seit sie in das neue Osteuropa eingebunden seien. Nur selten habe er solch ein Gefühl für die wesentlichen und charakteristischen Qualitäten „unseres Kontinents" gespürt wie in dem Gespräch mit dem jungen Russen, der „lebhaft, weißhäutig, hochgewachsen", in seinem Herzen ein so klares Bild von allem, was Europa umfasst, getragen habe, dass er sein Leben riskiert habe, um Europäer zu werden. Die Bolschewisten hätten mit dem Europäer nichts gemein, wohl aber jener junge Russe, der „so wie wir denken und fühlen wollte."

Derzeit stelle sich die Frage, „wie wir leben wollen", ob wir den „fruchtbaren Humus", zu nutzen verstehen, aus dem die moderne Welt entstanden sei, oder ob wir von außereuropäischen Mächten (UdSSR und USA) beherrscht werden wollten. Dann bemüht der Autor die Geschichte: Vor derselben Frage seien die Griechen vor 2000 Jahren gestanden, die von den Persern aus dem Osten bedroht worden seien. Im 16. und 17. Jh. habe die türkische Bedrohung die europäischen Völker geeint, bald sei aber diese Einheit wieder zerbrochen. Nord- und Südamerika seien ein gemeinsames Werk Europas. Unser internationales Recht habe universelle Bedeutung, die Reformation habe über ganz Europa entschieden. Kunst, Literatur und Musik hätten (in früheren Zeiten) eine unerhörte Höhe erreicht. Europa stehe zwischen den USA und der UdSSR – letztere wolle aus Europa ein Anhängsel machen, das sich seinem Diktat unterwerfen müsse. Vor einigen Wochen aber seien die 6. Armee und ihre rumänischen und kroatischen Verbündeten mit „wehender Fahne" untergegangen, zerrissen vom eisigen Wind der Steppe. Das sei nicht nur ein deutscher Krieg, sondern der „heilige Krieg Europas". USA und England wollten Europa dem Bolschewismus ausliefern. Nur die deutschen Soldaten schützten die europäischen Länder vor dem Abgrund. Man müsse diesen Freiheitskrieg gegen die außereuropäischen Mächte kämpfen. Europa dürfe nicht in die Zeit der Kriege zurückfallen, Europa sei das Symbol für Freiheit und Gleichheit, die triumphieren werde. In diesem Befreiungskampf wolle niemand eine Gewaltherrschaft, sondern die Individualität der Völker werde geachtet werden. Die Vereinheitlichung Europas gehe allerdings nicht ohne Gewalt, falls das Gemeinwohl dies erfordere (1943).[46]

Politische Themen

Im Mai 1943 schrieb Giselher Wirsing in *Signal* den Artikel: *La jeunesse européenne,*[47] in dem er seine Europaeinstellungen mit Appellen an die „Jugend Europas" verbindet. Die Jugend in Westeuropa sei wenig an Politik interessiert, die französische Regierung sei überaltert gewesen und habe eine von der Jugend völlig abgehobene Politik betrieben. Frankreich nach dem I. Weltkrieg sei nicht vergleichbar mit dem Nachkriegsdeutschland oder Nachkriegsitalien. Ähnliches – Gleichgültigkeit gegenüber der Politik – treffe für Holland und Skandinavien zu. Nun habe die Erfahrung des II. Weltkriegs eine Annäherung dieser Jugend gebracht, die bisher nicht möglich war. Es stelle sich die Frage, so der Autor, ob man nach den Kriegserfahrungen alles früher Gewesene wiederherstellen könne. Die USA und England wollten Europa nur eine Stellung zwischen Kolonie und Dominion, ähnlich wie Indien, zubilligen. Die europäische Jugend wolle aber aus der Enge Dutzender kleiner und mittlerer Staaten heraus und hoffe auf einen Staat, gegründet auf soziale Gerechtigkeit *(„justice sociale")*.[48]

Für die Mehrheit der europäischen Jugend hätten die alten Formen keine Bedeutung mehr, sowohl national wie sozial. Die zukünftige europäische Politik könne nur auf der Anerkennung der historischen Gegebenheiten der einzelnen Völker entstehen, die die „kontinentale Familie" *(famille continentale)* bilden. Die europäische Jugend habe gesehen, dass Kollaboration, ja Einheit, Europas Freiheit nicht gegen das „sowjetische Asien", den sowjetischen Kommunismus und den Amerikanismus verteidigen könne. Die Idee einiger neutraler Staaten, zu dem Vorkriegszustand zurückzukehren, sei illusionär. Es gebe keinen Weg zurück. Die europäische Jugend wolle leben und sich an der Zukunft orientieren, selbst wenn – in den Zeiten großer Umbrüche – ihr „legitimer Ehrgeiz" kühn erscheine (1943).

In dem Artikel: *Aujourd'hui, L'Europe unifiée ne peut être que le résultat d'une victoire allemande,*[49] der noch vor der Niederlage von Stalingrad erschienen war,[50] beschwört der anonyme Autor die Kraft Deutschlands. Nur diese könne Europa (gegen England) schützen und den Bolschewismus zum Stillstand bringen. England wolle mit Hilfe Stalins eine „pragmatische Politik" betreiben und Europa dem sowjetischen Zugriff durch Zustimmung zu dessen Expansionsplänen unterwerfen. Die übliche englische Taktik des Ausspielens der europäischen Mächte gegeneinander

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[44] Und weiter sinngemäß: Diese Beunruhigung sei aber nicht realistisch, denn die Achsenmächte Berlin und Rom sowie Japan seien unbezwinglich.
[45] Signal Nr.6 / 1943, S.21 (März 1943).
[46] Signal Nr.6 / 1943, S.38.
[47] Signal Nr.9 / 1943, S.8ff.
[48] Signal Nr.9 / 1943, S.18. Auf den Schlachtfeldern im Osten kämpfe eine europäische Jugend, die gemeinsame Richtung gehe dahin, eine europäische Form zu finden, die von einem Sozialismus durchwirkt sei – der, anders als der Bolschewismus, dem einzelnen seine Freiheit lasse und ihn nicht nur als amorphe Masse behandele.
[49] Die Überschrift ist ein Zitat aus der Zeitschrift „19. Jahrhundert", die sehr einflussreich in England war und die schrieb: Eine europäische Union ist unvereinbar mit der Doktrin des europäischen Gleichgewichts.
[50] Signal Nr.2 / 1943.

sei durch die Allianz mit der UdSSR eine noch gefährlichere Bedrohung.

In dem Artikel: *Les buts de guerre du continent*[51] fasst ein weiterer anonymer Autor nochmals die Kriegsziele Deutschlands zusammen: Mit ihrem Kampf die Früchte ihrer Revolution zu ernten, die für sie *das* Jahrhundertproblem gelöst hat: Nämlich die „soziale Frage". Deutschland sei das Bollwerk gegen die Bedrohung durch die USA und England und verteidige die Interessen Westeuropas. Deutschland habe seine Kriegsziele präzise definiert und diese mit Tapferkeit und Intelligenz verwirklicht. Nun müsse es auch die Neugruppierung Europas gestalten, um dessen Kräfte sinnvoll zusammenzuführen.

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

Das Russlandbild im NS-Staat

Ein wesentlicher Teil der offiziellen NS-Propaganda im Hinblick auf ein künftiges Europa bestand, wie bereits erwähnt, aus der Warnung vor dem „Bolschewismus". Der frühere Verbündete, der infolge des Nichtangriffspakts vom August 1939 bis 1941 als Freund Deutschlands betrachtet wurde, musste nun als Feind begriffen werden. Es wimmelte von negativen Schlagworten, eine neue „Russland-Forschung" wurde aufgebaut.[52] Diese Politik bedeutete allerdings nicht eine Kehrtwende, da schon die Russlandforschung in der Vorkriegszeit die Sowjet-Union trotz freundlicher Beziehungen zu Deutschland stets als eine Bedrohung für Europa gesehen hatte. Die „Forschung" im NS-Staat, wie sie in den damaligen Zeitschriften wie z.B. *Jahrbücher für die Geschichte Osteuropas* (bis 1935), *Jahrbücher für Kultur und Geschichte der Slawen*, *Zeitschrift für osteuropäische Geschichte* (die beiden letztgenannten später vereinigt in einer neuen *Zeitschrift für Osteuropäische Geschichte* bis 1941), *Historische Zeitschrift,* sowie *Nation und Staat* betrieben wurde, war allerdings pseudowissenschaftlicher Art. Im Vordergrund standen die Außenpolitik der Sowjetunion und ihr Verhältnis zu den anderen Staaten; die NS-Autoren machten daraus hochpolitische Aufsätze, oft ein Mischmasch aus deutschnationaler, antiliberaler und völkischer Blutideologie, insgesamt voll von rassistischen Vorurteilen.[53] Es ging darum, russische Geschichte als Geschichte einer Bedrohung Europas in Verbindung mit angeblicher Kulturlosigkeit und innerer Schwäche darzustellen; als Folge predigte man die Ausklammerung Russlands aus dem „europäischen Kulturkreis".[54] Seit Kriegsbeginn 1941 trat die „jüdisch-bolschewistische Komponente" hinzu, die als eine weitere Verstärkung der Bedrohung gesehen wurde. Die „normale", herkömmliche Russlandforschung entsprach mehr oder weniger diesem Negativbild. Schon seit Jahren hatte sie mangels Interesse und der Geringschätzung der Fachleute nur ein bescheidenes Dasein gefristet und das „traditionelle" Russlandbild als negativ festgeschrieben.[55] Nach Kriegsausbruch zog sich die Wissenschaft aus der Erforschung der russischen Geschichte zurück. Man beschränkte sich auf die aktuellen Probleme seit der Russischen Revolution von 1917 (sog. Sowjetforschung), die aber nur höchst oberflächlich erörtert wurden. Man suchte nicht einmal die zahlreichen Negativ-Klischees weiter voranzutreiben, sondern Staats- und Parteistellen ignorierten einfach die Dinge und verzichteten auf eine Infiltration der Fachwissenschaft, die ebenfalls an langfristigen Russlandforschungen wenig Interesse zeigte.[56]

Hitlers Forderungen gegenüber der Sowjet-Union waren „eindeutig propagandistisch, nicht programmatisch" orientiert (Broszat); es herrschte in der NS-Führung ein Mangel an Konzeption und Neugestaltungswillen.[57] Die Theorie Hitlers von einem „Lebensraum im Osten" sah keine staatlichen Strukturen vor; unklar blieb auch, was mit der Bevölkerung der besetzten Gebiete im Osten geschehen sollte. Die wahrscheinlichste Vermutung ist, wie man Andeutungen des sog. Generalplans Ost des Reichsführers SS entnehmen kann, ihre Vertreibung hinter den Ural, um Platz für deutsche Siedler zu schaffen. Hitler selbst hatte dies 1937 in einem Gespräch mit der Wehrmacht deutlich gemacht (sog. Hoßbach-Protokoll). Zusätzliche Faktoren für die Dezimierung der einheimischen Bevölkerung waren, wie später auszuführen ist, auch Hunger und Kälte, wie die deutsche Wehrmachtsführung schon im Herbst 1941 feststellte und „billigend in Kauf" genommen hatte, da die Truppen unmittelbar aus den besetzten Gebieten versorgt werden sollten. Auch die in *Signal* enthaltenen Aufsätze über das Leben in der Sowjetunion gingen über Polemiken nicht hinaus. Die Bilder zeigen zerlumpte sowjetische Kriegsgefangene oder Wehrmachtssoldaten, die in den Dörfern eine Kommandozentrale einrichten und von den Einwohnern bestaunt werden.

Ab Juni 1941 wurden die Pläne zur Neuordnung Europas mit dem „Kampf gegen den Bolschewismus" gekoppelt. Es gehe nun, so Goebbels,[58] um einen „Aufbruch Gesamteuropas" und um die Waffenbrüderschaft in einer europäischen Dimension. Im Rundfunk hieß es, dass „Europas Soldaten" im Osten kämpf-

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[51] Signal Nr.12 / 1943 (Juni), ohne Verfasser, S.22.

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

[53] Seraphim, S.197ff.; ders. in: Historische Zeitschrift 161 / 1940, S.277 ff.; Hasselblatt in: Nation und Staat 15 / 1942, S.352ff. Weitere antirussische Aufsätze in: Volk und Reich 1941, S.368ff.

[54] Camphausen, Das Russlandbild, S.367.

[55] 1933 bestanden in Deutschland nur vier Lehrstühle für Russlandforschung, die 1939 auf nur noch zwei Lehrstühle und zwei Extraordinarien geschrumpft waren. Camphausen, S.379ff.

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

[57] Camphausen, S.398.

[58] Zit. nach Wette, S.323.

ten; ein weiteres Kriegsziel war es, die Dauerkonflikte auf dem Balkan zu unterbinden.[59] Solange die Wehrmacht auf dem Vormarsch war, war diese Propaganda integrierend. Nach der Niederlage von Stalingrad entstand ein „machtleerer Raum", der bei den Bündnispartnern immer größere Unruhe hervorrief.

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

Nach der Niederlage von Stalingrad warb die NS-Propaganda verstärkt um die Verbündeten, vor allem um die kollaborationswilligen Kräfte in den besetzten Ländern. Die Grundfrage blieb ungelöst: In wieweit sollten die besiegten Länder in einem künftigen Großeuropa erhalten bleiben? Die Verbündeten klammerten sich an die Hoffnung, Stalingrad würde eine einmalige Niederlage bleiben. Das Schweigen Berlins über eine künftige europäische Ordnung hatte jedoch zur Folge, dass die Bündnispartner immer mehr auf nähere Erläuterungen über ein Nachkriegseuropa unter deutscher Hegemonie drängten.[60] Im Auswärtigen Amt (AA) war man auf die Vorstellungen der Verbündeten vorbereitet: Eine kleine Gruppe hatte 1942 einen Friedensplan für die Nachkriegszeit entwickelt, der den besetzten Ländern eine gewisse Autonomie verhieß, der jedoch von Hitler verworfen wurde; solche Friedensvorbereitungen seien nicht notwendig. Er könne selbst in zwei Stunden diese diktieren, wenn „die Zeit reif sei". Stattdessen gingen die NS-Propagandisten zu einer intensiven Kulturdiplomatie zur „Beruhigung" der Verbündeten über, die als Ersatz für ernsthaftes politisches Engagement dienen sollte. (Gründung eines europäischen Jugendverbandes, Einigung über moderne Verwaltungsstrukturen, europäischer Schriftstellerkongress etc.) Besondere Aktivitäten zeigte Italien, das eine einheitliche politische Gemeinschaft auf dem ganzen Kontinent wünschte.

Hitler, der alle Autonomiebestrebungen auf dem Kontinent strikt ablehnte, befahl jedoch das Ende auch dieser „Ersatz"-Aktivitäten, d.h. das Ende aller pro-europäischen Kulturdemonstrationen – auch hier in völligem Widerspruch zu den Tatsachen, da solche Initiativen ohnehin viel zu spät kamen. Die alliierte Invasion 1943 in Nordafrika, die vollständige Besetzung Italiens 1944 (das im August 1943 auf die Seite der Alliierten übergegangen war) und Südfrankreichs steigerten bei Deutschlands Verbündeten die Unruhe. Das neutrale Spanien rief dazu auf, die Annektierungen im Osten aufzugeben und wieder unabhängige Nationalstaaten zu schaffen. In Ungarn und Rumänien begannen diplomatische Absetzbewegungen, deren die NS-Propaganda trotz aller „europäischen Visionen" nicht Herr wurde.[61]

Eine Beruhigung der aufgebrachten Verbündeten war nicht zu erreichen, da das Schicksal der kleinen Völker in Osteuropa nach wie vor im Unklaren blieb. Vermittlungsversuche des Auswärtigen Amts, das die Dinge nicht Goebbels überlassen wollte, scheiterten, wie erwähnt, da Außenminister Ribbentrop einerseits die Gespräche mit den Verbündeten nicht abbrechen und gleichzeitig Hitlers hartem Kurs (jedes Zugeständnis bedeutete nach ihm Schwäche) einer rücksichtslosen Repression folgen wollte – ja den Verbündeten gegenüber auch folgen musste.[62] Die Unfähigkeit Ribbentrops, der Sachlage gemäß zu handeln, zeigte sich schon im März 1943, als, wie erwähnt, das Auswärtige Amt eine Erklärung zugunsten einer europäischen Nachkriegsföderation herausgab, die Deutschland zur Wahrung der Rechte der kleineren Nationen verpflichtete. Ribbentrop propagierte auf dieser Grundlage den europäischen Staatenbund, sobald ein bedeutender militärischer Erfolg eingetreten sei. Dieser Staatenbund werde bei den Bundesgenossen Besorgnisse zerstreuen und die Neutralen beruhigen. Nach dem Entwurf sollten die Staaten einander Freiheit und politische Unabhängigkeit garantieren; das war nun nicht nur eine Flucht nach vorne, sondern vielmehr eine Realitätsblindheit ohnegleichen: „Es war, als hätte die NS-Revolution im Völkerrecht nie stattgefunden".[63]

Hitler konnte sich allerdings auch europäischer Phrasen bedienen, um die Verbündeten zu gewinnen bzw. für später „bei der Stange" zu halten. Hitler zum italienischen Außenminister Ciano am 25. 10. 1941: Bemerkenswert sei, dass sich zum ersten Mal ein Gefühl europäischer Solidarität entwickelt habe. Es gehe für die Zukunft nicht mehr um Deutschland, sondern um die gemeinsamen Interessen innerhalb des europäischen Wirtschaftsgebietes mit seinen nordafrikanischen Ergänzungen.[64] Die deutschen Pläne für Nachkriegseuropa, die im Auswärtigen Amt und anderen Dienststellen entwickelt wurden, hatten allerdings mit Europa nur den Namen gemein: Sie be-

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[59] Wette, S.320.

[60] Zusammenfassende Darstellung bei Mazower, Mark: Hitlers Imperium. Europa unter der Herrschaft des Nationalsozialismus (2009), S.330ff., auf den sich der folgende Text stützt.

[61] Mazower, S.332f.

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

[63] Mazower, S.334.

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

trachteten konkret nur deutsche Bedürfnisse – Städteneubau, Kolonisation des Ostens, Infrastruktur, Verkehrswege – Pläne, die Hitler und Himmler sehr beschäftigten[65] und sie zu immer neuen Megastädten im Osten inspirierten. Rücksichtslose Verfolgung demographischer Ziele mit ausbeuterischem Nationalismus ohne Rücksicht auf andere Staaten machte Deutschlands Anspruch zum Hohn. Alle sonstigen Fragen überließen Hitler und Himmler anderen. Die NS-Spitze würde Frankreich, Belgien und Norwegen niemals erlauben, eigene politische Wege zu gehen oder Partner des Reiches zu werden. Wichtig waren diese Völker allein als Hilfe in ihrer Rolle für die Kolonisierung des Ostens. Schon während und nach dem Krieg fragten sich viele, wie es komme, dass ein Land in der Mitte Europas nicht geradezu eine Kunst entwickelt habe, den Frieden zu erhalten. Obwohl seit Frühjahr 1943 die Propaganda die positive Rolle der europäischen Nationen beim „Kampf gegen den Bolschewismus" herausstrich, wurde eine echte Beruhigung nicht erreicht.

Die generelle Unverbindlichkeit der Europa-Artikel in „Signal" und die Verlautbarungen anderer NS-Institutionen sorgten auch weiterhin für böses Blut bei den Verbündeten (Italien, Finnland), ohne dass das Auswärtige Amt, wie erwähnt, etwas zur Beschwichtigung unternahm oder unternehmen konnte. Das Schlagwort der „europäischen Solidarität gegen den Bolschewismus und das Judentum" blieb eine Leerformel, auch wenn jetzt die fremden Völker noch mehr hofiert wurden: Man propagierte jetzt nicht mehr ein Europa unter deutscher Führung, sondern eine „freie Partnerschaft der (souveränen) Völker (Giselher Wirsing, ab 1943 Hauptschriftleiter von *Signal*).[66] Tausende von Freiwilligen aus Frankreich, den Niederlanden und Norwegen strömten zu den Waffen. Sie glaubten an eine „Partnerschaft" mit festen Rechten und Pflichten. Wirsing verkaufte jedoch nur alten Wein in neuen Schläuchen, die grundlegenden Prämissen deutscher Europa-Propaganda sind von ihm nicht hinterfragt worden; auch Wirsing sagte nicht, was nach Kriegsende in dem Fabelreich des „europäischen Bundes" passieren würde.[67] Das erzeugte Missmut bei den Verbündeten und Kollaborateuren. Offenbar bemerkte man, dass diese Appelle lediglich eine Beruhigungsstrategie darstellten.[68] War es dem Chefredakteur von *Signal* wirklich ernst, von der Hauptlinie des Auswärtigen Amts (keinerlei Rechte für die Verbündeten) abzuweichen und von Partnerschaft zu sprechen? 1944 häuften sich die Appelle; *Signal* sprach vom „völkischen Sozialismus", der zum Wohl der Menschen agieren solle („Europa ohne Proletarier"). Das Ideal des deutschen und preußischen Sozialstaats wurde beschworen (Menschenwürde, Persönlichkeit, Kultur), dies seien die Ideen der Zukunft.

Mit dem Näherrücken der Front, als die Niederlage immer deutlicher wurde, nahm die NS-Propaganda einen absurden Charakter an. Die besiegten Völker seien noch nicht reif für Europa, tönte das Blatt. Die Völker wollten nicht lernen.[69] Die bisherigen Opfer seien gering im Verhältnis zum Schicksal, das Europa drohe, wenn die Alliierten siegten. Diese wollten die Einigkeit Europas zunichtemachen.[70] Es drohe ein Rückfall in Kleinstaaterei mit neuen Kriegen. Das war ein Eingeständnis der Rückschläge, aber keine endgültige Aufgabe der Ziele. Die Einigung Europas, so *Signal*, lasse sich nicht aufhalten.[71] Die Naturkräfte des deutschen Volkes würden Deutschland als Teil des künftigen Europa ein Fortbestehen garantieren und könnten nicht „ausgerottet" werden. Es gebe, so Wirsing in *Signal*, kein Europa ohne Deutschland. Ein Land könne nicht „ausgerottet" werden, das die „stärksten Konstruktionen und schöpferischsten Ideen" hervorgebracht habe.[72] Dies ähnelte Hitlers Ideen von April 1945, dass das deutsche Volk für die Herrschaft in Europa nicht „reif" gewesen sei und daher zu Recht untergehe.

Im folgenden wird versucht, die Reaktionen der Regierungen der Verbündeten auf die Pläne eines NS-Europa im einzelnen festzuhalten, weil an ihnen deutlich wird, wie groß der Glaube der Verbündeten an ein großeuropäisches Reich war – dafür war man sogar bereit, die deutsche Hegemonie in einem künftigen Europa zu akzeptieren. Dass die Verbündeten auf die Versicherungen in den Europaplänen des Auswärtigen Amts (AA), die eine Beteiligung der europäischen Verbündeten an einem künftigen „Großeuropa" vorsahen, mit großem Misstrauen geagierten, wurde bereits ausgeführt. Sie sahen eine absolute Dominanz Deutschlands und das Ende ihrer Souveränität voraus.

Finnland

So befürchtete Finnland,[73] das 1941 an der Seite des Reiches in den Krieg gegen die Sowjet-Union[74] eingetreten war, trotz formeller Neutralität und eines „ungebundenen Verhältnisses" zu Deutschland, einen Totalverlust der Staatlichkeit, d.h. zu einer Provinz Deutschlands zu werden. Schon nach Kriegsbeginn 1939 schrieb der beunruhigte Marschall Mannerheim, dass „die Völker Europas zu weißen Negern verwandelt werden sollten".[75] Dennoch plädierte Finnland für einen engeren Zusammenschluss Europas, damit dieses gegenüber dem asiatischen Raum und den USA bestehen könne. Bedingung war allerdings die Wahrung alles historisch Gewachsenen, ferner auf freiwilliger Basis eine gemeinsame Außen- und Militärpolitik, also ein Status mit reduzierter Souveränität (Autonomie).[76] Ein Goebbels-Interview vom März 1943, wonach die europäi-

[65] Speer, Erinnerungen, S.237.
[66] Signal Nr.15 / 1943, S.8.
[67] Rutz, S.296f.
[68] Rutz, S.293.
[69] Zusammenfassend: G. Wirsing in: Signal Nr.19 / 1944, S.10f.; Nr.16 / 1944, S.10f, zit. n. Rutz, S.303.
[70] Wirsing in Signal Nr.16 / 1944, S.10f., zit. nach Rutz, S.303.
[71] Wirsing in Signal Nr.16 / 1944, S.10, 11, 23, zit. nach Rutz, S.305.
[72] Wirsing in Signal Nr.19 1944 (Dez.) S.10f. zit. n. Rutz, S.306.
[73] Vgl. näher Michael Jonas, NS-Diplomatie und Bündnispolitik, 1936-1944 (2011); Wipert von Blücher, Das Dritte Reich und Finnland (2011).
[74] Jedoch nur mit dem Ziel, die im Winterkrieg 1939/40 an die Sowjetunion abgetretenen Gebiete (Karelien und die Kola-Halbinsel) zurückzugewinnen.
[75] Neulen, S.369ff.
[76] Neulen, S.370.

sche Neuordnung freiwillig unter Wahrung der Individualität der europäischen Nationen erfolgen solle, gab diesen Hoffnungen vorübergehend neuen Ausdruck[77]; sie wurden aber alsbald von Reichsaußenminister Ribbentrop vernichtet, der eine Einmischung in seine Kompetenzen befürchtete, selbst jedoch keine klare Konzeption hatte. So blieben die finnischen Bestrebungen eines gemeinsamen europäischen Reiches wie auch die Bemühungen der anderen verbündeten Staaten, zum Scheitern verurteilt.[78]

Rumänien

Ein ähnliches Schicksal war den Bestrebungen Rumäniens beschieden,[79] das die großdeutschen Pläne mit den eigenen Kriegszielen[80] verbinden wollte. Marschall Ion Antonescu, der im Januar 1941 eine Militärdiktatur eingeführt hatte, vertrat eine autonome Außen- und Europapolitik mit dem Ehrgeiz, eine „lateinische Achse" (Italien, Frankreich, Portugal, Spanien, Rumänien) gegen das deutsche Übergewicht, eingebunden in eine größere Europäische Gemeinschaft mit europäischem Parlament und europäischer Zollunion zu entwickeln. Sein Außenminister Mihal Antonescu drängte gegenüber Deutschland auf positive Zielsetzungen und auf Präzisierung seiner Aussagen, indem er 1941 schon ziemlich konkrete Vorstellungen über die künftige Stellung Rumäniens entwickelte (z.B. Eintritt in einen noch zu schaffenden europäischen Wirtschaftsverband; Anhänger einer „europapolitischen Union unter Führung Deutschlands" etc.), und suchte für seinen Plan einer „lateinischen Achse" auch Italien als Mitstreiter zu gewinnen.[81] Nachdem dieser Plan 1943 mit dem Sturz Mussolinis scheiterte, setzte Rumänien seine Bemühungen fort, indem es eine Erklärung über die künftige Gestaltung Europas nach dem Krieg vorschlug und bei seinen deutschen Gesprächspartnern im Außenamt inständig auf ein Europaprogramm drängte.[82] Dort ließ man allerdings die Verbündeten im Ungewissen, die „am langen Arm" verhungern sollten. Im August 1944 kam es allerdings zu einer Unterredung zwischen dem rumänischen und dem deutschen Außenminister, die fast vier Stunden andauerte und in der es an deutlichen Tönen nicht mangelte. Mihal Antonescu sprach sich gegen eine nur auf Gewalt beruhende Herrschaft Deutschlands aus, an ihre Stelle sollte die Kooperation treten.[83]

Damit stieß er bei Ribbentrop auf taube Ohren. Wie im Falle Finnland hatte dieser dafür keinerlei Verständnis, weil er sklavisch der Linie Hitlers und Himmlers folgte;[84] noch angesichts des nahen Sieges der Alliierten äußerte er, jetzt könnten „nur noch die Waffen entscheiden". Mit Ribbentrop als Hitleranhänger konnte es für die Verbündeten daher keine Europapolitik unabhängig von NS-Deutschland geben. Die verbündeten Staaten waren zwar bereit, Deutschlands Führungsrolle anzuerkennen, beanspruchten in diesem neuen Europa jedoch eine Position der Gleichberechtigung untereinander, die mit Kooperation umschrieben wurde.[85]

Norwegen

Die Illusion über ein künftiges NS-Europa und die Stellung der besetzten Staaten wurde auch von einem der treuesten Hitler-Anhänger des seit April 1940 besetzten Norwegen, Vidkun Quisling, geteilt. Norwegen erfreute sich einer gewissen Scheinautonomie.[86] Aufgrund der „Rassenverwandtschaft" des Landes im NS-Sinne schlug Quisling, seit Februar 1942 norwegischer Ministerpräsident, ein Föderativsystem vor, nach dem eine „germanische Harmonisierung" in einem europäischen Bund geschaffen werden sollte. Die Eigenstaatlichkeit Norwegens mit Ausnahme unverzichtbarer Kompetenzen des föderativen Europas sollte nicht geschwächt werden.[87] Als solche Kompetenzen sahen diese Vorschläge die Handels- und Finanzpolitik vor. Auch die Skandinavier, Briten, Holländer und Deutschen, sogar die britischen Dominions und die USA sollten diesem Bund angehören (ohne Vorherrschaft einer einzelnen Macht); der Anschluss sollte freiwillig erfolgen. Ziel der Union sollte die „Eindämmung des Bolschewismus" sein.

Diese Vorschläge waren reichlich nebulös, in vielem sogar widersprüchlich. Es lag jedoch von vornherein auf der Hand, dass Deutschland als die größte Macht auf dem Kontinent die Vorherrschaft haben würde. Andererseits waren die wirtschaftspolitischen Pläne Quislings, eine Art europäische Freihandelszone zu schaffen, nicht unvernünftig.[88]

Quisling sprach schon in seiner ersten Denkschrift vom Oktober 1940 den großgermanischen Bund an, mit einem Bundes-Kanzler, einheitlicher Außenpolitik, gemeinsamer Marine und Luftwaffe; jedem Mitgliedstaat sollte territoriale Integrität und nationale Freiheit garantiert werden; Europa sollte also eine Art Staatenbund (noch weitergehender als die heutige EU) werden. Damit traf er genau die Auffassung von Europa in abendländisch-national ausgerichteten Europäerkreisen".[89]

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77 Interview abgedruckt bei Neulen, S.105, Dok. Nr.9.

78 Neulen, S.372.

79 Rumänien trat am 23. 11. 1940 dem Dreimächtepakt bei. Dieses Bündnis dauerte bis zum Staatsstreich am 23. 8. 1944 (Sturz von Ion Antonescu, Übertritt zu den Alliierten).

80 Wiedergewinnung der an Ungarn im August 1940 abgetretenen Gebiete von Nordsiebenbürgen und des Szekler Zipfels, sowie die Rückgängigmachung des im Juni 1940 an die Sowjetunion abgetretenen Bessarabiens und der Nordbukowina, näher Neulen S.381ff.

81 Neulen, S.383.

82 Neulen, S.389.

83 Ihm (M. Antonescu) scheine es, „als würde Deutschland besser fahren, wenn es anstelle der kalten Gewalt den Anderen vermittelte, dass es mit ihnen zusammenarbeiten wolle." Zit. n. Neulen, S.385.

84 Neulen, S.383f.

85 Näher Neulen, S.397.

86 Vidkun Quisling war Führer der 1933 gegründeten „Nasjonal Samling" (Nationale Sammlungsbewegung).

87 V. Quisling: Russland und wir, Oslo 1942, S.220 ff., zit. nach Neulen, S.331.

88 Zum ganzen vergleiche Neulen, S.333.

89 So der Historiker Bernd Martin, zit. nach Neulen 1987, S.334.

Das Projekt hatte freilich, ähnlich wie die finnischen Vorstellungen, keinerlei Realisierungschance, da die NS-Führung sich nie mit der Idee autonomer Staaten (auch bei gemeinsamer Außen- und Militärpolitik) anfreunden konnte; „rassisch" sollte Norwegen im Reich aufgehen. Das war der Standpunkt der NS-Führung und des Gauleiters Terboven, der Norwegen ins Reich eingliedern wollte (Himmler 1941: „Hier sitzen wir und gehen nicht wieder hinaus").[90]

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

Ähnlich wie gegenüber den Vorstellungen der Verbündeten, blieb Hitler auch gegenüber den norwegischen Vorschlägen vage und unentschlossen. Erbost über die zahlreichen Eingaben vertagte er alle Regelungen auf das Kriegsende. Die Wut und die Enttäuschung darüber (die sich seit 1943 bemerkbar machten) waren bei den Norwegern groß. Hinzu kamen, dass die Nutzung der norwegischen Energiequellen einseitig durch die deutsche Seite geregelt wurde. Auch neue Ideen, die Quisling entwarf (so z.B. die Errichtung sozialistischer Bauernrepubliken in Russland)[91], brachten die Dinge nicht weiter.

Am 16. September 1943 gab schließlich Hitler eine Selbständigkeitserklärung für Norwegen ab, allerdings nur für die Nachkriegszeit,[92] was als großer Erfolg für Quisling galt, da dies die einzige deutsche Erklärung gegenüber Kollaborationspolitikern war. Quisling, dadurch beflügelt, schlug darauf die Bildung eines „Germanischen Commonwealth" vor (Deutschland, Norwegen, Dänemark, Niederlande sowie eine Option für Schweden) und fand damit viel Zustimmung bei seinen Anhängern. Himmler sprach sich aber auch jetzt gegen solche Pläne aus, da er eine Überstimmung Deutschlands in einem solchen Commonwealth fürchtete.[93]

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

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

Die Überlegungen der deutschen Besatzungsmacht ab 1943 waren in den besetzten Gebieten Westeuropas keine neue Idee. Ähnliche Gedanken wurden schon vor 1939 in zahlreichen Ländern von faschistischen Bewegungen vertreten.[94] Allerdings waren deren Protagonisten stets auf den Gedanken der Autonomie bedacht. Insofern bestand zwischen diesen und den NS-Vorstellungen zwar Übereinstimmung in Hinblick auf die Akzeptanz der Führung Deutschlands, aber ein grundlegender Unterschied über die Form dieser Akzeptanz: Autonomie oder totale Unterwerfung.[95]

Einige Beispiele mögen dies verdeutlichen.[96] Nach der Wende des Kriegsglücks 1942 hatte sich Deutschland die größtmögliche Ausbeutung der besetzten Gebiete zum Ziel gesetzt. Angesichts dieser Situation sahen auch die faschistischen Bewegungen ihre Stunde gekommen, ihren Forderungen nach mehr Autonomie mehr Nachdruck zu verleihen, insbesondere die Nationalsozialistische Bewegung NSB/Mussert in den Niederlanden und des Vlaamschen Verbandes van Frankrijk in Belgien und der Partie Populaire in Frankreich.[97]

Diese Bestrebungen zu einem staatenbündischen Europa begegneten strikter Ablehnung in der Reichsspitze. Außer der Einrichtung eines Europa-Ausschusses im Auswärtigen Amt geschah nichts. Hinsichtlich der Niederlande war Endziel der SS und des Reichskommissars Seyss-Inquart die Auflösung des Landes und seine Eingliederung in das großgermanische Reich. Nordfrankreich und Belgien sollten ohne jede Selbstständigkeit als Glacis gegen die englische Bedrohung ausgebaut werden.[98] Kernfrankreich sollte unter Belassung einer gewissen Autonomie „ehrenhaft in die Neue Ordnung eingegliedert werden",[99] was immer das bedeuten mochte. Die genannten Bewegungen sahen sich dadurch bitter enttäuscht, zumal ihre eindeutig prodeutsche Haltung sie im Volk unbeliebt machte. Es wäre falsch, sie als pro-nationalsozialistisch zu bezeichnen, sie waren, wie die rechtsgerichteten Parteien in den verbündeten Staaten, bürgerliche Faschisten,[100] die aber nach dem Kriege wie die entsprechenden Kollaborationsbewegungen (in den verbündeten Staaten) die volle Härte der Anti-NS-Stimmung traf (Vermögensbeschlagnahme, Gerichtsverfahren, soziale Ächtung).

Auch für die besetzten Gebiete Westeuropas gilt daher, dass eine Neuordnung Europas unter NS-Vorherrschaft im germanischen Großraum (das Wort Europa fehlt bezeichnenderweise) nur mit totaler Unterwerfung der besetzten Gebiete einherge-

[90] Neulen, S.334.
[91] Die Darstellung folgt Neulen, S.334ff, insb. S.334.
[92] Neulen, S.337; Abdruck der Erklärung bei Neulen, Dok.-Nr. 16, S.136.
[93] Neulen, S.339.
[94] Näher Grunert 2012.
[95] Zusammenfassend Grunert, S.25ff., 299ff.
[96] Die Beispiele sind Grunert, a.a.O. entnommen.
[97] Näher Grunert, S.25.
[98] Grunert, S.73.
[99] Denkschrift Stuckart, zit. nach Grunert, S.79
[100] Grunert, S.73.

hen konnte. Kleinere Zugeständnisse (wie Autonomie im „Kulturellen“ und „Volkstumsbereich“) waren nur für die „rassisch verwandten Völker“ vorgesehen.[101]

7.5 Die eigentlichen Kriegsziele Hitlers: Wirtschaftliche Autarkie und Lebensraum

Alle vorgenannten Pläne der kollaborierenden oder sympathisierenden Gruppen wurden, wie ausgeführt, von der obersten Staats- und Parteiführung nicht aufgegriffen. Letztlich war es Hitlers ureigene Entscheidung, dass nicht die *großeuropäische*, sondern nur eine *großgermanische* Lösung in Betracht kam. Im Ergebnis bedeutete dies nichts anderes als die „Germanisierung“, d.h. die Besiedelung des europäischen Raums mit deutschen Siedlern. Die besetzten Gebiete sollten einen „germanischen“ Charakter erhalten; letztlich sollte ein *deutschsprachiges* Europa entstehen. Dieses „großgermanische Reich“, sollte von einem Kranz abhängiger Satellitenstaaten ohne eigene Befugnisse umgeben sein, die je nach Sachlage territorial neu gegliedert bzw. zerschlagen (z.B. Polen) werden sollten. Es wäre demnach bei Gelingen dieser Pläne ein antidemokratisches, völkisch-bündisches System entstanden, das die Grundlagen der abendländischen Zivilisation ablehnte und ausschließlich unter der Leitung Deutschlands stehen sollte. Nach seiner Schlussrede auf dem Reichsparteitag der NSDAP 1937 sagte Hitler zu seinem Rüstungsminister Albert Speer: „Wir werden ein großes Reich schaffen. Alle germanischen Völker werden darin zusammengefasst sein. Das fängt in Norwegen an und geht bis Norditalien.“ [102]

Seine Ideen hatte Hitler in seinem zweiten, allerdings in der NS-Zeit nicht veröffentlichten Buch (1928) verdeutlicht und auch später nicht mehr geändert. Sie standen in offenem Widerspruch zu der bereits mehrfach geschilderten und von der offiziellen NS-Propaganda verbreiteten Idee eines „Großeuropa“ unter Beteiligung der besiegten Gebiete. Gemeinsam war beiden Projekten lediglich die Idee eines künftigen „Großraums“, sei es mit europäischem, sei es mit germanischem Charakter. Dieser „Großraum“ sollte die gesamten osteuropäischen Gebiete bis zum Ural umfassen und von Deutschland beherrscht werden. Diese Pläne wurden gespeist von der Idee einer Nachahmung des Imperialismus der Briten und Franzosen,[103] wobei er sich diese Räume offenbar als menschenleer vorstellte. Die entscheidenden Unterschiede lagen in der *Form* dieser Herrschaft. Die offizielle NS-Propaganda, wie sie von *Signal* und anderen Organen verbreitet wurde, versprach eine Art „konservative Lösung“, d.h. eine europäische Föderation (unter Einbeziehung auch nichtdeutscher Gebiete) mit begrenzter Autonomie, d.h. ein Überleben der kleineren Staaten, um dort die Akzeptanz der deutschen Oberherrschaft zu sichern.[104] Die Frage der Gewaltanwendung und der Autonomie der besetzten Staaten blieb offen und war Gegenstand ausführlicher Überlegungen in den NS-Führungsetagen. Denn wie sollte eine Föderation auf freiwilliger Grundlage unter gleichzeitiger Präsenz des deutschen Gewaltmonopols in dem künftigen Großraum entstehen? Ganze Abteilungen im Auswärtigen Amt und im Reichssicherheitshauptamt (RSHA) waren mit Europa-Plänen beschäftigt, die allerdings nicht konkrete Fragen behandelten, sondern sich auf abstrakte Ordnungsmodelle beschränkten.

Diese Konzeption Hitlers wurde öffentlich nie erörtert. Es kursierten jedoch zahlreiche ähnliche Lebensraumtheorien, die deutsche Siedler an den Küsten Norwegens und in den Wäldern des Ural sahen. So mancher Wehrmachtssoldat mochte sich als künftiger Besitzer einer Großbauernstelle im Osten sehen – Träume, die leicht Fuß fassen konnten, wenn man ständig den „Lebensraum des deutschen Volkes“ beschwor. Ein Beispiel ist der Aufsatz von Karl Richard Ganzer *Das Reich als europäische Ordnungsmacht*,[105] der die Besiedlung vom Nordkap bis Sizilien beschrieb. Letztlich machten diese Ideen die Propagandaarbeit, wie die des Auswärtigen Amtes und anderer Behörden, zur Makulatur. Nicht geklärt ist, inwieweit diese Stellen in die endgültigen Pläne Hitlers eingeweiht waren. Jedenfalls wurde ihre Propagandapolitik mehr und mehr zur Farce. Sie meinten wohl, Hitler zur Einbindung der besetzten Staaten in ein Reich mit europäischem Charakter bewegen zu können, was Einbindung der verbündeten Staaten in irgendeiner rechtlichen Form bedeutet hätte. Die in der Außenpolitik verwendete Tarnsprache von Gleichberechtigung und Mitsprache dieser Staaten stiftete daher in den betroffenen Gebieten, wie ausgeführt, nur Unruhe und nährte Hoffnungen, die sich als vergeblich erwiesen.

Die großgermanischen Gedankengänge Hitlers waren in ihrer Beschreibung in *Mein Kampf* sowie in Hitlers Zweitem Buch (1928) anfangs nur mehr oder weniger wirre Ideenkonglomerate. Diese Ideologie zu erkennen oder gar nachzuvollziehen, fiel den politischen Gegnern Hitlers schwer. Hitler war zur Kooperation unfähig, Gewaltanwendung war immanenter Bestandteil seines Denkens, mit üblichen Begriffen von (etwa nur vorübergehender) Gewaltausübung (Krieg) nicht zu verstehen. Auch nach dem Krieg herrschten aus seiner Sicht Kampf und Gewalt als die eigentlichen Lebensprinzipien. Ihre auf rationalem Kalkül beruhende Politik auf der Grundlage der technischen und wirtschaftlichen Realitäten des 20. Jahrhunderts konnte dem Irrationalismus abstruser Autarkievorstellungen nicht folgen.[106] Sie wurden aber blutige Realität, als Hitler sich seit 1938 anschickte, dem NS-Staat Europa einzuverleiben. Wie aber sollte das künftige Europa, das als Beute des Reiches vorgesehen war, aussehen?

Schon in „Mein Kampf“ hatte Hitler ein ungefähres Bild des zukünftigen Europa vorgezeichnet: Im Süden das faschistische Italien als Verbündeter, im Westen ein entmachtetes

[101] Grunert, S.288.
[102] Zit. nach Speer, Erinnerungen, S.83.
[103] Vgl. dazu neuerdings Herbert, Ulrich: Geschichte Deutschlands im 20. Jahrhundert, München 2014.
[104] Für Mitteleuropa waren die Expansionspläne auf die früheren habsburgischen Gebiete gerichtet (Österreich, Tschechoslowakei / Protektorat Böhmen und Mähren).
[105] Abgedruckt bei Foerster 1963, S.247ff.
[106] Der Vergleich mit der Besiedelung Nordamerikas ist falsch. Die Vertreibung der Indianer, bis heute ein dunkles Kapitel der US-Geschichte, erreichte niemals diese Ausmaße wie die Bevölkerungsverschiebungen in Europa im 20. Jahrhundert.

Frankreich, Osteuropa als zukünftiger „deutscher Lebensraum“, in Mitteleuropa ein starkes, weit über die Grenzen von 1914 hinausgehendes „Reich aller Deutschen“.[107] Das Wort Europa kam Hitler nicht über die Lippen, außer dann, wenn es politisch opportun erschien. War damit der äußere Rahmen vorgegeben, konnten im Inneren dieses Herrschaftsbereiches die drei Prinzipien, die Hitler beherrschten, nämlich Autarkie, Gewaltanwendung und Lebensraum verwirklicht werden. Hitler konnte sich sicher sein, dass eine willfährige Völkerrechtswissenschaft schon die „richtigen“ Begriffe und Theorien finden würde, wie solche Räume zu beherrschen seien und wie seine Ideen in die Partei und staatlichen Stellen Eingang finden konnten.

Dies soll im Folgenden gezeigt werden. Die NS-Staats- und Völkerrechtler nahmen die Annexionen seit 1939 (Tschechoslowakei, Polen etc.) zum Anlass, gänzlich neue Theorien und Begriffe für die neuen Formen der Besatzungsherrschaft zu entfalten. Diese Ausführungen erschienen in öffentlich zugänglichen Zeitschriften, d.h. auch hier sollte mit einer Tarnsprache die NS-Eroberungspolitik verschleiert werden. Es eröffneten sich, wie später zu zeigen ist, für die NS-Planungsstäbe ganz neue Perspektiven, die neuen zukünftigen Formen der Besatzungsherrschaft näher zu konkretisieren, deren Rahmen die Wissenschaft lieferte. Es entwickelte sich geradezu ein Wettstreit, wer die „besten“ Instrumente liefern konnte, um die „Beute“ in dem neuen „Großraum“ administrativ zu gliedern und zu verteilen. Mit der Aufstellung neuer Systeme enttäuschte die Wissenschaft die in sie gesetzten Hoffnungen nicht, wie die folgenden Ausführungen zeigen.[108]

8. Kapitel: Das deutsche Völkerrecht im Dienste der NS-Expansion nach Osten: Reich und „Großraum“

Grundbegriffe der NS-Expansion nach Osten in der Wissenschaft waren „Reich“ und „Großraum“. Der Begriff „Großraum“ war ursprünglich ökonomischer Natur. Er knüpfte an Vorstellungen von Zollunion, Meistbegünstigungsklausel und transnationaler Wirtschaftsstrukturen (Großkonzerne) an, die schon seit der Weimarer Zeit diskutiert worden waren.[109] Allerdings hatte dieser Begriff schon damals gewisse ideologische Komponenten, wie sie von Ideologen wie Karl Haushoffer verbreitet wurden. Nach der ökonomischen Interpretation sollte im Inneren des Großraums ein Netz von Außenhandelsbeziehungen bestehen, während Energie, Verkehr und Kommunikation von einer Zentrale gelenkt werden sollten.[110] Die juristische Ausformung der NS-Herrschaft konnte dann den Juristen überlassen werden. Diese blieben nicht untätig. Schon in den Monaten vor Kriegsausbruch und nach der Besetzung der Tschechoslowakei im März 1938,[111] hatte einer der führenden NS-Juristen, der Staatsrechtslehrer Carl Schmitt, in seinem richtungsweisenden Vortrag „Völkerrechtliche Großraumordnung“ am 1. April 1939 ausgeführt: „Heute ist ein machtvolles Reich entstanden […] Die Tat des Führers hat dem Gedanken unseres Reiches politische Wirklichkeit, geschichtliche Wahrheit und eine große völkerrechtliche Zukunft verliehen“. Diese Zukunft wurde von Carl Schmitt zum ersten Male der Öffentlichkeit vorgestellt. Die Begriffe, auf denen das neue NS-Völkerrecht aufbauen sollte, waren der bereits erwähnte Begriff des „Großraums“, vor allem aber der des „Reiches“ mit seinen zahlreichen historischen Anknüpfungen. Beide standen nach dieser Theorie im engsten Zusammenhang.

Oberbegriff war für Carl Schmitt, der Leitfigur der NS-Völkerrechtslehre, der Begriff des *Reiches*, der den Begriff des Staates ersetzen sollte. Das Reich wurde als eine „von bestimmten weltanschaulichen Ideen und Prinzipien beherrschte Großraumordnung“ definiert, „deren Garant und Hüter ein Volk [ist], das sich dieser Aufgabe gewachsen zeigt“.[112] Das neue Modell des „Reiches“ war geschickt gewählt, weil es äußerlich an den alten Reichsbegriff des „Heiligen Römischen Reiches Deutscher Nation“ anknüpfte, das bis zum Jahre 1806 die mitteleuropäischen Völker durch die Institution des Kaisertums vereinigt und damit wenigstens der Idee nach die Großmachtstellung des Reiches „Deutscher Nation“ wachgehalten hatte. Ernst Rudolf Huber, wie C. Schmitt einer der führenden Staatsrechtler, führte 1941 dazu aus: „So ist die europäische Aufgabe des Reiches, mit deren Erfüllung wir an die Überlieferung des ersten Reiches der Deutschen unmittelbar anknüpfen, zwar ein Ausdruck der deutschen Machtüberlegenheit, zugleich aber ein Ausdruck der deutschen Verantwortung vor Europa, vor der Welt…“.[113] Der Reichsbegriff des Nationalsozialismus sollte also Anknüpfungen an staatliche Strukturen und deutsche Geschichte vermitteln. De facto hatte er inhaltlich mit jenem historischen Begriff jedoch nichts gemein, sondern hatte, wie Carl Schmitt schon 1934 verkündete, lediglich den Zweck, irrationale Sehnsüchte nach einer Unterwerfung anderer Völker durch die Gewalt eines Eroberers, d.h. nach Nachahmung der Eroberungspolitik der antiken Großreiche (Perser, Römer usf.) zu wecken, als deren Nachfahren sich die NS-Strategen sahen.[114] Daher der propagandistisch aufgeladene Reichsbegriff als Tarnung. Der „Großraum“ hingegen war kein rechtlicher Begriff, wie später zu erläutern ist.

[107] Mein Kampf, München 1924, (20. Aufl. 1934, S.704, 710f., 728ff., 739, 741f., 754ff., 766f.). Näher: Majer, Fremdvölkische, S.317ff. für Mitteleuropa vgl. näher: Elvert, S.9ff.

[108] Nachw. bei Dreier, Staatsrechtslehre, S.62 ff. Die Unterschiede zwischen Staat, Reich und Großraum in der NS-Lehre werden jedoch nicht klar herausgearbeitet (Anm. d. V.).

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

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

[111] Erlass des Führers und Reichskanzlers vom 16. 3. 1939 (RGBl I 485) nach dem die Rest-Tschechoslowakei zum „Protektorat Böhmen und Mähren“ erklärt und in das „Großdeutsche Reich“ eingegliedert wurde (Art. 2 und 3).

[112] C. Schmitt, Der Reichsbegriff im Völkerrecht (1939), S.341ff.

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

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

War der Reichsbegriff im juristischen Sprachgebrauch immer noch ein rechtlicher Begriff, so gewann der Großraumbegriff, der ursprünglich, wie ausgeführt, eine internationale, auf Verträgen beruhende Wirtschaftsordnung kennzeichnen sollte, zusätzlich eine im NS-Staat geographische und politische Dimension. Zwar wurde der Begriff zunächst mit ökonomischen Attributen aufgefüllt – insofern der Weimarer Tradition folgend –, sodass eine lebhafte Diskussion um die Großraumwirtschaft im NS-Staat entbrannte.[115] Doch zeigte sich bald, dass der Hintergrund dieser Debatte politisch war: Volk und Raum waren nun die wesentlichen Bezugsgrößen.[116] Der Großraum – so die Theorie – beschrieb den Machtbereich eines Hegemonialstaates *außerhalb* des eigenen Staatsgebiets, also das von NS-Deutschland beherrschte Gebiet anderer Staaten, auf die das Reich seine politisch-weltanschaulichen Ideen ausgedehnt hatte und das es als „seinen Machtbereich" betrachtete, den es vor „raumfremden Interventionen" zu schützen galt.[117,118]

Das Verhältnis zwischen Reich und Staat, sowie zwischen Reich und Großraum war für die NS-Völkerrechtler allerdings schwierig zu bestimmen. Offensichtlich ging für Carl Schmitt der Reichsbegriff über den Staatsbegriff hinaus, d.h. umfasste auch nichtdeutsche Gebiete innerhalb der Reichsgrenzen (z.B. eingegliederte Gebiete). Andererseits gab es auch deutsche Gebiete außerhalb des Reichsgebiets (z.B. die besetzten Niederlande)[119]; gehörten sie zum Großraum? Das Reich jedenfalls wurde als Völkerrechtssubjekt erster Ordnung bezeichnet; der Staatsbegriff hingegen ging in ihm auf.[120] Die bisherigen Definitionen des Völkerrechts, so argumentierte man, trugen dieser Frage nicht Rechnung; neue Begriffe mussten her. Carl Schmitt (der sich immer als Verfechter der Kontinuität staatlicher Strukturen des Reiches verstanden hatte) lehnte als erster eine Souveränität der beherrschten Staaten in dem neuen Reich ab, wollte sie aber auch nicht vollständig untergehen lassen. Die Staaten müssten, so Schmitt, als eigene Größe und Völkerrechtssubjekte „zweiten Ranges" fortbestehen – ein Eiertanz zwischen verschiedenen Theorien, der sich in der Praxis als gänzlich wirkungslos erwies. Diese Konstruktion zeigt deutlich die NS-typische Linie, angesichts neuer Gegebenheiten vage Begriffe zu erfinden oder zu verwenden, die inhaltlich völlig leer waren. Dies gilt auch für Vorstellungen, die gegen die Schmittschen Großraumvorstellungen agitierten: Der Vorwurf war, dass er an den staatsrechtlichen Kategorien des Staates und des Reiches festhalte.[121]

Folgt man den Gedankengängen von Carl Schmitt weiter, stellte sich die Frage: Welche Position sollte in dieser Konstruktion der Großraum einnehmen? Carl Schmitt konnte sich einer Lösung nur durch abstrakte Umschreibungen nähern. Den Konflikt zwischen Großraum als Ganzes und Einzelexistenz der Staaten löste Schmitt, indem er behauptete: „Jede bündische Zusammenfassung politischer Einheiten könne nicht rein zwischenstaatlich sein, sondern müsse eben etwas „Drittes, Anderes" sein, das sich derartigen Alternativen entzieht".[122] Man erfand also neue Theorien, um die Ziele des NS-Staates mit den Gegebenheiten der besetzten Gebiete kongruent zu machen. Schmitt ließ immerhin einige Konkretisierungen der neuen Ordnung erkennen, indem er ausführte, dass die Beziehungen im NS-Großraum zwischen dem Reich und den nicht souveränen Staaten (nur) staatsrechtlicher Natur sein könnten.[123]

Der Staatsbegriff verwischte sich somit bei Schmitt allmählich mit dem Reichsbegriff und driftete in Richtung der neuen NS-Begriffe „Reich" und „Großraum": „Heute aber wird der Staatsbegriff des 19. Jahrhunderts von uns selbst durch den Reichsbegriff überwunden. Daher sind wir jetzt in der Lage, die überkommene dualistische Lehre unter neuen Gesichtspunkten zu überprüfen".[124] Politisch gesehen bildeten „Reich" und „Großraum", so „unfertig" diese Begriffe auch waren, die perfekte juristische Grundlage für die Besetzung Mittel- und Osteuropas, wie sie Carl Schmitt in seinem oben erwähnten Vortrag am 1. April 1939 vorgestellt hatte. Dabei betonte er die Überordnung des Reiches über den Großraum im Einklang mit den rassentheoretischen Grundanschauungen von der Ungleichheit der Rassen, d.h. von der Vorherrschaft der germanischen Rasse.[125] Schmitt hielt also immerhin noch an dem historisch-politischen Begriff des Reiches fest und rettet sich damit in die staatlich-juristische Sphäre. Das Reich war prioritär gegenüber allen Neuschöpfungen. Insofern konnte er seine Herkunft aus dem Staatsdenken des 19. Jahrhunderts nicht verleugnen. Immer noch galt es aber, den Begriff des (Groß-) Raums zu konkretisieren.

Dieser Begriff erhielt nunmehr eine geopolitische Dimension. Das Reich, so Schmitt, habe eine „Raumhoheit" über das vor fremden Interventionen bewahrte Territorium der Großrauminteressenssphäre, man müsse also zwischen „Raumhoheit" und „staatlichem Hoheitsgebiet" unterscheiden. Die zur Entscheidung „zuständige" Stelle war eine nicht näher bezeichnete „Führerzentrale" (des Reiches). Der Großraum war also nichts anderes als die Gebiete der *Interessenssphären* einer Großmacht gegenüber einer anderen Großmacht.

Hinsichtlich der inneren Ordnung in diesem Großraum fragte es sich: Was sollte als innerstaatliches Regiment gelten, so

[115] Dreier, Wirtschaftsraum, S.47ff., 64 mit z.N.
[116] Dreier, Wirtschaftsraum, S.96.
[117] Carl Schmitt, Völkerrechtliche Großraumordnung, S. 69ff., 88. Das Buch wurde für das nationalsozialistische Großraumdenken richtungsweisend und erreichte vier Auflagen, die letzte 1941 (siehe dort S.66f.).
[118] Dabei wurde die Geschichte angerufen und „zurechtgebogen", so z.B. der Begriff des Reiches (Anm. d. Verf.).
[119] In keiner der Äußerungen der NS-Rechtslehrer wurden konkrete Gebiete benannt. Dies eröffnete einen fast unbegrenzten Auslegungsspielraum.
[120] Dreier, S.67, m.N.
[121] Näher Grunert, S.55 m.N.
[122] Carl Schmitt, Führung und Hegemonie, in: Schmollers Jahrbuch 1939, 516f., zit. nach Gruchmann, S.122.
[123] Genau dies hätte die Einführung des NS-Rechts in den besiegten Staaten bedeutet, Gruchmann, S.132.
[124] Zit. nach Gruchmann, S.141.
[125] Zit. nach Gruchmann, S.141, 143.

wie C. Schmitt es postulierte? Das des Nationalsozialismus oder das einheimische Recht?[126] Schmitt verfocht die Vorherrschaft des (innerstaatlichen) NS-Rechts auch in den besetzten Gebieten, da dieses immerhin noch gewisse formale Ordnungselemente (Verfahren) enthielt.[127] Er unterschied sich hier von den extremen Verfechtern eines Großraums, die die Existenz der besiegten Staaten gänzlich aufheben und nur (obwohl nicht ausdrücklich formuliert) als Verwaltungseinheiten mit gewissen autonomen Befugnissen (z.B. Lokales, Versorgung) fortbestehen lassen wollten.[128] Es sollten also in diesen Gebieten (z.B. in den besetzten sowjetischen Gebieten) nur staats- und nicht völkerrechtliche Grundsätze herrschen, d.h. nur deutsches Recht gelten. Das einheimische Recht sollte verdrängt werden (z.B. im besetzten Polen, Anm. d. V.), und da die Völker dann kein eigenes Recht hätten, besäßen sie auch keine eigene „ordnungsstiftende Funktion" mehr.

Die Geltung des Rechts des NS-Staates in den annektierten Staaten hatte schwerwiegende Konsequenzen, wenn man diese Theorie weiter verfolgte: Sie bedeutete z.B., dass das deutsche Rassenrecht, aber auch das (vielfach rassisch umformulierte) Straf- und Zivilrecht in diesen Gebieten zur Anwendung kommen sollte. Allen deutschen Normen, so die NS-Juristen, sei ein Vorbehalt immanent: sie dürften die einheimische Bevölkerung nicht „begünstigen", d.h. keine Rechtsvorteile gewähren.[129] Das bedeutete z.B., dass im Gerichts- oder Verwaltungsverfahren Zeugenaussagen von „Fremdvölkischen" zu Lasten deutscher Beteiligter nicht berücksichtigt werden durften. Da das deutsche Recht jedoch grundsätzlich noch viele Elemente der Rechtsgleichheit enthielt, wurde von Vertretern der extremen NS-Lehre noch eine andere Alternative vorgeschlagen: Es sollte in den zu besetzenden Gebieten *gar keine* Rechtsnorm gelten, einheimisches Recht und die Staatsangehörigkeit der Bevölkerung sollten aufgehoben werden. Die Behörden sollten mit Verwaltungsanordnungen und Entscheidungen *im Einzelfall* agieren. So zumindest wurde weitgehend in den besetzten sowjetischen Gebieten verfahren. Das allerdings bedeutete die totale Auslieferung dieser besetzten Länder an die Willkürakte der herrschenden Staatsfunktionäre im Behörden-, Polizei- und Parteiapparat.[130] In der propagandistischen Sprache der NS-Völkerrechtler wurde die Besatzungsherrschaft, in welcher Form auch immer, wiederum schöngeredet und als „milde Aufsicht" beschrieben: „Die NS-Völkerrechtler sahen im Großraum kein Schreckensregiment der Gewaltherrschaft. Nach Schmitt gewährte ein führendes Volk anderen Völkern Entwicklungsmöglichkeiten, Förderung, Austausch und Schutz. Grundlage des Ordnungsprinzips sollte die Achtung jedes Volkstums, die Achtung jedes Volkes als einer durch Art, Ursprung, Blut und Boden bestimmten Lebenswirklichkeit sein. Das bedeutete, dass die Völker im Großraum dem Reich nicht in gleicher Weise zu- und untergeordnet seien, sondern dass eine Skala von konkreten, individuellen Zwangsverhältnissen existierte."[131]

Können sich Völker im Großraum gegen ungleiche Behandlung wehren? Nach der NS-Lehre war dies ausgeschlossen, da die Völker kein jus belli hatten, d.h. nicht souverän waren. Jede Auflehnung gegen das Reich wäre ein Bruch der Großraumordnung gewesen. Dazu kamen die faktische Übermacht des Reiches sowie das Interventionsverbot für andere Mächte. All diese Beschreibungen dienten nur dem Zweck, die Vorherrschaft des „Prokurators" über den von ihm beschriebenen Raum zu sichern.[132]

Der Großraumbegriff im NS-Sinne war somit ein Versuch, sich von allen Bindungen des Rechts zu lösen, von Carl Schmitt mit den Ersatzbegriffen mit einer Politik der „Fürsorge" und der „Achtung fremder Völker" umschrieben. Damit hatte Schmitt die endgültige Verneinung des Völkerrechts im Großraum postuliert. Dies bedeutete, dass das Völkerrecht nur als „Gnadenerweis" der Besatzung statt völkerrechtlich festgelegter Verhaltensweisen der Besatzungsmacht betrachtet wurde. In formaler Hinsicht galt nur noch das Recht der Besatzungsmacht. Zwar ging die völkerrechtliche Lehre auch in anderen Staaten von der dualistischen Lehre vom Recht aus, das neben dem Recht eines Staates einen eigenen völkerrechtlichen Rechtskreis mit eigenen Geltungsgründen und Normadressaten anerkennt (z.B. Haager Landkriegsordnung 1907). Die deutsche Lehre interpretierte dieses Prinzip jedoch nicht als universales, zwingendes Prinzip, sondern lediglich im nationalstaatlichen Sinne: Als Naturrecht und Staatsgrundrecht der Politik, das der Durchsetzung von Deutschlands Interessen dienen, d.h. dessen Ansprüche auf Gleichberechtigung durch Wiederherstellung der Wehrhoheit (1933-1936) sichern sollte. Das bedeutete: Anwendung des Völkerrechts im Kriegsfall nur, wenn es politisch opportun war, ansonsten Ablehnung.

Hinzu kamen weitere Argumente, die aus der Geschichte beschworen wurden: Deutschlands Ansprüche (auf die 1920 abgetretenen Gebiete) sollten als „naturgegeben" erscheinen. Schlagworte wie „Recht auf sichere Grenzen", „Selbstverteidigung", „Selbstbehauptung" oder „Anspruch auf Gleichberechtigung" sollten die deutschen Ansprüche, insbesondere die auf eine Wiederaufrüstung, verstärken.[133] Alle diese Ansprüche seien, so Hitler, „natürliche Grundrechte" eines Staates, von denen Deutschland zuvor zu Unrecht durch den Versailler Vertrag und die weiteren völkerrechtlichen Verträge (Vertrag von Locarno, Kellogg-Pakt) ausgeschlossen worden sei.[134]

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[126] Grundlegend: Lothar Gruchmann, Nationalsozialistische Großraumordnung. Die Konstruktion einer „deutschen Monroedoktrin", Schriftenreihe der Vierteljahreshefte für Zeitgeschichte Nr.4, Stuttgart 1962, hier S.121ff. Beschreibung des NS-Großraummusters sowie dessen staats- und völkerrechtliche Aspekte, S.121ff., 124.

[127] Näher Majer, Fremdvölkische 1981/1993, S.317ff.

[128] Gruchmann, S.150.

[129] Unter diesem Aspekt wurde deutsches Recht im besetzten Polen eingeführt.

[130] So z.B. in den Reichskommissariaten wie in der Ukraine.

[131] Zit. nach Gruchmann, S.135, 137.

[132] Carl Schmitt, zit. nach Gruchmann, S.137.

[133] Rede Hitlers am 7. 10. 1936, zit. nach: Des Führers Kampf um den Weltfrieden, München 1936, S.29.

[134] Gürke, Volk und Völkerrecht, Tübingen 1935, S.48ff.

Diese Einstellung wirkte sich auch auf die NS-Konzeptionen eines künftigen Europa aus. Daher betrachtete die radikale Richtung der NS-Völkerrechtler Verhandlungen mit den Vertragspartnern des Versailler Vertrags als überflüssig, da Deutschland diese „natürlichen Grundrechte" ohnehin habe.[135] Auf derselben Linie lagen die Angriffe der NS-Völkerrechtler auf die „ungerechte" Völkerbundordnung; diese sei keine Rechtsordnung gleichberechtigter Staaten, sondern nur eine von England und Frankreich beherrschte „Macht- und Herrschaftsordnung" gewesen[136], welche Deutschlands Recht und „konkrete Existenz" verletzt hätte[137] – was für die Nationalsozialisten das Streben nach unbeschränkter Souveränität *ohne* Bindung an völkerrechtliche Normen bedeutete.

Die entscheidenden Fragen für die besetzten Gebiete – Gewaltanwendung und Widerstand – wurden im Schrifttum allerdings nicht behandelt, sondern ergaben sich nur mittelbar aus den allgemeinen Bekundungen der Autoren. Überhaupt sprach man lieber von „Räumen", als von der Bevölkerung. Jede Auflehnung gegen das Reich sei, so die NS-Juristen, ein Bruch der Großraumordnung.[138] Durch das Unterlassen, ja die bewusste Ablehnung normativer Vorgaben, schufen die NS-Völkerrechtler die Voraussetzungen, dass die Besatzungsbehörden in den besetzten Gebieten nach Willkür schalten und walten konnten, d.h. die Willkür durch Eingliederung vieler Gebiete in das Reichsgebiet (Warthegau, Danzig-Westpreußen usw.) oder durch Nichtanwendung der Haager Landkriegsordnung von 1907 (HKLO) (besetzte Ostgebiete) verfestigten. Der „Großraum" ging jedoch, wie ausgeführt, über die beherrschten Gebiete hinaus: Er war nicht abstrakt, sondern hochpolitisch. Letztlich war er nichts anderes als die Abgrenzung nach *„Interessensphären"* auf der Grundlage des deutsch-sowjetischen Nichtangriffspakts vom 23. August 1939, der die perfekte Vorlage für das dann folgende Kriegsgeschehen war.

Zusammenfassend muss festgestellt werden, dass die oben beschriebenen Charakteristika des NS-Völkerrechts die vollständige Kapitulation des Rechts gegenüber allen eroberten Gebieten in Osteuropa bedeutete. Zudem zeigen sie die Willfährigkeit der Juristen im Erfinden immer neuer Begriffe, um sich mit der Theorie eines „Raums ohne Recht" profilieren zu können.[139] Wissenschaftler, die auf anderen Rechtsgebieten scharfsinnige Analysen entwickelten, hatten aus Opportunismus gerade auf dem Gebiet des Völkerrechts in auffälliger Weise nur niveaulose Begriffswelten geschaffen, um „flexibel" reagieren zu können, ohne sich festlegen oder gar „kompromittieren" zu müssen. Völkerrecht, Wissenschaft und Politik ergänzten sich im NS-Staat aufgrund dieser Konstellation in geradezu idealer Weise. Letztlich war damit eine klare Absage an das europäische Völkerrecht verbunden, wenn die Juristen argumentierten, dass die Interessen der nationalen „Volksgemeinschaft" absoluten Vorrang vor allen anderen rechtlichen, moralischen oder ethischen Erwägungen hätten.[140] Allerdings ist bemerkenswert, dass seit 1942 die völkerrechtliche Lehre im NS weithin verstummte – war es die Erkenntnis, dass die Leugnung allen Rechts durch die Politik das Ende der Rechtswissenschaft[141] bedeuten musste?

Hatten die oben beschriebenen Lehren der NS-Völkerrechtler die Kategorisierung und Substantivierung der seit 1939 im besetzten Osteuropa bestehenden Auseinandersetzungen um die „richtigen" Herrschaftsformen betrieben, ist über die eigentlichen *Kriegsgründe* – jenseits der völkerrechtlichen Vorwände, dass Deutschland „seine Rechte" wahren müsse, kaum öffentlich diskutiert worden, sei es aus Unkenntnis, sei es aus politischen Gründen.

8.1 Die Folgen der NS-Großraumtheorien: Vertreibung, Versklavung und Hungerstatus der einheimischen Bevölkerung

Zwischen den bisherigen Europatheoretikern und Hitlers Politik besteht ein eigenartiger Gegensatz. Hitler beharrte entgegen deren Ansichten auf der Bildung eines deutschsprachigen „Großraumes", der jede wie auch immer geartete europäische Ordnung ausschloss. Man muss hierfür, wie erwähnt, auf die bereits oben skizzierten Gedanken Hitlers vom Lebensraum in seinem „Zweiten Buch"[142] eingehen, die nicht in staatliche Kategorien eingeordnet werden können. Zwar waren Lebensraumtheorien Diskussionsstoff in den öffentlichen Debatten schon vor 1933 (z.B. Hans Grimm: Volk ohne Raum, 1926)[143], jedoch hatte niemand so wie Hitler selbst die Konsequenzen dieser Lebensraumtheorie beschrieben. Es waren gewissermaßen archaische, vorstaatliche Ideen. Hitler hatte zwar Vorstellungen[144] vom Verhältnis zu anderen Staaten, die jedoch wiederum auf

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

[136] Von Bruns, Rechtsgemeinschaft oder Herrschaftsgemeinschaft?, in: Völkerbund und Völkerrecht 1934/35, S.15ff.

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

[138] Gruchmann, S.139.

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

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

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

[142] Hitlers Zweites Buch. Ein Dokument aus dem Jahr 1928, Deutsche Verlags-Anstalt, Stuttgart 1961; ähnlich, aber nicht so präzise, hatte sich Hitler auch in *Mein Kampf*, München 1935, S.143f., 151f., 689f., 732 geäußert.

[143] Zu den Lebensraumdiskussionen im einzelnen vergl. Näher: Horst Dreier, in: Raum und Recht, S.73ff.

[144] Mazower, S.514ff.

Vorstellungen nach dem Muster früherer Jahrhunderte gründeten. Die bisherigen Muster: Besiegung, Annektierung von Territorien, abhängige Satellitenstaaten, eine Zentralmacht wurden von ihm grundsätzlich abgelehnt. Die Gründung von *Vereinigten Staaten von Europa* durch „freiwilligen" Zusammenschluss der besiegten Staaten war für ihn ausgeschlossen. Er wollte den weiten leeren Raum ohne Grenzen, aber warum? War es eine Nachahmung der Imperialen Ansprüche Großbritanniens und Frankreichs? Wie aber sollte dieser Siedlungsraum gewonnen werden? Nur durch Krieg und Gewalt. Keine politische Entwicklung, so führte er in seinem „Zweiten Buch" aus, habe Bestand, die nicht aus Kampf und Krieg hervorgegangen sei. Zweitens spielte der Rassengedanke eine große Rolle für ihn. Dieser war auch hier entscheidend; die zahlreichen Rassenmischungen in Europa seien für die Entwicklung der Völker schädlich. Hitler verachtete die Pan-Europa-Bewegung; deren Begründer Coudenhove-Kalergi war für ihn ein „wurzelloser Kosmopolit" und „elitärer Mischling". Die Rassenzusammensetzung in Europa entscheide dessen Schicksal. Rasse, Bevölkerung und Raum müssten mit Gewalt (Krieg) erobert werden. Das Schicksal der Bevölkerung war für Hitler somit abhängig von der Rassenzugehörigkeit, die er für den wirtschaftlichen Auf- oder Abstieg der Nationen verantwortlich machte. Während die Alliierten von *traditionellen* Machtvorstellungen ausgingen, argumentierte Hitler an ihnen vorbei; sie hatten Hitlers Grundvorstellungen offenbar nie begriffen. Deutschland habe, so Hitler, einen hohen Anteil an „nordischen" Elementen, die übrigen Völker hingegen bestünden aus einem „Rassenmischmasch", der nur negativ sei. Es gehe um einen „großgermanischen Raum deutscher Zunge". Hitler wollte daher auch nicht ein Führer „innerhalb Europas" sein, sondern Herrscher in einem Großraum in Mittel- und Osteuropa, der dann auch den Vereinigten Staaten von Amerika die Stirn bieten könne.[145]

Als weiteres Element für die Expansion Deutschlands hob er den Gedanken wirtschaftlicher Autarkie hervor,[146] der den eigentlichen Schlüssel für seine Großraumtheorien darstellt. In einem Gespräch mit dem Pariser Botschafter Otto Abetz im September 1941 äußerte Hitler geradezu abenteuerliche Vorstellungen. Die Asiaten und Bolschewisten müssten aus Europa hinausgejagt werden. Nach dem erfolgreichen Krieg werde Europa wirtschaftlich autark sein, man brauche dann den übrigen Welthandel nicht mehr. Das neue Russland bis zum Ural werde ein deutsches Indien werden, das neue Großdeutsche Reich werde 135 Mio. Menschen umfassen und weitere 150 Mio. beherrschen. Zugleich äußerte er die Hoffnung, dass ein Kontinent unter Deutschlands Führung auch gegen die USA kämpfen und gewinnen könne.

Die Angst vor Bevölkerungswachstum und fehlenden Lebensmitteln blieb einer von Hitlers grundlegenden Irrtümern, weil er die Modernisierung der Industrie, aber auch die gesteigerte Produktion der Landwirtschaft selbst seit Anfang des 20. Jahrhunderts nicht in Erwägung zog[147]. In seinen späteren Äußerungen hat er stets an diesen Vorstellungen festgehalten, diese allerdings nie mehr so deutlich wie 1928, sondern eher in unverbindlichen und vagen Andeutungen geäußert. Seine Vorstellungen waren der Öffentlichkeit, wie erwähnt, nicht bekannt. Die bekannte Passage in *Mein Kampf:* „Wir stoppen den ewigen Germanenzug nach dem Süden und Westen Europas und weisen den Blick nach dem Land im Osten… Wir gehen über zur Bodenpolitik der Zukunft. Wenn wir heute in Europa von neuem Grund und Boden reden, können wir in erster Linie nur an Russland und an die ihm untertanen Randstaaten denken…[148] Das neue Reich muss sich in Marsch setzen, um mit dem Schwert… der Nation ihr täglich Brot zu geben…".[149] betraf nur die Frage der Gewaltanwendung,[150] nicht aber die Frage, wie man *konkret* Siedlungsland gewinnen wollte. Ähnliches gilt für Hitlers Äußerung in seiner Denkschrift zum Vierjahresplan,[151] in der er ebenfalls nur über die künftige Eroberungspolitik durch Gewalt sprach.

Die entscheidende Frage war, was mit der *Bevölkerung* des künftigen deutschen Lebensraums geschehen sollte. Merkwürdigerweise wird die Frage in der zeitgeschichtlichen Forschung nicht angesprochen. Zwar betonte die Lebensraumtheorie, dass die Bevölkerung in ihrem Lebensraum „kulturelle Bindungen" erfahre, das NS-Schrifttum schweigt sich aber hierüber aus, denn die Vertreibung ganzer Völker aus Osteuropa widersprach dieser Theorie. Hitlers Konzept einer „Neuordnung Europas" schien eigentlich nicht raum-, sondern rassebezogen zu sein. Oder aber die NS-Lehre wollte die kulturellen Bindungen eines Volkes in seinem jeweiligen Lebensraum nicht auf die Bevölkerung der besiegten Staaten angewendet wissen.[152] Letztlich überwogen, wie die Entwicklung zeigt, die wirtschaftlichen Interessen als Lebensraumkonzepte. Welchen Gang aber nahm diese Interessenwahrnehmung im einzelnen? Die Äußerungen Hitlers aus dem „Zweiten Buch" geben Aufschluss. Sie zeigen deren Neuartigkeit und Abstrusität, weil er abenteuerliche Ideen über die Vertreibung der Bevölkerung entwickelte. Das Buch, das, wie ausgeführt, während der NS-Zeit nicht veröffentlicht

[145] Hitlers zweites Buch, Einleitung Ziff. IV, S.30ff., 129ff., 161ff.

[146] Schon 1928 hatte er den Gedanken entwickelt, dass Machtpolitik in eroberten Gebieten und die Revision von Grenzen falsche Kategorien der Politik seien. Es ging ihm nicht um Europa, sondern wie erwähnt um „Raumdenken", das sich im Osten Europas realisieren sollte, es gehe ihm um „Lebensraum", d.h. um „Siedlungsraum" für deutsche Bauern, die die Ernährung sichern sollten – eine Erfahrung aus den Hungerwintern des Ersten Weltkriegs aufgrund der Handelsblockaden. Das Bevölkerungswachstum führe zu Ernährungsengpässen, deshalb müsse Deutschland expandieren.

[147] Paul Kluke, Nationalsozialistische Europaideologie, in: Vierteljahreshefte für Zeitgeschichte 3/1955, S.259. – Die Bundesrepublik in der Nachkriegszeit war durchaus in der Lage, die Bevölkerung mit Nahrung zu versorgen und produzierte bald sogar landwirtschaftliche Überschüsse („Butterberg"; Anm. d. Verf.).

[148] Mein Kampf, Band II, zwei Bände in einem, München 1942 (711-715 Aufl.) Erstaufl. 1925-1927, S.742.

[149] Mein Kampf, Band I, S.154.

[150] „Was man nicht hat, muss man erobern", Nürnberger Dokumente (Dok.1456 PS), zit. nach Benz, S.53.

[151] Hitler: „Wir sind übervölkert und können uns auf der eigenen Grundlage nicht ernähren. Die endgültige Lösung liegt in einer Erweiterung des Lebensraums…". Wiedergabe in: VjhZ 1955, Heft 2, S.210.

[152] Dreier, Großraumordnung, S.74.

wurde, sondern erst 1961 zugänglich war, macht deutlich, dass diese extremen Ideen nicht bekannt werden sollten.[153] Auch der genannten Aufsatz von Ganzer (1941) enthält keine Andeutung über das Schicksal der Einheimischen.

Die rassebedingten Vorstellungen Hitlers als Rechtfertigung der Vertreibung traten in den späteren Jahren allerdings zurück. Primär wurden die Wirtschaftsfragen, d.h. die Ernährungs- und Rohstoffprobleme. Auf einer Konferenz mit den Spitzen der Wehrmacht am 5. November 1937 erläuterte er die Einzelheiten, nutzte diese Gelegenheit jedoch gleichzeitig zu einer grundsätzlichen Darlegung seiner Außenpolitik, die er als sein politisches Testament verstanden wissen wollte (sog. Hoßbachprotokoll).[154] Das wichtigste Credo war, dass der Bevölkerungszuwachs die Gefahr einer Hungersnot auf Dauer schaffe, so dass zur Sicherung der Ernährung die Expansion Deutschlands nach Osten unumgänglich sei. Allen Teilnehmern musste klar sein, was dies für die Bevölkerung in den osteuropäischen Ländern bedeuten würde: Nämlich die Freimachung des Raumes für deutsche Siedler.[155] Vertreibung wohin? Hitler wollte also einen menschenleeren Kontinent schaffen, in den dann deutsche Siedler einströmen sollten,[156] ein ungeheuerliches Unterfangen! Im Lande verbleiben sollten nur die als Arbeitssklaven benötigten einheimischen Arbeitskräfte.

Später wandelte sich offenbar das Ziel der Vertreibung, als die unmittelbaren Kriegsvorbereitungen angelaufen waren. Jetzt wurden sog. Hungerpläne (eine Wortschöpfung der zeitgeschichtlichen Forschung) konzipiert, die von Göring als Bevollmächtigter für den Vierjahresplan und dem Wirtschaftsrüstungsamt des OKW in enger Zusammenarbeit entwickelt wurden. Diese Pläne enthielten die aus den besetzten Gebieten zu erbringenden Lebensmittellieferungen, die der einheimischen Bevölkerung fast nichts zum Leben ließen. Der „Hungerkrieg“[157] sollte offenbar die Vertreibung (die in den eingegliederten Ostgebieten teilweise schon angelaufen war)[158] ersetzen. Auf einer Staatssekretärskonferenz vom 2. Mai 1941 rechnete man mit ca. 30 Mio. Menschen, die verhungern würden,[159] während das Reich sich im Osten „gesundstoßen“ solle.[160] Dies bedeutete die Ausbeutung der Bevölkerung nach genozidalen Kriterien, Vernichtung der einheimischen Industrie und Schwerpunktsetzung auf die Landwirtschaft. D.h. Priori-

[153] „… So wird aber auch auf zahlreichen anderen Gebieten unser Kontinent als Wirtschaftsfaktor in aggressiver Form immer mehr in Erscheinung treten und dadurch mithelfen, den Kampf um den Absatzmarkt zu verschärfen. Die Zukunft Deutschlands muss einem unter Berücksichtigung aller Faktoren, besonders angesichts der Beschränktheit unseres eigenen Rohstoffmaterials und der dadurch bedrohlichen Abhängigkeit von anderen Ländern, als sehr trübe und traurig erscheinen. Aber selbst wenn Deutschland alle wirtschaftlichen Erschwerungen meistern würde, dann stände es eben immer nur dort, wo es im August 1914 schon gestanden hat. Die allerletzte Entscheidung über den Ausgang des Kampfes um den Weltmarkt wird bei der Gewalt und nicht bei der Wirtschaft selber liegen…“ (Hitlers zweites Buch, S.123f.).
„… Deutschland entschließt sich zu einer klaren weitschauenden Raumpolitik überzugehen. Es wendet sich damit von allen weltindustriellen und welthandelspolitischen Versuchen ab und konzentriert statt dessen alle seine Kräfte, um unserem Volk durch die Zuweisung eines genügenden Lebensraumes für die nächsten 100 Jahre auch einen Lebensweg vorzuzeichnen. Da dieser Raum nur im Osten liegen kann, tritt auch die Verpflichtung zu einer Seemacht in den Hintergrund. Deutschland versucht erneut, auf dem Wege der Bildung einer ausschlaggebenden Macht zu Lande seine Interessen zu verfechten…“ (a.a.O. S.163).

[154] Die Niederschrift stammt von dem militärischen Adjutanten Oberst Hoßbach, der an der Besprechung teilgenommen hatte und nach seiner Erinnerung darüber am 10. November 1937 eine Niederschrift verfertigte. Sie wurde als Dokument PS-366 im Nürnberger Hauptkriegsverbrecherprozess als Beweisstück für die frühen Absichten Hitlers hinsichtlich der Führung eines Aggressionskrieges verwendet.

[155] Nach dem Hoßbachprotokoll führt Hitler weiter aus: „Das Ziel der deutschen Politik sei die Sicherung und die Erhaltung der Volksmasse und deren Vermehrung. Somit handele es sich um das Problem des Raumes. Die deutsche Volksmasse verfüge über 85 Millionen Menschen, die nach der Anzahl der Menschen und der Geschlossenheit des Siedlungsraumes in Europa einen in sich so fest geschlossenen Rassekern darstelle, wie er in keinem anderen Land wieder anzutreffen sei und wie er anderseits das Anrecht auf größeren Lebensraum mehr als bei anderen Völkern in sich schlösse.
Die deutsche Zukunft sei daher ausschließlich durch die Lösung der Raumnot bedingt, eine solche Lösung könne naturgemäß nur für eine absehbare, etwas 1-3 Generationen umfassende Zeit gesucht werden.
Die einzige, uns vielleicht traumhaft erscheinende Abhilfe läge in der Gewinnung eines größeren Lebensraumes, ein Streben, das zu allen Zeiten die Ursache der Staatenbildungen und Völkerbewegungen gewesen sei. Dass dieses Streben in Genf und bei den gesättigten Staaten keinem Interesse begegne, sei erklärlich. Wenn die Sicherheit unserer Ernährungslage im Vordergrund stände, so könne der hierfür notwendige Raum nur in Europa gesucht werden, nicht aber ausgehend von liberalistisch-kapitalistischen Auffassungen in der Ausbeutung von Kolonien. Es handele sich nicht um die Gewinnung von Menschen, sondern von landwirtschaftlich nutzbarem Raum…
Dass jede Raumerweiterung nur durch Brechen von Widerstand und unter Risiko vor sich gehen könne, habe die Geschichte aller Zeiten - Römisches Weltreich, Englisches Empire - bewiesen. Auch Rückschläge seien unvermeidbar. Weder früher noch heute habe es herrenlosen Raum gegeben, der Angreifer stoße stets auf den Besitzer.
Zur Lösung der deutschen Frage könne es nur den Weg der Gewalt geben, dieser wird niemals risikolos sein. Die Kämpfe Friedrichs des Großen um Schlesien und die Kriege Bismarcks gegen Österreich und Frankreich seien von unerhörtem Risiko gewesen, und die Schnelligkeit des preußischen Handelns 1870 habe Österreich vom Eintritt in den Krieg ferngehalten. Stelle man an die Spitze der nachfolgenden Ausführungen den Entschluss zur Anwendung von Gewalt unter Risiko, dann bleibe noch die Beantwortung der Frage „wann“ und „wie“. Hierbei seien drei Fälle zu entscheiden:
Fall 1: Als Zeitpunkt wurden die Jahre 1943-1945 genannt. Nach dieser Zeit sei nur noch eine Veränderung zu unseren Ungunsten zu erwarten. Wie die Lage in den Jahren 1943/45 tatsächlich sein würde, wisse heute niemand. Sicher sei nur, dass wir nicht länger warten können.“ Hitler befürchtete spätestens ab 1943/45 eine Notsituation durch Bevölkerungsvermehrung und ständigen Nahrungsmittel- und Geldmangel (Anm. d.V.); näher Smith, Bradley F.: Die Überlieferung der Hoßbach-Niederschrift im Lichte neuer Quellen, in: Vierteljahreshefte für Zeitgeschichte, 38. Jg., 1990, S.329-336.

[156] Mit dieser Praxis wurde in den Reichsgauen Wartheland und Danzig-Westpreußen 1940 begonnen: Vertreibung der polnischen Bauern (ins Generalgouvernement); Ansiedlung deutscher Bauern aus den baltischen Staaten.

[157] Ausführlich Benz, Der Hungerplan, insb. S.31ff.

[158] Vergl. Majer, Fremdvölkische, S.446ff.

[159] So auch Göring zum italienischen Außenminister, zit. n. Benz, S.52; Himmler teilte diese Auffassung, Benz, S.59ff.

[160] Nürnberger Dokumente 126-EC, zit. nach Benz, S.34, Fn.22.

tät genoss die höchstmögliche Ausnutzung der Regionen auf dem Gebiet Lebensmittelversorgung zugunsten Deutschlands sowie der Zugriff auf die Mineralölwirtschaft,[161] gleichgültig, wie sich das Schicksal der einheimischen Bevölkerung gestalten würde (d.h. in den meisten Fällen Hungersnot). Diese Ausbeutung unterlag im Operationsgebiet den Weisungen des Generalbevollmächtigten für den Vierjahresplan, der diese Befugnisse auf das OKW (Chef des Wirtschaftsrüstungsamts General Thomas) übertrug.[162] Diese Ermächtigung zum Hungerkrieg ist in Hitlers Richtlinien vom 13. März 1941 auf Sondergebieten zur Weisung Nr.21 (Fall Barbarossa)[163] enthalten. Es lässt sich nun durchaus ein gedanklicher Zusammenhang mit der Hungerblockade herstellen, die Frankreich und zunächst auch England nach dem Ersten Weltkrieg gegen Deutschland verhängt hatten.[164] Schon damals wurden solche Maßnahmen von den Alliierten offenbar als „völkerrechtlich unbedenklich" eingestuft. Dahinter stand die Auffassung, dass besiegte Völker durch Hunger dezimiert werden durften. – Eine Idee, die auch exakt den Vorstellungen der NS-Führung bei ihrem Krieg gegen die Sowjetunion entsprach.

Lebensraum, Hunger, Krieg, Ausbeutung aller Ressourcen – diese Begriffe passten indessen nicht in die herkömmliche Sprache der Politik. Sie wurden deshalb umgebogen, um sich nach außen hin als Großmacht im europäischen Kontext darzustellen. Hitler vermochte daher in der Außenpolitik von „gemeinsamen Interessen" Europas zu sprechen, um seine eigentlichen Absichten zu verschleiern. Im Neujahrsaufruf vom 31. Dezember 1939 bekundete er: „Wir kämpfen für ein neues Europa…".[165] Nur wenige Wochen nach seinem Gespräch mit Otto Abetz gab er sich in einem Gespräch mit dem italienischen Außenminister Ciano am 25. 10. 1941 durchaus „europäisch": Bemerkenswert sei, dass sich mit dem Russlandkrieg zum ersten Mal ein Gefühl europäischer Solidarität entwickelt habe. Es gehe für die Zukunft nicht mehr um Deutschland, sondern um gemeinsame Interessen innerhalb des europäischen Wirtschaftsgebietes mit seinen nordafrikanischen Ergänzungen. Das europäische Solidaritätsgefühl müsse sich allmählich in eine europäische Erkenntnis von der europäischen Gemeinsamkeit umwandeln. Daher gehöre die Zukunft nicht dem lächerlichen halbkultivierten Amerika, sondern dem neuerstandenen Europa – unter der Voraussetzung, dass der Osten in den Dienst des europäischen Gedankens gestellt würde.[166]

8.2 Exkurs: Heydrichs Pläne zu Europa – Anknüpfung an das „alte Reich"?

Innerhalb der Pläne der NS-Führung, nur mit Gewaltanwendung ein neues Großreich schaffen zu können, bildet die Politik Reinhard Heydrichs (1904-1942), des Chefs der Sicherheitspolizei und des SD, eine Ausnahme. Heydrich war eine der rätselhaftesten Figuren in der NS-Spitze. Schon früh zeigte er sich als Visionär einer neuen Ordnung, in der die SS als Polizeimacht des Dritten Reichs mit allen Kontrollbefugnissen gegenüber den staatlichen Stellen ausgestattet werden sollte.[167] Das zweite Element seiner Ordnungsvorstellungen betraf das besetzte Europa, das sich ohne Gewaltanwendung in das Großdeutsche Reich einfügen sollte; nur so sei dessen Zusammenhalt gesichert. Darin unterschied er sich von den Lebensraumvorstellungen Hitlers, die von einem „europäischen" Reich nichts wissen wollten. Eine reine Gewaltherrschaft, so Heydrich, führe zu nichts. Nur Härte gegen Partisanen und Saboteure hielt er für richtig. Ähnlich soll Heydrich in der Frage der Judenverfolgung, so Zeitzeugen, nicht von vornherein ein Verfechter von Gewaltaktionen gewesen sein. Bis Sommer 1941 war er Anhänger des sog. Madagaskar-Plans, die Juden auf dieser Insel zu konzentrieren, später des Plans, die Juden nach Osten zu „evakuieren".

Die Quellenlage zu Heydrichs europapolitischen Vorstellungen ist allerdings unsicher,[168] sodass der folgende Text über Heydrichs Auffassungen unter Vorbehalt zu sehen ist. Jedoch scheinen verschiedene Tatsachen, die im Folgenden geschildert werden, unabhängig von persönlichen Zeugnissen diese Vorstellungen indirekt zu bestätigen.

Hinsichtlich seiner Biographie kann auf die vorliegenden Quellen verwiesen werden.[169] Nach seiner unehrenhaften Entlassung aus der Marine wegen einer Frauenaffäre im Jahr 1931[170] war er zunächst arbeitslos, kam 1931 zur NSDAP und

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[161] Benz, S.41, mit zahlr. Nachweisen.

[162] Wirtschaftspolitische Richtlinien vom 23. 5. 1941, zit. nach Benz, S.31f.

[163] Zit. nach Benz, S.32, der in Fn.10 sich auf Hitlers Weisungen für die Kriegsführung 1939-1945, abgedruckt in: Dokumente des OKW, Hg. Walter Hubatsch, Frankfurt 1962, S.88ff. bezieht.

[164] Diesen Blockaden, die schon im Krieg begonnen hatten, fielen in deutschen Städten ca. 800.000 Menschen zum Opfer.

[165] Zit. nach Dreier, Großraumordnung, S.65 Anm. 270.

[166] Zit. nach Mazower, S.514ff.

[167] Diese Vorstellungen hatte Heydrich schon Mitte der 1930er Jahre entwickelt. Insgesamt ein antistaat-liches Programm, das seinen ersten Ausdruck 1936 in der Verschmelzung von SS und Polizei unter Heinrich Himmler als RFSS und Chef der deutschen Polizei fand.

[168] Die einzige Quelle ist Deschner, Günther: Reinhard Heydrich. Statthalter der totalen Macht. Biographie, Esslingen 1977, auf die sich der vorliegende Text stützt. Die Studie beruht nach Angaben des Autors auf persönlichen Interviews mit Zeugen und auch mit Heydrichs Witwe Lina Mathilde von Osten. Unmittelbare Äußerungen Heydrichs zu einem künftigen Großeuropa sind nicht bekannt. In jüngster Zeit ist Robert Gerwarth: Reinhard Heydrich. Eine Biographie, Berlin 2011, erschienen, die sich besonders mit den Jugendjahren befasst und die Ausbildung Heydrichs bei der Marine schildert. Die Studie stellt auch Heydrichs Ehrgeiz für das Soldatische, Bürokratische und für das Perfektionistische heraus. Die bei Deschner geschilderten Europaprobleme finden keine Erwähnung.

[169] Heydrich war von Geltungssucht und Perfektionismus getrieben, in der „großen Gesellschaft" zu bestehen. Er war von extremem sportlichen Ehrgeiz besessen, um seinen Minderwertigkeitskomplex aufgrund seiner Außenseiterrtolle in Schule und Ausbildung (in der man ihm zu Unrecht „jüdische Abstammung" unterstellte – Deschner S. 23ff.), trotz bester schulischer Leistung und bester fachlicher Beurteilungen seiner Vorgesetzten in der Marine, zu kompensieren.

[170] Deschner, S.38ff., S.48.

SS, wo er rasch Karriere machte.[171] Er übernahm zunächst für Himmler, d.h. für die NSDAP, die Aufgabe, einen Nachrichtendienst aufzubauen: Den Sicherheitsdienst (SD), eine Aufgabe, die er aufgrund seines Organisationsgeschicks mit großem Erfolg löste, indem er die organisatorische Struktur des britischen Secret-Service kopierte.[172] Nach der Machtergreifung stieg Heydrich weiter in den Führungsrängen der Polizei auf: 1933 wurde er Chef der Bayrischen Politischen Polizei, 1934 Chef des Gestapo-Amtes in Berlin, 1936 Chef der neugegründeten Sicherheitspolizei (SIPO), 1939 Chef des Reichssicherheitshauptamtes (RSHA).[173]

Heydrich galt als unideologisch, jedoch als äußerst ehrgeizig. Er erfüllte alle Aufgaben mit nachgerade unheimlicher Effizienz. Er war der Erfinder der Tarnworte, mit denen die Ermordung der Juden in dem Behördenapparat und in der Öffentlichkeit verschleiert wurden („Evakuierung", „Umsiedlung").[174] Im Januar 1942 erhielt er auf der Wannseekonferenz den Auftrag zur „Evakuierung" (Deportation) aller europäischen Juden in den Osten, nachdem die Madagaskar-Pläne gescheitert waren und als Folge hiervon seit Juni 1941 in Osteuropa bereits ca. eine Mio. Juden den Einsatzgruppen der SIPO und des SD, die im sog. rückwärtigen Heeresgebiet operierten, zum Opfer gefallen waren. Schon im September 1939 war er durch Führererlass mit der „politischen Sicherung" der besetzten polnischen Gebiete beauftragt worden; das war eine Vorstufe des Judenmords. Denn schon damals wurden viele Juden in Polen auf dieser Grundlage umgebracht, weil sie der Gruppe politischer Gegner, die von den Einsatzgruppen bekämpft werden sollten, zugerechnet wurden. Später wurde diese Ermächtigung auf die zu besetzenden sowjetischen Gebiete ausgedehnt. Eine ausdrückliche Ermächtigung zur Ermordung aller Juden gab es also nicht, auch nicht im Russlandkrieg. Durch exzessive Auslegung der zur Bekämpfung politischer Gegner ergangenen Bestimmungen wurden jedoch in den besetzten (sowjetischen) Ostgebieten *alle* Juden als „politisch-polizeiliche Gefahr" angesehen, die „eliminiert" werden müssten. Das „politische Element" diente also als Vorwand für das „rassische Element" (Vertreibung, Deportation). Eine spezielle Ermächtigung erübrigte sich damit.

Gleichwohl war Heydrichs Ehrgeiz nicht befriedigt. Die Ermordung der Juden war für ihn eine „negative Aufgabe". Im März 1941 wurde er stellvertretender Reichsprotektor im Protektorat Böhmen und Mähren (wie die damals besetzte Tschechoslowakei hieß), da der Reichsprotektor Kurt von Neurath nach Hitlers Auffassung einen zu milden Kurs steuere und der tschechische Widerstand wachse.[175] De facto war Heydrich Alleinherrscher. Endlich hatte er eine „positive Aufgabe". Er sah sich als Landesvater, der „soziale Ordnung" schaffen wollte, z.B. durch Sonderzuteilungen an die Arbeiter, was von der Mehrzahl der Bevölkerung sehr positiv aufgenommen worden sein soll,[176] die ihn offenbar in eben dieser Rolle sah. Heydrich regierte mit Zuckerbrot und Peitsche, d.h. er pflegte im Bereich Zusammenarbeit mit den einheimischen Arbeitern einen maßvollen Kurs (gleicher Lohn wie für Deutsche, zusätzliche Zuteilungen von Lebensmitteln, Bekleidung usw.), um die Kriegswirtschaft zu fördern. Mit Härte ging er jedoch gegen die bürgerliche Intelligenz und den Widerstand vor. Er pflegte ferner die Zusammenarbeit mit dem bürgerlichen tschechischen Präsidenten Hacha, der ihm Loyalität zusicherte. Gegen die Wirtschaftskriminalität ging er mit harten Mitteln vor.

In diesem Zusammenhang sind auch Heydrichs Pläne eines germanischen Reiches zu sehen, die er mit Hitler und Himmler teilte. Allerdings sollte dieses Reich ein europäisches Reich sein. Heydrich sah darin keinen Widerspruch. Er träumte von der Wiederherstellung des Kaiserreichs des 17. Jahrhunderts (d.h. des Heiligen Römischen Reiches deutscher Nation), indem er sich als „des Führers Wallenstein" (er hatte das gesamte Schrifttum über Wallenstein studiert) sah[177], der Böhmen und Mähren ins Reich führen müsse. Heydrichs Pläne gingen jedoch über Böhmen und Mähren weit hinaus. Es ging ihm anscheinend nicht nur um die Wiederherstellung einer Art Kaisertum in Mitteleuropa, sondern darüber hinaus um eine neue europäische Ordnung, die vom Nationalsozialismus beherrscht sein werde. Diese müsse jedoch ohne Gewaltanwendung errichtet werden. Damit setzte er sich in Gegensatz zu Hitler und Himmler, die die Gewinnung neuer Territorien und die Beherrschung der Bevölkerung nur durch Krieg und Gewalt kannten. Die jeweilige Ordnungsmacht habe, so Heydrich die böhmischen Länder in ihren Bereich gezogen: „Karl der Große, das I. Deutsche Reich des Mittelalters, die Habsburger in der Neuzeit und der Schöpfer des Großdeutschen Reiches, Adolf Hitler". Das war sein politisches Glaubensbekenntnis.[178]

Heydrich hatte große historische Kenntnisse und brachte mit ihnen Farbe in die bisher nur sehr abstrakte europäische Diskussion. Es lohnt sich durchaus, diese Vorstellungen näher zu beleuchten, da, wie ausgeführt, über die europäischen Projekte der SS-Führung nur wenige schriftliche Primärquellen vorhanden sind.[179] Die Epochen des tschechisch-deutschen Gegensatzes (Jan Hus) sollten minimiert, die Zeiten gemeinsamer Tradition (Zugehörigkeit zum Heiligen Römischen Reich deutscher Nation und zu Habsburg) glorifiziert werden, besonders in den Propagandaschriften über Böhmen und Mähren. Der Heilige Wenzel, so hieß es dort, wollte das Christentum in Böhmen

[171] Deschner, S.46.
[172] Heydrich organisierte nach dem Vorbild des Secret Service ein Netz von Informanten, die er sich persönlich unterstellte (Deschner S.57ff.).
[173] Näher: Deschner, S.57, 87ff., 103ff.
[174] Heydrich wandelte Rechtsbegriffe (auf gesetzlicher Grundlage) in Polizeibegriffe (ohne normative Grundlegung) um (z.B. Rechtssicherheit als Reichssicherheit) und erfand Tarnworte wie „Evakuierung", „Umsiedlung" oder „Sonderbehandlung" (Hinrichtung).
[175] Deschner, S.213ff.
[176] Näher Deschner, S.219ff.; Gerwarth, S.292f.
[177] Heydrich hatte großes historisches Interesse und las alles über Wallenstein, in dem er das Symbol der „Reichstreue" sah. Deschner, S. 244 ff., 246 ff.; Gerwarth, S.322.
[178] Deschner, S.247.
[179] Die Studie Deschners enthält viele wörtliche Zitate, die aber nur auf Bekundungen von Zeitzeugen und Angehörigen beruhen (Anm. d. V.).

einführen und Böhmen in den Gedanken der „Reichseinheit“ einbinden. „Wenzeltradition“ war daher Mittelpunkt der Propaganda, bei der auch Staatspräsident Hacha durch Besichtigung der böhmischen Krönungskleinodien auf der Prager Burg mitwirkte. Hacha sei, so Heydrich, der „Garant der Verbundenheit und Treue des Protektorats zum Reich“. Heydrich hatte diese Ideen aus seinen historischen Studien und Gesprächen mit Intellektuellen zusammengetragen und zuvor auf ein „handliches Format“ reduziert.[180] Die Zeremonie im Veitsdom hatte in der Bevölkerung große Resonanz.[181] Seiner Linie der „Reichstreue“ (ohne Gewaltanwendung) entsprach es, dass er 1942 eine neue tschechische Regierung aus kooperationswilligen Kräften ernannte, die auf Adolf Hitler vereidigt wurde.[182]

Was aber sollte das Schicksal der einheimischen Bevölkerung des neuen Reichs sein? Dazu enthielten seine Pläne wenig Konkretes. Die Eingliederung von Böhmen und Mähren in das Reich war ja ebenfalls ein Fernziel Hitlers („dieses Gebiet ist ein Teil des Reiches“), dessen Plänen Heydrich folgte oder folgen musste. Landnahme, wie sie Hitler im besetzten Osteuropa vorschwebte, bedeutete immer, wie ausgeführt, nicht bloße Besatzung, sondern zugleich auch Germanisierung (deutsche Siedler / „Wehrbauern“), d.h. *Vertreibung* und *Unterdrückung* der „fremdrassigen“ (hier: slawischen) Bevölkerung, was freilich nie deutlich ausgesprochen wurde; im Land verbleiben sollten nur die deutschstämmigen Einwohner[183] und die für die Industrie benötigten „Arbeitssklaven“. Alle Deutschen sollten in einer neuen Welt leben. Es ging um ein Jahrhundertprojekt: die Schaffung eines Reichs, das Münster und Osnabrück (d.h. die Ergebnisse des Westfälischen Friedens von 1648) „überwinden“ sollte (!).[184] In diesem Reich sollten keine Juden leben dürfen; ihre Ermordung war also Teil dieser Pläne.[185] Langfristig stand den Tschechen also die Vertreibung in „den Osten“ bevor, soweit sie nicht für die deutsche Wirtschaft benötigt wurden. Es blieb allerdings bei solchen Plänen, sie wurden aus kriegswirtschaftlichen Gründen nicht umgesetzt. Denn das Protektorat wurde als wichtige Kriegsgüterproduktionsstätte dringend gebraucht; zudem war es für die alliierten Fliegerverbände aufgrund seiner geographischen Lage nicht erreichbar. Die von den Nationalsozialisten als Umsiedlung bezeichnete Vertreibung hätte zudem einen in den Augen der Besatzungsgewalt unverhältnismäßigen Aufwand bedeutet und erschien zudem unrealistisch. Vertreibung wohin? Welche Gruppen sollten betroffen sein? Ein Beispiel für die Kompliziertheit derartiger Vertreibungspläne waren die „eingegliederten Ostgebiete“ (Danzig-Westpreußen und Warthegau), aus denen neben polnischen Bauern, Juden und politisch Missliebigen auch wirtschaftlich wichtige Gruppen (Kaufleute etc.) in das Generalgouvernement abgeschoben wurden (sie galten als Vertreter des feindlichen Polentums), was alle Kräfte der Verwaltung beanspruchte.[186]

Vorläufig wollte Heydrich jedoch die Loyalität der Tschechen durch den bereits beschriebenen milden Kurs erreichen (z.B. Bekämpfung des Schwarzhandels, akzeptable Löhne usw.), die tatsächlich glaubten, sie könnten als autonomes Gebiet überleben. Sie wussten nichts von den Endzielen der NS-Führung, die Hitler hinter nebulösen Formulierungen versteckte;[187] Heydrich selbst sprach das Thema nicht an. Stattdessen förderte er auch deutsche Künstler und Kultur und kümmerte sich um die Städteplanung. Prag sei die „schönste deutsche Stadt“.[188]

Ob Heydrich allerdings diese großdeutschen Pläne nur als Vorwand benutzte, um rein ökonomische Zwecke zu verwirklichen, bleibt eine offene Frage. Er war kühler Rationalist, ohne Slawenhass: Der Raum müsse befriedet und der deutschen Kriegswirtschaft nutzbar gemacht werden. Alles andere, z.B. die Abneigung der Deutschen gegen die Tschechen in den innenpolitischen Querelen, sei für ihn kein Thema.[189] Er wollte eine „Elite Mitteleuropas“ gründen. In diesen Gedankengängen entdeckt man den zynischen Politiker, der frei von ethischen Erwägungen ist, verbunden mit völliger Rücksichtslosigkeit gegenüber dem Schicksal der unterworfenen Bevölkerungsgruppen, soweit sie nicht in die großdeutschen Pläne passten.

Heydrichs Pläne unterschieden sich von denen Hitlers (und Himmlers) nicht in der Zielsetzung eines großgermanischen Reiches, sondern nur, wie erwähnt, hinsichtlich der Frage der Zusammensetzung dieses Reichs (europäisch) und der Frage der Gewaltanwendung. Aber wie sollte eine Vertreibung ohne Gewaltanwendung stattfinden? Sollten nach der Vertreibung auch die Tschechen den „Hungerplänen“ der deutschen Wehrmacht ausgeliefert sein? Was hatte Heydrich mit seinem Gewaltverzicht, so muss gefragt werden, gemeint? Mit großer Wahrscheinlichkeit kann er nur Territorien gemeint haben, deren Bevölkerung sich vollständig der NS-Besatzung unterworfen hatte und in allem willfährig war. D.h. der Alltag sollte ohne Gewaltanwendung auskommen (wie dies im besetzten Westeuropa im allgemeinen der Fall war). Anders bei Widerstandshandlungen. Heydrich hatte nämlich geäußert, dass man gegen Widerstand immer mit harten Mitteln vorgehen müsse, sonst könne Gewalt-

[180] Deschner, S.251.
[181] Deschner, S.248.
[182] Deschner, S.253ff.
[183] Vorher, so Heydrich, müsse man die Bevölkerung nach rassischen Kriterien „abtasten“, Gerwarth, S.300.
[184] Gerwarth, S.322.
[185] Gerwarth, S.318.
[186] Für die Umsiedlung war Himmler als „Reichskommissar für die Festigung deutschen Volkstums“ (RKF) zuständig, der die Reichsstatthalter (d.h. die innere Verwaltung) mit der Durchführung beauftragt hatte. Deren Dienststellen errichteten sog. Umwandererzentralen (UWZ), die die Details dieser Pläne durchführten. Die Umsiedlung polnischer Bauern sollte deutschen Siedlern aus Bessarabien, Walkynien, Galizien und dem Holmer Gebiet Platz machen. Zu diesem Zweck wurden umfängliche Umsiedlungspläne entwickelt (1., 2. und 3. 1941/42.) Zum Ganzen vergl. Majer: Fremdvölkische, 1981/1993, S.446ff.
[187] Deschner, S.255ff.
[188] Deschner, S.263.
[189] Deschner, S.323.

freiheit nicht erreicht werden. So seien Geiselerschießungen in Osteuropa zulässig, nicht aber in Westeuropa (Frankreich), da dies einer Abdankung der Polizei gleichkäme. Dies zeigt, dass Heydrich, der seit 1942 für die Sicherheitsfragen in Frankreich zuständig war, einen milderen Kurs steuern wollte.[190] Diese Vorgehensweise hatte er auch dem OKW vorgeschlagen, und auch mit Hitler im Mai 1942 besprochen.[191]

Was Heydrich selbst betrifft, schien er von dem romantischen Gedanken der Wiederherstellung des Alten Reiches fasziniert gewesen zu sein, denn letztlich war er in dem für ihn kleinräumigen Böhmen und Mähren nicht zufrieden. Er träumte von Höherem. Nicht zuletzt wegen Spannungen mit Himmler und Bormann strebte er immer noch nach neuen Aufgaben. Er rechnete damit, das „Versuchskaninchen Böhmen" auch auf andere Besatzungsgebiete zu übertragen und von Hitler Sondervollmachten zu erhalten: Er wollte als Bevollmächtigter von Belgien und Nordfrankreich und als „Protektor" Vichys berufen werden, um sich in dieser Eigenschaft für ein neues Europa zu engagieren.[192] Ob allerdings Hitler diese Absichten tatsächlich hegte, ist umstritten.[193]

Die Ermordung Heydrichs am 6. Juni 1942 in Prag setzte diesen Plänen ein Ende. Die Experten im RSHA arbeiteten jedoch weiter an dem Plan eines Großeuropa – was darauf schließen lässt, dass Heydrich keine isolierten Problemlösungen entwickelt hatte, sondern der gesamte ihm zur Verfügung stehende Machtapparat der SIPO und des SD im Reichssicherheitshauptamt auf diese Linie festgelegt war. Die Stäbe der SS im RSHA[194] arbeiteten zusammen mit dem Außen- und Wirtschaftsministerium Entwürfe für eine „Europäische Wirtschaftsgemeinschaft" aus, mit einem Binnenmarkt samt einer gemeinsamen Währung, selbst eine Liste von Grundfreiheiten wurde erstellt.[195] E. R. Huber sagte 1941: „So ist die europäische Aufgabe des Reichs, mit deren Einführung wir an die Überlieferung des ersten Reiches der Deutschen im Mittelalter anknüpfen, zwar ein Ausdruck der deutschen Machtüberlegenheit, zugleich aber auch ein Ausdruck der deutschen Verantwortung vor Europa und der Welt."[196] Nichts konnte den Vorstellungen ferner liegen als die Wirklichkeit des Alltags im besetzten Europa.

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

Die NS-Pläne eines germanischen Großreichs wirkten auch über das Kriegsende hinaus. Die Alliierten beabsichtigten, nach den unermesslichen Zerstörungen durch Deutschland, dieses als staats- bzw. völkerrechtliches System vollständig zu zerschlagen. Ein deutscher Staat habe durch den Missbrauch des Nationalsozialismus jede Daseinsberechtigung verloren.[197] Stattdessen sollte eine Art europäische Föderation entstehen, in die Deutschland eingebunden werden müsse, um Sonderwege künftig zu verhindern. „Der Nationalismus" (gemeint war Deutschland) wurde als gefährliches Phänomen der modernen Massenpsychologie angesehen. Andererseits wollten die Alliierten ein Machtvakuum in Deutschland verhindern, das in ihren Augen die Ausbreitung des Kommunismus befördert hätte. Wie diese Föderation aussehen sollte, blieb vorläufig im Ungewissen. 1946 forderte Churchill die Vereinigten Staaten von Europa, einige Monate zuvor hatte er seine Rede über den „Eisernen Vorhang" in Missouri gehalten[198]; eine völkerrechtliche Festlegung war allerdings daraus nicht zu erkennen.

Fest stand lediglich, dass das besiegte Deutschland keine politische Macht mehr haben sollte. Auch völkerrechtlich sollte Deutschland auf den Nullstatus reduziert werden. Die bedingungslose Kapitulation erlaubte den Siegermächten Eingriffe jeder Art. Die Haager Landkriegsordnung von 1909, nach der nach Besiegung eines Staates (debellatio) Eigentum, Leib und Leben der Bevölkerung zu schützen waren, fand keine Anwendung. Faktisch bedeutete dies das Ende Gesamtdeutschlands und die Aufteilung Deutschlands in verschiedene Besatzungszonen. Die Eingriffe der Alliierten erfolgten früh. Bereits Mitte 1945 begannen die Demontierungen der gesamten Fabrikproduktion und des Maschinenparks, oft auch Deportierung der jeweiligen Fachkräfte (wie z.B. die der Firma Zeiss aus Jena etc.). Noch war der Morgenthau-Plan, der aus Deutschland ein Agrarland machen wollte, nicht aufgegeben. Ihren Ausdruck hatten diese Pläne schon in der von den USA und Großbritannien beschlossenen Atlantik-Charta vom 14. August 1941 gefunden: Sie formulierte acht Kriegsziele,[199] darunter unter Punkt sechs die endgültige Vernichtung der „Nazi-Tyrannei". Dieser Punkt wurde so interpretiert, dass Deutschland völlig entmachtet werden solle und keinerlei Bindung der Alliierten durch Vertrag oder Völkerrecht gegenüber Deutschland bestehe.[200] Die Charta versprach, die souveränen Rechte und die Selbstbestimmung der Völker (außer Deutschlands) wiederherzustellen. Konkreter wurden diese Ziele auf der Konferenz von Casablanca am 24. Januar 1943, auf der die Alliierten die „bedingungslose Kapitulation" Deutschlands gefordert hatten, sowie auf der Teherankonferenz von November 1943, als von Roosevelt, Churchill und Stalin die Teilung Deutschlands in verschiedene Besatzungszonen – eine amerikanische, eine britische und eine sowjetische – (auf Drängen Frankreichs kam später noch eine französische Besatzungszone hinzu)

[190] Gerwarth, S.332.
[191] Nach Gerwarth, S.331, sind Dokumente über diese Vorgänge verschollen.
[192] Deschner, S.266.
[193] Gerwarth, S.333, verneint dies.
[194] Dreier, S.271, zit. in Fn.271 das Dok. Nr.24 (bei Neulen S.169f.), das auf das SS-Hauptamt, Amtsgruppe D, Planungsstelle Europacharta 1944/45 verweist.
[195] Dreier, Staatsrechtlehre, S.64ff. m. Zahlen; vorwiegend stützt er sich auf Neulen, S.106ff., 128ff.
[196] Bau und Gefüge des Reichs, in: Huber, Idee und Ordnung des Reiches, Bd.1, 1941, S.5ff., 14, 52.
[197] Vgl. im einzelnen: Mazower, Hitlers Imperium, 2010.
[198] Der Begriff „Eiserner Vorhang" taucht schon in den frühen 1940er Jahren in der Zeitschrift *Signal* in Zusammenhang mit Stalin auf (Anm. d.V.).
[199] Selbstbestimmungsrecht der Völker über territoriale Änderungen und die Regierungsform, freier Zugang zu allen Rohstoffen, dauernder Friede.
[200] So Churchill am 22. Feb. 1944 im Unterhaus; zit. nach Rainer Blasius: Vollständiger Sieg über die Feinde, in FAZ vom 15. 8. 2011, S.8.

beschlossen wurde. Allerdings war eine Einigung nur mühsam erreicht worden, weil die Westalliierten bei den Verhandlungen in Nordafrika das Datum der Landung gegen den Willen der Sowjet-Union möglichst lange hinausschieben wollten.[201] Bekräftigt wurde dies durch Beschluss auf der Konferenz von Jalta im Februar 1945, die zugleich für eine neue Weltorganisation auf der Grundlage der Kriegskoalition der gegen Deutschland verbündeten Nationen plädierte. Die erneute Bekräftigung des Selbstbestimmungsrechts der Völker wurde wiederum für Deutschland als nicht anwendbar erachtet, da das oberste Ziel „der Sieg über die Feinde" (d.h. über den Nationalsozialismus) sei. Das Potsdamer Abkommen vom 2. August 1945 konkretisierte diese Ziele: Die Aufteilung Deutschlands in zunächst drei (später vier) Besatzungszonen, die Entnazifizierung verbunden mit dem Aufbau demokratischer Strukturen, die Entmilitarisierung, die Reparationsleistungen und der Umgang mit Kriegsverbrechern.

Die alliierten Pläne standen im Zusammenhang mit zahlreichen Überlegungen, die schon während des Krieges auf dem Kontinent diskutiert worden waren, da eine Teilung Deutschlands allein keine Lösung für eine neue Ordnung sein konnte. Als Option wurde z.B. von den Exilregierungen der Tschechoslowakei und Polens ein europäischer Bundesstaat in Erwägung gezogen, in den das geteilte Deutschland eingebunden werden sollte, allerdings nur mit beschränkten eigenen Rechten. Kleine Gruppen von Intellektuellen in Italien, Frankreich und den Niederlanden entwarfen Pläne zur Schaffung einer europäischen Gemeinschaft, die Jahrzehnte später von Historikern wieder aufgegriffen wurden, weil sie Vorbildfunktion hätten.[202]

Die Pläne einer europäischen Föderation wurden damals durchaus auch von einem „Europäismus" in den Widerstandsbewegungen gegen den Nationalsozialismus unterstützt. Man erkannte, dass nur die europäische Einigung der Schlüssel zur Lösung mittel- und langfristiger Probleme war. In diesem Sinne forderte auch das „Manifest von Buchenwald" vom 13. April 1943, das Sozialisten aus den USA, Schweden, Deutschland, Frankreich, Holland, Österreich, Polen, Italien verfasst hatten, ein föderatives Europa. Die europäische Gemeinschaft solle sich für Ordnung und Wohlstand verbürgen. Europa war damals aber noch keine Handlungsmaxime, nur Idee und Ziel.[203]

Auf die Alliierten warteten schwierige Aufgaben. Einerseits wollten sie ihr Terrain gegeneinander abstecken,[204] andererseits mussten sie sich der mühseligen Aufgabe unterziehen, Europa neu zu ordnen. Über die Struktur einer künftigen europäischen Föderation bestand allerdings damals, in der Entstehungszeit des „Kalten Krieges" ab 1947/48, keine Einigkeit. Der Europagedanke im Kalten Krieg inspirierte Föderalisten, die einen europäischen Bundesstaat anstrebten, ebenso Anhänger einer staatenbündischen Lösung, die einen Bund mit gleichberechtigten Mitgliedern wollten.[205] Welcher Option sollte die 1949 gegründete Bundesrepublik Deutschland zugeordnet werden? Zahlreiche Kongresse und Europagruppen in allen europäischen Ländern trugen die Idee eines föderativen Europa voran, oftmals gingen sie weiter als heute, so z.B. die Forderung der Linken (SPD und Labour) nach einer demokratisch gewählten Föderationsregierung, einer europäischen Streitmacht usw.[206] Gegen „zuviel Europa", nur für eine „Europäische Union der Vaterländer" waren de Gaulle, de Gasperi (Italien) und Adenauer; es waren die führenden Persönlichkeiten, die Europa nach 1945 aufbauten, weil sie durch die gemeinsame Erfahrung von Krieg und Widerstand verbunden waren.

Die europäische Entwicklung wurde maßgeblich vom Haager Kongress im Mai 1948 beeinflusst, an dem über 750 Delegierte der westlichen Staaten teilnahmen (die sozialistischen Staaten waren eingeladen worden, hatten aber abgesagt). Der Kongress wurde von Winston Churchill, Konrad Adenauer, Alcide De Gasperi und Paul-Henri Spaak wesentlich mitgestaltet. Er verabschiedete zahlreiche Resolutionen zu wirtschaftlichen und sozialen Situationen im Nachkriegseuropa, und vor allem eine politische Resolution über die spätere Gestaltung Europas. Hier standen sich die Union der Europäischen Föderalisten, (UEF) die einen Staatenbund befürworteten, der jedoch einzelne Kompetenzen durch Abtretung erhalten sollte, und das United Europe Movement (UEM) gegenüber, die ebenfalls einen Staatenbund forderten, indem jedoch nur das Prinzip der Kooperation herrschen sollte.[207]

Die noch aus der Kriegszeit stammenden Ideen eines föderativen Europa als Gegensatz zu einem Gewaltstaat nach NS-Prägung, wie dies den USA vorschwebte, erwiesen sich letztlich als verfrüht, d.h. als kurzlebig.[208] Es siegten im Zuge der allgemeinen (welt)-politischen Lage die Anhänger der Idee eines Staatenbundes, der die Bundesrepublik fest in das westliche Bündnis einordnen sollte – ohne die eigenen Interessen als Besatzungsmacht aufzugeben. Die 1957 gegründete Europäische Wirtschaftsgemeinschaft (EWG) beruhte somit auf der Kooperation (nicht Integration) souveräner Staaten. Auch die dahinter stehenden ökonomischen Hoffnungen, dass Westeuropas Wirtschaftsplanung mit der OEEC (später OECD) koordiniert werden könne, hatten sich bald zerschlagen. Die Jahrhunderte alte Idee des Nationalstaates konnte nicht so einfach über den Haufen geworfen werden. Eine Ausnahme bildete die sowjetische Zone. Stalin war von vornherein gegen jeden Versuch, Eur-

[201] Schließlich einigten sich Roosevelt und Churchill auf den Mai 1944, womit Stalin einverstanden war.
[202] Mazower, S.516ff.
[203] Zit. nach Schmale, Geschichte Europas, S.131.
[204] Dies gilt besonders für das russische Bestreben, einen Zugang zu den Weltmeeren zu haben, der eisfrei war. So behielt die UdSSR die dänische Insel Bornholm ein ganzes Jahr lang besetzt (8. 5. 1945–8. 5. 1946), um neben Königsberg einen weiteren eisfreien Zugang zur Ostsee zu haben. Erst auf nachdrückliches Drängen der Briten räumten sie die Insel.
[205] Vgl. Krüger, der diese europäischen Pläne (fälschlicherweise) als Integration bezeichnet: Das unberechenbare Europa, 2010, S.14.
[206] Zit. nach Schmale, Geschichte Europas, S.133.
[207] Zu den Details der europäischen Bewegungen vgl. im einzelnen Brunn, Gerhard, Die europäische Einigung 1945 bis heute, Stuttgart 2002; Altrichter, Helmut, Bernecker, Walter, L., Geschichte Europas 2004.
[208] Mazower, S.524f.

opa als Staatenbund zu organisieren. Ihm ging es ausschließlich um die Beherrschung Europas.

Dass nur vier Jahre nach Kriegsende ein Teilstaat Westdeutschland entstand und in Europa eingebunden wurde, war das Ergebnis der Politik der Westalliierten, die das neue westdeutsche Gebilde sobald als möglich aufbauen und als Bollwerk gegen die Sowjetunion nutzen wollten, die die Grenzen ihres Machtbereichs bis an die Elbe vorgeschoben hatte. Die Wiederherstellung Gesamtdeutschlands verschwand seit 1946 aus den vorrangigen Zielen. Die Westalliierten waren bereit, dieses Ziel zugunsten einer Stabilisierung der Westzonen zurückzustellen. Die Regierung unter Konrad Adenauer folgte dem – der Westkurs mündete 1957 in die Gründung der Europäischen Wirtschaftsgemeinschaft (EWG). Die Opposition in Westdeutschland (SPD) vertrat über 20 Jahre lang den Standpunkt, dass der Weg zu Europa nur über Gesamtdeutschland führe. Erst Ende der 1960er Jahre öffnete sie sich den europäischen Ideen und Institutionen, die sie vorher abgelehnt hatte. Es passte zu dem Konzept der Westalliierten, die europäischen Staaten für ein starkes Westeuropa zu gewinnen.

Hinzu kam, dass das deutsche Führungspersonal, d.h. die Mitgestalter des Gemeinsamen Marktes seit 1957, seine Erfahrungen aus der Zeit vor 1945 mit einbrachten; die meisten hatten zunächst dem NS-Regime gedient, indem sie Wirtschaftspläne entwarfen, die Vollbeschäftigung und Autarkie anstrebten. NS-Ökonomen, z.B. im Reichswirtschaftministerium, und Geschäftsleute, aber auch Politiker wie Ludwig Erhard, der Bankier Joseph Abs und der spätere Bundesbankpräsident Karl Blessing, stellten nun ihre Dienste der neuen politischen Ordnung der Bundesrepublik zur Verfügung. Sie bejahten, in erster Linie aus ökonomischen Gründen (Wiederanschiebung der Wirtschaft), das nach Deutschlands Niederlage neugegründete Staatswesen Bundesrepublik als ein Gebilde sui generis. Sie bejahten zugleich die amerikanische Hegemonie. Diese war für das Fortbestehen der Bundesrepublik notwendig, und daher eine Anlehnung an das westliche Bündnis unerlässlich,[209] weil die Bundesrepublik gegen die vereinigte Wirtschaftsmacht des damaligen Ostblocks (COMECON) mit amerikanischer Hilfe aufgebaut werden sollte.

[209] Mazower, S.525f.

Cosmin Sebastian Cercel

Towards a Jurisprudence of State Communism: Law and the Failure of Communism

Abingdon, New York: Routledge, 2018, 230 pp.

The monograph by Cosmin Cercel is a very important piece of scholarship at the interstices of legal history, history of legal ideas and legal theory. It addresses the phenomenon of actually existing socialism or – as the Author prefers to call it – state communism in its juridical dimension. Cercel's main claim is that state communism was not only a political phenomenon, but also a juridical one it its own right. In other words, state communism should not be treated as a form of illegality or counter-legality, but as a specific modality of the juridical (p. 1, 11). This claim has significant consequences: firstly, the legal life of state communism should not be dismissed as inexistent or merely a façade, but instead it is a legitimate object of research as a form of legality (p. 4). Secondly, the study of state-socialist legality can reveal certain more general features of the juridical as such and therefore can be helpful to understand the juridical phenomenon in general (p. 1, 6). For these reasons, Cercel's monograph can be described as groundbreaking both in the area of legal history and legal theory.

The book consists of seven chapters, preceded by a brief introduction and even more succint conclusions. The 'Introduction' (pp. 1-14) announces the book's main arguments, already referred to above, and exposes its intellectual inspirations. The latter are threefold: critical legal history (p. 5-6), Giorgio Agamben's political philosophy, in particular his theory of the state of exception (p. 6-7) and, thirdly, Jacques Lacan's psychoanalysis (p. 8-9). From the perspective of traditional legal history or history of legal ideas, this theoretical framework can come as a surprise, but from the perspective of critical legal theory it is certainly an adequate choice. Especially the use of Lacanian psychoanalysis, which has an immense yet untapped potential for legal theory, is to be welcomed.

Chapter 1 is entitled 'Law before communism: Modernity and the authoritarian drive' (pp. 15-45). It sets the intellectual scene for the development of communist jurisprudence by presenting a subjective panorama of Western legal theory of the early 20th century. This overview includes Hans Kelsen (pp. 18-25), Carré de Malberg (pp. 25-28) and Carl Schmitt (pp. 28-34). It is followed by a section devoted to problems of sovereignty, exception ad dictatorship (p. 34-39) and the rise of authoritarianism (pp. 39-45), both of which rely heavily on the three previously mentioned authors. Whilte undoubtedly the Schmitt-Kelsen controversy was the axis of pre-World War II legal theory in Europe, the choice of Carré de Malberg is certainly an original one and brings to the spotlight a somewhat forgotten French legal theorist of the period. What I miss, though, in Chapter I, is a broader reference to the legal and political theories developed in Central and Eastern Europe, including such authors as Leon Petrażycki, František Weyr, Leonid Pitamic or Antoni Peretiatkowicz. Putting the Western Europeans in dialogue with Central and Eastern Europeans could have open up a broader perspective on the issues of sovereignty, exception, dictatorship and authoritarianism, discussed in the chapter, especially that those excperiences were not foreign to the Central and Eastern European states.

What seems to be one of the most important claims of Chapter 1 is Cercel's polemic with the mainstram of transitional justice literature which treats communism as a form of pure lawlessness and a regime devoid of a legal system (p. 15-17). The stake behind this argument is the Author's critique of the present conjecture, featuring neoliberalism and the emerging illiberal tendencies. As he writes:

> 'While communism was devoid of law, our liberal present is law-full, that is protected byt law and vested with its symbolic authority. However, this position is deeply problematic (…). To be sure, the comfortable dualism opposing a dark and lawless past to a bright, lawful or law-full, liberal, or more recently, illiberal present certainly had a political and ideological advantage of reducing to a relatively simple and seemingly unproblematic axis the manifold and resilitent materiality of the historical debris left by the failure of communism.' (p. 17).

Cercel also touches upon a topic which I personally consider important, namely the claim that state communism was – as Tomasz Giaro called it – merely a 'blackout of European legal history'.[1] Cercel calls this myth an 'obscure and dream-like history' (p. 17) and points out that 'the law was never complete in itself even before the advent of communism' (ibid.). The first chapter ends with the conlcusion that:

'The authoritarian drive of the interwar could be read as a failed attempt of filling [the] void of signification within the law by recourse to the mystique of the state. (…) [S]tate building an the affirmation of nationalism are doubled by a constant suspicion towards any inimical intrusion able to sap the boundaries of the state. In these ways, the nineteenth-century nationalism is pushed

[1] GIARO T. Some Prejudices about the Legal Tradition of Eastern Europe. In: *Comparative Law in Eastern and Central Europe*, ed. SITEK B. et al (ed.) *Comparative Law in Eastern and Central Europe*. Newcastle-upon-Tyne 2013, p. 26–50, 45. See also MAŃKO R. Demons of the Past? Legal Survivals of the Socialist Legal Tradition in Contemporary Polish Private Law. In: MAŃKO R. et al. (ed), *Law and Critique in Central Europe: Questioning the Past, Resisting the Present*. Oxford 2016.

further: the national shall occupt the central place within the frame of meaning. (…) Before communism, law was preparing its own erasure.' (p. 44-45)

Having thus set the scene of the general intellectual climate at the time of advent of state communism, the Author passes on to a presentation of Marx's and Engel's critique of law in Chapter 2, entitled 'A criticism of the heaven: Class struggle and the law in theory and practise' (pp. 46-71). This way the further chapters, devoted to state communism proper, are set in their full context. The Author works his way through all major texts by Marx and Engels which contain their views on the law, ranging from Marx's early article on 'Debates on the Law on Thefts of Wood' (1842), his *Critique of Hegel's Philosophy of Right* (1843-1844), Marx's and Engel's joint works (the *German Ideology* [1846], and the *Manifesto of the Communist Party* [1847-1848]), through Marx's 'The Class Struggles in France' (1850), 'Preface to a Contribution to the Critique of Political Economy' (1859) and *The Capital* (1867), up to Engel's 'Anti-Dühring'. The reconstruction is essentially chronological, i.e. the Author presents the evolution of the views of Marx and Engels on the law in their historical context. Cercel's approaches the sources above all as a legal theorist, and makes a succesful attempt at their new reading in light of the methodological tool box he employs, including Lacanian psychoanalysis. For instance, he writes (commenting on Marx's 'Preface to a Contributon to the Critique of Political Economy' that:

> 'Law is both real and ideological, insofar as ideology in itself emerges from real, material structures and it hints to an unarticulated real. Yet, it also distorts the perception of reality, and this distortion is constitutive of reality. In this way it acts as a fetish, in both its religious and psychoanalytical meaning; the attachment to the law and state becomres the central focus necessary for ordering realiy, and this particular meaning is referred to as being the „reality".' (p. 67).

Cercel also provides an interesting re-reading of the concept of the dictatorship of the proletariat, positing that it

> '…should perhaps be understood as essentially a limit concept that aims to describe the temporary organisation of the *proletariat* as a state during the transition to communism as a *reversal* of the bourgeois dictatorship.' (p. 70).

Chapter 2 is, therefore, not only a passive reconstruction of the juridical views of Marx and Engels (hence, not only an intervention in the history of legal ideas), but also the output of creative research in the field of critical legal theory, where the legacy of Marxism is reinterpreted and can serve as a source of inspiration for the development of contemporary legal thought.

Whilst Chapter 2 is concerned with a Marxist critique of bourgeois law, Chapter 3 – entitled 'Revolution under siege: Law, violence and Marxist legal theory' (pp. 72-96) is an attempt at reconstructing the concept of revolution within Marxist jurisprudence. As such, it is an intervention at the interstices of legal history, history of legal ideas, legal theory, as well as political philosophy. The task of the chapter 'is to stress some of the major paradoxes that the unfolding of the Octover Revolution has unearthed for legal and political philosophy' (p. 73). In this Chapter, the Author draws philosophical inspiration not only from Hegel and Lacan, but also from Alan Badiou, from whom he borrows the concept of the Event (p. 72-73). As Cercel writes:

> 'In short, the revolution [of 1917] was an *event* which cut through the nomos of the world and opened radically new possibilities for articulating the relation between law and life. (…) [A]s an event, in its proper philosophical meaning, that is an ontological anomaly which disturbs the existing situation, the revolution is precisely that which should have not had happened, an excess which is not easily reducible to an intersection of historical processes, intellectual and economic tensions, nor is it graspable through the analysis of its standard bearers (…).' (pp. 72-73).

The most important conceptual analyses within Chapter III are concerned with the notion of the dictatorship of the proletariat and involve an exegesis of Lenin's chief work on this subject, namely *State and Revolution* (1918). Cercel argues that 'Lenin's rendition of the dictatorship of the proletariat is, despite its concision and apparent simplicity, jurisprudentially and philosophically rich' (p. 87). He concludes that

> '…the transitional period of the dictatorship of the proletariat is also one of legal survival, in which the old technical-legal apparatus of the past continues to infuse the legal structures of the present.' (p. 88).

Following a close reading of Lenin's *State and Revolution*, Cercel turns to the legal theory of Evgeny Pashukanis (pp. 89-93), finding that 'the law, understood as a legal form, is so far interwoven with the capitalist mode of production that it cannot be thought outside of it and would be rendered meaningless outside of this historical horizon' (p. 92). From Pashukanis, the Author moves on to Benjamin and reads the communist legal theory in light of the latter's concept of mythical violence (pp. 93-96). The concluding remarks of Chapter III pave the way towards Chapter IV, concerned with the legal theory of Stalinism. As Cercel writes:

> 'As Pashukanis and Lenin would suggest, the law was there to stay, until its final annihilation, which was postponed *sine die*. With this survival of the legal form, another law 'destined to decay' [Benjamin] was about to emerge. In this process the revolutionary potential of the proletariat was slowly inscribed in the state apparatus, that is into the law, and the original, law-making violence was paradoxically retracting to becoming the all-too-human law-preserving one.' (p. 96).

The subsequent Chapter 4, entitled 'Revolution betrayed: The great retreat and the enduring legal canon' (pp. 97-120) is devoted precisely to the jurisprudence of Stalinism. The focus is, therefore, on the writings of Andrei Vishinsky in an ettempt to 'investigate [the] survival of the legal form within the context of Stalinism' (p. 98). The Author's main lcaim is that 'the central feature of Stalinism is thus the resilience not of law in its relation to a material basis that was putatively shifting, but of law as a form supported by the ideological, pure force of law of the state' (p. 99). In Hegelian terms, Cercel points out that 'instead of being an ultimate demise of the law, a lawless totalitarian regime, Stalinism opens itself as an *Aufheben* of the form of law' (p. 99). He demonstrates that Stalinism actually revers the Marxist claim that 'the law reflects the material basis' (p. 103) and treats law as 'an ideological force in the hands of the proletariat' which is to stay even after the material basis had changed (ibid.). Cercel disagrees

with Hannah Arendt's claim that 'totalitaritarianism is an embodiment of lawlessness' (p. 112). In his view, Arendt's 'rendition of totalitarian rule is misleading as it overlooks the jurisprudential significance of the positivie law within this regime' (ibid.). He adds that 'the specific turn towards formalism in legal theory, which was intended to support the normative core of the state as a reality beyond any opposition and questioning, should not be overlooked' (p. 114).[2] In order to conceptualise law in Stalinism, Cercel introduces the figure of the 'living dead' (p. 117-118). All in all, Stalinism is a failure of revolution, where 'critique turns into ideology and Marxism is reduced to ritual' (p. 119). The role of law is to offer legitimacy to state and to serve as a disciplining tool (p. 119).

Chapter 5 bears the title 'The discourse of the master: War, law and the communist takeover' (pp. 121-150). At this moment we leave the Soviet Union and move into Central Europe which, as from 1944-1945, became part of the Soviet bloc and embraced actually existing socialism (p. 122). However, contrary to what the title of the chapter (and of the entire book) would suggest, Cercel limits himself to the case study of Romania. He admits, nonetheless, that 'the Romanian case cannot cover entirely the experience of law in Central and Eastern Europe' (p. 122), and he points to a number of significant difference between the legal experience of socialist Romania and other socialist Central European states (p. 123). To be fair one has to admit that despite the focus on Romania, there are numerous references to Poland, Czechoslovakia and Hungary.

The narrative starts in interwar Romania (pp. 126-135), and the reader has the opportunity to learn important facts about its legal history, otherwise unavailable in the English literature. It is noteworthy that Cercel, as a Romanian, works with both primary and secondary sources in his native language, and this in itself constitutes a valuable input of the book. This part of the chapter also contains numerous interesting, more general observations, such as that 'Austro-Hungary was dissolved not by political representations of class antagonism but by a specific framing of political demands in the language offered by nationalism. This failure is thus the zeinth of nationalis ideologies, which despite their heterogeneity (…) were able to secure and negotiate a number of changes within the structure of power' (p. 129). Following the part on the interwar period, Cercel, following chronology, moves on to World War II (pp. 135-150), discussing the Antonescu fascist regime in Romania. He provides *inter alia* interesting insights into the background of Romania's participation in the Holocaust, pointing out that it was preceded by a redefinition of the Romanian nation as a 'closed ethnical community founded on an imagined link of race, blood and cultural simmilarity' (p. 141). This part of the book is undoubtedly a valuable and unique intervention in the legal history of Romania, otherwise missing in the English-language literature.

Chapter 6 is entitled 'Law as state truth: The law-preserving violence and the limits of communism' (pp. 151-175). As chapter 5, it focuses on Romania as a case study and takes up the narrative in the place where it was left in that chapter, i.e. at the end of World War II. Likewise, it draws on primary and secondary sources in the Romanian language, including legislation, journal articles, case-law as well as contemporary literature, all of which are unavailable in translation. The chapter is organised not so much chronologically, as by subject-matter, starting from the communist takeover in 1946 and its direct aftermath (p. 152-156), the show trials (pp. 156-163), the removal of King Mihai I (pp. 163-167) and Stalinist jurisprudence in Romania (pp. 167-175). Cercel concludes the chapter by pointing out that

> 'By subverting the law rather than abolishing it, the communists aim to bring about a new understanding of legality that is built around »the strict and unconditional observance of the law« [Drăgan]. (…) Legality is the wall guarding the exploits of a revolution decreed by the law, supported by its force and resting within the sphere of the hegemonic power.' (p. 174-175).

The final Chapter 7 is entitled 'Exit communism: Legal amnesia and the return of the repressed' (pp. 176-198). Its aim 'is to challenge the assumption of a clear dividing line between a communist rule and its presumably democratic aftermath' (p. 176). The Author develops this task in the following words:

> 'The question to be asked (…) seeks to know, beyond the propaganda and the state-sanctioned rhetoric, as well as beyond the reality of the authoritarian structure, whether the system in place in various parts of Central and Eastern Europe raised to the main pledge, that of rendering the control of the proletariat over the means of production' (p. 178).

In order to address this question which, both from a historical and theoretical perspective is of paramount importance for any impartial evaluation of actually existing socialism, Cercel uses the insights of Romanian Marxist Pavel Câmpeanu into the nature of state socialism. He concludes that

> '…the abolition of the ownership over the means of production is not a concluded task insofar as it is the state that keeps the means of production in its administration, while the proletariat acts its (mere) nominal owner. (…) To be sure, what we are facing (…) is not the abolition of property, but a vacuum of property (…) a continual deferral of the moment of the final socialisation of the means of production. In other words, private ownership might have been abolished, but the owner is not really the working class (…). Instead of the capitalist class, one finds the state in its juridical guises (…).' (pp. 180-181).

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[2] On the excessive formalism of state-socialist legal theory and practice see e.g. KÜHN, Z. *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* Leiden-Boston 2011; MAŃKO, R. Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome' In: *Pólemos – Journal of Law, Literature and Culture* 2013, vol. 7, p. 207ff; CSERNE P., Formalism in Judicial Reasoning: Is Central and Eastern Europe a Special Case? In: BOBEK M. (ed), *Central European Judges under the European Influence: The Transformative Power of the EU Revisited*. Oxford 2015.

Cercel also makes a very poignat remark comparing capitalism (where the 'market' functions as an ideological screen) and state socialism, where the working class directly attributes any economic failures to the ruling bureacracy (pp. 184-185). This, in turn, makes the system fragile and is conducive to brutal repression of workers' protests (p. 185). The Author then moves on to discuss the evolution of Romanian criminal law (pp. 185-186), the constitutional position of the communist party in Romania (p. 188-189) and the interplay between Marxism and nationalism and state-centrism (p. 190-191). He notes that under Ceauşescu, 'socialist legality is no longer a weapon for fighting the remnants of the bourgeois regime, or for defending the revolutionary conquests, but the legal armature of the state itself' (p. 191). Concluding this part of the analysis, Cercel writes:

> '…the politico-juridical apparatus is effectively sustaining through the coercion the functioning of a system whose core failure is its inability to socialise the economic material basis. In furthering the functioning of coercion, a second-level, symoblic politico-juridical discourse is operating an ideological coding and displacement of this reality. But in doing so the mechanism also exposes its paradoxes: law is no longer a mere instrument, politics is no longer outside the sphere of the juridical, and the state, parrty and all all sphere of society seem to be governed by a network of norms.' (p. 191).

Indeed, a paradoxical outcome of a socialist revolution, which is the effect of the fact that 'the [communist] party continues to stay both within the sphere of politics and that of the juridical' (p. 191).

The last section of Chapter 6 is devoted to the 1970 s. Cercel analyses, *inter alia*, the statute on national defence of 1972 (p. 195-196), the 1974 programme of the communist party (p. 196) as well as treatises on *History of the Romanian State and Law* (p. 196-197), a 'monumental history supporting the foreclosure operated by the present' (p. 197). He also mentions the fact that the communist government decided to pay all Romania's foreign debt, and made the country debt-free by 1989 (p. 198). However, this course of action, aimed at preserving the country's sovereignty' proved fatal to the regime of Ceauşescu:

> '…during the final decade, the symbolic functions of ideological legitimation were pushed to their limits. After all, mobilisation, militarism and ethno-nationalism had their limits in keeping the economic real at bay. (…) The payment was done ont only with the knowledge of the strains for the national economy, but also in breach of the agreed schedule. It was marked thus by a level of tension which hints as to its implicit signification, that of settling a debt towards the Big Other with and through the sacrifice of the people.' (p. 198).

The monograph ends with a 'Conclusion' (p. 199-207). He starts from pointing out that the concept of 'communism' as a past experience is crucial to the (self-)identificiation of the region of Central and Eastern Europe (p. 199-200). Communism, therefore, is Central and Eastern Europe's 'symptom' in the Lacanian sense of the word (p. 200). Cercel declares that his book 'aimed (…) to pierce through the veils of the contemporary ideological play of representations and take the symptom seriously, as an internal part of the legal and political historical subject' (p. 200). He emphasises that 'state communism (…) is not a project emerging out of nowhere. It entails both a materil and intellectual relation of continuity with forms and practises of domination that go beyond the Marxist tradition' (pp. 199-200). Hence, Cercel defends the thesis of continuity of development of the juridical phenomenon, which – contrary to folk wisdom – was not broken by the October Revolution:

> '…state communism does not constitute a radical break with the past either legally or politically. (…) [I]t inscribes itself in a history of law that certainly overpasses the historical and intellectual spectrum of the communist movement.' (p. 201).

Therefore, the study of the juridical under state socialism is instrumental to the understanding of the juridical phenomenon itself (p. 201). However, the survival of the legal form under that system is problematic for two reasons. First of all, it the Marxist orthodoxy of communist jurisprudence is questionable. Secondly, a 'blind spot' of Marxist legal theory is identified (p. 201). Cercel argues that the endurance of law under state socialism is strictly connected to the survival of classes, although different than in a capitalist society, and of class struggle (pp. 202-203).

He then draws more general conclusions for critical legal theory, noting that:

> 'Reflecting on the failures of the communist revolution in overcoming the ideological force of law, its attachment to the existence of an autonomus realm that is separated from the movements of history is a way of calling for thinking the law historically. (…) Dealing with the communist past authentically might thus require (…) recuperating what is woth saving from the Marxist tradition, that is its emphasis on historicity. To put it simply, in order to overcome the pitfalls of the prresent, and to be able to glance into the looking glass of history, we need not be able to mark our own historical situation and to ote what continues to stay untouched in our present.' (pp. 205-206).

This statement can be read as a proposal of historicising critical legal theory which, mostly, has been detached from legal history or has been informed by legal history only slightly. Cercel's call for a closer cooperation between critical legal theory and critical history, in an effort to build a historically informed critical jurisprudence is certainly to be welcomed. Furthermore, a historical component within critical legal theory could help to bridge the gap between theory and practice, between the speculative and the empirical, which also remains a methodological challenge for critically oriented legal scholars,[3] more often than not engaged in 'armchair critique' of law.

Concluding, Cosmin Cercel's monograph can be regarded as a much needed book on the legal theory of actually existing socialism, filling a significant lacuna in the existing literature on the subject. At the same time, thanks to his approach, inspired by critical

[3] Cfr. MAŃKO R. Critique of the "Juridical": Some Metatheoretical Remarks. In:*Journal of the University of Latvia: Law* 2018, vol. 11, p. 29-30.

theory (Jacques Lacan, Walter Benjamin, Slavoj Žižek) Cercel's book constitutes an original input into the development of critical jurisprudence. By addressing the links between the juridical and the partial failure of the Russian Revolution of 1917 to deliver upon its promises of emancipating human subjects from violence perpetrated in the name of the law, Cercel contributes to the ongoing theoretical debates within critical legal theory. His book, however, has significance also for general jurisprudence, regardless whether critical or theoretical. In particular, it is a fruitful intervention in the perennial discussions on the essence or concept of law in the context of a liminal experience. The books is also noteworthy for its critical legal methodology, and the way in which Cercel uses inspirations from Jacques Lacan or Slavoj Žižek can definitely be of inspiration for other critical legal researchers.

A further merit of Cercel's monograph is the succesful merger of law and history in one research endeavour. The book is, at the same time, an exercise in a theoretical understanding of the juridico-historical process (in the Soviet Union and socialist Romania), and an attempt at informing legal theory through the input of legal history. The history of the juridical in times of Revolution and actually existing socialism can, as Cercel's book shows, be a very helpful lens through which one can look upon crucial debates in legal theory. In a sense, the juridical experience of actually existing socialism was a liminal experience, as the law was first destined to extinction (as per Lenin's *State and Revolution*) before becoming a tool of the state repressive apparatus.

The book can definitely be recommeded for (critical) legal theorists, legal historians, historians of legal and political ideas, but also political and social theorists, as well as political philosophers. It provides a unique insight into the essence of the juridical and into the socialist legal experience. Hopefully, it will inspire a strand of further research, especially focusing on the role of law in the state-socialist economy (civil law, economic law) as well as on the post-1989 transformation from actually existing socialism back to capitalism. In a sense, it would be excellent if another monograph took up the narrative in the place where Cercel leaves it, i.e. at the end of the 1980 s.

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Siegfried Hanke / Rainer Vogel (Hg.)

Urbar Freudenthal / Bruntál 1604. VRBARIUM oder Grundtbuch der Herrschaft Freudentaal, REVIDIRT vnd CORRIGIRT Anno 1604 E.T.
(= Schriftreihe PHILOLOGIA. Sprachwissenschaftliche Forschungsergebnisse, Bd. 221)

Hamburg: Verlag Dr. Kovač, 2017, 269 S., ISBN 978-3-8300-9637-5

Urbar der Herrschaft Freudenthal / Bruntál von 1618
(= Schriftreihe PHILOLOGIA. Sprachwissenschaftliche Forschungsergebnisse, Bd. 228)

Hamburg: Verlag Dr. Kovač, 2018, 477 S., ISBN 978-3-8300-9971-0

Mit den beiden Editionen knüpfen die Herausgeber an die Reihe der von ihnen bereits edierten Urbare für das ehemalige österreichische Schlesien an. Nach der Herausgabe von Urbaren des Fürstentums Jägerndorf aus dem 16. Jahrhundert (1531, 1535, 1574/78) und des Fürstentums Troppau aus dem 17. bzw. 18. Jahrhundert (1631, 1658/59, 1691/92 bzw. 1716 und 1740) sowie der Urbare der ihm zugehörigen Stadt Troppau (1645) und der Herrschaft Freudenthal (1735) schließt sich nun der Kreis der für diese komplexe Herrschaftsregion vorliegenden Editionen insofern, als diese – (überwiegend) in deutscher Sprache verfassten Urbare – sich in Grundstruktur und Aufbau an das erste für das Fürstentum Jägerndorf vorliegende – allerdings in (alt)tschechischer Sprache verfasste – Urbar aus 1521 orientieren.

Die beiden Herausgeber der vorliegenden Editionen sind selbst auch sudeten-schlesischer Herkunft, sie sind auch durch zahlreiche andere Publikationen zur Wirtschafts- und Sozialgeschichte ihrer altösterreichischen Heimat hervorgetreten. Für die vorliegenden Transkriptionen zeichnete – wie immer – Siegfried Hanke verantwortlich, die Festlegung der Transkriptionsregeln sieht eine nahezu wortgetreue Wiedergabe der Originaltexte vor, lateinische Eintragungen sind weitgehend übernommen worden, ebenso vereinzelte alttschechische Termini. Die Edition wird begleitet von einer umfassenden Erschließung und Auswertung dieser Quellen durch Rainer Vogel in Hinblick auf die Sprache der zeitgenössischen mundartlichen und juristischen Begriffe sowie insbesondere zur Entwicklung von Familien- und Ortsnamen. Umfassende Glossare erschließen die Texte aber nicht nur in sprachhistorischer und namenskundlicher Hinsicht, sondern auch für wirtschafts-, sozial- und rechtshistorisch interessierte Forscher. Die Edition zum Urbar von 1618 enthält noch Übersichten zu den damals bestehenden Zinstypen und Abgabenterminen sowie zu den damals gän-

gigen Münzsorten und Maßeinheiten. In Verbindung mit der geographischen Einordnung der Orte und Städte in den historischen Kontext der politischen und kulturellen Entwicklung dieses Raums bietet der vorliegende Band außerdem reichhaltiges historisches Bildmaterial und graphische Übersichten.

Urbare stellen als Quellengattung unter dem frühneuzeitlichen Archivgut des mährisch-schlesischen Raums eine dominante Textsorte dar. Sie enthalten mehr als bloße Verzeichnisse des Güterbestandes der betreffenden Herrschaften, sie geben auch ein Abbild der Wirtschaftsorganisation inklusive der ihr zugeordneten Handwerks- und Gewerbebetriebe und informieren detailliert über die Rechtsverhältnisse der Grunduntertanen, insbesondere über ihre Abgaben- und Dienstpflichten den Grundherrn gegenüber. Durch ihre Gegenüberstellung ermöglichen die beiden für Freudenthal/Bruntál vorliegenden Urbare auch Aufschlüsse über die im Verlauf der Zeit (von 1604 bis 1618) erfolgten Umstrukturierungen der grundherrlichen Wirtschafts- und Leistungsverwaltung. Die Auswertung von Urbaren ist mühevoll, sie verspricht aber einen reichen Erkenntnisgewinn, vor allem für sprachwissenschaftliche Fragestellungen. Die vorliegenden Editionen stellen der historischen Sprachforschung, und insbesondere der Mundartforschung, weiteres reichhaltiges Reservoir an Informationen aus der Zeit der sich entwickelnden neuhochdeutschen Schriftsprache in einem überschaubaren deutsch-westslawischen Kontaktgebiet zur Verfügung. Ihre Auswertung ist aber auch für Fragstellungen von anderen Disziplinen der historischen Forschung nutzbringend, und zwar nicht nur für die Kultur-, Sozial- und Wirtschaftsgeschichte, sondern vor allem auch für die Rechtsgeschichte dieses Mikroareals im Verlauf der frühen Neuzeit.

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Bernd Rüthers

Die unbegrenzte Auslegung

8. unveränderte, um ein neues Nachwort verlängerte Auflage.

Tübingen: Mohr Siebeck, 2017, 550 S., ISBN 978-3-16-155445-2

50 Jahre nach dem Erscheinen des Buches des bekannten Kritikers des NS-Rechts erscheint dessen 8. Auflage, da die Nachfrage nach diesem Standardwerk ungebrochen ist. Zunächst untersucht der Autor das Privatrecht, wie es im NS-Staat umgestaltet wurde. Dabei greift er weit zurück, um die großen Unterschiede zwischen der herkömmlichen Rechtsordnung und der neuen Ordnung im Sinne der Machthaber aufzuzeigen. Dabei erörtert der Autor vor allem die Eckpunkte, an denen neue Tendenzen am ehesten Eingang in die herkömmliche Rechtsordnung finden. Das waren für die Zeit vor 1933, also in der Zeit der unbeschränkten Geltung des BGB, die Institute der Unzumutbarkeit im Rechtsgeschäft, ferner die Formel Wegfall der Geschäftsgrundlage (*clausula rebus sic stantibus*), also das Hinfällig-Werden eines Rechtsgeschäfts wegen veränderter Umstände, eine Formel, die es in Ausnahmefällen erlaubt, von dem allgemeinen Prinzip, dass Verträge einzuhalten sind, abzugehen.

Anschauungsmaterial für die Anwendung dieser Grundsätze boten die Zeitläufte in der Weimarer Republik in Hülle und Fülle: Inflation, Weltwirtschaftskrise etc. Die Gerichte praktizierten damals die richterliche Korrektur des Gesetzes infolge wirtschaftlicher Umstände. Höhepunkt dieser Korrektur war das sog. Aufwertungsurteil des Reichsgerichts von 1923. Es ging um die Frage, ob Schulden, die vor der Inflation entstanden waren, nun mit wertlosem Papiergeld beglichen werden konnten, oder ob der ursprüngliche Wert vor der Inflation zugrunde zu legen war. Das Gericht argumentierte: Wenn die Schuld mit wertlosem Papiergeld der Inflation bezahlt werden könnte, würden die Gläubiger um den ursprünglichen Wert ihrer Forderung geprellt werden. Das war nicht zulässig. Es war der frühere Wert vor der Inflation als Maßstab heranzuziehen. Die Schuld wurde an den veränderten Geldwert zum Schutz der Gläubiger angepasst.

Diese Korrektur stand im Gegensatz zum damals herrschenden Rechtspositivismus, wonach nur der *Gesetzeswortlaut* gilt, unabhängig vom Willen des Gesetzgebers und den Zeitläuften.

Die Berücksichtigung von Umständen jenseits des Gesetzeswortlautes, die im Aufwertungsurteil sanktioniert wurden, erleichterte dann das Eindringen normfremder Faktoren (also politische und andere Faktoren) in die Rechtsordnung. Der Autor erläutert, wie sich die Politik, d.h. die NS-Ideologie nach 1933 als normfremdes Element auf die Rechtssetzung und ihre Methoden auswirkte, was sich natürlich in einer veränderten Rechtspraxis niederschlug. Im Mittelpunkt standen die Generalklauseln des BGB, wie z.B. gute Sitten, Treu und Glauben etc., die nun einen gänzlich anderen Inhalt erhielten. So wurden diese Klauseln z.B. im Sinne des Rassenprinzips interpretiert, was sich z.B. verhängnisvoll für die Frage der Arbeitsverträge mit jüdischen Vertragspartnern auswirkte, deren Kündigung mit dem Hinweis auf das Rassenprinzip gerechtfertigt wurde. Auch die Grundbegriffe des bürgerlichen Rechts unterlagen tiefgreifenden Änderungen, z.B. die Rechtsfähigkeit, das subjektive Recht, Eigentum, Vertragsrecht, Ehe, Familie, etc. Nach den NS-Vorstellungen sollten diese Institute künftig die Maßstäbe für die Auslegung des Rechts sein. Man nannte dies

konkrete Lebensordnungen (Carl Schmitt). Die Lehre versuchte, historische Vorbilder für die Auslegungskriterien zu finden und berief sich u.a. auf Thomas Hobbes, Fr. Carl von Savigny bis hin zu Hegel und J.G. Herder, Versuche, die natürlich nicht überzeugend waren.

Der Rassegedanke als oberster „Verfassungsgrundsatz" sollte nach dem Willen der Machthaber nun auch im Zivilrecht gelten. Es wurde ein riesiger dogmatischer Aufwand getrieben, dem bürgerlichen Recht (BGB) dieses neue Prinzip aufzupfropfen. Das war aber völlig nutzlos, wie der Autor beschreibt, da die Rechtslehre des NS viel zu unbestimmt war und als einzigen Anhaltspunkt nur Art 19 des NSDAP-Programms von 1920 hatte, wonach das Römische Recht durch ein „Deutsches Gemeinrecht" ersetzt werden sollte.

Dass man mit diesen Leerformeln nichts anfangen konnte, scheinen auch die Rechtsprofessoren erkannt zu haben. Ab Mitte der 1930er Jahre gingen die Diskussionen um ein neues deutsches Recht zurück, die Pläne für eine grundlegende Reform versandeten, „ein Abschied vom BGB" fand nicht statt. Hitler misstraute grundsätzlich allen Juristen und ihren Projekten. Die Aversion des hitlerhörigen Machtapparats hemmte alle Reformbemühungen.

Hier noch einige Beispiele für die neue Deutung der grundlegenden Rechtsinstitute des bürgerlichen Rechts, die durch die NS-Ideologie verfälscht wurden. Rechtsfähig war an sich nach § 1 BGB jeder geborene Mensch. In der NS-Lesart verlieh nur das „konkrete Glied-Sein einer Gemeinschaft" die Rechtsfähigkeit (K. Larenz). In der Juristensprache verwendete man statt des „Rassenprinzips" das „Prinzip der Volksgemeinschaft" (Anmerkung der Rezensentin). Subjektive Rechte hat nach dem Rassenprinzip nicht das Individuum als solches, sondern nur der „gemeinschaftsgebundene" Mensch. Nur er war „Volksgenosse", und nur er war zugleich „Rechtsgenosse", also Inhaber von Rechten und Pflichten. Dieses Eindringen des Rassenbegriffs wirkte sich als Ausschluss der Juden von der Rechtsgemeinschaft aus, da diese keine „Volksgenossen" waren. Ähnlich gravierend waren die Einwirkungen der NS-Ideologie im Eigentumsbegriff: Es hieß jetzt „Gemeinnutz geht vor Eigennutz" (was schon auf den Münzen der Weimarer Republik geprägt war). Daher müsse die absolute Gewalt des Eigentümers über eine Sache, die im bürgerlichen Recht verankert ist und aus dem Römischen Recht stamme, im Sinne der NS-Ideologie neu interpretiert werden. Ähnlich weitgehende Einschränkungen erfuhr das Bürgerliche Recht durch das Rassenprinzip im Vertragsbegriff und im Arbeitsrecht. Mit diesem Begriff wurde die fristlose Kündigung von Personal in der öffentlichen Hand (Kliniken, Theater, Orchester etc.) gerechtfertigt, da die Eigenschaft als Jude eine umgehende Auflösung des Vertrags rechtfertige. Für Beamte ergingen besondere Regelungen wie das sog. Berufsbeamtengesetz vom 7. April 1933, nach dem jüdische Beamte zu entlassen waren.

Ein besonders eklatanter Fall ist der sog. Charrell-Fall des Reichsgerichts von 1935: Das Gericht erklärte die Kündigung eines Vertrags zwischen der Filmgesellschaft UFA und dem Regisseur E. Charrell (Nach dem Vertrag sollte Charrell den Film „Odysseus" nach einer Romanvorlage herstellen.) aus dem Jahr 1928 für zulässig, weil Charrell Jude sei. Der Anbruch einer neuen Zeit nach 1933 sei vergleichbar dem Eintritt in ein Kloster im Mittelalter, mit dem der Betroffene alle weltlichen Rechte aufgebe („bürgerlicher Tod"[!]).

Im herkömmlichen Familienrecht gab es ebenfalls Umdeutungen. Vor 1933 war u.a. die Scheidung zulässig wegen eheschädlicher „Eigenschaften eines Ehepartners", die dem Ehegatten zum Zeitpunkt der Heirat nicht bekannt waren. Die Abstammung gehörte nicht zu diesen eheschädlichen Eigenschaften. Diese Klausel wurde im NS-Staat in der Weise verfälscht, dass die *Bedeutung* der Rassenfrage vor 1933 eine völlig andere gewesen sei, während sie „heute" eine maßgebliche Rolle spiele. Dies war vor allem für deutsch-jüdische Ehen verhängnisvoll. Denn für den geschiedenen jüdischen Ehegatten bedeutete die Scheidung oft Isolation, Deportation, ja den Tod, während bei Fortbestand dieser sog. Mischehen der jüdische Ehegatte immerhin einen beschränkten Schutz genoss.

Es war augenfällig: Im NS-Staat war die dienende Funktion des Rechts, so der Autor, abhängig von den politischen Gegebenheiten. Der Einbruch der NS-Ideologie war leicht. NS-Staat war ein Willkürstaat, die Rechtswissenschaft war hilflos. Diese wurde nur als „Kampfinstrument" zur Durchsetzung der NS-Weltanschauung betrachtet, vor allem das absolute Führerprinzip und das Rassenprinzip. Hitler sagte 1937: Das letzte Recht liegt immer in der Macht (Picker, Tischgespräche 1942). Juristen seien dem Verbrecher ähnlich. Das individuelle Einzelfalldenken widerstrebte seiner Weltsicht.

Die Auslegung des Rechts und ihre Methoden waren damals immer Machtfragen, so der Autor. Sie erfolgte durch die „Einlegung" der NS-Ideologie in das Recht (auch heute bieten die Generalklauseln des Bürgerlichen Rechts, die Möglichkeit, den „Zeitgeist" zu berücksichtigen, Anm. d. Rez.). Carl Schmitt sagte: „Alles Recht muss allein vom NS-Recht beherrscht werden." Die Generalklauseln enthielten nach dieser Auffassung ihre Inhalte allein durch das „gesunde Volksempfinden", d.h. durch die NS-Weltanschauung. So urteilten das Reichsgericht und auch die anderen obersten Gerichte, wie das Reichsarbeitsgericht und auch der Reichsfinanzhof.

In der Rechtspraxis dürfte die Judikatur sich allerdings bei der Rechtsauslegung weitgehend im traditionellen Sinne bewegt haben, denn die Einbindung der NS Ideologie in die Normen setzte den innerlich überzeugten NS-Richter (der sich mit der rechtsfremden Ideologie identifizierte) voraus, was sicherlich nicht zutraf. Ein Indiz dafür ist, dass der Autor weitgehend Urteile der obersten Reichsgerichte zitiert, die Urteile unterer und mittlerer Instanzen aufhoben, welche die korrekte Anwendung des Rechts praktiziert hatten. Z.B. hatten untere Gerichte in durchaus korrekter Anwendung des Rechts die Kündigung von jüdischen Angestellten wegen des Rassenprinzips für unzulässig erklärt, da dies dem Arbeitsrecht widerspreche.

Im Nachwort zur 8. Auflage erklärt der Autor den schwierigen Weg seiner Studie. Diese war eine Art Tabubruch, vor allem weil er auch die Fortsetzung vieler Karrieren von Zivilrechtlern an den juristischen Fakultäten nach 1945 schildert, die schon im Dritten

Reich tätig waren. Der Autor galt in der juristischen Zunft als Paria, während die Arbeit sich in der juristischen „Gemeinde" von Anfang an steter Nachfrage erfreute. Die Arbeit erschien 1967, und bereits 1972 war die erste Auflage vergriffen. Die Nachfrage dauert bis heute an, wie die 8. Auflage zeigt.

Beweis für die anfängliche Verfemtheit des Autors waren seine erfolglosen Bewerbungen an den Universitäten Köln und Göttingen. 1967 erhielt er einen Lehrstuhl an der FU-Berlin. 1972 wurde er nach Konstanz berufen, wo er bis 1998 wirkte.

Das Buch weist über die deutsche Rechtsordnung hinaus. Während des Zweiten Weltkriegs fand das NS-Denken im besetzten Europa Eingang und damit auch dessen Ideologie und sein Rechtsverständnis, das Rüthers so gut schildert, wie bereits ausgeführt wurde. Insofern ist seine Studie für Recht und Rechtsphilosophie und deren Geschichte über den nationalen Rahmen hinausgehend auch für das Rechtsverständnis in Europa wichtig. Rüthers schildert ja auch die heutige Entwicklung. Für das im Folgenden erläuterte „Richterrecht" bietet insbesondere der Europäische Gerichtshof viele Beispiele.

Der Autor schließt mit der zutreffenden Feststellung, dass die „abenteuerliche Auslegungsakrobatik" des NS-Rechts durch willfährige Juristen zum Niedergang und zur Korruption des Rechts geführt hatten und nur eine ethische Fundierung des Rechts dieses vor dem Untergang bewahren könne. Das Buch besticht durch seine zeitübergreifende Betrachtung, weil er auch zu der Rechtsauslegung nach 1945 Stellung nimmt. So kritisiert er die heutige Rechtsprechung der obersten Bundesgerichte, die Richterrecht anstelle von Gesetzesanwendung praktizierten. Das Gesetz sei nicht mehr eine Schranke richterlicher Tätigkeit, wie es die Gewaltenteilung erfordere, sondern die Gerichte interpretierten ihre Auffassung in das Gesetz hinein, ohne sich an den Wortlaut gebunden zu fühlen. Dies gelte vor allem für die Auslegung des Grundgesetzes durch das Bundesverfassungsgericht, das vieles aus der Verfassung herauslese, was sich mit den herkömmlichen Auslegungsmethoden nicht ergebe. Also Richterstaat statt Gesetzesstaat, so der Autor. Der Autor vermittelt tiefe Einblicke in die Grundlagen des Rechts und der Rechtsauslegung. Das macht das Buch lesenswert.

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Peter Landau

Deutsche Rechtsgeschichte im Kontext Europas. Vierzig Aufsätze in vier Jahrzehnten

Badenweiler: Wissenschaftlicher Verlag Bachmann, 2016, 1050 S., ISBN 978-3-940523-14-3

Peter Landau ist einer der bekanntesten Rechtshistoriker und ein hervorragender Kenner des Kirchenrechts. Seine Schwerpunkte sind das Kirchenrecht des Mittelalters sowie das evangelische Kirchenrecht.

Weitere Schwerpunkte sind die Rechts- und Staatsphilosophie sowie die Rechtsgeschichte des Mittelalters. Weitere Arbeiten befassen sich mit der Frühen Neuzeit und der Rechtsgeschichte des 19. und 20. Jahrhunderts. Peter Landau hat zahlreiche Ehrentitel erhalten, so die Ehrendoktorwürde des Kanonistischen Instituts der Universität München und die Ehrendoktorwürde der Universitäten Basel und Paris. Er ist Träger der bayerischen Verfassungsmedaille in Silber. Seine Biographie spiegelt die Breite seiner Forschungsfelder wider.

Geboren 1935, studierte er Philosophie und Geschichte in Bonn. Es folgten das Studium der Rechtswissenschaft und Assistentenjahre ab 1966. 1969 wurde er Ordinarius für Rechtsgeschichte in Regensburg. 1987 bis 1993 lehrte er an der Universität München. Viele Gastaufenthalte in Großbritannien und den USA zeigen das internationale Ansehen des Autors. Seine Bibliographie offenbart ein wahrhaft enzyklopädisches Wissen, ihre Aufzählung in dem vorliegenden Band umfasst allein 41 Seiten.

Die zahlreichen Forschungsfelder und der Umfang des Schaffens des Autors müssen auf dem Hintergrund der universitären Reformen seit Ende der 1960er und Anfang der 1970er Jahre gesehen werden, als zahlreiche Hochschulen und Institute neu gegründet wurden, was auch der Rechtsgeschichte zugute kam. Der Autor hatte, wie andere damals an diese Neugründungen berufene Wissenschaftler, das Glück, sich, ausgestattet mit reichlich Sach- und Personalmitteln, intensiv seinen Spezialfächern widmen zu können. Heute fristet die Rechtsgeschichte, da sie nach der gegenwärtig praktizierten ökonomischen „Theorie" nicht unmittelbar „verwertbar" ist, nur noch ein kärgliches Dasein als Teil eines Wahlfachkorbes für das I. juristische Staatsexamen in Deutschland.

Die vierzig Aufsätze des Sammelbands umfassen neben Spezialthemen des kanonischen Rechts zahlreiche Themen der Rechtsgeschichte, die üblicherweise nicht im Fokus der wissenschaftlichen Diskussion stehen.

Die Aufsätze zeichnet eine große Klarheit aus, sodass sie auch für den rechtshistorischen Laien gut zu lesen sind. Am Ende jeden Beitrags steht eine Zusammenfassung und die Nennung der Erstveröffentlichung. Darauf folgt ein Zusatz (Addenda), der den neuesten Forschungsstand wiedergibt, da viele Beiträge bereits Jahre zuvor erstveröffentlicht wurden. Die folgenden Stichworte mögen zur Beleuchtung der vielen Forschungsgebiete des Autors beitragen:

In einem Beitrag zum bayerischen Recht erläutert der Autor die Entstehung dieser spezifischen Rechtskultur, die das Werk gelehrter Kleriker aus Regensburg war und sich vor allem mit der Stellung des Herrschers (Herzog) befasst. Ein anderer Bei-

trag untersucht die Entstehung des öffentlichen Strafanspruchs in der Rechtswissenschaft des 12. Jahrhunderts. Er war Teil eines damals entstehenden Jus Commune (Gemeinrecht), das aus der Rezeption des Römischen Rechts in den Rechtsschulen von Bologna erwachsen ist. Der Strafanspruch des Staates, d.h. der Fürsten und des Kaisers, betraf vor allem die „hohe Gerichtsbarkeit", also die Ahndung von Verbrechen gegen Leib und Leben, während die „niedere Gerichtsbarkeit" bis ins 19. Jahrhundert hinein den Grundherren bzw. den Magistraten der Städte oblag. Der Beitrag „der Prozess Heinrich des Löwen", in dem der Welfenfürst beim kaiserlichen Gericht angeklagt wurde (1180), schildert die Lehnsverhältnisse zwischen Lehnsmann und Lehnsherrn. Heinrich der Löwe wurde angeklagt wegen Wegnahme von Kirchengut und Adelsbesitz. Da er trotz dreimaliger Ladung nicht beim Gericht erschienen war, wurde er vom Kaiser in Acht und Bann getan und seiner Ländereien für verlustig erklärt. Ein weiterer Beitrag beleuchtet die Einflüsse des Römischen Rechts, das im 12. und 13 Jahrhundert in Italien rezipiert wurde und als Jus Commune jahrhundertelange Geltung hatte. Es galt subsidiär als Gewohnheitsrecht, wenn es partikulares Recht nicht gab oder dieses nicht anwendbar war. Es gab also schon damals ein gemeinsames europäisches Recht, das in den europäischen Ländern, wenngleich nur subsidiär, praktiziert wurde. In Beiträgen zum „Sachsenspiegel" und zum „Schwabenspiegel" wird die Wahl des Herrschers beschrieben: zuerst Volkswahl nach germanischem Recht, dann Königswahl durch die sieben Kurfürsten des Reiches. Ein Beitrag zu „Recht als Lebensrealität im Mittelalter" schildert die Landrechte der Fürsten im „Alten Reich", die sich aus Landesgesetzen, Stadtrechten und Gewohnheitsrecht zusammensetzten. Die Rechtsetzung durch den Herrscher wurde als Verkörperung der christlichen Kultur angesehen, die man als Suche zu Gerechtigkeit und Frieden sah. Dafür hatte der Fürst zu sorgen, da ohne Gerechtigkeit die Staaten „nichts als große Räuberbanden" (Augustinus) seien.

Ein weiterer Beitrag widmet sich Goethes verlorengegangener juristischer Dissertation, die 1771 von der Universität Straßburg abgelehnt worden war. Der Text behandelte die Probleme der Glaubensfreiheit in der Zeit der Aufklärung (die Ablehnung erfolgte vermutlich wegen der damals in Frankreich [Straßburg gehörte damals schon zu Frankreich] herrschenden Zensur). Das Rechtsverständnis der Fürsten zeigt der Autor am Beispiel der Vormundschaft. Sie war ein Rechtsprinzip, das bis Ende des 19. Jahrhunderts in ganz Europa galt. Die Vormundschaft verkörperte Schutz und Fürsorge für die Schutzbefohlenen, insbesondere für Frauen und Kinder. Sie fand auch im Staatsrecht Eingang. Der Fürst wurde als „Hausvater" oder „Landesvater" gesehen, der als guter Vormund durch Handel und Gewerbe für das Wohl der Untertanen zu sorgen hatte.

Zum 200. Jubiläum des Preußischen Allgemeinen Landrechts (ALR) von 1794 wird dessen Aufgabe als Leitschnur für den Alltag geschildert. Die Auslegung des Rechts müsse ein Juristenstand machen, weil, so glaubte man damals, eine Reformgesetzgebung aufgrund des „unzulänglichen Bildungsstand" des Volkes nicht sogleich möglich sei. Es folgt ein Beitrag über die Entstehung der Reichsjustizgesetze von 1879, die die 1871 zustande gekommene deutsche Rechtseinheit verwirklichten. Sie gelten zum Teil (in ihrer jeweiligen aktuellen Fassung) bis heute, z.B. Straf- und Zivilprozessordnung, Gerichtsverfassungsgesetz, Konkursordnung (diese abgelöst durch die Insolvenzordnung seit 1999), was die große Stabilität und Qualität dieser Systeme zeigt.

Abschließend widmet der Autor eine Betrachtung dem Römischen Recht und dem „deutschen Gemeinrecht" und beschreibt hierfür die rechtspolitische Zielsetzung im NSDAP-Parteiprogramm von 1920 (Art. 19.: „wir fordern Ersatz für das der materialistischen Weltordnung dienende Römische Recht durch ein deutsches Gemeinrecht"). Das war damals eine Leerformel, die viel Raum für Gesetzgebung und Auslegung ließ. Die Formulierung stammte von einer deutsch-sozialistischen Partei, einem Vorläufer der NSDAP. Die Machthaber forderten vor allem ein Revision des Eigentumsbegriffs, der zu individualistisch sei und aus dem Römischen Recht stamme. Man müsse stattdessen ein neues, aus dem Germanentum geschöpftes Gemeinschaftsrecht schaffen. Im Rahmen dieses Grundsatzes stellt der Autor fest, dass die Beiträge der Juristen unter dem Einfluss der Rassenideologie das Recht vulgarisierten und verzerrten. Sie trugen damit erheblich zur Legitimierung der Rassenlehre bei. Die Belohnung ließ nicht auf sich warten: Es wurden zahlreiche Institute neugegründet oder erweitert, die die Zusammenhänge von Rasse und Recht untersuchen sollten.

Im letzten Beitrag: „Die deutschen Juristen und der NS-Juristentag in Leipzig am 1. 10. 1933" widmet sich der Autor dem propagandistischen Aufwand, den das NS-Regime trieb, um die Juristen für sich zu gewinnen. Die Veranstaltung vermittelte den 20.000 Teilnehmern einen „überwältigenden Eindruck", wie es damals berichtet wurde. Die Redner überboten sich in antisemitischen Ausfällen und Attacken gegen den Liberalismus. Die Juden seien eine dämonische Macht im deutschen Rechtswesen, so ein Redner. Dies war, so der Autor, eine „geistige Kapitulation des deutschen Juristenstandes" gegenüber dem neuen Regime. Die Redner, so Landau, vermittelten den Eindruck, dass der neue Staat „eine irgendwie geartete rechtsstaatliche Struktur haben werde". Die Rechtslehrer hätten sich der Ideologie von oben bereitwillig angepasst. Es ist naheliegend, dass diese Anpassung aus Karrieregründen erfolgte, wobei offen bleiben muss, ob ihr auch eine NS-Überzeugung zugrunde lag oder ob diese nur rein äußerlich war.

Fazit: Das Werk ist eine Materialsammlung zum Nachschlagen, die dem rechtshistorisch versierten Leser viele Details der europäischen und deutschen Rechtsgeschichte vermittelt, und das zugleich ein Zeugnis für ein ungewöhnlich reiches, ja sogar einzigartiges Forscherleben ist.

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João Nuno Pereira – Jochen Zenthöfer

Einführung in das luxemburgische Recht

München: C.H. Beck, 2017, 223+XX S., ISBN 978-3-406-69539-1

Es gibt viele Gründe, das Erscheinen dieses Buches zu loben. Der wohl wichtigste Aspekt ist, dass bislang kein systematischer Überblick zum luxemburgischen Recht in deutscher Sprache erhältlich war. Die JuS-Schriftenreihe, die bereits viele Übersichtsdarstellungen zu ausländischen Rechtsordnungen verzeichnet, wird somit um ein weiteres Landesrecht erweitert, welches historisch bedingt bis heute von der französischen Rechtstradition und Rechtssprache geprägt ist. Allerdings kann auch die deutsche Sprache in Justiz und Verwaltung verwendet werden und nicht zuletzt haben gerade viele germanophone Bürger, Arbeitnehmer sowie Unternehmer ein Interesse, zum luxemburgischen Recht in deutscher Sprache Zugang zu erhalten. Die Autoren Pereira und Zenthöfer, der eine Rechtsanwalt, der andere Wirtschaftspublizist in Luxemburg, stellen in der Einführung die besondere Gemengelage des luxemburgischen Rechts dar, ohne die damit verbundenen Mängel zu verschweigen. Im Kapitel „Sprache, Rechtsquellen, Rechtsetzung" sparen sie Rechtsgeschichte und -sprache nicht aus, beleuchten die Rechtsquellen, ehe sie zum Rechtsetzungsprozess und den Quellen informieren.

Ein weiterer Abschnitt beschäftigt sich mit Juristenausbildung, Gerichtsverfassung und Rechtswissenschaft. Besonders betont wird die Mediation als Form der außergerichtlichen Streitbeilegung; hierzu existiert das von der luxemburgischen Chambre de commerce eingerichtete und wegen seiner Praxiswichtigkeit erwähnenswerte *Centre de médiation civile et commerciale*. Der Rezensent [1] hat sich selbst eingehend mit „Mediation und Translation im Recht des Geistigen Eigentums" und der damit verbundenen Wirtschaftsmediation in Luxemburg und Deutschland beschäftigt. Das Buch (Nomos: Baden-Baden 2015 [2]) ist entstanden im Rahmen seines Forschungsbereichs zum Geistigen Eigentum: Grundlagen und Anwendungen, der an der Hochschule der luxemburgischen Wirtschaft, dem Institut Supérieur de l'Economie (kurz ISEC Université), beheimatet ist. Als von der Chambre de commerce und der Chambre des métiers getragener Ausbildungs- und Forschungsstandort in Luxemburg und eine der größten privaten Universitäten im Großherzogtum hätte ISEC neben sicherlich weiteren Hochschulen erwähnt werden müssen (in Ergänzung zu den S. 38-40).

Von hohem Interesse sind unterdessen die Kapitel zum Verfassungs- und Verwaltungsrecht, dem Datenschutzrecht ist sogar ein eigener § 6 gewidmet. Zwar ist dieser Bereich wegen des Europarechts nicht „spezifisch luxemburgisch", doch nutzen ihn die Verfasser geschickt, hier einige „Affären" wie Médicoleak, Geheimdienst oder auch Amazon zu präsentieren. Straf- und Strafverfahrensrecht nehmen leider, obwohl praxisnah, kaum 15 Seiten ein. Die relevanten Teile des Code civil werden dem Leser sodann anschaulich nahegebracht und nach Vertrags-, Delikts-, Sachen- sowie Familien- und Erbrecht aufgefaltet. In beiden letzten Gebieten hätten Unterschiede zum deutschen Recht gut herausstechen können; nehmen wir hier nur beispielgebend die Themen Patientenverfügung und Vorsorgevollmacht sowie die Testamentserrichtung.

Das Großherzogtum kennt kein privatrechtliches Vorsorgeinstrument, das mit der deutschen Vorsorgevollmacht gleichzusetzen ist. Für die Einrichtung gesetzlicher Betreuungen zuständig zeichnen in Luxemburg die Vormundschaftsgerichte, die eine Betreuung als gesetzliche Stellvertretung beschließen. Was heißt dies? Der Richter ernennt einen Betreuer, der für alle in Frage kommenden Angelegenheiten eingesetzt wird und dessen Kontrolle wiederum durch das Vormundschaftsgericht garantiert wird. Diesem Gericht ist der Betreuer jährlich zur Rechnungslegung verpflichtet.

Die Patientenverfügung ist in Luxemburg ausführlich geregelt und unterscheidet sich durch die Möglichkeit der Sterbehilfe bzw. des assistierten Suizids erheblich von der Rechtslage in Deutschland – dies sieht ein Gesetz vor, das bereits seit März 2009 in Luxemburg gilt.[3] Besondere Formerfordernisse gelten gerade dann, wenn in der Patientenverfügung (auch) Bestimmungen zum Lebensende enthalten sind – das Gesetz spricht hier von Euthanasie, also Sterbehilfe. Die Verfügung dazu muss ebenfalls schriftlich abgefasst sein und von dem Betroffenen datiert und unterschrieben sein. Wenn der Betroffene dauerhaft aufgrund seines Gesundheitszustandes nicht zur eigenen Abfassung und Unterzeichnung in der Lage ist, kann die Verfügung von einem Dritten (Vertrauensperson) geschrieben werden. Erforderlich dafür sind zwei Zeugen. Des Weiteren muss in der Verfügung eine Begründung angegeben werden, warum der Betroffene nicht selbst dazu in der Lage ist, diese zu verfassen. Weiterhin ist in einem solchen Fall ein ärztliches Attest erforderlich, mit welchem die dauerhafte Unfähigkeit des Betroffenen, die Verfügung selbst zu schreiben und zu unterzeichnen, bestätigt wird. Die Registrierung der Verfügung mit Bestimmungen zum Lebensende erfolgt bei der „Commis-

[1] https://www.fries-herrmann.de/kanzlei/prof-dr-dr-thomas-gergen/
https://en.business-science-institute.com/professors/thomas-gergen/ [beide Seiten vom 15. 02. 2019].

[2] https://ipil.lu/wp-content/uploads/2015/10/FLYER_Gergen_2330-0.pdf [15. 02. 2019].

[3] Überblick bei http://sante.public.lu/fr/publications/e/euthanasie-assistance-suicide-questions-reponses-fr-de-pten/euthanasie-assistance-suicide-questions-fr.pdf sowie bei der Kester-Haeusler-Stiftung, Fürstenfeldbruck, und dem dortigen Forschungsinstitut zum internationalen Betreuungsrecht http://www.internationales-betreuungsrecht.de/category/luxemburg [1. 10. 2018].

sion Nationale de Contrôle et d'Evaluation" (Art. 4 Abs. 2 Sterbehilfegesetz, Gesetz vom 13. März 2009). In der Verfügung können die Umstände und Bedingungen festgelegt werden, wann Sterbehilfe erteilt werden soll, wenn ärztlich festgestellt wurde, dass der Betroffene an einer schweren und unheilbaren Verletzung oder Krankheit leidet, er nicht bei Bewusstsein ist und diese Situation nach dem aktuellen Stand der Wissenschaft unumkehrbar ist. Grundsätzlich ist jeder Arzt, der einen sterbenden oder sich in einer medizinisch unumkehrbaren Situation befindenden Betroffenen behandelt, dazu verpflichtet, sich bei der „Commission Nationale de Contrôle et d'Evaluation" darüber zu erkundigen, ob eine Verfügung für den Betroffenen vorliegt und registriert wurde. Es gibt keine Regelung wie § 161 deutsches VVG oder Art. 15 des belgischen Euthanasie-Gesetzes im Hinblick auf Versicherungen. Das belgische Recht stellt bezüglich der Versicherungen den legalisierten Suizid dem natürlichen Tod gleich. Es wird kritisiert[4], dass der luxemburgische Gesetzgeber dem nicht gefolgt ist, sondern der Versicherer beweisen muss, dass es sich um Suizid oder Betrug (fraude) handelt. Die Praxis folgt, wie oftmals auch, inzwischen dem belgischen Modell.

Und für die grenzüberschreitende Erbrechtspraxis von Belang: Wie in den meisten romanischen Rechtsordnungen (v.a. Frankreich, Italien, Spanien, Portugal) sind auch in Luxemburg Erbverträge verboten. Es gilt das Verbot, über eine noch nicht angefallene Erbschaft ein Rechtsgeschäft abzuschließen. Darüber hinaus untersagt Luxemburg Erb- und Pflichtteilsverzichte oder den Erbschafts(ver-)kauf zu Lebzeiten (Artikel 1130 Abs. 2 Code civil). Beachte: Die französische Rechtssprache spricht stets von „vente" (Verkauf), die deutsche rückt den „Kauf" in den Vordergrund.

Zulässig sind indes Vereinbarungen, die in Form einer „institution contractuelle" getroffen werden. Dabei handelt es sich um ein Versprechen zwischen Ehegatten oder eines Dritten gegenüber Ehegatten oder deren Kinder, dem Versprechensempfänger im Todesfall das ganze oder einen Teil des Vermögens zu hinterlassen. Zuwendungen dieser Art werden Verfügungen durch Eheverträge zugerechnet und unterliegen deswegen nicht den erbrechtlichen Vorgaben.

Schlägt der Begünstigte bei Anfall der Schenkung aus, wird diese nicht auf die testamentarisch frei verfügbare Quote angerechnet. Jedoch können sich Ehegatten, sofern Kinder vorhanden sind, nur unter Beachtung der Noterbrechte der Kinder gegenseitig bedenken. Eine „institution contractuelle", die zwischen Ehegatten während einer bestehenden Ehe abgeschlossen wird, ist jederzeit frei widerruflich; dagegen bewirkt eine Vereinbarung, die vor Eheschließung oder von Dritten vorgenommen wird, ein Verbot, zu Lebzeiten anderweitig unentgeltlich über den verschenkten Gegenstand zu verfügen.

Verboten sind nach luxemburgischem Recht gemeinschaftliche Testamente. Die luxemburgische Rechtsprechung sieht indes in diesem Verbot wohl überwiegend *eine reine Formvorschrift*, weswegen ausländische gemeinschaftliche Testamente unter Umständen dennoch anerkannt werden können. Dasselbe gilt für das deutsche Berliner Testament. Sofern keine wechselseitige Bindungswirkung bezweckt ist, können wohl auch nach luxemburgischem Recht zwei voneinander unabhängige Testamente in einer Urkunde zusammengefasst werden.

Als zulässige Form letztwilliger Verfügungen von Todes wegen ist im luxemburgischen Recht nur das Testament bekannt. Dieses kann handschriftlich, öffentlich oder als geheimes Testament errichtet werden. Daneben gibt es noch Sondervorschriften falls der Erblasser weder lesen noch schreiben kann oder z.B. für See- und Militärtestamente, die aber wenig bedeutsam sind.

Ein handschriftliches Testament erlangt Wirksamkeit, wenn es vom Erblasser eigenhändig geschrieben, unterschrieben und datiert wird. Das Datum ist mit Tag, Monat und Jahr der Errichtung anzugeben. Ein falsches Datum kann ebenso wie ein fehlendes Datum zur Nichtigkeit des Testamentes führen. Dagegen ist der Errichtungsort nicht notwendig mit anzugeben. Maschinenschriftliche Einfügungen oder Einfügungen durch fremde Hand führen gleichfalls zur Unwirksamkeit des Testaments.

Nach Art. 971 Code civil ist das öffentliche Testament entweder vor zwei Notaren oder vor einem Notar in Gegenwart von zwei Zeugen zu errichten. Die Zeugen dürfen weder mit dem Erblasser verwandt oder verschwägert noch dessen Ehegatten, Angestellte oder Hauspersonal sein. Der Erblasser diktiert seinen letzten Willen zur Niederschrift der Notare. Das Testament ist anschließend vorzulesen und von allen Anwesenden zu unterschreiben, wobei die Einhaltung dieser Förmlichkeiten in der Urkunde zu vermerken ist.

Bei einem geheimen Testament kann der Erblasser oder ein Dritter ein Testament verfassen, das vom Erblasser anschließend in einem verschlossenen, gesiegelten und gestempelten Umschlag dem Notar zu übergeben ist. Auch hier ist entweder die Anwesenheit von zwei weiteren Zeugen oder von zwei Notaren erforderlich. Bei der Übergabe versichert der Erblasser, dass es sich um sein Testament handelt, in welcher Form (hand- oder maschinenschriftlich) dieses verfasst ist und dass er, sofern die Niederschrift durch einen Dritten erfolgte, den Wortlaut überprüft hat. Das geheime Testament wird vom Notar verwahrt. Dadurch ist eine Ersetzung oder Fälschung ausgeschlossen. Da das geheime Testament beim Notar hinterlegt wird, ist außerdem sichergestellt, dass es nach dem Tod des Testierenden aufgefunden wird.

Die Tatsache, dass der Notar sofort nach Erhalt des geheimen Testaments die Übergabe bestätigt, bedeutet jedoch nicht, dass das Testament auch gültig ist. Ganz im Gegenteil kann das geheime Testament, selbst wenn es entsprechend den einschlägigen Formvorschriften ordnungsgemäß errichtet und hinterlegt wurde, aufgrund eines inhaltlichen Mangels für ungültig erklärt werden. Da das geheime Testament dem beurkundenden Notar in einem verschlossenen, versiegelten und gestempelten Umschlag übergeben wird, ist eine Gewährleistung der inhaltlichen Gültigkeit der in Frage stehenden letztwilligen Verfügung von Seiten des Notars gar nicht möglich. Daher verwundert es nicht, dass die Form des geheimen Testaments in Luxemburg zur Errichtung einer letztwilligen Verfügung nur selten gewählt wird.

[4] Siehe den Kommentar von Nicolas Henckes auf legitech: https://www.legitech.lu/newsroom/articles/les-dispositions-de-fin-de-vie-sont-elles-compatibles-avec-une-assurance-vie/ [1. 10. 2018].

In Luxemburg müssen bzw. können die wesentlichen Angaben bestimmter Testamente in das Testamentsregister eingetragen werden. Die Eintragung ist für notarielle Testamente sowie für geheime bzw. eigenhändige Testamente, die einem Notar zur Hinterlegung anvertraut werden, verpflichtend. Gleiches gilt auch für die Rücknahme, den Widerruf und alle sonstigen Änderungen, die an diesen Testamenten vorgenommen werden. Bei eigenhändigen Testamenten, die im Besitz einer Privatperson sind, ist die Eintragung in das Register fakultativ.

Weder das Testament selbst noch dessen Inhalt werden in das Register eingetragen. Die Eintragung enthält ausschließlich folgende Angaben: Name und Vorname des Testierenden sowie gegebenenfalls von dessen Ehegatten, Geburtsdatum und -ort, Personalausweisnummer, Beruf und Wohnanschrift des Testierenden, Art der einzutragenden Urkunde mit Datum, Name und Anschrift des Notars, der die Urkunde errichtet hat bzw. bei dem diese hinterlegt wurde, oder, im Falle eines eigenhändigen Testaments, gegebenenfalls Name und Anschrift einer anderen Person oder Institution, der das Testament anvertraut wurde, oder Aufbewahrungsort der Urkunde.

Zurecht schenken Pereira/Zenthöfer schließlich dem sich gleichfalls vom deutschen Recht stark unterscheidenden Gesellschafts- wie Insolvenzrecht viel Aufmerksamkeit. Das Investmentrecht greift auf dieses Wissen, aber auch auf das zuvor abgehandelte Steuerrecht zurück. Für luxemburgische Arbeitnehmer sowie für die zahlreichen Grenzgänger bzw. Berufspendler einschlägig ist die Darstellung von Arbeitsrecht und dem Recht der Sozialversicherungen. Etwas „nachklappernd", da wohl eher ins Verwaltungsrecht gehörig, sind die beiden Abschlusskapitel zum Staatsbürger- sowie zum Asyl- und Flüchtlingsrecht. Didaktisch hohen Wert besitzt der Anhang mit einem Urteil eines luxemburgischen Gerichts (hier Arbeitsgericht Diekirch) und einer Klausur zum Strafrecht (jedoch bedauerlicherweise ohne Musterlösung oder wenigstens einer Lösungsskizze, was gerade zu dieser ausbildungsorientierten Schriftenreihe gepasst hätte!). Des Weiteren folgt ein Verzeichnis der Ortsnamen in Luxemburg sowie ein sehr brauchbares Glossar juristischer Fachbegriffe in den drei Sprachen Luxemburgs: Französisch, Deutsch und in der zentralen Mitte als „langue nationale" das Luxemburgische.

Ein Stichwortverzeichnis rundet das empfehlenswerte Buch ab, das bereits erschienene Werke nicht ersetzen, sondern lediglich ergänzen kann. Sicherlich bleibt daher stets weiterhin zurückzugreifen auf Eyschens „Staatsrecht des Grossherzogtums Luxemburg" von 1910 sowie in Sonderheit auf die nur in französischer Sprache vorliegende „Histoire du droit dans le Grand-Duché de Luxembourg" von Majerus aus dem Jahre 1949. Unverzichtbar ist obendrein Michel Paulys Geschichte Luxemburgs, deren 1. Auflage die Autoren erwähnen. 2014, also vor dem Erscheinen des hier rezensierten Buches, erschien Paulys Geschichte Luxemburgs jedoch bereits in 2. überarbeiteter Auflage im Verlagshaus Beck. Zurecht greifen die Autoren auf das Gemeinschaftswerk „Inventing Luxembourg. Representations of the Past, Space and Language from the nineteenth to the twenty-first century" von Péporté/Kmec/Majerus/Margue zurück. Weitere Beiträge zur Rechtsentstehung und -entwicklung hätten gewiss noch angeführt werden können[5]. Doch verdanken wir dem vorliegenden Buch den Hinweis auf ein zentrales Forschungsdesiderat, nämlich das einer systematisch angelegten Rechts- und Institutionengeschichte Luxemburgs neueren Datums.

Thomas Gergen*

[5] Siehe Homepage des legitech-Verlages, Luxembourg-Bertrange, zum Beispiel: https://www.legitech.lu:444/?s=Gergen&post_type=any&searchsubmit= [15. 02. 2019].

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Markus Gehrlein

Franz Schäfer – Ein Juristenleben vom Kaiserreich bis zum Bonner Grundgesetz

(= Heft 20 der Schriftenreihe des Rechtshistorischen Museums Karlsruhe, herausgegeben von Detlev Fischer und Marcus Obert. Mit einer Betrachtung der Juristenbiographien bis zu Heft 35 /2019/).

Karlsruhe: Ges. für Kulturhistorische Dokumentation, 2010, 78 S., ISBN 978-3-922596-81-3

1. Juristenbiographien in der Schriftenreihe

Die Schriftenreihe des Rechtshistorischen Museums weist bereits zahlreiche Porträts bekannter und weniger bekannter Juristenleben auf. So zeichnete Hildebert Kirchner die Vita Eduard von Simsons nach (Heft 3, 1985), Reiner Haehling von Lanzenauer den Dichterjuristen Scheffel (Heft 6, 1988) und Detlev Fischer bearbeitete die Karlsruher Juristenportraits aus der Vorzeit der Residenz des Rechts (Heft 9, 2004). Fischer verantwortet ferner die Karlsruher rechtshistorischen Blätter (vgl. https://www.rechtshistorisches-museum.de/juristenportraits.html abgerufen 28. 01. 2019).

Aufmerksam gemacht sei auf „Theodor Mommsen – Gedanken zu Leben und Werk des großen deutschen Rechtshistorikers" von Fritz Sturm (Heft 11, 2006), auf „Julius Federer (1911-1984), Rechtshistoriker und Verfassungsrichter" von Alexander Hollerbach

(Heft 13, 2007) sowie „Eduard Dietz (1866-1940), Vater der badischen Landesverfassung von 1919“ von Detlev Fischer (Heft 16, 2008; 2. Aufl. 2012) und die Hommage an Guido Kisch von Wilhelm Güde (Heft 18, 2010).

Heft 17 der Schriftenreihe des Rechtshistorischen Museums Karlsruhe war dem badischen Universaljuristen Josef Kohler gewidmet (Heft 17, 2009). Diese Widmung und auch diejenige an Ernst von Simson mit dem Beititel „im Dienste Deutschlands: von Versailles nach Rapallo (1918-1922) in Heft 28 erschienen 2013 oder die (Heft 33, 2016) an den Karlsruher Rechtsanwalt Reinhold Frank (1896-1945) entstammen allesamt der Feder von Norbert Gross. Und weitere Biographien sind in der Schriftenreihe publiziert worden: Christian Würtz zu Reichskanzler Constantin Fehrenbach (Heft 27, 2013), Alexander Hollerbach über „Anton Christ (1800-1880); Vormärz, Revolution und Nachmärz im Spiegel des Wirkens eines badischen Juristen“ (Heft 26, 2013) sowie von Karl Zippelius zu „Arnold Horn (1844-1938), Karlsruher Rechtsanwalt und Privatgelehrter“ (Heft 24, 2012). Heft 29 erinnert schließlich an Hildebert Kirchner (1920-2012), herausgegeben von Detlev Fischer im Jahre 2013.

Nunmehr erschien auch Reiner Haehling von Lanzenauers Abhandlung zum badischen Juristen Reichlin von Meldegg (Heft 35, 2019). Bereits angekündigt ist ein Vortrag von Christoph Klaas zu „Professor Dr. Gerd Pfeiffer (1919-2007), Präsident des Bundesgerichtshofs“.

Die bereits seit 2010 vorliegende Schrift zu Franz Schäfer (Heft 20) hat Markus Gehrlein verfasst. Ihr möchten wir in dieser Besprechung besonderes Augenmerk zu Teil kommen lassen.

2. Autor und Studie

Der Autor, Jahrgang 1957, Honorarprofessor an der Universität Mannheim seit 2005, amtiert bereits seit 2003 als Richter am Bundesgerichtshof, nachdem er seit 1995 Richter am Oberlandesgericht in Saarbrücken gewesen war. Die Karlsruher Virtuelle Bibliothek weist mehr als 330 Publikationseinträge Gehrleins zu Kernfragen des Zivil- und Zivilprozessrechts auf.

Die Studie zu Franz Schäfer, mit ihr einher ging ein Beitrag Gehrleins zu Schäfer für die Festschrift Friedrich Pannier aus demselben Jahr (dort S. 39-48), gliedert sich in elf Kapitel: Einführung, Jugend und Kindheit, Studium und Referendarzeit, sodann: Die staatsrechtliche Lage an der Saar, Rückgliederung an Deutschland, Der Mensch Franz Schäfer, Heimkehr an die Saar, Professor an der Universität des Saarlandes, Der Weg zum Bundesland Saarland sowie schließlich „Die letzten Jahre“.

3. Quellen und ihre Auswertung

Danach folgt der Anhang mit Primärquellen (S. 66-76), auf dem die Studie nebst Sekundärliteratur (S. 61-64) fußt. Widmen wir uns den abgedruckten Quellen, d.h. den Urkunden, so die Ernennung zum Landrichter Schäfers im Jahre 1909, die Zusage des preußischen Justizministers an Schäfer, dass es unbedenklich sei, das Amt des Landgerichtspräsidenten in Saarbrücken anzunehmen und interessanterweise auch: „Für den Fall, dass Sie ohne Ihr Verschulden zum Verlassen des Saargebiets genötigt sein sollten, ist beabsichtigt, Ihnen ausserhalb des Saargebiets ein Amt gleichen Ranges zu übertragen.“ vom 28. Februar 1927. Dem folgt unverzüglich die Ernennungsurkunde zum Landgerichtspräsidenten durch die Regierungskommission des Saargebiets vom 4. März 1927. Vom 13. September 1937 datiert die „Bestallung zum Landgerichtspräsidenten für den Landgerichtsdirektor Dr. Franz Schaefer in Saarbrücken“ durch das preußische Staatsministerium.

Die Regierungskommission des Saargebiets ernannte Schäfer mit Urkunde vom 26. Oktober 1927 und mit Wirkung zum 1. November 1927 zum Mitglied des Oberverwaltungsgerichts für das Saargebiet. Am 20. April 1929 ernannte Reichspräsident von Hindenburg Schäfer als Mitglied des Saarsenats beim Bundesamt für das Heimatwesen.

Mit Schreiben vom 21. Juli 1937 an den Reichsminister der Justiz stimmte der Führer-Stellvertreter der Ernennung Schäfers zum Reichsgerichtsrat zu. Darin: „Ich gebe Ihnen zur Kenntnis, dass Dr. Schäfer von meinen Dienststellen nicht gerade günstig beurteilt wird. Es wird ihm vorgeworfen, dass er vor der Machtübernahme dem Zentrum nahegestanden habe. Auch heute hat sich Dr. Schäfer von seiner früheren Weltanschauung noch nicht lösen können. Es ist daher für mich recht zweifelhaft, ob er sich jederzeit rückhaltlos für den nationalsozialistischen Staat einsetzen wird […]“ (S. 72)

Die vier zuletzt abgedruckten Urkunden stammen aus der unmittelbaren Nachkriegszeit. Einmal vom 30. Januar 1946: Schäfer wurde zum „Präsidialdirektor“ von Seiten des Regierungspräsidiums Saar ernannt. Aus dem Bonner Bundesministerium der Justiz verlautbarte am 1. und 19. August 1950 die Frage an den „Reichsgerichtsrat a.D. Rechtsanwalt Dr. Franz Schäfer“, ob er einer Ernennung zum Bundesrichter zustimmen könne nebst Vorschlag zu Vorbesprechungen. Schäfer lehnte indes eine Ernennung wegen seines fortgeschrittenen Alters ab. Am 15. Mai 1956 ernannte ihn die saarländische Landesregierung noch zum Geheimen Oberjustizrat.

4. Einordnung

Anhand dieser Quellen und den einschlägigen Aufsätzen hauptsächlich zur Saargeschichte zeichnet Gehrlein das Porträt dieses aus der Kaiserzeit stammenden und geformten Juristen, welcher 1909 eher zufällig an die preußisch-kaiserlich, aber gleichwohl sehr industriell geprägte Saar kam, dort blieb und sich privat wie beruflich mit der saarländischen Geschichte „ehelichte“, solange es ging als Landgerichtspräsident, später dann als Reichsgerichtsrat in Leipzig. Diese Stationen eröffnet der Biograph seinem Leser detailliert, wenngleich den Leser sicherlich ebenfalls die eigentliche Rechtsprechungstätigkeit Schäfers im Allgemeinen oder anhand von Beispielsfällen interessiert hätten. Dem akademischen Schaffen Schäfers hätte überdies noch mehr Beachtung geschenkt werden können. Seine Dissertation „Die Einwirkung der nachfolgenden Unmöglichkeit der Leistung auf Schuldverhältnisse aus

gegenseitigen Verträgen“ wird im Rahmen des Kapitels „III. Studium und Referendarzeit“ angesprochen (S. 9/10). Sie ist auch heute noch bei Recherchen zu finden als Freiburger Universitätsdissertation von 1902, im selben Jahr dann bei Pilz in Berlin gedruckt (VIII, 76 Seiten). Bei der Recherche kamen folgende Fragen auf: Stammten andere Veröffentlichungen ebenfalls von Schäfer, so z.B. ein Übungsbuch für Referendare aus den 1920er Jahren? Es handelt sich genau um „Teilungsfälle: Aufgaben und Lösungen von Vorprüfungs-, Referendar- und Lehrfällen; nebst Aufgabensammlung zu den vom Württembergischen Notariatsverein Stuttgart hrsg. Lösungen zu Teilungsfällen“, bearbeitet von Franz Schäfer, Karl Burth, Stuttgart 1928. Gab es daneben andere Publikationen, Gutachten oder Schriftsätze aus der Rechtsanwaltszeit an der Saar unmittelbar nach dem Kriege?

Ungeachtet all dieser weiter verästelnden Fragen bleibt festzuhalten, dass Markus Gehrlein Franz Schäfer als Universitätslehrer an der nach dem II. Weltkrieg aus der Universität Nancy heraus gegründeten Universität des Saarlandes trefflich charakterisieren und einige Stimmen aus dieser Zeit einfangen konnte (S. 48-53). Schäfer las an der Saarbrückener Juristenfakultät die ersten drei Bücher BGB, obwohl er als Reichsgerichtsrat hauptsächlich mit Strafrecht und in der Saargebietszeit ebenfalls am Oberverwaltungsgericht (OVG in Saarlouis) beschäftigt war. Daher hat ihn Markus Gehrlein völlig zurecht als Universaljurist charakterisiert.

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Silke von Lewinski / Heinz Wittmann (Hg.)

Urheberrecht! Festschrift für Hon.-Prof. Dr. Michel M. Walter zum 80. Geburtstag

Wien: Verlag Medien und Recht, 2018, 625 S., ISBN 978-3-900741-74-7

Der sofort augenfällige Titel dieser Festschrift trägt völlig zu Recht und aus vielen Gründen ein Ausrufungszeichen. Nicht allein, weil das Urheberrecht seit der Erfindung des Buchdrucks bis ins digitale Zeitalter von hoher Bedeutung ist (siehe dazu stellvertretend Fedor Seifert, Kleine Geschichte(n) des Urheberrechts, Verlag Medien und Recht, Wien/München 2014), sondern insbesondere weil der Jubilar diese Rechtsdisziplin mit seiner ganzen Kraft auf nationaler, europäischer und internationaler Ebene ausfüllt, darin lehrt und forscht, ja eine nicht wegzudenkende Leitfigur in der internationalen Wissenschaftsgesellschaft geworden ist. Die Würdigung, die der Mitherausgeber Heinz Wittmann verfasst hat (S. VII-XI), bringt dies auf den Punkt: Michel Walter – Ein Leben für die Kunst, die Urheber und deren Rechte. Walters Schriftenverzeichnis am Ende der Festschrift (S. 617-625) reicht von den Jahren 1963 bis 2018 – und vieles ist bereits im Erscheinen. Die Grußworte von Adolf Dietz und Gernot Schödl benennen den Jubilar trefflich als „Urgestein“ und sogar als „Robin Hood“ des Urheberrechts.

Sieben Kapitel setzen sich sodann mit Fragen der Rechtsmaterie auseinander und spiegeln auf ihre Weise das Wirken des Gefeierten in nahezu 50 wissenschaftlichen Beiträgen wider. Ohne alle Namen der Autoren zu nennen und die Lektüre der Festschrift für den Leser vorwegzunehmen, seien die Kapitel kurz angesprochen. Bei den methodischen Grundfragen steht die semiotische Analyse als interdisziplinäre Methode vor der Klammer des wissenschaftlichen Arbeitens. Ein großes Kapitel widmet sich Grundfragen des europäischen Urheberrechts und reicht vom EU-Urheberrecht im Spannungsfeld des nationalen Rechts über die digitale Strategie der EU-Kommission bis hin zum Problem der angemessenen Vergütung und den Schutzrechte verletzenden Warenimporten im Europäischen und US-amerikanischen Recht.

Des Weiteren durften in diesem „Liber amicorum“ für Michel Walter digitale Nutzungen und Haftungsfragen nicht fehlen. Dabei stößt der Leser auf Stichworte wie Hyperlinks, Linksetzung und Suchmaschinen, Roboter als Schöpfer, Cloud-Recorder oder Online Platformen. Andere Autoren wiederum präsentieren ihre Hommage an den Jubilar folgendermaßen: Sie widmen sich Musik, Tanz, Theater, Film und Bildender Kunst. Bühnenwerke und bühnenmäßige Aufführungen im österreichischen Urheberrecht, die Folgerechtsvergütung, das Filmurheberrecht, Rechte bei musikalischen Werken, aber auch Themen wie Urheberrecht versus Design oder Choreographisches Werk und Werkverbindung sind an dieser Stelle gleichfalls aufzuzählen.

Die beiden Herausgeber haben sich entschieden, im Anschluss daran einen Themenschwerpunkt „Interessenausgleich durch Schrankensetzung“ zu bilden. Dort kommen die Autoren zu sprechen auf den Vertrag von Marrakesch zur Erleichterung des Zugangs zu veröffentlichten Werken für blinde, sehbehinderte oder sonst lesebehinderte Personen, das Zitatrecht oder die Nutzung vergriffener Werke, vor allem in Bezug auf Druckwerke. Die Ethik des Zitierens steht genauso auf dem Programm wie der gerechte Ausgleich für die digitale Vervielfältigung zu eigenen und privaten Zwecken oder die Parodie nach neuem Unionsrecht und deutschem Urheberrecht. Dazu gesellen sich noch die Abhandlungen zu Intranetnutzungen für Unterricht und Lehre sowie Gedanken zur freien Benutzung und zu einer allgemeinen Grundrechtsschranke.

Die Internationalität der Festschrift wird ebenfalls deutlich im Kapitel, das dem Urhebervertragsrecht und dem Internationalen Privatrecht gewidmet ist. Die Rechtsdurchsetzung im nationalen Recht rundet das sehr lesenswerte Festmenü ab; hier bieten die

Verfasser Studien über den Auskunftsanspruch bei Verletzungen geistigen Eigentums im Online-Bereich, Gedanken zu Hausdurchsuchungen im Privatanklageverfahren sowie schließlich zu Beweisproblemen und -erleichterungen im Urheberrechtsverfahren.

Thomas Gergen*

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Stephan Meder (Hg.)

Geschichte und Zukunft des Urheberrechts

Göttingen: V & R unipress, 2018, 222 S., ISBN 978-3-8471-0872-6

Der gehaltvolle Sammelband mit den Beiträgen zur jüngsten Tagung des Arbeitskreises „Geschichte und Zukunft des Urheberrechts" 2017 an der Leibniz-Universität Hannover vermittelt interdisziplinäre Forschungen zum Immaterialgüterrecht im Schnittpunkt von Rechts-, Kultur- und Kunstgeschichte. Die Zäsur zu dem bisher seit Beginn von Manfred Rehbinder (Zürich) souverän geleiteten Kreis von vor allem Rechtshistorikern und Urheberrechtlern wird deutlich bei Betrachtung seiner eindrucksvollen Übersicht über die Breite und Tiefe der Erträge aller Tagungen von 1986 bis 2015 mit ihrer sinnvollen Verschränkung von historisch basierter Theorie und Praxis.

Zu den in diesen Jahren immer wieder mit brillanten Vorträgen herausragenden Autoren zählen Renate Frohne und Ludwig Gieseke, in diesem Band vertreten mit zwei Beiträgen zur Frühgeschichte des Urheberrechts.

Stephan Meder, Leiter der Tagung, wies an einer aufschlussreichen Quelle nach, wie sich bei Leibniz der Gedanke der Billigkeit der Vermittlung von Eigen- und Gemeinwohl auf dem Hintergrund des von Naturrecht und Aufklärung bestimmten Optimierungsdenkens ausprägte.

Eine detaillierte Untersuchung lieferten Norbert Flechsig ebenfalls für die frühe Neuzeit mit einer Untersuchung über die ediktalische Privilegienerteilung zu Beginn des 16. Jahrhunderts und Klaus Neuenfeld mit einer engagierten Neuauflage der bekannten Pohlmann-Bappert-Debatte zum strittigen Geschichtsbild des Urheberrechts vor allem im musikalischen Urheberrecht des Privilegienzeitalters. Die berechtigte rechtshistorisch-methodisch-archivalische Kritik an Pohlmanns polemisch-pointierten Thesen wird, wie Elmar Wadle und Thomas Gergen gezeigt haben, wohl künftig durch weitere eingehende und breiter angelegte archivalische Studien belegt, differenziert oder widerlegt werden müssen, welche die Fülle der Wiener Reichshofrats-Akten mit regionalen oder städtischen Detailstudien, sie etwa neuerdings für Nürnberg vorliegend in Beziehung bringen.

Mit einem übergreifenden Ansatz widmete sich Alexander Peukert der weiterhin zu diskutierenden Frage nach drei maßgeblichen Entstehungsbedingungen des modernen Urheberrechts und seines Schutzgegenstandes. Sein auch gegen Pohlmann gewendeter Punkt ist, dass im 16.Jahrhundert es an der Idee des abstrakten Werkes gefehlt und erst die Entkoppelung des Kunstwerks von allen externen Vorgaben durch eine „wilde" semantische Innovation der Gedanke des geistigen Eigentums sich im revolutionären Frankreich des 18. Jahrhunderts sich vollzogen habe – dies alles auf dem Hintergrund der Entwicklung neuer technologischer Mittel, von der dirigistischen Ökonomie zum Markt, von der „namenlosen Nachahmung zum genialen Werk".

Von übergreifendem Interesse ist ebenfalls die Studie zum „Verlagsrecht aus Produktionsverhältnissen" im 18. Jahrhundert. Christoph Sorges interessanter Ausgangspunkt ist die „selbstredende Natur der Sache" bei Johann Stephan Pütter, eine rechtsdogmatische Konstruktion für das bürgerliche Verlagsrecht mit dem Anspruch eines europäischen jus gentium (S.148), als subsidiäre Rechtsquelle neben Gesetz und jus commune - auf der Grundlage von Pütters sozioökonomischen Argumenten. Sorges filigrane und ganz neu angelegte Untersuchung von Pütters Verlagseigentumslehre, abgeleitet aus der empirischen Natur des Buchmarkts, gipfelt in der Erkenntnis der hier deutlichen integrativen Verschränkung von Recht, Wirtschaft und Soziologie, bis hin zu seiner Normativität des Faktischen – und im Ergebnis in einer grundsätzlichen Neubewertung von Inhalt und Stellenwert von Pütters Gutachten von 1774, aufschlussreich auch für die dogmatische Unterfütterung des faktischen Fortlebens des Verlagseigentumsgedankens im 19. Jahrhundert.

E.T.A. Hoffmann als juristischer Gutachter in einer speziellen Nachdruckfrage bei Klavierauszügen auf der Basis des ALR wird von Fedor Seifert im Kontext der Vita des Dichter-Juristen präsentiert. Es ging wieder einmal um den gesetzlichen Schutz des „Freischütz" in den Jahren 1822/3. Hoffmann, damals selbst Objekt einer disziplinarischen Untersuchung in der sog. Knarrpanti-Affaire, entscheidet sich gegen Nachdruck und für zulässige Bearbeitung, eine Ansicht, deren Für und Wider noch manche musikurheberrechtlichen Differenzen des 19.Jahrhunderts prägen werden.

Ein aktueller Rechtsvergleich zur nach wie vor höchst fragwürdigen Haftung von Auktionshäusern für Kunstfälschungen bildet den Abschluss (Sanders/Beckmann).

Der Band knüpft an die jahrelange Dokumentation der Vorträge des Arbeitskreises mit seinen systematischen rechtshistorischen Dokumentationen in der „alten" UFITA unter Manfred Rehbinder produktiv an.

Albrecht Götz von Olenhusen*

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Bericht zum Symposium für Hans Jürgen Becker zum Thema *Deutscher Bund und nationale Rechtseinheit* an der Universität Regensburg am 21. und 22. März 2019

Am 21. und 22. März 2019 fand an der Universität Regensburg ein Symposium zum Thema „Deutscher Bund und nationale Rechtseinheit" für *Hans Jürgen Becker* statt. Das Symposium wurde von seinem Schüler *Martin Löhnig* und dessen Schüler und damit akademischen „Enkel" *Stephan Wagner* anlässlich des am 03. November diesen Jahres bevorstehenden 80. Geburtstags *Beckers* ausgerichtet. Die zweitägige Tagung zeichnete sich auch durch ihren illustren Teilnehmerkreis aus: Zeugnis der Anerkennung und Wertschätzung durch die anwesenden Weggefährten eines Lebens mit und für die Wissenschaft.

Hierauf verwiesen auch der Rektor der Universität Regensburg *Udo Hebel* und der Dekan der Juristischen Fakultät *Jürgen Kühling* in ihre Grußworten. Neben der Erwähnung der wissenschaftlichen Leistungen *Beckers*, *Kühling* verwies insbesondere auf die über 300 Publikationen, betonten Rektor und Dekan das große Engagement des angehenden Jubilars im Bereich der Universitätsverwaltung und für die Studierenden.[1] Gerade Letzteres fand über die Dauer der Tagung hinweg immer wieder Erwähnung, beispielsweise durch *Christoph Becker*, der seinen Vortrag zum Konkursrecht mit einer Erinnerung an seine Studienzeit und eine Vorlesung bei seinem „Namensvetter" begann, oder auch in Pausengesprächen, wenn Erzählungen des „letzten Hörer-Jahrgangs" die Runde machten.

Nach den Grußworten führte *Stephan Wagner* in die Veranstaltung ein. Als Veranstalter des Symposiums hofften *Wagner* und *Löhnig* mit dem Thema „Deutscher Bund und nationale Rechtseinheit" ein Thema gefunden zu haben, dass zum Interessengebiet des Geehrten gehört und diesem trotzdem noch neue Erkenntnisse vermitteln könne. Idee der Themenwahl sei gewesen, dem üblichen Narrativ des Deutschen Bundes als bei der Rechtsvereinheitlichung gescheitert und des Deutschen Reiches als Ursprung der nationalen Rechtseinheit eine Gegenerzählung entgegen zu setzen, indem die prägenden Ursprünge der verschiedenen Privatrechtskodifikationen im Deutschen Bund beleuchtet werden sollten. Dazu sollten insbesondere die durch die Bundesversammlung zwischen 1861 und 1866 vorgelegten Entwürfe verschiedener zivilrechtlicher Kodifikationen vorgestellt werden.

Das Symposium war in vier Sessionen mit je zwei Referenten und anschließender Diskussion unterteilt. Es begann mit einem etwas längeren einführenden historischen Vortrag von *Jürgen Müller* zum Thema „Deutscher Bund und nationale Rechtsvereinheitlichung 1848-1866".

Die danach vorgesehene erste Session thematisierte mit Referaten zu den Themen „Allgemeines Deutsches Handelsgesetzbuch von 1861 – Nürnberger Entwurf" von *Stephan Wagner* und „Entwurf eines allgemeinen deutschen Gesetzes über Schuldverhältnisse von 1866 – Dresdner Entwurf" von *Stefan Vogenauer* die Kodifikationen zu privatrechtlichen Kerngebieten (Handelsrecht und Schuldrecht).

Die weiteren drei Sessionen waren für den nachfolgenden Tag vorgesehen. Die zweite Session enthielt mit den Referaten „Entwurf einer allgemeinen Civilprozeßordnung für die deutschen Bundesstaaten von 1866 – Hannoverscher Entwurf" von *Martin Löhnig* und dem „Konkursrecht" von *Christoph Becker* prozessuale Kodifikationsentwürfe.

Die dritte geplante Session zu den Themen „Entwurf eines Gesetzes zum Schutze der Urheberrechte an literarischen Erzeugnissen und Werken der Kunst von 1864 – Frankfurter Entwurf" (*Rainer Nomine*) und „Patentrecht" (*Lous Pahlow*) hätte sich mit den Immaterialgüterrechten befasst, musste allerdings krankheitsbedingt vollständig ausfallen.

Die letzte Session enthielt Referate zum „Entwurf eines Gesetzes über die gegenseitige Rechtshilfe" von *Ignacio Czeguhn* und zum Thema „Deutscher Juristentag" von *Nikolaus Linder* und beleuchtete damit den politischen Rahmen der Rechtsvereinheitlichung.

Zum Ende des Symposiums hielt *Martin Löhnig* ein Schlusswort.

Die Schriftfassungen der Referate sollen in der Festschrift zum 80. Geburtstag von *Hans Jürgen Becker* veröffentlicht werden.[2]

A. Historische Einführung

I. Deutscher Bund und nationale Rechtsvereinheitlichung (Jürgen Müller)

Jürgen Müller[3] stellte in seinem Referat die Hypothese auf, der Deutsche Bund habe wesentliche Vorarbeiten zur

[1] Insbesondere Erwähnung fand das Engagement als Vertrauensdozent der Studienstiftung und des Cusanuswerks und als Prodekan und Senator der Universität Regensburg.

[2] *Martin Löhnig/Stephan Wagner* (Hrsg.), Deutscher Bund und nationale Rechtseinheit. Festgabe für Hans-Jürgen Becker, Tübingen 2019 [im Erscheinen].

[3] Prof. Dr. Jürgen Müller ist außerplanmäßiger Professor am historischen Seminar der Johann Wolfgang von Goethe-Universität Frankfurt am Main.

Rechtsvereinheitlichung geleistet. Dabei seien die Bemühungen allerdings von einer ständigen Blockade durch Preußen geprägt gewesen. Hierzu stellte *Müller* zunächst die großen Herausforderungen im Zusammenhang mit einer Rechtsvereinheitlichung im deutschen Bund dar. 38 Bundesstaaten mit teils diametral verschiedenen Interessen hätten das Projekt zu einer Mammutaufgabe gemacht, was bereits damals unter Mitgliedern der Bundesversammlung zu Kritik geführt habe, wenn beispielsweise die kodifikatorischen Bemühungen als das „Dreschen leeren Strohs" betitelt wurden. Die Konstitution des Deutschen Bund als Staatenbund habe lange Zeit als defizitärer Irrweg gegolten. Erst in jüngerer Zeit würden Staatenbünde als legitime Alternative zu Bundesstaaten gesehen.

In seinem weiteren Vortrag ging Müller den Fragen nach, warum überhaupt eine Rechtsvereinheitlichung gewünscht war, welches Recht vereinheitlicht werden sollte, mit welcher Methode dies umgesetzt wurde und welche Erfolge das Projekt zeitigte. Das Ziel einer nationalen Rechtsvereinheitlichung sei ein zur damaligen Zeit moderner Ansatz gewesen. Dem Mittelalter seien entsprechende Ideen fremd gewesen.[4] Die Herrscher der frühen Neuzeit seien mit solchen Anliegen am ausgeprägten Ständewesen gescheitert. Erst das aufkommende Bürgertum im 18. Jahrhundert und die Abschaffung feudaler Privilegien hätten den Wunsch nach einem allgemeinen und einheitlichen Recht für alle Bürger geschaffen. Solche Überlegungen seien in den Kodifikationsstreit Thibauts und Savignys gemündet.

Erster Gegenstand der Rechtsvereinheitlichung sei das Zivilrecht, insbesondere das Wirtschaftsrecht gewesen. Hierin zeige sich eine der vielen Parallelen zwischen Deutschem Bund und der EU. Diese kamen im Laufe des Symposiums immer wieder zur Sprache. Weniger bekannt, allerdings ebenfalls mit der EU vergleichbar, sei, dass der Deutsche Bund sich regelmäßig auch mit Fragen zum Heimatrecht und Urheberrecht beschäftigt habe. Die Gesetzesentwürfe seien durch Ausschüsse und Kommissionen der Bundesversammlung erarbeitet worden. Ausschüsse hätten dabei aus Mitgliedern der Bundesversammlung selbst bestanden und Kommissionen seien mit externen Mitgliedern besetzt gewesen. Hierzu hätten vielfach Professoren, aber auch Praktiker wie Richter, Anwälte und Beamte oder auch ein Kapitän, der seine Expertise in die Beratungen zum Kapitel des Seehandelsrechts im ADHGB habe einfließen lassen, gezählt. Insgesamt seien durch die Bundesversammlung etwa 200 solcher Gremien eingesetzt worden. Allerdings hätten sich die meisten mit dauernden sowie außerordentlichen Verwaltungsaufgaben beschäftigt. Nur 18 Kommissionen oder Ausschüsse hätten sich mit Fragen und Entwürfen zur Rechtsvereinheitlichung befasst. Diese sei insbesondere ab 1850/1851 ein zentrales Anliegen geworden. Die Kommissionen zur Erarbeitung von Gesetzesentwürfen seien dabei der föderalen Idee folgend in den verschiedensten Städten des Bundes eingesetzt worden. Dies sei auch an den Namen der Entwürfe, wie Nürnberger, Dresdner oder Hannoverscher Entwurf, erkennbar.

Die Kommissionen hätten teilweise über Jahre hinweg getagt. Die abgeschlossenen Entwürfe seien dann von allen Bundesstaaten zu ratifizieren gewesen. Hieran und am jähen Ende des Deutschen Bundes seien viele der Entwürfe gescheitert. Dennoch sei die Arbeit der Kommissionen keinesfalls folgenlos geblieben. Das ADHGB sei in Kraft getreten, der Dresdner Entwurf sei Vorlage des Zweiten Buches des BGB geworden und die entwickelte Maß- und Gewichtsordnung sei durch das Deutsche Reich übernommen worden. In seinem Resümee unterstrich *Jürgen Müller* nach alldem die Bedeutung des Deutschen Bundes für die Rechtsvereinheitlichung Deutschlands.

II. Diskussion

In der anschließenden, von *Stephan Wagner* moderierten Diskussion ging es zunächst um Fragen zur Arbeitsweise und zum Gegenstand der Kommissionen. Auf Nachfrage erklärte *Müller*, die Arbeitssprache sei ausschließlich Deutsch gewesen. Die anderssprachigen Mitgliedsstaaten hätten sich insbesondere an den Entwürfen zur Rechtsvereinheitlichung nicht beteiligt und diese später nur langsam umgesetzt. Das Zivilrecht sei zwar grundsätzlich Gegenstand der Rechtsvereinheitlichung gewesen, allerdings insbesondere auf den wirtschaftsrechtlichen Gebieten. Erb- und Immobiliarsachenrecht seien aufgrund regionaler und althergebrachter Besonderheiten nicht Gegenstand der Bemühungen um Vereinheitlichung gewesen. Auch hierin erkannten Teilnehmer Parallelen zur EU. Ein gemeinsames Bundesgericht sei aufgrund des Widerstandes durch Österreich und Bayern nicht eingeführt worden.

Christoph Becker stellte die Frage, ob [nationale] Integration durch Recht überhaupt möglich sei. Auf diesen durch das EU-Recht geprägten Begriff ging zumindest *Jürgen Müller* in seiner Antwort ein, indem er Recht bis heute als wesentliches Instrument zur Schaffung und Bewahrung von politischer, gesellschaftlicher und wirtschaftlicher Stabilität darstellte. Die gesamte Diskussion war von Hinweisen auf Parallelen zwischen dem Deutschen Bund und der EU geprägt. Nicht zufällig schienen die Organisatoren eine Europakarte von 1815-1870 im Symposiumshörsaal aufgehängt zu haben.

B. Erste Session (zivilrechtliche Kernthemen - Handels- und Schuldrecht)

I. ADHGB – Nürnberger Entwurf (Stephan Wagner)

Im Anschluss stellte *Stephan Wagner*[5] das ADHGB von 1861, den sogenannten Nürnberger Entwurf, vor. Das

[4] Hiergegen wendeten sich einige Wortmeldungen in der anschließenden Diskussion (s.u. B., III.).

[5] PD Dr. *Stephan Wagner*, M.Jur. (Oxford), M.A., ist Privatdozent u.a. für Bürgerliches Recht und Rechtsgeschichte der Universität Regensburg und vertritt aktuell einen Lehrstuhl an der Universität Tübingen.

ADHGB sei der größte Erfolg des deutschen Bundes auf dem Gebiet der Rechtsvereinheitlichung, auch wenn dem Deutschen Bund selbst hierzu die Gesetzgebungskompetenz fehlte. *Wagner* stellte detailliert die Genese des Entwurfes dar und betonte auch den großen Einfluss außerhalb Deutschlands. So nannte er beispielsweise die Indian Law Conference, die das ADHGB zur Grundlage ihrer Beratungen zum Gesellschaftsrecht gemacht habe, und das japanische Handelsrecht, welches in weiten Teilen auf dem ADHGB fuße.

Die nationale Bedeutung des ADHGB machte *Wagner* mittels eines Zitats von Levin Goldschmidt deutlich, der das Handelsrecht als Motor des Zivilrechts beschrieben haben soll – und so fand sich auch in diesem Vortrag eine begriffliche Parallele zur EU mit dem EuGH als Motor der Integration.

II. Schuldrecht – Dresdner Entwurf (Stefan Vogenauer)

Hiernach sprach *Stefan Vogenauer*[6] zum Dresdner Entwurf für ein allgemeines deutsches Gesetz über Schuldverhältnisse von 1866. Zunächst verwies *Vogenauer* auf den schlechten Ruf des Entwurfs als „hässliches Entlein" der Entwürfe, dessen 150. Jubiläum, anders als die des BGB und ADHGB, sang- und klanglos verstrichen war. Selbst das Handwörterbuch zur deutschen Rechtsgeschichte enthalte keinen selbständigen Eintrag dazu.

In seinem Vortrag setzte er sich neben der Entwurfsgenese intensiv mit der Gesetzgebungskompetenz des Deutschen Bundes auseinander. Diese sei durch die Deutsche Bundesakte und die Wiener Schlussakte bestimmt und bereits damals umstritten gewesen. Die Möglichkeit, Entwürfe auch nur in Teilen des Deutschen Bundes bi- oder multilateral umzusetzen, bezeichnete *Vogenauer* als „Deutschen Bund der zwei Geschwindigkeiten" und schuf damit ebenfalls eine (begriffliche) Parallele zur EU.

Auch wenn der Dresdner Entwurf nicht umgesetzt worden sei, sei dieser von hoher Qualität gewesen. Grundlage des Entwurfes seien die Pandektenwissenschaft und das Sächsische BGB gewesen. Er lese sich in weiten Teilen wie ein Lehrbuch der damaligen Zeit und habe es als Grundlage für das Schweizer Obligationenrecht und das Zweite Buch des BGB, das Schuldrecht, zu großer Wirkung gebracht.

III. Diskussion

Die anschließende Diskussion befasste sich im Wesentlichen mit der Beteiligung und dem Einfluss Preußens im Rahmen der Arbeiten zum Dresdner Entwurf. *Anja Amend-Traut* bemerkte, dass das ALR als Quelle zur Erarbeitung des Dresdner Entwurfes durch die Kommission nicht berücksichtigt wurde.

C. Zweite Session (Prozessrecht)

I. Civilprozeßordnung – Hannoverscher Entwurf (Martin Löhnig)

Am zweiten Tag begann das Symposium mit dem Referat zur Civilprozeßordnung, dem sogenannten Hannoverschen Entwurf, von *Martin Löhnig*[7]. Der Zivilprozess sei bis zum 19. Jahrhundert gemeinrechtlich geprägt gewesen; geheim, schriftlich, teilbar und strengen Beweisregeln unterstellt. Auch das corpus iuris Fridericianum von 1781 habe keinen Parteiprozess vorgesehen, der tatsächlichen Wahrheitsfindung gedient und sei Ausdruck der absolutistischen Herrschaft gewesen. Erst das französische Prozessrecht mit dem mündlichen und öffentlichen Parteiprozess habe Einflüsse auf die neuen Kodifikationen gezeigt.

Der durch die Kommission von 1862 bis 1866 erarbeitete Hannoversche Entwurf einer Zivilprozessordnung habe sich stark an der hannoverschen Prozessordnung orientiert. Diese wiederum habe sowohl gemeinrechtliche als auch französische Elemente enthalten. Auch wenn der Entwurf weder im Deutschen Bund noch im Norddeutschen Bund in Kraft getreten sei, habe er doch als Grundlage für die 1877 in Kraft getretene Reichscivilprozeßordnung gedient.

II. Konkursrecht (Christoph Becker)

Hiernach trug *Christoph Becker*[8] zum Konkursrecht und dessen Vereinheitlichung im Deutschen Bund vor. Ziel einer gemeinsamen Konkursordnung sei es gewesen, Handelshindernisse durch die erschwerte Realisierung von Forderungen in Gebieten fremder Rechtsordnungen abzubauen. Hierbei machte *Becker* klar, welche Vielzahl an Fragen zur Rechtsvereinheitlichung mit dem Konkursrecht zusammenhänge, beispielsweise die Frage, ob eine einheitliche Konkursordnung nicht auch immer ein einheitliches Obligationenrecht als Ausgangspunkt benötigt.

Becker stellte auch die verschiedenen bereits bestehenden Konkursrechte vor und ging dabei auf deren Unterschiede ein. Prägend sei insbesondere das preußische Modell des Kaufmannskonkurses als Normalfall des Konkursrechts gewesen.

III. Diskussion

In der anschließenden Diskussion bemerkte *Wolfgang Sellert* im Hinblick auf den Vortrag von *Martin Löhnig*, dass es durchaus bereits im gemeinen Recht Ansätze eines einheitlichen und prinzipiengeleiteten Prozessrechts gegeben habe. Er verwies hierbei auf die Reichskammergerichtsordnung mit Elementen der unmittelbaren und freien Beweiswürdigung, dem Öffentlichkeitsgrundsatz und der Parteimaxime. *Sellert* stellte die These auf, es sei bei der Schaffung eines ganz neu-

[6] Prof. *Stefan Vogenauer* ist Direktor am Max-Planck-Institut für europäische Rechtsgeschichte in Frankfurt am Main.

[7] Prof. Dr. *Martin Löhnig* ist Inhaber des Lehrstuhls für Bürgerliches Recht, Deutsche und Europäische Rechtsgeschichte sowie Kirchenrecht der Universität Regensburg.

[8] Prof. Dr. *Christoph Becker* ist Inhaber des Lehrstuhls für Bürgerliches Recht, Zivilverfahrensrecht, Römisches Recht und Europäische Rechtsgeschichte an der Universität Augsburg.

en Prozessrechts insbesondere auch um die Abgrenzung zum alten Reich gegangen.

D. Dritte/Vierte Session (Politischer Rahmen)

I. Gegenseitige Rechtshilfe (Ignacio Czeghuhn)

Nach der Pause trug *Ignacio Czeguhn*[9] zur gegenseitigen Rechtshilfe vor. Diese sei für den grenzüberschreitenden Rechtsverkehr zwischen den Bundesstaaten von großer Bedeutung gewesen. Die Beratungen der zuständigen Kommission hätten sich auf das Zivilrecht beschränkt. Strafrechtliche Regelungen seien den zivilrechtlichen Kommissionsmitgliedern als zu komplex erschienen und seien weitestgehend bereits bilateral geregelt gewesen.

Die Kommission habe ihren Entwurf 1862 fertig gestellt. Dieser habe der Rechtshilfe bei Zustellung, Vollstreckung und Beweiserhebung gedient. Bis 1865 hätten zwar alle Bundesstaaten ihre Zustimmung erteilt, das Ende des Deutschen Bundes habe aber das Inkrafttreten des Entwurfs verhindert. Allerdings sei der Entwurf vom Norddeutschen Bund übernommen worden.

II. Deutscher Juristentag (Nikolaus Linder)

Das letzte Referat hielt *Nikolaus Linder*[10] zum Deutschen Juristentag. Der erste Juristentag habe 1860 mit etwa 700 teilenehmenden Juristen in Berlin stattgefunden. Erklärtes Ziel sei über weite Zeit die Förderung der Schaffung eines gemeinsamen deutschen Rechts gewesen.

In diesem Zusammenhang seien insbesondere das Zivilprozessrecht, das Konkursrecht, aber auch Teile des Gesellschaftsrechts, wie das Aktienrecht, regelmäßig Thema gewesen. *Linder* führte durch die Geschichte des wachsenden Juristentages. So hätten bereits 1867 in München 2000 Juristen teilgenommen.

III. Diskussion

In der letzten Diskussion befassten sich die Wortmeldungen weitestgehend mit dem Referat zum Juristentag. *Anja Amend-Traut* fragte nach personellen Überschneidungen zwischen den Teilnehmern des Juristentages und den Kommissionen der Bundesversammlung. *Linder* stellte die Vermutung auf, dass dies allenfalls Einzelfälle sein dürften, wies allerdings darauf hin, dass es hierzu bisher keine Untersuchungen gebe.

Dietmar Willoweit stellte klar, dass die Juristen des 19. Jahrhunderts leidglich liberale Vorreiter ihrer Zeit waren. Auf der einen Seite hätten diese zwar Diskussionen zur Pfändung künftiger Ansprüche geführt, auf der anderen Seite hätten aber teilweise rigide und illiberale Landesrechte geherrscht, die erst sehr allmählich abgelöst worden seien.

E. Schluss und Zusammenfassung

Im anschließenden Schlusswort von *Martin Löhnig* wurden die Referate noch einmal zusammengefasst. Weiter unterteilte er den Prozess der Rechtsvereinheitlichung in zwei Schritte: den verfassungsrechtlichen Rahmen und die wirtschafts- und handelsbezogene Gesetzgebung. Ersterer sei immer wieder von der Frage „Staatenbund oder Bundesstaat“ geprägt und durch die starken Gegenkräfte Preußens beeinflusst gewesen. Letztere unterteilte er in zwei Gruppen: die zivilrechtlichen Entwürfe (ADHGB, Obligationenrecht) auf der einen und die prozessualen Entwürfe (Civilprozeßordung) auf der anderen Seite. In Bezug auf das Konkursrecht und die Rechtshilfe sprach *Löhnig* von einer hybriden Natur zwischen Zivil- und Prozessrecht.

Abschließend lässt sich sagen, dass die Veranstaltung das von *Martin Löhnig* und *Stephan Wagner* gesetzte Ziel, die Ursprünge der verschiedenen Privatrechtskodifikationen im Deutschen Bund zu beleuchten, erreicht hat. Der einführende Vortrag von *Jürgen Müller* vermittelte die historischen und politischen Hintergründe. Die nachfolgenden Referate gaben teilweise detaillierte Einblicke in die Entstehungsgeschichten und inhaltlichen Ursprünge der Kodifikationsentwürfe. Immer wieder konnte gezeigt werden, dass auch die nicht umgesetzten Entwürfe wesentlichen Einfluss auf die späteren Kodifikationen im Deutschen Reich hatten.

Ein besonderer Wert der Veranstaltung lag sicherlich auch darin, dass bisher vernachlässigte Themen, *Stefan Vogenauer* erwähnte den Dresdner Entwurf, spätestens mit den Schriftfassungen der Vorträge[11] Anregung und Ansatz weitergehender wissenschaftlicher Auseinandersetzungen bieten. Gleiches gilt wohl für die immer wieder bemühten Vergleiche mit der Europäischen Union. Solche historischen Parallelen sind grundsätzlich mit großer Vorsicht zu behandeln. Allerdings wurde hier zumindest deutlich, dass es Potential für eine tiefgreifendere Auseinandersetzung gibt - vielleicht ein Thema für den 90. Geburtstag.

Julius Wieske*

[9] Prof. Dr. *Ignacio Czeguhn* ist Inhaber des Lehrstuhls für Bürgerliches Recht, Deutsche und Europäische sowie vergleichende Rechtsgeschichte an der Freien Universität Berlin.

[10] Dr. *Nikolaus Linder* ist wissenschaftlicher Mitarbeiter am Institut für Rechtsgeschichte, Rechtsphilosophie und Rechtsvergleichung der Universität Göttingen.

[11] *Martin Löhnig/Stephan Wagner* (Hrsg.), Deutscher Bund und nationale Rechtseinheit. Festgabe für Hans-Jürgen Becker, Tübingen 2019 [im Erscheinen].

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