Vol. 11 / 2020 No. 1

Journal on European History of Law

9 772042 640001 01

STS Science Centre

The European Society for History of Law

JOURNAL ON EUROPEAN HISTORY OF LAW

Vol. 11 / 2020 No. 1

Editorial staff

JOURNAL ON EUROPEAN HISTORY OF LAW:

Prof. Dr. Christian Baldus
Faculty of Law, Heidelberg University, Germany

JUDr. PhDr. Stanislav Balík, Ph.D.
Attorney at Law, Prague, Czech Republic

Prof. Dr. Barna Mezey
Faculty of Law, Eötvös-Loránd-University Budapest, Hungary

Prof. JUDr. Jozef Beňa, CSc.
Faculty of Law, Comenius University in Bratislava, Slovak Republic

Doc. JUDr. PhDr. Jiří Bílý, CSc.
Metropolite – University Prague, Czech Republic

dr hab. Piotr Fiedorczyk
Faculty of Law, University of Białystok, Poland

Alberto Iglesias Garzón, Ph.D.
Charles III University of Madrid, Spain

Prof. Dr.iur. Dr.phil. Thomas Gergen, MA
Institut Supérieur de l'Économie, ISEC Université Luxembourg

Prof. Dr. Gábor Hamza
Faculty of Law, Eötvös-Loránd-University Budapest, Hungary

Prof. JUDr. Ignác Antonín Hrdina, DrSc.
Faculty of Law, Westbohemia University, Plzeň, Czech Republic

JUDr. Vilém Knoll, Ph.D.
Faculty of Law, Westbohemia University, Plzeň, Czech Republic

Doc. dr. sc. Ivan Kosnica
Faculty of Law, University of Zagreb, Croatia

izv. prof. dr. sc. Mirela Krešić
Faculty of Law, University of Zagreb, Croatia

Prof. zw. dr hab. Adam Lityński
Faculty of Law, University of Silesia, Katowice, Poland

Doc. Dr. Olga Lysenko
Faculty of Law, Lomonosov Moscow State University, Russia

Tony Murphy
Department of Law & Criminology, Sheffield Hallam University, UK

ao. Univ. Prof. Dr.jur. Christian Neschwara
Faculty of Law, University of Vienna, Austria

Prof. Dr. Dmitry Poldnikov
Faculty of Law, National Research University, Higher School of Economics, Moscow, Russia

Dr Dr Guido Rossi
Edinburgh Law School – University of Edinburgh, UK

Doc. JUDr. Karel Schelle, CSc.
Faculty of Law, Masaryk University, Brno, Czech Republic

Dr. Gábor Schweitzer, Ph.D.
Institute for Legal Studies of the Hungarian Academy of Sciences, Hungary

Adw. Ewa Stawicka
Attorney at Law, Warsaw, Poland

Dr. Magdolna Szűcs, Ph.D.
Faculty of Law, University of Novi Sad, Serbia

Doc. JUDr. Bc. Jaromír Tauchen, Ph.D., LL.M.
Faculty of Law, Masaryk University, Brno, Czech Republic

Prof. Dr. Wulf Eckart Voß
Faculty of Law, University of Osnabrück, Germany

TABLE OF CONTENTS

Christian Neschwara: „Zurück in die Zukunft“: Österreichs staatsrechtliche Zeitreise im Jahr 1945“ 2

Andrew Watson: Changes in American Court Advocacy during the Long Nineteenth Century: Classical Influences, their Decline, Similarities and Comparisons with England and Wales 14

Brenno Bianchi: The Courage of Beccaria: the Disruption of “On Crimes and Punishments” in the Climate of the “Son-of-Fear’s Law” in Bellum Exulum 22

Javier Belda Iniesta: “Una cum capite suo”: the Relations between the Pope and the Council from the 4th to the 9th Century 34

Adolfo A. Díaz-Bautista Cremades: Personal Injury Claims 44

Dmitry Poldnikov: The Formalistic Pattern of Soviet Civil Codification as a Chapter in European Legal History 53

Konstantin P. Krakovskiy: Jeremy Bentham and the Judicial Reform of 1864 in Russia 61

Vasil Gorbachov: On the Impartiality of the Prosecutor in the Courts of the Russian Empire (Normative Regulation and Practice of Implementation) 71

Georg W. Oesterdiekhoff: Divergent Worlds of Political Consciousness and Behavior in Contemporary Societies. The Contribution of the Cognitive-developmental Approach to the Foundation of the Political Sciences 77

Tomasz Chłopecki: The Petroleum Law in Poland in the 19th and 20th Centuries 87

Piotr Z. Pomianowski: Legal Status of Women in Codes Binding in Central Polish Lands in the Early Nineteenth Century 96

Piotr Michalik: Consent to a Jewish Marriage in Legislation of the Free City of Cracow (1815–1846). 102

Konrad Graczyk: Die (beschleunigte) Evakuierung des Sondergerichts Kattowitz im Jahre 1945 110

Karol Siemaszko: Perpetrators and Victims. Sex Crime on the Territory of Middle Odra Region in the Early Years after the World War II. 114

Magdalena Pyter: A Centenary of Legal Education at the University of Lublin. The Early-Stage Challenges 119

Judit Balogh: Debates in Articles (Positions in the Legal Literature on the Possibilities of Private Law Codification, 1866-1900) 126

István László Gál: The Relationship between Economic Crises and Criminality from the 18th Century to Today. 138

Csaba Cservák, György Tamás Farkas: Development of the Nationality Law in Hungary 145

János Erdődy: SC Claudianum: a Positive Feedback on Property or Defence of Family Bonds? 152

Ihor Lohvynenko, Igor Nevzorov, Gennadii Dedurin: Formation of the Constitutional and Legal Status of National Minorities in the Second Polish Republic 160

Bashkim Rrahmani: Kosovo Judicial Position from the Second World War until 1974 169

Jiří Bílý: The Human Rights, Canonic Law and the Impact of Religion from the Perspective of Vatican II 182

David Parra Gómez: The Failure of the Weimar Constitution: Institutional Keys and Lessons to be Drawn 188

BOOK REVIEWS

Hans Petter Graver: Der Krieg der Richter. Die deutsche Besatzung 1940-1945 und der norwegische Rechtsstaat. 194

Christian Baldus, Wojciech Dajczak (Hrsg.): Der allgemeine Teil des Privatrechts: Historische Wurzeln – Leistungsfähigkeit im 21. Jahrhundert. 195

Reidar Maliks, Johan Karlsson Schaffer (eds.): Moral and Political Conceptions of Human Rights: Implications for Theory and Practice. 197

Vitalii Voropanov: Sud i pravosudie v provincii Rossiiskoi imperii vo vtoroi polovine XVIII v. 198

Mona Hasenritter: Wilhelm Theodor Kraut (1800-1873), Ein Leben für die Lehre. 200

Wilhelm Güde: Max Güde (1902–1984), ein Juristenleben im 20. Jahrhundert 201

Hans Hugo Klein: Vor- und Entstehungsgeschichte des Bundesverfassungsgerichts 202

Detlev Fischer: Maklerrecht. 203

Christoph Sorge: Verpflichtungsfreier Vertrag als schuldrechtlicher Rechtsgrund. Das Rechtsgeschäft der *condictio ob rem* gemäß § 812 Abs. 1 S. 1 Alt. 2 BGB jenseits von Erfüllungszwang und Markttausch. 204

REPORTS FROM HISTORY OF LAW

Richter am Bundesgerichtshof a.D. Dr. Detlev Fischer erhält Verdienstkreuz am Bande des Verdienstordens der Bundesrepublik Deutschland. 207

Guidelines for authors. 209

JOURNAL ON EUROPEAN HISTORY OF LAW

© 2020 STS Science Centre Ltd.

All contributions / papers are subject to a peer-review. The journal is indexed in SCOPUS and ERIH PLUS.
All rights reserved. Neither this publication nor any part of it may be reproduced, stored in a retreival system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of STS Science Centre Ltd.. Published semiannually by STS Science Centre Ltd. „Journal on European History of Law“ is a registered trademark of STS Science Centre Ltd.
Issued twice a year.

Printed in the EU.

ISSN 2042-6402

„Zurück in die Zukunft“: Österreichs staatsrechtliche Zeitreise im Jahr 1945“

(Back to the Future: Austria’s Constitutional Time Travel in 1945)

Christian Neschwara *

Abstract

In the course of 1945 a striking change of the constitutional status happened in Austria: At Easter, when the Red Army was crossing the border in the southeast of Austria, the way was paved for terminating the national-socialist rule, which was in effect since the „Anschluß“ in March 1938. Austria, now renamed „Ostmark“, perished as a subject of international law, it was totally integrated in the organisation of German Empire. In 1940 the historical structure of Austria’s Länder was completely modified with the establishment of „Reichsgaue“, following the pattern of the territorial structure of the NSDAP. Due to the Declaration of the Allied powers in autumn 1943 at Moscow about the re-establishment of Austria’s sovereignty the way was paved for an independent state authority in her eastern Länder – with personal benevolence from Stalin. On behalf of the Soviet occupation forces the formation of a Provisional State Government took place, consisting of members delegated by the new antifascist political parties under the leadership of Karl Renner; he served as State Chancellor. Citing the Moscow Declaration, they ordered to set up Austria „in the spirit of the Constitution of 1920“. Lacking democratically legitimated organs a Provisional Constitution had to take the place of the Federal-Constitutional Law of 1920. At first Austria was built up as a decentralized unitary state. Following the occupation of the western national territory of Austria by the western Allied forces until summer of 1945, in the course of Länder-conferences in September the agreement of the political parties in western Austria was reached about the legislative activities taken by the Provisional State Government at Vienna. Due to the recognition by the Allied Committee in October 1945 the Provisional State Government was able to organize general elections in next month. After appointment of all organs provided by the Federal-Constitutional Law the Provisional Constitution was abrogated in December 1945; this did not meet the approval of the Allied Council, due to his demand to draft up a new constitution. The constitutional change was accompanied by an abruptly renunciation of Austrian citizens from the former self-image based on the idea of 1918 about belonging to the German nation, which was replaced by a growing attention to a new awareness about Austria as their nation.

Keywords: *Allied Committee in Austria; Allied Control in Austria; Allied Declaration on Austria 1943; Austrian Federal Constitution of 1920; Austrian Provisional Constitution of 1945; Declaration on Austrian Sovereignty; Denazification; Moscow Conference 1943; State Symbols; Transfer of Constitutional Law.*

I. Der „Anschluß“: Das Ende von Österreichs Staatlichkeit?

Die Idee eines Anschlusses der deutschsprachigen Gebiete der Habsburgermonarchie an das Deutsche Reich war eine Folge der sich im Oktober 1918 abzeichnenden Auflösung des alten Österreich durch Bildung von neuen Staaten auf ihrem Gebiet. Nachdem die Tschechen und Südslawen eine Zusammenarbeit mit den Deutschen des alten Österreich im Verband einer neuen Konföderation ablehnten, musste das von den Abgeordneten der deutschen Wahlkreise des Reichsrates ins Leben gerufene Deutschösterreich zur Sicherung seiner Lebensfähigkeit eine andere Anbindung suchen: Der zuerst von Sozialdemokraten geäußerte Wunsch eines Anschlusses an Deutschland zur Bildung einer „großdeutschen“ Republik wurde in der Folge von den Deutschnationalen und auch von den Christlichsozialen befürwortet. Nach der am 30. Oktober mit den Stimmen aller Abgeordneten einhellig erfolgten Staatsgründung wurde dieses Staatsziel am 12. November 1918 aus Anlass der feierlichen Proklamation der Republik von der Parlamentsrampe in Wien einer mehrhundertausendköpfigen Versammlung feierlich verkündet. Ein Staatsvertrag über den Beitritt von Deutschösterreich zum Deutschen Reich war im März 1919 bereits punktiert und die Vereinbarung eines Staatsvertrags über den Zusammenschluss der beiden Staaten vorbereitet. Sein Abschluss wurde aber von den Siegermächten unter Androhung wirtschaftlicher Sanktionen und militärischer Inventionen unterbunden; in den Diktaten von Paris-Versailles und -St. Germain wurde sodann ein „Anschluß“-Verbot verankert, das nur unter Mitwirkung des Völkerbundes modifiziert werden konnte. Alle Versuche, einen Zusammenschluss der beiden Staaten anzubahnen, wurden von den Alliierten unterbunden.

Der am 13. März 1938 bewirkte „Eintritt“ von Österreich „in das Deutsche Reich“ wurde schließlich unter Ignorierung völkerrechtlicher Mechanismen im Zusammenwirken von den in beiden Staaten bestehenden nationalsozialistischen Regierungen im Weg paktierter Verfassungsgesetze juristisch perfektioniert. Damit hatte Deutschösterreich im 20. Jahr seines

* ao.Univ.-Prof. Dr. iur., Institut für Rechts- und Verfassungsgeschichte der Rechtswissenschaftlichen Fakultät der Universität Wien, Österreich.

Bestandes nach herrschender Ansicht des Jahres 1938 zu bestehen aufgehört. Österreich existierte für eine Übergangszeit als politische Einheit, als „Land" des Deutschen Reiches, fort. Im April 1938 setzte der politische Umbau des Landes ein, nach „Durchführung der staatlichen, wirtschaftlichen und kulturellen Wiedereingliederung [!] Österreichs in das Deutsche Reich" wurde Österreich im Mai 1939 in „Ostmark" umbenannt und im April 1940 als politische Einheit liquidiert: An die Stelle der historischen Gliederung des österreichischen Bundesstaates in neun Bundesländer[1] trat eine an der Organisation der NSDAP orientierte Gliederung in sieben Reichsgaue.[2]

A) 1938 ein rechtlich konstitutives Faktum

Am 30. Oktober 1918 aus der Konkursmasse der Habsburgermonarchie als neuer Staat hervorgegangen, war Österreich schon in jungen Jahren, im zwanzigsten Jahr seines Bestandes[3], als Völkerrechtssubjekt untergegangen. Seit 13. März 1938[4] galt Österreich durch den „Anschluß" an das Deutsche Reich als Völkerrechtssubjekt nicht mehr existent. Das anlässlich seiner „Geburt" im Staatsgründungsbeschluss vom 30. Oktober 1918, zunächst nur durch seinen Staatsnamen „Deutschösterreich" angedeutete und bei seiner „Taufe" am 12. November 1918 in Verbindung mit der Proklamation seiner Staats- und Regierungsform als demokratische Republik sodann ausdrücklich deklarierte Ziel, künftig als Gliedstaat einen „Bestandteil" des Deutschen Reiches bilden zu wollen (Art. 2 leg. cit.)[5], schien erfüllt: Freilich war dieses Staatsziel durch die am 12. März mit militärischen Mitteln durchgeführten Besetzung durch das Deutsche Reich formal betrachtet „gewaltsam"[6], und daher in völkerrechtswidriger Weise verwirklicht worden. Mit der Okkupation des österreichischen Staatsgebietes war der „Anschluß" faktisch verwirklicht, am nächsten Tag erfolgte im Zusammenwirken der nationalsozialistischen Regierungen der beiden Staaten der juristische Vollzug mittels paktiertem Erlass von Verfassungsgesetzen über die „Wiedervereinigung Österreichs mit dem Deutschen Reich"[7], womit fingiert werden sollte, dass die beiden Staaten früher schon einmal vereinigt waren.[8] In Österreich war dieses Verfassungsgesetz auf verfassungsrechtlich anfechtbare Weise geschaffen worden: Am 11. März 1938 – nach dem durch ein Ultimatum des Deutschen Reiches erzwungenen Rücktritt des Bundeskanzlers Kurt Schuschnigg – hatte sich unter Führung des In Österreich nationalsozialistischen Vizekanzlers Arthur Seyss-Inquart– ohne Zustimmung des Bundespräsidenten – staatsstreichartig eine „provisorische" Bundesregierung gebildet. Die zugleich – mit Wissen der deutschen Reichsregierung österreichweit von Nationalsozialisten inszenierten „Volksaufstände" sollten den Anschein einer innenpolitischen Situation wecken, welche dem Deutschen Reich einen Vorwand bot zu einer – schon lange davor geplanten[9] – militärischen Intervention in Österreich: Unter dem Vorwand hier – auf Ersuchen der österreichischen Bundesregierung[10] – „die Ruhe und Ordnung wiederherzustellen", kam es in den Morgenstunden des folgenden Tages zum Einmarsch deutscher Streitkräfte und zur Besetzung des österreichischen Staats-

---

[1] Die Stadt Wien, auf Grundlage des Bundes-Verfassungsgesetzes von 1920 mit 1. 1. 1922 als Bundesland konstituiert, wurde durch die Verfassung 1934 mit dem Status einer bundesunmittelbaren Stadt den übrigen Bundesländern gleichgestellt: KOHL, G. / NESCHWARA, Ch. / OLECHOWSKI, Th. / REITER-ZATLOUKAL, I. / SCHENNACH, M. P., *Rechts- und Verfassungsgeschichte*, [5]Wien 2018, S. 287f. (Randziffer 1908).

[2] Niederösterreich bildete nun mit dem nördlichen Burgenland den Reichsgau Niederdonau, Oberösterreich mit dem bisher steirischen Salzkammergut den Reichsgau Oberdonau. Diesen beiden Reichsgauen wurden 1939 Teile des ehemaligen tschechoslowakischen Staatsgebiets zugeschlagen (Südmähren und Gebiete um Preßburg an Niederdonau sowie Südböhmen an Oberdonau). Der Reichsgau Wien wurde um bisher niederösterreichische Nachbargemeinden, der Reichsgau Kärnten um Osttirol und der Reichsgau Steiermark um das südliche Burgenland vergrößert. Weitere Änderungen erfolgten im Verlauf des Zweiten Weltkrieges: Den Reichsgauen Steiermark und Kärnten wurden 1941 jugoslawische Gebiete (die Untersteiermark und Oberkrain) zugeschlagen. Vorarlberg wurde dem Reichsgau Tirol unterstellt. Nur das Gebiet des Reichgaus Salzburg blieb mit dem des ehemaligen Bundeslandes identisch: KOHL / e.t al., *Rechts- und Verfassungsgeschichte* (n 1), S. 302f. (Randziffer 1958).

[3] NESCHWARA, Ch., Die Rolle der Parlamente im Übergang von der „alten" Monarchie zur „neuen" Republik", in: DERS. / RAINER M. J. (Hrsg.), *100 Jahre Republik. Der Beitrag der Provisorischen Nationalversammlung zur Entstehung Deutschösterreichs*, Graz 2018, S. 11–53, besonders S. 22ff.

[4] BRAUNEDER, W., *Österreichische Verfassungsgeschichte*, Wien [9]2003, S. 248ff.; NESCHWARA, Ch., Zur Entwicklung des Verfassungsrechts nach 1918, in SCHAMBECK, H. (Hrsg.), *Parlamentarismus und öffentliches Recht in Österreich*, Berlin 1993, 170 ff; SCHMIDL, E., *Der „Anschluß" Österreichs. Der deutsche Einmarsch im März 1938*, Wien [3]1994, S. 111 ff.

[5] Zum Bild der „Geburt" und „Taufe" des Staates Deutschösterreich, das Karl Renner als Staatskanzler der ersten Republik geprägt hatte: NESCHWARA, Verfassungsentwicklung (n 4), S. 90. – Die entsprechenden Kundmachungen in: *Staatsgesetzblatt für Deutschösterreich* (im Folgenden abgekürzt: *StGBl.*) 1918/Nr. 1 und 5.

[6] Ungeachtet dessen, dass der so vollzogene „Anschluß" auf keinerlei militärischen oder zivilen Gehorsam gestoßen war: BOTZ, G., Der „Anschluss" Österreichs an das Deutsche Reich, in: KARNER, St. / TSCHUBARJAN, A. (Hrsg.), *Die Moskauer Erklärung 1943 „Österreich wieder herstellen"*, Wien-Köln-Weimar 2015, S. 121–133, besonders 128f.

[7] Bundesverfassungsgesetz über die Wiedervereinigung Österreichs mit dem Deutschen Reich: *Bundesgesetzblatt für den Bundesstaat Österreich* Nr. 75 (25. Stück, ausgegeben am 13. 3. 1938); Kundmachung des Bundeskanzleramtes, womit das Bundesverfassungsgesetz über die Wiedervereinigung Österreichs mit dem Deutschen Reich, B. G. Bl. Nr. 75/1938, neuerlich verlautbart wird: *Gesetzblatt für das Land Österreich* Nr. 1/1938 (1. Stück, ausgegeben am 15. 3. 1938); Gesetz über die Wiedervereinigung Österreichs mit dem Deutschen Reich vom 13. März 1938: (deutsches) *Reichsgesetzblatt*, Teil I (25. Stück, ausgegeben am 14. 3. 1938), S. 327.

[8] Im März 1919 waren beide Staaten schon auf dem Weg diese Vereinigung auf Grundlage eines Staatsvertrags vorzubereiten, was aber letztendlich am Veto der Alliierten scheiterte und zur Verankerung eines „Anschluß"-Verbotes in den Verträgen von Versailles und St. Germain führte: NESCHWARA, Parlamente (n 5), S. 29, 36f.

[9] Pläne zu militärischen Interventionen in Österreich seitens des Deutsches Reiches reichen bis in das Jahr 1935 zurück: SCHMIDL, E., „Anschluss" 1938 – ein Rückblick nach 75 Jahren, in KARNER / TSCHUBARJAN, Moskauer Erklärung (n 6), S. 140.

[10] Ein vermeintlich von der provisorischen Bundesregierung an die deutsche Reichsregierung abgesendetes Telegramm, mit dem diese Hilfe angesucht wurde, sollte den politischen Rechtfertigungsgrund liefern, es hat freilich nie existiert.

gebiets.[11] Dies wurde damals nicht nur fast einhellig von der Bevölkerung der beiden Staaten begrüßt[12], sondern auch von der gesamten Staatenwelt, von einzelnen Protesten, wie jenem von Mexiko, abgesehen[13], als rechtlich konstitutives Faktum akzeptiert[14], meist stillschweigend wie von Italien, Frankreich oder den USA, teils aber auch durch schlüssige Handlungen wie der Fall bei Großbritannien, das seine Gesandtschaft in Wien Anfang April 1938 in ein Generalkonsulat umwandete.[15] Die Sowjetunion notifizierte zumindest den Westmächten Bedenken gegen den Anschluss.[16]

B) Seit 1943: ein absolut nichtiges völkerrechtlich Unrecht

Initiativen zur Wiederherstellung eines unabhängigen österreichischen Staates[17] sind zunächst weder im Ausland – im Kreis von Exilösterreichern – hervorgetreten, noch konnten sich solche unter den herrschenden politischen Verhältnisse – im Inland etablieren. Auch in der ersten Phase des Weltkrieges spielten solche Überlegungen in den alliierten Kriegsplanungen keine Rolle: Ehemalige österreichische Staatsbürger, zunächst auch jüdische Flüchtlinge, wurden als feindliche Ausländer betrachtet und interniert. Erst nach der Katastrophe von Stalingrad und der Eskalation der nationalsozialistischen Herrschaft gewann die Idee der Herauslösung Österreichs aus dem Deutschen Reich in Widerstandskreisen im Inland an Bedeutung, und wurde auch von den Alliierten in Betracht gezogen, zunächst freilich nur als militärstrategisches Mittel der psychologischen Kriegsführung. Just zum 25. Jahrestag der 1918 erfolgten Staatsgründung erfolgte auf der Konferenz in Moskau am 30. Oktober 1943 eine gemeinsame „Erklärung" der alliierten Regierungen von Großbritannien, der Sowjetunion und der Vereinigten Staaten von Amerika „über Österreich", „das erste freie Land, das der hitlerischen Aggression zum Opfer gefallen war", sollte „von der Herrschaft der Deutschen befreit" werden, weil die Alliierten nun den „Anschluß als null und nichtig" betrachteten; Frankreich schloss sich dieser Erklärung Mitte November an.

II. Die Moskauer Erklärung vom 30. Oktober 1943

A) Aus alliierter Sicht

Überlegungen im Kreise der Alliierten zu einer Wiederherstellung von Österreichs Staatlichkeit sind vereinzelt in beiden Lagern, bei den Westalliierten wie auch in der Sowjetunion, im Verlauf des Weltkriegs schon vor der Moskauer Konferenz 1943 zu konstatieren. Vordenker und Vorreiter waren hierbei die Briten; Äußerungen über Österreich waren zwar auch dort nur vereinzelt gefallen: Schon 1940 erklärte Churchill in einer Rede in London vor Exilösterreichern: „Austria was the first victim of Nazi aggression".[18] Außenminister Eden wird sich im September und Dezember 1942 in ähnlicher Weise äußern[19], unter anderem auch gegenüber Stalin, der sich wiederum gegenüber Eden schon 1941 für eine Wiederherstellung der Souveränität Österreichs aussprach.[20] In den USA wurden 1943 Überlegungen angestellt, Österreich als Staat mit neutralem Status wie die Schweiz auszustatten[21], allerdings hatten andere Überlegungen mehr Gewicht, welche von einer Anbindung Österreichs an die südlichen Länder Deutschlands (Baden, Württemberg und Bayern) ausgingen, als Teil eines Plans, Deutschland zu zerschlagen, allenfalls auch beschränkt auf Bayern[22], aber in Verbindung mit Ungarn, oder, ähnlich wie in den britischen Überlegungen, von seiner Einbindung als souveräner Staat in eine

[11] Vgl. SCHMIDL, „Anschluß" (n 4), S. 111ff.

[12] Die Volksabstimmung fand am 10. April 1938 unter Beteiligung von 99,7 % der Abstimmungsberechtigten statt, wobei sowohl in Österreich als auch im „Altreich" über 99 % die „Wiedervereinigung" bejahten. Auch der Andrang zu Mitgliedschaften in der NSDAP und ihren Gliederungen war verglichen mit anderen Regionen des Großdeutschen Reiches in den „Alpen- und Donaugauen" besonders ausgeprägt. Schätzungsweise ein gutes Drittel der erwachsenen männlichen Österreicher war nationalsozialistisch organisiert: BOTZ, „Anschluss" (n 6), S. 129f.

[13] Die Protestnote, mit der Mexiko gegen den „Anschluss" aufstand. Am 19. März, eine Woche nach dem Einmarsch deutscher Truppen, übergab der Gesandte Mexikos beim Völkerbund dem Generalsekretariat der Weltorganisation in Genf das Schreiben. Zwar protestierten auch andere Staaten gegen den „Anschluss", etwa die Sowjetunion. Doch erfolgten diese Einwände verbal oder in Form bilateraler Demarchen. Nur Mexiko brachte die Causa vor den Völkerbund: HAFNER, G., A Swallow in Winter: The mexican protest in 1938, in: *University of Vienna Law Review*, Band 2/Nr 2 (2018: Special Issue: In the Spirit of Isidro Fabela - Mexican and Austrian Approaches to the Challenges of International Law (https://viennalawreview.com/index.php/vlr/issue/view/24 [abgerufen 25. 3. 2020]).

[14] SUPPAN, A., Erniedrigung und Unterwerfung, in: RAUSCHER, W. / SUPPAN, A. (Hrsg.), *Außenpolitische Dokumente der Republik Österreich 1918–1938*, Band 12 (Österreich zwischen Isolation und Anschluss: 28. September 1937 bis 15. März 1938), herausgegeben von, Wien 2016, S. 11–60.

[15] BEER, S., Die Besatzungsmacht Großbritannien 1945–1949, in: ABLEITINGER, A. / BEER, S. / STAUDINGER, E. G. (Hrsg.), *Österreich unter alliierter Besatzung 1945–1955*, Wien-Köln-Graz 1998, S. 41–70, hier 43, 54; BEER, S., SOE, PWE und schließlich FO. Die Briten als Vorreiter der alliierten Österreichplanung, 1940–1943, in KARNER/TSCHUBARJAR (n 6), S. S. 99–108, besonders 100 Anm. 8.

[16] IBER, W. M. / RUGGENTHALER, P., Zur Bedeutung der Moskauer Deklaration zu Österreich für die Sowjetunion, in KARNER / TSCHUBARJAN (n 6), S. 78–91, hier 78.

[17] ERDMANN, K. D., *Das Ende des Reiches und die Entstehung der Republik Österreich, der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik* (= Handbuch der deutschen Geschichte 22), München ^{9}1999, S. 70ff.

[18] STOURZH, G., *Um Einheit und Freiheit Staatsvertrag, Neutralität und das Ende der Ost-West-Besetzung Österreichs 1945-1955*, Wien ^{4}1998, S. 14, unter Hinweis auf eine Meldung in der englischen Tageszeitung „The Times" vom 19. 2. 1942. In durch die Übersetzung ins Französische abgeänderter Variante später auch in der französischen Zeitschrift „Toujours" vom 15. 3. 1944.

[19] BEER, Besatzungsmacht (n 15), S. 54.

[20] STOURZH, *Einheit* (n 18), S. 15.

[21] BEER, SOE, PWE und schließlich FO (n 15), S. 107 Anm. 27; STOURZH, *Einheit* (n 18), S. 16.

[22] Die Idee eines solchen als „Alpenland" bezeichneten Süddeutschland war in Frankreich schon 1923 aufgebracht worden (als Gegenpol zum preußisch dominierten Norddeutschland) in Erwägung gezogen worden: SOUTOU G. E., Paris zwischen Angst vor einem „neuen Anschluss" und Schwärmerei für eine neue europäische Ordnung, in KARNER/TSCHUBARJAR (n 6), S. 116.

Föderation mit anderen mittel- und osteuropäischen Staaten[23], als eine Art Cordon sanitaire zur Eindämmung des sowjetischen Einflusses auf Europa[24], was freilich von den USA zunächst auch in Kauf genommen wurde.[25] Frankreich, das auf der Moskauer Konferenz nicht vertreten gewesen ist, hatte sich, ohne es zu wissen, nahezu zeitgleich auch in diesem Sinne ausgesprochen: Österreich sollte als Teil einer Donau-Konföderation von Deutschland als unabhängiger Staat losgelöst werden.[26] Die Idee einer solchen Konstruktion wurde in französischen Kreisen sogar über 1945 hinaus in Diskussion gehalten, freilich war schon seit 1944 erkennbar, dass weder die Tschechen noch die Sowjetunion eine solche Einbindung Österreichs dulden würden, die Politik von Beneš und Stalin zielte auf die Errichtung einer Volksdemokratie in Österreich unter sowjetischer Kontrolle ab.[27] Für die Sowjetunion waren die Kriegszielvorstellungen auf eine Wiederherstellung Österreichs als unabhängiger Staat zunächst als Mittel zur Schwächung Deutschlands[28] vorgesehen, von dem Österreich als von Deutschen besiedeltes Land separiert werden musste.[29] Eine Föderation von den an der Donau gelegenen Staaten – eine Habsburger-monarchie im Kleinformat, wie zunächst von den USA akzeptiert – lehnte sie ab.[30] Für die Kriegsplanung der Sowjets wurde die Verschiebung ihrer Westgrenze zu Europa entscheidend.[31]

In den Verhandlungen auf der Moskauer Konferenz blieb die Sowjetunion bei der Ausformulierung der Erklärung über Österreich zurückhaltend und überließ Großbritannien die Initiative[32], wo schon im Frühjahr 1943 im Außenministerium ein Memorandum über den künftigen Status von Österreich ausgearbeitet worden war. Darin wurden verschiedene Szenarien dargestellt: Denkmöglich, aber von vorneherein negativ bewertet wurden Modelle, in welchen Österreich als integrativer Bestandteil eines neuen Deutschlands bzw. im Verbund mit einem Teil davon (den süddeutschen Ländern) fortbestehen sollte. Favorisiert wurden von Churchill andere Konstellationen, in denen Österreich als unabhängiger Staat im Verbund mit anderen mittel- und sudosteuropäischen Staaten eine – vom Modell der Habsburgermonarchie inspirierte – Konföderation bilden sollte. Das Problem hierbei war – abgesehen von der mangelnden Existenz einer österreichischen Exilregierung, welche als Träger dieser Idee fungieren konnte – vor allem die ablehnende Haltung, die in Polen, der Tschechoslowakei und in Jugoslawen gegen eine solche Habsburg-Restauration zu erwarten gewesen wäre.[33] Dem Manko der Existenz einer österreichischen Exilregierung sollte durch den Aufbau einer wirksamen Widerstandsbewegung in Österreich abgeholfen werden, und durch die Androhung[34], dass die Bevölkerung Österreichs für seine „Haltung während des Krieges“ zur Verantwortung gezogen werde, angefacht werden; man erwartete sich daher seitens der Alliierten aktive Beiträge zum Widerstand gegen das NS-Regime in Österreich.[35] In Verbindung mit dieser Zielsetzung wurde im Schlusssatz der Moskauer Erklärung noch hervorgehoben: Österreich werde daran erinnert, dass es „Verantwortung habe… für die Beteiligung am Krieg an der Seite von Hitlerdeutschland“, es werde „bei der definitiven Regelung der Verhältnisse unvermeidlich auf den eigenen Beitrag Bedacht genommen, den es für seine Befreiung geleistet habe“. Die in der von Großbritannien vorgelegten Fassung enthaltene Textierung, wonach sich diese Verantwortung gegen „das österreichische Volk“ richtete, wurde auf Betreiben der Sowjets in eine „Verantwortung Österreichs“ als Staat abgeschwächt[36], Dies stand allerdings in Widerspruch zu der gleichzeitigen Feststellung, wonach Österreich das erste Opfer der deutschen Aggression gewesen sei, das daher von den Alliierten zu befreien war, obwohl es als Völkerrechtssubjekt durch den Anschluss eigentlich untergegangen war. Widersprüchlich zum Ergebnis der über Österreich zustande gekommenen Erklärung erscheint auch, dass bei der Vorbereitung der Moskauer Konferenz Österreich von den USA und Großbritannien als einer der „Feindstaaten“ behandelt wurde und sein Verhältnis zu Deutschland als das einer „Union“ charakterisiert wurde. Auf Einschreiten der Sowjetunion wurde dieser Terminus allerdings abgeändert in „annexation“ im Sinne des russischen Wortes für „Verschmelzung“, „Fusion“.[37] Frankreich, das auf der Moskauer Konferenz nicht vertreten war, hatte sich der Erklärung der „großen Drei“ über Österreich vom 30. Oktober gut zwei Wochen später, am 16. November 1943 angeschlossen[38]; mit einer Erklärung, in welcher die Tragweite

[23] STOURZH, *Einheit* (n 18), S. 16.
[24] ŠVEJCER, V., Die Moskauer Erklärung von 1943: Kommentare zur Position der UdSSR, in KARNER / TSCHUBARJAN (n 6), S. 53–58, hier 55f.; dazu auch STOURZH, *Einheit* (n 18), S. 16.
[25] Ebda.
[26] SOUTOU, Paris (n 22), S. 109–120, hier 113f.
[27] Ebda, S. 117.
[28] STOURZH, *Einheit* (n 18), S. 17.
[29] IBER/RUGGENTHALER, Moskauer Deklaration (n 16), S. 88f.
[30] ŠVEJCER, Moskauer Erklärung (n 24), S. 56f.; STOURZH, *Einheit* (n 18), S. 16.
[31] IBER/RUGGENTHALER, Moskauer Deklaration (n 16), S. 80, 82
[32] STOURZH, *Einheit* (n 18), S. 11–28. – Ferner ŠVEJCER, Moskauer Erklärung (n 24), S. 55ff.; BEER, SOE, PWE und schließlich FO (n 15), S. 99ff. Auch BEER, Besatzungspolitik (n 15), S. 55.
[33] Ebda, S. 11f.
[34] Ebda, S. 14.
[35] BEER, Besatzungspolitik (n 15), S. 55.
[36] ŠVEJCER, Moskauer Erklärung (n 24), S. 56f.; STOURZH, *Einheit* (n 18), S. 21f.; KEYSERLINGK, G., Moskauer Deklaration – Die Alliierten, Österreich und der Zweite Weltkrieg, in STEININGER, R. / GEHLER, M. (Hrsg.), *Österreich im 20. Jahrhundert*, Band 2, Wien-Köln-Weimar 1997, S. 9ff, 34 (Text der Deklaration).
[37] STOURZH, *Einheit* (n 18), S. 18, 20.
[38] SOUTOU, *Paris* (n 22), S. 114. STOURZH, *Einheit* (n 18), S. 23

der Verantwortlichkeits-Klausel mit den Worten beschwichtigt wurde, dass man nicht „zweifelt…, daß die österreichischen Patrioten die Sache ihrer Unabhängigkeit fördern werden, in dem sie selbst an der Wiedergeburt ihres Landes arbeiten".[39]

Für die USA war die Moskauer Erklärung zunächst „ein Propagandatrick" (so Außenminister Hull), der den Widerstand gegen die nationalsozialistische Führung in Österreich anfachen sollte.[40] Die gewünschte Wirkung wurde zunächst aber verfehlt, die in den traditionellen politischen Lagern etablierten Widerstandsgruppen blieben im Untergrund. Anders als etwa in Italien oder Jugoslawien mangelte es in Österreich an einer Koordinierung der einzelnen Widerstandsgruppen und Einzelpersonen im Widerstand, zum Teil fehlte es aber auch an der Bereitschaft zu aktivem Widerstand.[41] Der Charakter der Erklärung über Österreich wandelte sich aber bald: Durch das Eingreifen der Sowjetunion in ursprüngliche britische Textierung der Verantwortlichkeitsklausel wurde diese „von der Ebene der psychologischen Kriegsführung bzw. Propaganda… auf die juristisch-völkerrechtliche Ebene" verschoben.[42] Mit der sich abzeichnenden Niederlage Deutschlands kam es auch in den USA aber auch zu einer Neubewertung der Moskauer Erklärung als konkrete politische Zielsetzung für Österreich nach dem Krieg.[43]

B) Aus österreichischer Sicht

Im Frühjahr 1945, nach der sukzessiven Besetzung des österreichischen Staatsgebietes durch Truppen der Alliierten – Ende März rückten die Russen über das südliche Burgenland bis zum 10. April nach Wien vor, das am 13. April eingenommen wurde[44], – begannen sich in den politischen Lagern neue Parteien zu formieren: Am 14. April wurde die SPÖ und am 17. die ÖVP gegründet; die KPÖ hatte nach dem 1933 verhängten Verbot im Untergrund fortbestanden. Unter Verdrängung der zersplitterten übrigen Widerstandsgruppen und unter Ausschluss des nationalen Lagers, das sich wegen seiner Verflechtungen mit dem nationalsozialistischen Regime selbst diskreditiert hatte, war es die Zielsetzung der „antifaschistischen Parteirichtungen"[45], die Absichtserklärung der Alliierten von Moskau 1943 umzusetzen, und Österreich als unabhängigen Staat wiederherzustellen.

Mit Zustimmung des Militärkommandos der sowjetischen Truppen in Österreich wurde Karl Renner, der sich dafür kurz davor bei Stalin als „erster Staatskanzler" der Republik (1918) und als ihr „letzter Parlamentspräsident" (1933) selbst empfohlen hatte[46], am 21. April ermächtigt, eine Provisorische Staatsregierung zu bilden.[47] Aus taktischen Erwägungen, weniger aus in gemeinsamer Lagerhaft gewonnenem gegenseitigem Verständnis, wurde eine Konzentrationsregierung aus Mitgliedern der drei genannten Parteien vorgesehen. Mit der Übernahme ihres Wortlauts in die Unabhängigkeitserklärung vom 27. April 1945 wurde die Moskauer Erklärung von den politischen Parteien bewusst zur Untermauerung der „Opfer"-Rolle Österreichs herangezogen und als theoretisches Fundament seines Okkupations-Status in der Zeit des „Anschlusses" instrumentalisiert: Österreich wäre demnach 1938 als Staat nicht untergegangen, sondern bloß seiner Handlungsfähigkeit beraubt worden. Mit Wegfall der deutschen Besetzung 1945 wäre dieses Manko eo

---

[39] Ulrich NACHBAUR, *Österreich als Opfer Hitlerdeutschlands*, Regensburg 2009, S. 16f. STOURZH, *Einheit* (n 18), S. 22.

[40] KEYSERLINGK, Moskauer Deklaration (n 36), S. 20.

[41] ŠVEJCER, Moskauer Erklärung (n 24), S. 55f.

[42] STOURZH, *Einheit* (n 18), S. 22.

[43] CSÁKY, M., *Der Weg zu Freiheit und Neutralität. Dokumentationen österreichischer Außenpolitik 1945–1955*, Wien 1980, S. 1ff.; KNIGHT, R., Besiegt oder befreit? Eine völkerrechtliche Frage historisch betrachtet, in: BISCHOF, G. / LEIDENFROST, J., *Die bevormundete Nation. Österreich und die Alliierten 1945–1949*, Innsbruck 1988, S. 75ff.; RAUCHENSTEINER, M., Das Jahrzehnt der Besatzung als Epoche in der österreichischen Geschichte, in: ABLEITINGER/BEER/STAUDINGER (n 15), S. 22ff.; NESCHWARA, Verfassungsentwicklung (n 4), S. 170ff.

[44] Insbesondere zum von 6. bis 14. 4. 1945 tobenden Kampf um Wien aus zeitgenössischer Sicht: SCHÄRF, A., *April 1945 in Wien*, Wien 1948, S. 7 – 22.

[45] SCHÄRF, A., *Österreich Erneuerung 1945–1955. Das erste Jahrzehnt der zweiten Republik*, Wien 1955, S. 67–76. – Die SPÖ (Sozialistische Partei Österreichs) war aus den Kadern der Sozialdemokratischen Partei und dem 1934 davon abgetrennten Revolutionären Sozialisten hervorgegangen – ein Umstand, der es erklärlich macht, dass die KPÖ (Kommunistische Partei Österreichs) letztendlich bei den ersten Parlamentswahlen (trotz massiver Unterstützung durch die Sowjets) nur bei 5% landeten; die ÖVP (Österreichische Volkspartei) war aus den Resten der alten Christlichsozialen (und Heimwehren) sowie der Vaterländischen Front hervorgegangen. Es mag daher nicht zu überraschen, dass Julius Raab, prominenter Funktionär der Vaterländischen Front und Minister unter dem letzten Kabinett Schuschniggs, als Mitglied des ersten Kabinetts Figl, auf Veto der Sowjets aus der Ministerliste wieder gestrichen werden musste. Von den ehemaligen Deutschnationalen war nach den letzten Landtagswahlen 1932 und in der Folge der Großteil der Wähler ins Lager der Nationalsozialisten abgewandert. Das großdeutsche Parteiattribut „Volkspartei" wurde von der ÖVP übernommen. In die ÖVP integriert wurde auch der kleinere ehemalige Koalitionspartner, der (ebenfalls deutschnational-)katholische Landbund; sein prominentester Funktionär, Vinzenz Schumy, erfuhr dasselbe Schicksal wie Raab, er durfte auf Veto der Sowjets – wegen „pronazistischer" Einstellung – dem ersten Kabinett Figl ebenfalls nicht angehören. Dasselbe gilt übrigens auch für den Ehemaligen, 1945 ins Lager der SPÖ gewechselten Andreas Korp: Vgl. STOURZH, G., Die Regierung Renner, die Anfänge der Regierung Figl und die Alliierte Kommission für Österreich September 1945 bis April 1946, in: *Archiv für Österreichische Geschichte* 125 (1966), S. 321–342, hier 325f.; HÖBELT, L., Die Besatzer und die Parteien: Chicago, nicht Westminster, in; MÖLZER, A. (Hrsg.), *Als wir befreit wurden*, Wien 2005, S. 81–91, hier 81f.; WOHNOUT, H., *Leopold Figl und das Jahr 1945. Von der Todeszelle auf den Ballhausplatz*, St. Pölten-Salzburg 2015, S. 162–173.

[46] MÄHNER, P., Historische Einführung zu den Kabinettsratsprotokollen 30 bis 43, in: ENDERLE-BURCEL, G. / JEŘÁBEK, R. / KAMMERHOFER, L. (Hrsg.), *Protokolle des Kabinettsrates der Provisorischen Regierung Karl Renner 1945* [im Folgenden abgekürzt zitiert: *ProtPolKabR*], Band 3, Wien 2003, S. XXIII. Renner lieferte auch eine Selbstdarstellung: *Denkschrift über die Geschichte der Unabhängigkeitserklärung Österreichs und die Einsetzung der Provisorischen Regierung der Republik*, Wien 1945.

[47] ENDERLE-BURCEL, G., Einleitung, *ProtPolKabR* (n 46), Band 1, Wien 1995, S. IIIff.; Band 2, Wien 1999; vgl. PAPE, M., *Ungleiche Brüder. Österreich und Deutschland 1945–1965*, Köln-Weimar-Wien 2000, S. 24ff.

ipso hinfällig geworden, so dass die staatliche Kontinuität über das Intermezzo des „Anschlusses“ hinweg gewahrt gewesen wäre. Auf Grundlage dieser sogenannten „Okkupationstheorie“ sollte Österreich unter möglichst günstigen Bedingungen von den Auswirkungen der Behandlung Deutschlands durch die Alliierten herausmanövriert und es sollten vor allem auch allfällige Reparationsverpflichtungen der ehemaligen Kriegsgegner, aber auch private Wiedergutmachungsforderungen von nach dem „Anschluß“ in Österreich aus politischen oder rassischen Gründen verfolgten Personen abgewehrt werden.[48]

Die Deklaration der Unabhängigkeit erfolgte im Gemeinderatssitzungssaal des Rathauses. Sie wurde von Renner in eine pathetische „Proklamation“ gekleidet, in der die Umstände, welche 1938 zum „Anschluß“ geführt hatten, in tendenziöser Weise so dargestellt wurden, als sei dieser „einer wehrlosen Staatsregierung abgelistet und abgepreßt“ und „das Land… kriegsmäßig besetzt“ worden sei. Ein anschließender gemeinsamer Gang der Mitglieder der Provisorischen Staatsregierung zum Parlamentsgebäude sollte „als Symbol der Freiheit“[49] die Kernaussage der Unabhängigkeitserklärung – „Die demokratische Republik Österreich ist wiederhergestellt“ (Art. I leg. cit.) – plakativ veranschaulichen. Die Moskauer Erklärung wurde deswegen später auch zu einer „Magna Charta“[50] der wiederhergestellten Republik hochstilisiert. In „pflichtgemäßer Erwägung des Nachsatzes“ der Moskauer Erklärung hatte sich die Staatsregierung – auf Drängen der KP-Mitglieder – zu der Feststellung „genötigt“ gesehen, dass der eigene Beitrag Österreichs zu seiner Befreiung „angesichts der Entkräftung unseres Volkes und der Entgüterung unseres Landes zu ihrem Bedauern nur bescheiden sein“ könne.

III. Die Wiederherstellung der Unabhängigkeit Österreichs

A) Die „Überleitung“ der Verfassungsordnung von 1920

Zur Durchführung der Unabhängigkeitserklärung hatten die politischen Parteien eine Provisorische Staatsregierung als Träger des politischen Willens der Bevölkerung damit beauftragt, Österreich wieder „im Geiste der Verfassung von 1920 einzurichten“ (Art. I leg. cit.). Sie wurde hierzu „mit der vollen Gesetzgebungs- und Vollzugsgewalt betraut“ – freilich „vorbehaltlich der Rechte der besetzenden Mächte“ (Art. III leg. cit.). Obgleich die Staatsregierung sich zunächst de facto nur im sowjetischen Machtbereich, der fast ganz Niederösterreich inklusive Wien sowie den Großteil des Burgenlandes und der Steiermark umfasste, entfalten konnte, sah sie sich als legitimiert an, für den gesamten Staat zu handeln. Nach der Konstituierung am 29. April nahm sie ihre Tätigkeit auf. Ihre ersten Maßnahmen zur Durchführung der Unabhängigkeitserklärung waren bis Mitte Mai vorbereitet und wurden – gegen den Widerstand der KPÖ – rückwirkend zum 1. Mai 1945 (an diesem Tag hatte gar keine Sitzung stattgefunden!) in Wirksamkeit gesetzt: Ein Verfassungs-Überleitungsgesetz setzte „das Bundes-Verfassungsgesetz in der Fassung von 1929“ (B-VG) sowie alle übrigen Normen des Bundesverfassungsrechts nach dem Stand der Gesetzgebung vom 5. März 1933 wieder „in Wirksamkeit“.[51] Vorbehalte dagegen kamen von der KPÖ, welche in dieser Festlegung eine Präjudizierung der kommenden Nationalversammlung erblickte; aber auch das – politisch neutrale – Staatsamt für Justiz äußerte Bedenken dagegen, weil die Staatsregierung dadurch ihr Mandat überschreiten würde: Die Unabhängigkeitserklärung sprach ja relativ vage vom „Geiste der Verfassung vom 1920“ und nicht vom B-VG in der Fassung von 1929. Diese Verfassung konnte – „infolge der Lahmlegung des parlamentarischen Lebens“– noch nicht zur Anwendung kommen; sie war zufolge „der kriegerischen Ereignisse tatsächlich undurchführbar“.

Es musste daher zunächst für eine provisorische Verfassung Vorsorge getroffen werden. Diese sogenannte „Vorläufige Verfassung“[52] installierte als oberstes Organ unter Vorsitz des Staatskanzlers die Provisorische Staatsregierung, bestehend aus Staatssekretären und aus den politischen Parteien zugeordneten Unterstaatssekretären; die regionale Herkunft der 30 Mitglieder beschränkte sich auf den sowjetischen Machtbereich, die meisten kamen aus Wien. Getrennt von dieser obersten Verwaltungsspitze wurde als Träger der eigentlichen Regierungsfunktion ein „Politischer Kabinettsrat“ gebildet, bestehend aus dem Staatskanzler sowie aus Beiräten, die den drei politischen Fraktionen zugeordnet waren. Die Provisorische Staatsregierung übte aber nicht nur die gesamte Regierungs- und Vollzugsge-

---

[48] Dazu allgemein BAILER-GALANDA, B., *Die Entstehung der Rückstellungs- und Entschädigungsgesetzgebung. Die Republik Österreich und das in der NS-Zeit entzogene Vermögen*, Wien 2003, sowie GRAF, G., *Die österreichische Rückstellungsgesetzgebung. Eine juristische Analyse*, 2003. – Die Mehrzahl der Mitglieder der Staatsregierung konnte sich persönlich mit der „Opfer“-These identifizieren, weil sie selbst nationalsozialistischer Verfolgung ausgesetzt waren: STOURZH, *Einheit* (n 18), S. 26 Anm. 38. Kundmachung der Unabhängigkeitserklärung in: *StGBl.* (n 53) Nr. 1.

[49] ENDERLE-BURCEL, Einleitung (n 47), S. III. Kundmachung der Regierungserklärung in: *StGBl.* (n 53), Nr. 2. Die Konstituierung folgte im Rathaus, danach begab sich die Provisorische Staatsregierung zum Parlamentsgebäude, wo sie auf der Rampe von einer Abordnung der russischen Besatzer empfangen wurde, welche das Gebäude der Staatsregierung übergab – vor einer versammelten Masse, dominiert von Kommunisten und Sozialisten, eine Szene, welche an die Verkündung von Republik und Anschluss am 12. 11. 1918 erinnerte: Vgl. SCHÄRF, *April* (n 44), S. 107ff., 113f., 116ff., 120f. Die Staatsregierung bezog dann das ehemalige Bundeskanzleramt am Ballhausplatz.

[50] Vgl. BISCHOF, G., Die Moskauer Erklärung vom 1. November 1943: „Magna Charta“ der Zweiten Republik, in KARNER, St., *Österreich ist frei*, Wien 2005, S. 22–28, hier 22ff.

[51] NESCHWARA, Verfassungsentwicklung (n 4), S. 171ff.; BRAUNEDER, *Verfassungsgeschichte* (n 4), S. 255ff.; WIEDERIN, E., Einheitsstaat oder Bundesstaat? Diskurse und Entscheidungen 1945, in: SCHENNACH, M. P., *Rechtshistorische Aspekte des österreichischen Föderalismus. Beiträge zur Tagung an der Universität Innsbruck am 28. und 29. November 2013*, Wien 2015, S. 184–208, hier 186–193.

[52] NESCHWARA, Verfassungsentwicklung (n 4), S.; BERCHTOLD, K., Verfassungsentwicklung seit 1945, in: *75 Jahre Bundesverfassung. Festschrift aus Anlaß des 75. Jahrestages der Beschlußfassung über das Bundes-Verfassungsgesetz*, hrsg. von der Parlamentarischen Gesellschaft (Redaktion G. SCHEFBECK), Wien 1995, S. 141–166, hier 141f. – Die Kundmachung der Vorläufigen Verfassung in: *Staatsgesetzblatt der Republik Österreich* 1945/Nr. 5).

walt aus, sondern „bis zum Zusammentritt einer frei gewählten Volksvertretung“ auch die „nach dem B-VG… dem Bund und den Ländern zustehende Gesetzgebung“ (§ 18 leg. cit.). Damit war das bundesstaatliche Prinzip zugunsten einer gewaltenverbindenden Konzeption verlassen worden; ob und inwieweit die bundesstaatliche Organisationsform des B-VG aber wieder zur Geltung kommen sollte, blieb „der künftigen Volksvertretung vorbehalten“ (§ 4 leg. cit.). Die Länder behielten bloß die ihnen „nach der Überlieferung zustehenden wirtschaftlichen, sozialen und kulturellen Angelegenheiten“ (§ 31 leg. cit.). Die „überlieferte Ländereinteilung“ (§ 2 leg. cit.) war jedoch inzwischen verändert worden. Die seit dem „Anschluß“ modifizierten Landes- und Bezirksgrenzen wurden zunächst nach dem Stand vom 10. April 1945 aufrechterhalten: Das Burgenland blieb daher aufgelöst und Niederösterreich sowie der Steiermark zugeordnet. Die übrigen Veränderungen, die Anbindung Osttirols an Kärnten und des oberösterreichischen Ausseerlandes an die Steiermark sowie die Ausdehnung des Stadtgebiets von Wien auf zahlreiche Gemeinden in Niederösterreich, wurden offengelassen – eine Wiederherstellung der Grenzen war in einer Situation eines teils bereits von alliierten, teils aber noch von deutschen Truppen besetzten Staatsgebietes auch nicht tunlich.

B) Die Absonderung aus der Konkursmasse des Deutschen Reiches

Zu den Maßnahmen im Bereich der Verfassungs-Überleitung gesellten sich weitere, welche die Herauslösung Österreichs aus der rechtlichen und organisatorischen Verbindung mit dem Deutschen Reich bezweckten: Mit dem „Rechts-Überleitungsgesetz“ erfolgte durch Rezeption der bis zum 10. April 1945 bestehenden Rechtsordnung des Deutschen Reiches die „Wiederherstellung des Rechtslebens“ (§ 4 leg. cit.), wobei jedoch alle Rechtsvorschriften, „welche mit dem Bestand eines freien und unabhängigen Staates Österreich oder mit den Grundsätzen einer echten Demokratie unvereinbar sind, die dem Rechtsempfinden des österreichischen Volkes widersprechen oder typisches Gedankengut des Nationalsozialismus enthalten“ (§ 6 leg. cit.) als aufgehoben anzusehen waren; dies wurde außerdem laufend durch Erlässe der Provisorischen Staatsregierung festgestellt. Parallel dazu wurde die österreichische Justiz durch Wiederverlautbarung der meisten, nach dem 13. März 1938 aufgehobenen österreichischen Rechtsvorschriften, wiederhergestellt.

Die Verfassungs- und Rechts-Überleitung musste so rasch als möglich abgeschlossen werden: Man wollte „nicht zuwarten, bis… die… [Alliierten] diktieren“ [53], wie der äußere Staatsaufbau des auszusehen hatte. Die Grundlagen hiefür lagen erst am 20. April 1945 vor: die bis dahin bestandenen Behörden wurden durch die bis zum „Anschluß“ bestehenden österreichischen ersetzt: „Innerhalb 3 Monaten ist der Staat fertig geworden; alles was aus dem Deutschen Reich gekommen ist, ist ausgeschieden“ [54], wie Renner resümierte.

Zugleich mit diesen Verfassungsakten wurden weitere Maßnahmen ergriffen, welche auf die „Entnazifizierung“ [55] von Staat und Wirtschaft sowie der Gesellschaft abzielten; eine Aufgabe, die in der Proklamation der Staatsregierung vom 27. April als eine vorrangige herausgestrichen wurde. Mit dem Verbots-Gesetz vom 8. Mai war eine radikale Säuberung des öffentlichen Dienstes, der Wirtschaft und Kultur von der Ideologie des Nationalsozialismus in die Wege geleitet worden: Ehemalige Angehörige der NSDAP oder ihrer Gliederungen unterlagen einer Registrierungspflicht. Sie wurden außerdem einer breit gefächerten Vielfalt von Sanktionen und Sühneleistungen – erhöhte Steuerpflicht sowie der Anhaltung in Lagern, Entlassungen aus dem öffentlichen Dienst, Verlust von Ruhegenüssen, Publikations- und Auftrittsverbote, Ausschluss von bestimmten Berufen und vom Hochschulstudium, Verlust des aktiven und passiven Wahlrechts, Beschlagnahme des Vermögens, das Verbot, Parteien anzugehören – ausgesetzt. Bei der Handhabung dieser Maßnahmen wurde differenziert zwischen „Minderbelasteten“ und „Belasteten“ [56], für welche diese Sanktionen verschärft wurden. Sie wurden auch strafrechtlich gesondert verfolgt durch rechtsstaatlich bedenkliche Ausnahmegerichte, „Volksgerichte“. Die für das Gesetz zunächst geplante Bezeichnung als „Vergeltungsgesetz“ [57] war also durchaus passend, sie wurde dennoch fallengelassen. Die strafrechtliche Grundlage für die Verfolgung von NS-Verbrechern bildete das Kriegsverbrechergesetz vom 26. Juni 1945. Seine Vorbereitung hatte längere Zeit in Anspruch genommen, weil es schwierig war, die erforderlichen Tatbestände juristisch zu fassen. Die damit verbundenen Einschränkungen von Grund- und Freiheitsrechten wurden als sachlich gerechtfertigt akzeptiert. Die von der Staatsregierung unabhängig von den Besatzungsmächten in Gang gesetzten „Entnazifizierungs“-Maßnahmen konnte in der Praxis aber nur eine beschränkte Effektivität entfalten. Vor allem die Durchführung der Registrierung der Nationalsozialisten hatte sich als schwierig erwiesen; zur Aufrechterhaltung des öffentlichen Lebens, vor allem der Gesundheits- und Rechtspflege, mussten zahlreiche Ausnahmen gemacht werden. Problematisch war auch die unentschiedene Haltung der Westalliierten zu den „Entnazfizierungs“-Maßnahmen, so dass die damit befassten Behörden außerhalb des sowjetischen Machtbereichs im luftleeren Raum agierten.

---

[53] *ProtKabRat* (n 46), Band 1, S. 297 (Renner). – Die Kundmachung des Rechts-Überleitungsgesetzes in: *Staatsgesetzblatt der Republik Österreich* (im Folgenden abgekürzt: *StGBl.*) Nr. 6.

[54] *ProtKabRat* (n 47), Band 2, S. 8. – Kundmachung des Behörden-Überleitungsgesetzes in: *StGBl.* (n 52) Nr. 94.

[55] PLATZGUMMER, W., Die Bewältigung des Nationalsozialismus durch das Strafrecht nach 1945, in DAVY, U. / FUCHS H. / HOFMEISTER, H. / u.a. (Hrsg.), *Nationalsozialismus und Recht. Rechtssetzung und Rechtswissenschaft in Österreich unter der Herrschaft des Nationalsozialismus*, Wien 1990, S. 209ff.; STIEFEL, D., *Entnazifizierung in Österreich,* Wien 1981.

[56] Als „Belastete“ wurden auch die „Illegalen“, Funktionäre, die sich zwischen 1. Juli 1933 und 13. März 1938 nationalsozialistisch betätigt hatten, sowie finanzielle Förderer der Partei angesehen.

[57] *ProtKabRat* (n 47), Band 1, S. 14 Anm. 7, insbesondere 24. – Kundmachung des Verbotsgesetzes bzw. des Kriegsverbrechergesetzes in: *StGBl.* (n 52) Nr. 18 und 32.

C) Unter alliierter Kuratel: Totale Kontrolle durch eine Militärregierung

Angesichts[58] des Faktums, dass die Provisorische Staatsregierung ihre Tätigkeit ungeachtet „der Rechte der besetzenden Mächte" auch außerhalb des sowjetischen Machtbereichs – die Franzosen waren erst am 29. April in Vorarlberg, die Amerikaner sodann von 2. bis 5. Mai in Tirol, Salzburg und Oberösterreich sowie die Briten schließlich am 8. Mai, dem Tag der deutschen Kapitulation, in Kärnten eingerückt – zur Geltung bringen wollte, kam es zu heftigen Protesten seitens der Westalliierten, insbesondere der USA und Großbritanniens: Einerseits gegen das Agieren der Renner-Regierung und andererseits gegen deren Duldung durch die Sowjets, die offenbar durch die Einbindung von Kommunisten mit einer ähnlichen Entwicklung rechneten wie in Polen oder Bulgarien und Rumänien, wo sich starke kommunistische Einflüsse bereits geltend gemacht hatten.

Nach angloamerikanischer Interpretation war durch die Moskauer Erklärung der „Anschluß" auch nicht eo ipso aufgehoben worden, er sollte vielmehr durch die Alliierten rückgängig gemacht werden. Österreich zählte zur Konkursmasse des großdeutschen Reiches. Zur „vornehmsten Aufgabe" der Alliierten gehört es daher insbesondere, „die Trennung Österreichs" von Deutschland „zu verwirklichen". Diese alliierte „Erklärung über die Niederlage Deutschlands" und die Übernahme der obersten Regierungsgewalt vom 5. Juni 1945 bildete somit auch eine Grundlage des Besatzungsrechts in Österreich. Die westalliierten Verbände rückten nach eigenem Selbstverständnis daher auch „in Österreich als Sieger" ein: Denn „Österreich hat als wesentlicher Bestandteil des Deutschen Reiches gegen die Vereinten Nationen Krieg geführt"[59] – Großbritannien wird den Kriegszustand mit Österreich erst Mitte September 1947 formell beenden! Österreich wurde folglich denselben Kapitulations- und Besatzungsbedingungen wie Deutschland ausgesetzt.

Die Alliierten gerierten sich in der ersten Phase der Besatzung auch als unbarmherzige Sieger: Plünderungen und Misshandlungen von Zivilisten waren bis in den Sommer 1945 allgemein an der Tagesordnung, im sowjetischen Machtbereich[60] ist es der sowjetischen Militärleitung erst im Verlauf des Jahres 1947 gelungen, ihre Truppen zu disziplinieren[61]. Bis zur Installierung des alliierten Kontrollapparats im September 1945 ist vor allem in den westlichen Besatzungsbereichen eine besonders strenge Kontrolle Österreichs als Kriegsgegner gehandhabt worden; Nationalsozialisten sollten wegen ihrer Verstrikkung mit dem Regime auch für dessen Verbrechen rücksichtslos verantwortlich gemacht werden; in der amerikanischen Besatzungszone wurden sogar eigene Anhaltelager betrieben.[62] Die sowjetische Militärführung hatte die Renner-Regierung dagegen bloß angewiesen, dass „nicht allzu viele Gesetze gemacht werden"[63], ihr im übrigen aber bei der „Entnazifizierung" weitgehend freie Hand gelassen. Während sich die Sowjets in ihrem Bereich über die Einbeziehung von KP-Mitgliedern mit einem mittelbaren Einfluss auf die Staatsregierung begnügten, hat es in den westlichen Besatzungsbereichen nichts Entsprechendes gegeben. Bis zum Abschluss des Kontrollabkommens am 4. Juli in London blieb das westliche Österreich von der Wirksamkeit der Provisorischen Staatsregierung völlig abgeschottet, vor allem Briten hegten großes Misstrauen gegen Renner, weil sie in ihm bloß eine Marionette Stalins sahen.

Mit dem anschließend am 9. Juli 1945 abgeschlossenen Zonenübereinkommen wurde das österreichische Staatsgebiet in den Grenzen von 1937 fixiert: Damit waren einerseits jugoslawische und tschechische Territorialforderungen abgewehrt – andererseits ergaben sich durch die Zoneneinteilung, die sich mit den Ländergrenzen zum Teil nicht deckte, Probleme – etwa in Oberösterreich, wo für das sowjetische besetzte Mühlviertel eine Außenstelle der Landesregierung, die sich in Linz, also in der amerikanischen Zone, befand, geschaffen werden musste.

Nach dem Abschluss des Kontrollabkommens wurde von der Staatsregierung daher eine Wende der alliierten Besatzungspolitik erwartet; Renner dazu: „Bis dahin war eigentlich Krieg. Jetzt wollen wir Friedensarbeit leisten".[64] Seine Erwartungen wurden freilich enttäuscht: Die bisher moderate Aufsicht durch

---

[58] EISTERER, K., Österreich unter alliierter Besatzung 1945–1955, in STEININGER/GEHLER (n 36), S. 147ff.; NACHBAUR, *Österreich als Opfer* (n 39), S. 28f.

[59] Proklamation bei BISCHOF/LEIDENFROST (n 43), S. 12.

[60] RAUCHENSTEINER, Besatzung (n 43), S. 28ff.; MULLEY, Befreiung und Besatzung. Aspekte sowjetischer Besatzung in Niederösterreich 1945–1948, in ABLEITINGER/BEER/STAUDINGER (n 15), S. 361ff.

[61] Allein in Wien wurden von Anfang April bis Juni 1945 bis zu 100.000 weibliche Personen aller Altersklassen (oft auch Minderjährige und alte Frauen) vergewaltigt; in Niederösterreich allein im Juni 1945 insgesamt mehr als 1000 (in manchen Orten bis zu 80% der weiblichen Bevölkerung), außerdem wurden mehr als 100 Morde zur Anzeige gebracht. Das NS-Propaganda-Bild vom „russischen Untermenschen" blieb im Gefühl der betroffenen Menschen lebenslang eingeprägt wie der bekannte österreichische Historiker Hugo Hantsch rückblickend festhielt: So EISTERER, Österreich (n 58), S. 147ff., hier 151f. sowie Anm. 17 bis 19. – Das menschenverachtende Verhalten der russischen Soldaten kann freilich nicht einfach als Ausdruck eines übersteigerten Rachegefühls gegen Österreicher als ehemalige Kriegsgegner erklärt werden, denn Vergleichbares ist auch den Menschen in Polen widerfahren! Aus zeitgenössischer Sicht über Diebstahl, Raub und Plünderungen (von Fremdarbeitern im Zusammenwirken mit Einheimischen und Angehörigen der Roten Armee) sowie Schändungen von Frauen „aller Altersklassen und Stände" (Geistliche): SCHÄRF, *April 1945* (n 44), S. 26f., 31f., 41.

[62] ENDERLE-BURCEL, G. / JEŘÁBEK, R. / MÄHNER, P. (Hrsg.), Die Protokolle des Ministerrates der Zweiten Republik der Republik Österreich. Kabinett Leopold Figl I, Band 1 (20. Dezember 1945 bis 8. November 1949. Band 1 (20. Dezember 1945 bis 9. April 1946; im Folgenden abgekürzt: *ProtMinR Kab Figl* I), Wien 2004, S. 114, 196 Anm. 13. Von der in der ersten Proklamation der Roten Armee in Österreich, in der „Frontzeitung für die Bevölkerung Österreichs" vom 15. 4. 1945 bekanntgemacht gemachten Ankündigung, wonach die „einfachen Mitglieder der nationalsozialistischen Partei nicht verfolgt [werden], wenn sie sich den Sowjettruppen gegenüber loyal verhalten", war nun keine Rede mehr: Vgl. SCHÄRF, *Österreich Erneuerung* (n 45), S. 33.

[63] *ProtKabRat* (n 47), Band 1, S. 1, 19.

[64] ENDERLE-BURCEL, Einleitung (n 47), S. III.

das sowjetische Militärkommando sollte sich nach den Intentionen der Westalliierten – so wie in Deutschland – zu einer totalen Kontrolle durch die Organe der Alliierten Kommission in Österreich, dem Alliierten Rat und sein Exekutivkomitee als alliierte „Superregierung" steigern; die Entwicklung ist dann doch etwas anders verlaufen.

D) Anbahnung von Wahlen und beschränkte Handlungsfähigkeit auf Grundlage der Verfassungsordnung von 1920

Schon auf der Potsdamer Konferenz der Alliierten war Anfang August 1945 eine weitere für das Schicksal Österreichs weichenstellende Entscheidung gefallen: Die Westalliierten hatten das Zugeständnis gemacht, nach der Einnahme der Besatzungszonen in Wien Verhandlungen über eine Ausdehnung der Autorität der Staatsregierung auf ganz Österreich in Aussicht zu nehmen.[65] Nach seiner Konstituierung am 11. September wurde vom Alliierten Rat zunächst jedoch nur die Zulassung der Tätigkeit der politischen Parteien im gesamten Staatsgebiet beschlossen. Dadurch konnte aber erstmals eine Verbindung der Provisorischen Staatsregierung zu den in den westlichen Besatzungszonen eingerichteten provisorischen Landesausschüssen hergestellt werden: Mit Beschluss des Alliierten Rates vom 20. September wurde sodann der Vorschlag Renners, „eine Konferenz der Ländervertreter einzuberufen, gebilligt".[66] Die vom Kabinettsrat penibel vorbereitete Tagung fand von 24. bis 26. September in Wien statt – im niederösterreichischen Landhaus, das, wie Renner am Schluss der Tagung betonte, „auch die Geburtsstunde der ersten Republik gebracht hatte".[67] Hier erfolgte die Anerkennung der Provisorischen Staatsregierung und der von ihr geschaffenen provisorischen Verfassungsordnung durch die politischen Vertreter der westlichen Bundesländer. Im Gegenzug dafür wurden Politiker aus diesen Ländern in die Provisorische Staatsregierung aufgenommen, die dadurch auf fast 40 Mitglieder angewachsen war. Außerdem wurde vereinbart, den Ländern – dazu zählte auch das inzwischen als selbständiges Bundesland wiederhergestellte Burgenland – ihre bis dahin sistierte Stellung als Gliedstaaten eines Bundesstaates zu restituieren und die entsprechenden Gesetzgebungsbefugnisse den neugebildeten provisorischen Landesversammlungen zu übertragen.

Das selbstbewusste Auftreten der Staatsregierung gegenüber den Ländern färbte auch auf das Verhältnis zu den Alliierten ab. Nach der Mitteilung der Beschlüsse der Länderkonferenz an den Alliierten Rat rechnete die Staatsregierung bereits täglich mit ihrer Anerkennung; sie blieb aber aus. Renner reagierte offensiv: „Wir können nicht mehr… warten, bis die Anerkennung erfolgt… Wir werden also so handeln, als ob wir bereits anerkannt wären".[68] Zur Durchführung der von der Länderkonferenz gefassten Beschlüsse wurde am 12. Oktober von der Staatsregierung eine Novelle der Vorläufigen Verfassung beschlossen. Weitere Länderkonferenzen am 9. und 10. sowie am 25. Oktober befassten sich sodann bereits mit der Vorbereitung von Wahlen zu den Landtagen und zum Nationalrat, welche für den 25. November fixiert wurden.[69] Im Einvernehmen mit der Länderkonferenz blieben alle ehemaligen Nationalsozialisten vom Wahlrecht ausgeschlossen.[70]

Der Alliierte Rat hatte schon am 1. Oktober 1945 den jeweiligen eigenen Regierungen die Anerkennung der Provisorischen Staatsregierung vorgeschlagen. Mit Memorandum vom 20. Oktober wurde sodann die de facto-Anerkennung auch bekannt gegeben; dies freilich unter der Auflage, dass die „Führung und Kontrolle der höchsten Gewalt in Österreich" beim Alliierten Rat verblieb, insbesondere in Bezug auf Fragen der Staatsgrenzen und der Demilitarisierung sowie die Behandlung von Vertriebenen, von ausländischen Vermögenswerten, ferner auswärtige Angelegenheiten und die diplomatische Vertretung sowie die Regelung von Handels- und Finanzbeziehungen zum Ausland. Der Vorbehalt der höchsten Gewalt schloss auch die generelle Approbation der Gesetzgebung einschließlich der bereits kundgemachten Gesetze durch den Alliierten Rat ein. Die Staatsregierung wurde aber ermächtigt, „öffentliche Rechtsvorschriften" für das gesamte Staatsgebiet zu beschließen. Zugleich wurde sie aufgefordert, bis zum 31. Dezember „freie Wahlen abzuhalten", wofür nach der zweiten Länderkonferenz bereits am 19. Oktober ein Wahlgesetz kundgemacht worden war. Von der gewählten „Nationalversammlung" sollten dann „alle gesetzlichen Verfügungen verfassungsmäßiger Natur…, welche von der… Provisorischen Regierung" erlassen worden waren, überprüft werden.[71]

Am 10. November begannen der Alliierte Rat und sein Exekutivkomitee, nach Vorbereitung durch die Legal Division, die Verfahren zur Genehmigung der von der Staatsregierung bereits erlassenen Rechtsvorschriften aufzunehmen. Im Hinblick auf den Beschluss der ersten Länderkonferenz, alle bisher getroffenen verfassungsrechtlichen Maßnahmen anzuerkennen, hatte die Staatsregierung zum Zweck der Ausdehnung des Geltungsbereiches dieser Rechtsvorschriften auf das gesamte Staatsgebiet noch vor dem Zusammentritt des Nationalrates ein „Rechts-

---

[65] Allgemein: ROSNER, W., *Die Länderkonferenzen 1945. Dokumente und Materialien*, Wien 1995, S. 33–103 (Dokumente), 77–86, 91–100: Resolutionen. Zu den Länderkonferenzen DERS., „Der Rütli-Schwur in der Herrengasse" – Die Länderkonferenzen im Herbst 1945, in: DERS. / BUßJÄGER, P. (Hrsg.), *Im Dienste der Länder – im Interesse des Gesamtstaates. Festschrift 60 Jahre Verbindungsstelle der Bundesländer*, Wien 2011, S. 3–14.

[66] *Gazette of the Allied Commission for Austria* (=Amtsblatt der Alliierten Kommission für Österreich), 1/1945/46, S. 64 f.

[67] Stenographisches Protokoll. Plenarsitzungen der Ersten Länderkonferenz, 1945, in ROSNER, *Länderkonferenzen* (n 65), S. 34.

[68] MÄHNER, Einleitung, in *ProtKabRat* (n 46), Band 3, S. XXVII.

[69] BERCHTOLD, Verfassungsentwicklung (n 52) S. 142f.; WIEDERIN, Einheitsstaat oder Bundesstaat (n 51), S 196–200. – Kundmachung der Novelle zur Vorläufigen Verfassung in: *StGBl.* (n 52) Nr. 196.

[70] Ausgenommen Mitgliedschaften im NS-Kraftfahrerkorps bzw. NS-Fliegerkorps nach dem 13. 3. 1938 gemäß Verfassungsgesetz vom 19. 10. 1945 über die erste Wahl des Nationalrates, der Landtage und des Gemeinderates der Stadt Wien in der befreiten Republik Österreich (Wahlgesetz), in: *StGBl.* (n 52) Nr. 198, hier § 7 (3) Litera D.

[71] KRAUTGARTNER, A., *Die Verfassungsentwicklung Österreichs unter alliierter Kontrolle,* juristische Dissertation Wien 2002, S. 29ff. (Genehmigungsverfahren allgemein), 106, 141, 213 f (Ergebnisse). – Kundmachung des Wahlgesetzes in: *StGBl.* (n 52) Nr. 196.

anwendungsgesetz“ vorbereitet, dessen Kundmachung aber mangels Zustimmung des Alliierten Rates unterbleiben musste; ebenso wie ein von der Staatsregierung vorbereiteter Entwurf zu einem Verfassungs-Übergangsgesetz, womit ein reibungsloser Übergang von der bisherigen provisorischen zu jener von 1920/29 als definitive Verfassungsordnung bewältigt werden sollte. Der Alliierte Rat verweigerte aber seine Zustimmung auf Einspruch der Briten, welche in dem Verfassungs-Übergangsgesetz einen Vorgriff auf die Zuständigkeit des Nationalrates sahen. Die Staatsregierung wurde lediglich ermächtigt, „einen sehr genauen Spezial-Entwurf eines Verfassungsgesetztes… betreffend die Einberufung und Organisation des Parlaments und die Bildung einer neuen Regierung vorzulegen“. In weiteren Verhandlungen wurde sodann die Vorgenehmigung für eine Novelle zum Verfassungs-Überleitungsgesetz erreicht. Dieses am 13. Dezember von der Staatsregierung beschlossene 2. Verfassungs-Überleitungsgesetz konnte schließlich am 18. Dezember, nur einen Tag vor Zusammentritt des Nationalrates, kundgemacht werden; dadurch wurde die Verfassungsordnung von 1929 in zwei Punkten abgeändert: Dauernd in Hinblick auf die 1929 vorgesehene Umwandlung des Bundesrates in einen Länder- und Ständerat, welche fallengelassen wurde; vorübergehend in Bezug auf die Wahl des Bundespräsidenten, welche ausnahmsweise nicht als Volkswahl, sondern wie vor der Verfassungsnovelle von 1929 durch die Bundesversammlung, in einer gemeinsamen Sitzung von Nationalrat und Bundesrat, erfolgen sollte.[72]

Nach der Wahl und der Konstituierung der Landtage sowie der Wahl der Mitglieder zum Bundesrat fand am 19. Dezember 1945 der Zusammentritt des Nationalrats zu seiner ersten Sitzung statt; am folgenden Tag wurde Karl Renner durch die Bundesversammlung zum Bundespräsidenten gewählt; seine erste Amtshandlung war die Ernennung der Bundesregierung.[73] Am Tag davor erstattete er noch als Staatskanzler den Rechenschaftsbericht über die bisherige Tätigkeit der Staatsregierung. Mit der einstimmigen Genehmigung war die bisherige provisorische Verfassungsordnung konstitutiv geworden. Danach gelangte der von den Alliierten abgelehnte Entwurf für das Verfassungs-Übergangsgesetz zur Verhandlung. Es wurde unverändert angenommen. Das vom Alliierten Rat zunächst ebenfalls nicht genehmigte Rechtsanwendungsgesetz wurde sodann in einer der folgenden Sitzungen, im Jänner 1946, vom Nationalrat ebenfalls unverändert angenommen: Die Haltung des österreichischen Parlaments und der Bundesregierung, mit der Verfassungsordnung von 1920/29 die staatliche Kontinuität zur ersten Republik im Sinne der Okkupationsthese zu untermauern, hatte sichtbaren Ausdruck auch im Österreichischen Amtskalender gefunden, wo die Provisorische Staatsregierung als Kabinett „Renner IV“, sowie in den Protokollen von Nationalrat und Bundesrat, wo die Gesetzgebungsperiode ab 1945 mit „V.“ gezählt wurde-[74] Auch auf internationaler Ebene wurde die staatliche Kontinuität demonstriert, das Verlangen nach Zulassung zur Liquidationssitzung des Völkerbundes am 18. April 1946 in Genf blieb allerdings ohne Erfolg.[75]

Die Kundmachung des Rechtsanwendungsgesetzes wurde wegen Einwendungen Frankreichs und Großbritanniens untersagt, jene des Verfassungs-Übergangsgesetzes wegen eines sowjetischen Vetos. Der Alliierte Rat hatte in seiner Sitzung am 25. März 1946 aber nicht nur beschlossen, dazu keine Zustimmung zu erteilen, sondern dem Bundeskanzler auch aufgetragen, „bis 1. Juli 1946 eine definitive Verfassung auf Grundlage demokratischer Prinzipien vorzulegen“[76]. Die extensive Betonung der Kontinuitätsthese durch Österreich war bei den Mitgliedern des Alliierten Rates – vor allem bei den Sowjets – auf Unverständnis gestoßen; lediglich im Umfeld des US-Elements zeigte sich eine gewisse Akzeptanz, weil es über einige Experten verfügte, die als Auslandsösterreicher mit den Besonderheiten der österreichischen Staats- und Rechtsordnung vertraut gewesen sind.

Nachdem es bereits Mitte März im Nationalrat zu einem heftigen Protest gegen die schleppende und das Parlament bevormundende Praxis der Alliierten bei der Genehmigung der österreichischen Gesetzgebung gekommen war, steigerte sich die öffentliche Empörung gegen diese Zensur nach der Mitteilung des Alliierten Rates über die Aufforderung zur Ausarbeitung einer neuen Verfassung zum Eklat: In einer Resolution vom 13. April 1946[77], die – von der KPÖ abgesehen – einhellig angenommen wurde, und welcher auch der Bundesrat beigetreten war, verwahrte sich das Parlament mit aller Schärfe gegen jegliche Einflussnahme auf seine Verfassungshoheit. Österreich ist dieser Forderung des Alliierten Rates zwar nie nachgekommen, musste aber das Besatzungs-Recht, das kein Bestandteil seiner Rechtsordnung war, de facto, gleichsam als vis maior“ dulden.

Gemäß (erstem) Kontrollabkommen sollte es nach erfolgter de iure-Anerkennung der österreichischen Regierung durch die Regierungen der Besatzungsmächte, welche zwischen 22. Dezember 1945 und 5. Jänner 1946 ausgesprochen wurde[78], zur Vereinbarung eines neuen Kontrollabkommens durch die Alliierten kommen. Während nun zu Jahresbeginn 1946 in Kreisen des US-Besatzungselements bereits Stimmen laut wurden, welche meinten, dass die alliierte Kontrolle seit den Wahlen ei-

---

[72] BERCHTOLD, Verfassungsentwicklung (n 51), S. 143f. – Kundmachung der Novelle zum Verfassungs-Überleitungsgesetz in: *StGBl.* (n 52) Nr. 232.

[73] Details aufgrund der Protokolle der Alliierten Kommission in Österreich bei: STOURZH, in *Archiv für Österreichische Geschichte* (n 45). Dazu nun auch *ProtMinR Kab Figl* I, Band 1 (n 62) und WOHNOUT, *Figl* (n 45).

[74] RAUCHENSTEINER, *Besatzung* (n 43), S. 23f. – *Stenographische Protokolle… des österreichischen Nationalrates und des Bundesrates der Republik Österreich*, V. Gesetzgebungsperiode (19. 12. 1945–8. 11. 1949), Wien 1945–1949 (im Folgenden abgekürzt *StenProtNR V* bzw. *StenProtBR V*).

[75] BERCHTOLD, Verfassungsentwicklung (n 52), S. 144ff.; WIEDERIN, Einheitsstaat oder Bundesstaat (n 51), S. 201–207.

[76] ADAMOVICH, L., Die Entstehung des österreichischen Verfassungsrechts seit 27. April 1945, in *Jahrbuch des öffentlichen Rechts*, Neue Folge 2 (1953), S. 189.

[77] *StenProtNR V* (n 74), S. 165ff., 174; *StenProtBR V* (n 74), S. 69ff.

[78] *ProtMinR Kab Figl* I, Band 1 (n 62), S. 18f.

gentlich „sinnlos“ geworden wäre, und einen raschen Abschluss eines „Vertrags mit Österreich“[79] vorgezogen hätten, ging vor allem von Großbritannien die Initiative für die Vereinbarung eines neuen Kontrollabkommens aus: Der Kalte Krieg begann seine Schatten auf Österreich zu werfen – er wird zum Haupthindernis auf dem Weg für den von den USA seit 1946 bereits vorbereiteten „Vertrag mit Österreich“ werden.[80]

IV. Genese eines neuen Österreich-Bewusstseins

Die schwierige internationale Lage, in die Österreich seit 1945 geraten war, zog eine radikale Kehrtwendung im „nationalen“ Selbstverständnis[81] der Republik nach sich: „Der (fast) vollkommenen Integration in die deutsche Nation“ durch den „Anschluß“ im Jahr 1938 „folgte die (fast) vollkommene Flucht aus ihr“ im Jahr 1945.[82] Renner hatte diese Richtungsänderung am 10. Mai 1945 bei einem Empfang für die Vertreter der „österreichischen Beamtenschaft“ angekündigt: „Uns bleibt nichts übrig, als selbst auf den Gedanken eines Anschlusses zu verzichten“, weil „Hitler… den Anschluß… für alle Zeiten verspielt hatte“.[83]

Es folgte nun eine Beseitigung der Staatssymbole der ersten Republik, weil auch sie diesen Gedanken – den Anschluß – versinnbildlicht hatten: Der Staatsfeiertag vom 12. November 1918, womit der Erlass des Gesetzes über die Staats- und Regierungsform Deutschösterreichs und sein Bekenntnis, ein „Bestandteil der Deutschen Republik“ zu sein, gewürdigt worden war, wurde auf Vorschlag Renners „wegen der ungünstigen Wetterlage, die um diese Zeit gewöhnlich herrscht“, abgeschafft; die Haydn-Hymne, nach deren Melodie auch das sogenannte „Deutschland“-Lied, die Hymne der „Deutschen (Weimarer) Republik“, gesungen worden war, wurde aus innen- und außenpolitischen Rücksichten fallengelassen.[84] Es mussten daher neue Staatssymbole geschaffen werden: Als neuer „Staatsfeiertag“ wurde von der Bundesregierung der 13. April als „Tag der Befreiung“ Wiens durch die Rote Armee favorisiert – 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“ abgehalten; analog dazu gab es Paraden auch in anderen Landeshauptstädten, etwa in der amerikanischen Besatzungszone in Linz und in Salzburg.[85] Außer bei der sowjetischen Besatzungsmacht fand diese Idee bei den anderen Alliierten aber keine Zustimmung. Der 13. April wurde schließlich 1946 als Landesfeiertag[86] in Wien festgelegt, während es für die Bundesländer beim 9. Mai blieb[87]; die „Befreiungsfeiern“ wurden – mit rasch abnehmender Begeisterung – begangen[88]. Die alte Haydn-Hymne wurde durch eine andere ersetzt, durch die Melodie der Freiermauerkantate „Laut verkünde unsre Freude“[89], welche nach dem ihr zugrundegelegten Text auch „Kettenlied“[90] genannt wurde.

Ein anderes Kettensymbol fand bei der Gestaltung des Staatswappens Berücksichtigung: Die 1919 für den Adler an

---

79 STOURZH, *Einheit* (n 18), S. 34f.

80 BERCHTOLD, Verfassungsentwicklung (n 52), S. 146f.

81 BRUCKMÜLLER, E., *Nation Österreich. Sozialhistorische Aspekte ihrer Entwicklung*, Wien-Köln-Graz 1984, S. 200ff.; PAPE, M., Die völkerrechtlichen und historischen Argumente bei der Abgrenzung Österreichs von Deutschland nach 1945, in: *Der Staat. Zeitschrift für Staatsrecht und Verfassungsgeschichte,* 1998, S. 305ff.

82 BRUCKMÜLLER, *Nation* (n 81), S. 216.

83 *ProtKabRat*, Band 1 (n 47), 55. Renner hatte sich im April 1938 nicht nur durch die persönliche Unterstützungserklärung für die Wiedervereinigungs-Volksabstimmung am 10. 4. 1938 hervorgetan (in einem Zeitungsinterview für das Neue Wiener Tagblatt am 43. 4. 1938), er hatte auch eine Broschüre mit dem Titel „Die Gründung der Republik Deutschösterreich, der Anschluß und die Sudetendeutschen“ zur Drucklegung im Herbst 1938 vorbereitet, als mit dem Anschluss der sudetendeutschen Gebiete die Zerschlagung der Tschechoslowakischen Republik eingeleitet worden war.
Ein Teil der österreichischen Sozialdemokratie hatte über 1938 hinaus an dem Gedanken des Anschlusses, als Instrument zur Verwirklichung der Idee einer „gesamtdeutschen Revolution“ festgehalten: Vgl. SCHÄRF, *Österreichs Erneuerung*, (n 45), S. 188–191 (Schärf hatte sich – nach eigener Angabe – schon 1943 vom Anschlussgedanken losgesagt: ebda., S. 20). Auch die österreichischen Kommunisten hatten die Anschlussforderungen aus diesem Grund unterstützt, jedenfalls bis 1936/37, dann schwenkten sie auf die Linie der Komintern mit der Forderung der nationalen Selbständigkeit Österreich – um Hitlers Einfluss einzudämmen; nach dem Hitler-Stalin-Pakts folgte eine entsprechende Kurskorrektur: Dazu NACHBAUR, *Österreich als Opfer* (n 39), S. 23–26.

84 *ProtMinR Kab Figl* I/1 (n 62), S. 206 (Zitat Renner), 328. – Der kommunistische Bundesminister Karl Altmann gab zu bedenken, dass wahrscheinlich „viele Leute aus der Erinnerung heraus nach dem Abspielen dieser Hymne das Horst-Wessellied erwarten“ [und allenfalls anstimmen?] würden: Ebda S. 298f., 327f., 450f.

85 *ANNO-AustriaN Newspapers Online. Historische österreichische Zeitungen und Zeitschriften online* [http://anno.onb.ac.at/], Volltextsuche für den Zeitraum 1945–1947, Suchwort „Siegesparade“.

86 *ProtMinR Kab Figl* I, Band 1 (n 62), S. 296f., 326, 362f.

87 Zum Zweck der Anwendung der sogenannten „Befreiungsamnestie“ BG vom 6. 3. 1946 (*Bundesgesetzblatt der Republik Österreich* [im Folgenden abgekürzt: *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.

88 SPANN, G., Zur Geschichte des österreichischen Nationalfeiertages, in Beiträge zur historischen Sozialkunde 26 (1996), S. 27ff., 29.

89 Nach dem bekannten Freimaurerkantate („Kettenlied“) mit dem Text „Brüder reicht die Hand zum Bunde“, das früher irrtümlich Mozart zugeschrieben wurde (KV 623a); nach neueren Erkenntnissen der Musikwissenschaft gilt nun Mozarts Logenbrüder Johann Holzer als Urheber. Zu dieser alten Melodie hat Paula von Preradovic den Text der Österreichischen Bundeshymne verfasst: <http: www.uni-protokolle.de/Lexikon/ Land_der_Berge,_Land_am_Strome.html>.

90 Der vermutlich von Karl Ludwig Gieseke verfasste Text leitet mit dem Bild einer „Brüderkette“ als Freundschaftssymbol ein und er schließt auch damit.

seinen Fängen angelegte geschlossene Eisenkette wurde durch eine gesprengte als Sinnbild der „Wiedererringung der Unabhängigkeit“ der Republik ersetzt; die schwarz-rot-goldene Farbensymbolik des Wappens von 1919 wurde offenbar übersehen; sie blieb unverändert.[91]

Nach der Wiedererlangung der Unabhängigkeit wurde von den neuen – nichtfaschistischen – Parteien, der christlich-sozialen 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 Jahr 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 ausdrücklich als „Staatsfeiertag“ erklärt.[92] Ein der neuen Identität Österreichs entsprechender Feiertag[93] bahnte sich erst nach dem Ende der Besatzungszeit in Verbindung mit der Festlegung der dauernden Neutralität seit 1955 an.[94]

[91] Vgl. Wappengesetz 1919 (*StGBl.* [n 5] Nr. 257) und Wappengesetz 1945 (*StGBl.* [n 52] Nr. 7); NESCHWARA, Ch., Mißdeutete Geschichte des Staatswappens, in *Die Presse* 27. 1. 1992, S. 4.

[92] Bundesgesetz [BG] vom 7. 8. 1945, kundgemacht in: *BGBl.* (n 86) Nr. 116; BG vom 14. 7. 1949, kundgemacht in: *BGBl.* (n 87) Nr. 173.

[93] Der Erfolg, an die Tradition der alten „Ostmark“ des Heiligen Römischen Reiches und an die älteste Dokumentierung des Namens „Österreich“ (in der mittelhochdeutschen Fassung „Ostarrîchi“) am 1. 11. 996 mit Feiern unter dem Motto „950 Jahre Österreich“ im Jahr 1946 anzuknüpfen, war mehr als dürftig. Die Sorge um die bevorstehende Zukunft war wohl größer als die das Bedürfnis nach einer neuen Tradition: Dazu auch GUTKAS, K., Die Feiern „950 Jahre Österreich“ im Jahre 1946, in: *Jahrbuch für Landeskunde von Niederösterreich* Neue Folge 62/2 (1966) (= Festgabe des Vereins für Landeskunde von Niederösterreich zum Ostarrîch-Millennium, 2. Teil), S. 665–686. Vgl. SANDGRUBER, R., Vom Versuch, dem politischen Alltag zu entkommen: Österreichs republikanische Jubelkultur nach 1945, eine kritische Revision, in: *Die Presse* vom 31. 12. 2004 (Spectrum).

[94] Dazu NESCHWARA, Ch., „Zum immerwährenden Gedenken an die Ausrufung des Freistaates“: Das Selbstbild der (deutsch-)österreichischen Republik 1918/19 und seine Verdrängung, in: *Journal on European Legal History* 10/2019 Nr. 1, S, 2–14, hier 13.

Changes in American Court Advocacy during the Long Nineteenth Century: Classical Influences, their Decline, Similarities and Comparisons with England and Wales

Andrew Watson *

Abstract

Important alterations in the style and content of court advocacy occurred throughout the common law world in the Nineteenth Century. This article turns to the United States, where a sea change in advocacy took place, and to similarities and differences with England and Wales. Matters considered include: influences of Greek and Roman classics and rhetoric in late Eighteenth Century and first half of the Nineteenth Century America and their decline thereafter; key changes in evidence and procedure; discussion whether advocates should be allowed to express belief in the causes of their clients and later adoption of professional rules forbidding the practice; granting accused persons the right to give evidence on oath; the presence of expert witnesses in court; the introduction of plea bargaining procedure and the origins of bench trials.

Keywords: *Court Advocacy; Changes; Nineteenth Century; America, England; Comparisons.*

Introduction

In the 19th century considerable alterations in advocacy took place throughout the common law world; not just England and Wales. Major developments occurred in the United States, very conspicuously in criminal courtroom advocacy. However, there was nothing akin to the English and Welsh Prisoners Counsel Act 1836 (and the debate which preceded it), a milestone, granting prisoners charged with felonies the right of a full defence by counsel: That right had already been secured in all states and Federal courts under the Bill of Rights (Sixth Amendment to the US Constitution) 1789.

The place of the Greek and Roman classics and rhetoric in advocacy in late 18th Century America and in the first half of the Nineteenth Century is explored in this article. Use by many attorneys of an apologetic, dispassionate and formulaic type of criminal advocacy bearing much of the influence of Cicero, strongly contrasts with the extravagant, melodramatic and flowery styles of address in the English courts at the time. However, changes in procedure, laws of evidence and the prevailing general style of public oratory led, in the third quarter of the 19th Century to attorneys assuming the mix of flamboyance, appeal to emotion and aggression which has been their hallmark before juries ever since. As in England and Wales, discussion occurred about whether advocates should be allowed to express belief in the causes of their clients and later professional rules forbidding the practice were adopted. Further, like in England, it became necessary for attorneys in the United States to adjust to laws granting accused persons the right to give evidence on oath and also to the presence of expert witnesses in court. Attorneys in criminal cases, had to be able to conduct plea bargaining, a procedure which arose independently in a number of jurisdictions in the early mid -19th Century, and pleas in mitigation. The late 19th Century saw the beginnings of bench trials which became more frequent in the following century. Taking the jury out of the court had a huge impact on advocacy. Unlike jurors, judges had no time for stirring speeches, sensationalism and histrionics. Strict attention to evidence and law by attorneys was required.

Cicero and other classical influences

Until roughly the mid-19th century most criminal advocacy was largely apologetic, deliberately avoiding extravagance, fervour and pushiness. Although by 1800 it had begun to be overshadowed in politics and the pulpit by newer models of persuasive eloquence which emphasised plainer speech and effective elocution, Ciceronian oratorical techniques still strongly influenced lawyers during the opening decades of the 19th century.

Use of classical argumentation, allusions and sentence structure dated back to the preceding century when much education centred around knowledge of antiquity. Richard Davis in his *Intellectual Life in Jefferson's Virginia* [1] wrote:

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

[1] Chapel Hill: University of North Carolina Press, 1964, Page 365. Classical influences on early America have long been noted. See Mullet, C.F, *Classical Influences on the American Revolution,* Vol 35 Classical Journal, 1939-40, pp. 92-104 and Meyer Reinhold, ed., *The Classick Pages: Classical Reading of Eighteenth Century Americans*, University Park, Pennsylvania State University, 1975.

"Americans, Virginians especially, were fully aware of formal critiques of the art of eloquence from ancient Greece to their own time. During the latter half of the eighteenth century colleges taught rhetorical theory, including Aristotle's Rhetoric and Poetics, Cicero's De Oratore and the critical epistles of Horace and Longinus".[2].

When Davies wrote of "*Americans"* and "*Virginians"* he did not, of course, refer to the population at large but to a very small, though highly influential, classically educated minority.

The 2nd Century orator, politician, general and writer, Cato the Elder also had a strong appeal to Virginians[3] whilst Cicero was particularly admired as an orator and philosopher in New England.[4]

As the Fathers of the American Republican were no strangers to ancient Rome and Greece, it is perhaps not surprising to find references to things classical in the decisions of judges in federal and state courts of the new nation. In a study based on the years 1790 – 1800, Richard J. Hoffman[5] focused on the Supreme Court of the United States and the Virginia Court of Chancery, the latter because of the importance of its first sole Chancellor, George Wythe, a man who was significant in national and state politics and, as a judge, key to the development of law in Virginia. He was also in the opinion of Thomas Jefferson "*the best Latin and Greek scholar in the State"* and was dubbed by his contemporaries "*a walking library"*. Hoffman found that the sources and functions of the classical references in the judgments of Wythe and the Supreme Court were similar. Allusions and quotes were drawn from Greek and Roman literature, history and mythology. Any dissimilarity between the two courts came in the frequency of the references and in the use of Roman Law. Wythe made extensive use of the classics, especially of the *Corpus Iuris Civilis* of Justinian, while the Supreme Court justices were more sparing in their allusions and made no reference to Roman Law. In neither court were references generally made for the mere display of erudition by judges but for literary functions that were identical and fell into three broad categories. First specific quotes from classical literature were used to express a particular feeling, or sentiment, of the user. Second, quotes or allusions were employed as similes. In the third category as an extended simile by which ancient events or points of law were used as precedents for the holdings or views of judges[6]. In both courts the percentage of cases in which classical references are present amounted to twenty percent. Interestingly, Robert Hoffman examined judgments from the same period by the English High Court of Chancery and King's Bench. Usually each Chancellor and Chief Justice was classically educated, to a level beyond most American jurists, and had the ability both to read and write Latin and Greek. Some, like Lord Mansfield and Lord Loughborough, were also trained in Roman Law. Given this, it could reasonably be expected that their judgments would be liberally sprinkled with quotes and allusions from antiquity and contain numerous citations from Roman Law. The contrary appears to be the case. Hoffman read Chancery and Kings Bench decisions between 1790 and 1800, and occasionally before and after, at random. Against expectations, he found that few classical allusions appeared in them[7]. Only rarely was Roman Law cited in arguments before the courts or in their decisions and when done so it was usually limited to appeals from Ecclesiastical Courts, where Canon Law and Roman Law stood side by side.

In seeking to explain the greater use of the classics by the courts in America, where in fact fewer judges were classically educated, than those in England, Hoffman drew attention to the general nature of polemical literature then in the country. In sermons, pamphlets, newspapers and various writings on national affairs classics played an important part. Because classics were present in the writings of Americans they could also be expected in judicial decisions, seen by Hoffman as a specialized form of polemicism. He gives greater weight, however, to two other factors. At the federal level judges had to work out the legal relationship between the states, and between a state and the federal government. In these respects, Britain, not organized as a federal state, could not provide an adequate legal model for the new country. Classics, particularly those referring to ancient constitutional arrangements, could and did play a role for judges and lawyers who attempted to deal with various problems that arose. Secondly, the question asked within states was to what extent ought English Law and practices be observed? Traditionalists thought they should be followed closely. Others, of whom Chancellor Wythe was a prominent example, believed that English precedents should not be slavishly followed and that Roman law should be the basis of a new system. In this cause they not only quoted widely in cases from Justinian's *Corpus Iuris Civilis* but also made as many classical allusions and references as possible; the intended effect of which being to heighten the break with Britain and connect the young republic with something solid from the ancient past.

---

2 On the study of classical rhetoric in Connecticut, especially at Yale, from where, after the Revolution, the number of graduates going to the bar exceeded those going to the pulpit, see Christopher Grasso, *A Speaking Aristocracy*, University of North Carolina Press, 1999, Chapter 8.

3 See Fredric M. Litto, *Addison's Cato in the Colonies,* William and Mary Quarterly, 3d Ser., Vol., 23, 1966, pp. 431-449.

4 Stephen Botein, *Cicero as a Role Model for Early American Lawyers: A Case Study in Early Classical Influence*, Classical Journal Vol. 73, pp. 313-321.

5 Richard J. Hoffman, *Classics in the Courts of the United States, 1790-1880,* American Journal of Legal History,1978, Vol. 22, No1, pp.55-84.

6 Hoffman, *ibid*, pp.57-58. Chancellor Wythe, in the Virginia High Court of Chancery, made 85 classical references in a total of 21 reported cases. Of these, 39 appear in the text of the judgment and 46 are contained in notes added either simultaneously or later for publication. In the Supreme Court 12 classical references are made in five cases by four Supreme Court justices, one Attorney General and several attorneys arguing before the court.

7 Richard J. Hoffman, *Classics in the Courts of the United States 1790-1880*, American Journal of Legal History, Vol. 22. No1, page 69, does, however identify some exceptions, a notable one being ex parte Wrangham, 2 Ves. Jun. 609 (1795), a case involving Trinity Hall, Cambridge. In it Lord Loughborough used many classical allusions and quotes. However, Hoffman speculates, this may be that as Visitor for Trinity Hall he was keen to demonstrate that his classical training in Scotland was not inferior to that at Cambridge.

Many lawyers had read Cicero's political works and criminal defences either in the original, those entering university would have to demonstrate competence in the classical tongues, or, more usually, in translation. A useful source was a popular translation, completed in 1740, of Cicero's orations by William Guthie, a hack Tory writer from Grub Street in London. Surprisingly, Guthrie's fondness for Cicero did not prevent him elsewhere lavishing praise on Julius Caesar as "*perhaps the greatest man that was ever on earth*"[8]. First published in 1744, Thomas Gordon, an English libertarian polemicist, appended Cicero's four orations against Catiline, charged with plotting against the Roman republic, to his translation of Sallust, where further details of Cicero's life might be obtained. Gordon prefaced his work with a lengthy discourse on what he saw as the true principles of government heavily drawing on those of republican Rome. This book, which soon travelled to the colonies, is said to have had a decisive influence on early American political culture.[9]

Caleb Bingham's Columbian Orator, first published in 1797 was widely used in American schoolrooms in the first quarter of the 19th Century to teach reading and speaking. In addition to pieces praising republican virtues this anthology, "*to improve youth and others in the ornamental and useful art of eloquence*", gave examples of the speeches of Cicero whose oratorical techniques were strongly praised and presented as a model for statesmen and lawyers to aspire.[10] Over two hundred thousand copies of this influential book were published in twenty three editions over fifty years.

At university professors of law would combine teaching of English common law with Greek democratic principles and Roman republicanism in their lectures. This tradition began at the College of William and Mary with the appointment of George Wythe as the first professor of Law and Police.[11]

Employment in criminal trials

Following Cicero's methods, many lawyers would inform jurors of their lack of experience and limited ability in criminal trials and of how little they were acquainted with the defendant, but despite this, a solemn sense of professional duty compelled them to represent him or her. After this self-justificatory preliminary, again in the manner of Cicero, attorneys would often try to blunt the prosecution evidence with dispassionate stylized arguments about human nature and behaviour which they submitted should govern the way jurors, assessed the facts. To reinforce what they said about universal human conduct lawyers frequently quoted from sentimental novels, at first imported from Britain but soon written in abundance at home. By the technique of concentrating on general norms of human behaviour, rather than upon the defendant's discrete acts and intentions, lawyers sought to obscure the motives of their clients and encourage jurors to interpret the evidence with mercy. As well as throwing this oratorical cloak about their clients, lawyers would tell jurors that by finding a defendant guilty they would have decided he or she had no sense of right and wrong and were like amoral monsters found in gothic novels, which were popularly read at the time, and appeared in theatrical melodrama.[12]

In conducting defences, especially in capital trials, lawyers urged juries to insist on an almost absolute standard of proof before convicting their clients and to reject circumstantial evidence. Attorneys frequently underlined the gulf between jurors and defendants, who were often forlorn and on the margins of society, but, nonetheless, urged juries to accept that they had a special duty, stretching long back into history, to treat them, even if they were not objects of ready sympathy, with fairness, humanity and clemency.

Contrasting strongly with the apologetic, dispassionate and formulaic type of criminal advocacy established throughout much of America, a small group of attorneys in New York, into whose hands much of the criminal work was concentrated during the first quarter of the 19th century, developed an ardent form of oratory intended to show defendants as deserving of pity, and to inform jurors that displays of mercy would encourage obedience and instill morality amongst rootless and impoverished people in trouble with the law.[13] Courts witnessed emotional language, flights of rhetoric, flashes of humour and even buffoonery. Reports of this distinctive advocacy were not always well received by attorneys in other parts of the country. To some extent, the "New York style" has been explained by the fact that the criminal bar in the city attracted to it a number of radicals from England and Ireland, where florid appeals to emotion and zealous advocacy, in the spirit of Thomas Erskine and Henry Brougham, were more ensconced.

Major alterations in procedure, evidence and general oratory

By the end of the second quarter of the 19th century profound procedural and evidential changes had swept across the United States. Appellate courts, convinced in their decisions by trial judges and prosecutors, stressed the ability of defendants, as bearers of rights and aided by lawyers to

[8] Stephen Botein, *Cicero as a Role Model for Early American Lawyers: A Case Study in Early Classical Influence,* Classical Journal Vol. 73, page 315.

[9] Another much read book in late 18th Century America was John Ward's *System of Oratory*, first published in 1759, which drew heavily on Cicero's oratorical technique.

[10] Especially in "Introduction, General Directions for Speaking" and "An oration on the powers of eloquence written for an exhibition at a school in Boston 1791" *Columbian Orator*, Caleb Bingham and Co, Boston, 1817, pp. 7-30 and pp. 282-287.

[11] On the place of classical rhetoric in American legal education, see Linda Levine and Kurt Saunders, *Thinking like a Rhetor*, Journal of Legal Education, Vol. 43 1993, pp. 108-122.

[12] See, Michael Millender, *The Transformation of the American Criminal Trial 1790 – 1875*, Doctoral Dissertation, Department of History, Princeton University 1996, pp. 92-106.

[13] Michael Millender, *ibid,* pp. 108-122.

enforce them, to look after their own interests during jury trials. They also rejected arguments that a guilty verdict could only be legitimate if based on direct proof; accepted circumstantial evidence[14]; and, very importantly, emphasized that jurors need only heed reasonable doubts, and not demand an almost absolute substantiation, when considering the prosecution's case. Further, appeal court judges and writers of treatises on evidence maintained that jurors, through their everyday experiences of life, should be sufficiently confident to reach conclusions, even if not of complete certainty, about defendants' intentions and mental states from the evidence of their words and actions.

American oratory generally in the 19th Century was much influenced by two rhetorical texts, both written in the Eighteenth Century Scottish Enlightenment: *The Philosophy of Rhetoric*, by George Campbell and *Lectures on Rhetoric and Belle Lettres* by Hugh Blair. Stressing that human beings could discover truth through experience and only communicate it by recreating that experience in the minds of their listeners, the rhetorician was expected to develop his own understanding by reflecting on experience and then to explain such comprehension to an audience by appealing to faculties of mind which included understanding and imagination. Following this approach, 19th Century American orators often told stories of their experiences and or created "word pictures" to impart their ideas. The purposes of rhetoric was not merely to entertain, but to persuade listeners towards noble ends.

An essay entitled *American Eloquence,* from the United States Democratic Review[15] written in 1854, described what it considered to be the chief characteristics of American oratory including their *"Fervor"*, strong *"common sense"*, *"frank, open business-like air"* and appeals to emotion. On the latter, it was said

"Powerful and effective eloquence always has been and always must be addressed mainly to the passions or feelings in a man's heart. What could all the metaphysical subtleties of Thomas Aquinas and Duns Scotus effect, in impelling men to action, or in accomplishing any great and grand end, when compared with that warm, gushing eloquence, coming from the heart and going to the heart? We care not how powerfully the intellect is addressed and stimulated, enlightened and convinced, by argument. But let us remember, the work is not effectually done, the grand end and aim of eloquence is not attained, till the consenting sympathies of the inner man of the heart are touched and roused and brought into action. True eloquence – effective, useful eloquence – must appeal to the heart, through the understanding and the conscience. It must open the floodgates of sensibility within us, and thus bring into exercise our active powers for the promoting of good or the preventing of evil, or else, its real power and utility will be of a very small amount. And such, we think, in a very grand degree, is the character of American Eloquence".[16]

Attachment in public oratory to the classics waned generally, although some speakers held on to them tenaciously.[17]

A sea change in advocacy

Changes in procedure, laws of evidence and the effect of the prevailing general style of oratory produced a sea-change in advocacy in court, at first in the big cities and then spreading beyond. Attorneys adopted the mix of flamboyance, appeal to emotion and aggression that has been their hallmark ever since[18]. No longer able to argue that jurors were duty bound to acquit if there was any doubt in a case, they attempted to move jurors with the sincerity of their belief in the innocence of their client and, where possible, by closely examining evidence so as to point to different conclusions than those urged by the prosecution. Alternative versions, narratives, of what had happened were put forward. In doing so they jettisoned earlier objections to circumstantial evidence, the admissibility of which had been championed by the prosecution. Very unlike the earlier advocacy, which underlined differences between jurors and usually wretched defendants, lawyers started to stress the faculty of jurors to know the innermost thoughts and emotions of defendants, as well as their own, those of their spouse, or child, or neighbour.

Lawyers began to tenderly paint sympathetic pictures, often in the manner of sentimental novelists, of their clients to the jury. Addresses frequently became generously spiced with quotations from literature and poetry and the Bible. Because, as Tocqueville had observed, the great mass of people in nineteenth century America were largely indifferent to "*what oc-*

[14] On the acceptability of admitting circumstantial evidence into trials see, for example, the jurist James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law,* Little Brown and Company, 1898, Chapter VI.

[15] Volume 34. Issue 1. pp.40-52.

[16] Volume 34. Issue 1. page 45.

[17] One such was William Henry Harrison, elected as President of the United States in 1840, after a campaign in which his Democratic opponents had portrayed him as a simple frontier fighter, and a hard cider drinker living in a log cabin. In reality he was from the Virginia planter aristocracy and had studied classics and history. Once elected – and determined to slay this false image – he delivered a three hour inaugural address, on a cold March 1841 day in Washington, which employed many the rhetorical flourishes from his classical training and included references to the ancient Athenian constitution. He caught a cold. Unfortunately, this later developed into pneumonia and he died soon after.

[18] J. A. Millender, *The Transformation of the American Criminal Trial 1790-1875*, Doctoral Dissertation, Department of history, Princeton University 1996, Chapter 7. Commercial necessity may well have contributed to the major changes in advocacy that occurred. Lawrence M. Friedman, *A History of American Law*, Simon and Schuster, New York, 1973, pp. 270 – 275," saw *flamboyance, tricks and courtroom antics"* adopted in the 19th Century by lawyers, and not restricted to criminal cases, as influenced by business reasons. Lawyers constantly needed to advertise themselves to attract new clients. Although they could place notices in newspapers, word of mouth was the most effective way. Their style of advocacy was "*more than a matter of personality; this behaviour created reputation; and a courtroom lawyer who did not impress the public and gain a reputation would be hard pressed to survive"* (Page 270).

curred in Rome and Athens",[19] classical allusions to jurors became rare. This was not to everyone's liking.[20]

Sensationalism, as a tactic in criminal trails, appeared. Theatrical appeals to the emotions of jurors became more charged and were most probably taken to their extreme by William E Howe,[21] a partner in the infamous New York firm of Howe and Hummel, who could, and did, cry "at will" to win the sympathy of the jury. Described as a *sickening spectacle* in A. H. Rovere's astonishing book, *Howe and Hummel* it often carried a jury to extraordinary decisions.[22] Howe once, despite his considerable bulk, made an entire closing speech on his knees in front of the jury box. Another technique was to place the wife and children of the defendant in the front row "*to gaze devotedly at the man on trial. If perchance a particular defendant did not have a pretty wife, fond children, or a snowy haired mother, he was not for that reason deprived of the sympathy they might create on his behalf. Howe would simply supply them from the firm's large stable of professional spectators".*[23]

Theatricality also extended to clothing. At the beginning of a case, Howe would dress showily in a dove –grey suit and with much jewellry. As the days passed he shed his bright garments for darker suits and ties and stopped wearing watch chains, tiepins and rings. By the day the jury would be called on to decide the fate of his client his attire, matching his face, would be very sombre.[24]

Originally a Londoner, William Howe (1828-1902) professed on occasions to have been employed as a clerk at a barrister's chambers in the early 1850 s, frequently visiting courts in the course of his work.[25] It is at least possible to suggest that the histrionic advocacy observable in London at the time may have later influenced his style in New York.[26]

Books began to be produced on forensic address, including an important series compiled by Judge J.W. Donovan. The first edition of *Modern Jury Trials*, published in 1881, contained some forty condensed trials and ninety pages of descriptive matter, and formed a book of 700 pages. Despite being expensive, it sold many thousands of copies. *Trial Practice and Trial Lawyers* followed in 1883 and also met with success. It was confined mainly to descriptions of American advocates, preparing cases for trial and the conduct of court cases. *Tact in Court* was published in 1885. Deliberately moderately priced, and aimed at the great mass of young lawyers,

---

[19] Quoted by Stephen Botein, *Cicero as a Role Model for Early American Lawyers,* Classical Journal. Vol.73, 1978, page 318.

[20] In 1851, a contributor to the *Democratic Review* (*The American Bar in 1851,* XXVIII, pp.195-209), presumably not merely presenting his own views but also those more widely held, wrote indignantly about a distinct decline in courtroom advocacy. In his opinion, the *dearth of oratory* was attributed, in part, to *the number of inferior men who crowd themselves within the bar* (Page 203). Following the election of President Andrew Jackson in 1828, and the introduction of Jacksonian democracy, aimed at giving citizens greater participation in the running of their country, admission to state bars became much less stringent. This coupled with growing legal business in an expanding economy led to more lawyers, many of whom had not undergone college education, where they would have been exposed to the classics. A further reason for what was seen as a fall in standards was said to be a lack of literary appreciation amongst the mass of the legal profession, college educated or not. According to the *Democratic Review* commentator, "*They study law…and they study nothing else… They are content to know the verbiage of the law, and they bow reverently to the ipse dixit of ancient compilers of rules, and modern digesters of precedents. As to studying the classics, they were bored sufficiently with them at college. As to Burke and Milton, they throw no light upon the Rule of Shelley's case, and a lawyer should not waste time upon them. Such members of the profession… will never cultivate eloquence themselves, nor encourage its growth in others".* The author of the article in the *Democratic Review* complained about "*the disciples of the "black-letter school"* who exerted *"a pernicious influence"*. They were also to be found elevated to the bench "*where they are apt to discourage the display of those gifts in the advocate, of which they are destitute, either not appreciating their value, or ill-concealing their envy at the superior influence they exert upon jurors and auditors over their own bald exhibitions".* (pp. 203 -204.). Further contributing to the neglect of eloquence in oratory, with some notable exceptions, principally works by Kent, Story, Hoffman and Greenleaf, were treatises and text books, written in a "*disorderly, vague and jejune manner",* with which lawyers and judges stocked their minds (page 204).

[21] Over the course of his career William Howe represented over six hundred accused murderers – a greater number than the rest of the New York Bar combined. See *Decadence of New York's Criminal Bar,* New York Times, 7th September 1902, page 34.

[22] Although Howe's ability to cry was exceptional, others also used the technique. Indeed in 1897 the Tennesseee Supreme Court rejected a claim that public displays of emotion were wrong and held they might be positively good. "*Tears have always been considered legitimate arguments before a jury. Indeed if counsel has them at his command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises*". Ferguson v. Moore, 39 S. w. 341, 343,Tenn. 1897. Quoted by Sadakat Kadri, *The Trial A History from Socrates to O. J. Simpson.* Harper, 2006, Page 299.

[23] R. H. Rovere, *Howe and Hummel*. New York, Farrar Straus, 1947. Powell and Paterson, *Cicero the Advocate*, Oxford University Press, New York, 2004, page 33, compare this kind of appeal to sympathy with those made in ancient Rome, where a defendant would appear in mourning, unkempt and dirty in the company of family and relatives in a similar way. Interestingly, a junior barrister interviewed considered most advocates in modern England, whilst strongly discouraging displays of emotion from defendants, would encourage their relatives, respectably dressed, to be present before juries.

[24] Francis L. Wellman, *Luck and Opportunity*, MacMillan, New York, 1938, page 27.

[25] Howe claimed to had read law at Kings College, London and, after graduation, had entered the office of George Waugh ' a noted barrister'. There is evidence that he did work for Waugh, who was a solicitor, not a barrister, for a number of years. In this capacity he attended court often. He also appeared in court as a witness in two murder cases and as a defendant in a criminal trial at the Old Bailey in 1854 concerning a perjured bail affidavit. Upon conviction, Howe received 18 months hard labour. See, James Morton, *Uncovering the truth*, Law Society Gazette, 18th October, 2007, 104/40, page 17.

[26] Perhaps it is not too unreasonable to speculate that the success of William Howe's appeal to emotion and theatricality may, somewhat later, have influenced the histrionic styles of Earl Rogers (1869 -1922) in California and William Fallon (1886-27) in New York, the pre-eminent criminal attorneys of their respective bars. William Fallon, known as the *Great Mouthpiece*, became the inspiration for Billy Flynn, in the popular entertainment films *Roxy Hart* and *Chicago*. See Gene Fowler, *The |Great Mouthpiece, A Life Story of William J.Fallon*, Covici Friede, 1931. On Earl Rogers see Michael Trope, *Once Upon a Time in Los Angeles: The trials of Earl Rogers*, Arthur H. Clerk Company, 2001.

it sold, in various editions, over thirty thousand copies in the following thirty years. The work contained a selection of short articles by eminent advocates. Amongst a great quantity of advice contained within the book were the necessities of thoroughly preparing cases and of formulating a credible intelligent theory why a party's version of events should prevail, suitable confidence, not over- confidence, attention to voice, gestures and appearance, avoiding the appearance of trickery (rather running against the approach taken by William Howe, although, perhaps, his success was in being able to hide it), courtesy to the court and opposing counsel and careful selection of language before juries. On the latter A. B. Maynard, in an article entitled *Tact in Trials,*[27] wrote:

"I found farmers had one language, carpenters had another, country merchants had another and labourers another – these are the average jurymen. I adopted and used their catchwords and phrases, not as 'clap-trap,' or a 'trick', but to talk to them in their own language. I found it took better; they understood me and knew my meaning better. I never lost my suit by a jury's ignorance of what I contended for".

Recognising the respect with which most jurors held judges, Maynard also strongly cautioned advocates from arguing with judges once they had ruled on a particular matter.

In *Winning cases,* by "Different Counsel" the importance of stating facts simply before a jury was stressed along with illustrating points by comparisons with which jurors could easily identify.[28] In this respect, the abilities of Abraham Lincoln's were much praised.[29] This article also stressed usefulness of drawing on biblical stories.[30]

In *To cross- examine well*, Judge Donovan urged a restrained form of cross-examination:

"Most young lawyers think they appear dull if they pass a witness without 'tearing him to pieces' under rigid questioning, and find that they have fed their enemy at every question. Older advocates use this weapon with tact and caution. They have tried the sabre exercise too often, and remember the deep scars it produced on their clients".

A little after he said:

"The fine art of cross – examination is in making your case out of an opponent's witness. This is almost always done by a gentle and delicate leading process coupled with concealed kindness that fascinates and encourages, whilst it creates the reasonable doubt or supplies the broken thread of a story that you are seeking to establish".

Donovan concludes:

"*There are no better rules of cross- examination than five: (1) Know what you need, and stop when you get it. (2) Risk no case on the hazard of an answer that may destroy it (3) Hold your temper while you lead the witness, if convenient, to lose his. (4) Ask as if wanting one answer when you desire the opposite, if the witness is against you: and reverse the tactics if he is more tractable. (5) Treat a witness like a runaway colt; and see he does not get too much start on his master; and if he does, let go of the reins at the first safe turn in the testimony; but if you see any object to break his running, call the turn quickly".*

Lawyers who appeared before juries acquired knowledge, not found in books, about the way they often worked. In a satire, but which nonetheless reflected reality, written in 1906, a commentator wrote of a system of "*jury –made lawlessness, or juries imprudence, which recognizes rights that are forbidden by law and denies rights that are granted by law".* He then set out examples "*of jurisprudence of lawlessness"* including: "*Any man who seduces an innocent girl may, without a hearing be shot, or stabbed to death by…any near relative* and *In prosecutions for stealing horses, cattle or hogs, the presumption of innocence is shifted in favor of the live stock, and the accused is presumed to be guilty"*[31]. Attorneys who ignored these strong presumptions and other "*unwritten laws"* did so at their peril.

Up until the beginning of the second half of the Nineteenth Century, courts in the United States generally conducted hearings in civil matters at a leisurely pace. Marathon speeches by counsel were allowed. The federal Supreme Court was described in 1824 as "*Not only one of the most dignified and enlightened tribunals in the world, but one of the most patient. Counsel are heard in silence for hours, without being stopped or interrupted".*[32] In the course of their speeches judges would sometimes deal with subjects remote to the matter in hand. The speed of court life hastened greatly as the growing economy brought with it burgeoning numbers of cases. To cope with them, courts did not have the time to listen to long speeches, even if judges wanted to. Attorneys had to adapt to this new reality in their advocacy.

Before lawyers were engaged in significant numbers in managing the legal and commercial affairs of the large corporations that emerged in the third quarter of the 19th Century, the business of lawyering was largely conceived as a courtroom activity, mainly carried out by attorneys in sole practice. Good ability in advocacy across a wide variety of criminal and civil cases was important for a lawyer's reputation and success.

Expression of belief in causes

As in England and Wales, especially after Courvoisier's case in 1840 and that of William Palmer in 1856 (both much re-

[27] *Tact in Court*, Sweet and Maxwell, London, 1915, Edition, pp.35-37.

[28] *Tact in Court*, *ibid,* pp. 49-54.

[29] It has been said that Abraham Lincoln well understood that a lawyer's success depended more on his popular appeal than on his technical expertise. Charles M. Haar, *The Golden Age of American Law*, George Braziller, New York, 1965, page 4.

[30] By the time of Donovan's *Modern Jury Trials* this had a long history, especially in some States. In discussing 18th Century Connecticut, where until about 1750 it was common for church ministers to appear in court on behalf of neighbours, Sally Hadden, Professor of History and Law at Florida State University, said that lawyers consciously adopted ministers' gestures and flourishes. Interview conducted on the 11th May, 2010.

[31] Thomas J. Kernan, *The jurisprudence of lawlessness*, Green Bag 18: 588 (1906). Cited by Lawrence M. Friedman, *American Law in the 20th Century,* Yale University Press, 2002, pp. 87-88.

[32] Quoted in Charles Warren, *The Supreme Court in United States History,* Little, Brown and Co, 1922, Volume 1, page 467.

ported in America), there was discussion in the United States about whether advocates should be allowed to express belief in the causes of their clients. The first American code of ethics, that of the Alabama State Bar Association published in 1887, rejected any distinction between permissible and impermissible expressions of belief: All expressions of belief were disapproved: The Code stated:

"The same reasons which make it improper in general for an attorney to testify for his client, apply with greater force to assertions, sometimes made by counsel in argument, of personal belief of the client's innocence or the justice of his cause. If such assertions are habitually made they loose all force and subject the attorney to falsehoods; while failure to make them in particular cases will be esteemed a tacit admission of the client's guilt, or the weakness of his cause".[33]

Similarly the American Bar Association, somewhat later in 1908, was unequivocal in its prohibition:

"It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause".[34]

While American judges repeatedly reaffirmed the no personal belief rule, there is evidence that some lawyers, in civil and criminal cases, disregarded it.[35] Wide latitude was still permitted to lawyers expressing comments on the evidence.

During the second half of the 19th century, every state in the Union, save Georgia, granted accused persons the right to give evidence on oath at their trial.[36] Like England and Wales, where the Criminal Evidence Act of 1898 gave defendants similar rights, lawyers in the United States had to adapt their advocacy to take account of this shift in procedure which weakened their control over their client's defence. Also during this period, US advocates had to adjust to the growing use of expert evidence in court, as did their counterparts in England and Wales. Similar to there, it was for a time a habit to speak slightingly of the reliability of the testimony of expert witnesses. In one of the leading American law magazines a professional expert witness was defined as *"a man who is paid a retainer to make a sworn statement".*[37]

Plea bargaining

There is general agreement amongst legal historians that prior to 1800 the distinctively American feature of plea bargaining did not exist. Plea bargaining is a process by which a person agrees to plead guilty to a criminal charge in exchange for concessions by the prosecutor representing the state. The defendant waives the right to trial, loosing any chance of acquittal, but usually avoids conviction on a more serious charge. The state on the other hand, is not required to go through the expense of a trial. Matters negotiated in plea bargaining include reduction in the charges, a specific recommendation to the judge on sentence or an agreement not to oppose a request by the defence such as for probation. Plea bargaining began to appear in the early or mid-nineteenth century, apparently independently in a number of jurisdictions. It became a standard characteristic of American urban criminal courts in the last third of that century.[38] Various explanations why it arose and grew have been put forward.[39] They include heavy caseloads of judges, swelled by increasing numbers of civil claims for remedies under newly invented torts, over crowded prisons and that plea bargaining conveniently, in a more bureaucratized criminal justice system, settled cases where guilt was obvious but problematic to prove, thereby lessening risk to both the defendant and prosecution. As most criminal trials were fast paced and frequently resulted in conviction, similar to England, plea bargains were an attractive alternative, especially for guilty defendants.[40] By bargaining they had a hand in their own fate, rather than leaving it entirely to the not so tender mercies of the judge and jury.[41] Attorneys in 19th Century America, both for the defence and prosecution, as an important aspect of their court work, had to develop the ability to negotiate pleas. Competence by defence attorneys in composing and delivering pleas in mitigation following guilty pleas was essential.

---

[33] Code of ethics (Ala.) Chapter 18.

[34] Canon 15.

[35] David Mellinkoff, *Conscience of a Lawyer*, St Paul, West Pub Co, 1973, Chapter 11.

[36] It was not until 1962 that defendants in Georgia were allowed to testify on oath.

[37] 27 Am. Law Reg., iii., footnote., cited by Frederic Wrottesley, *The Examination of Witnesses in Court,* Sweet and Maxwell, London, 1910, Chapter 3, page 65.

[38] See Albert Alschuler, *Plea bargaining and its history.* Law and Society Review Vol 91 No2, 1979, pp. 211-246; Lawrence Friedman, *Plea bargaining in historic perspective* pp. 247-260, same volume; and John Langbein, *Understanding the short history of plea bargaining*, pp. 261-272, also in the same volume.

[39] See Mary Vogel, *Coercion to compromise: plea bargaining, the courts, and the making of political authority.* New York: Oxford University Press, 2000 and George Fisher, *Plea bargaining's triumph: A history of plea bargaining in America,* Stanford CA:Stanford University Press, 2003.

[40] Lawrence Friedman, *American Law in the 20th Century,* Yale University Press, 2002, page 85, wrote: *"Before plea bargaining became routine, these people went to trial- but the trials were quick, slapdash; they were typically lawyerless, and many of them started and finished within half an hour or even less".*

[41] Interestingly George Fisher, *Plea bargaining's triumph: A History of plea bargaining in America,* Stanford CA: Stanford University Press, 2003, found, in his research in Middlesex County, Massachusetts, after 1866, when defendants were given the right to testify, that the trial rate rapidly decreased and guilty pleas rose, presumably because of more bargains being struck. Although meant to safeguard defendants, making them competent to give evidence paradoxically resulted in defendants having less advantage at trial. If they did not testify adverse inferences would often be drawn against them by jurors. Also if they testified there was then no prohibition on prosecutors commenting on their prior silence and questioning them about previous convictions. A reasonable interpretation of the increase in guilty pleas in Middlesex County is that defendants and lawyers were aware of these dangers.

Bench Trials

In the 19th Century Maryland stood alone in allowing defendants to elect trial before a judge without a jury. These became known as bench trials. By the 1920's, in that state, they far exceeded jury trials. Bench trials were particularly popular with those charged with sexual offences and black people, both at risk of prejudice from jurors. That judges could dispose of many more cases when sitting without a jury was noted as beneficial. Elsewhere there was some constitutional doubt whether a state could allow a defendant to waive the right to jury trial. This began to dissolve. In 1927 Michigan permitted the practice. Other states followed. The Supreme Court approved of bench trials in federal courts in 1930. Eventually almost states came to permit them. In some, Virginia and Mississippi are examples, they became very widespread for felony cases.[42] Taking the jury out of the courthouse had a huge influence on advocacy, as it did in England. Unlike jurors, judges had no time for stirring speeches, sensationalism and histrionics. Strict attention to evidence and the law was required of attorneys, not appeals to passion, sympathy and prejudice.[43]

Conclusion

This article sought to examine key changes and influences on courtroom advocacy in the United States during the long Nineteenth Century referring to England and Wales for purposes of comparison.

[42] Lawrence Friedman *American Law in the 20th Century*, Yale University Press, 2002, page 87.

[43] Lawrence Friedman, *ibid* page 88, mentioned the case of Richard Loeb and Nathan Leopold in 1924 as a rare instance where a strong appeal to emotion was made to a judge sitting alone. Clarence Darrow, on behalf of the two young men, who had murdered a boy, apparently just for the thrill of doing so, made an impassioned speech in mitigation for their lives drawing on psychiatric reports. They were spared death. The judge emphasised their youth. Friedman thinks it unclear whether Darrow's eloquence, which was much reported, made any difference.

The Courage of Beccaria: the Disruption of "On Crimes and Punishments" in the Climate of the "Son-of-Fear's Law" in Bellum Exulum

Brenno Bianchi *

Abstract

The Fear of trial was a tried and tested tool of the legal systems of the old regime: a fearful response to the fear that pervaded society. In this context, Beccaria found the courage to go against the common thought of its time denying the goodness of the death penalty as an element of criminal justice. The philosophers of the time such as Voltaire and Kant, and even jurists such as Facchinei, Vergani and Giudici from Milan or as the Neapolitan Gaetano Majo (1757-1817) were all in favor of the death penalty. Starting from Majo, I followed the Neapolitan path to illustrate how fear was considered a necessary element in a literal war on brigandage and how, from the sixteenth century onwards, "increasingly terrible" measures were taken against highwaymen, until was decided to adopt against them the modules of the trial ad modum belli. It was then born a centuries-long spiral of a Law that might be seen as a fear's son, which facing the increase of crimes made the punishments even more terrible, but thus increasing the very crime that was wanted to fight: in a vicious circle to which Beccaria found the courage in opposing.

Keywords: *Beccaria; On Crimes and Punishments; fear; death penalty; XVIII Century; XVII Century; Kingdom of Naples; bellum exulum; highwayman; ad modum belli; bandit; law son of fear.*

1. Introduction

Look out the window. The crowd is terribly frightened: because of the general increase in delinquency, due to the strengthening of criminal organizations… everyone faces these problems as much as they can: many do not trust the institutions and call for self-defence; the spread of firearms increases. Everyday life is uncertain, today you can have a job, tomorrow who knows?

Unemployment is rising; masses of disinherited people, but also of educated technicians, are moving towards Europe, or inside Europe, all are looking for a better future. The fear of a monetary crack looms over everyone.

If you are thinking that I am referring to our January 2020, you are wrong: this is the description of how much an "Italian" would have perceived by looking at the crowd outside his balcony in the middle of the eighteenth century, epidemics and wars making an exception. There are many characteristic elements of fear: fear of crime, economic fear, fear of religion (so little highlighted in this article actually, but the contrasts between Catholics and Protestants, between Christians and Jews, between Christians and Muslims are a characteristic element of the whole modern age): in some ways also the fear of technology, which at those times was substantiated in the spread of new firearms called blunderbusses or flintlock pistols, which made the bloody wars in a way previously unknown and easier for brigands to commit kidnappings and murders.

General historians have shown [1] that since the early 18th century there has been a steady increase in complaints about the increasing number of criminals and the invocations for increasingly cruel punishments. There were no criminal statistics at those times, and we did not know whether it was for fear of a real increase in crime or just an imaginary perception. As it really was, this was the "hostile" context in which the marquis Cesare Beccaria condemned almost all the practices of ancient regime's criminalistic. These practices might be largely be considered as sons of fear. The courage that found that marquis to go in stark contrast to the spirit of his time, in spite of not being a brave man, makes his famous pamphlet *On Crimes and Punishments* much less obvious than it may appear to a contemporary, not immersed in the climate of the period: this is the invigorating element that allowed his work to still maintain the spirit of a real light for all the next generations.

2. The *On Crimes and Punishments* and its critics

On 16th July 1764, the first edition of an anonymous little book destined to change the fate of criminal law arrived in Milan, suffering at the time the effects of a strange cold and muddy summer, having as a result three years of famine. The

* JUDr. Brenno Bianchi, Ph.D., candidate at Scuola di Dottorato "Cesare Beccaria", Department of Italian and Supranational Public Law, University of Studies of Milan, Italian Republic.

[1] In example, NAPHY, W. G. and ROBERTS, P., *Fear in early modern society*, Manchester and New York, 1997.

work, needless to say, is the *On Crimes and Punishments*, written by the twenty-six years old marquis Cesare Beccaria. The booklet-pamphlet has, in the public intellectual sphere[2], a disruptive effect for its laicization of criminal law, for the innovative foundation upon which recovers the right to punish, for his theories on the value, the purpose, the function of the judgment, for its conception of a different relationship between prevention and repression, for his denunciation of the futility of capital punishment as well as the futility of atrocious torture, for his strong affirmation of the presumption of innocence of the accused, for its universal recognition of the right to bear arms… and for many other elements, which, being already known to all of us, it is not necessary to list.

The harsh criticism of Beccaria's work has been much less treated, and it shows that the *On Crimes* was anything but a mere collection of elements of mainstream criminal doctrine[3].

The Vallombrosian monk Ferdinando Facchinei, for example, in his *Notes* (1765)[4] charges Beccaria of treason and blasphemy for lese majesty of God, because of its position on the death penalty. Nevertheless, he adopts also the modern utilitarian argument, claiming that it is the life sentence and not the death penalty that generates habit and indifference among the citizens, thus denouncing life imprisonment as incapable of performing a generally preventive function.

Paolo Vergani, as well, in *On The Death Penalty* (1777)[5] marries the utilitarian vision of Beccaria, but just starting from that point of view he moves to support the way to the death penalty: he criticizes the marquis for having based its analysis on an abstract, philosophical man, very different in his opinion by the subject who lived at the time in the Duchy of Milan: a subject that, in its materiality, proves to have more fear of the death penalty than of a life sentence. When the subject would become as the one described by Beccaria, write Vergani, the death penalty could be abolished.

Another one is Antonio Giudici, marquis and professor of Civil Law Institutions in Pavia, who in his *Apology of Roman Jurisprudence* (1784)[6], structured as a series of glosses in the form of note by note on the music of *On Crimes*, wants to defend the sanctity of the Roman Law from the errors of Beccaria and his *non sequitur*[7]. And so, if Giudici, being a man of moderately reformist spirit, embrace the Beccaria's position on the presumption of innocence, however, he as well admits torture in some exceptional cases. Moreover, he does not repudiate the death penalty, considered necessary for the crimes of treason, assassination, murder… for all those crimes, in short, who break the social contract and disturb the safety of persons, whether public or private.

It is also true that Beccaria himself left a similar loophole open, through which the death penalty could be utilitarianly deemed fair and admissible, in the passage where he writes it may be considered correct to condemn to death a man whose "*existence can produce a dangerous revolution in the form of established government. The death of some citizens becomes, therefore, necessary when the nation recovers or loses its freedom, or in times of anarchy, when the unrest itself risks to becoming a law.*[8]" A very sensitive point, as we shall see.

We should not be surprised by these harsh contrasts and these defences about the death penalty. For example, the English criminal jurists of the time were all in favor of the death penalty and even on the basis of humanitarian grounds, seeing life sentence as a form of torture as long as a lifetime[9]. Consequently, the British reaction to Tuscan Leopoldina (the first state-wide law abolishing death penalty in the world), on this point, was very negative[10]. So much so, that in the United Kingdom it was hard to come and the abolition of the death penalty for civil crimes arrieved just in 1973.

Going back to the eighteenth century, speaking in favor of the death penalty were characters such as Locke, Kant, Voltaire, Rousseau, Sonnenfels, Filangeri… If, therefore, the argument of Beccaria on torture was also shared by many moderate reformers, that one on the death penalty was much less widespread even among the Enlightenment "radicals"[11].

It is not accidental the reference made last to Filangeri. In fact, he introduces us directly to the criminal difficulties of the Neapolitan territory. Here, in 1787, a young Gaetano Majo publishes a text entitled: "*The Justice of Laws which Prevent Crimes*"[12]:

---

[2] WETTERS, K., *The Opinion System. Impasses of the Public Sphere from Hobbes to Habermas*, New York, 2008; ROSPOCHER, M., *Beyond the Public Sphere. Opinions, Publics, Spaces, in Early modern Europe*, Bologna, 2012.

[3] Regarding this subject: MASSETTO, G. P., *Osservazioni sull'attività giudiziaria del Senato milanese nell'età di Beccaria*. In: *Scritti di Storia Giuridica di Gian Paolo Massetto*. Vol. II, Milan, 2017, pp. 1175-1198; MASSETTO, G. P., *Il* Dei delitti e delle pene*: Cesare Beccaria sotto accusa (1764-1766)*. In: *Scritti di Storia Giuridica di Gian Paolo Massetto*. Vol. II, Milan, 2017, pp. 1481-1514.

[4] FACCHINEI, F., *Note ed osservazioni sul libro intitolato Dei delitti e delle pene*, Venice, 1765, p. 191.

[5] VERGANI, P., *Della Pena di morte*, Milan, p. 62.

[6] GIUDICI, A., *Apologia della giurisprudenza romana, o Note critiche al libro intitolato Dei delitti e delle pene*, Milan, 1784, pp. 248.

[7] Regarding this work: GARLATI, L., *Molto rumore per nulla? L'abolizione della tortura tra cultura universitaria ed illuminismo giuridico: le note critiche di Antonio Giudici a Dei delitti e delle pene*. In: DI RENZO VILLATA, M. G., (ed.), *Formare il giurista: esperienze nell'area lombarda tra sette e ottocento*. Milan, 2004, pp. 263-322.

[8] BECCARIA, C., *Dei Delitti e delle Pene*, Leghorn, 1764, p. 62. The original text in italian: *«esistenza possa produrre una rivoluzione pericolosa nella forma di governo stabilita. La morte di qualche cittadino divien dunque necessaria quando la nazione ricupera o perde la sua libertà, o nel tempo dell'anarchia, quando i disordini stessi tengon luogo di leggi*.»

[9] SHARPE, J. A., *The failure to reform Criminal Law in Eighteenth-century England: Some problems of Interpretation*. In: BERLINGUER, L., and COLAO, F., (ed.), *Illuminismo e Dottrine Penali*. Milano, 1990, pp. 483-500.

[10] MACCIONI, P. A., *Enlighted Despotism in Action. The 1786 penal code of Leopold II, Grand Duke of Tuscany, and its reception in England.* In: BERLINGUER, L., AND COLAO, F., (ED.), *La Leopoldina nel Diritto e nella Giustizia in Toscana*. Milan, 1989, pp. 646-656.

[11] ISRAREL, J. I., *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750*, Oxford, 2001.

[12] MAJO, G., *La Giustizia delle leggi prevenienti i delitti*, Naples, 1787.

the author criticizes Beccaria as a sacrilegous and defends the Neapolitan legislation, to the point that he recognizes the reason for the large number of crimes taking place in the Kingdom in the judges, claiming there was such a large amount because the magistrates did not apply properly or in full the legislation in force in the Kingdom of Naples, with its extensive use of the death penalty even for minor crimes.

This very criticism directed me on the path of the eighteenth-century Neapolitanian criminalistic, which began, in fact, several centuries earlier, in the sixteenth century. A path that is a clear example of how a law son of fear was established and with what kind of regulatory characteristics. But also, how this type of law can lead to both order and chaos. A Contradictory dichotomy that is concurring, moreover, in its being a manifestation of Pure Power, but as well as the unable solving the criticalities in existence.

3. Of the brigands, the fear and the Law

The men of the sixteenth century believed, probably rightly, to live in an exceptional situation. In a non-exhaustive way, there was a rapid deterioration of economic conditions: if the Black Death produced a collapse of the Italian gross domestic product that only in the early 1800 s returned to previous levels (but with a much larger population and therefore a lower per capita income), in the sixteenth century there was a new rapid collapse of the manufactures of the small Italian states, due to the shift of the world's trade gravity centre from the Mediterranean Sea to the Atlantic Ocean, as well as in the process of formation of modern states, which, from the outset, imposed customs duties for both the export of raw materials and the import of finished products. This resulted in a situation of chronic underdevelopment (linked since the late 17th century by an intellectual reflection on the decline of the Peninsula, which for this reason resurrected, *risorse* from which the act of *risorgimento*, in the mid-1800s), aggravated by an agriculture that since 1200 was not able to independently support the population without wheat imports from beyond the Alps[13]. Add to that, an ongoing climate change, characterized by a cooling of temperatures and an increase in humidity, with all the consequent effects easily imaginable on agriculture and daily life[14].

During this time of crisis or change, say how you prefer, the social fabric was exhausted in the territory and hordes of highwaymen began to prosper again throughout Europe.

This was one of the many emergency elements that led the men of that time to question the effectiveness of existing magistrates, often instituted by ancient times. New courts and exceptional laws were called for, to meet the social needs of order and stability. We jurists, however, are well aware of how "exceptionality" in law is a dangerous category, because "exceptional" situations call for "exceptional" remedies: indeed, then the Princes were invoked precisely to implement these "exceptional" remedies on the land to guarantee peace, their main function. Princes who were driven, on the one hand, by interest in centralizing in their hands powers held by ancient local or privileged magistrates, on the other, being the guarantee of peace on the land was the foundation of their legitimacy: not being able to maintaining it, undermined the very core of their authority and more so in the specific case of bandits. Having disturbed public order and refused to bend the knee in front of Justice, they had begun a real war not only against the entire community but also against the Prince himself.

In fact, the measures taken against robbers and bandits are counted as inherent in the *Bellum Exulum*: *exulum*, literally means exiled or refugees, in this context it is used in the sense of "bandits", "exiled", "contumacious". The one against them is analogous to a war: an analogy that refers to that one made by the Council of Trent when announced that it was war the fight against heretics. The practice of the authorities holding political power is forced to change radically: the state, in the modern sense, was perceived as absent from the subjects because it, actually, was not yet born. Now, however, when the sovereign power moves, precisely because this rarely happens, it must do so with great theatre, with ostentation, in a big show to generate fear and through this, manifest both its existence to the criminals, and confidence and a sense of security in the population. As Giovanni Antonio Summonte noted in his *Historia Of The City and Kingdom Of Naples*[15] in 1601, the role of the royal inquisitions is to be sudden and produce that disconcerting, that disorientation indispensable for a good activity of investigating, i.e. producing contradictions between the versions of the inquisitees and interest in delation[16].

I am not in a position to say whether this is the moment when in European not ancient history the "Law Son of Fear" flourishes, defined as a right that arises from fear to be a soothing conditioner, even succeeding in part, but at the same time using fear itself as a tool, focusing more and more in the social system and finding no ways of venting. Nevertheless, this is a moment of junction where the phenomenon finds a quantitative but also qualitative intensification, taking clear all the tying connotations. I have identified as emblematic the development of the prammatics (*prammatiche* in italian) against banditry and highwaymen of the Kingdom of Naples, a State in whose capital we know there was a gallows perpetually erected in the Market Square at least since 1566, as warning for those who intended to attack the tranquillity of the town.

[13] CIPOLLA, C. M., *Storia economica dell'Europa preindustriale*, 3ed reviewed, Bologna, 1980.

[14] About the climate change occurring during the early modern age, its entity and the effects it produced in the social, political and religious realms (effects it produced also for the fear it caused), it is advised to read: BEHRINGER, W., *Storia culturale del clima. Dall'Era Glaciale al Riscaldamento globale*, Torino, 2013 (original ed. *Kulturgeschichte des Klimas. Von der Eiszeit bis zur globalen Erwärmung*, München 2010), pp. 151-217.

[15] SUMMONTE, G. A., *Historia della Città e Regno di Napoli, ove si trattano le cose più notabili, accadute dalla sua edificazione sin'a tempi nostri. Divisa in due Parti. Con l'origine, sito, forma, religione antica, e moderna politia, Tribunali, Nobiltà, Seggi, acque, circuito, amenità, Province, Santi, e Chiese, oltre gli Imperadori Greci, Duci, e Principi di Benevento, di Capua e di Salerno. Con li Gesti e Vite De Suoi Re con loro effigie presa dal naturale, Alberi delle Discendenze e Sepolchri. E De Gli Vicerè del Regno e con Altre Cose Notabili e altre non più date in Luce*, Naples, 1601.

[16] Ibid., VI, lib. XI, p. 80.

4. The prammatics of the Kingdom of Naples "De Exulibus"

This ostentation of force, this law (rectius: laws *extra ordo*) son of fear, which uses fear as a paradoxical tool to appease the population, as a means of obtaining collaborators, is evident precisely in the prammatics of the Kingdom of Naples concerning banditry[17]. Among the various collections, I will examine the prammatics on bandits contained in the *New Collection of Prammatics of the Kingdom of Naples* of 1803[18], the last and most complete, realized by Lorenzo Giustiniani (Napoli, 1761 – Naples, 1824), jurist, lawyer and scholar. The prammatics in question are placed in the fourth volume, under the title 81 *De Exulibus*[19]. The first report is on 31st May 1561, but it does not worth to linger on it, because it is not innovative compared to the similar measures taken in previous periods. In fact, my analysis of these prammatics will consist of a chronological exposition of what have been the innovative and relevant provisions on the subject contained in them, vulgarized in English to the use of modern, I would say.

Instead, the following measure - which places one of the two columns upon which is placed all the castle of the *bellum contra exules* - is of considerable significance. *Prammatic II* dated 26th February 1563 is issued by Don Peraran de Ribera, duke of Alcalŕ: the first Spanish Viceroy to attempt a systematic eradication of banditry, at the time of his neapolitanian rule interconnected even with phenomena of heresy, as in the case of his campaign against the brigand King Marcone[20], confirming the endiades in the minds of those times between contra *hereticos* warfare and *contra exules* warfare.

De Ribera announces to the population that he has issued an extraordinary decree because, with an Italian language partially updated by me and translated to English, "*being* [to him] *known that the number of bandits and criminals has increased so much in all the provinces of the Kingdom… and continues increasing daily, constantly coming complaints and from cities and people of the excesses, crimes, thefts, murders and insolences committed by these bandits and criminals, who have no fear of God, in contempt of Justice and lacking with respect to Her Majesty, they have the audacity to kill people inside the Cities and their homes, and even in the midst of public streets, brutally kidnapping women, blackmailing men and, as if all this were not enough, killing them most of the time; they also rob on the streets and in public places, destroying the carriageways of the couriers and murdering the poor travellers and the people who accompany them; and committing other and several heinous crimes, and disturbing the quiet and peaceful living of Her Majesty's subjects, forbid free trade to merchants and other men who do business and live in the Kingdom. And according to reports given by the Governor of the Provinces… it is impossible for us to remedy these enormous excesses and crimes through the ordinary laws that have been enacted under the Constitutions, Chapters and Prammatics of the Kingdom, and therefore it is necessary to adopt other ways, methods, reforms and extraordinary measures, harsh and strict requirements.*[21]" This reason for justifying extraordinary measures will be repeated often and without variation in words, in all those emanating from successive Viceroys, whether they were renewals or not.

Therefore, what are these extraordinary measures? So extraordinary to be six months limited! I will try to clarify the verbiage typical of the proclaimed edicts of the modern age in a bulleted and "caged" list: 1. To all those who were in contumacy, to the *forgiudicati* (i.e. in the Neapolitan legislation those who were in contumacy for at least one year against which was declared a death sentence and the confiscation of the estate, according to Frederick the First's Constitutions) and to their accomplices are given ten days to appear in front of the Court that summoned them. If they do not appear, they will be considered to be *forgiudicati* at the Royal Court, in derogation of the one year time provided for by the Constitutions of the Kingdom; 2. By virtue of this, anyone will be able to kill them with impunity; 3. In the event that a bandit, a thug or an ordinary person, residing in Basilicata or in the Principality of Citra for at least five years, should kill or hand over a bandit or any criminal, the pardon or a cash prize would be provided[22],

---

[17] MILETTI, M. N., *Strade di banditi, banditi di strada. Criminalità e comunicazioni nel Mezzogiorno del Cinquecento*. In: *Frontiera d'Europa*, year VI, n. 2, 2000, pp. 49-114.

[18] GIUSTINIANI, L., *Nuova collezione delle prammatiche del Regno di Napoli*, 15 Volums, Naples, 1803-1805.

[19] Ivi, Vol. 4, pp. 215-286.

[20] MARTIRANO, C., *Re Marcone*, Cosenza, 198-?.

[21] In a modernized italian: «*essendo* [a lui] *giunta notizia che il numero dei banditi e dei delinquenti è talmente aumentato in tutte le Province del Regno… e continuano ad aumentare quotidianamente arrivando continuamente denunce e lamentele da Città e persone degli eccessi, delitti, furti, omicidi e insolenze commessi da questi banditi e malfattori, i quali senza timor di Dio, in disprezzo alla Giustizia e mancando di rispetto a Sua Maestà, hanno l'audacia di ammazzare le persone dentro le Città e le loro case, e anche in mezzo alle strade pubbliche, rapendo con forza le donne, ricattando gli uomini e, come se non bastasse, uccidendoli la maggior parte delle volte; inoltre rapinano per le vie e nei luoghi pubblici, distruggendo le strade ai corrieri e assassinando i poveri viandanti e le persone che li accompagnano; e commettendo altri e diversi delitti enormissimi, inquietando e perturbando il quieto e tranquillo vivere dei sudditi di Sua Maestà, proibiscono il libero commercio ai mercanti e agli altri uomini che fanno affari e si trovano nel Regno. E stante le relazioni ottenute dai Governatori delle Province… non si può rimediare a questi enormissimi eccessi e delitti attraverso le provvisioni ordinarie che sono state emanate in virtù delle Costituzioni, Capitoli e Prammatiche del Regno, e dunque è necessario adottare altri modi, vie, riforme e provvedimenti straordinari, duri e rigorosi*».

[22] Regarding the fact that «*In some tribunals a pardon is offered to an accomplice in a great crime, if he discover his associates*», Beccaria wrote in chapter XXXVIII of his *On Crimes*, «*this expedient has its advantages and disadvantages. The disadvantages are, that the law authorises treachery, which is detested even by the villains themselves […]. Besides, the tribunal, which has recourse to this method, betrays its fallibility, and the laws their weakness, by imploring the assistance of those by whom they are violated. The advantages are, that it prevents great crimes, the effects of which being public, and the perpetrators concealed, terrify the people. It also contributes to prove, that he who violates the laws, which are public conventions, will also violate private compacts […]. But it is in vain, that I torment myself with endeavouring to extinguish the remorse I feel in attempting to induce the sacred laws, the monument of publick confidence, the foundation of human morality, to authorise dissimulation and perfidy.*»
Therefore, Beccaria highlights the difficulties arising from a penal rewarding system, as it developed from the sixteenth century to his own times. The State giving moral sanction to treason at the same time shows its weakness, because this reward reveals his inability to do justice without the help of private citizens. Furthermore, this rewarding produces by itself a spiral of violence, as it made possible to commit a theft, robbery or a crime in general, having the reliance on the possibility of presenting the head of any kind bandit and being pardoned for everything. Despite all these thoughtful considerations, however, Beccaria sees no other measure than the traditional ones to solve the problem of brigandage and greasing, thus reluctantly giving his assent to this type of means.

according to a pointed casuistic; 4. Follows a list (also typical of later prammatics, often containing only this point) of particular band leaders with full name, sort of "public enemies number one", who cannot enjoy these benefits and against which special prizes are indicated for capture, alive or dead; 5. Relatives within the fourth degree of these, if they do not proceed with their delivery, have eight days to leave the Principality of Citra or Basilicata, otherwise they will be subject to the penalty of 1,000 ducats and also to other corporal punishment at the Viceroy's will; 6. Officers of each land, both direct and baronial, in the event that a crime is committed in their jurisdiction or will have news that there are bandits present, must ring the bell to call the people to arms and prosecute them. Elected mayors will have to go and warn those of neighbouring lands, who will have to do the same thing. In the event that this does not happen they will have to pay a fine of one thousand ducats out of their own pocket, in addition to compensating for the damage done by the bandits and will also be subject to additional punishment, even corporal, at the Viceroy's will; 7. Anyone who helps bandits is punished with the ordinary punishment plus a corporal one at the Viceroy's will; 8. If during torture three bandits claim to have been aided, even by individual acts, by an individual of any order and degree, the proof of such help is by virtue of this pragmatic very fully proven.

The first four points, which were supposed to be temporary, are a few years later reaffirmed as exceptional and extraordinary measures, but made permanent and extended to the entire kingdom, with the prammatic number VI of July 22, 1583, by the Viceroy Don Pedro Téllez-Girón, duke of Osuna and grandee of Spain.

Just three years later, on 21st January 1586, the duke of Osuna issued a new prammatic, the number IX, aiming to affect strongly against kidnapping for ransom, including the disposition provided in my point 5 of the prammatic II. In particular, this new measure stipulates that: 1. In the case of abduction for extortion, by the moment of the event of the fact, the offender is automatically *forgiudicato* and can be killed with impunity by anyone. The Royal Court disapplies the one-year buffer period for declaring the state of *forgiudica*, while applying the death penalty as is provided by ordinary laws for this type of offence; 2. A cash prize will be given to those who kill the kidnappers; 3. Relatives within the fourth degree of the kidnapper are obliged to hand him over within eight days from the fact, otherwise, except for the children under the age of 14 and the older of 60s, the competent magistrates may have an obligation to move them to another Province, with no possibility of returning to their residence in the absence of a written authorization granted by the Viceroy; otherwise there will be the punishment of the whip for women and the whip and five years in galea for men.

The prammatics II and IX together form the two main columns defining the main type of offences concerning the *bellum exulum* and their penalties. These type of offences, as the decades go by, will be broadened by analogy, equating the attempt with the crime committed and at the same time increasingly lowering the threshold of punishability from a temporal point of view; as well as extending the complicity hypotheses beyond measure, bringing the relationship of randomness further and further back: all this is accompanied by the continuous tightening of the penalties.

There is, however, a third element to take into account, not so much related to the substantial criminal law but to the criminal procedure. In fact, on 11th April 1584, the Duke of Osuna had issued a particular prammatic, unnumbered as it is not contained in any collection, the text of which is provided to us by Giovanni Grande, and only by him, as the beginning of his work *De Bello Exulum aureus Perutilisque Tractatus ac in Regnis Neapolis, Sicily, Lombardie. Galliae, & aliis frequentissima*[23], on 1589[24]. With it the Viceroy had conferred a perpetual delegation to the military and civilian governors of the provinces, as well as the Presidents of the individual Audiences, the *extra ordinem* power to proceed in *modum belli* against the contumacious and bandits who committed crimes on the public roads and in the countryside, as "analogues" to enemies, to *hostis*. The Viceroy, however, goes further, stating that not only the terror of the sentence can fulfil a function of general prevention of crimes, but also the very way of the proceedings: "*seeing that proceeding by the legal path causes an impediment of justice and execution, and it comes from that too little fear in those offenders, who it would be convenient for them to stick and refrain from carrying out such excesses, not only for the imposition of punishments but also for the form of the proceeding.*" "*A terrible trial for terrible crimes*" it could be summed up. A brief digression is therefore needed regarding the implications of a "*ad modum belli* trial" and where this trial was widespread.

5. The *"Ad Modum Belli"* Trial

The general characteristic of the inquisitorial rite of the modern age was to induce terror: that for its own way of proceeding. Regarding the Duchy of Milan, we have the precious testimony of Gerolamo Cardano, with his chapter "*De Lite*" placed in the 3rd Book of his work "*De utilitate ex adversis capienda Libri IIII Defensiones eiusdem pro filio coram praeside provinciae & senatu habitae*[25]", in the Basel print edition in 1561 and in other handwritten additions[26]. The chapter is devoted to suggestions on how to deal with a criminal trial, an event so terrible that the best

[23] The complete title of the work is: GRANDE, G., *De Bello Exulum Aureus Perutilisque Tractatus ac in Regnis Neapolis, Siciliae, Lombardie. Galliae, & aliis frequentissima. Praxis. In quo tam potestas Praesidibus Provinciarum concessa procedenti in Exules ad modum belli, & militari modo tractatur, quam hanna contra eodem edita explicantur, ac omnia, quae ad Exulum extirpationem requiruntur, miro ordine praeticantur, ita ut nihil ulterius desiderari possit*, Naples, 1589.

[24] The paternity of the work had been questioned, some authors think it has been written by Scipione Martello. See: GIUSTINIANI, L., *Memorie Istoriche degli Scrittori Legali del Regno di Napoli*, Vol. II, entry GRANDE (Giovanni), Naples, 1787, pp. 122-123.

[25] CARDANO, G., *De vtilitate ex aduersis capienda, libri 4. Ex quibus in omni fortuna, rebus secundis & aduersis, diligens lector mirabilem ad tranquille feliciterque uiuendum (quantum in hac misera miserorum mortalium conditione fieri potest) utilitatem percipiet: … Defensiones eiusdem pro filio coram præside prouinciæ & senatu habitæ. Ioannis Baptistæ Cardani… De abstinentia ab usu ciborum foetidorum libellus exiguus, quem moriens explere non potuit*, Basel, 1561, p. 1161.

[26] STORTI STORCHI, C., *Gerolamo Cardano 'giurista' e la giustizia*. In: *Gerolamo Cardano nel suo tempo. Atti del Convegno 16- 17 novembre 2001*. Pavia 2003, pp. 207-219.

advice Cardano can provide is to escape: advice all the more valid for the innocent, as even if they had been able to prove to be not guilty, they would probably have died soon afterwards because of all the physical damages caused by the period of imprisonment and the terrible injuries suffered in the torture sessions. This is also why he dedicates Chapters IX and X of Book IIII to how to deal with the possibility of having a child in abstentia or fugitive.

As if the ordinary rite were not in itself capable of generating sufficient terror, the proceedings *ad modum belli* was also present in the Duchy of Milan, where it was referred to with the term of "*brachio regio*", given its derivation as the main power of the Prince delegated in a limited and exceptional way.

In an proclamation dated June 25th 1749[27], issued by Empress Maria Theresa despite "*many foresighted proclamation, ordered to the extermination of the guilty of atrocious crimes, individually the street thieves*", which identifies the existence of a "*reckless infestation, which should be promptly rushed to, and provide with unusual means for public tranquility and for common security*", a special Campaign Commissioner with the qualities of a judge is instituted "*by extraordinary remedy adapted to the most singular circumstances*" so that he "*can proceed against death sentenced bandits and against the famous highwaymen, disturbers of the public quiet, without observing the unuseful formalities of the criminal practice and prescribed laws, aiming only at the pure truth of the fact, that is ad modum belli, ex abrupto, levato velo, brachio regio*".

We can find a reference to the same way of pursuing in Article 49 of the *Constitutio Criminalis Theresiana* of 1768, under the name of "*Processo Statario* or Judgment On The Spot" or "*processus summarissimus*", defined as a "*extraordinary procedure that, in certain attacks on public tranquility, which are particularly dangerous, the Inquisition over that fact is set up, and the offender is punished hastily, with the abbreviation of the usual way of bringing on the trial, so that the offended public is pleased quickly, and other rogues of similar calibre could be punished by effective means of punishment, which pursues the traces of the same sort of serious misdeeds, being discouraged, and considered by their bad deeds.*"

Later on, in the *Interim Disposition regarding Criminal Trials for Austrian Lombardy*[28] (1786), the *processo statario* or *summarissimus process* is still present, governed by Article 30 and its paragraphs. It is referred as an extraordinary rite that for its rigour it is possible to be adopted only against predetermined crimes and following an explicit authorization of the Government aimed at indicating the limits of its use in places and over time.

The extraordinary *processo statario* is still repeated in the *Austrian Universal Penal Code* of 1803, in the book I Paragraph XVI, but this time, with explicit limitation in the object and duration to the mere repression of exceptional rebellions declared such by the Central Government: it has now become something very similar to the proceedings associated with the declarations of state of political siege on nineteenth-century in Italy[29]. Under the same name, therefore, we find an institution that, however, reconnects to a later phase of the history of law (or *vice versa*?).

This way of proceeding was also found in the Grand Duchy of Tuscany and in the Kingdom of Sardinia[30], it was widespread throughout the territory of the Peninsula.

But, therefore, what is this rite *ad modum belli* of the modern age, more terrible than the already terrible ordinary inquisition, so terrible that it has to terrorize the worst bandits, rogues, highwaymen of any area of Italy[31] and Europe (not surprisingly the Great subtitles his work *Ac in Regnis Neapolis, Siciliae, Lombardie. Galliae, & Aliis Frequentissima*)?

The trial *ad modum belli* must, however, provide for certain formalities which, as part of the *ius gentium* as *iura naturalia*, cannot be absolutely overlooked: even if, precisely by virtue of the jurisdiction *ad modum belli*, these formalities can be reduced or shortened (the evidence collection, the witness hearing, the defence of the offender). Nevertheless, the granting of this same special jurisdiction of a "princely" nature includes an implicit power to transgress any rule of law, since the conferred are not required to submit to a syndicate, nor to account for their actions. The jurisdiction *ad modum belli* involves having the "*liberum arbitrium*", that is to say the possibility to proceed *de facto*, without observing the *ordo iuris* and the system of legal evidence.

All this exceptional procedure, says Bartolomeo De Angelis in his *Allegationes Aurae*[32], another excellent source for the reconstruction of the rite, finds justification and legitimacy among the judges of the time precisely from being a rite of terror, put in place to deal with exceptional dangerous situations: "*iudex conscientiatus contra banditos debet apparere terribilis*[33]".

In the Kingdom of Naples, at the capture of the bandits were engaged the country militia squads, which could be commanded by the Fiscal Prosecutor, the Captain of the Cops, an Extraordinary Campaign Commissioner, the President of the Audience himself or one of its Auditors.

Once the bandits were caught, the offenders were identified, it was tried to ascertain their age and the charges were

[27] Inside: CANTÙ, C., *L'Abate Parini e la Lombardia nel Secolo Passato: Studj*, Milano, 1854, pp.151-152.

[28] In Italian: *Norma interinale del processo criminale per la Lombardia Austriaca.*

[29] See: LACCHÈ, L., STORTI, C., COLAO, F., (ed.), *Giustizia penale e politica in Italia tra Otto e Novecento. Modelli ed esperienze tra integrazione e conflitto*, Milan, 2015.

[30] TRAVERSO, M., Sicurezza e Libertà nelle strategie di contrasto al banditismo nel Regno di Sardegna tra XVIII° e XIX° Secolo. In: Italian Review of Legal History, 4 (2018), n. 02, pag. 1-22.

[31] For a reconstruction of the judicial trials *ad modum belli* in front of the Tribunale di Campagna Court in Kingdom of Naples' Province of Terra di Lavoro, see: CORCIONE, M., *Modelli processuali nell'antico regime: la giustizia penale nel tribunale di Campagna di Nevano*, Frattamaggiore, 2002, pp. 146.

[32] DE ANGELIS, B., *Allegationes aureae magistratuum provinciarum Capitinatae, et Comitatus Molisji. Accessit Pereccellens Allegatio Gio. Cammilli Caracij Vbi Tota Materia Campaneae Tractatur. Omnibus non solum in foro versantibus, sed Auditoribus Provinciarum adverae Praxis cognitionem, et eruditionein summopere necessaria*, Naples, 1631.

[33] Regarding this theme: MILETTI, M. N., *La paura del processo. Spunti nella penalistica italiana (secoli XVIII-XX)*. In: Quaderno di Storia del Penale e della Giustizia, I, 2019.

determined. All this was not accompanied by any form of transcription of the individual stages and only after the execution there was some documentation of what had been accomplished. A confession was then requested and if not given the offender was then subjected to torture. This was the fundamental moment of the proceedings, the only one assisted by a particular solemnity of forms, with an entirely written relation, having the purpose of validating the confession made earlier by the inquiry. After the torture phase was over, it was given two hours for the defense's ruling, giving the lawyer the original of the trial to shorten the time. However, in the presence of exceptional, extraordinary and indeterminate situations, it was possible to reduce this time frame until the defence phase was completely annulled.

After the lawyer had pronounced his (possible) defence, the Court (which could be reduced in some cases to even one of the Officers mentioned previously) stated its "vote", which the judgment was exhausted with and the judgment, thus issued, was immediately enforceable. Grande reminds us that: "*contra istos forascitos potest praeses imponere novum genus paenae, nempe obtruncare manus, et eruere oculos vigore ultimarum ordinationum et bannorum in Curia Apruzzi et fuit practicatum (ut audivi) per dominum Aguirrem tempore quo erat Commissarius Campaneae*". A punishment so heinous that Grande himself feels the need to provide the extremes of the edict that authorized the use of such a form of punishment. In addition, when there was danger of uproar or sedition, it is permissible to hasten the execution and carry it out immediately on the spot. The judgment issued ad modum belli was in itself impossible to appeal, so much so that the (few) papers concerning the trial were often burned[34] in order to prevent any kind of review.

In the event that the acts had not been burned, the only experious remedy was to make a plea directly to the Viceroy, since the judgment was issued in the delegation of his power, or to invoke the nullity of the acts.

6. The prammatics of the Kingdom of Naples *"De Exulibus":* continues

Returning to the succession of prammatics, on 19th March 1596 the new Viceroy Enrique de Guzmán, count of Olivares, promulgate one under the number XII, by virtue of which: 1. The attempt of a rapture at the end of extortion is punished as if the abduction had happened, moreover, even the mere threat by letter or voice of a kidnapping for purposes of extortion is punished as the completed offense; 2. In relation to this crime, to issue a decree to appear in front of the Tribunal within four days, under penalty *forgiudica* and death if not complied with, are sufficient some clues and not evidences; 3. The extortionist relatives to the fourth degree are jointly and immediately liable to return the money paid for the ransom to those who have paid. If they do not have liquid funds, it is proceeded by putting their assets at an auction publicly banned: if at auction does not show up anyone, for fear of retaliation, the "Universities" competent (i.e. the township) must proceed to purchase them according to the market value; 4. The sons and brothers of extortionists cannot hold any public office and any new tax imposed to the community in which they live must be distributed primarily on them and only then on the heads of other citizens: this unless they have worked in substantiality for the capture of the extortionist; 5. Who carries threatening letters or money linked to extortion, shall be punished by galley to life if not noble, with life imprisonment if noble.

It is possible to be harsher? Yes. In fact, on 31 May 1616 a new viceroy, Pedro Fernández de Castro, count of Lemos and Grandee of Spain[35], exudes a very long pragmatic (its length it's the reason why it is called of "the 89 chapters"), under the number XII, for the scope of judicial reorganization (for this reason it is found in the ninth volume of the collection, in chapter CXCIX named *De officio et Judicum aliorum officialium*).

In this measure, as far as we are concerned, it is granted the extraordinary power to trial *extra ordinem ad modum belli* both to the Presidents of Royal Audiences as to Royal Audiences collectivly: 1. In cases of theft and violent kidnapping of women if in the countryside and fire of houses, barns, woods and fields; 2. For *more piratico* crimes committed at sea (there is therefore a complete analogy between pirates and bandits: these last are a kind of "land pirates"); 3. In cases of kidnapping for ransom, although the amount has not been paid; 4. Against anyone wander the countryside in groups of at least four persons carrying prohibited weapons; 5. Proceeding is *ad modum belli* against the offender as all his accomplices; 6. In cases of an exceptional offence giving a bad example to the population, it is possible to ask the Viceroy, afterwards that fact, a patent with the specific jurisdictional power to trial *ad modum belli* relative to that fact.

On January 15, 1643 follows a new harshening, with the prammatic XXI, issued by the Viceroy Ramiro Núñez de Guzmán, duke of Medina de la Torres, in which are given ten days to anyone, of any gender or status, which had provided in the past any kind of help to a bandit or a squad of them, including a help in the form of food or clothes, or had fomented the same, to appear in front of the royal magistrate competent for the area in order to provide information for the eradication of bandits and, moreover, to remain at his disposal for others four days; if these individuals did not fulfill this obligation, they will be considered sentenced to death *ipso facto ipsoque jure* upon publication of this prammatic, with inability to receive grace.

The same duke of Medina, noting that prammatic XXI had no significant effects, decides to go to impinge directly against those privileged social classes among which lurked the powerful protectors of the robbers. Therefore, on 25 July 1643 he issued the prammatic XXIII according to which: 1. Everyone, including nobles, aid in any way for the future bandits, *forgiudicati* and

[34] For this very reason, it might be of great interest the study of the documents concerning a famous trial *ad modum belli* happend during the May of 1556 just outside the walls of Milan, contained in a rare publication preservere in the National Braidense Library, titled: *Processo formato contro due famosissimi banditi Giacomo Legorino, e Battista Scorlino, con suoi seguaci, quali furono tutti pubblici assassinidi strada; dove narrano gli assassinamenti, ruberie, omicidi, incendj, ed altre iniquità da loro commesse in diverse parti. Come sono stati presi, e giustiziati. Estratto giustamente dal processo, secondo il loro detto*, Milan, 1747.

[35] To whom, incidentally, Cervantes dedicated the second part of Don Quixote.

contumacious are *ipso facto* condemned to death. Similarly, are the others which provide help to those criminals with an intermediary; 2. The feudal lord who tolerate a squad of bandits for more than two days in its territory is liable to a fine of 6,000 ducats plus the loss of jurisdiction and the seizure of its land for five years in order to sending royal judges to exterminate the band. This presence is considered fully and sufficiently proved by two witnesses; 3. In order to avoid excuses, the landowners are obliged to take measures aimed at knowing who dwell in their jurisdiction, whether it is a robber or a helper, collect information about them and pursue them, providing connection to the judge royal responsible for the area within six days, otherwise the punishment will be three years in prison, a 500 ducats fine and a disqualification of jurisdiction; 4. It incurs in the same penalty who do not act for the negligence of an officer subordinate, sufficiently proved by two witnesses for singular cases; 5. Since many people who have not previously committed crimes, have joined the bandits companies and then make crimes and then return to their country, trusting that this does not become known, anyone saw carrying weapons in the presence of four other bandits is *ipso facto* condemned to death, with a declaration of *forgiudica* within four days and can be killed with impunity without the need of a a judgment; Moreover, if his head is presented to a Royal Court, it can be exchanged with a pardon for another bandit or criminal.

Continuing on this path, a few days before the revolt of Masaniello, the Viceroy Rodrigo Ponce de León, duke of Arcos and grandee of Spain, issued on 28 May 1647 the prammatic XXVII. Realizing that the system of pardons, amnesties and penalties switches did not work and actually was in fact itself a manufacturer of more crime, stating that "*From experience we have seen that the main cause of the crimes committed and those who are committed daily in countless time in this faithful city of Naples, in its villages and farms, as throughout the Kingdom, it has been that the criminals have had confident to obtain forgiveness from the offenses with which is easier to obtain compositions, pardons, amnesties or switching of the punishments; and there being heard that to get easier this result many have endeavoured through exceptional measures by the authority or the power to powerful people, having forced and did violence to the poor plaintiffs offenses and parts to make remissions* ", confirms a prammatic of over one hundred years before regarding the solemn acts necessary to make a remission, and the death penalty for those who had managed to extort onw, adding that: 1. the simple attempt to extort a remission with violence or abuse of authority is *ipso facto* punished with death. Equally it shall be punished who gets a remission with resources made available thanks to the work of third parties, if knowingly. All these remissions are to be considered as non-existent; 2. During the investigation for this crime the offender is to be considered as a criminal confessed even with only three testimonies of individual facts. Against him will apply all the rules of the Kingdom against the guilty confessed except those for the *forgiudica*, which is reduced from one year from the Kingdom's Constitutions to ten days later the condemnation.

We intend to end with the last major innovative prammatic regarding *De exulibus*: the number XXXII, dated 12 June 1684. In fact, since 2 December 1683, Viceroy Don Gaspar Méndez de Haro, marquis of El Carpio and three times grandee of Spain, had expressed its determination to destroy the groups of bandits with a vigorous military-judicial[36] campaign, so energetic to open a rift between him, supported by the Collateral Council and the kingdom's magistrates and the same government in Madrid, led instead to immobility. The Viceroy still not changed its intention and came to issue the above prammatic, where he announced the discouragement that has moved him to measure such an exceptional and hard, In fact, "*although until then they were very good provisions were given to produce the extermination of the criminals and bring them to repentance and the fine and making them partners of the King's clemency; because some of them are more stubborn in their perversion, it was necessary to find the most appropriate means in order to experiment with them their due punishment and warn others by example ".*

And because of this provides that: 1. Everyone, both for the future but also for the past, had some kind of correspondence with bandits, and has supplied them with food or advices, it shall be punished with 6000 ducats fine and no possibility of grace, life imprisonment if noble or galea for life if not noble, even if he live outside the Kingdom or is a subject of another Prince. Anyone giving other form of aid or commission to the bandits that has not already punishable by death, could be under the judge's *arbitrium,* prior a relation to the Viceroy; 2. Since these crimes are difficult to prove, is referenced to the temporary disposition on evidence present in the prammatic II (which I indicated in paragraph 8) and renewed making it perpetual and more bitter: therefore if two bandits confess, even during torture, that they have been helped in any way by someone, even for individual and separated acts, this will be a full and legitimate proof, even if it is not mentioned the appointed in the act of confession; 3. The same can be observed in the event that these helpers are appointed by bandits or pardoned by confess to torture in the hands of others who work on convicted, although these names are not confirmed in the ordinary torture or cited in the acts; 4. In town homes in Abruzzo in the months from April to September it is forbidden to store food that can feed a person for more than one day, under the punishment of three years of galea with no possible pardon; 5. Only the officers and cops, if not investigated or bandits relatives, can bring any kind of legal firearm in the provinces of Abruzzo, under the punishment ten years of galea for non-nobles and ten in prison for the nobles; if the weapon is one of those forbidden, the penalty is death as is custom; 6. The one who steals legal weapons, turns in a group for the countryside and then holds them in his house, shall be punished with death; 7. If during a torture session, a person is said to have stolen weapons and then has committed an offense punishable by corporal punishment, the clue of the theft is a valid full proof and the author was sentenced to ten years to be served in accordance to his personal quality; 8. If two credible people individually testify that they saw a person in different times and places with stolen weapons, the theft is con-

[36] PAZ, J., *Campaña del marqueés del Carpio virrey de Napoles contra los banditos del Abruzzo en 1684*. In *Revista de Archivos y Bibliotecas y Museos*, Vol. VIII, 1903, p. 248.

sidered occurred *in flagrante* and therefore punishable by death; 9. The subject, already banned then benefiting from a pardon, if caught *in flagrante* with any type of weapon, could be killed with impunity and presenting its head it is possible to request certain rewards; 10. Whoever stole out of town, even disarmed and only one time, more than ten *carlini* in goods or money, will be considered as a real bandit, distrusted, *forgiudicato* and punished as such; 11. In case of theft in the country, in the absence of material evidence or witnesses of its existence, three witnesses of the good reputation of the complainant procedurally sufficient; 12. Who hides or buries a bandit corpse in order to conceal it from a Royal Court is punished with ten years to be served according to its personal quality and the place where the corps was buried is to be demolished; 13. Anyone guarding weapons, items or money of bandits is punishable by death. It is a sufficient proof tempering the said objects in his own home; 13. In the case of crimes that occurred in the country or blackmailings, the judges of the Royal Audiences and the campaign commissioners may proceed *ad modum belli*. Similarly, can proceed all the officials charged against bandits.

The latter closes the roundup of innovative *de exulibus* prammatic. This does not, however, imply a fall in desuetude of the procedure *ad modum belli*. In fact, the doctrine continues to talk diffusely throughout the eighteenth century and even beyond. That particular approach is in fact even in that part of the *Commentary*[37] prepared by Rapolla himself. In 1756 it comes in a chapter of Nicola Alfani's third volume of his work *Juris Criminalis*[38]. The lawyer Domenico Moro extensively analyzed the matter in his *Pratica Criminale*[39] of 1768. It was even a subject in the Fiorentino work of 1794[40] and in Valletta's in 1797[41]. Still, in the early nineteenth century, Oronzo Fighera felt the need to address the procedure *ad modum belli*, which he included in the sixth edition of his manual of institutions for the use of auditors in 1802[42].

The institute went down on the Kingdom of Naples only with the new French criminal procedure code brought with weapons by Joseph Bonaparte.

7. Documentary Traces of the law son of fear in the Kingdom of Naples

This succession of prammatics, very strict measures, raises a spontaneous question in the minds: was there any real application of them? It is not a farfetched question, seeing as already Manzoni ridiculed the proclamation of the Spanish Viceroys in matters of *bravi* (the coarse soldiery employed by the lordlings) enacted in the Duchy of Milan. We know and we are not surprised about the fact that those Milanese proclamations were ineffective in coping with the phenomenon, however it cannot be automatically inferred that they were not applied. At the moment, we do not have any study on this particular matter. The situation, nonetheless, is different in the Kingdom of Naples, where we have numerous testimonies as to the application of these *de exulibus* prammatics and as to *ad modum belli* judgments.

In fact, the prammatic unnumbered issued on April 11th 1584 by Don Pietro Girňn found immediate application. Eliseo Danza in his *Tractatus de pugna doctorum*[43], shows how the measure as soon as issued was carried out and suffering this penalty were two "*ladroni*" (technical term for robbers or sometimes even more specifically, street robbers) hanged on the spot by the President of the Audience of Bari, Don Francesco Carafa, using the power delegated *extra ordinem* conferred by the prammatic.

Another important document to rebuild the impact of these proclamations is the *Relazione de' servizi fatti*[44] written by Francesco D'Andrea, at the time Fiscal Prosecutor at the Audience of Abruzzo Citra. At the end of August 1647, in an atmosphere of effervescence because of the revolt of Masaniello and that one of the Duke of Guise, news arrived that the people of the village of Guardiagrele started a revolt, setting fire to the *Mastrogiurato*'s house, then kill him. To quell the sedition, the President of the Audience Don Michele Pignatelli, marquis of San Marco, sent there D'Andrea, with the command to restore order *ad modum belli* by the help of terror, or to be more precise, "*that you would go to be the Attila of that Country*."

From the description that the Fiscal makes of his actions appears a certain satisfaction: "*And the Fiscal Prosecutor did not fail to behave in the way that* Signor *D. Michele had indicated to him. As he immediately arrived at Guardiagrele with the company of Borgognoni, and with the militia squad, commanded by Captain Pietro de Santi, and having housed the soldiers in the houses of the culprits, he not only assumed the information of the turmoil that had been there, but put in prison the main People's Leader, author of sedition, and after taking him to Lanciano (it seems that it was time now that the population knew that sedition was subject to the strictness of the laws), condemned him, as Auditor of War of* Signor *D. Michael, to die on the wheel, so that he would be an example to others. He was then commuted*

37 RAPOLLA, F., *Commentariorum de jure regni Neapolitani in ordinem redacto*. First Part*: pars prima, quae est de jure publico*, Naples, 1746, p. 222.

38 ALFANI, N., *Iuris Criminalis ad usum Regni Neapolitani*. Vol. III: *De criminali Judicio*, Naples, 1756.

39 MORO, D., *Pratica Criminale coll'addizione in cui si tratta anche delle pene, secondo la legge comune e di questo Regno*, Vol. IV, Chapter XXVIII, Naples, 1768, pp. 316-321.

40 FIORENTINO, N., *Istituzioni criminali teoriche e pratiche ad uso di ogni tribunale e corte della città e del Regno di Napoli*, Naples, 1794 (II edition), pp. 307 et seq.

41 VALLETTA, N., *Delle leggi del Regno Napoletano distribuite in tre parti*, Part II, Naples, 1797, pp.165 et seq.

42 FIGHERA, O., *Institutiones iuris regni Neapolitani in quatuor libros tributate et commoda methodo adornatae, in usum Auditorii*, Vol. I, Lib. I., paragraphs LVII-LVIII, Naples, 1802, pp. 44-45.

43 DANZA, E., *Tractatus de pugna doctorum, Proexio Iudicum et victoria advocatorum*, Vol. I of III, Trani, 1633, p. 370.

44 D'ANDREA, F., *Relazione de' servizi fatti dal Signor Francesco di Andrea nel tempo, ch'esercitò il Posto di Avvocato Fiscale nella Provincia di Abruzzo Citra. E particolarmente di tutto ciò, che da lui si operò in servizio di S. M. mentre durarono le rivoluzioni popolari, cominciate in Napoli nel di 7 luglio 1647, ed estinte nel di 6 di Aprile 1648 sotto il Presidato ad Signor D. Michele Pignatelli Preside, e Governatore delle armi in quel tempo di ambedue le provincie di Abruzzo*. In: GENNARO RAVIZZA, G., (ed.) *Collezione di diplomi e di altri documenti de' tempi di mezzo per servire alla storia della città di Chieti*. Vol. III, document number XV, Miranda, 1836.

his judgment to the callows, by clemency, on the advice of the Fiscal Prosecutor himself. The conviction of the gallows was carried out in Lanciano Square, along with another, who had been one of the murders of the Mastrogiurato, sentenced to the same torture." The following is an important step, which can be considered written against Beccaria over a hundred years before, in fact, D'Andrea tells us that: "*With this justice* [sic!] *in order to punish popular revolutions, the law was administered in this way for the first time in the Abruzzi, and perhaps also in the whole Kingdom; people were induced to fear so that in both Provinces from that moment on there were no more popular uprisings in Abruzzo."*

In fact, this described by D'Andrea constitutes the most essential form of the *ad modum belli* procedures, where the already scarce formal rules were eliminated. However, the *communis opinio* justified this point with the need to crack down on riots. This very brief way of proceeding, legitimized precisely by the ongoing rebellions, was applied not only to the insurgents, but also to all those who were in the territories where the insurrections took place.

Another important source for understanding the impact that these practices had are the newspapers of the time. In an issue dated May 10th 1679 of the newspaper edited by Antonio Bulifon[45] an interesting, albeit rudimentary, statistic is reported as regards the data connected to the war against the brigands. From this we learn that just in the period between 1675 and 1679 in the Kingdom of Naples 1541 bandits were object of an act of clemency, 516 were killed and 1079 sentenced to jail or obliged to join the military.

In addition to newspapers, travel reports written and published in that period are also of some importance. Therefore, the report provided by Serafino Razzi (1531-1611), a Dominican priest, professor of Aristotelian logic and preacher, about his travels in Abruzzo done between 1574 and 1578[46] is very precious on the way to understand of proceedings *ad modum belli*. The story is always peaceful and serene, even when it reports of towns where the memory of the Turks' raids of 1566 was still very alive, or where the population lives in terror of the bandits. The story serenely illustrates both the ambushes orchestrated on the streets by bands of brigands, sometimes even noble ones, as the network of informations helping to track them down and the purely military strategies adopted by the provincial Audiences to capture them. There is no shortage of stories of *ad modum belli* trials and heads placed on the spades at the entrance of villages.

Strictly literary sources, on the other hand, testify how this extremely harsh procedure had become everyday use, a background element of the theater of everyday life. Giambattista Basile (1575- 1632), in his *Pentamerone* or *Cunto De Li Cunti* (1634), in the *novella* The Two Brothers[47] shows the case of an *ad modum belli* trial. He tells: "*Now those objects had been robbed by certain small offenders right at the innkeeper where Parmiero went to eat; and then they had hidden them in the beam they knew, to go and pick them up and spend a little at a time. So when Parmiero, after having filled his stomach well, took them out of the bag to pay, the innkeeper recognized them, and immediately called certain cops, customers of the tavern, had him caught. Conducted with fine ceremonial before the judge, and rummaged and found the evidence of the crime on him, and made the comparison with the robbed, it was as a self-confessed offender condemned to "Play at Three", in play he would have had to make whirlpools with his feet* [the gallows]. *[…] And while he was screaming and screaming on the street, that there was no justice, that the poor were not listened to, that the sentences were made at random, and that, for not having anointed the judge's hand, given the bite to the scribe, the tip to the Mastrodatti, the envelope to the procurator, he was sent to work stitches in the air to the widow teacher*[48]".

The news of the summary trials of the Neapolitan area must have crossed its boundaries, since Niccolň Granucci (1521-1603) from Lucca chose Naples as the setting for his short story, in which he tells how justice there was really very summary[49]: "*The Viceroy… immediately had a law published, that whoever was found at night possessing a ladder, would cut off his head. […] One morning at daybreak (the very noble Cola was surprised with a ladder), the poor fellow was immediately surrounded by justice. […] He was brought before the judge, he confessed all that fact, he could not deny it. For this reason, the Viceroy sentenced with his own words to cut Cola's head the following morning, and immediately climbed on horseback and went to Pozzuoli to avoid being begged to change his verdict."*

Although most of the documentary evidence of the application of this law son of fear in the Neapolitan area regards the 16th and 17th centuries, as far as the eighteenth century is concerned, given that the doctrinaire writing on the subject did not end after the end of the issuing of new pragmatic *de exulibus*, therefore we still find remnants of references regarding its application in diaristic and correspondence. A well-known example is the one in which the Prime Minister of tuscan origin Bernardo Tanucci entertained with his new sovereign Charles of Bourbon[50]. In fact, despite being an offense against God and the Sovereign, brigandage resisted any attempt of repression: Sicily, Calabria, Basilicata, Abruzzo, and the lands between Montefusco, Chieti and Lucera, the province of Salerno were full of "*highwaymen and they often commit enormous and cruel excesses*[51]". In 1773 the province of Terra di Lavoro was infested with thieves, and in Naples, the flood of thefts was such that in 1774 it arrived "*at the same chapel of the Council of S. Chiara, that is, in the house of justice, of prisons, of the cops*[52]."

So it was that, six years after the publication of *On Crimes*, since 1770, there was a notable increase in the use of *ad modum belli* procedures. Tanucci on March 13th 1770 reports that

[45] BULIFON, A., (ed. CORTESE, N.), *Giornali di Napoli dal MDXLVII al MDCCVI*, Vol. I, 1932, pp. 223-224.
[46] RAZZI, S., *Viaggi in Abruzzo (Inedito del sec. XVI)*, L'Aquila, 1968.
[47] BASILE, G., *Lo conto de li Cunti*, Milano, 1995 (1a ed. 1643), pp. 314-324.
[48] Ibid., p. 322.
[49] GRANUCCI, N., *La piacevol notte et lieto giorno*, Venice, 1574, Novella di Cola Giuovane Napolitano, pp. 138-139.
[50] TANUCCI, B., (ed. MINCUZZI, R.), *Lettere di Bernardo Tanucci a Carlo III di Borbone (1759-1776)*, Rome, 1969.
[51] Ibid., p. 118.
[52] Ibid., p. 119.

against a sentry guilty of robbery and eleven murders "*the King ordered… to deliver it to the Vicaria Court to whom he delegated the cause with all the clauses, which are used in similar cases, because exemplary justice do it promptly, and soon would be spread terror. The Vicaria Court obeyed zealously and effectively and within two days he set up the trial, in which because the indubitable indications the offender confessed, he was sentenced to the gallows, and to burn the corpse off the coast of Castello*." On April 20th 1773, he reports that "*Being also the province of Terra di Lavoro infested with thieves, the king ordered the Campaign Commissioner to do the quickest, and exemplary justice with the extraordinary faculty, and ad modum belli and per horas, as they say here without admitting a call, and only with reporting before executing*". And, without a referring date, he tells us that "*The Vicaria's regent with the extraordinary faculties given to him recently sent three thieves to prison summarily, and without formalities, with full evidence and confessed, and sent 20 of the most slandered criminals under custody in the S. Elmo castle: things that were done for the multitude of thefts, where the capital is haunted no less than the provinces of the Kingdom, as it has never been* ".

In the midst of this terribly extraordinary situation, which had continued for over two hundred years, it was perhaps simpler, albeit illusory, to share viscerally the words of the aforementioned young Gaetano Majo than those of the illuminists Beccaria and Francesco Mario Pagano [53].

8. Conclusions

Beccaria found a not granted courage in going against at least two centuries of culture and criminal practice. Not only that, his pamphlet exposed Power in its inability to ensure that order on which its legitimacy was based, both for traditional models and contractual ones of natural law. At the same time, he proposed a solution to the "criminal problem", as it was dubbed, which then had to seem counterintuitive to most: that is, milder trials, even if more certain and rapid (even if we have sometimes seen the problem was in the excessive speed of trials). This was a response of the mind that went against the common one, the classic one, the "visceral" one of the men of the time, that is, to implement terrible justice for terrible crimes. In fact, political power feared the risk that in the eyes of the people a "mere" life sentence could appear as too little for the wickedness performed by a man, leading them to see the justice of the Sovereign as "unjust" and thus undermining the legitimacy of his power.

It is also true, as I believe I have outlined in a sufficiently clear manner, that these "very severe and exceptional" measures had been going on for centuries like an avalanche and an inevitable breaking point had been reached: the types of offences and the punishments had become so much enlarged that it was not possible to go further. The attempt to find new solutions must have seemed inevitable.

This is how Beccaria proposed his innovative recipe, bearing in mind that all that had to be done in the first place was to defuse the spiral of violence on which society had screwed itself, also because of the repressive models that had been adopted. The challenge was to reduce the overall violence of society by reducing that one exercised by the State\Government\Power. Beccaria sees that the reduction of violence in society can be obtained from an extension and guarantee of individual rights, not from their (even arbitrary) subtraction.

A giant innovation, a real watershed, which still held this pragmatically, without utopian flights, what were the possibilities of the 'law enforcement' in his time. As we have seen, in the Kingdom of Naples, forms of reward were widely used, which Beccaria, although with great reluctance, came to admit as licit. The Neapolitan government, however, against the phenomenon of banditry and extortion deployed alongside extremely powerful royal commissioners, a network of bounty hunters and imposed heavy social pressure: for example, where it made the relatives of a bandit pay for the wrongdoings of him. A so strong social pressure as to cancel the individual criminal liability. Embracing Beccaria's proposal instead implied a timely circumscription of legitimate force and the execution of justice in the hands of the State only, with the only exceptions inevitable for the time, but despised by him.

However, Beccaria's position on the death penalty remains ambiguous. He condemns it, but at the same time allows it "*for two reasons. […] The death of some citizens therefore becomes necessary when the nation recovers or loses its freedom, or in the time of anarchy, when the riots themselves become a place of law.*" The fight against the brigands, the expedition of D'Andrea to Guardiagrele… are they subsumable as cases in which "*the riots themselves take place as laws*"? The question is, paradoxically, unreasonable and relevant at the same time.

Unreasonable since Beccaria himself seems to give us his answer later in the paragraph, writing that it is useless "*during the peaceful reign of the laws, in a form of government for which the nation's votes are gathered, well-equipped both outside and inside by force and opinion, perhaps more effective than force itself, where the command is only with the true sovereign, where riches buy pleasure and not authority*". He cleverly reverses the question: where the death penalty is not used, there can be recognized a good government and therefore a good sovereign.

At the same time, however, the question remains relevant, precisely because of the practice it has produced. As you know, on November 30th 1786 with the Tuscan Criminal Law the Grand Duke Pietro Leopoldo (known also as Emperor Leopold II), first of all the Sovereigns, abolished the use of the death penalty motivating, in the beginning of the provision, that it was a fruit inherited from the times of anarchy following the fall of the Roman Empire, therefore not adapting to those present and to the sweet and gentle nature of the Tuscan nation. Nonetheless, in the face of the initial events of the French Revolution and the upheavals in Tuscany of the "Viva Maria", he sent, as Emperor, from Vienna to Florence a dispatch in 1790 where he commanded its reintroduction (although, with secret annotation, symbolically). Again, did the "*riots themselves take the place of the laws*"? Further investigation would be needed on this point.

Therefore, there are few conclusions that we can draw. Fear is one of the most powerful and paradoxical feelings, capable of terrorizing and reassuring at the same time. It is a visceral

[53] PAGANO, F. M., *Considerazioni sul processo criminale*, Naples, 1787, pp. 184.

sentiment in the masses and because of this with it politics is obliged to confront itself, Moreover, politics can exploit this feeling, controllable only through an iron cage of empiricist rationalism, under penalty of the risk for justice and the legislator to enter into an increasingly acute spiral of violence that can last even centuries. A spiral of difficult defusing, because, as the borders of the legitimate individual defense are vague, which have context in situations where one acts instinctively for pressure and fear (even perceived for unreal reasons), even more vague are the borders of "Legitimate collective defense", to use a naturalistic terminology. "*Eternal vigilance is the price of liberty*", wrote Thomas Jefferson in the same years as Beccaria.

"Una cum capite suo": the Relations between the Pope and the Council from the 4th to the 9th Century

Javier Belda Iniesta *

Abstract

During the centuries of the ius antiquum, the history of the ecumenical council and the establishment of the criteria of ecumenicity intertwines with the relational dynamics that connect the bishop of Rome, the conciliar institution and the emperor. This research work seeks to highlight the important moments that have determined the establishment of the role of the pope in the Ecumenical Council: that is, it seeks to find the most ancient roots of the expression: "una cum capite suo, et numquam sine hoc capite" which is still present in the Code of Canon Law in force (can. 336).

Keywords: *ius antiquum; council; ecumenical council; Petrine primacy; holy rule.*

1. Introduction

The synodal institution as a tool for consultation and decision-making has very ancient origins which derive from the apostolic era [1].

The diffusion of the Good News from the eastern provinces of the Empire to the heart of the *latinitas*, the Imperial Rome, finds external difficulties - especially in relation with a political power that is not always tolerant towards the new religion - but also internal ones. In fact, the physical distance between the great communities of the East and of the West, which is hard to bridge during the persecutions, determines the development of a strong feeling of community identity that does not exclusively express itself *ad extra*, in relation with the pagan society, but also *ad intra*, towards the communities which occupy the opposite side of the political space of the empire.

In the discussions about the liturgical practices [2] as well as in the defence of the *depositum fidei* from the influence of the Hellenistic philosophies [3], the history of the pre-Constantine Church demonstrates that precisely in the synodal assembly it is possible to recover that feeling of belonging to a entity, the universal Church, which transcends the mere sum of the gathered communities and even the earthly dynamics, because of the role of guidance and collaboration that is recognised to the Spirit; ever since the famous gathering of the Apostles in Jerusalem, in fact, the formula "It is the decision of the holy Spirit and of us..." (Acts 15,28) has been used to enunciate the decisions adopted in this type of assemblies.

The gathering of ecumenical assemblies of bishops, which have the authority to make decisions that are binding for the whole Christianity, can happen only from the 4th century, in conjunction with the accession to the throne of Constantine the Great. From this moment on, the definition of the characteristics of ecumenicity is carried out through a series of historical stages in which three institutions, the pope, the emperor and the council, collaborate and discuss, until they reach the crystallized balances of Gratian's *Decretum* (1140 ca.), prelude to the hierocratic theorizations of the Late Middle Ages.

2. Constantinus and the ecumenicity of the council

Some very important historical data regarding the relations between the conciliar institution and the Roman Pontiff can be collected by observing the attempt to solve the Donatist issue, carried out by the emperor, Constantinus, already at the beginning of his reign.

This issue, as we know, has its roots in a more ancient time, the era of Diocletian's persecution, which was particularly bloody in northern Africa, where the imperial order to deliver the sacred texts to the civil authorities was observed only by some faithful (the so-called *traditores*, from *tradere*, which, in fact, means to deliver); on the other hand, other faithful suffered the martyrdom.

* Javier Belda Iniesta, Ph.D., Facultad de CC. Humanas, Canónicas y Religiosas, Universidad Católica San Antonio de Murcia, Spain.

1 Belda Iniesta, J. "La stagione conciliare antica". Gherri, P. "Consultare e Giudicare nella Chiesa." Atti della Giornata canonistica interdisciplinare (2–3 March 2015), Città del Vaticano 2018, pp. 71-108; on the origins of the conciliar institution cf. J. Orlandis Rovira, *Consideraciones históricas sobre la disciplina de los Concilios provinciales*, in *Cuadernos de Historia del Derecho*, vol. ext. (2004), 203-210; F. Retamal, *El ejercicio del poder en la Iglesia*, in *Teología y Vida*, XLV (2004), 318-352; J. Orlandis Rovira, *Historia de las Instituciones de la Iglesia católica. Cuestiones fundamentales*, Pamplona, 2003, 75-76; J. Gaudemet, *L'Empire romain. IV-V siècle*, Paris, 1958; A.M. JONES, *The Later Roman Empire (284-602)*, 4 voll., Oxford (UK), 1964.

2 Eusebius Caesarensis Ep., *Historia ecclesiastica*, V, 23, in *P. G.*, XX, coll. 490-491.

3 A. Camplani, *Le trasformazioni del cristianesimo orientale: monoepiscopato e Sinodi (II-IV secolo)*, in *Annali di Storia dell'Esegesi*, XXIII (2006), I, 67-114; Belda Iniesta, J. "La stagione conciliare antica" cit., pp. 71 ss.

During Maxentius dictatorship (which began in 311), as Optatus of Milevi tells us, the persecution ended («*Chritianis libertas est restituta*»[4]); therefore, the Bishop of Carthage, whose See had remained vacant, was nominated. The office, which was quite coveted[5], was given to Caecilianus – Deacon during the previous episcopate – who was elected Bishop by popular suffrage[6].

Regarding the designation of Caecilianus, the Church split into two: many persons, in fact, accused the new Bishop of Carthage of being a *traditor* and they didn't recognise the election. After a Council which gathered seventy Bishops in Carthage, Caecilianus was removed and Majorinus, predecessor of Donatus[7], was elected to take his place.

After the schism, when Constantinus indirectly acknowledged Caecilianus Church[8] as Catholic, Donatus sent to the Christian Emperor a letter requesting the celebration of a Trial to evaluate which of the two Churches was, in fact, *Catholic*, his Church or Caecilianus Church: That is, he requested the establishment of a Synod and the judgement by the Judges from Gaul, since in Gaul there were no *traditores*[9], because it had not been affected by Diocletian's persecution.

This was not the first time in which the Council was also the place in which the valid election of the Bishops was judged – for example, by around 230, a Council was celebrated in Alexandria which discussed about the regularity of Origen's election[10] – but it was the first time that the secular power had interests related to the issue. In fact, Constantinus, who wanted to avoid divisions inside the Church, accepted the Trial[11] subject to the following conditions:

> «*Placuit mihi ut idem Cæcilianus una cum decem Episcopis qui accusare ipsum videantur, et cum decem aliis quos ipse ad suam Causam necessarios esse iudicaverit, Romam naviget: ut ibi coram vobis et coram Reticio, Materno ac Marino collegis vestris, quos ea Causa Romam properare iussi, possit audiri, quemadmodum sanctissimæ Legi convenire optime nostris*»[12].

In the text taken from the letter to Pope Miltiades (311-314), Constantinus established that the Case must be judged by the Bishop of Rome (*coram vobis*) together with three Bishops from Gaul – to whom the Emperor had ordered to go to Rome – in compliance with the *lex* (*τῷ νόμῳ*) *sanctissima* that, as Constantinus adds, is known by the Bishop of Rome (*quemadmodum sanctissimć Legi convenire optime nostris*). The trial requested by the accusers of Caecilianus, therefore, is accorded; the emperor accepts also the request for the Judges from Gaul – Reticius, Maternus and Marinus – who can't be suspected of committing treason. However, the participation of the Bishop of Rome in this type of Trial must have seemed necessary to the Emperor, at least to solve the issue regarding the compliance with the *sanctissima Lex*, to which Constantinus refers, in order to avoid further divisions inside the Church and to definitively solve the African schism[13].

---

[4] optatus milevitanus ep., *De schismate Donatistarum*, I, 18, in *P. L.*, XI, col. 919.

[5] Optatus describes the attempt of some Presbyters, supported by the matron Lucilla, to obtain in an improper way the episcopal Ordination (cfr. Optatus Milevitanus Ep., *De schismate*, I, 18, in *P. L.*, XI, col. 919).

[6] Apparently, Lucilla, the matron, was particularly hostile to Caecilianus who, as a Deacon, had criticised her for her inappropriate habit of placing to the lips the bone of a martyr who had not been verified yet («*os nescio cuius martyris, si tamen martyris*») before receiving the Communion (cfr. Optatus Milevitanus Ep., *De schismate*, I, 16, in *P. L.*, XI, col. 916).

[7] Optatus Milevitanus Ep., *De schismate*, I, 19, in *P. L.*, XI, col. 920.

[8] In a letter to the governor of the African Province, Constantinus orders that the clerics must be immune from the civil duties by using these words: «*Quocirca eos homines qui in Provinciam tibi creditam in Ecclesia catholica cui Cæcilianus præst, huic sanctissimæ religioni ministrant, quos clericos vocare consueverunt, ab omnibus omnino publicis functionibus immunes volumus conservari*» (Eusebius Cæsariensis Ep., *Historia*, X, 7 (*Exemplum epistolæ Imperatori Constantini, qua cunctos Ecclesiarum Præsides ab omnibus publicis functionibus immunes esse præcipit*), in *P. G.*, XX, col. 894 B. Therefore, the immunity was granted only to the clerics that belonged to the Catholic Church presided by Caecilianus: for this reason, Donatus and his clerics addressed to Constantinus in order to protest against the acknowledgment as "Catholic" that had been given exclusively to Caecilianus Church.

[9] Optatus Milevitanus Ep., *De schismate,* I, 22, in *P. L.*, XI, col. 928-930.

[10] Concilium Alexandrinum, *Habitum circa anno Christi CCXXX*, in *MANSI*, I, coll. 753-754.

[11] Optatus Milevitanus Ep., *De schismate,* I, 23, in *P. L.*, XI, col. 930-932.

[12] Eusebius Cæsariensis Ep., *Historia*, X, 5 (*Epistola Costanini Imperatoris Miltiadi Episcopo urbis Romæ*), in *P. G.*, XX, col. 887 A.

[13] The reference to this rule also appears frequently in the imperial Legislation: «*Quoniam comperimus quosdam ecclesiasticos et ceteros catholicæ sectæ servientes a diversarum religionum hominibus ad lustrorum sacrificia celebranda compelli, hac sanctione sancimus, si quis ad ritum alienæ superstitionis cogendos esse crediderit eos, qui sanctissimæ Legi serviunt, si condicio patiatur, publice fustibus verberetur, si vero honoris ratio talem ab eo repellat iniuriam, condemnationem sustineat damni gravissimi, quod rebus publicis vidicabitur*» (CTh. 16,2,5); «*Privilegia, quæ contemplatione religionis indulta sunt, catholicæ tantum Legis observatoribus prodesse oportet. Hæreticos autem atque schismaticos n on solum ab his privilegiis alienos esse volumus, sed etiam diversis muneribus constringi et subici.; Proposita kal. sept. Gerasto Constantino a. VII et Constantio c. conss. 326 sept. 1.* (CTh. 16,5,1) »;«*Imperator Constantinus. Privilegia, quæ contemplatione religionis indulta sunt, catholicæ tantum legis observatoribus prodesse oportet. Hæreticos non solum his privilegiis alienos esse volumus, sed et diversis muneribus constringi et subici*» (C. 1. 5. 1); SIRM. I: «*Satis mirati sumus gravitatem tuam, quæ plena iustitiæ ac probæ religionis est, clementiam nostram sciscitari voluisse, quid de Sententiis Episcoporum vel ante moderatio nostra censuerit vel nunc servari cupiamus, Ablabi, parens karissime atque amantissime. Itaque quia a nobis instrui voluisti, olim promulgatæ Legis ordinem salubri rursus imperio propagamus. Sanximus namque, sicut edicti nostri forma declarat, Sententias Episcoporum quolibet genere latas sine aliqua ætatis discretione inviolatas semper incorruptasque servari; scilicet ut pro sanctis semper ac venerabilibus habeantur, quidquid Episcoporum fuerit Sententia terminatum. Sive itaque inter minores sive inter maiores ab Episcopis fuerit iudicatum, apud vos, qui Iudiciorum summam tenetis, et apud ceteros omnes Iudices ad exsecutionem volumus pertinere. Quicumque itaque litem habens, sive possessor sive petitor vel inter initia litis vel decursis temporum curriculis, sive cum negotium peroratur, sive cum iam cæperit promi Sententia, Iudicium elegerit sacrosanctæ Legis antistitis, ilico sine aliqua dubitatione, etiamsi alia pars refragatur, ad Episcopum personæ litigantium dirigantur. Multa enim, quæ in Iudicio captiosa præscriptionis vincula promi non patiuntur, investigat et publicat sacrosanctæ religionis Auctoritas. Omnes itaque Causæ, quæ vel prætorio Iure vel civili tractantur, Episcoporum Sententiis terminatæ perpetuo stabilitatis Iure firmentur, nec liceat ulterius retractari negotium, quod Episcoporum Sententia deciderit. Testimonium etiam ab uno licet Episcopo perhibitum omnis Iudex indubitanter accipiat nec alius audiatur testis, cum testimonium Episcopi a qualibet parte fuerit repromissum. Illud est enim veritatis auctoritate firmatum, illud incorruptum, quod a sacrosancto homine conscientia mentis illibatæ protulerit. Hoc nos edicto salubri aliquando censuimus, hoc perpetua Lege firmamus, malitiosa litium semina comprimentes, ut miseri homines longis ac Pæne perpetuis actionum laqueis implicati ab improbis petitionibus vel a cupiditate præpostera maturo fine discedant. Quidquid itaque de Sententiis Episcoporum clementia nostra censuerat et iam hac sumus Lege complexi, gravitatem tuam et ceteros pro utilitate omnium latum in perpetuum observare convenit».*

In sum: it seems that Constantinus, by referring the Trial to Milziade, has acted in compliance with an ecclesiastical Norm regarding the Councils according to which, in this type of trial (the validity of the designation of the Bishop of the prestigious See of Carthage was at stake, as well all the acknowledgement of the catholicity of a Church and the resolution of a schism), the opinion of the Bishop of Rome was necessary. At this point, we must ask ourselves a question: is it possible to talk about Law of the Church at the beginning of Constantinus reign? The Emperor refers to a norm that is previous to Nicaea, which must be observed, which has not been issued by a previous Council nor by his predecessors, since it probably derives, as we will see, from a custom that began in the Council of Jerusalem.

Anyway, the Synod that took place in Rome ended with the Sentence of Miltiades, who absolved Caecilianus and condemned Donatus who, during the Trial, had confessed that he had baptised again the faithful and he had laid again the hands on the *lapsi* Bishops; these two practices are both alien to the tradition of the Church [14]. Obviously, Donatus and his supporters thought that the Sentence was unfair, and they appealed the decision of Constantinus the Emperor [15]. Therefore, he convoked a Council in Arles [16] (a. 314) to which Milziade's successor, Pope Sylvester I (314-335), participated by sending his Legates [17], initiating a practice and a new form of legitimate participation in the conciliar decisions that will be observed by the Bishop of Rome in various successive Councils, including the ecumenical one of Nicaea, of 325 [18].

Although he didn't participate personally in the Council [19], the Pope preserved a prestigious role in the assembly, not only in the decision making, in which he participated through his Legates, but also in the publication of the decisions with a view to their broader application. In fact, after the Council, the Bishops gathered in Arles send an *epistola synodica* to Sylvester, to inform him about the decisions. In the letter we can read the following:

> «*Et utinam, frater dilectissime, ad hoc tantum spectaculum interesse tanti fecisses; profecto credimus, quia in eos severior fuisset Sententia prolata: et te pariter nobiscum iudicante, cætus noster maiore letitia exultasset… non tamen hæc nobis visa sunt tractanda, frater carissime, ad quæ fueramus invitati. Sed et consulendum nobispsis censuimus: et cum diversæ sint Provinciæ ex quibus advenimus, ita et varia contingunt, quæ nos censemus observare debere. Placuit ergo, præsente Spiritu sancto et angelis eius, ut et his qui singulos quos movebat iudicare, proferremus de quiete præsenti. Placuit etiam a te qui maiores Diœceses tenes, per te potissimum omnibus insinuari*» [20].

3. The Holy Rule

Apart from the Donatist case for which they had been convoked, the numerous conciliar fathers, who had arrived to Arles from various Provinces of the Empire, had considered it appropriate to adopt decisions also regarding other problems in which their intervention was necessary. Furthermore – as the participants in the Council write – they established that the above mentioned decision had to be communicated to all mainly by the Bishop of Rome, who governed the *maiores Diśceses*. Somehow, the conciliar activity, that had been carried out with a discrete autonomy from the Bishop of Rome, was brought back again under his sphere of influence. However, in this case, the conciliar Institution demonstrates to have a certain level of autonomy from the Roman Pontiff: relying on the great number of participants, by common accord, the Bishops gathered in Arles judge disciplinary issues regarding which the Pontiff had not expressed an opinion yet. In fact, the Bishop of Rome is involved in the decision-making of the Council regarding the validity of Caecilianus investiture and the African schism: the decisions are shared by Sylvester, who collaborates in the conciliar works through his delegation. However, other decisions have been adopted in the Council: we can suppose that the intervention *a posteriori* requested to the Roman Pontiff, to whom the Bishops of Arles requests to communicate to everyone the conciliar decisions "*per se potissimus*" (especially personally), has been a method to solve a decision-making procedure that they feared that was, somehow, vitiated. Or, most likely, the rule under examination was applied only in case of trials regarding Bishops, especially those who guided the main episcopal sees, and the Councils, therefore, still had the possibility of deciding about other disciplinary issues aroused in the Church without the intervention of the Roman Pontiff.

The norm to which Constantinus refers might be the same ecclesiastical Norm mentioned by the eastern historians Socra-

---

[14] Optatus Milevitanus Ep., *De schismate*, I, 24, in *P. L.*, XI, col. 932A-933A.

[15] *Ivi*, I, 25, col. 934A. One of the causes of the discontent due to Milziade's decision was the reduced number of Judges: leaving aside Pope Milziade and the three Judges who came from Gaul, only fifteen Bishops from an equivalent number of Italian cities had gone to Rome. Therefore, while Caecilianus removal had been decided by a Council of seventy Bishops, his reinstatement was established by a synod of only twenty Bishops: «*ut dicerent illam esse Catholicam, quæ esset in toto orbe terrarum diffusa, et Sententiam decem et novem Episcoporum iamdudum data, dissolvi non posse*» (Optatus Milevitanus Ep., *De schismate*, I, 26, in *P. L.*, XI, col. 936).

[16] Since the sentence of absolution of Caecilianus by the Judges was the object of a dispute, Constantinus convoked a Council to which he invited as many Bishops as possible. In the letter of convocation to the Council sent to the Bishop of Syracuse, Constantinus justifies the call of the Council in Arles: «*Prolatæ iam Sententiæ acquiescere nolentes, asserentesque paucos admodum Episcopos Sententiam tulisse […] Idcirco mihi sedulo providendum fuit, ut hæc quæ post depromptum Iudicium voluntaria assensione iam finita esse debuerant, nunc tandem multorum interventu finem possint accipere*» (Eusebius Cæsariensis Ep., *Historia*, X, 5 (*Epistola Constanini Imperatoris Chresto Syracusorum*), in *P. G.*, XX, col. 890: since the Donatists didn't want to observe the Sentence, issued by a small number of Judges, as the Emperor wrote, the diligent administration of the reign obliged them to organise a new Council, in order to finally conclude, with the intervention of many, the controversies that should have already ended by *voluntaria assensione* after the Roman Judgement.

[17] The delegation of the Pontiff was composed by two Presbyters and two Deacons: «*Claudianus et Vuitus Presbyteri, Eugenius et Cyriacus Diacones, ex urbe Roma missi a Silvestro Episcopo*» (Concilium Arelatense I, *Nomina Episcoporum cum clericis suis quinam ex quibus Provinciis ad Arelatensem Synodum convenerint*, in *MANSI*, II, col. 476).

[18] The Legates of the Pontiff had a significant role in the realisation of the synods and they were the first ones who signed the acts.

[19] «*Sed quoniam recedere a partibus illis minime potuisti*», Concilium Arelatense I, *Epistola synodica ad Silvestrum Papam*, in *MANSI*, II, col. 469.

[20] Concilium Arelatense I, *Epistola synodica*, in *MANSI*, II, coll. 469.

tes Scholasticus (380-?) and Sozomen (400-450) on the occasion of the description of the troubled episcopate of Athanasius of Alexandria.

Athanasius, Bishop of Alexandria, who had participated in the ecumenical Council that had condemned Arius and was a staunch defender of the Nicene Creed, was soon accused of violence and persecutions by the exponents of the heretic party of the Meletians, and he was deposed and condemned to exile in the Council of Tyre (335), during Constantinus reign[21]. Once he returned to the homeland when the East was governed by Constantius[22] (who sympathized with the Arianist party), he faced the persecution of Eusebius of Nicomedia, who was ordered Bishop of Constantinople by the Emperor himself[23]. Since he intended to condemn Athanasius and send him in exile again, as Socrates says[24], Eusebius made sure that a Council was gathered in the city of Antioch in Syria, in which the Emperor Constantius himself participated. The Bishop of Rome, among others, didn't participate in this Council:

> «*Sed neque Julius interfuit romanæ Urbis Episcopus; nec quemquam eo misit qui locum suum impleret: cum tamen ecclesiastica regula* (*κανόνος ἐκκλησιαστικοῦ*) *vetet, ne absque consensus* (*τὴν γνώμην*) *romani Pontificis quidquam in Ecclesia decernatur*»[25].

Therefore, the Bishops reunited in Antioch had not observed the *κανόνος ἐκκλησιαστικοῦ* by virtue of which no decision concerning the valid investiture of the Bishops can be made in the Councils without the opinion (τὴν γνώμην, meaning *consensus*) of the Roman Pontiff. Socrates Scholasticus only cites the rule, without giving any other information regarding the source from which he took it.

The historian Sozomen gives us more detailed information regarding this. The Bishop of Rome Julius I (337-352), who received information regarding these eastern events through letters[26], answered to a letter of the Bishops that had gathered in Antioch and he accused them of having innovated the faith of the Council of Nicaea covertly, and Sozomen adds:

> «*quod præter Ecclesiæ Leges ispum ad Synodum non vocassent. Legem enim esse pontificiam* (*Εἶναι γὰρ νόμον ἱερατικὸν*), *ut pro irritis habeantur quæ præter sententiam* (*γνώμην*) *Episcopi romani fuerint gesta*»[27].

The "holy Rule", disobeyed by the Bishops of Antioch, imposed the convocation of the Synod by the Roman Pontiff. Therefore, all the decisions made during that Synod, without the necessary sentence (γνώμην, *sententiam*) of the Bishop of Rome[28], had to be considered as ineffective, they had no validity.

The necessary participation of the Roman Pontiff in the conciliar decisions regarding the judgement of the episcopal investiture must be exercised in the form of the prior γνώμη, a term translated into Latin as *sententia* or, in the translation of Socrate's works, as *consensus*.

Regarding the nature of the Norm, according to the narration of the historians of the fifth century, the *Lex* (νόμον) *sanctissima* to which Constantinus refers is generally called *Regula* (κανόνος) *ecclesiastica* by Socrates and *Lex pontificiam* (νόμον ἱερατικὸν) by Sozomen[29]. In the letter to the Antiochians, however, Pope Julius defines this Norm as a *Consuetudo*:

> «*Oportuit omnibus nobis scripsisse, ut ita ab omnibus quod iustum esset decerneretur; Episcopi enim erant qui patiebantur, nec vulgares Ecclesiæ quæ vexabantur, sed quas ipsi Apostoli per se gubernarunt. Cur autem de Alexandrina potissimum Ecclesia nihil nobis scriptum est? An ignoratis hanc esse Consuetudinem, ut primum nobis scribatur, et hincquod iustum est decernatur?*»[30].

Although the historians call it κανόνος or, in other occasions, νόμον, probably, the rule in point is more precisely a customary Norm. As we can read in the letter, since the judgement involved a Bishop (and not any Bishop, but the Bishop of one of the most ancient episcopal Sees *quas ipsi Apostoli per se gubernarunt*) the Bishops gathered in the Council should have written a letter to Pope Julius, according to the Custom by virtue of which it is necessary, first of all, to request to the Roman See its prior sentence.

The customary nature of the Norms referred by Pope Julius will be confirmed, at the beginning of the 5th century, by Pope Innocent I (401-417):

---

[21] Socrates Scholasticus, *Historia ecclesiastica*, I, 35, in *P. G.*, LXVII, coll. 170-171; Hærmias Sozomenus, *Historia ecclesiastica*, II, 25-27, in *P. G.*, LXVII, coll. 999-1018.

[22] Socrates Scholasticus, *Historia*, II, 3, in *P. G.*, LXVII, coll. 190-191.

[23] *Ivi*, II, 7, col. 194.

[24] «*Omnem, ut est in proverbio, movebat lapidem, ut id quod proposuerat efficeret*», Socrates Scholasticus, *Historia*, II, 8, in *P. G.*, LXVII, col. 195.

[25] Socrates Scholasticus, *Historia*, II, 8, in *P. G.*, LXVII, col. 195.

[26] Based on the historical reconstruction of Sozomen, Julius, already informed about the decisions made in the Council of Tyre, had received from the Egyptian Bishops a letter that defined as false the accuses which had emerged against their Patriarch Athanasius. Meanwhile, Julius received by the Egyptian Bishops gathered in Antioch a letter notifying everything that had happened in this second Council: among other things, the removal and the new exile of Athanasius and the election of Gregory of Cappadocia as Patriarch of Alexandria. Then, the Bishop of Rome decided to write the *Epistola ad Antiochenos*, in which he informs the Bishops who had gathered in Antioch about the invalidity of the decisions adopted by the Council convoked without respecting the ecclesiastical norms about the Councils (cfr. Hærmias Sozomenus, *Historia*, III, 10, in *P. G.*, LXVII, col. 1058A; see also Julius I narration: Julius Pp., *Epistola ad Antiochenos*, in *P. L.*, VIII, coll. 892 e ss.).

[27] Hærmias Sozomenus, *Historia*, III, 10, in *P. G.*, LXVII, col. 1058.

[28] Another reference to this Norm can be found also in the *Historia tripartita*: «*Sed neque Julius interfuit maximæ Romæ Præsul: neque in locum suum aliquem destinavit cum utique regula ecclesiastica iubeat non oportere præter sententiam romani Pontificis Concilia celebrari*» (Flavius Magnus Aurelius Cassiodorus, *Historia tripartita*, IV, 9, Lugdunum, 1534; edited also in: *P. L.*, LXIX, col. 960).

[29] Cassiodorus, probably, has considered the text of the Scholasticus, referring to a *regula ecclesiastica*.

[30] Julius Pp., *Epistola ad Antiochenos*, n. 22, in *P. L.*, VIII, coll. 905-908.

«Si maiores Causæ in medium fuerint devolutæ, ad Sedem apostolicam, sicut Synodus statuit, et beata Consuetudo exigit»[31].

The basic idea for which the Bishop of Rome constitutes, in the judgement of the Bishop, a superior instance in relation with the Councils has been widely accepted in the Council of Sardica (343), which was held during the pontificate of Julius I and was presided by Hosius. Canons 3 and 4, in fact, provide for the possibility of the Bishop submitted to Judgement to request the help of the Bishop of Rome, so that he decides about the possibility of admitting a second level of trial. If the Instance is rejected, the Sentence issued by the Council of the metropolitans is definitively binding for the appellant; on the other hand, if it is accepted, a second Trial can be made, in which the Roman Pontiff nominates the Judges[32].

Following the same direction, a few years later, Pope Damasus I (366-384) did not recognise the Council of Rimini of 359, in which many Bishops participated, many of which were Arrians. In a letter to the Orientals who had gathered in a Council, the Bishop of Rome explains that, first of all, the things discussed in that context were clearly opposed to the symbol of faith agreed upon in Nicaea. Secondly, although the number of the participants in the Council was high, the decision made in that occasion could not produce any effect[33], because *«cum constet, neque romanum Episcopum, cuius ante omnes fuit expetenda* sententia*, […] consensum aliquem commodasse»*[34].

In another occasion Damasus expresses himself in even a more incisive way:

«[…]*quamvis per orbem catholicae diffusae Ecclesiae, quasi unus thalamus Christi sit, sancta tamen Romana Ecclesia nonnullis synodicis constitutis, caeteris Ecclesiis praelata est: sed et evangelica voce Domini Salvatoris nostri primatum obtinuit: Tu es Petrus, et super hanc petram aedificabo Ecclesiam meam; et portae inferi non praevalebunt adversus eam; et tibi dabo claves regni coelorum; et quaecumque ligaveris super terram, erunt ligata in coelo: et quaecumque solveris super terram, erunt soluta in coelo*[35]*. Addita etiam est societas beatissimi Pauli apostoli, vasis electionis, qui non diverso, sicuti haeretici garriunt, sed uno tempore, uno, eodemque die, gloriosa morte cum Petro in urbe Roma sub Caesare Nerone agonizans, coronatus est: et pariter supradictam Romanam Ecclesiam Christo Domino consecrarunt, aliisque omnibus universo mundo sua praesentia, et venerando triumpho praetulerunt. Est ergo prima Petri apostoli sedes Romana Ecclesia…»*[36]

Although all the Churches are connected to Christ by an almost matrimonial bond, the Church of Rome is not preceded by the synodic decisions of the other Churches; the Roman Church, instead, because of the Divine disposition and because of Peter's and Paul's martyrdom which took place in the city, is more important than the other ones and it is, therefore, *prima Sedes*. In other words, any decision adopted by a Council *cćteris Ecclesiis*, meaning in which the Church of Rome does not participate, is not binding at all for the first See; this last *prćst* is more important than all the other ones. The justification of the primacy of the Roman see finds its foundation in the words said to Peter by the Divine Founder, and in the martyrdom in the city of Rome of Peter and Paul, who shed their blood to consecrate to Christ the Church of Rome, in this way subjecting all the other ones to its *prćsentia*.

In conclusion, there's a switch from the necessary involvement of the Bishop of Rome in the Trials celebrated in the conciliar form by the other Bishops, according to the customary Norms referred by Julius I, to the acknowledgement of the Roman See as an Instance that is superior to the Council, in front of which an appeal can be made so that the Case can be examined again, in compliance with the Canons of Sardica, until the declarations of Damasus, by virtue of which the synodic decisions adopted without the participation of the Roman Pontiff are not binding for the *prima Sedes*.

Boniface I (418-422) didn't simply confirm the position that had already been assumed by Damasus regarding the relation between the Roman See and the Council, but he also defined with more precision the exclusive competence of the Roman See regarding the ecclesiastical discipline:

«Institutio universalis nascentis Ecclesiæ de beati Petri sumpsit honore principium, in quo regimen eius et summa consistit. Ex eius enim ecclesiastica disciplina per omnes Ecclesias, religionis iam crescente cultura, fonte manavit. Nicænæ Synodi non aliud præcepta testantur: adeo ut non aliquid super eum ausa sit constituere, cum videret nihil supra meritum suum posse conferri: omnia denique huic noverat Domini sermone concessa»[37].

---

[31] Innocentius I, *Epistola ad Victricium episcopum Rothomagensem,* c. III, in P. L. 20, p. 473, in *P. L.*, XX, col. 473A (also in: *MANSI*, III, col. 1034A). In a letter that has been falsely attributed to Julius I and which is included in the Pseudo-Isidorian Decretals, the rule by virtue of which the ecumenical Council can't be convoked and can't condemn a Bishop without the prior Sentence of the Roman Pontiff is traced back to the ancient Statutes adopted by the Apostles and by their successors: «*Porro dudum a sanctis Apostolis successoribusque eorum in præfatis antiquis Decretum fuerat statutis, quæ actenus sancta et universalis apostolica tenet Ecclesia, non oportere præter sententiam romani Pontificis Concilia celebrari nec Episcopum dampnari, quoniam sanctam romanam Ecclesiam primatum omnium Ecclesiarum esse voluerunt*» (Julius Pp. I, *Epistola Orientalibus missa Episcopis*, in P. Hinschius [ed.], Decretales *Pseudo-Isidorianæ et Capitula Angilramni*, Lipsiæ, 1863, 459, n. 6).

[32] «*Si quis autem Episcoporum in aliquo negotio condemnandus visus fuerit, et existimet se non malam, sed bonam causam habere, ut etiam rursus Iudicium renovetur: si vestræ dilectioni videtur, Petri Apostoli memoriam honoremus, ut ab iis qui iudicaverunt, scribatur Julio Romanorum Episcopo; et per propinquos Provinciæ Episcopos, si opus sit, Iudicium renovetur; et cognitores ipse præbeat. Si autem probari non potest, Causam eius esse talem, ut eam rursus iudicari opus sit: quæ semel sint iudicata, non infirmentur, sed rata sit lata sententia*». Concilium Sardicense Generale (a. 347), *Can. 3*, in *MANSI*, III, col. 7C-E); also Canon 4: «*Si videatur, necesse esse adiici huic Sententiæ, quam sincera dilectione plenam protulisti, ut si quis Episcopus fuerit depositus Iudicio Episcoporum, qui sunt in vicinia, et dicat rursus sibi defensionis negotium competere; non prius in Cathedram substituatur, quam romanus Episcopus Causa cognita Sententiam tulerit*» (*ivi*, col. 7E-10A).

[33] «*Neque enim præiudicium aliquod nasci potuit ex numero eorum, qui apud Ariminum convenerunt*». Damasus Pp. I, *Epistola prima Episcopis Catholicis per Orientem constitutis*, in *P. L.*, XIII, col. 349.

[34] *Ibidem*.

[35] *Matthew* 16, 18-20.

[36] Damasus Pp. I, *Epistolæ. De explanatione fidei, ex Baronio ad ann. 382, num 19*, in *P. L.*, XIII, col. 374.

[37] Bonifacius Pp. I, *Epistola XIV. Dilectissimmis fratribus universis Episcopis per Thessaliam constitutis*, n.1, in *P. L.*, X, col. 777.

The Institution of the nascent universal Church, states Boniface, has based on the topic of the honour of the blessed Peter the principle according to which the Church governs the universal Church and is its leader. For this reason, ever since the beginning, the Roman See issued the ecclesiastical discipline for all the Churches. Hence the correct interpretation of Canon VI of the Council of Nicaea[38]: according to the letter, in fact, the Canon, although it recognises the power of the See of Alexandria, doesn't say anything regarding the Roman See and its relation with the other major episcopal sees of the Christian antiquity. Facing the silence of the Canon, the interpretation offered by Boniface is definitively beneficial for the Roman See: according to the Bishop of Rome, form the text we can only deduce that nothing has been established regarding the Petrine See, because the Council thought that it could not decide about it; after all, the Council knew everything that had been conceded to the Petrine See by Divine disposition. The silence of the Canon regarding the Roman See, therefore, is interpreted by the Pontiff as a lack of competence of the Council to regulate somehow the faculties and the privileges of the Apostolic See, basically acknowledging its primacy.

4. The Council's autonomy

On the one hand, the Bishop of Rome tries to establish the position of supremacy on the conciliar institution, while, on the other hand, the Council protects its own autonomy, especially with reference to the correct comprehension of the truths of faith.

The Council of Chalcedon, for example, tried to show its strength. In the report sent to Leo the Great (390-461), although they recognise the function of first protector of the faith of the Roman Pontiff, who is constituted by everyone as the interpreter of Peter's voice (*vocis beati Petri omnibus constitutus inteprete*)[39], the Bishops gathered in Chalcedon (451) state:

> «*Unde et nos quippe ut inchoatore bonorum, te ad utilitatem utentes, Ecclesiæ filiis hereditatem sortemque veritatis ostendimus: non singulatim faciente in occult unoquoque doctrina; sed uno spiritu, una conspiratione atque concordia confessionem fidei declarantes. […] Si enim ubi sunt duo aut tres congregati in nomine eius, ibi se in medio eorum fore perhibuit, quantam circa quigentos viginti sacerdotes peculiaritatem potuit demonstrare, qui et patriæ et labori suæ confessionis notitiam prætulerunt? Quibus tu quidem, sicut membris caput, præras in his qui tuum tenebant ordinem, benevolentiam præferens*»[40].

The conciliar fathers expose the truth to the sons of the Church, fulfilling the function of usefulness that belongs to them inside the Church itself; they do not act individually, but rather "*uno spiritu, una conspiratione atque concordia*", and they declare, in this way, the confession of faith. And if Christ said to the disciples: «*Ubi enim sunt duo vel tres congregati in nomine meo, ibi sum in medio eorum*»[41], a fortiori, He was present among the five hundred and twenty priests who were gathered in Chalcedon, and he instructed them about the truth. And among the participants in the Council, as the authors of the report say, the Bishop of Rome was the first one, "*sicut membris caput*", who was present through his Delegates.

Notwithstanding that the Bishop of Rome is in charge of the Council, the conciliar institution recognises to itself a parallel and clearly autonomous role from the one of Peter's successor when he acts alone[42]. At the end of the relation we can read:

> «*Ut autem cognoscatis, quia nihil alicui donando per gratiam fecimus, aut per inimicitias adversando, sed ut nutu gobernati divino; omnem vobis gestorum vim insinuavimus, ad comprobationem nostræ sinceritatis, et ad eorum quæ a nobis gesta sunt, firmitatem et consonantiam*».[43]

On the one hand, we must observe that the synodal fathers know that they have acted guided by the Divine will (*fecimus […] ut nutu gobernati divino*): therefore, as we have already said, they are aware that the act inside an Institution that, even if it is guided by the Roman Pontiff, is autonomous from him when it acts *uti singulus*. However, on the other hand, they communicate to the Bishop of Rome the decisions made "*ad eorum firmitatem et consonantiam*": meaning for their validity and for the verification of their agreement, a task that belongs to the first guardian of faith, Peter's successor. In this way, the universal Church remains strongly tied to its leader, who grants its unity[44].

Pope Gelasius I (492-496) confirmed this rule:

> «*[…]Ita quod firmavit in synodo sedes apostolica, hoc robur obtinuit; quod refutavit, habere non potuit firmitatem: et sola rescindit quod praeter ordinem congregatio synodica putaverat*

---

[38] Cfr. Concilium Nicænum I Generale, *Can. 6*, in *MANSI*, II, coll. 670-671: «*Antiqui mores serventur, qui sunt in Aegipto, Lybia et Pentapoli, ut Alexandrinus Episcopus horum omnium habeat potertatem quandoquidem et Episcopo romano hoc est consuetum*».

[39] «*Quam [fidem] veluti auro textam seriem, ex veste Christi et præcepto legislatoris venientem usque ad nos, ipse servasti, vocis beati Petri omnibus constitutus interpretes, eius fidei beatificationem super omnes adducens*». Relatio sancta Synodi Chalcedonensis ad Sanctissimum Papam romanæ Ecclesiæ Leonem, de omnibus gestis generaliter, in J. Hardouin Et Al. (edd.), *Acta Conciliorum et Epistolæ decretales, ac Constitutiones summorum Pontificum*, Parisiis, 1714, II, col. 655 (hereinafter: "Acta Conciliorum").

[40] *Ibidem*.

[41] *Matthew* 18,20.

[42] After all, the tasks of binding and freeing attributed to Peter (*Matthew* 16,19) are equally entrusted to the Apostoles (*Matthew* 18,18: «*Amen dico vobis: Quæcumque alligaveritis super terram, erunt ligata in cælo; et, quæcumque solveritis super terram, erunt soluta in cælo*»): for this reasons the College of the Bishops enjoys the supreme and full power in the universal Church, which must be exercised - differently from the personal Petrine power - only in a collegial form, with Peter's successor as the leader of the College (cf. Can. 336 *CIC*- 1983; M.J. Arroba Conde - M. Riondino, *Introduzione al Diritto canonico*, Milano, 2015, 73).

[43] *Relatio sancta Synodi Chalcedonensis ad Sanctissimum Papam Romanae ecclesiae Leonem, de omnibus gestis generaliter*, in *Acta conciliorum et epistolae decretales, ac constitutiones summorum pontificum*, Hardouin, J. et al. (ed.), Parisiis 1714, t. II, p. 659.

[44] The Code of Canon Law in force established a three-folded participation of the Roman Pontiff in the Decrees of the ecumenical Councils: approbatio, confirmatio and promulgatio. In fact, he doesn't only approve the decisions together with the other Bishops, but, for the decisions to be in force, they must be confirmed, and they must be promulgated at his order (cf. Can. 341§ 1: «Concilii œcumenici Decreta vim obligandi non habent nisi una cum Concilii patribus a romano Pontifice approbata, ab eodem fuerint confirmata et eius iussu promulgata»).

usurpandum: non promulgatrix iteratae sententiae, sed cum apostolica sede veteris executrix»[45].

Among the decisions adopted by the Council of Chalcedon, only those that the Apostolic See has confirmed *in Synodo* come into force; on the other hand, the ones that have been rejected by the Apostolic See are not valid. Furthermore, only the Apostolic See can rescind all the things established by the Council *prćter ordinem*. The Bishop of Rome doesn't only have to confirm the conciliar decision, so that they can be valid, but he also has the duty of monitoring, so that the Council will act correctly, and it can rescind all the decisions which are not adopted in compliance with the *ordo*. In conclusion, the Bishop of Rome must control both the matter of the conciliar decisions and the control of legitimacy.

In a letter sent to the Bishops gathered in the Balcans, Gelasius I had already dealt with the topic of the relations between the Bishop of Rome and the conciliar Institution:

«*Ex paterna traditione perpensi confidimus, quod nullus iam veraciter christianus ignoret uniuscuiusque Synodi constitutum, quod universalis Ecclesiæ probavit assesnsus, nullam magis exsequi Sedem oportere præ cæteris, quam primam, quæ et unamquamque synodum sua auctoritate confirmat, et continuata moderatione custodit; pro suo scilicet principatu, quem beatus Apostolus Petrus Domini voce perceptum, Ecclesia nihilominus subsequente, et tenuit semper et retinet*»[46].

In compliance with the Tradition, and as all the faithful know - states Gelasius - it is a duty of the Apostolic See to be the first one to execute each synodic sentence that expresses the will of the universal Church; the Apostolic See, in fact, confirms the authority of each Synod and preserves its government forever, by virtue of its superiority (*pro suo principatu*) that Peter has received from the Lord's words, observed, remembered and preserved by the Church. In other words: it is a duty of the head of the ecumenical Council to ensure the application of the conciliar decisions that express the will of the universal Church (*quod universalis Ecclesić probavit assesnsus*).

On the occasion of the Second Council of Chalcedon of 553, the participation of the Roman Pontiff in the Councils which were relevant for the universal Church was seen not in terms of law but in terms of duty.

The Emperor Justinian, who wanted to solve the conflicts between the monophysists and the chalcedonians that risked fragmenting the social fabric of the Byzantine Empire (even the wife of the Emperor, as is known, sympathised with the monophysist Christology), in 543 issued an Edict condemning the so-called Three Chapters (τρία κεφάλαια), a collection of three texts related to the Nestorian doctrine condemned in 451 in Chalcedon, and particularly opposed to the monophysists[47]. Submitted to the eastern Bishops for the signing of the sentence, the Edict was not signed by the Bishop of Constantinople, who referred the issue to the Roman See, referring to its decision[48]. Not even Vigilius of Rome approved the Edict, so in 544 he was collected by the imperial guards and he was brought to Constantinople[49] where, in Easter of 548, he condemned the Three Chapters with the so-called *Iudicatum*[50]. The Papal document caused the indignation of the western Bishop; therefore, two years after, in order to avoid further divisions, Vigilius withdrew the *Iudicatum* and asked Justinian to convoke a Council in Rome to discuss the issue of the Three Chapters. Justinian acceded to the request only partially: in fact, he convoked the Council, but in Chalcedon, in 553, and, therefore, Vigilius refused to participate.

In the letter from Justinian to the Bishops gathered in the Council there's a reference to a generic duty of the priests to participate in the Synods in which they must discuss the questions of faith and they must answer rapidly to the questions that are posed to them:

«*Scientes autem et Petri Apostoli præceptum dicentis:* Parati semper estate ad satisfactionem omni petenti vos rationem de spe quæ in vobis est*: celeriter de his quæ interrogavimus, vestram manifestate voluntatem. Cum enim qui de recta fide interrogatur, diu protrahit; nihil aliud est, nisi abnegatio rectæ confessionis. In interrogationibus enim et responsis quæ de fide sunt, non est primus vel secundus: sed qui in recta confessione paratior invenitur, acceptabilis apud Deum est*»[51].

In an historical era in which the Emperor convoked the Councils, and sometimes he was more interested in obtaining peace in the Church that the clerics themselves - especially when the controversies switched from religious to political and they caused social disorders - the peremptory expression of Justinian should not come as a surprise: «*comunicate celermente la vostra opinione in merito alle domande che vi sono state poste*», which demonstrates the hurry of the Emperor to reach a definitive condemnation of the Three Chapters. The duty to participate in the conciliar gatherings is justified by Peter's words[52], while the unreasonable slowness in answering to the questions of the

[45] Gelasius I Pp., *Tomus de anathematis vinculo*, in P. L. 59, p. 107.

[46] Gelasius Pp., *Epistola universis Episcopis per Dardaniam constitutis*, in *MANSI*, VIII, col. 65.

[47] It was Theodore Ascidas, supported by Theodora, who suggested to the Emperor to adopt this provision. The sentence affected Theodore of Mopsuestia and his texts, the letters of Ibas of Edessa to the Bishop of Ardashir and the texts of Theodoret which are favourable to Nestorius and are contrary to Cyril and to the Council of Ephesus. On the origin of the discussion about the Three Chapters (cf. K.J. Hefele, *Histoire des Concilies d'apress les documents originaux*, III/1, Paris, 1909, 1-19).

[48] *Ibidem*. In fact, the Nestorian theses had already been condemned more than a hundred years before, in the Council of Chalcedon, who had restored the honour of both Iba and Theodoret, whereas Theodore had already died in full communion with the Church: also for these reasons, the Patriarch of Constantinople, Menas, doubted of the opportunity of the imperial provision.

[49] «a. 544. *Iustinianus Imperator acephalorum subreptionibus instigatus Vigilium Romanorum Episcopum subtiliter compellit, ut ad urbem regiam properaret et sub specie congregationis eorum, qui ab Ecclesiæ sunt societate divisi, Tria Capitula condemnaret*», Victor Tonnennensis Ep., *Chronica a. CCCCXLIV- DLXVII*, in *Societas aperiendis fontibus rerum Germanicarum Medii Ævi, Monumenta Germaniæ historica. Autorum Antiquissimorum*, XI, Berolini, 1892, 201.

[50] About this topic, see the historical reconstructions of K.J. Hefele, *Histoire*, 20 e ss.

[51] Concilium Constantinopolitanum II, *Iustiniani Imp. epistola ad Episcopos Constantinopoli degentes*, in *Acta Conciliorum*, III, col. 60.

[52] *1Peter* 3,15.

Emperor is compared to the "*abnegatio rectć confessionis*". Furthermore, Justinian says that when it comes to clarifying matters of faith, there is neither a first nor a last, but everyone has the duty to answer in order to be *acceptable* in the eyes of God. It seems like the Emperor refers exactly to Vigilius, who had refused to participate in that Council.

The duty of the Bishop of Rome to participate in the Council is expressed more clearly in the conciliar Sentence which condemnes the Three Chapters. In the letter we can read the following:

> «*[Vigilius] consentit in scriptis in Concilio convenire, et disceptare una nobiscum de his Tribus Capitulis, ut definitio communiter ab omnibus nobis præbeatur fidei rectæ conveniens: piissimus Imperator…tam ipsum quam nos hortatus est communiter convenire, eo quo sacerdotes decet ommunibus quæstionibus finem communem imponere. Unde necessario petivimus ipsius reverentiam scriptas suas promissiones adimplere; nec enim iustum esse amplius scandalum pro Tribus istis Capitulis crescere, et Dei ecclesiam conturbari*»[53].

Apparently, Vigilius has given a written undertaking to participate in the Council to adopt a decision with the other Bishops regarding the Three Chapters and to formulate a convenient definition of the right faith in a common form. According to the Bishops gathered in Chalcedon, the presence of the Bishop of Rome was adequate because it was due, for all the priests, to establish a *finem communem* for the matters of faith: in fact, the Council itself was the only tool available for the Church to solve a problem that, from the East, had ended up involving the whole Catholic world. For this reason, the Chalcedonians asked to the Pope to fulfil his promise to participate in the Council, without unjustly allowing that the scandal caused by the Three Chapters kept growing and that the Church of God would suffer even more its consequences.

5. The requirements for an Ecumenical Council

Vigilius' successor, Pope Pelagius I (556-561), faced the problem of the interpretation of the Decrees of the second Council of Chalcedon[54]:

> «*Sed quotiens aliqua de universali Synodo aliquibus dubitatio nascitur, ad recipiendam de eo quod non intelligunt rationem, aut sponte hi qui salutem animæ suæ desiderant ad apostolicas Sedes pro recipienda ratione conveniant, aut si forte […] ita obstinati et contumaces exstiterint, ut doceri non velint, eos ab eisdem apostolicis Sedibus aut attrahi ad salutem quoquomodo necesse est, aut ne aliorum perditio esse possint secundum Canones per sæculares opprimi potestates*»[55].

The correct interpretation of the provision of a universal Synod is provided by the apostolic Sees, which include, of course, also the Roman See. The task of impeding the diffusion of incorrect interpretations of the conciliar Decrees, furthermore, is entrusted to all the apostolic sees and even to the civil Authorities.

On the other hand, on the occasion of the second Council of Nicaea, convoked in 787, the necessary requirements for a Council to be defined as "ecumenical" were identified. Actually, the legal definition of "ecumenicity" was not in the agenda of the conciliar assemblies, but it was elaborated during the sixth Session[56], for reasons that are strictly connected to the contingencies that had led to the celebration of the Council.

The Emperor Leo III the Isaurian, who had been reigning during the first half of the 8th century, has openly taken the sides of the iconoclastic theological current (from εἰκών, which means "image", and κλάω, meaning "to destroy") which was contrary to the cult of the sacred images or *iconoduly*. In spite of the opposition of the western Church - Gregory III himself (731-741) excommunicated the supporters of iconoclasm - in the East, the iconoclastic fury burst, especially towards the monks, who were obliged to look for a shelter in southern Italy. Leo's son, Constantinus V called Copronymus by the iconodulist, gathered a Council in Hieria, in 754, while the See of Constantinople was vacant, so that the iconoduly could be condemned in the whole Church. The number of the participants in the Council was high, but neither the Bishop of Rome nor the Patriarchs of Alexandria and Antioch participated in it. The new Patriarch of Constantinoples, who had been nominated by Constantinus, participated in it. As we can learn from the Act of the Second Council of Nicaea, the Council of Hieria defined itself as a Synod «*sancta magna ac universalis septima*»[57].

Once the iconoclastic fury ended, the Empress Irene and her son Constantinus V, who was still under her protection, convoked a new Council in Nicaea, celebrated between 786 and 787, which condemned the iconoclastic theological trend and dealt with the definition of *synodus universalis,* even if incidentally. In the letter of convocation sent to Pope Hadrian I (772-795), the Emperors request the participation of the Bishop of Rome in order to express his opinion regarding the ancient tradition of the cult of the sacred images, as first priest (*verus primus sacerdos*) and as the person who stays *in loco et fede Petri.* Furthermore, the presence that is requested to the Pontiff is not a passive one: he is convoked to participate in the discussion (*suscipere*) and to communicate what he considers as appropriate (*quć opportuna sunt impartiri*)[58]. Then, if the Bishop of Rome

---

[53] Concilium Constantinopolitanum II, *Collatio octava*, in *Acta Conciliorum*, III, coll. 188-189.

[54] Pelagius Pp. I, *Epistola Valeriano patricio*, in *P. L.,* LXIX, col. 413.

[55] *Ibidem*.

[56] Concilium Œcumenicum Vi Sive Nicænum II, *Actio sexta*, in *MANSI*, XIII, col. 651 e ss.

[57] Concilium Œcumenicum VI Sive Nicænum II, *Actio sexta. Refutatio eius quæ resarcinata et fallaciter nominata est definitio a congregata turba eorum qui christianos accusant. Tomus primus. Terminus sancta magna ac universalis septima Synodi*, in *MANSI*, XIII, col. 207.

[58] «*Et rogamus vestram paternam beatitudinem […] ut det seipsam, et nulla tarditatem faciat, et ascendat huc in stabilitatem et firmitatem antiquæ traditionis super veneralibus imaginibus. […] Et tamquam verus primus sacerdos, et is qui in loco et fede sancti et superlaudabilis Apostoli Petri præsidet, sicut dictum est, ascendat; et simul cum omnibus sacerdotibus, qui hic sunt, inveniatur, et voluntas Dei fiat:* Ubi enim sunt duo vel tres congregati in nomine meo*, sicut evangelice didicimus,* ibi sum in medio eorum*. Certifcetur enim et confirmetur a magno Deo et rege, omniumque Domino nostro Jesu Christo et a nobis servis eius, quod ascendentem vestram paternam et sacram beatitudinem huc cum omni honore et gloriam habemus et suscipere, et quæ opportuna sunt impartiri*», Concilium Œcumenicum VI Sive Nicænum II, *Divalis sacra directa a Costantino et Irene Augustis ad sanctissimum et beatissimum Hadrianum Papam senioris Romæ*, in *MANSI*, XII, coll. 985-986.

thinks that he can't leave his own see, he is invited to send to the Council is own Legates *una cum syllabis*, with the answers written by him, to legitimately confirm, in the conciliar form (*synodice*), together with the other priests, the ancient tradition of the cult of the images, thus avoiding the schism in the Catholic Church[59]. Therefore, the Empress Irene was fully aware of the necessity for the participation of Hadrian for the Synod of Nicaea to be properly defined as "ecumenical".

On the occasion of the sixth Session, the Second Council of Nicaea defined itself as *sancta et universalis Synodo* and it denied these characteristics to the Council of *Hieria*:

> «*Quomodo autem magna et universalis, quam neque receperunt neque concordaverunt relinquarum Præsules Ecclesiarum, sed anathemati hanc transmiserunt? Non habuit enim adiutorem* (*συνεργός*) *illius temporis Romanorum Papam, vel eos qui circa ipsum sunt sacerdotes, nec etiam per Vicarios eius, neque per encyclicam epistolam, quemadmodum Lex dictat Conciliorum* (*καθὼς νόμος ἐστὶ ταῖς συνόδοις*). *Sed nec consentientes* (συμφρονοῦντες) *sibi Patriarchas Orientis, Alexandriæ scilicet, Antiochiæ, ac sanctæ civitatis, vel comministros et summos sacerdotes, qui cum ipsi exsistunt. […] Porro septima quomodo, quæ non concordavit* (*ἡ μὴ συμφρωνήσασα*) *cum præcedentibus sex sanctis ac venerabilis Synodis?*»[60].

The conciliar fathers ask themselves how it is possible to define as ecumenical a Council that the Prelates of the other Churches have not acknowledged nor accepted and that they have, instead, punished with anathema. Therefore, they specify the requirements for a Council to be defined as ecumenical and that, evidently, can't be found in the Council of Hieria: first of all, the Pope and the other priests of the Roman clergy did not participate in it, and the Bishop of Rome did not participate legitimately through his Vicars or by sending to the Council an encyclical letter, as the Law of the Council establishes (*quemadmodum Lex dictat Conciliorum*; org. txt. *καθὼς νόμος ἐστὶ ταῖς συνόδοις*); second of all, the eastern Patriarchs of Alexandria, Antioch and Constantinople and their collaborators did not give their consent to the celebration of the Council; lastly, the Synod was not in harmony with the previous six ecumenical Councils.

Although the second Council of Nicaea, like the previous ones, had been convoked by the Emperor, the *νόμος ταῖς συνόδοις* makes no reference to it for the ecumenical Council to be validly summoned: the requirements of the ecumenicity completely disregard the collaboration of the *Princeps Romanorum*, leaving aside the secular world from a decision-making activity that is strictly ecclesial. On the other hand, it is necessary for the Bishop of Rome to be συνεργός, meaning a collaborator: the "synergy" is a form of participation that implies an active collaboration in the Council[61], even if through the legitimate form of the representation. After all, the Empress Irene, who wanted to overcome the iconoclastic crisis that had caused serious social disorders in the Empire, in the letter sent to Hadrian I, requests to the Pope a participation that consists in "*suscipere et impartiri quć opportuna sunt*": which means to answer, to participate actively in the discussion, and to communicate the things that he considers adequate. However, the Council of Nicaea makes a general reference to collaboration, or synergy, without specifying, more concretely, which tasks should be included in the συνεργειν.

Clearly, the synergy must be different from the form of involvement of the Eastern Patriarchs, because their agreement is sufficient, for an ecumenical Council to be summoned; this means that they must give their consent (συμφρονειν). The same verb "to consent", "to agree with" is used in reference with the relation that must exist between an ecumenical Council and between all the previous ones: they must be all harmonised.

6. *Prima Sedes a nemine iudicatur*

Various decades after, the theme of the relation between the Roman Pontiff and the conciliar Institution is dealt with, under a different aspect, by Nicholas I (858-856): it has to do with the problem of the possibility, for the Council, to judge the decisions adopted by the *prima Sede.* Starting from the assumptions that the conciliar decisions are null without the *consensus* of the Roman See and of the Roman Pontiff[62], Nicholas, in a letter to the Emperor of the East, Michael, states:

> «*[…]Quoniam cum secundum canones ubi est maior auctoritas iudicium inferiorum sit defendendum, ad dissolvendum scilicet vel ad roborandum, patet profecto sedis apostolicae, cuis auctoritate maior non est, iudicium a nemine fore retractandum neque cuiquam de eius liceat iudicare iudicium. Siquidem ad illam de qualibet mundi parte canones appellari voluerunt, ab illa autem nemo sit appellare permissus…Ergo de iudicio Romani praesuli non retractando*»[63].

Since the inferior Authority can't judge the decision of the higher one, neither to annul it nor to reinforce it, the decisions of the Roman Pontiff, who has no superior, are not susceptible to being retracted. This principle will be adopted in the Fourth Council of Constantinople, summoned in 869. Can. 21, in fact, establishes that:

> «*Porro si Synodus universalis fuerit congregata, et facta fuerit etiam de sancta Romanorum Ecclesia quævis ambiguitas et controversia, oportet venerabiliter, et cum convenienti reverentia de proposita quæstione sciscitari et solutionem accipere, aut profectum facere, non tamen audacter sententiam dicere contra summos senioris Romæ Pontifices*»[64]

---

[59] «*Si enim non potuerit ascendere huc […] eligat viros honorabiles, habentes scientiam, et dirigat una cum syllabis, ut inveniantur ex persona sacræ et paternæ vestræ beatitudinis hic. Verumtamen convenientibus ipsis cum omnibus sacerdotibus qui hic sunt, synodice confirmetur antiqua traditio sanctorum patrum nostrorum. […] Et ex hoc non sit schisma et separatio in una sancta catholica apostolica Ecclesia*», *ivi*, col. 986.

[60] Concilium Œcumenicum VI Sive Nicænum II, *Actio sexta*, coll. 207-210.

[61] Salachas, D., *I criteri circa l'ecumenicità di un Concilio nella prassi dei primi secoli*, in *Iura Orientalia*, X (2013), 180-207, part. 188-189.

[62] «*Ad cuius [intellectus apostolicæ Traditionis] etenim, sicut ipsi scitis, integritatem observationis multotiens conventus facuts est sanctorum partum, a quibus et deliberatum ac observatum extitit, qualiter absque romanæ Sedis romaniquæ Pontificis consensus nullius insurgentis deliberationis terminus daretur*». Nicolaus Pp. I, *Epistola LXXXII*, in *Societas aperiendis fontibus rerum Germanicarum Medii Ævi*, *Monumenta Germaniæ historica. Epistolæ karolini Ævi*, IV, Berolini, 1925, 434.

[63] Nicolaus I Pp., *Epistola n. 88 ad res orientales pertinentes*, in *Monumenta Germaniae Historica*. *Epistolae Karolini Aevi*, IV, p. 480-481.

[64] Concilium Costantinopolitanum IV, *Oecumenicum octavum* (a. 869), can. XXI, in *Acta conciliorum et epistolae decretales, ac constitutiones summorum pontificum*, Hardouin, J. et al. (ed.), Parisiis 1714, t. V, p. 909.

If, on the one hand, the decisions adopted by the universal Synod must be accepted, the Synod itself, in turn, can't pronounce a Sentence against the Roman Pontiff.

The rule by virtue of which the *prima Sedes* can't be subjected to judgement, already specified by Nicholas I, will be proposed again widely, until the end of the *Ius antiquum* and, passing through the *Decretum Gratiani*[65], it will pass through the modern era of Canon Law unharmed, until the Codes of the 20th century[66].

7. Conclusions

As we have been able to observe in the previous pages, the birth and the development of the institution of the ecumenical council is indissolubly intertwined with the emergence and the strengthening of the Petrine primacy, on the one hand, and with the fluctuating dynamics of the relations between the Empire and the Church, on the other hand.

From the reign of Constantine until the Second Council of Nicaea of 787, there's a crystallization of the prominent role of the Roman See in the institution of the ecumenical council. At the end of this centuries-old process, Peter's successor receives the task of being present – although indirectly – in the gatherings; of expressing his own judgement and of verifying the legitimacy of the decisions adopted; of validating the conciliar decrees and of publishing them, disseminating their contents in the catholic world. The need for the συνεργειν, meaning for the active participation of the bishop of Rome in the council, which acquires the characteristics of the "synergy" between the two institutions, is never questioned, not even in the Council of Chalcedon of 451, which simply defines the limits between the actions of the ecumenical council, as an institution that is undoubtedly headed by the bishop of Rome, and the actions of the pope *uti singulus*.

On the contrary, the initially decisive figure of the emperor – to whom we owe the convocation of the great ecumenical councils of the Christian antiquity and the idea itself of an ecumenical assembly that takes decisions which are binding for the entire Christianity – starts fading, paradoxically: the νόμος ταῖς συνόδοις, the law of the councils pronounced by the Second Council of Nicaea doesn't say anything regarding the convocation of the council by the emperor being a requirement for the ecumenicity. The political fragmentation in the West and the *querelle* of the iconoclasm had determined huge changes in the relations between the pope and the emperor, and many other relevant changes were to take place between the Early and the Late Middle Ages.

We already owe to the Emperor, Constantine, an expert connoisseur of the canon law that had been created during the first centuries of life of the Church, the recognition of the customary rule (*νόμον ἱερατικὸν*, called *consuetudo* by Pope Julius II) according to which the sentence of the Roman Pontiff has a crucial role in the judgement of the council regarding the orthodoxy and the valid episcopal investiture: this is a decisive step towards the strengthening of the role of the bishop of Rome *ad extra*, in relation to the secular institutions, and *ad intra*, inside the conciliar institution. The emperor, who is the owner of the highest authority in the biggest political entity of the entire West, recognises an inviolable nucleus of competences that belong to the bishop of Rome, to which he refers the issue raised by the Donatists. The consolidation of the primacy of the Roman See, therefore, also depends on the imperial choices and, starting from the 4h century, it starts acquiring the characteristic of a processual instance: a primacy of jurisdiction in the strict sense, that will have the opportunity to extended itself during the upheavals of the history of the following centuries.

[65] C. IX, q. III, c. XIII: «*Prima sedes nullius iudicio subiaceat*», *Corpus Iuris Canonici. Pars prima: Decretum Magistri Gratiani*, Friedberg A. (ed.), Graz 1959, p. 610.

[66] «*Prima sedes a nemine iudicatur*»: can. 1556 CIC 1917 e can. 1404 CIC1983.

Personal Injury Claims

Adolfo A. Díaz-Bautista Cremades *

Abstract

In Roman Law, both offense and malicious aggression were considered iniuria. The legal consequence of the iniuriae in the XII Tables was a fixed fine, but over time, a variable fine was established whose determination corresponded to the victim, who received the amount as a „compensation" for the offense suffered. In the High Middle Ages, the penalty of fixed fine was recovered, combined with other corporal punishment, but in the VII Partidas, compensation is reintroduced by a variable amount. On the other hand, in England the punitive damages system was developed for aggressions contrary to honor and dignity. In this paper, we explore the relationship between both institutions.

Keywords: *iniuria; damages; tort law; punitive damages; injuries; Roman law; medieval law.*

1. The repair of the iniuriae in Roman law The XII Tables

As is well known, the XII Tables [1] do not establish a general system of civil liability but regulate a series of unlawful acts which accompanies a consequence that is generally punitive and not compensatory. Property damage.[2]

Apparently, the XII Tables provide pecuniary and personal penalties for those who commit willy damage to people and things [3], usually referred to what we now call "non-contractual liability" [4]:

In Rome, intentional physical aggression was treated as an insult, which was considered an attack on the honour of the free citizen committed by word or deed. Certainly, the modern consideration of "iniuria" [5] as an expression - generally verbal - specifically aimed at harming the honour of the victim goes a long historical path that we can barely aim for. It is true, as MIGLIETTA [6] points out, that in an origin the *iniuria* was not linked to verbal expression. Proof of this point is that *mala carmina* was typified autonomously - and not as a modality of *iniuria* [7]- as well as the regulation, already in law, of the *convicium* as an autonomous modality of *iniuria*.

First, with systematic differences, the reconstructions insert a text related to the *iniuria*:

Tab. VIII.4 SI INIURIAM FAXSIT, VIGINTI QUINQUE POENAE SUNTO

The text, taken from a variety of sources (Gaius, 3, 223; Gell., 20, 1, 12; Coll., 2, 5, 5; Fest., 508 L; Gell., 16, 10, 8), appears almost identical in all reconstructions, although in some of them (RICCOBONO and GIRARD) it is preceded by another similar fragment:

Iniuriarum actio aut legitima est –. Legitima ex lege XII Tab. 'qui iniuriam alteri facit, V et XX sestertiorum poenam subito.

The rule, as noted, is the same, although here the penalty is established in twenty-five sestertia instead of the twenty-five asses of the later fragment. As is well known, sestertium, silver, currency equivalent to a quarter of a denarium, was introduced into the Roman monetary system around the 3rd century BC, long after the promulgation of the XII Tables (V century BC) so

* Adolfo A. Díaz-Bautista Cremades, PhD, Professor of Roman Law, Universidad de Murcia, Spain.

1 Probably, following WATSON, A.: *Rome of the XII Tables*, Princeton University Press, New Jersey, 1975, p. 5 and RODRÍGUEZ MONTERO, RP.: *Responsabilidad contractual y extracontractual en Derecho Romano*, Andavira, Santiago de Compostela, 2015, p. 155, the cases included in the decenviral regulation indicate the most important legal assets in the fifth century BC Rome: the house, the slaves, the fields. Although, RODRÍGUEZ MONTERO suggests that there may be more assumptions in the XII Tables (such as the death of the other slave) that have not come to us.

2 Vid. DÍAZ-BAUTISTA CREMADES, A.: *De la actio iniurarum a los daños punitivos, la reparación de lesiones dolosas en la tradición jurídica continental*, Tirant Lo Blanch, Valencia, 2019.

3 CURSI warn that, while the rules on theft or injury contained in the XII Tables are considered a compact table, those relating to damage to things are dispersed and do not seem to offer a unitary logic. CURSI, F.: Gli illeciti privati, en *XII Tabulae,* Napoli, 2018, p. 560.

4 There are few vestiges of consequences established by the *decenviri* to the breach of pre-existing obligations (contractual liability) although they are not entirely unknown.

5 Spanish Criminal Code: Artículo 208. *Es injuria la acción o expresión que lesionan la dignidad de otra persona, menoscabando su fama o atentando contra su propia estimación*. Certainly, the words of the rule would include not only expressions but also physical aggressions. However, at the light of the crime of intentional injury (art. 147 and concordants) would have no systematic reason.

6 MIGLIETTA, M.: Le norme di diritto criminale, en CURSI, F.: *XII Tabulae, testo e commento*, Napoli, 2018, p. 488.

7 In fact, the crime of *malum carmen* should not include defamatory songs, in view of Cic. *Rep*. 4.12, quoted by MIGLIETTA.

the reference to the sestertium cannot be original in the decenviral text. It may correspond to an attempt to update the fine that apparently became soon obsolete. By the way, Inst.4.4.7 report that the fixed penalty was soon deprecated, allowing the praetors to be set by the judge at his discretion depending on the seriousness of the offense:

> sed postea praetores permittebant ipsis qui iniuriam passi sunt eam aestimare, ut iudex vel tanti condemnet, quanti iniuriam passus aestimaverit, vel minoris, prout ei visum fuerit.

Aulo Gelio (20.1.13) tells the story of a wealthy citizen (L. Verazio) who, faced with the small amount of the sentence, went through the streets slamming all who were in his way, immediately paying them the fine of twenty-five Asses:

> Itaque cum eam legem Labeo quoque 1 vester in libris, quos Ad Duodecimn Tabulas conscripsit, non probaret: 'Quidam,' 2 inquit, 'L. Veratius fuit egregie homo inprobus atque inmani vecordia. Is pro delectamento habebat, os hominis liberi manus suae palma verberare. Eum servus sequebatur ferens crumenam plenam assium; ut quemque depalmaverat, numerari statim secundum Duodecim Tabulas quinque et viginti asses iubebat.' Propterea," inquit, "praetores postea hanc abolescere et relinqui censuerunt iniuriisque aestumandis recuperatores se daturos edixerunt.

The decenviral text, on the other hand, does not specify what kind of offense is repressed by the established penalty[8], but the authors assume that it would be mild slander, since together with this the XII Tables place offenses of "aggravated"[9] injuries, rupture of teeth and breakage of limbs[10]:

> Tab VIII.3 MANU FUSTIVE SI OS FREGIT LIBERO, CCC, SI SERVO, CL POENAM SUBITO

The idea, as we can see, is to knot body damage an amount in a lump sum, not to mention a resarcitory content that, as we have noted, does not correspond to personal injury.

Alongside this, decenviri introduce a rule that we know from various sources and which is generally reconstructed as

> Tab. VIII.2 : SI MEMBRUM RUP[S]IT, NI CUM EO PACIT, TALIO ESTO.

This fragment, in our view, opens the possibility of financially compensating for injuries. It must be understood that, although for us the repair of property damage and compensation for personal injury is almost the same, it did not have to be in archaic Rome, nor even in the classic. The decenviral rule, as we know, provides that if a person breaks a member the law of talion will apply unless victim and aggressor reach an agreement. In our modern mentality the mention of the agreement *(si pacit)* leads us to think about compensation and therefore the "repair" of personal injury, but the XII tables do not speak here of repair (*sarcio*) but of agreeing (*pacio*). It is understood that the victim can freely assess the "price" of his indemnity and agree with the aggressor for adequate compensation (which does not redress) appropriately, which would be maintained for a long time in the so-called "*actio estimatoria*".

2. Subsequent evolution

In the post-decenviral evolution of Roman law, the property damage was regulated by the *lex Aquilia* while the *iniuriae*, whose fine of twenty-five asses were soon outdated, were treated in the *lex Cornelia.*

Although it is possible that the concept of *iniuria* initially encompassed elements of property damage that could be framed in the broad concept of offense, or perhaps those cases of intentional harm, certainly a plebiscite dictated, probably, between 287 and 217 BC proposed by a tribune named Aquilius, specifically regulated the *damnum iniuria datum,* in which, according to all the doctrine, are framed cases of property damage caused illegally. The *lex aquilia*, which has been extensively analyzed by doctrine, is commented upon by Ulpianus, Gaius and other jurists in D.9.2;[11] contained three chapters, the second of which apparently referred to the action against the co-creditor that had released the pro-debtor in creditor fraud. The first and third chapters concern the offence of damages. As is well known, the first chapter punished the cause of death of a slave or quadruped outside the payment of the maximum value of the good in the previous year and the third chapter condemned the author of any other property damage *(urere, frangere, rumpere*) to pay the maximum value of the object within thirty days[12].

---

[8] Santa Cruz Teijeiro, d' Ors y Pérez-Peix say that at this time the expression *iniuria* referred only to the less serious offenses, distinguishing as different categories the *ruptum* and the *fractum.* Vid. "A propósito de los edictos especiales "de iniuriis" en *AHDE* 49(1979) p. 653. Carvajal analyses the different doctrinal positions regarding the decenviral scope of these terms: *La membri ruptio de la Tabla VIII,2 consistiría, según algunos, en la pérdida física de una extremidad (mutilación) y, según otros, en la pérdida de su funcionalidad –lo cual incluiría una ossis fractio que tuviera este efecto–; pero también ha sido entendida como cualquier tipo de lesión corporal, o como cualquiera que no constituya una ossis fractio.* Carvajal, PI.: La función de la pena por la "iniuria" en la Ley de las XII Tablas, en *Rev. estud. hist.-juríd*. Valparaíso 35(2013) p. 153.

[9] In different opinion, Pugliese, *Op. cit,* p. 5, expresses its conviction that this decenviral foresight is a crime other than *iniuria,* citing authors as Voigt, Cornil and others.

[10] The doctrine has, however, expressed its perplexity because in these cases the term *iniuria* is not mentioned. Vid. Guerrero Lebrón, M.: *La injuria indirecta en el Derecho Romano*, Dykinson, Madrid, 2005, p. 15.

[11] The fact that we know the law by the references that are made of jurists who lived a few centuries after its promulgation may make us suspect that there are original aspects of the legislative text that we cannot know, or that they were interpreted differently mode over time.This alludes, Valditara, G.: *Damnum iniuria datum*, Giappichelli ed., Turín, 1996, p. 8 n. 46.

[12] The reference to the „thirty days to come"(in diebus triginta proximis) together with the future form of the verb sum (erit), used by Ulpiano in D.9.2.27.5 has generated that much ink has been spilled in the doctrine, which is debated between the possible interpolation of the text (originally speaking of the 30 days before the event) and the possibility of refer to the value of an object similar to that damaged, to the possibility that the rule refers to the traditional period of voluntary payment of debts contained in the XII Tables. Vid. Ankum, H.: Quanti ea res erit in diebus XXX proximis dans le trosieme chapitre de la loi Aquilia; un fantasme florentin, en *Mélanges Ellul*, (Paris 1983) 171.

Let's highlight two gigantic steps in legal thinking. The first was to interpret that the damage caused by the person who has acted on the other is so unfair as that produced by the one who has been negligent and has not put the necessary care to avoid it. This interpretation was very novel for its time, because ancient peoples tended to punish only those who wished to harm another, and not those who recklessly or negligently damaged it. In Rome, one could now hold accountable both for willful acts and for negligent acts.

The second discovery of Roman jurisprudence is to understand that damage is caused not only through physical contact with the damaged object, but by performing any action or omission from which the harm logically arises. In other words, the important thing to hold someone responsible for property damage is that between their conduct and the damage there is a "causal link".

We do not know the assumptions of *iniuria* to which the decenviral penalty of twenty-five asses applied, but we know that very soon its amount proved derisory,[13] so the Pretor admitted, in fact, an assessment subjective harm caused by the plaintiff.[14] This practical reality was elevated to the standard category by a law proposed by the dictator Lucio Cornelius Sila in 81 Bc.[15]

The *Lex Cornelia de iniuriis* established a *quaestio* for certain particular qualified *iniuriae* hypotheses, such as beatings, floggings, homelessness, injuries and attacks on personal freedom; as a result, the aggressor was required to pay pecuniary compensation, the amount of which was set at the request of the victim; a subsequent *senatusconsultum* extended the material field, including the drafting and publication of defamatory writings including, in addition, the ancillary penalty of *intestabilitas,* or loss of active probate.

Ulpianus, in D. 47.10.5, specifies the scope of the offence of *iniuria* relating to injuries,[16] clarifying that it includes beatings, whippings and tresing:

> …Lex itaque cornelia ex tribus causis dedit actionem: quod quis pulsatus verberatusve domusve eius vi introita sit. Apparet igitur omnem iniuriam, quae manu fiat, lege Cornelia contineri.

Although, in the accompanying examples, it points to the need for direct recourse to aggression, as Paulo clarifies in D.74.10.4

Paulus libro 50 ad edictum

> Si, cum servo meo pugnum ducere vellem, in proximo te stantem invitus percusserim, iniuriarum non teneor.

Concerning locus standi, the action corresponds to the free citizen who has suffered the offense - including women and *puber alieni iuris*- as well as the owner of the slave attacked. But the husband may also bring the action with respect to the wife and father to the daughter:

D. 47.10.1.9

Ulpianus libro 56 ad edictum

> Idem ait Neratius ex una iniuria interdum tribus oriri iniuriarum actionem neque ullius actionem per alium consumi. Ut puta uxori meae filiae familias iniuria facta est: et mihi et patri eius et ipsi iniuriarum actio incipiet competere.

Subsequently, it was envisaged that, apart from the dictates of the Lex Cornelia, some types of *iniuriae*, such as crimes against the modesty of women and children, crimes caused by people of high lineage, contempt, personal injury and rape of domicile, would be punishable[17], alternatively, with consistent corporal punishment, depending on the severity of cases, in flogging, *deportatio in in insulam,* confiscation of property, and even the penalty of death.[18]

In the *actio iniurarum*, the penalty was not a pecuniary assessment of the material damage suffered[19], because the integrity of a free person was priceless, but a lump sum that compensated the victim for the affront suffered, considering both the suffering and evil of the agent. Faced with the difficulty of measuring moral affront financially, the judge used to accept the victim's assessment, provided it was reasonable, although the Pretor could limit the condemnatio to a ceiling by means of a *taxatio*.

3. High Middle Ages

After the fall of the Western Empire, the High Middle Ages was a time of poor social and commercial activity; therefore, Roman law, which had served for a developed society, was inapplicable. In the Germanic kingdoms that emerged after the fall of the Empire, compilations of vulgar Roman law were drafted, which continued to apply for a long time. In the legal collections of this era, elements from Roman Law are noted, especially from the Justinian Code, together with the Canon Law and the local law of each of the small feudal states.

In the barbaric kingdoms that emerged after the fall of the Western Roman Empire (476 AD) some compilations of post-classical Roman law were made, such as the Edictum Theodorici, the Codex Euricianus, the Lex Romana Wisigothorum or the Lex Romana Burgundionum.

---

[13] Vid. supra. About Tab. VIII.4.

[14] Possibly this practice was generalized following the *edictum generale de iniuriis aestimandis* (227- 150 a.C). Bravo Bosch, M. J.: *La injuria verbal colectiva*, Dykinson, Madrid, 2007, p. 6.

[15] Zumpt, AW.: *Das kriminalrecht der röm. Republik*, Scientia Verlag, Amsterdam, 1993, denies the autonomous existence of such a law that it links, on the other hand, the *Lex Cornelia de sicariis et veneficis.* The sources, however, seem to be decisive in the opposite direction.

[16] Later, however, according to Ulpianus, the Pretor extended the scope of the iniuria to any infamous act, as set out in D. 47. 10. 15.25(*Ulpianus libro 77 ad edictum*) Ait praetor: "Ne quid infamandi causa fiat. Si quis adversus ea fecerit, prout quaeque res erit, animadvertam".

[17] Guerrero Lebrón, *Op. cit*, p. 46.

[18] Barbero Santos, M.: "Honor e Iniuria en el Derecho Romano", in *Estudios de Criminología y Derecho Penal*, Universidad de Valladolid, Secretaría de Publicaciones, Valladolid, 1972, p. 323.

[19] But if, through the *iniuria*, material damage had been caused, in addition, *the actio legis aquilia*.

It maintains the criminalistic doctrine that the Germanic influence in the late Middle Ages provoked a spiritualization in the concept of *iniuria* that shifted the focus of physical injuries to offenses, shaping the insult as an attack on honor that may be or not accompanied of physical aggression. In our view, this process (if was) would be gradual and could be nuanced; because in classical sources we can find enough arguments to defend the importance, since the earliest times, of honor as a legal good protected with *actium iniurarum.* In addition, as we will see, even the legislation under medieval law includes, as *iniuriae*, the willful physical aggressions.

Therefore, some specialists such as Grande Pascual[20], consider the concept of *iniuria* as an offence against honor to be formed in this period. Confusion seems widespread in some historiographic doctrine. In our view, these authors allow themselves to be the polysemic nature of the term *iniuria* in classical law which, while meaning any action contrary to law, also soon takes place in the private crime of *iniuria,* which includes the physical injuries caused intentionally and offenses, as we have already seen.

In the *liber iudiciorum* there is a publification of the insults, called here *contumeliae,* which are usually punished with personal penalties, as in the case of the son or grandson who outrage parents and grandparents who, in addition to lose hereditary rights are punishable by flogging:

Liber 4.5.1 (Ervigio)

Exheredare autem filios aut nepotes licet pro levi culpa inlicitum iam dictis parentibus erit, flagellandi tamen et corripiendi eos, quamdiu sunt in familia constituti, tam avo quam avie, seu patri quam matri potes tas mane bit. Nam si filius filiave, nepos veI neptis tam presumtiosi extiterint, ut avum suum aut aviam, sive etiam patrem aut matrem tam gravibus iniuriis conentur afficere, hoc est, si aut alapa, pugno vel calce seu lapide aut fuste vel flagello percutiant, sive per pedem vel per capillos ac per manum etiam vel quocumque inhonesto casu abstrahere contumeliose presumant, aut publice quodcumque crimen avo aut nvie seu genitoribus suis obiciant: tales, si quidem manifeste convicti, et verberandi sunt ante iudicem quinquagenis flagellis et ab hereditate supradictorum, si idem avus aut avia, pater vel mater voluerint, repeilendi. Tamen si, resipiscentes a suo excessu, veniam a suprascriptis, quibus offenderant, inploraverint, eosque in gratiam receperint paterna pietate aut rerum suarum successors instituerint, neque prohiben ab eorum hereditate neque propter disciplinam, qna correpti I sunt, infamiam poterint ullatenus sustinere.

A corporal punishment (fifty lashes) is also applied, along with a fine of five solids, to whom he committed unlawful detention, considered an insult:

Lib. 6.4.4

Si in itinere positum aliquis iniuriose sine sua voluntate retinuerit, et ei in nullo debitor existat, quinque solidos pro sua iniuria consequatur ille, qui tentus est et si non habuerit, unde conponat, ille, qui eum re tinue ra t, L flagella suscipiat.

Specifically referred to injuries (separated already from moral offenses) the Liber Iudiciorum establishes fixed pecuniary sanctions reminiscent of decenviral legislation, including the noxality of the aggressor slave.

Lib. 6.4.1

Si ingenuus ingenuum quolibet bictu in capite percusserit, pro libore det solidos v, pro cute rupta solidos X, pro plaga usque ad ossum solidos XX, pro osso io fracto solidos C. Quod si ingenuus hoc in servo alieno conmiserit, medietatem superioris conpositionis exolvat. Si vero servus in servo hoc fecerit, tertiam eiusdem conpositionis adinpleat et L flagella suscipiat. Si autem servus ingenuum vulneraverit, ita componat, sicut curo ingenuus servum vulneraverit alienum, et LXX flagella suscipiat. Si vero dominus noluerit pro servo conponere, servus tradatur pro crimine.

Also following the decenviral model, the talion is established, although without express possibility of financial compensation, which we nevertheless assume would be admitted in avoidance of the talion:

Lib. 6.4.3

Quorumdam seva temeritas severioribus penis est legaliter ulciscenda, ut, dum metuit quisque pati quod fecerit, saltim ab inlicitis invitus abstineat. Quicumque igitur ingenuus ingenuum pertinaciter ausus decalvare aliquem aut turpibus maculis in faciem vel cetero corpore flagello, fuste seu quocumque hictu feriendo aut trahendo malitiose fedare vel maculare sive quacumque parte membrorum trucidare presumserit, aut etiam ligaverit, vel in custodiam aut in quocumque vinculo detinuerit, seu ligari ab alio aut custodie vel vinculo mancipari preceperit, iuxta quod alii intulit vel in-ferendum preceperit, correptus a iudice in se recipiat talionem; ita ut his, qui male pertulerit aut corporis contumeliam sustinuerit, si conponi sibi a presumtore voluerit, tantum conpositionis accipiat, quantum ipse taxaverit, qui lesionem noscitur pertulisse…

Although the talion is then replaced for a variety of cases, with flogging penalties.

Lib.6.4.3

…Pro alapa vero, pugno vel calce aut percussionem in capite proibemus reddere talionem, ne, dum talio rependitur, aut lesio maior aut periculum ingeratur…

In the case of reckless injuries, however, a fixed fine is imposed:

Lib.6.4.3

Certe qui lesit vel ledendum dicitur instituisse, si non ex priori disposito, sed subito exorta lite et cede conmissa

[20] Grande Pascual, A.: El delito de injurias en la documentación procesal vizcaína a finales del Antiguo Régimen (1766-1841), en *Clio & Crimen, n° 13 (2016), pp. 213-232.*

aliquo casu id convicerit se nolente perpetratum fuisse, pro evulso oculo det solidos C. Quod si contigerit, ut de eodem ocuio ex pa rte videat, qui percussus est libram auri a percussore in conpositionem accipiat…

The "Fuero Juzgo" adds, to this regulation (present in FJ 6.4), a new chapter (Book XII, Title III) that includes corporal punishment (lashes) to those who utter insulting expressions. However, according to the doctrine, it should be borne in mind that at this time not all persons are honorary holders and therefore as likely to be victims of crime[21]

4. Low Middle Ages. The ius commune

4.1 Reception of Roman Law

From the 11th century onwards, a cultural and social resurgence took place in Western Europe. Roman Law in its justinian version was re-studied and applied together with the Canon (Roman-canonical reception or "ius commune").

In this period the texts of Corpus Iuris Civilis were remanaged, which had remained almost forgotten, and especially the Digest, which was the highest technical part. Some circumstances of this time made it difficult to apply Roman law, but they slowly overlapped. Roman law appeared as the Law of the Holy Empire, and the Canon Law of the Pontificate. In times of discord between the two powers, the Church tried to stop the application of Roman law. On the other hand, the practice of the Western European population was based on vulgar Roman law, so that the „classicist" Roman law of the Justinian Compilation appeared as „strange" and too complicated technically. In addition, in each city or small state an indigenous law („Statutes") strongly entrenched in the population had developed.

The jurists of this era managed to incorporate canonical elements into Roman law, creating the so-called *ius commune* that spread throughout Europe. This law was composed of a technical element (the concepts of Justinian Roman law) and an ideological element (Christian thought incorporated through Canon Law).

The method for the study of the *ius commune* was the scholastic logic, initially cultivated by the Schools of Bologna. The Reception was a cultural phenomenon that arose with the creation of the medieval Universities, (11th and 12th centuries) especially that of Bologna and from there it was extended to all other European Universities. Later (12th and 13th centuries), glossa school emerged throughout Europe, jurists who made terminological clarifications in the texts of Corpus Iuris and incorporated them in the pages themselves as side notes. Finally, post-glossatores (14th and 15th centuries), instead of clarifying the texts, made systematic comments on Corpus Iuris.

The monarchs, although often did not accept the supremacy of the Holy Empire, were favourable to the Reception, to strengthen their power against the nobility. They mainly took advantage of the absolutist ideas of the public Roman Law of the *Imperium*, which was the one that had been transmitted in the Justinian Compilation, to justify the independence of civil power from the papacy. Students at Italian universities, and then in those of their own countries, learned the Roman Law of Reception, and sought to apply it in their professional work. The bourgeoisie accepted Roman law as it was considered more suitable for the commercial economy. They mainly took advantage of the "liberal" private law of the classical era that was collected in Justinian's compilation. The nobility, which continued to be attached to feudal privileges, showed resistance because it understood that the Roman Law of Reception favoured on the one hand the absolutism of real power, and on the other the rise of the bourgeoisie. The people, linked to tradition, of vulgar Roman law, received through the *leges Romanae barbarorum,* and to their local systems and jurisdictions, was contrary to the roman-canonical law that appeared as a "new" law.

In the southern regions of France, the penetration of common law was very easy and rapid, because the Roman tradition was stronger in those lands. In the northern regions, on the other hand, penetration was slower and more difficult because there was a very developed customary law ("Droit coutumier"), but the jurists were harmonizing this indigenous law with common law and in the Modern Age ended up succeed the Reception.

In the different Spanish kingdoms, there was also a different reception of the Reception: In Catalonia, Mallorca and Valencia, the penetration of the Reception was rapid and very intense, due to the greater proximity with Italy, the tradition of a very strong Romanization, and the development of a commercial and industrial bourgeoisie. The influence of the Reception is particularly evident even today in the Foral Law of these regions. In Aragon and Navarre, the penetration was slower and of a more doctrinal than practical character, but also left its mark. In Castile and León, penetration was slow and it founds strong resistance, until the arrival of Alfonso X "El Sabio".

4.2 Fuero Real

The discovery of the Corpus entails the breaking of the traditional principle of medieval law ("as far as all is concerned must be by all approved") which required medieval monarchs to agree on the law with the nobles in the courts. The generalization of the principle "Princeps legibus solutus est", decontextualized from its classical origin, can be interpreted so much as that "the right that governs for its people. it does not oblige the monarch" - which Alfonso X would soften by stating that the king must comply with his own laws "pero sin premia" - or as an expression of the monarch's ability to "create right, without having to rely on the existing right". This legislative capacity of the monarch will prove capital in the construction of the Modern States, which begins, in the case of Spain, with Alfonso X.

[21] Pérez Martín, La protección del honor y la fama en el derecho histórico español, en *Anales de Derecho, Universidad de Murcia, 11(1991) 117. In the same way, Masferrer Domingo cites the Breviary of Alaric y PS 5. 4. 1-20 (22). Masferrer Domingo, A.: La pena de infamia en la codificación penal española, en Ius fugit: Revista interdisciplinar de estudios histórico-jurídicos, 7(1998) pp. 123-178. However, the words of the Wise King, in Partidas VII.9.9 are clear: Tuerto o desonrra puede ser fecha a todo ome, o mujer de qualquier edad que sea, maguer fuese loco o desmemoriado… where, expressly, servants are included.*

In parallel with the VII Partidas, the Wise King promulgated the „Fuero Real de España" with the intention of replacing traditional Spanish law and unifying the rules of the different territories. This new "Fuero" was granted to Aguilar de Campoo, in 1256, the text was granted to different Castilian villages and cities (Burgos, Palencia, Sahagún, Santo Domingo de la Calzada, Valladolid and probably Miranda de Ebro), as well as communities of villa and land of the Castilian Extremadura (Alarcón, Alcaraz, Atienza, Arévalo, Avila, Buitrago, Cuéllar, Hita, Peñafiel, Segovia, Soria, and possibly Cuenca) and even the Extremadura of León (Trujillo). In 1257 Talavera de la Reina was granted, for three years later to resume the policy of concessions of the same text to localities such as Agreda (1260), Béjar, Escalona and Villa Real (1261); and finally, to Guadalajara, Madrid, Plasencia and Tordesillas in 1262. The policy of uniformity of the law through the application of the Fuero Real was paralyzed coinciding with the economic problems that the kingdom was going through and with the uprising of the Mudejars in Murcia and Andalusia in 1263, probably by the resistances of nobles to the implementation of this *ius commune*.

In the Fuero, the *Liber Iudiciorum* tradition of punishing insults and injuries with fixed monetary penalties is maintained. Thus, in the first law, title III of the fourth book, it is provided:

> Todo ome que metiere la cabeza a otro so lodo, peche trecientos sueldos, los medios al rey e los medios al querelloso: et si nol fuer provado, salvese asi como manda la ley.

And it continues in Law II:

> Qualquier que a otro denostare, quel dixiere gafo o fodudinculo, o cornudo, o traydor, o herege, o a muger de su marido puta, desdigalo antel alcalle e ante ornes buenos al plazo que! pusiere el alcalle e peche ccc sueldos, la meytad al rey e la meytad al querelloso: et si negare que lo non dixo e non ge lo pudieren provar, salvese como manda la ley, et si salvar non se quisiere, faga la enmienda e peche la calonnaa: et qui dixiere otros denuestos, desdigase antel alcalle e ante omes buenos, e diga que mentió en ellos: et si ome de otra ley se tornare cristiano e alguna le llamare tornadizo, peche x maravedis al rey e otros x al querelloso, e si non oviere de que los pechar, caya en la pena que dice la ley

However, the amount of the fine corresponding to the injuries is undetermined in Law IX, opening the door to the reintroduction of the estimate by the victim:

> Sy alguno firiere a otro, e el ferido diere la boz al merino o a los acalles, maguer que se avenga con aquel quel firió por los fieles, o por sí, o por otro qualquier, non pierda el merino la caloña, o aquel que la oviere de avera; pues la voz le fue dada.

The text offers - in the style of the XII Tables - the possibility of composition between the parties, which, tacitly, implies the payment of an amount that the victim considers enough, although this does not exclude the fine because the voice was given.

We find in the texts of the Fuero a "pubification" of the crime of insults, which here appears as a novelty, unfolded in two crimes: offenses (laws I and II) and injuries (Law IX). As stated, the action for injuries becomes public here, excluding forgiveness of the offended as a cause of termination of criminal liability. But even in the offenses, where the offended offense holds, we believe, the possibility of forgiving the author, the fine is no longer a private penalty, but half will be given to the King. In this case, moreover, if the offender does not wish to apologise, he must pay both the fine and the amendment, understood as compensation estimated by the actor.

4.3 VII Partidas

The regulation of *iniurae* will be different in the VII Partidas: First, word and deed offenses are reunify in a single type. In addition, the amendment (estimated compensation by the victim) will be an alternative to the penalty. The Wise King includes it in Heading VII, Title IX, Law VI:

> Firiendo un ome a otro con mano, o con pie, o con palo, o con piedra, o con armas, o con otra cosa qualquiera, dezimos que le fase tuerto, e desonrra. E por ende dezimos que el que recibíese tal desonrra, o tuerto; quier salga sangre e de la erida, quier no, puede demandar que le sea fecha enmienda della, e el judgador deve apremiar a aquel que lo firio que lo enmiénde…

The Wise King then includes a long list of actions that involve "disgrace," including unlawful detention and kidnapping.

Later, in Law XX of the same title, the Headings classify dishonors into appalling, serious and minor and clarify how amendments should be calculated:

> …por ende mandamos que los juzgadores que hubieren a juzgar las enmiendas dellas que se aperciban por el departimiento susodicho e esta ley a juzgarlos: de manera que las enmiendas de las graves deshonras sean mayores, e de las mas ligeras sean menores, ansí que cada uno reciba pena según meresce e según fuere la deshonra, o ligera o grave, que fizo o dixo a otro.

And it continues in law 21st

> E si pidiere el que recibe la desonrra que sea fecha la enmienda de dineros, e prouare lo que dixo, o querello: deue entonces preguntar el judgador al querelloso, por quanto nó querria aver recebido aquella desonrra: e desque la hubiere estimado, el deve mirar qual fue el fecho de la desonrra, e el lugar en que fue fecha, e qual es aquel que la recibio, e el que la fizo. E catadas todas estas cosas, si entendiere que la estimó derechamente, deve el mandar que jure que por tanto cuanto estimó la deshonrra, que la non querría aver recibido…

The action, in any case, shall last for one year, as was the case, in classical law, for the foregoing actions. In addition, it is included in forgiveness, express or tacit, as a mode of extinction of the action:

Partidas VII.9.22
Fasta un año puede todo ome demandar enmienda de la desonrra, o del tuerto que recibió. E si un año passasse desde el día que le fuese fecha la desonrra, que non demandasse en juyzio enmienda della, de allí en adelante non la podría fazer… Otrosí dezimos que si un ome recibiesse desonrra de otro, e después de ello se acompañasse con él de su grado, e comiesse o bebiesse con él en su casa, o en la de otro, o en otro lugar, que de allí adelante non puede demandar enmienda de tuerto, o de desonrra quel ouiesse ante fecha. E aún dezimos que si después que un ome ouiesse recebido desonrra de otro, que si aquél que gela ouiesse fecho le dixesse asi: ruego vos que non vos tengades por desonrrado de lo que vos fize, e que non vos quexedes de mi: e el otro respondiesse que se non tenía por desonrrado, o que non lo quería mal, o que perdía querella del: que de allí adelante non es el otro tenudo de le fazer enmienda por aquella desonrra.

The action, for its part, as was already the case in classical law - and continues to happen today - was personal, prohibiting, in Law XXIII, the beginning of the action by the heir.

También contemplan las Partidas la *exceptio veritatis*, según la cual, *si aquel que deshonrase a otro por tales palabras o por otras semejantes dellas, las otorgase o quisiese demostrar que es verdad aquel mal que le dixo del, non cae en pena ninguna, si lo probase*. Esta exceptio queda, sin embargo, limitada en la siguiente ley, al disponer que no se admitirá la *probatio veritatis* a los hijos, nietos o biznietos, respecto del ascendiente, ni al criado respecto al señor.

4.4 Evolution of iniuriae in Anglo-Saxon law

Although at first there was the reception of the justinian texts also in England, the jurisprudential practice was to depart the application of the Digest in the interests of a system - much closer to the classical tradition - of legal creation based on the Precedent. Thus, Anglo-Saxon law was separated from *civil law,* forming the so-called Common *law.*

In *tort law,* the expression *punitive damages* (also exemplary *damages, punitory damages, non-compensatory damages,* etc.) has been formed as a part of the consequences legal damage. Alongside this, other categories are often considered, lost of *income,* out of *pocket expenses, hedonic damages, pain and suffering* (damage from pain or suffering), etc.

According to the authors, the figure of "punitive damages" is first regulated in a statute of 1275[22] which sentences the penalty of the *duplum* to the person who caused harm to a religious.[23] Revealingly to our thesis, the early evolution of this institution develops around the injuries of honor, understood in a broad sense[24], as understood in the Roman world.

Most of the doctrine places the first jurisprudential application in the judgments in *Huckle v. Money* and Wilkes *v. Wood* of 1763. As CARRASCOSA González[25] explains, the British government tried to prevent the publication of a pamphlet (the North *Briton)* by unlawfully arresting the editor and editor, which sued the government. The judge proposes to the jury that it impose pecuniary sentences in charge of the government and for the benefit of those injured in excess of the actual damages caused, understanding that the offense involved in arbitrary imprisonment is far superior to the actual damage. From our perspective, such an "arbitrary" condemnation may be shocking, given the strict principle of legality that governs in continental countries, but no Romanist will be surprised:

1. That the judge imposes pecuniary penalties for the benefit of the victim
2. That in assessing the damage the court has sufficient arbitrate to determine the amount unmatched by the damage caused
3. To impose - as proposed by the statute of 1275 - sentence the *duplum*

All this would, in our view, perfectly consistent with the pre-coding Romanesque tradition, at least with the principles underlying the construction of the Western legal tradition and which have not been fully received in coding, which is why *punitive damages* appear as an element systematically foreign to our modern law.

The doctrine usually considers the institution of *punitive damages* as a primarily sanctioning measure[26], it could properly be characterized as a pure criminal action, as it was, for example, the *actio furti*, since the possibility of the victim claiming compensation for the damage caused is not excluded[27]. As a sanctioning and not properly restorative action, the characterization of this institution entails the usual notes of any punitive[28] standard: this is usually the purposes of general and special[29] prevention and satisfaction of the victim's need for justice. Alongside this, in a manner consistent with the criminal nature of the sanction,

---

22 Saux, E.I.: *Responsabilidad civil contractual y aquiliana*, Universidad Nac. del Litoral, 2005, p. 217.

23 Aliste Santos, T. J.: *El origen histórico de los punitive damages como presupuesto de su rechazo procesal en los países de civil law*, *La Ley* 1699/2014, relates its origin to medieval *amercements* (p. 3).

24 Calls, in modern English,"injuries". Vid. Rodríguez Samudio, R.: El daño no económico en el derecho estadounidense. *Revista Facultad de Derecho y Ciencias Políticas* 44(2014). Available in: http://www.redalyc.org/articulo.oa?id=151433273008. Within the category of *non-economic* damages, the author make an interesting historical analysis of the case law of the institution in English and American law, around the protection of honor.

25 *Op. cit,* p. 389.

26 García Matamoros y Herrera Lozano, MC.: El concepto de los daños punitivos o punitive damages in *Estud. Socio-Juríd*., 5 (2003), 212.

27 Some criminal actions, such as the actio furti, did have this compatibility with the *rei-persecutio* claim while others, such as the actio legis aquilia were incompatible with a claim for damages; while such a character may have appeared in late times, being originally a pure actio, as Diaz Bautista argues, A.: La función reipersecutoria de la poena ex lege Aquilia, en *La responsabilidad civil: de Roma al derecho moderno: IV Congreso Internacional y VII Congreso Iberoamericano de Derecho Romano* (coord. por Alfonso Murillo Villar), Burgos, 2001, p. 269.

28 García Matamoros y Herrera Lozano: *Op. cit.* p. 216,

29 According to some authors, this is the main function of the institution analyzed. Vid. Zavala De Gonzalez, M.: Función preventiva de daños, *LA LEY*, 03/10/2011.

the Anglo-Saxon doctrine includes a subjective[30] element that is defined as *outrageous conduct, due to its perverse motivation or careless indifference to the rights of others*. According to the doctrine[31], the agent's malicious behavior is precisely the differentiating and quantifier element of punitive damage.

However, it is not possible to provide a precise definition of the conduct motivating the imposition of punitive damages because this regulation is not uniform across *common law* countries. Thus, in the United Kingdom, the figure of exemplary *damages* was reduced in 1964[32] to typical cases such as the violation of constitutional rights, the harmful conduct expressly calculated and those cases in which the law expressly foresee it. In the United States, where the punitive *damage figure* is much more widespread, the application of this is not totally uniform, presenting peculiarities in the different states.

While the direct malice[33] and its variants (second-degree direct malice and recklessness[34]) appear to be clearly covered by the assumption, it is doubtful that punitive damages may be incurred in the event of action so that while some authors expressly rule out the extension of this rule to cases of guilt can[35], the description of the conduct that is usually offered, usually includes criminal *indifference to obligations civil or to the rights of others*[36], which could be described as "*culpa lata*" Anyway, the limits in our doctrine between malice and willful blindness are very diffuse[37]. As Paulus points out, *magna culpa dolus est (culpa lata a dolo equiparetur*).

One of the famous cases of punitive damage was that of the "Ford Pinto". The Pinto model was a compact, low-weight vehicle developed by the American company in the early 70 s in the context of the oil crisis. It was designed by Lee Lacocca to compete with the lighter, lower-power Japanese vehicles. Even in the design and manufacturing process, engineers warned of two structural problems (placement of the gasoline tank behind the rear axle and weakness of the materials) that frequently caused the explosion of the vehicle and the entrapment of the occupants in the event of a rear collision. However, the need to launch the vehicle and meet the company's financial expectations ruled out safety warnings, thus put on the market a product that the manufacturer knew unsafe.

In May 1972, Lily Gray was traveling with the youngest Richard Grimshaw in a Ford Pinto, when her vehicle was hit by another one driving about 30 miles per hour. The crash effectively caused a fire in the vehicle, as well as the locking of the doors, leaving the occupants trapped in the fire. Lily Gray died of heart problems from burns, while Richard survived with severe aftermath.

Grimshaw and Ms. Gray's heirs sued Ford Motor Company. After a six-month trial, the jury ordered Ford Motor Company[38] to pay Grimshaw two and a half million dollars for compensatory damages and more than one hundred million in punitive damages, and the Grays half a million dollars in damages compensation, although these amounts were revised downwards in the appeal.

This case shows the subjective element of the action deserving of the conviction for punitive damages: obviously it cannot be attributed to the company or its direct collateral. It does not seem likely that there was a deliberate intention to provoke the result, but it does prove a very serious willful blindness, since it appears that the company, prior to marketing, was the presence of deficiencies which, in the event of range, would cause the explosion and entrapment. As Carrascosa González[39] argues, Ford made calculations and determined that it would be cheaper for him to compensate damages than modifying the vehicle to make it safer, this is the malice that American jurisprudence considers necessary for the *punitive damages* to be generated and which, in our view, is consistent with The axioma of Paulus that equates the negligence with the malice.

5. Conclusions

Thus, according to our study, there is a long evolution of the *iniuriae*, which comprise both intentional and affront injuries, from the dawn of law, with the XII Tables, to the Partidas, passing through the lex Cornelia that includes a means of sanction private economic economy *(actio estimatoria)* which, although disappeared in the early Middle Ages, is reintroduced, quite faithfully, by Alfonso X The Wise in the VII Partidas. In parallel with this, a concept of *punitive damages* is developed in the United Kingdom - and subsequently in the United States- which, although it seems strange to the continental tradition, is perfectly consistent - in our view - with the classic system of the estimated private fine. It will therefore be from the Codification, when the offence is disregarded, which constitutes a criminal offence of insults, of the damage (patrimonial or bodily) which is subject, in our law, at least apparently, to reparation, with the abolition of the private fine.

[30] Vid. AMERICAN LAW INSTITUTE; Restatement of the Law of Torts, Art. 908, vol. 4. ST Paul, Minn, 1979, p. 464.
[31] Vadillo Robredo, G.: daños punitivos en el proceso civil norteamericano, *en Estudios de Deusto: revista de la Universidad de Deusto*, 44, 2 (1996) p. 178.
[32] Case Rookes v Barnard and others [1964] UKHL 1, [1964] AC 1129.
[33] The agent wants to perform the action and produce the result.
[34] When the agent desires the action, but not the result, however, and being aware that the result is inevitable or very likely, performs the action.
[35] Vid. Keeton, D., Dobbs, D., Keeton, R. & Owen, D., *Prosser and Keeton on the Law of Torts*, 5.a edic., West Publishing Co. (Lawyers edition), St. Paul (Minn.), 1984, pp. 9-10.
[36] Vid. a. e. Field, G.W., A Treatise on the Law of Damages, Mills & Company Law Publishers, Des Moines (Iowa), 1876, pp. 82-83
[37] *Paulus libro primo manualium* D. 50. 16. 226: Magna neglegentia culpa est: magna culpa dolus est.
[38] Grimshaw vs Ford Motor Company, 119 Cal App 3d 757 (1981).
[39] Carrascosa González, *op. cit.*, p. 390.

6. Bibliography

ANTEQUERA, JM.: *Historia de la legislación romana*, 3ª Ed, Madrid, 1874, apéndice II

ANTOLISEI, F.: *Manuale di Diritto Penale*, 8ª ed., Mialno, 1981.

BARBERO SANTOS, M.: "Honor e Iniuria en el Derecho Romano", en *Estudios de Criminología y Derecho Penal*, Universidad de Valladolid, Secretariado de Publicaciones, Valladolid, 1972

BRAVO BOSCH, M. J.: *La injuria verbal colectiva*, Dykinson, Madrid, 2007.

BRUNS, CG: *Fontes iuris Romani antiqui*, I, Tübingen, 1909, pp. 15-40

CARRASCOSA GONZÁLEZ, J.: Daños punitivos. Aspectos de derecho internacional privado europeo y español, en HERRADOR GUARDIA, MJ (dir.) *Derecho de daños*, Aranzadi, Cizur Menor, 2013, págs. 386

CASTRESANA, A.: *Nuevas lecturas de la responsabilidad aquiliana*, Universidad de Salamanca, 2001.

CIPROTTI, P.: *De iniuria ac diffamatione in iure poenali canonico*, Roma, 1937

CRAWFORD, MH: *Roman Statutes*, II, London, 1996, pp. 555-721, n. 40

Cursi, F.: Gli illeciti privati, en *XII Tabulae,* Napoli, 2018

DÍAZ BAUTISTA, A.: La acumulación de responsabilidades ex delicto en el código de las VII Partidas, en *Glossae Revista de Historia del Derecho Europeo* 3(1992) p. 117 ss

DÍAZ-BAUTISTA CREMADES, A.: de la *actio iniurarum* a los daños punitivos, la reparación de lesiones dolosas en la tradición jurídica continental, Tirant lo Blanch, Valencia, 2019.

FLORIAN, E.: Ingiuria e diffamazione sistema dei delitti contro l'onore secondo il codice, en GIRARD PF y SENN, F.: *Les lois des Romains*, Napoli, 1977, pp. 22-73

GUERRERO LEBRÓN, M.: *La injuria indirecta en el Derecho Romano*, Dykinson, Madrid, 2005.

GIRARD, P. F. y Senn, F.: *Les lois des Romains*, Napoli, 1977

GRAVINA, JV.: *Originum Juris Civilis*, Liber I, Gleditschius, 1717

MANFREDINI, A.: *Contributi allo studio dell'iniuria in etá republicana*, Giuffrè, Milán, 1977

MASFERRER DOMINGO, A.: La pena de infamia en la codificación penal española, en Ius fugit: *Revista interdisciplinar de estudios histórico-jurídicos*, 7(1998) págs. 123-178

MEZGER, E.: *Derecho Penal. Libro de Estudio. Parte Especial*, Editorial Bibliográfica Argentina, Buenos Aires, 1959,

MIGLIETTA, M.: Le norme di diritto criminale, en Cursi, F.: *XII Tabulae, testo e commento*, Napoli, 2018

PÉREZ MARTÍN, A.: La protección del honor y la fama en el derecho histórico español, en *Anales de Derecho*, Universidad de Murcia, 11(1991)

PÉREZ MARTÍN, A. (ed.): *fuero real de Alfonso X el Sabio*, BOE, Madrid, 2015, p. 24

RODRÍGUEZ MONTERO, RP.: *Responsabilidad contractual y extracontractual en Derecho Romano,* Andavira, Santiago de Compostela, 2015.

RICCOBONO, S.: *Fontes iuris Romani antejustiniani*, I, Firenze, 1941, pp. 21-75

penale italiano. 2ª ed. Milán, 1839

SANTA CRUZ TEIJEIRO, D' ORS Y PÉREZ-PEIX 'A propósito de los edictos especiales de iniuriis' en *AHDE* 49(1979)

SAUX, E.I.: *Responsabilidad civil contractual y aquiliana*, Universidad Nac. del Litoral, 2005, p. 217

SCOTT, H.: 'Liber homo suo nomine utilem Aquiliae habet actionem: D. 9,2,13 pr in context' in Jan Hallebeek, Martin Schermaier, Roberto Fiori, Ernest Metzger and Jean-Pierre Coriat (ed), *Inter cives necnon peregrinos: Essays in honour of Boudewijn Sirks*, Göttingen, 2014

TORRENT RUIZ, A.: Diccionario de Derecho Romano, v. actiones bonae fidei, Edisofer, Madrid, 2005

VAETEBENDER, P.: *Dissertatio juridica inavgvralis, de deposito*, Utrecht, 1729

VALDITARA, G.: *Damnum iniuria datum*, Giappichelli ed., Turín, 1996,

WATSON, A.: *Rome of the XII Tables*, Princeton University Press, New Jersey, 1975

ZUMPT, AW.: *Das Kriminalrecht der Röm. Republik*, Scientia Verlag, Amsterdam, 1993

The Formalistic Pattern of Soviet Civil Codification as a Chapter in European Legal History

*Dmitry Poldnikov**

Abstract

Many European and even some Russian academics consider Russian legal history to be a series of ruptures. There is some truth to this, and yet the law in east of Eastern Europe is not devoid of continuities which link it with European legal trajectories. This paper examines the pattern of the codification of civil law as one of those links.

Russian experience with drafting civil codes goes back to the 'age of codifications' and culminates with the 'normal' draft Civil Code of the Russian Empire of 1882–1913. After the Bolshevik revolution of 1917, Soviet civil legislation claimed to break away from all continuity with the bourgeois legacy, domestic and foreign. However, even the codification of 'real socialism' in the early 1960 s reveals notable similarities with the 'bourgeois' legal experience. The theoretical concept of the Civil Code of 1964 overlapped with the modern notion of the code during the 'age of codification'. This similarity was backed up by the positivistic legal scholarship that conceptualized Soviet law as a hierarchical and gapless system of binding norms.

This part of the Soviet legal legacy still marks the Russian Civil Code of 1994-2006. Hence, the formalistic pattern of codification remains one of the Soviet relics in contemporary Russian legal style and allows a comparison with other civil law jurisdictions in Europe.

Keywords: *codification; Soviet law; civil code; legal formalism; legal style.*

1. Introduction

Codifications are widely believed to be the hallmark of the civil law legal family. Their impact reaches far beyond the systematic collection of legal provisions and notably affect lawmaking, the interpretation and application of law, and legal education. In so doing, codification secures the current legal style of civil law as opposed to common law.[1] However, this seemingly clear narrative becomes more problematic from a historical perspective which reaches into pre- and post-modernity as the concept of the code and codification evolved and continues to evolve over time and space.

European legal scholarship offers at least two approaches to codes and codification. A broader, *functional* understanding associates the code with an increase in legal certainty by reducing the multiplicity of legal sources. It allows a definition of the code as a set of legal norms arranged in a single body. Hence codification can be understood as the collecting and shaping of these norms in a single body.[2] A narrower, *formal* understanding equates the code with a particular form of European legislation in the modern period. Thus, the code becomes inextricably linked with the rise of the modern (nation-)state which progressively monopolized lawmaking. The code has also become the symbol of political and legal unity or a tool to decrease legal particularism and pluralism, to reassure cultural homogeneity, to serve as the vehicle of legal emancipation from Roman law, and to rationalize government by law.[3]

Split between these two approaches to understanding the code, legal historians extend or shrink the range of statutory acts in European history which could illustrate the process of codification. Is it correct to call Hammurabi's stele or Justinian's *Corpus Juris Civilis* a 'code'?[4] Were the Prussian ALR, Austrian ABGB, and French *Code civil* the only true first codes in (European) history or was it just that the postwar understanding of 'the Code' was not yet fully in place in 19th century Eu-

* Dmitry Poldnikov, Professor of legal history at the School of general and inter-branch legal disciplines, Faculty of Law, National Research University 'Higher School of Economics', Moscow, Russia.

1 See for example: Kischel U., *Comparative law*, Oxford: Oxford University Press, 2019, p. 385 f.

2 Cabrillac R., *Les codifications*, Paris: PUF, 2002 (cited after Russian edition, Moscow: Statut, 2007. p. 108-109).

3 Zimmermann R., Codification: The Civilian Experience Reconsidered on the Eve of a Common European Sales Law, in: *European Review of Contract Law*, 8(4) (2012), p. 367-399. doi:10.1515/ercl-2012-1000.

4 Ankum H., Was the Corpus Juris a codification? in: *Extravagantes. Scritti spars sul diritto romano*, Naples, 2001/2008, p. 399-412; Vanderlinden J., *Le concept de code en Europe occidentale du XIIIe au XIXe siècle: Essay de définition*, Bruxelles: Université libre de Bruxelles, 1967. On the alternative ways of organizing legal information in Roman law see: The Oxford handbook of Roman law and society, C. Ando et al. (eds.), Oxford: Oxford University Press, 2016.

rope?[5] What attributes of a 'true' code are indispensable?[6] Is the modern concept of the code to outlast modernity itself by transforming itself into a code of principles or will it fall prey to the de-codification of private law in the post-war period?[7] The choice of the approach begs these and many other questions which often do not have commonly acceptable answers.

For this paper, it is important to stress that the discourse on the codification or the systematization of legal provisions makes sense for European legal history beyond its Romano-Germanic 'core' jurisdictions further to the east. In the academic literature Eastern Europe is often presented as a patchwork of ruptures, especially in the domain of civil law. First came the (semi-) feudal regulations of the pre-modern *Sobornoye Ulozheniye* (Council Code) of 1649 with its later irregular amendments. This was followed by the titanic efforts of a small bureaucratic team under Mikhail Speransky to collect and re-arrange the law *ŕ la russe* in *Svod Zakonov* (Digest of Laws) of 1833 in the absence of a professional legal community. Next comes the rupture of Alexander II's Great Reforms to modernize Russian law though its 'scientification' and the construction of private law and the BGB-like draft Civil Code of the Russian Empire of the late 19th century. Then, again, the anti-bourgeois Bolshevik revolution of 1917, which led to the brand-new civil law of 'real socialism' diligently reflected in the Principles of Civil Legislation of the USSR of 1961 and the Civil Code of Soviet Russia of 1964. Finally, the collapse of the USSR in 1991 led to the wholesale replacement of Soviet civil law with the 'normal' westernized codification of 1994-2006.

Against this backdrop, it should not be surprising that Russian civil law scholars prefer not to dive deeply into the waters of the 'tradition(s)' of Russian and Soviet codifications. The historiography of Russian civil law codification does not break the narrative of ruptures as it remains overwhelmingly national, fragmentary, and scarce. The history of private law in Russia is often believed to be limited to the mid-1860s through October 1917.[8] All this markedly contrasts with the well-researched national histories of civil law codifications in Western Europe. Although many academics tend to agree that the true European history of codification has still not been written.[9]

The scarcity of the literature on the topic is partially due to the lack of available sources. Unlike historians of the great Western codifications, their counterparts of the Soviet period are deprived of most materials which could disclose the evolving intention of the lawmaker from the initial draft and its motives, its subsequent assessment, and the final draft presented to parliament.[10]

The initial period of the drafting of the first Soviet civil code of 1922 is fairly well known because Vladimir Lenin paid close attention to it – as attested in his wirings readily available now in his '*Complete Works*'. Other archival materials are scarce and what there is were published in Tatyana Novitskaya's book.[11] In the mid-20th century, various ministerial committees engaged in drafting several codified acts of civil law but the best part of the preparatory materials perished due to various unhappy circumstances, including trivial oversight and several moves of the relevant committees around Moscow.[12] The same bad luck happened with the last Soviet codification of civil law of 1991 and even the current Civil Code. In the words of one of the drafters:

> *'…as the civil law scholars [working in the drafting committee – D.P.] were short of time, they thought least of all about preserving the working materials or to date them. Moreover, many of them subscribed to [Boris] Pasternak's opinion that 'one should not create archives or look twice at every manuscript' with their documents as doing so was* mauvais ton*…'*[13]

Legal historians can therefore only venture into more or less probable conjectures based on the published and amended versions of the legislative acts, or the memoires of some drafters.[14]

---

[5] Pihlajamäki H., Why private law not codified in Sweden and Finland, in: Moréteau O. et al. (eds.) *Comparative legal history*, Cheltenham: Elgar, 2019, p. 480.

[6] For example, J. Vanderlinden enumerates the following attributes: 1) perfection, 2) coherence, 3) promulgation and circulation within the jurisdiction, 4) usability, 5) structured content, 6) clarity of language, 7) absence of contradiction, 8) actual application and enforcement, 9) completeness. See: Op. cit., p 163-190. H. Ankum wrote about 11 attributes many of which *Corpus iuris civilis* lacked.

[7] An Italian academic N. Irti was perhaps the first to use 'decodification' to describe the multiplicity of laws outside the codes that started to lose their central position in the European legal systems. See: Giaro T., Dekodyfikacja. Uwagi historyczno-teoretyczne, in: *Dekodyfikacja prawa prywatnego: szkice do portretu*, Warszawa: Fundacja "Utriusque Iuris", 2017, p. 13 f.

[8] Pre-revolutionary legislation is mostly presented by the pre-1917 publications often re-printed after 1991. Soviet codification still waits for its researchers. The domain of civil law has been studied by the authors cited in this paper below. The current codification has not yet become part of 'history' for legal historians.

[9] Obviously, the national phenomenon of modern codification generated nation-focused dedicated historiography that either downplayed, simplified foreign influences, or ignored it altogether. For Spanish, Belgian, and Romanian experience see: Masferrer A., Codification as nationalisation or denationalisation of law: the Spanish case in comparative perspective, in: *Comparative Legal History*, 4(2) (2016), p. 100–130 (with further references to D. Heirbaut and M. Gutan).

[10] Throughout the history of Russian civil law, only the draft Civil Code of the Russian Empire (1882-1913) is well documented with *travaux préparatoires* published several times from 1899 to 1910 (and republished by Wolters Kluwer in 2007).

[11] Novitskaya T., *The Civil Code of the Russian Soviet Federal Socialist Republic of 1922: drafting history, general description, text, appendices*, 2nd ed, Moscow: Zertsalo, 2002, p. 111–178 (in Russian) (on the scarcity of the archives see author's remark on p. 40).

[12] The remaining materials have been collected and digitalized by Aleksander Muranov, *Drafts of the Civil Code of the USSR and other draft materials of the Soviet period* (in Russian) https://zakon.ru/blog/2017/10/24/proekty_gk_sssr_i_nekotorye_inye_civilisticheskie_proekty_sovetskih_vremen#comment_416027 (last accessed on 24. 02. 2002).

[13] Makovsky A., The list of files becoming chronicles, in: *Vestnik grazhdanskogo prava*, 19(6) (2019), p. 177-206.

[14] Makovsky A., *On codification of civil law (1922-2006)*, Moscow: Statut, 2010.

Last but not least, the historiography lacks the conceptual framework to investigate the continuity in the face of the declared ruptures. In this paper, I propose to rely on the *pattern* of codification to link the Soviet codification of civil law with the pre-, post-, and non-Soviet experience. I take this heuristic tool from comparative law, where connections between the pattern of codification and those of lawmaking, its interpretation and application are well-established.[15] It will allow me to show that the codification of 'real socialism' builds on the modern concept of the code and the approach to codification.

The limits of this paper do not allow me to analyze the Russian experience of codification beyond a brief overview (Section 2). Then I present the Soviet concept of the code and investigate it alleged originality (Section 3) against the backdrop of the formalistic approach to codification and the legal system. Finally, I outline the relevance of the Soviet experience with codification for the current Civil Code of the Russian Federation (Section 4).

2. Russian experience with the codification of civil law: an overview

Many Western European scholars deplored the 'age of codifications' as the end of the European unity built on the Roman-canonical *ius commune*.[16] Their Eastern European counterparts do not share these regrets as the modernization of law through its codification and the Pandectist 'scientification' marked an age of much more intense interaction between Eastern and Western Europe. In that sense, the 19th century destroyed one unity but paved the way for another, though at the expense of extinguishing the local legal traditions of Eastern Europe.[17]

The new kind of unity rested on the methodology of juridical interpretation and the form of lawmaking rather than a common set of values and beliefs (as used to be the case of *ius commune*). As a result, unity was lost in substance but was gained in flexibility. Russian history offers a good example. The form and technique of modern codification began to influence Russian law earlier than the values of free-market private law. This influence survived the rupture of the Soviet period and even outlived the USSR.

Russia's experience with the codification of civil law may be presented as follows:

I. Late Imperial Legislation:

1) the draft Civil Code of the Russian Empire of 1811 (modelled by Speransky after the French *Code civil* and rejected as too alien and premature)[18];
2) the 10th volume of *Svod Zakonov* of the Russian Empire of 1833 (systematized by the very same Speransky with more cautious borrowings from major Western legislations);
3) the draft Civil Code of the Russian Empire (1882–1913: a sibling of the German BGB and a major result of comparative legislation);

II. Soviet Legislation:

4) the Civil Code of 1922 (the first civil code of Soviet Russia that paved the way for the civil codes of Soviet Armenia, Azerbaijan, Georgia, Belarus, Ukraine in 1923-1927);
5) the draft Civil Code of the USSR (1938-1952);
6) the Principles of Civil Legislation of the USSR of 1961 and the Civil Code of 1964 (the second civil code of Soviet Russia, together with 15 codes for the sister-republics of the Union);
7) the Principles of Civil Legislation of the USSR of 1991 (promulgated on May 31, 1991 but it became the interim civil code of post-Soviet Russia only on August 3, 1992);

III. Post-Soviet Legislation:

8) the Civil Code of the Russian Federation of 1994-2006 (the first part enacted on January 1, 1995, the final fourth part enacted on January 1, 2008).[19]

Unlike the one-party political regime or the state-controlled economy, the Soviet pattern of codification took shape not by mid-1930s but a decade after World War II. The first Soviet codification of civil law was nothing more than a promptly made concise compilation to provide a legal framework for the interaction of small and medium size entrepreneurs among themselves and with the dominating state entities (but not between the latter) in the years of the new economic policy (NEP, 1921–1929). It was meant to be an 'interim' code to incentivize private production in the devastated country and to create positive publicity abroad.[20]

The code of 1922 did not reflect either new socialist civil relationships (because these did not yet exist) or a particular Soviet pattern of codification. Rather, it tacitly reproduced the pattern of the draft Civil Code of the Russian Empire of 1882–1913 in terms of its abridged structure (the general part, followed by sections on property rights, obligations, inheritance; leaving family law for a special code), content (436 articles being selected and paraphrased norms of 2640 (!) articles of the pre-revolutionary draft), and the concept of the code (a coherent collection of general rules of an area of law). This was of no surprise, given

[15] For references see Kischel U., ibidem; Valcke, Comparing legal styles, in: *International Journal of Law in Context*, 15 (2019), p. 274–296 at 275–277 doi:10.1017/S1744552319000284

[16] Coing H. *Europäisches Privatrecht*, vol. 2 (das 19. Jahrhundert), München: Beck, 1989, p. 10 f.

[17] Giaro T., Legal tradition of Eastern Europe: an epitaph, in: *Civilian studies, Yearbook of civil law*, vol. 2, Moscow: Statut, 2006, p. 127-147 (in Russian; translated from Italian by D.Tuzov).

[18] Ruzhitskaya I., Draft codification of Alexander I as part of his political reforms, in: *Proceedings of the Faculty of History of the St. Petersburg State University*, 3 (2013), p. 130-139 (in Russian).

[19] There is a debate as to the way to break down the codification in Russia. Even the authors cooperating in the same research center for civil law, do not always agree on this point. See: Medvedev D. (ed.), *Codification of Russian private law*, Moscow: Statut, 2019 (in Russian). P. Krasheninnikov breaks it down to seven periods, A. Makovsky writes about five and a half stages.

[20] Makovsky A., Three codifications of the domestic civil law, in: Idem, *On codification of civil law, op. cit.*, p. 17-18.

the tight schedule and the pre-revolutionary education of the drafters (Krasnokutsky, Goikhbarg, Bernstein et al.).

The code of 1922 provided the model for the codes in Soviet Armenia, Azerbaijan, Georgia, Belarus, Ukraine in 1923-1927. However, proper Soviet civil law took shape in the aftermath of industrialization and collectivization. Although the Constitution of 1936 provided for an All-Union Civil Code and the drafting committee was active 1946–1952, it was never completed and civil legislation in Soviet Russia and the USSR generally experienced massive decodification in the 1930s and 1940s. This was due to other priorities in the years of industrialization, the great purges, World War II, post-war devastation, as well as the lack of the theory and technique for the systematization of the legislation.

True Soviet codification of civil law became possible when the USSR restored its economy and its lawyers faced the need to sort out the chaos of post-war legislation. The Principles of Civil Legislation of the USSR of 1961 and the Civil Code of 1964 finally arranged the civil legislation of 'real socialism' since the 1920s.[21] The Soviet authors praised this codification as an innovative document stipulating major rules for property relations within the socialist mode of production (not on the fringes thereof, as in the Civil Code of 1922).

The term 'mode of production' belonged to the economics which rested on state-owned means of production (land and capital) and full control over production through central planning, but it had clear legal implications: civil law was there to regulate the production and selling of raw materials, converting materials into other products, selling such products to state enterprises, shops, and consumers, although the main content of the contracts was dictated by the production plan. All that amounted to a 'conscious imitation of a free market' in order to incentivize production beyond straightforward commands.[22] This civil law encompassed primarily the legal relationships between state entities, also the economic activities of individual citizens (personal ownership over consumer products, intellectual property, succession). Family law and labor law were regulated by particular codes. However, one has to look closer at the theoretical framework of the new codification of Soviet civil law to understand and to appreciate its originality.

3. The Soviet pattern of codification

The theoretical framework for the true Soviet codification was rooted in the rigid legalistic positivism proclaimed at the '1st *All-Union Conference of the Legal Professionals and Scholars on the Issues of the Scholarship of State and Law*' in July 1938. In the 1930s, the relevant narrow normative definition of law (as a system of the rules of conduct created and sanctioned by the state in the interests of the ruling class) was soon coined by the prominent Soviet jurist and Procurator General of the USSR Andrey Vyshinsky to strengthen the governance with the principle of 'revolutionary legalism'.[23]

The imposition of the 'only correct line' led to at least three rounds of debates on the system of Soviet law, as attested in the columns of the legal journal '*The Soviet State and Law*'. During the first round of this debate, shortly after World War II, legal scholars interiorized the only correct concept elaborated by Vyshinsky:

> *'Law is a body of rules of human conduct that comprise [legal norms] stipulated by the state authorities representing the ruling class and customary rules approved and enforced by the same authorities in order to protect and promote social relationships that the ruling class approves and benefits from.'*[24]

It also formed the criteria for arranging and systematizing the growing number of legal acts. Yet, the fundamental criteria for differentiating the branches of law remained unclear leaving no blueprint for organizing the more disordered legislation of late Stalinist period.

This gap was to be filled in during the second round of the debate in the second half of the 1950s and early 1960s. The participants established a correlation between branches of the law and branches of the legislation. In the words of the leading protagonist, professor Nikolai Aleksandrov:

> *'any branch of law can be summarized in a single code[…] which does not have to absorb all the norms of this branch […]. The codification of positive law should be based on the correct, scientifically justified system of the law.'*[25]

By the time of the second Soviet codification, the leading academics agreed on its theoretical underpinnings:

- positive law equals legislation;
- law must be understood as a system of the state-made norms;
- this system is to be broken down into branches, sub-branches, institutes, and particular norms;
- this subdivision must be 'objective', i.e. it must reflect the actual relationships in society.

The third round of the debate in the 1970s finished the construction of the Soviet theory of codification building on the

---

[21] Ibidem, p. 13.

[22] See: Feldbrugge F., The codification process of Russian civil law, in: Julia Arnscheidt et al. (eds.), *Lawmaking for Development: Explorations into the Theory and Practice of International Legislative Projects*, Amsterdam: Leiden University Press, 2008, p. 231-232.

[23] Vyshinsky A., Revolutionary legalism and the tasks of Soviet advocates, in: *Verbatim report at the meeting of Moscow collegium of advocates, 21 December 1933*, Moscow, 1933. The politicians of the 1930s reasoned that the state and law were indispensable as the class struggle was expected to exacerbate on the way to communism.

[24] Vyshinsky A. *Issues of the theory of state and law*, Moscow, 1949, p. 366. The academic master-mind of this round of the debate was Mikhail Arzhanov (1902-1960), associate of the Academy of Sciences of the USSR. See: Arzhanov M. On the principles of constructing the system of Soviet socialist law, in: *The Soviet State and Law*, 3 (1939), p. 27 f.

[25] Aleksandrov N., Discussion on the issues of the system of Soviet law and socialist legality, in: *The Soviet State and Law*, 11 (1958), p. 127; cited after: Azmi D., Historical foundations of studies in system of the law in Russia, in: Rad'ko T. (ed.), *System of law*, Moscow: Prospekt, 2019, p. 45 (in Russian).

recently re-codified legislation. It offered few new insights other than differentiating the notions 'legal system' and 'system of law' on the basis of the popular system theory and system analysis in philosophy and hard sciences.

The leading voice of the period, Professor Sergey Alekseev, in a highly influential monograph '*The structure of the Soviet law*' (1975), insisted on grouping the branches of law with regard to 'actual relationships' in the USSR. He minutely described the hierarchy ('pyramid') of the branches (leading, procedural, special, and synthetic) and speculated on the 'horizontal' correlation between the branches of substantial and procedural law. For codification it was important to acknowledge that the system of legislation was to 'mirror' the system of law. No doubt, Alekseev thought the same way about his first field of studies, i.e. civil law.[26]

Similar voices echoed in the Soviet literature. As Roman Livshits put it, the branch of law provides the blueprint for the branch of legislation. The leading branches of legislation are the exact match of the branches of law. On the contrary, the synthetic branches of legislation may combine legal provisions from different branches of law.

The mirror-principle carried the day and determined the meaning of 'objectively' justified law and legislation. Those who proposed to reverse the relation between law and legislation – i.e. to acknowledge that the system of law is derived from legislation and, consequently, to limit the study of the system of (Soviet) law to positive legislation – remained a minority. As did those who supported the functional approach to the system of law – i.e. focusing on the social needs that it is supposed to address.[27]

The outcome of the academic debates was the formalistic and allegedly original theory of the systematization of legal norms imposed from the early 1960s until the end of the Soviet regime. Codification was put into the framework of other forms to maintain and promote the 'objective' system of law.

a) The most primitive and loose form, called '*inventory*' (*uczet*), implied nothing more than the register of new laws in three or four ways. It played a crucial role in locating and eliminating outdated legal acts which lost their validity *de facto* without being abolished *de iure*.
b) '*Incorporation*' referred to putting particular acts in a collection without modification. This form culminated in the official incorporation – the *Systematic (Full) Collection of the Legislation of the USSR* in the 1960–1970s, complemented by an abridged *Collection of the Laws of the USSR* in 11 vols. and the *Collection of the Laws of Soviet Russia* (1986-1988) in 8 vols.
c) '*Consolidation*' of the legislation meant creating a synthetic single statute on a particular topic, so that previous individual laws lost their validity, but their norms were included into the single statute unchanged. This form covered many 'codes' of the synthetic branches of Soviet law as they lacked a high level of coherence.
d) '*Codification*' was envisaged as the supreme systematization of the law which pulled together various laws and forged them into one coherent new statutory instrument called the 'code'. The result of codification was to have the following features:
   - an act of the state legislation was the most perfect form of coherent lawmaking;
   - cover a branch of positive law;
   - be marked by coherency of the content;
   - formally and symbolically label a 'code';
   - serve as a tool to transform social relations (though the claim is not backed up by proper regulatory impact assessment).[28]

This concept was coherently applied to the second codification of Soviet civil law. Its systematic and systematizing design manifested itself in the general part of civil law distributed between the Principles of Civil Legislation of the USSR of 1961 and the Civil Code of 1964. This two-tier system was due not to the federal structure of the USSR, since its constitution of 1936 provided for an all-union civil code, but rather to the politically motivated concessions of the central government in favor of the union republics in 1957 in the course of restoring Lenin's democratic principles of government.

Against this theoretical framework of codification, the Soviet pattern of codification does not look that original vis-à-vis modern codification. The novelty refers largely to its content, not to its form. Speaking in a lofty style, the Principles of Civil Legislation of the USSR of 1961 and the Civil Code of 1964 were the first legal statutes in the USSR to reflect the civil order of 'real socialism'. In pragmatic terms, this codification provided a detailed legal framework for the restricted usage of pecuniary relationships 'during the construction of communism' (to quote the enacting clause of the Principles of 1961) in the state-controlled economy which was already in place by the mid-1930s.

This civil-law framework was not applicable to the capital goods covered by other codified branches of Soviet legislation (land and subsoil, water, forest, housing code etc.). The civil-law 'sandbox' treated in greater detail the relationships between individuals, between individuals and state entities, and, to lesser extent, the relationships between state entities run in accordance with multiple by-laws. This was the original Soviet civil law without private law and with a simplified legal toolbox – no company law, few real rights or intellectual property, a limited number of contracts to accommodate consumer needs and plan-based relationships between state entities (mostly factories and collective farms), and succession law excluding capital goods. Family law and labor law were singled out as particular branches of Soviet law.

[26] Sergey Alekseev contributed to the second round of the debate with regard to civil law. See: Alexejew S., *Das Zivilrecht in der Periode des umfassenden Aufbaus des Kommunismus*, Berlin: Staatsverlag der DDR, 1964.

[27] See: Yampolskaya C., Sukiyaynen L., The system of Soviet law and the perspectives of its development, reports on the round table of the journal 'The Soviet State and Law', in: *The Soviet State and Law*, 6(1982), p. 94-98.

[28] See: Pigolkin A. Features of the codification of the Soviet legislation, in: Mitskevich A. (ed.), *Lawmaking in the USSR*, Moscow: Juridicheskaya literature, 1974, p. 229-272.

However, formally, the resulting concept of the civil code of 'real socialism' was the perfect match for its modern equivalent. The drafters of the Soviet codes repeated the words of legal theoreticians. The code was to become the linchpin of the branch of law with its particular 'objective' subject matter and method. It accumulated the principles and general rules (singled out in the Principles of 1961 or marked as the general part in the Civil Code of 1964) which provided the guidelines for the legislation of the whole branch.[29]

This combination of Socialist content with Pandectist form was the outcome of the positivistic and ideological perception of the law since the mid-1930s combined with dogmatic legal studies. Alternative approaches had been suppressed, including the main challenger of pure dogmatism – sociological jurisprudence. The pre-revolutionary beginnings in this field died out together with Sergey Muromtsev, Maksim Kovalevski, Yury Gamvarov, and Lev Petrazhitsky, while their sympathizers had to leave the country (such as Grigory Gurvich) or go to internal exile. In the 1920s a few Soviet lawyers (Stuczka, Pashukanis, Babunm, Magerovski, Rasumovski, Stalygevich et al.) worked on a Marxist sociological approach to the law which was suppressed by the mid-1930s.

In the absence of sociological jurisprudence, it was not clear how Soviet civil law would be practically applied and take into account the actual needs of society. Dogmatic legal scholarship postulated the primacy of legal theory over practice, often implied *petitio principii*, and bred disinterest in the law.[30] An illustration of such an attitude is the debate in the 1960-70s on the fault-based liability of public entities for not fulfilling contracts. According to the leading civil law scholar Olympiad Ioffe, the state *arbitrazh* committees, while settling disputes between such entities, refused to acknowledge fault as the basis for holding an entity liable for failure to deliver on a contract. Under the Soviet planned economy, the purpose to award damages was twofold: 1) to restore the assets of the entities as if there had been no failure to deliver, and 2) to incentivize the entities to deliver. There was no need to take fault into account, as the state *arbitrazh* committees discovered. Yet, Ioffe claimed fault to be part of the dogmatic scheme of the civil code. Hence, it was for these committees to change their practice, not *vice versa*.[31] The legislative model trumped the actual needs of public entities.

The Soviet pattern of codification existed unchanged until the late 1980s when the USSR fast-forwarded from the 'acceleration of (socialist) socio-economic development' to a 'regulated market economy' under Mikhail Gorbachev. To accommodate this rapid transition, lawmakers passed multiple new laws that notably de-codified civil law and necessitated the last Soviet re-codification – the Principles of the Civil Law of the USSR of 1991 which should have become law on January 1, 1992. The demise of the USSR and its legal system on December 26, 1991 did not automatically imply a change of the pattern of the codification.

4. The legacy of Soviet codification after 1991

Following the 'retrospective' revolutions of 1989, the nations of Central Europe rushed from 'real socialism' back to 'normal', 'civilized' Europe. The ensuing legal reforms led to the wholesale borrowing of Western institutions which, however, did not mean an easy transition nor the elimination of multiple socialist relics.[32]

Eastern Europe enthusiastically joined the race westwards in 1991. This move marked another rupture in the Russian legal trajectory. Yet, thirty years after the change, the Russian legal system is often identified as post-Soviet due to the relevance of that period. The pattern of the civil code offers an appropriate illustration of this incomplete transition from Soviet to Western.

The first civil law codification envisaging a market economy was the Principles of Civil Legislation of the USSR of 1991 enacted as the law of the Russian Federation on August 3, 1992 'until a new civil code is adopted' (fully repealed on January 1, 2008). This short statute of 170 articles covered general provisions, property and other real rights, obligations, copyright, intellectual property, international private law. Despite its quality, the Principles was too concise to match the scale of the social transformation and the race to draft a new civil code began.

One of the drafters testifies that the enterprise was carried out from March 1992 through the mid-1994 by a group of about 12 'unemployed civil law scholars' who initially drafted the Principles of 1991 and started to prepare a new code without any official mandate, competing with two or three other committees in 1993. Unlike all previous civil codes, this one was prepared with direct international borrowings and with the assistance of foreign experts – Dutch, German, and American.[33]

---

[29] Fleishits E., Makovsky A. The Civil Code of the Russian Soviet Federal Socialist Republic of 1964, in: Makovsky A., *On codification of civil law,* op. cit. p. 192–193 (reprinted from The Soviet State and Law, 8 (1964), p. 14-23).

[30] For the asocial attitude of legal dogmatism see: Fogelson Yu., Russian civil law in terms of sociological jurisprudence, in: *Zakon*, (4) 2019, p. 166-168. For *petitio principii* in the debates on legal system see: Azmi D., op. cit., p. 41.

[31] Ioffe O., Development of civil law scholarship in the USSR (part 1), in: Idem, *Selected Papers on Civil Law*, Moscow: Statut, 2000, p. 165 (first published as a brochure by Leningrad State University in 1975).

[32] Giaro T., Some Prejudices about the Legal Tradition of Eastern Europe, in: Sitek B. et al. (eds.), *Comparative Law in Eastern and Central Europe*, Newcastle: Cambridge Scholars Publishing, 2013, p. 45 f. For further critique of this stereotype see: Law and critique in central Europe: questioning the past, resisting the present, Oxford: Counterpress, 2016, as well as http://ceenels.org (last accessed on 24. 02. 2020).

[33] A. Makovsky expressed his deep gratitude to several Dutch experts: professors F. Feldbrugge and B. Simons, and, most notably, judge W. Snijders, funded by the Dutch ministry of justice. See: Makovsky A., Friendly and Wise Assistance from the Dutch, in: *CILC Focus Newsletter*, 23 (2008). In his recent unpublished presentation at the Private Law Research Centre under the President of the Russian Federation on 24 December 2019, he also specifically mentioned German (Bergman and German Foundation of Legal Cooperation), and American experts (Sumners and White, commentators of the UCC).

The first part of the Civil Code (with a general part, real rights, and major provisions on obligations) was adopted by the Russian parliament on October 21, 1994, the second (1995, a special part of the law of obligations), the third (2001, inheritance law and international private law), and the forth (2006: intellectual property) parts completed the code in due course. As the final, fourth part of the civil code became law on January 1, 2008, all the provisions and the codified acts of the Soviet civil law were fully repealed.

Does all that mean another rupture in Russian legal history in its codification? Again, a clear answer is not simple. As to the substance, the Civil Code of 1994-2006 disassociates itself from the Soviet one, starting with the principles summed up in Art. 1:

- formal equality of the participants of civil-law relations;
- the non-mandatory (voluntary) nature of acquiring and disposing of civil rights;
- guaranteed private property;
- good faith and no abuse of civil rights;

Each of the above has multiple implications in the particular provisions of all subsequent parts of the Code, which claims to be the economic constitution of a society which rushed towards a free-market economy and liberal democracy, and the Code aimed at constructing the rule of law as a bulwark against the return of an authoritarian regime. What is more, due to the ideological transformation, the Soviet legacy has been ignored or downplayed in the civil law discourse while pre-1917 works became 'classical' and were republished in the 1990s.

However, the Civil Code of 1994-2006 was not spared from more than one Socialist 'relic'.[34] The formalistic pattern of the code was one of them. Its symbolic value cannot be contested. The concept of the civil code as the linchpin of branch legislation and by-laws is still widely supported by lawmakers and scholars (both drafters and commentators). The Code offers a coherent set of general legal norms covering the whole area of civil law, which is most visible in its general part (with the same subsections as the Soviet codes but enlarged to over 208 articles compared with 91 articles in the 1964 Code and 51 articles in the 1922 Code). In the opinion of the drafters, the quality of the Code should be measured in updated and new general provisions which generalize the casuistry of multiple cases.[35]

Formal similarities should be understood against the backdrop of the personal continuity of the drafters (all of them became professionals during the late Soviet period), the theoreticians, and the dogmatic pattern of legal scholarship. The leading theoreticians envisage the law as a coherent system of state-made provisions, hierarchically subdivided into the branches built around the codes. They see 'no good reason to replace the adopted (Soviet) approach to legal branches today…'[36], although some voices call for an updated theory of codification and contemplate new forms of codification (electronic, limited to principles, private professional etc.).

5. Concluding remarks

The Russian experience with the codification of civil law reaches back to the second (Pandectist) wave of great codifications in Europe and opens new chapters during its Soviet and post-Soviet periods (including the recent re-codification of 2008–2012). As this paper shows, the Soviet codification claimed to be the most original. The Principles of Civil Legislation of the USSR of 1961 and the Civil Code of 1964 synthesized the civil law of 'real socialism' which had no parallels in Western Europe in terms of its content.

This was civil law without private law, applicable mostly to the relationships between individuals, between individuals and state entities, and, to lesser extent, the relationships between state entities. It offered a simplified legal toolbox (as compared to the pre-revolutionary draft Civil Code and coeval Western codes) as it did not cover the capital goods covered by other codified branches of Soviet legislation (land and subsoil, water, forest, housing code etc.).

Yet, even this truly Soviet codification does not break the continuity with the age of great codifications. The Civil Code of 1964 built on the formalistic vision of the code as the linchpin of the branch of the law with its particular subject matter and method. This vision overlapped with the modern notion of a code and rested on the positivistic perception of Soviet law in the professional legal community. Dogmatic legal scholarship in the USSR valued theory over practice, lacked the tools for socio-legal studies, and saw its mission as fostering civil law through melding particular rules into generalized principles.

This formalistic pattern of codification must be studied and understood from the Russian and European perspective for several reasons. It was deeply rooted in the positivistic scholarship and legislation of the age of great codifications. It was exported to other countries of 'real socialism' together with an authoritarian and positivistic approach to law, dogmatic legal scholarship, and bureaucratic judiciary. It remains one of many socialist relics in Eastern Europe that 'still rule us from their graves', not unlike the forms of action in English common law that remained part of its legal style long after the Judicature Acts of 1873 and 1875.

---

[34] To name but a few: several forms of state entities in the free-market economy, land ownership regulated by the Land Code, separate regimes for plots of land and the constructions thereupon; limited number of real rights, implied nominalism of contracts and their particular kinds, like supply agreement, the agreement to supply agricultural goods etc.

[35] Makovsky A., *Three codifications*, op. cit., p. 14.

[36] Rad'ko T., Theoretical issues of studies in the system of Russian law, in: *Vestnik Adaemii ekinomicheskoy bezopasnosti*, 4 (2015), p. 15 (in Russian). The post-Soviet bibliography on codification features mostly authors who published their principle works before 1991 and stick to their previous claims. See: Pigolkin A. (ed.), *Systematization of the legislation in the Russian Federation*, St. Petersburg: Juridicheskij Center Press, 2003, p. 142-153; Tikhomirov Yu., Theory of a Code, in: *Codification of the legislation: theory, practice, technique, Proceedings of the International conference in Nizhny Novgorod 25-26 September 2008*, Nizhny Novgorod: Akademia MVD, 2009, p. 36-42; Rakhmanina T., *Codification of the legislation*, Moscow: Jurist, 2005; Sivitsky V. (ed.), *Systematization of the legislation as a means of its development*, Moscow: HSE Press, 2010 (collected papers of the faculty of law, Higher School of Economics; despite the outlook into the 21st century, the editor fully acknowledged the relevance of Albert Pigolgin's book cited above in this footnote).

Bibliography

ANKUM H., Was the Corpus Juris a codification? in: *Extravagantes. Scritti spars sul diritto romano*, Naples, 2001/2008, p. 399-412.

CABRILLAC R., *Les codifications*, Paris: PUF, 2002 (cited after Russian edition, Moscow: Statut, 2007).

COING H. *Europäisches Privatrecht*, vol. 2 (das 19. Jahrhundert), München: Beck, 1989.

Dekodyfikacja prawa prywatnego: szkice do portretu, Warszawa: Fundacja "Utriusque Iuris", 2017.

FELDBRUGGE F., The codification process of Russian civil law, in: Julia Arnscheidt et al. (eds.), *Lawmaking for Development: Explorations into the Theory and Practice of International Legislative Projects*, Amsterdam: Leiden University Press, 2008, p. 231-245.

FOGELSON Yu., Russian civil law in terms of sociological jurisprudence, in: *Zakon*, (4) 2019, p. 160-173.

GIARO T., Legal tradition of Eastern Europe: an epitaph, in: *Civilian studies, Yearbook of civil law*, vol. 2, Moscow: Statut, 2006, p. 127-147.

GIARO T., Some Prejudices about the Legal Tradition of Eastern Europe, in: Sitek B. et al. (eds.), *Comparative Law in Eastern and Central Europe*, Newcastle: Cambridge Scholars Publishing, 2013, p. 26–59.

IOFFE O., *Selected Papers on Civil Law*, Moscow: Statut, 2000.

KISCHEL U., *Comparative law*, Oxford: Oxford University Press, 2019.

Law and critique in central Europe: questioning the past, resisting the present, Oxford: Counterpress, 2016.

MAKOVSKY A., *On codification of civil law (1922-2006)*, Moscow: Statut, 2010.

MAKOVSKY A., The list of files becoming chronicles, in: *Vestnik grazhdanskogo prava*, 19(6) (2019), p. 177-206.

MASFERRER A., Codification as nationalisation or denationalisation of law: the Spanish case in comparative perspective, in: *Comparative Legal History*, 4(2) (2016), p. 100–130.

MEDVEDEV D. (ed.), *Codification of Russian private law*, Moscow: Statut, 2019.

NOVITSKAYA T., *The Civil Code of the Russian Soviet Federal Socialist Republic of 1922: drafting history, general description, text, appendices*, 2nd ed, Moscow: Zertsalo, 2002.

PIGOLKIN A. (ed.), *Systematization of the legislation in the Russian Federation*, St. Petersburg: Juridicheskij Center Press, 2003.

PIGOLKIN A. Features of the codification of the Soviet legislation, in: Mitskevich A. (ed.), *Lawmaking in the USSR*, Moscow: Juridicheskaya literature, 1974, p. 229-272.

PIHLAJAMÄKI H., Why private law not codified in Sweden and Finland, in: Moréteau O. et al. (eds.) *Comparative legal history*, Cheltenham: Elgar, 2019, p. 465–481.

RAD'KO T. (ed.), *System of law*, Moscow: Prospekt, 2019.

RAD'KO T., Theoretical issues of studies in the system of Russian law, in: *Vestnik Adaemii ekinomicheskoy bezopasnosti*, 4 (2015), p. 12–15.

RAKHMANINA T., *Codification of the legislation*, Moscow: Jurist, 2005.

RUZHITSKAYA I., Draft codification of Alexander I as part of his political reforms, in: *Proceedings of the Faculty of History of the St. Petersburg State University*, 3 (2013), p. 130-139.

TIKHOMIROV Yu., Theory of a Code, in: *Codification of the legislation: theory, practice, technique, Proceedings of the International conference in Nizhny Novgorod 25-26 September 2008*, Nizhny Novgorod: Akademia MVD, 2009, p. 36-42.

SIVITSKY V. (ed.), *Systematization of the legislation as a means of its development*, Moscow: HSE Press, 2010.

VANDERLINDEN J., *Le concept de code en Europe occidentale du XIIIe au XIXe siècle: Essay de définition*, Bruxelles: Université libre de Bruxelles, 1967.

VYSHINSKY A. *Issues of the theory of state and law*, Moscow, 1949.

VYSHINSKY A., Revolutionary legalism and the tasks of Soviet advocates, in: *Verbatim report at the meeting of Moscow collegium of advocates, 21 December 1933*, Moscow, 1933.

YAMPOLSKAYA C., SUKIYAYNEN L., The system of Soviet law and the perspectives of its development, reports on the round table of the journal 'The Soviet State and Law', in: *The Soviet State and Law*, 6(1982), p. 94-98.

ZIMMERMANN R., Codification: The Civilian Experience Reconsidered on the Eve of a Common European Sales Law, in: *European Review of Contract Law*, 8(4) (2012), p. 367-399. doi:10.1515/ercl-2012-1000.

Jeremy Bentham and the Judicial Reform of 1864 in Russia

*Konstantin P. Krakovskiy**

Abstract

The article deals with the influence of the ideas of J. Bentham, set out in his treatise „On the judiciary", on the authors of the judicial reform of 1864 in Russia. The author divides the ideas and suggestions of Jeremy Bentham, concerning the court, into three groups: rejected by the reformers, partially accepted, and those, which were enshrined in the Judicial Statutes of 1864.

The first group included the ideas of a single court, the replacement of judges and the election of all judges by the people, of a jury in civil cases. The ideas of the great English philosopher of law, partially adopted by the „fathers of judicial reform of 1864", include, in particular, the idea of creating a mechanism for the removal of negligent judges. The ideas of J. Bentham, which found their place in the text of the Judicial Statutes of 1864, - the creation of the institution of jury, trial lawyers, ensuring high salaries of judges, publicity of the proceedings, the establishment of the optimal contingent of judges, etc.

The author notes, that the debate over the ideas of Bentham continued after the Judicial Statutes were created and became the law. This historiographical phenomenon once again reveals the relevance of the ideas of the great English philosopher of law about court and legal proceedings for the Russian post-reform reality. And for the modern Russian court, which is in a state of sluggish judicial reform since the early 90-ies of the last century, a number of ideas of Bentham have not lost its importance.

The author emphasizes, that despite the paradox of some of the Bentham's ideas about court, the great English philosopher of law was concerned about the high idea: to create a project of a fair trial, credible to the people.

Keywords: *judicial reform; judicial systém; independence of the court; election of judges; jury; publicity of proceedings; criminal and civil proceedings; political trial.*

1. Introduction

"Benthamiana" (domestic – Russian - and foreign) is so vast, that it seems that there is not a single meaningful fragment of the life or teachings of the great Englishman, an outstanding philosopher of law, "Lawmaker of the World" Jeremy Bentham, which would not attract the close attention of researchers. But there is one topic that is covered less than others: Bentham's doctrine of court system. For example, in the most extensive research in Russian literature about the great English philosopher of law by P. Pokrovsky only a little more than a dozen pages are devoted to this field of Bentham's work from almost 700 pages of the monograph.

K. Yanevich-Yanevsky in a lengthy article on the legal works of Bentham also devoted only a few pages (p. 285-291) to the works of Bentham about the court. However, he made an important stipulation for us: "Nowhere Bentham did expressed so much insight, so much wit, nowhere his activity was more directly practical and applicable to life, than in the field of court and judicial proceedings".[1]

The latest dissertation researches, sensitively "grasping" scientific and other relevance, as a rule, are devoted to Bentham's unfading doctrine of law, but, unfortunately, not his doctrine on the court.[2]

The part of this «judicial-procedural theme» which is interesting to us is the influence of Bentham's ideas on the «fathers of judicial reform»[3] of 1864 that remains in the shadow at all. Even the omniscient Brockhauz and Efron Encyclopedic Dictionary devoted only one phrase to this topic: "At the begin-

* Konstantin P. Krakovskiy, Doctor of Law sciences, Professor of the Chair of State Science of the Institute of State Service and Management, The Russian Presidential Academy of National Economy and Public Administration (RANEPA), Moscow, Russia.

1 Yanevich-Yanevskiy K. Bentam i znacheniye yego v oblasti yuridiko-politicheskikh nauk. In: *Yuridicheskiye zapisi* (Bentham and his importance in the field of legal and political sciences // Legal notes*)*. Vol. 4. St. Petersburg, 1860. p. 285.

2 See: Ostroukh A.N. *Ucheniye Bentama o prave (Bentham's doctrine of law).* Dissertation of the candidate of legal sciences. Moscow, 2002; Seidedemetova R.E. *Gosudarstvenno-pravovyye vzglyady I. Bentama, B. Konstana, L. Fon Shteyna: istoriko-pravovoy analiz.* (State-legal views of J. Bentham, B. Constan, L. Von Stein: historical and legal analysis. Dissertation of the candidate of legal sciences). Saratov, 2011.

3 This expression belonging to the outstanding Russian lawyer A. F. Kony became famous. See his book: *«Ottsy i deti sudebnoy reformy»* (Fathers and children of judicial reform) (Moscow, 1914).

ning of the last reign (Alexander II - K.K.), when extensive judicial reforms started… interest in Bentham's works reappeared in our society: A. Knirim published, according to Dumont, Bentham's essay "On the Judiciary" (St. Petersburg, 1860)" [4]

Before starting the analysis of the above-mentioned work of Bentham about the court and its influence on the authors of the Judicial Statutes of 1864, I consider it necessary to make a small digression concerning the «Russian theme» in the biography of Jeremy Bentham.[5]

2. Bentham and Russia

The fate of Bentham has repeatedly run across the fate of Russia. His first meeting with the "cold and harsh country" took place in 1786-1787, when he lived in Kremenchug with his younger brother Samuel, who served as a shipbuilder for Russian count G.I. Potemkin. It was then that J. Bentham completed his famous treatise "Panopticon" on the rational, or rather, ideal construction of the prison (it is very symptomatic, that it was in Russia, that his thoughts about the prison so rapidly developed).

The second meeting took place at the beginning of the 19th century, when he almost became the "soul" of the Russian *dolgostroy* (long-term construction) - the systematization of national legislation, which continued throughout the 18th and early 19th centuries. J. Bentham closely followed the work of the Commission on drafting laws and offered to Emperor Alexander I his, we emphasize, voluntary, assistance in the process of codification.[6] However, the disfavor of the talented and energetic M. M. Speransky, in whose success Bentham was confident, and transfer of codifying law process to Baron G. A. Rozenkampf (in the letter to Alexander I, Bentham spoke harshly about this «radically incapable man», assuring him that he would rather send his advice to the sovereign of Morocco, rather than to the Commission, headed by Baron Rosenkampf) put him off the idea.[7]

Nevertheless, I cannot resist the temptation to cite an excerpt from the letter of J. Bentham to Emperor Alexander I, concerning the preparation of the Russian criminal code (May, 1814). Referring to his 66 years age (venerable age) and his "Theory of Civil and Criminal Laws" published in 1805 in Russian, Bentham wrote that after this essay, French and Bavarian civil codes appeared - good, in Bentham's opinion, but both of them were based on Roman law, but not his theory. According to Bentham, Russia does not need such "ballast": "In the human body there are some features, that occur always and everywhere, while others change with the change of place and time. I paid particular attention to the latter. I know the features of Russia from experience. I spent two years of my life in Russia, the most devoted to observations. We have seen quite a few codes on the French model. Order, Sovereign, and Russia *will produce a sample of its own* (italics by K.K.). Let Europe then judge it».[8] Indeed, a country needs to live with its own legal mind; this thought has not lost its relevance to this day.

Unfortunately, Bentham seemed excessively radical to the Emperor and our conservatives of that time, and the first Russian «Criminal code» - the Code of criminal and correctional penalties – would appear only in 1845, thanks to the efforts of M. M. Speransky, a sincere admirer of the ideas and talents of the English philosopher of law, and the one Bentham himself considered extremely intelligent and talented as mentioned above.

So, let's get back to the «judicial topic». When visiting St. Petersburg in 1802, Bentham's friend and publisher of his works, Frenchman E. Dumont,[9] in a letter to his English friend gave the following description of Russian lawyers: «If you knew what the local attorney or lawyer in general is, you would blush for the honor of your profession. And judges! In England you cannot imagine the concept of the local magistracy here. I am sure that in 10 years everything will change here.» [10]

Alas, Dumont's optimism was not justified. Only 62 years later, the judicial reform was completed, which created a new court and conditions for the appearance of a fundamentally new type of lawyer. And it happened, in our opinion, not without the ideological participation of J. Bentham, although by this time his mummified body, dressed in a suit of that era, according to his will, was preserved in a glass Cabinet in the foyer of University College London for more than 30 years (where, by the way, it is preserved to this day).[11]

---

[4] «Entsiklopedicheskiy slovar'» Brokgauza i Yefrona (Brockhauz and Efron Encyclopedic Dictionary). Vol. 5. p. 460.

[5] See: Pypin A.N. Russkiye otnosheniya Bentama. In: *Vestnik Yevropy* (Russian relations of Bentham // Bulletin of Europe). 1869. Book. 2. (February) p. 784-815; Book. 4. (April). p. 730-788; *3.* Ayzenshtat M.P. Iyeremiya Bentam i Rossiya. In: *Yevropa i Rossiya: Diplomatiya i kul'tura* (Jeremy Bentham and Russia // Europe and Russia: Diplomacy and Culture) Moscow: 1995. p. 161-170; *Filosofskiy vek.* Al'manakh. Vypusk 9. Nauka o morali: J. Bentam i Rossiya. / Otv. redaktory T. V. Artem'yeva, M. I. Mikeshin (The philosophical age. Almanac. Issue 9. *The science of morality: J. Bentham and Russia.* / Editors T.V. Artemyeva, M.I. Mikeshin). Saint-Petersburg, 1999. p. 85-198; Christie Ian R. *The Benthams in Russia 1780-1891*. Oxford, 1993.

[6] When later the Russian Emperor wished to thank the famous Englishman by sending him an expensive diamond ring, Bentham would return it to the King, noting that he follows the principle of not accepting gifts and rewards for his labors. How not to recall the Poet: „He is just an example for others…»

[7] Pokrovskiy P. *Bentam i yego vremya*. Uchenyye zapiski imp. Petrogradskogo universiteta (Bentham and his time. Scientific notes by the Imperial Petrograd University). Publication 3. Petrograd, 1916, p. 687

[8] Cit: Knirim A. Bentam i yego sochineniya (Bentham and his works). In: *Journal of the Ministry of justice.* 1860. April. p. 83.

[9] Pierre Etienne Louis Dumont (1759-1829) – friend, publisher, translator and popularizer of J. Bentham's works.

[10] Cit: Levenson P. YA. *Bekkaria i Bentam. Ikh zhizn' i obshchestvennaya deyatel'nost'* (Beccaria and Bentham. Their life and social activity). St. Petersburg, 1893. p. 84. We should pay attention to the pleasant as well as the unexpected news reported to Bentham by Dumont at the same time (both for Bentham and for the pride of Russians): in Russia there were sold as many copies of Bentham's book as in London.

[11] Professor W. Butler, at the meeting in University College London told to the author of this article the following story: this glass Cabinet with the body of Jeremy Bentham is delivered every time to the meetings of the Council of the University, and the great Englishman is „present but not voting"… the British joke that in case of equality of votes of members present the voice of Bentham gives the advantage.

3. Bentham's book and the Judicial Reform of 1864

In 1860 J. Bentham's treatise "On judiciary" was published in Russian, at the height of the preparation of the judicial reform.[12] There is no doubt that this was not a regular publication of the work of the great Englishman, but an event specially dedicated to the work of the Commission on the transformation of the judicial system in Russia.[13] It is symptomatic, that the translation of this work was made by A. A. Knirim,[14] a highly respected member of the Commission and a big admirer of Bentham ideas, as well as the main «engine» of the same Commission S. I. Zarudny.[15]

A few words should be said about the very complex and even fascinating history of this work of the great Englishman, as well as many other his works.

As you know, Bentham responded to *global events* - it was his level. Therefore, he could not remain indifferent to the Great French Revolution.[16] The issue of the transformation of the court was brought up at one of the first meetings of the Constituent Assembly of France. There was formed a Committee consisting mainly of lawyers and judges and this Committee developed a draft of the judicial reform of an eclectic nature: combining the old institutions and the principles of the court with the new ones. After reading this project Bentham became indignant, as it was noted by the researchers: a lot of courts, a wide assembly, a lot of instances, the prevention of publicity in civil cases, unnecessary formalities…, i.e. everything that was contrary to his ideas about a fair and perfect court. He decided to submit a review of the draft to the Constituent Assembly.

Bentham published four articles to refute the draft of the Committee of the Constituent Assembly in the Paris journal "Courrier de Province", published by Mirabeau. However, he did not limit himself to criticizing this project, but wrote at the same time (1789-1790) his own project entitled «Draught of a Code for the organization of the Judicial Establishment in France». It was published at the first time in 1790.[17] Bentham hoped to persuade the Constituent Assembly to accept his, Bentham's, project of a new court system and legal proceedings; however, despite the project found many supporters in England and in France, the Bentham's project was not accepted.

Failure has not weakened his creative impulse, so he continued working and soon published it like this: there were two columns – in the first one he placed the text of his draft and in the other one - other comments and explanations (in English).[18]

In 1802, Dumont prepared and published a three-volume work of Bentham in French. He placed the above-mentioned work of the English philosopher of law translated into French in the 3rd volume (however, Dumont did not publish a draft declined by the Constituent Assembly, but only the comments of Bentham, and replaced the form of their presentation, moreover, added a lot of his own comments – Bentham did not object!) entitled «L'organisation judiciaire et de la Codification» (vol. 3. p. 1-126). In 1828 Dumont published the second edition of this work by Bentham (in French), but the Russian translation of 1860 was made from the edition of 1802.

It is interesting that while publishing a Russian translation of this work by Bentham, the editorial Board of the journal of the Ministry of justice, recognized, that it was an outstanding work, but stipulated that the Board «did not mean to attach to this work the importance of the project, the application of which would be convenient for any state. On the contrary, many of Bentham's ideas… with their undoubted merit in theoretical terms, are only bold assumptions that can only exist as the idea. Even the legislation of the western European countries declared the Bentham project as impracticable and stayed on the same principles, opposite to the ideas of the famous lawyer.[19]

It is symptomatic that third chapter, for censorship reasons, was excluded from the original treatise, describing the name of whom justice should be administered, and developed the thesis that justice should not be administered in the name of the monarch or any other person, but in the name of justice itself.[20] This is easily explained: at that time Russia was an absolute monarchy and such free statements were unacceptable to the regime then.

Bentham's work «On the judiciary» received a very favorable public response in Russia, not only from liberal lawyers.[21] that is easily explained, but also from representatives of the left wing of Russian social and political thought, in particular N. G. Chernyshevsky, who positively appreciated the book and especially supported the idea of introducing a jury trial in Russia.[22] Peter Tkachev (the future founder and ideologist

---

[12] Initially, this work of J. Bentham was published in parts as appendices to the „Journal of the Ministry of justice" (May - September 1860), and only later it was published as a separate book. See: *On the judiciary* / By J. Bentham; by FR. ed. Dumont, by A. Knirim, St. Petersburg: 1860. 222 p.

[13] At the same time the works on the foreign court and foreign procedural codes were translated into Russian and published. They were used by the „ fathers of the judicial reform „and were included in the" Materials on judicial reform in Russia in 1864 „ in 74 volumes collected by S. I. Zarudny.

[14] Knirim Alexander Aleksandrovich (1837-1904) was a Senator, an active participant in the preparation and implementation of the judicial reform of 1864, worked as Chairman of the Commission of Civil code drafting, since 1901 – a member of the State Council. Published „Journal of civil and criminal law".

[15] Zarudny Sergey Ivanovich (1821-1887) - mathematician by education and self-taught lawyer, became the main person in the preparation of the judicial reform, Senator, author of a number of books about the Russian court.

[16] See: Blamires C. *The French Revolution and the Creation of Benthamism.* London: Palgrave. 2008.

[17] Published later in 4th Volume by John Bowring, executor of Bentham's will (The Works of Jeremy Bentham published under superintendence of his executor John Bowring. In XI vols. Edinburg. MDCCCXLIII. Vol. IV. P. 285-406.

[18] Bentham J. *Plan of a judicial establishment.* London, 1792.

[19] Journal of Ministry of justice. 1860. Book 5. (May).

[20] See: Pokrovsky P. *Op. cit.* p. 669.

[21] Knirim A. *Bentam i yego sochineniya (Bentham and his works)* p. 53-88; Yanevich-Yanevskiy K. *Op. cit.* p. 237-295.

[22] Chernyshevskiy N.G. Retsenziya na knigu Bentama «O sudoustroystve» (Review of Bentham's book "On the Judiciary"). In.: *Sovremennik* (Contemporary). 1860. Book 12. p. 289-304. The review was included in the Collected works of Chernyshevskiy N.G. (Moscow., 1950. Vol. VII. p. 505-510).

of the «plot» direction in the revolutionary populism) was the admirer of Bentham's ideas and in 1861 he was expelled from the 1st year of the faculty of law of St. Petersburg University for his participation in student unrest, which did not prevent him from 1862 to 1866 to place in journals scientific articles and reviews (!) on the court. Inspired by Bentham he supported, in particular, the need for the magistrates in Russia, the advocacy.

When in 1867 the first, and, unfortunately, the only, volume of the three-volume book of selected works by Bentham in Russian[23] was published, the «Bulletin of Europe» welcomed the publication of the book and reminded, that the judicial reform announced three years earlier, revived interest in civil and criminal law, so we need to turn to the roots of our legislation, and «Bentham is useful for this.»[24]

Comparison of the organization and principles of functioning of judicial authorities, stated in the book of J. Bentham, with the projects of the Commission on the transformation of the judicial authorities in Russia shows, that some of Bentham's ideas were declined, some were accepted partially, and finally, a number of his ideas found their way in the text of Judicial Statutes of November 20, 1864.

We have no direct evidence that some of Bentham's ideas were enshrined in the text of the Statutes: many of them were similar to those enshrined in the legislation on the court of a number of European countries, which was also used as an example by the «fathers of judicial reform».[25] But I am sure, that the authority of J. Bentham and his ideas could not remain without their attention, especially in the post-reform literature devoted to judicial reform of 1864, it was possible to meet many responses, polemics in connection with Bentham's ideas, and about this we will tell below.[26]

4. Bentham's ideas rejected by the "fathers of judicial reform»

Some of the ideas, expressed by Bentham in his treatise "On the judiciary", were not accepted by the "fathers of judicial reform", and it was them that Russian authors drew attention to in the post-reform years, unlike Bentham, who already knew what was enshrined in the Judicial Statutes: this, of course, made the task of critics more simple. Thus, J. Bentham insisted on the principle of the replacement of judges[27] and their election by the people.[28] as a guarantee against their abuse. Bentham's argument is important: the judge must earn public trust. «It is not enough for a judge to be just, it is necessary for him to be considered just», Bentham said. In his opinion, this system will make judges value the qualities that gain universal love: affability, patience, smooth communication, which are very rare between judges (I note that the insight of the great philosopher and lawyer allowed him to look into the distant future of the Russian Themis). It is important to mention, that Bentham was concerned about the creation of guarantees of justice for judges. He saw it in the right of society to choose judges, and in the natural right to displace them.

The next idea is the *single jud*ge.[29] Bentham presented a whole system of arguments that, in our view, have not lost their relevance, in favor of the consideration of cases by a single judge. Let us give an example of argumentation in favor of this proposal by Bentham and refutation of his idea by the Russian opponent.[30] The table makes it easier to compare the weight of arguments and counterarguments.

J. Bentham	J. Mikhailovsky
The honesty of the judge depends on his responsibility to public opinion and to the law – it is obvious, that the collegial form weakens the responsibility in proportion to the number of judges (the sole judge is very attentive, in the board the judge can hide behind the backs of other judges in the board).	It is possible to create procedural guarantees when none of the members of the board could say – the verdict is not mine, I have nothing to do with it; in English law – every judge publicly gives his vote.
The sole judge is obliged to consider the public opinion more than the board.	The court should not be subject to public opinion, should be independent. And the board is easier to show independence than one person.
Collegial form gives more possibility for bribing and for influence than the sole judge.	He considers this statement actually unfounded – it is easier to bribe one.

[23] *Izbrannyye sochineniya Iyeremii Bentama* / Per. po angl. izd. Bouringa i fr. Dyumona, A.N. Pypina i A.N. Nevedomskogo. (Selected Works of Jeremy Bentham / Translation of English edition of Bowring and French edition of Dumont, by A.N. Pypin and A.N. Nevedomsky. Vol. 1. St. Petersburg, 1867. (The library of classical Western European writers in Russian translation).

[24] K. A-v Biograficheskie zametki *(*Bibliographic notes) In: *Bulletin of Europe.* 1867. Vol. IV. (December). p. 35.

[25] See: Krakovskiy K.P. K voprosu o vliyanii inostrannogo, v tom chisle frantsuzskogo zakonodatel'stva na Sudebnyye ustavy 1864 g. In: *Pravovyye instituty Rossii i Frantsii* (The question of the influence of foreign, including French, legislation on the Judicial Statutes of 1864 // Legal institutes of Russia and France). Moscow, 2018. p. 301-313.

[26] In this regard it is difficult to explain that the author of the only generalizing pre-revolutionary work on the influence of foreign legislation and doctrine on the draft judicial reform I.G. Shcheglovitov never even mentions the name of J. Bentham. See: Shcheglovitov I.G. *Vliyaniye inostrannykh zakonodatel'stv na sostavleniye Sudebnykh ustavov* (The Impact of Foreign Legislation on the Judicial Statutes drafting). Moscow, 1914.; *Sudebnyye ustavy 20 noyabrya 1864 za pyat'desyat let.* V 2-kh tt (The judicial statutes of November 20, 1864 for fifty years. In 2 Vol.). Saint-Petersburg, 1914. Volume. 1. p. 233- 285.

[27] Bentham J. *O sudoustroystve* (On judiciary). St. Petersburg, 1860. p. 68-73. Hereinafter, references are given for this publication.

[28] Bentham J. Op. cit. p. 21-22.

[29] Bentham J. *Op. cit. p*. 34-47.

[30] Mikhailovsky J.V. *Osnovnyye printsipy organizatsii ugolovnogo suda* (Basic principles for organizing a criminal court). Tomsk, 1905, p. 178-182.

The vast majority of cases are simple, there will be no difference of opinion.	Complexity and simplicity are relative terms; it is better for a panel to discuss the nuances of the case (exchange of opinions is helpful).
Practice shows, that in the boards the case is usually decided by a single judge (the presiding judge or reporting judge) – the rest judges in laziness or carelessness – are passive, but approving by their presence the credibility of the presiding judge.	The board is holding back the presiding judge from abuse.
Attention and diligence of people weakens when they rely on one another - hence the possibility of mistakes.	Fatigue and attenuation of attention – does not depend on the collegial form – there are other reasons (procedural defects, encumbrance of the court work).
Collegial form entails slowness and complexity of proceeding – this is bad for justice.	Yes, single judge decides faster, but the courts differ in principle from the administrative procedure by its slowness and difficulty; keeping with its ceremonies – the value of the court. A speeding up can be achieved by other means (improvement of the investigation, procedural improvements).
The individual form gives the chance to the most talented ones involve in judicial chairs, and to pay their work highly.	The country never exhausts from talented people, cheap court is a bad court. And a bad court – poor finance.

We believe, that reasonable arguments are presented by both opponents. The Commission left the sole judge for the Magistrates court (Justice of the Peace) in the Judicial Statutes. Collegiality has remained in the general jurisdiction court. 150 years will pass and Russia will return to the predominantly sole form of consideration of cases. So, was Bentham so wrong then?

Another idea that has not received support in the Commission is the creation of a *jury in civil cases*, however, not in the first, but in the appellate instance.[31] Undoubtedly, the English lawyer's commitment to the legal traditions of the common law family played a role here; in the Civil law family this judicial form was not supported. «Fathers of the judicial reform» did not take it and limited the jury to the criminal process. There are appeals for the creation of this judicial form in modern Russian legal science.[32]

It is hard to believe, but Bentham spoke in favor of the introduction of such institutions as «public prosecutors» and «public defenders" in legal proceedings[33]. The idea, of course, could not have the right to live in an absolute monarchy, but, as it is well known, was picked up in the Soviet period.

Even the atmosphere of the court was the focus of Bentham's attention. In his opinion, everything should be beautiful and majestic during the trial. Needless to say, as one of these attributes, he advised, of course, to follow the example of the English court, to introduce the mantle for all judges. «Fathers of the judicial reform» missed this advice, and it was used by judges only in post-Soviet Russia.

5. The ideas of Bentham, partially accepted in 1864

Bentham's idea of election of judges was partially accepted,[34] though it was applied only to Magistrates court, and then only in the provinces of «native Russia» (Central Great Russian provinces). In the national regions of Siberia judges were still appointed by the government.

Bentham's good idea of the necessity and possibility to remove *negligent judges:* he believed that "the reasons that weaken public confidence are often such that they do not allow any other means than resignation; the very possibility of resignation may have a beneficial effect without application to the case" - was not enshrined in the Judicial Statutes. There was stated the responsibility and removal of judges only in the case of a crime; in all other cases of "negligence", only weak forms of disciplinary responsibility were applied.

Only in 1885 the Supreme disciplinary office of the Senate was created, entitled with the right to relocate and even to dismiss the judge due to different omissions in his duty, devoid of signs of a crime[35]. As in other cases of metamorphosis of «good ideas», this mechanism was used by the Ministry of

[31] Bentham J. *Op. cit.* p. 159-168.

[32] See.: Domrachev I.G. Sud prisyazhnykh v grazhdanskom sudoproizvodstve In: *Yuridicheskaya nauka i praktika* (Jury trial in civil proceedings // Jurisprudence and practice). 2016. № 2. p. 129-132; Kuklina V.Ye., Tombulova Ye.G. K voprosu o vozmozhnosti vozrozhdeniya suda prisyazhnykh po grazhdanskim delam v Rossii In: *Yevraziyskiy nauchnyy zhurnal* (The question of the possibility of the revival of the jury in civil cases in Russia // Eurasian Scientific Journal). 2016. № 11. p. 96-97; Gribov N.D. Modeli uchastiya grazhdan v osushchestvlenii pravosudiya po grazhdanskim delam // *Arbitrazhnyy i grazhdanskiy protsess* (Models of citizen participation in the administration of justice in civil cases // Arbitration and Civil Procedure). 2018. № 1. p. 21-26.

[33] Bentham J. *Op. cit. p.* 75-79.

[34] Bentham J. *Op. cit.* p. 21 et seq.

[35] Vysochayshe utverzhdennoye mneniye Gosudarstvennogo soveta «O poryadke izdaniya Obshchego nakaza sudebnym ustanovleniyam i o distsiplinarnoy otvetstvennosti chinov sudebnogo vedomstva» In: PSZ. Sobraniye 3. (The Highly approved opinion of the State Council „On the procedure for issuing the General Order to judicial institutions and on the disciplinary liability of the officials of the judicial department" // Complete collection of laws of the Russian empire. Collection 3rd), Vol. V. № 2959.

justice to eliminate unfavorable judges, primarily for political reasons.[36]

Bentham was a principle *opponent of the "special courts"*, which have jurisdiction over certain categories of cases. "By creating special courts, you create a new science, constructing a labyrinth on the way to justice," he insisted.[37] However, he admitted existence of military, religious, admiralty (on merchant ships) courts, courts in the representative assemblies, providing an order during a meeting.

Russia could not resist: although in the initial discussions on the jurisdiction of cases of state crimes it was planned to transfer them to the jury,[38] the conservative point of view prevailed and already in the Judicial Statutes, in addition to the types of special courts allowed by Bentham (military, religious, «people's» courts of customary law), it was provided for the creation of the Supreme criminal court for particularly important cases of state crimes. Later (1872) in addition to it Special Office of the Governing Senate for consideration of political cases was established.[39] Analysis of the political cases in these two aforementioned instances[40] once again proves the truth of the great Englishman on the issue of the inadmissibility of «special courts».

6. Bentham's ideas enshrined in the Judicial Statutes of 1864

Bentham's idea of *utilitarianism*, as applied to the reform of justice, was considered as *useful* and accepted by the authors of the Judicial Statutes, because, like the great Englishman, they proceeded from the need to create "a court that is prompt, just, merciful and equal for all."[41] And in the documents of their discussion, we will find more than once a glimpse of Bentham's idea of the importance of ensuring public confidence in the court. It was the concern for the latter that led to the introduction of completely forms and principles, completely new for Russia, but introduced in Western European legal proceedings long ago.

First of all, it should be said about the *jury*, although we must say that Bentham, expressing skepticism about this judicial form, still found a number of advantages in it. He called the conditions – guarantees against injustices of the jury in criminal cases:

- use a lot in voir dire and unmotivated withdrawal;
- a temporariness of jury duty;
- the jury must not be appointed by judges or persons in their power.[42] All these conditions have found their place in Judicial Statutes.[43]

Bentham was a consistent and staunch advocate of *publicity*. "In my opinion," he wrote, "publicity in the courts is tantamount to all other precautions taken together".[44] He even made a specific proposal, that the courtrooms must accommodate 200-300 people. He assigned to the press no less role, which was to deliver to society extensive information about the trials. Another «branch of publicity» Bentham saw in the fact that judges were required to give the grounds for their decisions and make the public, the deviation from this rule, he considered inappropriate.[45]

Unfortunately, in post-reform Russia, the principle of publicity of legal proceedings, enshrined in the Statutes of 1864, was seriously corroded, especially when it came to political or other famous processes.[46] Information about the processes in press

---

[36] Perhaps this very circumstance explains why this measure is traitionally considered in Russian historiography as an act of judicial counter-reform. See, for example: L. Zaitsev. *Nezavisimost' suda.* (Independence of the court). Saint-Petersburg, 1912. p. 12 et seq.; Shibanov A. S. *Nesmenyayemost' sudey v Rossii: 1864–1917 gg.*: Avtoref., DiS… kandidat yuridicheskikh nauk (The irremovability of judges in Russia: 1864–1917: Synopsis of a thesis by candidate of legal sciences). Saratov, 2001; Ryzhov D. S. Vyssheye distsiplinarnoye prisutstviye Pravitel'stvuyushchego senata kak organ nadzora za sudebnymi uchrezhdeniyami v poreformennoy Rossii In: *Pravo i politika.* (Higher Disciplinary Office of the Governing Senate as a Supervisory Authority for Judicial Institutions in Post-Reform Russia // Law and Politic). 2007. № 9. p. 110 et sec. Meanwhile, it should be remarked that the outstanding Russian lawyer A.F. Koni saw the creation of a Higher Disciplinary Office as a positive measure in the same sense as Bentham. See: Koni A.F. *Ocherki i vospominaniya (Essays and memories).* St. Petersburg, 1906. p. 743-745.

[37] Bentham J. *Op. cit.* p. 15.

[38] See: Materialy po sudebnoy reforme v Rossii 1864 g. V 74-kh tt. Proekt Razdela 7-go Ustava sudoproizvodstva ugolovnogo, ob osobennykh rodakh sudoproizvodstva v delakh po prestupleniyam i prostupkam. Ob"yasnitel'naya zapiska (Materials on judicial reform in Russia in 1864. In the 74 vols. Volume 7 (Section 1). Draft Section 7 of the Charter of criminal proceedings on special types of proceedings in cases of crimes and misconduct. Explanatory note. p. 158-168; Ibid. Vol. 18. Part. 2. p. 8-14.

[39] Vysochayshe utverzhdennaya novaya redaktsiya razdela vtorogo knigi tret'yey Ustava ugolovnogo sudoproizvodstva, st. 1030-1061 o sudoproizvodstve po gosudarstvennym prestupleniyam // PSZ. Sobr. 2-ye. (The highly approved new edition of the section of the second book of the third Charter of criminal proceedings, Art. 1030-1061 on proceedings on state crimes // PSZ. Collection 2nd.). Vol. XLVII. № 50956.

[40] See.: Krakovskiy K.P. *Politicheskaya yustitsiya v Rossii vo vtoroy polovine XIX-nachale XX vv.: istoriko-pravovoye issledovaniye.* (Political justice in Russia in the second half of the 19th and beginning of the 20th centuries: historical and legal research). Moscow, 2012.

[41] This is a line from the decree of Alexander II, which approved the Judicial Statutes on November 20, 1864.

[42] Bentham J. *Op. cit.* p. 172-184.

[43] *Uchrezhdeniye sudebnykh ustanovleniy* (Establishment of judicial regulations). Sec. 2. Chapter. 2. On jury. Art. 81-109 // Judicial statutes of November 20, 1864. St. Petersburg, 1864.

[44] Bentham J. *Op. cit.* p. 133.

[45] We think that this valuable indication of the great philosopher and lawyer should draw the attention of modern legislators, purposefully reducing the obligation to declare the motives of judicial decisions.

[46] See: Vysochayshe utverzhdennoye mneniye Gosudarstvennogo soveta «Ob izmenenii i dopolnenii statey 88, 89, 620-622, 624, 918, 1056, 1061a i 1103 Ustava ugolovnogo sudoproizvodstva» In: Polnoye Sobraniye Zakonov (The highest approved opinion of the State Council "On Amending and Supplementing Articles 88, 89, 620-622, 624, 918, 1056, 1061a and 1103 of the Charter of Criminal Procedure" // Complete Collection of Legislation). Collection 3. Vol. VII. № 4227.

(in political processes) were significantly reduced in the 70-ies of the XIX century: only the resolutions of the courts were published, if the trial took place behind closed doors.[47]

Bentham also touched a number of specific problems in the organization of judges ' work. He justified the approach to the question of the optimal *number of judges*, which had to be established in accordance with the "geographical principle": there had to be connection to the territory of judicial districts and the number of people living there, being distracted from any extraneous considerations, such as the administrative division of the state.[48]

«Fathers of the judicial reform» «fulfilled» these «valuable instructions» of the great Englishman entirely.[49] They collected accurate statistics on the territories of Russia, the number of residents, and created judicial districts that do not coincide with the territorial division of the state (the latter has also become an important guarantee of the independence of the court[50]).

The authors of the Judicial Statutes also accepted Bentham's idea of the *incompatibility of the profession of judge and other profession*: this according to Bentham created a danger to honesty and good reputation of a judge, as in this case the judge has any other relationship is a source of passion, thereby weakening the confidence of the people to the court.[51]

Bentham said, that inadmissibility for a judge to do business had to be compensated by a sufficiently high salary, and coming exclusively from the state Treasury.[52] Cheap justice can cost much for people. We must pay tribute to the «fathers of the judicial reform», who honorably fulfilled the will of the great philosopher of law: the salary of judges of the Russian courts, established in 1864, conceded only to salaries of the English judges, but in 2-4 times exceeded the maintenance of judges in the countries of continental Europe (France, Italy, etc.).

However, we should not forget in this context the important statement of Bentham: no matter how the salary of the judge is increased, it will not be enough to guarantee his justice and impartiality. «Publicity, the right of appeal, the judge's awareness of the importance of his duty – that's the true guarantee of his good behavior» - insisted Bentham.[53]

Bentham considered gradual *increase in the status of judges* as an important condition for the success of the judicial career, his transition to higher courts as his experience grows (he drew here an analogy with the growth of ranks in the army).[54] This provision also found a response from the creators of Judicial statutes, which established requirements for the length of service at each step of the judicial hierarchy.[55]

Bentham even paid attention to the details of the trial, such as the obligation (as a guarantee against the predilection) of a public announcement by the judge that he had any interest in the trial,[56] which was to serve as the basis for the recusal of judge.

And, of course, it is impossible to pass by Bentham's arguments about the important role of the advocacy («trial lawyer – assistant of the judge in the search for truth») in the trial.[57] As you know, for a long time the Russian autocracy considered the profession of the trial lawyer as a very vicious, and treated it with some organic prejudice.[58] Nevertheless, one of the significant innovations of the judicial reform of 1864 was the introduction of the bar in Russia. Undoubtedly, one of the arguments that inspired the creators of Judicial Statutes in favor of the bar was the opinion of Jeremy Bentham.

7. Controversy after the judicial reform of 1864

I would like to draw attention to the fact, that the controversy over Bentham's ideas about the basics of the court's structure and its functioning did not disappear even after the Judicial Statutes became law on November 20, 1864.

M. A. Filippov, the author of the *first* research on judicial reform of 1864, argues with a number of proposals of J. Bentham, stated in his treatise "On the judiciary", about the organization of the court. He neglected an extremely subtle ethical principle, which was followed by one of the most active polemists in the science of legal history of Russia M. F. Vladimirsky-Budanov all his life. He could start a very hot dispute with a person, whose views on a particular subject of science, he did not share. But he stopped any controversy after the death of his opponent for a simple but good reason: the opponent could not answer him.

---

47 Vysochayshe utverzhdennoye mneniye Gosudarstvennogo soveta «O dopolnenii sushchestvuyushchikh uzakoneniy o pechatanii sudebnykh resheniy»// PSZ. (The highest approved opinion of the State Council "On the addition of existing laws on the printing of court decisions" // Complete Collection of Laws). Collection 2nd. Vol. L. № 54353.

48 *Bentham J.* Op. cit. p. 11-12.

49 See: *Krakovskiy K.P.* Provedeniye sudebnoy reformy v Rossii. Chast' 1-ya // *Severo-Kavkazskiy yuridicheskiy vestnik.* (Realization of Judicial reform in Russia. Part 1 // North Caucasian legal Bulletin). 2014. № 3. p. 20-25.

50 During the ongoing discussions in modern Russia on ways to develop sluggish judicial reform, there are urgent proposals to return to the idea of recreating judicial districts (and relevant courts) that do not coincide with the boundaries of administrative-territorial division. The author strongly supports the embodiment of the old ideas of Bentham.

51 Bentham J. *Op. cit.* p. 58-60.

52 Bentham J. *Op. cit. p.* 54-57.

53 Bentham J. *Op. cit.* p. 57.

54 Bentham J. *Op. cit.* p. 61-63.

55 Uchrezhdeniye sudebnykh ustanovleniy. Razd.6. Gl. 1. Otdeleniye 1-ye. Ob usloviyakh dlya zanyatiya dolzhnostey po sudebnomu vedomstvu. // Sudebnyye ustavy 20 noyabrya 1864 g. (Establishment of judicial regulations. on the conditions for holding positions in the judicial Department. // Judicial statutes November 20, 1864) Section 6. Chapter. 1. p. 203-210 In: Judicial statutes, November 20, 1864. St-Petersburg. 1864.

56 Bentham J. *Op. cit.* p. 66-67.

57 Bentham J. *Op. cit.* p. 97-119.

58 See.: Vas'kovskiy Ye.V. *Organizatsiya advokatury* (Organization of advocacy). Vol. 1. St-Petersburg, 1893. p. 320 et seq.

M. A. Philippov presented controversy with J. Bentham on all more or less fundamental issues of the organization and functioning of the court, expressed by the English philosopher of law in the treatise "On judiciary", throughout the text of his major monograph. Thus he criticized Bentham's ideas concerning the principle of replicability of judges,[59] the order of appointment of judges,[60] the right of judges to hold public office,[61] payment of court costs and expenses of the judicial department,[62] judicial career,[63] military courts[64] and the sole judges.[65]

Later Mikhailovsky J.V., professor of Tomsk University, took part in this controversy with Bentham on the question of the sole or collegiate form of the court[66]. Also I. Y. Foinitsky presented the arguments of Jeremy Bentham in favor of the collegiality of the court, he did not examine them, but merely stated, that they were not accepted by the legislator in 1864.[67]

It is possible to treat this kind of distance controversy with the dead philosopher of law in different ways, but its very existence shows that the ideas of the great English philosopher of law Jeremy Bentham were still at the center of the intellectual life of the legal world of Russia. This is not surprising, because Bentham, while expressing sometimes even paradoxical ideas and proposals, had the goal of creating an honest, fair court, credible to people, there were no any political conditions; and the similar thoughts did not leave Russian legal intellectual elite throughout the post-reform and late Imperial period.

Bentham believed, that honesty for a judge was even more important than independence; a judge must always be «a warden of law, a warden of society.» He considered the court as the instrument to bring the laws into the real life; and therefore their faith in law is their first duty. Citizens rest their hopes on the laws, and if the court decisions meet these expectations, as the result there will be public confidence in the court.[68]

If we sum up the view of Bentham on the perfect justice, it would look like the following: a well-educated, experienced and moral judge must decide the case, guided by the principles of natural justice and under vigorous and constant control of the representatives of public opinion and that the latter should be, of course, equipped with adequate facilities for the control.[69]

Russian court was transformed in 1864 close to this «standard». In other words, several ideas and proposals put forward by Jeremy Bentham for revolutionary France were declined there, but were accepted in absolutist Russia in 1864.

8. Conclusion

Alas, the judiciary power and its institutions, principles and forms, created then, were corroded.[70] In 1868, Minister of justice D. N. Zamyatnin, one of the «fathers of the judicial reform», was replaced by K. I. von der Palen, the first Russian head of the Judicial Department, a lawyer by education, but being «administrative» by origin - the former Governor of the Pskov region. It was he who began the campaign for «bureaucratization» of the new courts. According to contemporaries, the ideal court for him was «the court, which would decide on the orders of the authorities».[71] Successors of Palen (N. A. Manasein, according to A. A. Polovtsev, «during the appointment it was announced to him to destroy Judicial Statutes,»[72] and N. V. Muraviev, by definition of Alexander III, «a lawyer who realizes all that is irrelevant and subject to cancellation in a judicial proceedings»[73]) acted in the same direction until I. G. Shcheglovitov (Minister of Justice in 1906-1915) has started ugly judicial proceedings, later named «Shcheglovitov justice»,[74] the obvious antithesis of «Bentham justice».

In conclusion, it should be said, that there is a remarkable feature in the analyzed above, like in many other works of Jeremy Bentham – the desire to create a fair trial on the best grounds. And now watching the slow ongoing judicial reform in modern Russia, one want to exclaim (rephrasing Lomonosov slightly): «Is it possible, that Russian home ground would give birth to our own Platons and quick minded… Benthams «?!

---

[59] Philippov, M.A. *Sudebnaya reforma* (Judicial reform). Vol. 1. Saint-Petersburg, 1871-1875. p. 59-63.
[60] Op. cit. 92-98.
[61] Op. cit. 217-230
[62] Op. cit. 300-308.
[63] Op. cit. 324-327.
[64] Op. cit. 427, 439, 455
[65] Ibid. Vol. 2. p. 266-299.
[66] See.: Mikhailovsky J.V. *Osnovnyye printsipy organizatsii ugolovnogo suda* (Basic principles for organizing a criminal court). p. 178-182.
[67] Foinitsky I. Y. *Kurs ugolovnogo sudoproizvodstva* (Criminal Justice Course). Saint-Petersburg, Vol. 1, 1884. p. 308-309.
[68] According to the sociological survey by VTSIOM (ВЦИОМ) in 2018 concerning the question, whom citizens of Russia do not trust the most, there was the judicial system in the first place with 37.2% See: Resnik J. Bring back Bentham: 'open courts,' 'terror trials,' and public sphere(s) // *Law, Ethics, Human Rights.* 2011. № 5 (1). P. 1–69; Savkina, M.A. Doveriye grazhdan k pravosudiyu: sostoyaniye i perspektivy // *Vestnik Nizhegorodskogo universiteta im. N.I. Lobachevskogo.* (Citizens ' trust in law: state and prospects // Bulletin of Nizhny Novgorod University. N. I. Lobachevsky) 2013. № 6(1). p. 317-320.
[69] See.: Pokrovsky P. *Op. cit.* p. 480.
[70] See.: Vilensky B. V. *Sudebnaya reforma i kontrreforma v Rossii* (Judicial reform and counter-reform in Russia). Saratov,1969; Nemytina M.V. *Sud v Rossii: vtoraya polovina XIX-nachalo XX (The court in Russia: the second half of the XIX-early XX centuries). Saratov*: SUI, 1999.
[71] *Diary of Milutin D.A*., Moscow., 1950. Vol. 3. p. 42.
[72] Cit: Zayonchkovskiy P. A. *Rossiyskoye samoderzhaviye v kontse XIX stoletiya. Politicheskaya reaktsiya 80-kh-nachala 90-kh godov (Russian autocracy at the end of the XIX century. The political reaction of the 80s-early 90s).* Moscow, 1970. p. 257.
[73] Polovtsov A.A. *Dnevnik gosudarstvennogo sekretarya* (Diary of state secretary). Moscow., 1966. Vol. 2.p. 452, 458.
[74] See.: Krakovskiy K.P. *«Shcheglovitovskaya yustitsiya» v Rossii (Ministerstvo yustitsii pozdneimperskogo perioda po materialam Chrezvychaynoy sledstvennoy komissii Vremennogo pravitel'stva)* ("Shcheglovitov justice» in Russia (Ministry of Justice of the late imperial period based on the materials of the Extraordinary Investigation Commission of the Temporary Government). Moscow, 2014.

Bibliography

BENTHAM J. On courts (О судоустройстве). Saint-Petersburg, 1860.

BENTHAM J. Draught of a Code for the organization of the Judicial Establishment in France// The Works of Jeremy Bentham published under superintendence of his executor John Bowring. In XI vols. Edinburg. MDCCCXLIII. Vol. IV. P. 285-406.

AYZENSHTAT M.P. Iyeremiya Bentam i Rossiya // Yevropa i Rossiya: Diplomatiya i kul'tura (Jeremy Bentham and Russia // Europe and Russia: Diplomacy and Culture) Moscow: 1995. p. 161-170.

BLAMIRES C. The French Revolution and the Creation of Benthamism. London: Palgrave. 2008.

CHERNYSHEVSKIY N.G. Retsenziya na knigu Bentama «O sudoustroystve» (Review of Bentham's book "On the Judiciary"). 1860. Book 12. p. 289-304.

CHRISTIE Ian R. The Benthams in Russia 1780-1891. Oxford, 1993.

Filosofskiy vek. Al'manakh. Vypusk 9. Nauka o morali: Dzh. Bentam i Rossiya. / Otv. redaktory T. V. Artem'yeva, M. I. Mikeshin (The philosophical age. Almanac. Issue 9. The science of morality: J. Bentham and Russia. / Editors T.V. Artemyeva, M.I. Mikeshin). Saint-Petersburg, 1999. p. 85-198.

FOINITSKY I. Y. Kurs ugolovnogo sudoproizvodstva (Criminal Justice Course). Saint-Petersburg, Vol. 1, 1884.

KAZANTSEV S.M. Istoriya tsarskoy prokuratury. (The history of the czarist prosecutor's office). Saint-Petersburg, 1993.

KUTAFIN O.E., LEBEDEV V.M., SEMIGIN G.Yu. Sudebnaya vlast' v Rossii: istoriya, dokumenty. V 6 tt. T. 3. Ot Svoda Zakonov k sudebnoy reforme 1864 g. (otv. redaktor toma A.V. Naumov) (Judicial branch in Russia: history, documents. In 6 vols. T. 3. From the Code of Laws to judicial reform of 1864 (editor-in-chief of the volume A.V. Naumov). Moscow, 2003.

LIEBERMAN D. Bentham's Democracy // Oxford Journal of Legal Studies, 2008, 28 (3): p. 605–626.

LONG D. G. Bentham on Liberty: Jeremy Bentham's Idea of Liberty in Relation to his Utilitarianism. Toronto: University of Toronto Press. 1977.

LONSKAYA S.V. Ocherki istorii mirovoy yustitsii Rossiyskoy imperii (1864-1917 gg.). (Essays on the history of magistrates court of the Russian Empire (1864-1917). Moscow, 2013.

Materialy po sudebnoy reforme v Rossii 1864 g. V 74-kh tt. (Materials on judicial reform in Russia in 1864. In the 74th vol. (the only copy is kept in the Russian Department of the National Library of Russia in St. Petersburg).

MIRONOV B.N. Sotsial'naya istoriya Rossii perioda imperii (XVIII-nachalo XX v.). V 2-kh tt. T. 2. Genezis lichnosti, demokraticheskoy sem'i, grazhdanskogo obshchestva i pravovogo gosudarstva. (The social history of Russia during the empire (XVIII-early XX century). In 2 vols. T. 2. The genesis of personality, a democratic family, civil society and the rule of law. Saint-Petersburg, 2003). Saint-Petersburg, 2003.

MIKHAILOVSKY J.V. Osnovnyye printsipy organizatsii ugolovnogo suda (Basic principles for organizing a criminal court). Tomsk, 1905.

NEMYTINA M.V. Sud v Rossii: vtoraya polovina XIX-nachalo XX (The court in Russia: the second half of the XIX-early XX centuries). Saratov, 1999.

ORLOV A.A. «Pust' Iyeremiya Bentam prigotovit… kodeks!». Traktat Dzh. Bentama «Plan vseobshchego i vechnogo mira» (1786-1789 gg.) i yego vliyaniye na Rossiyu // Lokus: lyudi, obshchestvo, kul'tury, smysly. ("Let Jeremy Bentham prepare… a code!" The treatise by J. Bentham, „The Plan of Universal and Eternal Peace" (1786-1789) and its impact on Russia // Locus: people, society, cultures, meanings.). 2015. № 2. p. 53-62.

OSTROUKH A.N. Ucheniye Bentama o prave., DiS… kand. yurid. nauk (Bentham's doctrine of law. Dissertation of candidate of legal sciences). Moscow, 2002.

PHILIPPOV, M.A. Sudebnaya reforma (Judicial reform). Vol. 1-2. Saint-Petersburg, 1867.

POKROVSKIY P. Bentam i yego vremya. Uchenyye zapiski imp. Petrogradskogo universiteta (Bentham and his time. Scientific notes by the Imperial Petrograd University). Publication 3. Petrograd, 1916.

POPOVA A.D. «Pravda i milost' da tsarstvuyut v sudakh» (Iz istorii realizatsii sudebnoy reformy 1864 goda) ("Shall Truth and mercy reign in courts" (From the history of the implementation of the judicial reform of 1864). Ryazan, 2005.

POSTEMA G. J. Bentham and the Common Law Tradition, Oxford: Clarendon. 1989.

PYPIN A.N. Russkiye otnosheniya Bentama // Vestnik Yevropy (Russian relations of Bentham // Bulletin of Europe). 1869. Vol. 1. Book. 2. p. 784-819; Vol. 2. Book. 2. p. 730-788.

QUINN, M.A. Failure to Reconcile the Irreconcilable? Security, Subsistence and Equality in Bentham's Writings on the Civil Code and on the Poor Laws //History of Political Thought. 2008. 29 (2). P. 320–343.

RESNIK J. Bring back Bentham: 'open courts,' 'terror trials,' and public sphere(s) // Law, Ethics, Human Rights. 2011. № 5 (1). P. 1–69.

SAVYUK L.K. Portrety uchenykh-yuristov: Iyeremiya Bentam // Pravo. Zhurnal Vysshey shkoly ekonomiki (Portraits of legal scholars: Jeremy Bentham // Law. Journal of the Higher School of Economics). 2012. № 4. p. 19-38.

SEYDEMETOVA R.Ye Gosudarstvenno-pravovyye vzglyady I. Bentama, B. Konstana, L. Fon Shteyna: istoriko-pravovoy analiz., DiS… kand. yurid. nauk (State-legal views of I. Bentham, B. Constan, L. Von Stein: historical and legal analysis. Dissertation of candidate of legal sciences). Saratov, 2011.

SHAKHRAY S.M., KRAKOVSKIY K.P. Sud skoryy, pravyy, milostivyy i ravnyy dlya vsekh. K 150-letiyu Sudebnoy reformy (The court - quick, fair, gracious and equal for all. To the 150th anniversary of the Judicial Reform). Moscow, 2014.

SHCHEGLOVITOV I.G. Vliyaniye inostrannykh zakonodatel'stv na sostavleniye Sudebnykh ustavov (The Impact of Foreign Legislation on the Judicial Statutes drafting). Moscow, 1914.

Sud prisyazhnykh v Rossii: gromkiye ugolovnyye protsessy 1864-1917 gg. / Sost. S.M. Kazantsev (Jury trial in Russia: famous criminal trials of 1864-1917 / By S.M. Kazantsev.). Leningrad., 1991.

Sud prisyazhnykh v Rossiyskoy imperii: ideya, zakonodatel'stvo, prakticheskaya deyatel'nost' /Pod red. A.A. Demicheva (Jury trial in the Russian Empire: idea, legislation, practice / Edited by A.A. Demicheva. Moscow, 2015.

Sudebnaya sistema i grazhdanskoye obshchestvo Rossii: k 150-letiyu sudebnoy reformy. Sbornik nauchnykh trudov (The judicial system and civil society in Russia: on the 150th anniversary of judicial reform, Collection of studies). Saratov, 2015.

Sudebnaya sistema Rossii: istoriya i sovremennost': doklady i stat'i uchastnikov nauchno-prakticheskoy konferentsii, posvyashchennoy 150-letiyu sudebnoy reformy Aleksandra II (The judicial system of Russia: history and modernity: reports and articles of participants in a scientific and practical conference dedicated to the 150th anniversary of the judicial reform of Alexander II). Moscow, 2015.

Sudebnyye reformy v kontekste istorii rossiyskoy gosudarstvennosti: k 150-letiyu Sudebnykh ustavov 1864 g. Sbornik nauchnykh rabot po itogam konferentsii // Istoriko-pravovyye problemy: novyy rakurs (Judicial reforms in the context of the history of Russian statehood: on the 150th anniversary of the Judicial Statutes of 1864. A collection of scientific papers from the conference // Historical and legal problems: a new perspective). Publication. 9. Kursk, 2014.

Sudebnyye ustavy 20 noyabrya 1864 za pyat'desyat let. V 2-kh tt (The judicial statutes of November 20, 1864 for fifty years. In 2 Vol.). Saint-Petersburg, 1914. Volume. 1.

TROITSKIY N.A. Advokatura v Rossii i politicheskiye protsessy 1866-1904 gg. (Advocacy in Russia and the political processes of 1866-1904). Tula, 2000.

Velikaya reforma. K 150-letiyu Sudebnykh ustavov. V 2-kh tt. (The great reform. To the 150th anniversary of the Judicial Statutes. In 2 volumes.) Moscow, 2014.

VILENSKY B. V. Sudebnaya reforma i kontrreforma v Rossii (Judicial reform and counter-reform in Russia. Saratov,1969.

WORTMAN R.S. Vlastiteli i sudii: Razvitiye pravovogo soznaniya v imperatorskoy Rossii. (Rulers and Judges: The Development of Legal Consciousness in Imperial Russia). Moscow, 2004.

On the Impartiality of the Prosecutor in the Courts of the Russian Empire (Normative Regulation and Practice of Implementation)

*Vasil Gorbachov**

Abstract

The article deals with theory, normative regulation and practice of implementing the principle of impartiality when supporting prosecution by the Prosecutor's office in the courts of the Russian Empire after the judicial and military-judicial reforms of 1864 and 1867. The Prosecutor's office was organized on the principle of subordination of lower-level prosecutors to higher-level ones. However, this principle did not apply during the trial in which the Prosecutor enjoyed procedural independence, which created conditions for an objective assessment by the prosecutor of the evidence available in the case. The author analyzes the grounds, practice and consequences of prosecutors' refusals from the prosecution, as well as the attitude of the Prosecutor's superiors to them. Also shown are violations of the prosecutor's impartiality principle in court.

Keywords: *judicial reform; prosecutor's office; indictment; accusation; impartiality; accusatory bias; evidence; accusatory speech; refusal of accusation.*

1. Introduction

One of the main and most consistent reforms of the 60s-70s of the XIX century in the Russian Empire was the judicial reform of 1864 and the military-judicial reform of 1867, which radically changed the judicial system. In particular, the adversarial principle of consideration of criminal cases in court was introduced, which assumed the equality of procedural rights of parties – the prosecution and defense. The function of the prosecution in a court was assigned to the Prosecutor's office, which previously did not perform this function in the civil department, and in the military department the Prosecutor's office did not exist at all. The Prosecutor's office was organized on the principle of centralization, subordination of lower-level prosecutors to higher-level ones. However, this principle did not apply during the trial in which the Prosecutor enjoyed procedural independence, which created conditions for an objective assessment by the prosecutor of the evidence available in the case.

The Statute of Criminal Proceedings of 1864 (SCP),[1] the Military-Judicial Statute (MJS)[2] and the Naval Judicial Statute (NJS)[3] of 1867 required that prosecutors be impartial, and did not set the task to accuse at any cost. However, these requirements of the law were not always fulfilled. Therefore, it is important to study not only the regulatory framework, but also the practice of implementing the principle of impartiality of the Prosecutor in court.

2. Normative requirements of the impartiality of the prosecution and its violations

The main duty of the Prosecutor in court was to maintain the prosecution. However, the law forbade a Prosecutor in the accusatory speech to present the case unilaterally (that's, to extract from it only the circumstances that incriminated the defendant from it), to exaggerate the value of the evidence in the case or the importance of the crime in question (article 739 of SCP, article 808 of MJS, article 799 of NJS). The instructions of the prosecutors of the court chambers demanded the same.[4]

And in practice, there were examples that principled Prosecutor's employees, who did not have the opportunity to exercise the right on their independent position and impartiality in maintaining the accusation, refused to enter the trial. And this had negative consequences for them. For example, in 1878, in the resonant case of Vera Zasulich's attempt to assassinate the St. Petersburg city governor F. Trepov, deputy district court Prosecutor S. Andreevsky believed that in the accusation speech it was necessary to condemn Trepov's illegal orders, which served

* Vasil Gorbachov, PhD, Associate Professor, lawyer of the Donetsk Regional Bar Association Dnipro, Ukraine.

1 Устав уголовного судопроизводства (Высочайше утвержден 20 ноября 1864 года) [The Statute of Criminal Proceedings (Highest approved on November 20, 1864)]. In: *[Полное собрание законов Российской империи (ПСЗ РИ) [The Complete collection of laws of the Russian Empire (CCL RE)].* Coll. 2nd. Vol. 39, part 2. Saint Petersburg, 1867, Nr. 41476, pp. 215-306.

2 Военно-судебный устав (Высочайше утвержден 15 мая 1867 г.) [The Military-Judicial Statute (Highest approved on May 15, 1867)]. In: ПСЗ РИ *[CCL RE].* Coll. 2nd. Vol. 42, part 1. Saint Petersburg, 1871, Nr. 44575, pp. 536-637.

3 Военно-морской судебный устав (Высочайше утвержден 15 мая 1867 г.) [The Naval Judicial Statute (Highest approved on May 15, 1867)]. In: *ПСЗ РИ [CCL RE].* Coll. 2nd. Vol. 42, part 1. Saint Petersburg, 1871, Nr. 44576, pp. 637-736.

4 *Инструкция для руководства лицам прокурорского надзора Одесской судебной палаты [The instruction for directing the persons of Prosecutor's supervision of the Odessa court chamber].* [Odessa, 1872], pp. 30-31.

as the reason for attempted assassination. This was necessary "for the strength and dignity of the accusation itself", that is, in order to avoid the one-sidedness of the accusation. However, Andreevsky did not receive permission to do so, and therefore refused to comply with the requirement to become an accuser in this trial. For this refusal, he was transferred to another post, and then he resigned from the Prosecutor's office and moved to the Bar.[5]

However, such examples were rare, and the one-sidedness of accusers was widespread. Regarding the final debate of the parties, the preparatory Commission, when discussing the draft Statute of criminal proceedings, drew attention to the fact that no matter how much the Prosecutor tries to maintain impartiality, "the very appointment of him to be an accuser of a crime will inevitably make him one-sided".[6] And practice has confirmed these concerns.

According to A.F. Kony, in the late 1870s and early 1880s, the speeches of prosecutors were impartial, and exceptions to this general rule were rare.[7] However, already in 1883, the press wrote about metamorphoses in the general direction of the Prosecutor's office activities, the usefulness of which began to be measured not "exclusively by the disclosure of the truth", but by the number of convictions. "Inexperienced youth" for career purposes resorted to one-sidedness, illegibility of means, denigration of the defendant, who became, to a certain extent, a personal enemy; disclosure of the truth faded into the background.[8] In 1886, the press mentioned the "well- known fact" that under some Ministers of justice, the promotion of prosecutors "was determined not so much by the merit of the investigation as by the number of convictions obtained".[9]

Contemporaries noted that for the Prosecutor's office a one-sided accusatory approach was quite natural, and it could not always overcome it.[10] They also noted that in the Statute of Criminal Proceedings, it was most often violated precisely article 739, which prohibited the one-sidedness of the accusatory speech.[11] According to the memoirs of jurors, the prosecution (as well as the defense) often suffered from extreme one-sidedness, the deputy prosecutor very often unfoundedly denied the most serious doubts about the guilt of the defendants and resorted to "stretch"; such prosecutors usually considered it their duty to "drum in" the jurors that their duty was only to answer: "Yes, guilty".[12] And in the Soviet period, N. A. Troitsky noted that the bias of the prosecution was an «indispensable feature» of political processes.[13]

Regarding the accusatory bias, well-known jurist A. Kony, who worked as a prosecutor and chairman of the district court, chief procurator of the Governing Senate and a senator, gives in his memoirs a expressive example of the accusatory bias of the speech of one of the prosecutor, who in 1903, acknowledging the absence in case of the necessary evidence, told the jurors that he in their place would have found the available evidence insufficient for prosecution, and further stated: "But as a representative of the prosecution, and therefore a representative of society and the state, I nevertheless support the prosecution against the defendants and loudly declare that in the future, with equally small evidence, I will draw up indictments: there have been too many thefts recently, and we will protect society from them by putting suspected repeat thieves in pre-trial detention, even if they are based on such evidence". A. Kony noted that in previous years, such a statement by a Prosecutor's office employee was unthinkable both for its cynicism and for the complete perversion of the Prosecutor's tasks in trial.[14]

Convicts often complained about the Prosecutor's one-sided approach to the prosecution. However, in the judicial practice of the Governing Senate, the one-sidedness, incorrectness arguments, incompleteness and other shortcomings of the accusatory speech were not grounds for the annulment of the sentence, since the defendant and his defense lawyer had the right to refute the content and arguments of the Prosecutor's accusatory speech.[15,16,17]

3. The refusal of the Prosecutor from the accusation in the court (normative and moral requirements)

Even when preparing the draft Statute of Criminal Proceedings, the government commission emphasized that "the Prosecutor is an accuser of a crime in the name of the law, for which

---

[5] KONY, A. F., *Собрание сочинений : в 8 т. [Collected works (Vols 1-8)],* vol. 4. Moscow, 1967, p. 195.

[6] *Объяснительная записка к проекту Устава уголовного судопроизводства [Explanatory note to the draft Statute of Criminal Proceedings].* [Saint Petersburg, 1863], p. 276.

[7] KONY, A. F., *Курс уголовного судопроизводства [Criminal justice course].* Moscow, 2011, p. 159.

[8] Обвинительно-ораторские приемы нашей прокуратуры [Accusatory-oratory techniques of our Prosecutor's office]. In: *Судебная газета [Judicial newspaper],* Nr. 12, 1883, pp. 2-3.

[9] Съезд прокуроров [Congress of Prosecutors]. In: *Русь [Rus],* Nr. 27, 1886, p. 7.

[10] IFLYAND, P., К вопросу о роли суда в период приготовительных к суду распоряжений [On the role of the court in the period of pre-trial orders]. In: *Журнал министерства юстиции [Journal of the Ministry of Justice],* Nr. 6, 1902, pp. 166-167.

[11] Хроника [Chronicle]. In: *Сборник правоведения и общественных знаний [Collection of jurisprudence and public knowledge],* vol. 4, 1895, p. 154.

[12] NIKITIN, V., Петербургский суд присяжных (наблюдения и впечатления присяжного заседателя) [Petersburg jury trial (observations and impressions of a juror)]. In: *Отечественные записки [Domestic notes]*, Nr. 5-6, 1871, pp. 378-380, 385.

[13] TROITSKY, N. A., *Безумство храбрых. Русские революционеры и карательная политика царизма. 1866-1882 гг. [Madness of the brave. Russian revolutionaries and the punitive policy of tsarism. 1866-1882]*. Moscow, 1978, p. 191.

[14] KONY, 1967, p. 136.

[15] *Решения уголовного кассационного департамента Правительствующего Сената за 1870 год. Первое полугодие [Decisions of the Criminal cassation department of the Governing Senate for 1870. First half-year].* Saint Petersburg, [1870], pp. 142, 444, 528, 798.

[16] *Решения уголовного кассационного департамента Правительствующего Сената за 1870 год. Второе полугодие [Decisions of the Criminal cassation department of the Governing Senate for 1870. Second half-year].* Saint Petersburg, [1870], pp. 914, 2065.

[17] *Решения уголовного кассационного департамента Правительствующего Сената за 1873 год. Второе полугодие [Decisions of the Criminal cassation department of the Governing Senate for 1873. Second half-year].* Saint Petersburg, [1873], pp. 918, 1555, 1599.

the conviction of a guiltless person is even more repugnant than the acquittal of a guilty person"; therefore, the purpose of all actions of the Prosecutor should not be the prosecution, in order to achieve at any cost, the conviction of the accused, but "exclusively the disclosure of the truth, whatever it may be – in the guilt or guiltless of the defendant".[18]

The Governing Senate also clarified that the task of the Prosecutor's office in the court is not only to demand that the guilty be punished, but also to help the court achieve the truth by exposing the guilty or by establishing the innocence of the defendants.[19] Judicial practice has developed a rule that any doubt is interpreted in favor of the defendant. However, due to the fact that this requirement was absent in the law, its violation was not a reason for cassation of the sentence.[20,21]

One of the manifestations of the impartiality of the Prosecutor's office was using of the possibility of the Prosecutor's refusal to continue maintaining the prosecution in court, as stipulated by the CPS, MJS and NJS. This was a progressive rule of the law, which was absent in foreign (for example, French and German) legislation.[22] The drafters of Court statutes found it necessary that the prosecutor, who was the accuser, to have not only the right but also the duty to refuse the accusation, when it contradicted his belief or was refuted by the evidence presented at the trial.[23] Acknowledging that the indictment was refuted by court investigation, the Prosecutor was obliged, not supporting it, to "declare it to the court in conscience" (art. 740 SCP, art. 809 MJS, art. 800 NJS). Departmental instructions also spoke about this. For example, the Prosecutor of the Odessa court chamber explained in his instruction of 1872 that, in the cases provided for by law, the refusal to charge was not only the right, but also the duty of the accuser.[24]

In this regard, A. Kony noted that such a requirement of the law introduced "an element of impartiality" into the activities of the prosecutor's office. According to him, the right of the Prosecutor to refuse the accusation on a motivated basis made him "not a blind and indifferent tool of the accusation", but a free and conscious assistant to the court in finding the truth in a criminal case.[25]

The former Prosecutor of the Moscow district court, M. Gromnitsky, described the refusal of the accusation as "a precious right, without which the role of the Prosecutor would sometimes be morally extremely difficult".[26]

Much attention to the moral aspects of maintaining the accusation and the moral requirements for the prosecutor-accuser paid A. Kony. He noted that, along with official duty, a judicial figure also has a moral duty, which prescribes never to forget that the object of the judicial figure's actions is "first of all a human", who has inalienable rights to respect for his human dignity.[27] A. Kony noted that "the purpose cannot justify the means", while the purpose of justice must be achieved only by moral means.[28] He stressed that the Prosecutor should not "force his conscience" and act contrary to the belief of the defendant's innocence; in his accusatory speech, he should be completely impartial and objective, that is, "should be a speaking judge" who pursued only the purpose of justice.[29,30] During the trial, the Prosecutor had to become a "speaking judge" thanks to the articles 739 and 740 of the SCP, which forbade him to take a one-sided view of the case and gave him the right to refuse the accusation.[31] Maintaining the prosecution "at all costs" A. Kony called "morally unworthy" action,[32] and the position of such a Prosecutor "difficult and shameful".[33] According to him, in the first decade of judicial reform, this view of their duties was imbued with the majority of prosecutors, and then the expression "lost the case" about the acquittal would be a great dissonance with the entire essence of the Prosecutor's office activity.[34] A. Kony noted that the Prosecutor was set up to protect the society, but not for merciless hunting for persons whose guilt still needs to be proved.[35]

---

[18] *Объяснительная записка к проекту Устава уголовного судопроизводства [Explanatory note to the draft Statute of Criminal Proceedings].* [Saint Petersburg, 1863], p. 286.

[19] FOYNITSKY, I. Ya., *Курс уголовного судопроизводства [Criminal justice course],* vol. 1 (Reissue of the 3th Edition of 1910). Saint Petersburg, 1996, p. 77.

[20] Дело А. И. Пономарева [The Case of A. I. Ponomarev]. In: *Юридическая летопись [Legal record].* April, 1890, p. 349.

[21] GROMNITSKY, M. F., Роль прокурора на суде по делам уголовным [The role of the Prosecutor in the criminal cases]. In: *Журнал министерства юстиции [Journal of the Ministry of justice],* Nr. 2, 1896, p. 56.

[22] *Устав уголовного судопроизводства. Систематический комментарий [Statute of Criminal Proceedings. A systematic commentary].* Under the general ed. Prof. M. N. GERNET. Vol. IV. Moscow, 1915, p. 1218.

[23] *Объяснительная записка к проекту Устава уголовного судопроизводства [Explanatory note to the draft Statute of Criminal Proceedings].* [Saint Petersburg, 1863], p. 89.

[24] *Инструкция для руководства лицам прокурорского надзора Одесской судебной палаты [The instruction for directing the persons of Prosecutor's supervision of the Odessa court chamber].* [Odessa, 1872], p. 32.

[25] *Устав уголовного судопроизводства. Систематический комментарий [Statute of Criminal Proceedings. A systematic commentary].* Under the general ed. Prof. M. N. GERNET. Vol. IV. Moscow, 1915, pp. 1216, 1219.

[26] GROMNITSKY, 1896, p. 57.

[27] KONY, A. F., Нравственные начала в уголовном процессе [Moral principles in criminal proceedings]. In: *Журнал министерства юстиции [Journal of the Ministry of justice],* Nr 1, 1902, pp. 21-22.

[28] Ibidem, p. 36.

[29] Ibidem, p. 31.

[30] KONY, 1967, pp. 125, 141.

[31] Ibidem, p. 315.

[32] Ibidem, p. 139.

[33] KONY, A. F., *Курс уголовного судопроизводства [Criminal justice course].* Moscow, 2011, p. 158.

[34] KONY, 1967, pp. 125-126.

[35] KONY, 2011, p. 158.

At the official level, the Ministry of justice demanded that the accusations being well-founded. The Minister of justice, in his circular of December 15, 1900, explained that the Prosecutor "is not only a public accuser, but also an official guardian of the law, and therefore is interested (…) in the correctness and thoroughness of the accusation".[36]

The Prosecutor should not have supported the accusation against his inner conviction. And, according to the memoirs of M. Gromnitsky, at the first stage after the judicial reform, the Prosecutor was not imposed any another's opinions, and his freedom was not limited to anything other than the rules of the Statute of Criminal Proceedings.[37] However, in the future, the accusatory bias in fact began to be stimulated. There were even cases in which the accusatory bias was imposed on prosecutors by higher-ranking officials. For example, in 1913, in the case of Baylis, which acquired a political color and caused a great resonance not only in Russia but also abroad, the Prosecutor of the Kiev court chamber, G. Chaplinsky, was inculcated by the Ministry of justice, "at all costs, a guilty verdict",[38] despite the fact that at the highest government level they understood the inevitability of an acquittal.[39] And the Prosecutor "tried his best" to get a guilty verdict, even relying on perjury,[40] because in this case, his entire career "was on the scales".[41]

At the same time, in the military department, the law provided for one case where prosecutors did not have the right to refuse the accusation, but had to support it not by inner conviction, but "by job". This exception was applied to separate field military courts in Bulgaria created during the Russian-Turkish war in 1877. If the military Prosecutor of this court considered it necessary to dismiss the case due to insufficient evidence, but the military chief still brought the accused to court, the military Prosecutor of the field military court, as the only representative of the Prosecutor's supervision in this court, had no right to refuse to maintain the accusation in court and he was obliged to indicate in the accusation speech the data on the basis of which the governor or military authorities brought the accused to court. At the same time, the Prosecutor retained the right to express his conclusion based on his own conviction.[42]

4. Grounds and practice of the Prosecutor's refusal to accuse

The Prosecutor's office was obliged to refuse the accusation only if the elements of the crime or the guilt of the defendant was not proved at the court investigation. The insignificance of the violation was not a ground for refusing the accusation, because the activities of the prosecutor's office were not based on the principle of expediency, but on the principle of legality, which required to accuse before the court any violation of the criminal law.[43,44] This requirement was not supported by the jurors, and for insignificant crimes they acquitted the defendants. For example, one of the jurors recalled that in the 6-year-old case about attempted theft of a pot with 3 pickles, the Prosecutor did not have enough the civil courage to refuse the accusation, and the jury acquitted the defendant.[45]

At the initial stage after the judicial reform, the issue of whether the Prosecutor's office should justify its refusal to accuse was controversial. On this issue, the press expressed opposite opinions. At the same time, supporters of the motivation saw it as a guarantee against unjustified refusal of the accusation.[46] In practice, initially after the judicial reform, the Prosecutor's office did not justify its refusal to accuse. However, after the Senate's explanations, the practice changed, and prosecutors began to justify their refusals to accuse.[47]

According to the explanations of the Senate, the motive for refusing the accusation could be only its refutation during the court investigation. In 1866 and 1876, the Senate considered cases in which the deputy prosecutor refused the accusation on the grounds that no new evidence was found during the

---

[36] *Всеподданнейший доклад министра юстиции, статс секретаря Муравьева о деятельности министерства юстиции за истекшее десятилетие (1894-1904 г.г.) [Report of the Minister of justice, state Secretary Muravyov on the activities of the Ministry of justice over the past decade (1894-1904)].* [Saint Petersburg], p. 35.

[37] GROMNITSKY, 1896, p. 49.

[38] *Падение царского режима : Стенографические отчеты допросов и показаний, данных в 1917 г. в Чрезвычайной следственной комиссии Временного правительства [The fall of the tsarist regime: Verbatim reports of interrogations and testimony given in 1917 to the Extraordinary investigation commission of the Provisional government].* Vol. 3 (edited by P. E. Shchegolev). Leningrad, 1925, p. 357.

[39] TAGER, A. S., *Царская Россия и дело Бейлиса [Tsarist Russia and the case of Baylis].* 2nd Edition. [Moscow], 1934, pp. 161-164.

[40] Ibidem, pp. 108, 142-143, 145, 170.

[41] *Падение царского режима: Стенографические отчеты допросов и показаний, данных в 1917 г. в Чрезвычайной следственной комиссии Временного правительства [The fall of the tsarist regime: Verbatim reports of interrogations and testimony given in 1917 to the Extraordinary investigation commission of the Provisional government].* Vol. 3 (edited by P. E. Shchegolev). Leningrad, 1925, p. 359.

[42] Временные правила для отдельных полевых военных судов в Болгарии (утв. 9 августа 1877 года) [Temporary rules for separate field military courts in Bulgaria (approved on August 9, 1877)]. In: *Сборник материалов по русско-турецкой войне 1877-78 г.г. на Балканском полуострове. Выпуск 97. Приказы и приказания по Действующей армии [Collection of materials on the Russian-Turkish war of 1877-78 on the Balkan Peninsula. Vol. 97. Orders and bidding for the army in the field].* Saint Petersburg, 1911, pp. 84-85.

[43] FOYNITSKY, 1996, pp. 75-77.

[44] *Устав уголовного судопроизводства. Систематический комментарий [Statute of Criminal Proceedings. A systematic commentary].* Under the general ed. Prof. M. N. GERNET. Vol. I. Moscow, 1914, p. 10.

[45] N. N. O., Из заметок присяжного заседателя [From the juror's notes]. In: *Исторический вестник [Historical Bulletin],* vol. 74, 1898, pp. 650-651.

[46] TIMANOVSKY, A., *Сборник толкований русских юристов к Судебным уставам Императора Александра Второго. За двадцать пять лет (1866-1891). Учреждение судебных установлений и Устав уголовного судопроизводства. 2000 тезисов. [Collection of interpretations of Russian lawyers to the Judicial Statutes of the Emperor Alexander II. For twenty-five years (1866-1891). Establishment of judicial institutions and the Statute of Criminal Proceedings. 2000 abstracts].* 1892. 2nd Edition. Warsaw, 1892, p. 499.

[47] *Высочайше учрежденная комиссия для пересмотра законоположений по судебной части: Труды. Т. 3. Свод ревизионных отчетов [The Highest established commission for the revision of legislation on the judicial part: Proceedings. Vol. 3. Summary of inspection reports].* Saint Petersburg, 1897, part 2, p. 524.

court investigation. In this regard, the Senate explained that the Prosecutor cannot refuse to accuse if the court investigation did not change the evidence on which the accused was brought to trial,[48] and that the Prosecutor can refuse to accuse the defendant only if the indictment is refuted by the court investigation.[49] It was this explanation that guided the assistant military Prosecutor came, who in 1907, after the trial for the murder of the chief of the Tobolsk penal prison, told the defender that he could not refuse the accusation, since there were witnesses and eyewitnesses; but the court acquitted the defendant.[50]

The prosecutors' refusals of the accusation began to be practiced already in the first year of the introduction of judicial reform. One of the first to use the right to refuse accusation was the Minister of justice, Prosecutor General D. Zamyatnin. On August 31 and September 21, 1866, at the sessions of the Supreme Criminal Court in the case of D. Karakozov's attempt to kill the tsar the minister refused to accuse 7 of the 36 defendants due to the lack of evidence of their guilt during the court investigation.[51] In the same[52] and subsequent years, prosecutors refused to accuse in the common courts as well. For example, in 1894, prosecutors refused to accuse 1,574 times.[53] The accusation was refused not only by the civil Prosecutor's office, but also by the military Prosecutor's office,[54] not only for common but also for political crimes. For example, in 1877, in the Special Presence of the Governing Senate in the empire's largest political case "193" (about revolutionary propaganda), deputy chief prosecutor V. Zhelekhovsky, in connection with the lack of evidence, refused to charge almost a hundred defendants; at the same time he cynically stated that they were "only involved in drawing up the background in the picture of accusation the others".[55] On September 16, 1905, in the naval court of the port of Kronstadt, in the case of 20 reserve lower ranks accused of disobedience and rebellion, the assistant naval prosecutor refused to accuse 16 defendants.[56] In the case of the armed uprising in Moscow and the murder of the chief of the detective police, deputy prosecutor of the Moscow judicial chamber V. Ravsky on December 7 1906 refused to accuse 17 of the 27 defendants.[57]

In connection with the above, the statement of B. Vilensky that "the judicial practice of the post-reform years does not know cases of the prosecutor refusing to accuse" is inaccurate.[58]

The refusals of the accusation were explained, on the one hand, by the insufficiency of evidence obtained during the preliminary investigation, and as a result of this unreasonable putting on trial, and on the other hand, by changes in evidence during the court investigation.

The murder case, which was sent in 1866 to the Moscow district court without the necessary evidence in the hope of getting them directly in court, is indicative. A deputy of the prosecutor in the indictment indicated circumstances that could serve as evidence against the suspects, but which were not confirmed during the preliminary investigation. The case was sent to the court without evidence, with only the assumption that the witnesses, during interrogation of them under oath, would give the necessary evidence to the prosecution. However, during the court investigation, new evidence was not found, as a result, the deputy prosecutor refused to accuse.[59]

Despite these examples, the refusal of the accusation was mainly due to changes in the evidence of the prosecution during the court investigation. In cases that were sent to a court without a preliminary investigation, refusals of the accusation were more frequent, since in such cases, the materials that served as the basis for drawing up the indictment were less quality than the preliminary investigation, and they were often presented in court in a different form.[60]

Prosecutors was refusing to accuse in full or only in part. In addition to the direct refusal from the accusation, a special form of conditional refusal has been developed in practice. If during the court investigation it was found out that there was

---

[48] *Решения кассационных департаментов Правительствующего Сената. 1866 [Decisions of the Cassation Departments of the Governing Senate. 1866]*. Saint Petersburg, [1866], p. 105.

[49] *Указатель вопросов уголовного права и судопроизводства, разрешенных уголовным кассационным и общим собранием кассационных департаментов Правительствующего Сената за 1874, 1875 и 1876 г.г. [Index of issues of criminal law and proceedings resolved by the Criminal Cassation and General Assembly of the Cassation Departments of the Governing Senate for 1874, 1875 and 1876.].* Comp. by M. N. BELOV, V. V. POPOV and M. V. KRASOVSKY. Saint Petersburg, 1878, p. 385.

[50] ANISIMOV, S. Из воспоминаний защитника (Дело об убийстве начальника тобольской каторжной тюрьмы Богоявленского) [From the memoirs of the defender (The case of the murder of the chief of the Tobolsk backbreaking prison Bogoyavlensky)]. In: *Былое [The bygone],* Nr. 5-6, 1917, p. 38.

[51] *Покушение Каракозова: стенографический отчет по делу Д. Каракозова, И. Худякова, Н. Ишутина и др. [The attempt of Karakozov: stenographic report on the case of D. Karakozov, I. Khudyakov, N. Ishutin and others].* Comp. by M. M. KLEVENSKY, K. G. KOTELNIKOV. Vol. 1. Moscow, 1928, p. 268; Vol. 2. Moscow, Leningrad, 1930, p. 301.

[52] *Решения кассационных департаментов Правительствующего Сената. 1866 [Decisions of the Cassation departments of the Governing Senate. 1866]*. Saint Petersburg, [1866], p. 102.

[53] *Высочайше учрежденная комиссия для пересмотра законоположений по судебной части: Труды. Т. 6. Свод статистических данных* [*The Highest established commission for the revision of legislation on the judicial part: Proceedings. Vol. 6. Summary of statistical data*]. Saint Petersburg, 1897, p. 286.

[54] Судебные отчеты [Court reports]. In: *Право [Law],* Nr. 44, 1907, p. 2669.

[55] KONY, A. F., *Собрание сочинений : в 8 т. [Collected works (Vols 1-8)],* vol. 2. Moscow, 1966, p. 64.

[56] Судебные отчеты [Court reports]. In: *Право [Law],* Nr. 38, 1905, pp. 3198-3199.

[57] Судебные отчеты [Court reports]. In: *Право [Law],* Nr. 5, 1907, p. 380.

[58] VILENSKY, B. V., Судебная реформа и контрреформа в России [Judicial reform and counter-reform in Russia]. Saratov, 1969, pp. 187-188.

[59] *Решения кассационных департаментов Правительствующего Сената. 1866 [Decisions of the Cassation departments of the Governing Senate. 1866]*. Saint Petersburg, [1866], pp. 102-103.

[60] *Высочайше учрежденная комиссия для пересмотра законоположений по судебной части: Труды. Т. 3. Свод ревизионных отчетов [The Highest established commission for the revision of legislation on the judicial part: Proceedings. Vol. 3. Summary of inspection reports].* Saint Petersburg, 1897, part 2, pp. 524-525.

no convincing evidence for the prosecution, but some evidence was not refuted, the more experienced prosecutors did not directly refuse the prosecution, but told the court that they did not insist on the prosecution, and asked the court to independently resolve the issue of guilt of the defendants, based on their experience and belief.[61] Such examples were in the courts of both the civil and military departments.

5. The consequences of the Prosecutor's refusal to accuse and the attitude of the Prosecutor's superiors to the refusal of the accusation

The Prosecutor's refusal to accuse did not mean the automatic cancellation of the indictment, the termination of further proceedings in the case or the acquittal of the defendant. The court was to continue consideration of the case the common order. However, in practice, in the first year of judicial reform there has been a violation of this order. In 1866, after the refusal of a deputy prosecutor from the accusation in the murder case, the Moscow district court, without referring the issue to the jury and without a verdict, acknowledged the defendants as "free from the court". Thus, the fate of the defendants was decided not by the jurors, but by the Prosecutor's office.[62] In this regard, the Senate explained that if the Prosecutor refuses to maintain the accusation stated in the indictment, the court is obliged to give the case further progress (process, steps), that is, to raise questions about the defendant's guilt and resolve them in the established legal order.[63]

If the prosecutor refused the accusation, the court usually made an acquittal.[64] However, the Prosecutor's refusal to accuse did not deprive the court of the right to recognize the charge as proven and convict the defendant. For example, in 1894, in the whole Empire, in cases in which prosecutors refused the accusation, 98 convictions were decided, including 22 in cases with a jury and 76 in cases without a jury. Such facts were in 4 judicial chambers (out of 10) and in 33 district courts (out of 87).[65]

The Deputy Prosecutor should have informed the prosecutor of the refusal of the accusation. For example, the military Prosecutor's assistants had to report to the Prosecutor no later than the next day about the reasons for refusing the accusation or changing it in the court session.[66]

Prosecutors often disapproved of the refusal of the accusation and demanded that subordinates explain the reasons why they refused to maintain the accusation. For example, Senator A. Kochubey recalled that when he worked as a deputy of the district court Prosecutor and reported to the Prosecutor that in two cases he had refused to accuse, since the innocence of the defendants was proved at the trial, the Prosecutor "hissed": "I don't understand how you can refuse to accuse". And on the objection that the law itself requires this, the Prosecutor abruptly interrupted him and read in an angry tone "a whole lecture about what is the Prosecutor's supervision, how to understand his duties, how they should be carried out, and so on". The Prosecutor "very transparently hinted" that if the deputy prosecutor "so wrongly and incorrectly" understands his official duties, it is better to leave supervision in which he is "directly harmful person".[67]

Sometimes even a partial refusal of the accusation caused a negative reaction. For example, in 1906, in the case of the Council of workers' deputies, a deputy prosecutor of the St. Petersburg court chamber, V. Balts, refused to accuse the defendants of preparing an armed revolt.[68] As a result, the defendants were convicted only for participating in a criminal community. This impartial position of the Prosecutor in court caused displeasure in the Ministry of justice and even almost led to his dismissal from the service.[69]

At the same time, there were examples of the reverse property. For example, A. Kony recalled one case in which he rejected a proposal by his superiors to accept the charge in order to refuse it in court.[70]

6. Conclusion

Thus, it can be concluded that the legislation of the Russian Empire, as a result of judicial and military-judicial reforms, fixed the principle of impartiality of the Prosecutor when supporting the accusation in court, giving him the right and assigning him the duty to refuse the accusation, which was disprove during the court investigation. In practice, the accusation was refusing not only by the civil Prosecutor's officials, but also by the military Prosecutor's officials, not only for common but also for political crimes. However, when the Prosecutor's officials exercised this power, the Prosecutor's superiors often reacted negatively to this. At the same time, the principle of the Prosecutor's impartiality was often violated, especially in political cases. There were cases in which the accusatory bias was imposed by higher prosecutors.

---

[61] Ibidem, p. 524.

[62] KONY, 1967, pp. 140-141.

[63] *Решения кассационных департаментов Правительствующего Сената. 1866 [Decisions of the Cassation Departments of the Governing Senate. 1866]*. Saint Petersburg, [1866], pp. 102, 105.

[64] KONY, 2011, p. 158.

[65] *Высочайше учрежденная комиссия для пересмотра законоположений по судебной части: Труды. Т. 6. Свод статистических данных* [*The Highest established commission for the revision of legislation on the judicial part: Proceedings. Vol. 6. Summary of statistical data*]. Saint Petersburg, 1897, pp. 274-286.

[66] О военно-прокурорском надзоре : приказ по военному ведомству 19 октября 1890 г. № 258 [About the military Prosecutor's supervision : order on the military Department on October 19, 1890, Nr. 258]. In: *Военный сборник [Military collection]*, Nr. 1, 1891, p. 53.

[67] *Записки судьи. 4-е изд. [Judge's notes. 4th ed.]*. Saint Petersburg, 1913, pp. 9-10.

[68] BAL'TS, V., Суд над первым Советом рабочих депутатов (Воспоминания прокурора) [Trial of the first Council of workers' deputies (Memoirs of the Prosecutor)]. In: *Былое* [*The bygone*], Nr. 2, 1926, p. 66.

[69] BAL'TS, V., Суд над первым Советом рабочих депутатов (Воспоминания прокурора) [Trial of the first Council of workers' deputies (Memoirs of the Prosecutor)]. In: *Былое [The bygone]*, 1926, Nr. 1, p. 133; Nr. 3, pp. 102-103.

[70] KONY, 1967, p. 141.

Divergent Worlds of Political Consciousness and Behavior in Contemporary Societies. The Contribution of the Cognitive-developmental Approach to the Foundation of the Political Sciences

*Georg W. Oesterdiekhoff**

Abstract

Pre-modern and modern societies manifest different forms of political behavior and conduct. Pre-modern societies prefer authoritarian regimes, and exhibit more violence, power abuse, etc., and do not establish rule of law, democracy, liberty rights, and civil society. Modern societies, however, continuously established democratic structures and the rule of law. More, the political behavior of politicians specifically and humans generally have been becoming more civilized and rational, humane and pacific, moderate and empathic during the long process of modernization. It will be shown here that this civilization process of political behavior has been taking place on a global scale. However, the nations advance also regarding political behavior and customs on different speeds. Today's developing nations partially manifest strange forms of political behavior that wouldn't be even possible in the today's most advanced nations. It is argued that political sciences by today have no eyes for these differences, and more, no scientific tools to address and to explain them. But they shape or make the bulk of politics both on the national and international level. The cognitive-developmental approach is worked out as the general theory of the political sciences that is able to illuminate these foundations of political life for the first time.

Keywords: *political behavior; rule of law; democracy; human rights; developing nations; advanced nations; psychological stages.*

1. Introduction

There is a large gap in international social sciences between those authors who deny and those who reject that there has been a progress in the development of humankind concerning rationality, morals, behavior and social life. Those who deny that there has been a progress account social structures and constraints to former forms of behavior such as cannibalism, duel culture, sadistic forms of punishment law such as crucifixion, boiling or tearing to pieces, chases of animals and gladiator fights (as in Roman arena games), human sacrifices to the gods, burying alive humans to accompany their dead relatives or some noble people, etc. They implicitly or explicitly maintain that humans across history were always the same, while only the surroundings, the social structures and the institutions changed. Accordingly, they assume that the former social structures necessitated these cruel and strange forms of behavior mentioned. Consequently, social structures of modern societies abolished these atrocities for unknown or whichever reasons while the humans are still the same they had already been across millennia. Such opinions originate in the standard sociological theory model that holds on a universal anthropology and focuses social structures as the sole research object of social sciences. Rational Choice is a certain representative of this sociological theory model. Typical representatives of this way of thinking are Marvin Harris and James Coleman.[1]

The other group of authors maintains or describes that there has been a progress of mind and therefore of morals in the human psyche itself. Accordingly, humans across history developed higher forms of rationality, consciousness, and morals that led them to abolish atrocities and to improve social life. They see a certain link between some psychological stages and strange forms of behavior in pre-modern societies on the one side, and likewise between certain psychological advancements and the rise of humanism and morals in modern societies on the other side. Typical representatives of this type of sociological theory are Auguste Comte, John Lubbock, Edward Tylor and Norbert Elias.[2]

This article shows the implausibility of the assumptions made by the first group of theories and supports the second one by analyzing patterns of political behavior and conduct in contemporary societies. Premodern societies denied democracy and rule of law and were characterized by authoritarian political structures. The people had to obey to the rulers, the kings, the aristocrats, or the dictators. More, the people usually could not defend their rights against authorities. They did not live in civil societies under the rule of law. Powerful families, mafia clans, and influential politicians controlled society, economy, and politics. Political power was frequently abused by group or individual interests.[3]

* Georg W. Oesterdiekhoff, Department of Sociology, Karlsruhe Institute for Technology, Germany.

1 COLEMAN, J., Foundations of social theory. Cambridge, Mass.: Harvard University Press 1990.

2 ELIAS, N., Power and Civility. New York, 1982.

3 OESTERDIEKHOFF, G. W., Die Entwicklung der Menschheit von der Kindheitsphase zur Erwachsenenreife. Wiesbaden: Springer Verlag 2013a., ibid., Evolution of democracy. In: Cultura, 2015, pp. 81-102, ibid., Evolution of morals. In: Human Development, 2017c, pp. 1-24.

Violence and insecurity ruled the streets. Politicians tended to cruel and strange forms of behavior. When you look at the life of the Roman Emperors you see how they all tended to forms of barbarian practices and incredibly irrational behavior not one politician in Italy revealed during the past centuries. It was custom to slaughter whole cities for implausible reasons, to enslave those who tried to defend their rights or to oppress all those with other religious faith or whatever.

Especially during the past centuries there is observable a progress in politics. Democracy and rule of law, originally only as ideas developed by the authors of Enlightenment John Locke, Charles de Montesquieu (2011) and Jean-Jacques Rousseau (1983), slowly and stepwise developed as institutions and practices in Europe and North America during the 19th and 20th centuries, despite some relapses for example during the fascist era. The number of democratic nations increased worldwide especially after 1945, and again after 1970 and 1990. The claim for democracy and rule of law is now stronger than it ever was. Though the world is now divided in three parts: democracies, half-democracies, and authoritarian forms the trend seems to continue that history is in favor of democracy.

Developmental psychology can explain why pre-modern people have difficulties to practice democracy and why they are in favor of authoritarian forms and fundamentalism (Piaget 1932; Adelson & Bell 1970; Easton & Hess 1962). People on advanced psychological stages instead reject authoritarian forms of government and demand for democracy, tolerance, liberty rights, and rule of law. Therefore, it seems to be obvious that the decrease of authoritarianism and the increase of democracy originate in the psychological advancement of smaller or greater parts of the humankind.

Likewise people across the globe do not accept anymore maltreatment of women, minorities, and unprotected groups. They fight for freedom, security, and their rights to live and develop their skills. They fight against corruption, oppression, and exploitation. They are not willing anymore to accept brutal dictators, strange forms of political behavior, and sadistic forms of power abuse. They want to live instead in civil societies where the people care for their communities they live in.[4]

The process takes place on a global scale but not at the same speed and rate. While some world regions go ahead others are behind. Some nations are more advanced concerning the development of democracy and rule of law, other still live in authoritarian states. Some have developed very high standards of political communication, civilized forms of conduct and behavior, respectful treatment of political adversaries and minorities, and high standards in international diplomacy. Some nations, however, have still political cultures that appear as backward and strange. They still applaud politicians for actions and opinions that appear to come from remote times.[5] Most social scientists however have no tools available to explain these differences. More, they do not even perceive them as their mind and their scientific approaches are not equipped with the knowledge required to understand these differences. It is as if they take other glasses when they look at different societies. Thus, they measure different societies with different weights without even recognizing it.

For example, most social scientists and historians mostly believe the ancient Romans were the same kind of humans as modern humans are (so Peter Dinzelbacher). Facing the Roman arena games they maintain they were performed because the Emperor wanted to show his power generally or his power over nature specifically.[6] In consequence of their superficial ideas they belittle the strangeness of the games on the one side and hold on their implicit or explicit theory of the resemblance between ancient Romans and modern humans on the other side. Of course, authors with such superficial "explanations" cannot explain why modern societies today on a worldwide scale do not perform such games anymore. Social scientists could identify their intellectual limits when they considered what would happen when today some political parties or governments wanted to introduce the ancient arena games. The resistance against such proposals would be totally. If any person would claim for the games he or she would be removed from the public scene immediately. It would be a claim resembling proposals and ideas coming from people suffering from schizophrenia. There exists therefore a total dissonance between the modern psyche with its moral and emotional standards on the one side and the Roman arena games on the other side. There is not one nation anymore and anywhere in the world with that primitive mentality to accept the games. Of course, some intermediary stages and some "soft" remains of the ancient customs still exist anywhere. In China, at least for some years ago, people visited places where cows were killed by lions to entertain the visitors, or in Spain bull fights still exist. Presumably, both customs won't survive the next 20 years and in Scandinavia or other most advanced regions they couldn't be performed for a single day already for long.[7]

The following study analyses three contemporary examples of political behavior in three different nations, the Philippines, Liberia, and Turkey. The scrutiny of the examples show that these forms of behavior wouldn't be possible in the most advanced nations of today. This is so although all three nations have developed a lot over the past generations in terms of economy, politics, culture, and education. All three nations take part in processes of modernization and globalization for long. They represent modern societies and not archaic or premodern ones. They would or could never institutionalize the Roman arena games or the other archaic practices mentioned above. However, they have not attained the standards that for example Scandinavian nations represent. The examples show more. They detail that certain occurrences that happened in Liberia could not happen in the Philippines, and those occurrences that happened in the Philippines could not occur in Turkey. The incidents and traits presented typical for Turkey could not happen in Sweden or Germany. Turkey is the most developed

4 Ibid, 2013a, op. cit., ibid, 2015, op. cit., ibid, 2017c, op. cit.

5 Ibid, Evolution of mentality, politics, law, and social affairs during the past century. In: Asian Journal of Social and Human Sciences, vol. 1, Issue 2, 2016b, pp. 53-68.

6 GRANT, M., The gladiators. New York: Barnes & Noble Banks 1996.

7 OESTERDIEKHOFF, G. W., The arena games in the Roman Empire, Croatian Journal of Ethnology, 46, 1, 2009 b, pp. 177-202.

nation among the three examples chosen. The choice of the occurrences presented is by no means at random. Instead they represent very well the general developmental stage upon which the three nations stay respectively. Consequently, even within the range of current developing and threshold nations there are certain demarcation lines or ladder stages that can be clearly identified. Of course, they will change in future. It is thinkable or even probable that in some generations the three nations will have attained the stages of political culture that the today's most advanced nations have already reached by now. It is obvious that contemporary social sciences have no idea of the mere existence of these phenomena and they have no scientific tools to address or to explain them. However, these phenomena determine politics more than anything else, both on the national and international level. Basically, the current political sciences completely ignore the greatest bulk of that what makes politics, political culture, and political behavior.

2. Piagetian psychology as historical anthropology

Piaget discriminated four stages of human development unfolding during the first two decades of life. The sensorymotor stage of the speechless infant is followed by the preoperational stage with 18 months, characterized by the development of language, reasoning, anticipation of future and memory of past incidents, and abilities to act and participate at social life. The preoperational stage starts to end with six years of life and accomplishs its end with 10 years roughly. It is defined by certain traits, both accomplishments and shortcomings. The preoperational stage includes the prevalence of magical beliefs, the belief in witches, sorcerers, monsters, and fabulous beings, animistic views regarding the life and consciousness of inanimate objects such as artifacts, rocks, woods, winds, or waters, the belief in fairy tales and legends, and the belief in providence, destiny, and the moral order of the cosmos. Children this stage don't have an understanding for causality and chance, necessity and probability. They cannot draw some higher logical conclusions, for example those of the hypothetical-deductive or syllogistic type. Their mental operations are still weak and do not reach the level of abstractive considerations. Their perceptions entail representations and they again have the character of perceptions, a phenomenon called *eidetic*. Already Piaget discovered that the preoperational stage describes the mental life of adult humans living in primitive societies and ancient civilizations alike. Though, he did never realize that this reveals the greatest discovery ever made across all human and social disciplines.

The third stage, that of the concrete operations, starts with six and ends with 12 years of life. It entails the better mastering of physical entities, a phenomenon called conservation. The child this stage recognizes that the volume of liquid remains the same when it is poured from a small and low glass to a wide and tall one (actually only with 10 years roughly). It grasps that a cat equipped with a dog mask remains a cat, something preoperational children (and archaic humans) don't understand. It learns to master mathematical computations such as divisions and multiplications. The concrete operational child learns the understanding of causality, chance, probability, and necessity. More, the typical childish magical-animistic worldview starts to diminish and to weaken. The first three moral stages, according to the theory of Kohlberg, cover the whole first decade of life. They combine egocentric attitudes with conventional patterns, manifesting a law & order mentality.

The fourth stage, the adolescent stage of formal operations, starts with 11 or 12 years and ends with 20 or 25 years of age. It is divided in the sub-stages A and B, the latter one coming into existence with 15 years roughly. This stage brings the mentality of the child with his or her's magical-animistic belief systems to an end. It entails the origination of abstract, logical, systematic, coherent, and experimental reasoning patterns. The adolescent becomes now able to learn sciences and to grasp coherent theories. The adolescent discovers the fundamental discriminations between subjective and objective, psyche and physis, mind and matter, soul and things, and biology and physics. He or she discovers the empirical causality and the mechanical worldview. The Kohlbergian moral stages four, five and six may unfold during the formal operational stage, with four as the modal stage in modern societies.[8]

Piagetian Cross-Cultural Psychology conducted more than 1.000 empirical surveys right across continents, nations, cultures and social milieus from 1932 up to now. It was found that all humans everywhere manifest those patterns that match to the notions expected from developmental psychology respectively Piagetian stage theory. Piaget's early insight was confirmed that great percentages of adult humans living in archaic or premodern cultures do not develop beyond the preoperational stage. Frequently, humans living in traditional or underprivileged milieus within developing nations, in illiterate and remote regions outside of modern influences, manifest partially preoperational and partially concrete operational stage structures. This asymptotic development concerns the bifurcation of a given traditional population in those people staying on preoperational and in those staying on concrete operational stages mainly. It also implies that certain people manifest the preoperational stage limited to some areas of world understanding, while they master the concrete operational stage with reference to other areas.[9]

[8] PIAGET, J. & B. INHELDER, The psychology of the child. New York: Basic Books 1969. PIAGET, J., The moral judgment of the child. New York: The Free Press 1932. DAMON, W., The social world of the child. San Francisco, London, Washington: Jossey Bass Inc. 1977. MOGDIL, C. & S. MOGDIL (eds.), Piagetian research. London: INFR.

[9] LURIA, A. R., Cognitive development. Harvard: University Press 1982. DASEN, P. & J. BERRY (eds.), Culture and cognition, London: Methuen & Co 1974. DASEN, P. Cross-Cultural research: a summary. In: Culture and Cognition, ed. by Dasen & Berry, London 1974, pp. 409-424. DASEN, P. (ed.), Piagetian Cross-Cultural Psychology. New York: Gardner Press 1977. ASHTON, P., Cross-cultural Piagetian research. Harvard Educational Review 45, pp. 475-506. PIAGET, J., Need and significance of cross-cultural studies in genetic psychology. In P. Dasen, Culture and cognition, London 1974, pp. 299-310. OESTERDIEKHOFF, G. W., Mental growth of humankind in history, Norderstedt: Bod, 2009a, ibid., The steps of man towards civilization, Norderstedt: Bod, 2011, ibid. Child and ancient man, American Journal of Psychology, vol. 129, no. 3, 2016a, pp. 297-314, ibid., What went wrong with cross-cultural psychology over the past 40 years?, Human Evolution, vol. 32, no. 1-2, 2017 b, pp. 95-138, ders., 2013a.

The formal operational stage, however, is mainly bound to people living in modern, industrial nations. Surveys reveal that modern populations are divided expectedly in some percentages staying on sub-stage A, while others more manifest B. That fact implies that the adolescent stage of formal operations must have originated at certain points in history. There is ample evidence that it mainly evolved, apart from some forerunners in ancient civilizations, in intellectual elites of the 17th century. From there it slowly spread through educated classes during the 18th and 19th centuries, becoming a mass phenomenon in modern, industrial societies not before the 20th century.[10]

That implies the following conclusions:

1) People of the today's most advanced nations are psychologically more advanced than their great-grandparents 100 years before
2) People of the today's most advanced nations are more advanced than those living in threshold and developing nations, at the average, seen from a statistical viewpoint
3) People of today's developing and threshold nations are usually more advanced than their great-grandparents 100 years before
4) In the far future, when social, economic, and educational inequalities between nations will have been erased, inequalities concerning psychological stages will diminish or vanish, or the backbenchers of today can be the frontrunners of tomorrow (a usual phenomenon in world history)

These are not four hypotheses but conclusions confirmed by masses of ethnological and psychological data as well.

The correspondence between the psychology of the child and that of premodern adult human being concerns every single detail originating in psychological stage structures. Whatever developmental psychology found to describe the child's stages, ethnology and Piagetian Cross-Cultural Psychology discovered among adults from premodern cultures. It is not so that children and premodern adults share this pattern or other apart from branches where they are different. Instead premodern adults share the same magic-animistic worldview, the belief in fairy tales and legends, the belief in witches and monsters, sorcerers and ghosts, the ignorance of empirical causality and chance, necessity and probability, the non-conservation of physical entities such as volume, mass, etc., and the inability to perform syllogistic and hypothetical-deductive conclusions. They share the same basic concepts regarding the understanding of law, politics, religion, worldview, morals, etc.[11]

Therefore, modern adult humans develop 5, 10, or more developmental years more than archaic or premodern adult humans do. The developmental summit of premodern humans lies in the range 4 – 12, that of modern humans lies in the range 10 – 25. All stages possible (with all intermediary stages) were once and anywhere realized in history. This is the greatest discovery ever made in the human and social disciplines.

However, there are differences between the two groups but they are not describable in terms of psychological stage theory. Children and archaic human beings differ in their life experience and in their knowledge (only that knowledge that does not originate in stage structures). Archaic human beings stay on the child's stages over years and decades while the child aged seven has this developmental year only for twelve months. Thus, both groups share their qualitative but not their quantitative development.[12] The whole phenomenon of arrested development originates in the phenomenon *closed developmental window*. Obviously, socialization stimuli in premodern societies do not enforce and attract psychological development to a rate that humans can go beyond certain stages. Conversely, socialization conditions as given in modern, industrial societies enforce and attract psychological development to climb on higher stages. When humans do not have the opportunity to develop sufficiently in their early years, they cannot surmount certain stages later in their life. Certain amounts and qualities of stimuli in early years are required when humans were to reach the formal operational stage.[13]

These are not simply hypotheses that can be right or not but these contentions are proved by the whole mass of empirical data coming from Piagetian Cross-Cultural Psychology, historical disciplines and ethnology. Children very young taken from ethnicities living a traditional life and brought up in modern settlements equipped with modern schools develop psychologically more according to elaborated developmental paths, deviating from the lower stages that characterized the psychology of their parents. These results show that not racial-biological factors but cultural-educational ones account to the divergences discussed here. Yellow, red, white and black "races" living in premodern societies manifest the psychology of the child. When they grow up in modern cultures they all develop the higher psychological stages. Culture makes the difference, not "race".[14]

Against this background it is obvious that the whole history of humankind has to be rewritten. The history of language, population, economy, society, culture, politics, law, sciences, philosophy, morals, arts, literature, music, etc. follows certain psychological stages. The branches and areas mentioned in their premodern times were shaped by the lower stages mainly while their often revolutionary transformations in the past centuries originated in the establishment of the formal operational

[10] PIAGET, J. & R. GARCIA, Psychogenesis and the history of sciences. New York: Columbia University Press 1989. MOGDIL & MOGDIL 1976; OESTERDIEKHOFF, G. W., 2013a, op. cit., 2011, op. cit., 2016a.

[11] RADDING, C., A world made by men. Chapel Hill: University of North Carolina Press 1985. IBARRA, L., Creencias, mitos y rituales en el mundo prehispanico. Guadalajara: Universidad de Guadalajara 2007. LE PAN, D., The cognitive revolution in Western culture. London, New York: The Macmillan Press 1989. WERNER, H., Comparative psychology of mental development, New York: Follet 1948. OESTERDIEKHOFF, G. W., 2009a, op. cit. 2011, op. cit., 2013a, op. cit., 2016a, op. cit.

[12] OESTERDIEKHOFF, G. 2016a, op. cit.

[13] OESTERDIEKHOFF, G. W. 2016a, op. cit. WERNER, H. 1948, op. cit.

[14] DASEN, P. 1977, op. cit. DASEN, P. & J. BERRY 1974, op. cit. LURIA, A. 1982, op. cit. WERNER, H. 1948, op. cit. OESTERDIEKHOFF, G. W. 2009a, op. cit., 2011, op. cit., 2013a, op. cit., 2016a, op. cit., 2017b, op. cit.

stage. Greater or smaller parts of this work of reconstruction have been already done over the past decades.[15]

3. The history of politics in terms of developmental psychology

Developmental psychology found that children have a different understanding of politics than adolescents have. Piaget[16] showed this with reference to legislation and government. Children initially understand rules, customs, and laws as unchangeable, holy, and eternal, made by God, the first humans, or their parents. They do not come from decisions that could be altered but from the eternal order of the cosmos itself. Consequently, children do not discriminate physical from legal laws. They regard legal laws in terms of physical laws and physical laws in terms of legal laws. This phenomenon is called confusion of physics and morals. More exactly, they understand neither the true nature of physical laws nor that of legal laws. Consequently, children have an understanding both of physics and from legislation (morals, customs, etc.) that widely diverges from that of the formal operational stage (modern adults, modern society). They see the order of the cosmos as coming from the deliberate and conscious obedience of the winds, clouds, waters, stars, rainfalls, plants, animals, humans, and occurrences to the eternal laws and divine commands. The physical order comes therefore from commands and from morals, or from divine legislation and government. Thus, they interpret physical laws in terms of human legislation. Conversely, they regard human legislation in terms of physical laws as they see laws, customs, and manners as part of the physical cosmos. Humans are not allowed to change laws, customs, and manners because they are made by god and the cosmos. Consequently, children reject democracy and are in favor of authoritarian principles. The authorities command on behalf of God and the cosmos.[17]

Piagetian Cross-Cultural Psychology conducted among traditional peoples the same empirical surveys as those Piaget had made with children. It was found that peoples living in traditional societies during the 20th century answered the same way as children do. They manifest the same confusion of physical and moral laws and regard legislation as part of the divine order.[18] Consequently, premodern peoples around the world denied democracy and backed authoritarian regimes because they see democratic structures as bringing chaos and sin, disorder and crime. The fact that the whole premodern world only knew authoritarian political structures originated in certain psychological stage structures.[19]

However, although children have a holy understanding of rules, laws, and customs they are not good at preserving and obeying to them. Partially they don't understand them very well, partially their egocentrism produces difficulties in applying them. When they understand them well, then they may tend to obey strictly. When their egocentrism or their misunderstanding prevails then they ignore, forfeit or abuse them. Thus, children combine a holy understanding of rules with their scanty application.[20] Children don't have a sufficient understanding for tolerance. They tend to oppress those who have deviating opinions and don't want to give them the right to speak. They mainly follow a corps mentality and tend to group pressure laid upon all its members. Those who deviate run the risk of being mobbed more than it is common among adult persons.[21] Golding's *The Lord of the Flies* gives a good impression what happens when children lead a life unprotected by the elderly, or any observation at Kindergarten or school does the same.

Fritz Kern[22] identified the same combination of the holy law ideology and scanty social praxis in the medieval European culture. People living in Gottesstaaten suffer from all kinds of injustice, violence, corruption, mafia pressure, lack of liberty rights and tolerance, etc. People under the rule of God and holy law have no rights and cannot defend themselves against powerful institutions and authorities. Powerful persons use the public functions for their own purpose and against the common people who are exploited and oppressed. There is no ancient or medieval civilization without this specific combination defined by Fritz Kern.

This situation of awful social and political conditions holds on in the Third World by yesterday or sometimes even today. The African dictatorships in the second half of the 20th century manifested terrible and unbelievable conditions to the common people. Insecurity and oppression penetrated the social and political life in many Latin American and most Asian nations during the past 100 years. Especially the so-called Gottesstaaten in the Middle East manifested terrible conditions without any

[15] PIAGET, J. & R. GARCIA 1989, op. cit. IBARRA, L. 2007, op. cit. RADDING, C. 1985, op. cit. LE PAN, D. 1989, op. cit. OESTERDIEKHOFF, G., The role of developmental psychology to understanding history, culture, and social change, Journal of Social Sciences, 10, 4, 2014 b, pp. 54-64., ibid. 2009a, op. cit., 2011, op. cit., 2013a, op. cit.

[16] PIAGET, J. 1932, op. cit.

[17] PIAGET, J. 1932, op. cit. DAMON, W., 1977, op. cit. ADELSON, J. & L. BELL. Adolescent perspectives on law and government. Law and Society Review, 45, 1970, pp. 475-506. EASTON, D. & R. HESS, The child's political world. Midwest Journal of Political Science, vol. 6, 1962, pp. 229-246. OESTERDIEKHOFF, G. W., Evolution of law and justice from ancient to modern times, Journal on European history of law, vol. 5, no. 1, 2014a, pp. 54-64, ibid., op. cit., 2009a: 336-344, ders., 2015, op. cit.

[18] HAVIGHURST, R. & B. NEUGARTEN, American Indian and white children. Chicago: University Press 1955. KERN, F., Recht und Verfassung im Mittelalter, Wiesbaden: Wissenschaftliche Buchgemeinschaft 1952. TOPITSCH, E., Mythos – Philosophie – Politik. Freiburg 1969. OESTERDIEKHOFF, G., op. cit., 2009a: 338.

[19] OESTERDIEKHOFF, G. 2013a, op. cit., 2015, op. cit.

[20] PIAGET, J. 1932, op. cit., DAMON, P. 1977, op. cit.

[21] DURIO, H. F., A taxonomy of democratic development. In: Human Development, 19, 1976, pp. 197-219. CHAMBERLAIN, A. F., The child, London: Walter Scott 1901. OESTERDIEKHOFF, G. 2013a, op. cit.

[22] KERN, F. 1952, op. cit.

exception, especially the Khomeini Regime with casualties in practically every Iranian family.[23]

The social and political life improves when people advance psychologically and establish the formal operations. Piaget showed that when adolescents establish the fourth stage of human development then they develop democratic rules by themselves and surmount their former acceptance of authoritarianism. More, they surmount their former egocentrism somewhat and are better in applying rules. Although the rules lose their holy and eternal nature people are better in obeying to them. Their legitimacy only depends from collective decisions that can change over time but now rules are more strictly followed than before. People on higher stages understand better, obey more strictly and apply better rules than people do staying on the child's stages. Adolescents have more tolerance, grant more individual rights to single persons, and are more able to discuss than children do. Altogether, adolescents are more able to start civil societies staying under the rule of law. They introduce democracy, civil society, and rule of law.[24]

Rule of law and civil society developed slowly from the era of Enlightenment onwards during the whole 19th and early 20th centuries within the Western world. Parliaments and justice controlled governments, and individuals could defend their rights against the state. Likewise democratic structures slowly developed starting from the French and American revolutions. Great a many of Western nations institutionalized democracy during the first decades of the 20th century. Civil society and rule of law stepwise ameliorated during the whole 20th century, with some relapses occurring once and again. The improvement of political culture is identifiable by the disappearance of groups like the SA, of brawls of deputies in parliaments, of permanent turmoil in the streets, of harsh conflicts between the political parties, etc. This improvement has continuously increased in the Western world during the past centuries, also in the past 50 years. Nowadays presidents have to leave office when they get paid a hotel room by some businessman (the Christian Wulff case). This reveals the extreme sensibility of the civil society concerning any kinds of abuses, alleged or real ones. Of course, the present state of political culture also has only a transitional character. Presumably, future generations will look at present-day political culture as contemporaries may look at past Mao's or Stalin's political cultures.

Of course, this amelioration of political culture is by no means a Western or Japanese privilege. Russia under Putin is a paradise in comparison to Russia under Stalin. Present-day China with its digital control system or its oppression of its Muslim citizens in the Western parts of the country is likewise a paradise in comparison to Mao's China with its estimated 60 millions of casualties. The decline of dictatorships in Africa and Latin America during the past 50 years or so manifests the slow development of democracy, rule of law, and civil society. Even in the Muslim world a progress is identifiable when the look focuses for example developments in Tunisia or Morocco. Of course, it will last some more generations until the whole world will have reached those civilized political cultures the today's most advanced nations have already attained.[25]

4. War against drugs

The Philippines are exposed to Western influences for 500 years now. After 400 years under Spanish colonial rule they were exposed to the influence of the U.S.A. before they became an independent nation. The Philippines is a developing nation with a full participation at the processes of modernization and globalization. Despite it exhibits traits in culture, religion, and politics that are vanished in the today's most advanced nations. During his election campaign Rodrigo Duterte announced on practically every arrangement or interview his intention to kill hundred thousands of people in case of his election for president. He announced to fed the fish in the Manila Bay with the corpses of the drug dealers. He boasted in front of the whole nation that as mayor of Davao he had visited with his motorbike all places in the city where addicts and drug dealers stayed in order to shoot them down with his gun. Journalists were sure that it was these strange talks and announcements that caused Duterte's victory in the election campaign. Obviously, the electorate preferred a strong man who cleans the public scene with his iron fist and could present experiences related. They wanted a law and order killer who cleans the streets with his own gun. Only a few weeks after he took office Duterte announced he wanted to kill three millions of delinquents, as Hitler had done with allegedly three millions of Jews. Both police and civil guards were ordered to search for addicts and drug dealers in their quarters in order to kill them. In every quarter or suburb lists of drug addicts were made and handed over to police forces. From summer 2016 to November 2017 more than 13.000 human beings were killed without any juridical examination, due to some simple suspicions put forward by any persons. Both policemen and private killers got 300 Dollar for every assassination. This payment will have had a distortive impact on the amount of exploration of the deeds accused. Journalists maintained that these occurrences could be equalized with regular ethic cleansings.

A classic sociological explanation to these occurrences could maintain that poor nations with a huge drug problem necessarily install extremely drastic means, more drastic and strange means than rich nations use to do. Nations with bigger problems cannot afford the luxury to overlook but have to react harshly when in danger. However, the facts are different. The Philippines have no bigger drug problems than other nations have. Even the Philippine government published the numbers of the public drug office. According to the report, the nation had in 2016 only 1,75 millions of drug users, that are 2,3% of the total population. According to the world drug report of the United Nations, only one percent of the Philippine people are addicted to drugs. The worldwide average amounts 5% and in the U.S.A. 16% of the population are addicted to drugs. Hence,

[23] OESTERDIEKHOFF, G: 2013a, op. cit.

[24] PIAGET, J. 1932, op. cit., DURIO, H. F. 1976, op. cit., DAMON, W. 1977, op. cit., ADELSON, J. & L. BELL 1970, op. cit., EASTON, D. & R. HESS 1962, op. cit.

[25] OESTERDIEKHOFF, G. 2016b, op. cit.

the politics against drugs and the ensuing bloody occurrences reported do not originate in a greater pressure of problems.

The classical sociological approach could maintain that Duterte be a specific person, possibly suffering from mental disorder, and could live out his disorder because as an in-fact-dictator there might be nobody to stop him. However, even this approach focusing power control can be easily refuted by the facts. Duterte has announced his deeds planned before his election, that is during a phase where he didn't have any power upon the nation. More, he has won the election because he announced his deeds and assassinations. After the data published by the Philippine opinion research institute SWS, 75% of the population supported and backed Duterte in march 2017, that is during the hot phase of the killings. Only 9% of the people rejected his politics with this regard. As this approval existed already before the election it cannot be explained in terms of official propaganda. Obviously, there is no opposite between the opinions of Duterte and those of the majority of people. Duterte thinks like the people do. His actions ensue their expectations.

A combination of an a-historical model of the human being and social structure analysis – the theory model number one as presented in the introduction above – cannot explain these phenomena. Neither power politics models nor institutionalist approaches can help further. More, there is neither any problem pressure in the country nor any psychic disorder in the president's mind. Accordingly, the conclusion has to be drawn that even a nation that has progressed as the Philippines did has a political culture and a moral life that are below the civilized standards the most advanced nations of today exhibit. The nation must have archaic moral values and less developed humanistic standards, as Duterte himself said literally: "In the Philippines it is valid - an eye for an eye, a tooth for a tooth". Of course, his deeds do not match even to this strange code – they go far beyond.

The following consideration helps to understand the phenomenon better. Chancellor Schroeder or Chancellor Merkel visit with their motorbikes railway stations or other public places over months and shoot down there in Wild West manner humans of whom they believe they were drug dealers or drug addicts. Both persons weren't arrested and accused but tell about their shootings to the mass media and before greater audiences. Because of their shooting campaigns they are elected by the mass of the population. Then they start with their pogroms. Killer in Essen or Hamburg can fetch their reward at police stations and the people believe that from now on everything in the country turns for the better. Of course, this scenario is not imaginable and it reminds a myth country. The scenario would be possible physically but not psychologically. Such occurrences are not possible in the today's most advanced nations because any try of making them happen would address the fiercest resistance that originates in the meanwhile attained psychological stage of the people. The impossibility of realization of these occurrences in the most advanced nations led them appear as somehow mythical or non-real. They are non-real in Japan, Russia or South Korea but not in the Philippines where these things actually occurred.

The ideological programming both of the common citizen and the social scientist in consequence of the since 1975 prevailing ideology of cultural relativism cares for an interpretation of these incidents that when they happen in developing nations they are perceived differently as when they happen in Europe or Australia.[26] People unconsciously filter these data according to the cultures where they happen. A car accident caused by drunkenness in Canada matches a criminal blasting of a whole village in the Third World. People weigh with different measures without even recognizing it. The different measurements remain under the observation threshold, as consequence of universal ideological programming. Unconsciously people know that the story "Schroeder or Merkel in search for human victims" can only be a myth. Such occurrences when happening in past history or in developing nations are unconsciously belittled and withdrawn from any kind of problematization.

5. Killing of the president as regular video entertainment

Samuel Doe became president in Liberia 1980 after he had, as sergeant of a troop with 16 soldiers, his antecedent William Tolbert torn in four parts in his bed. Prince Johnson captured and murdered Doe in September 1990 after 10 years of terror regime. Johnson ordered to film the torture and assassination of Doe down to the smallest details. The two-hours-film shows the cruelties with the greatest exactitude. The viewer sees the bloody and hit Doe, hears the orders of Johnson to cut away first the one and then the other ear, what happens afterwards, hears the cries of pain of the victim, and the orders of Johnson to continue the torture. Doe is requested to spell the numbers of his bank account. He wants to do this but isn't able anymore to do this. He dies of his blood loss. Finally the viewer sees the furious and crying Johnson and his torturing and bloodthirsty soldiers.[27]

Of course, the occurrence itself is not very much astonishing or peculiar. These are however the consequences. The new president Johnson namely cares for the publication of the video in the whole country. It was the biggest attraction on the whole media market in Liberia. The film was cast not only in Liberia but in many nations of West Africa. Over years it run nonstop in every restaurant or bar. The film did not endanger Johnson's presidency. It hindered neither his inauguration nor his ensuing government. The movie did not create any hatred within the people, no doubt into his capability to govern and no loyalty problems. In fact, Johnson did not provide that the publication of the movie could cause him problems concerning the approval of the people. Rather conversely he seems to have believed that the communication of the former president's assassination might alleviate and legitimate his taking of power. Possibly he also wanted to intimidate possible competitors. In any case he had hoped for some advantages to gain from the publication. The whole nation's reaction is more interesting than the activity of Johnson himself. The people could have

[26] OESTERDIEKHOFF, G. 2017b, op. cit.

[27] KAPUSCINSKI, R., Afrikanisches Fieber. München: Piper Verlag 2005, pp. 246-248.

refused to watch at the movie on a regular basis, to cast it everywhere and to be addicted to watch at it all time. Yet the video became the movie most wanted throughout the country.

The necessity of the application of the developmental approach is apparent. Presumably the occurrences in Liberia are more strange and archaic than those reported from the Philippines. Perhaps it would not have been possible to show or to watch at that movie in the Philippines. Possibly it would hurt the sensibility of the majority of the Philippines. However, even when there may be differences concerning cognitive development and moral standards these differences seem to be not very great.

6. Back to authoritarianism

As the Liberia incidents may be stranger than the drug war in the Philippines, as the incidents around Duterte may be more strange and archaic than those happening in Turkey over the last years. It is not thinkable that the Liberia or Philippine incidents reported could happen in Turkey: they are there not psychologically and therefore not real-historically possible. Turkey is a highly developed threshold country that had started her's process of modernization and industrialization more than a hundred years ago. It has a long tradition of Kemalism, the strict separation between religion and state, of Westernization, of fight for the rights of unions and women, self-determination and minority protection. Structures of democracy and rule of law have been established there for almost a hundred years now.

Despite it is apparent that the nation's political culture does not match the standards of those nations that belong to the most advanced ones of today. The nation (obviously the majority of the people) denies accepting the genocide of the Armenians happened a 100 years ago and to confess guilt and responsibility to that. The divergence to the German attitude towards the Holocaust and the contemporary Ruanda attitude towards the 1994 genocide is obvious. It is a matter of fact that this primitive and egocentric refusal to accept the facts and the responsibility for them is explainable only with reference to developmental stages. A mature political culture would not hesitate to present the facts and to draw the political consequences. More, the country oppresses by today religious and ethnic minorities as for example Poland did during the thirties. Turkey bereaves the property of the Christians, it discriminates them and often forbids to build or even to restore Christian churches. Conversely, she takes it for granted that Muslims in Europe should be allowed all the rights that they deny Christians in Turkey. She leads a war against the Kurds and occupies parts of Syria, actions backed by the majority of the people and their political parties.

The nation had diminished central parts of democracy and rule of law in favor of authoritarian patterns over the last years. This transformation was wanted or accepted by at least half of the population. Hence, democratic consciousness is not as deeply anchored as it is in the today's most advanced nations. People with higher developed democratic minds would have never accepted or allowed to change the political system in the direction of authoritarianism. The Turkish people have accepted their own incapacitation. After the cup try of July 2016 more than 100.000 persons were removed from their job positions and were prosecuted by justice. Government officials frequently used terms such as "cleansing" or "hanging". The government started aggressive verbal campaigns against Western nations and against Western politicians convinced to satisfy the national emotions of their own people. Government officials used terms that probably not one European politician from the regional level onwards ever had used during the past 70 years. It was a raid against all standards of international diplomacy. Of course, this state-of-the-art analysis will change over time. Without any doubt it is sure that Turkey in future will join again the process of democratization and modernization. It is not the Islam that blockades the progress it is the psychological stage. That, however, will transform in future as it had done over the past 100 years already successfully.

Conclusions

It would be possible to add thousands of other examples related that all hint at the same direction. Despite processes of globalization and approximation even concerning political culture and socio-moral standards still today different nations operate upon different stages of political and cultural patterns. These differences are by no means explainable predominantly by different social structures and environmental constraints according to the *situation of logic* but with reference to divergent psychological developmental stages of the peoples. Accordingly, it is necessary to apply developmental psychology to the explanation of the history of politics generally and to the history of contemporary politics specifically. The conclusions drawn from the facts reveal further that the humankind has a better future with more possibilities to live a life in freedom and security than all the past has offered before. Basically, there is no reason why the process of psychological development and socio-moral advancement should stop in future.

Accordingly, developmental psychology is the most developed theory to understand politics both on the national and international level.[28] Without knowing anything from that what this article presents here and from that what was found out regarding the childlike mentality of premodern humankind and of the psychogenetic development of the modern humankind there were some social scientists who despite grasped the role developmental psychology could play within the political sciences, however weak and scanty this insight might have been. They emphasized that the political sciences base on a wrong assumption, namely that peoples across history and continents might stay on the same psychological stage, thinking in the same forms and structures. "We therefore conclude that only genetic-epistemological theories currently provide the psychological theory and cross-cultural validity (not to mention the normative support) required for a normative-psychological theory underlying a general political development… We advance a Piagetian reconceptualization of political culture, which is then used to define political development."[29]

[28] OESTERDIEKHOFF, G. 2015, op. cit., 2017a, op. cit.
[29] ROSENBERG, S. et al., Political reasoning and cognition. A Piagetian view. Durham & London: Duke University Press 1988.

References

ADELSON, J. & L. BELL. Adolescent perspectives on law and government. In: *Law and Society Review*, May 1970, pp. 495-504.

ASHTON, P. T. Cross-cultural Piagetian research. An experimental perspective. In: *Harvard Educational Review*, 1975, 45, pp. 475-506.

CHAMBERLAIN, A. F. *The child: a study in the evolution of man*. London: Walter Scott, 1901.

COLEMAN, J. *Foundations of social theory*. Three volumes. Cambridge, Mass.: Harvard University, 1990.

DAMON, W. *The social world of the child*. San Francisco, London, Washington: Jossey Bass Inc., 1977.

DASEN, P. & J. W. BERRY (Eds.). *Culture and cognition. Readings in cross-cultural psychology*. London: Methuen & Co., 1974.

DASEN, P. Cross-cultural Piagetian research: a summary (pp. 409-424). In: *Culture and cognition. Readings in cross-cultural psychology,* ed. by P. Dasen & J. Berry. London: Methuen & Co., 1974.

DASEN, P. *Piagetian cross-cultural psychology*. New York: Gardner Press, 1977.

DURIO, H. F. A taxonomy of democratic development. A theoretical interpretation of the internalising of democratic principles. In: *Human Development*, 1976, 19, pp. 197-219.

EASTON, D. & R. HESS. The child's political world. In: *Midwest Journal of Political Science*, 1962, vol. 6, pp. 229-246.

ELIAS, N. *Power and civility*. New York: Pantheon, 1982.

GRANT, M. *The gladiators*. New York: Barnes & Noble Banks, 1982.

HAVIGHURST, R. & B. NEUGARTEN. *American Indian and white children*. Chicago: University Press, 1955.

IBARRA, L. *Creencias, mitos y rituales en el mundo prehispánico. Una explicación desde la teoría histórico-genética*. Guadalajara: Universidad de Guadalajara, 2007.

KAPUSCZINSKI, R. *Afrikanisches Fieber. Erfahrungen aus 40 Jahren*. München: Piper Verlag, 2005.

KERN, F. *Recht und Verfassung im Mittelalter*. Darmstadt: Wissenschaftliche Buchgesellschaft, 1952.

LE PAN, D. *The cognitive revolution in Western culture*. London, New York: The Macmillan Press, 1989.

LURIJA, A. R. *Cognitive development. Its cultural and social foundations.* Harvard: University Press, 1982.

MOGDIL, C. & S. MOGDIL. *Piagetian research*. Vol. 1-8. London, 1976.

MONTESQUIEU, C. de. *Vom Geist der Gesetze*. Stuttgart: Reclam, 2011.

OESTERDIEKHOFF, G. W. *Mental growth of humankind in history*. Norderstedt: Bod, 2009a.

OESTERDIEKHOFF, G. W. The arena games in the Roman empire. A contribution to the explanation of the history of morals and humanity. In: *Croatian Journal of Ethnology* (Nar. Umjet.), 2009 b, 46, 1, pp. 177-202.

OESTERDIEKHOFF, G. W. *The steps of man towards civilization. The key to disclose the riddle of history*. Norderstedt: Bod, 2011.

OESTERDIEKHOFF, G. W. *Die Entwicklung der Menschheit von der Kindheitsphase zur Erwachsenenreife*. Wiesbaden: Springer VS, 2013a.

OESTERDIEKHOFF, G. W. Evolution of law and justice from ancient to modern times. In: *Journal on European History of Law*, 2014a, vol. 5, no. 1, pp. 54-64.

OESTERDIEKHOFF, G. W. The role of developmental psychology to understanding history, culture, and social change. In: *Journal of Social Sciences,* 2014 b, 10, 4, pp. 185-195.

OESTERDIEKHOFF, G. W. Evolution of democracy. Psychological stages and political developments in world history. In: *Cultura. International Journal of Philosophy and Axiology*, 2015, Vol. XII, No. 2, pp. 81-102.

OESTERDIEKHOFF, G. W. Child and ancient man. How to define their commonalities and differences. In: *American Journal of Psychology*, 2016a, vol. 129, no. 3, pp. 297-314.

OESTERDIEKHOFF, G. W. Evolution of mentality, politics, law, and social affairs during the past century. In: *Asian Journal of Social and Human Sciences*, 2016 b, vol. 1, Issue 2, pp. 53-68.

OESTERDIEKHOFF, G. W. Fascism and Nazism as transitional phenomena from traditional to modern society. The contribution of the cognitive-developmental approach to the explanation of the evolution of politics. In: *Russian Journal of Sociology,* 2017a, 3, 1, pp. 4-16.

OESTERDIEKHOFF, G. W. What went wrong with cross-cultural psychology over the last 40 years? The developmental approach in opposition to two main ideologies of our time, cultural relativism and universalism of mind. In: *Human Evolution*, 2017b, vol. 32, No. 1-2, pp. 95-138.

OESTERDIEKHOFF, G. W. Evolution of morals in world history. In: *Human Evolution*, 2017c, vol. 32, No. 1-2, pp. 1-24.

PIAGET, J. & B. INHELDER. *The psychology of the child.* New York: Basic Books, 1969.

PIAGET, J. & R. GARCIA. *Psychogenesis and the history of sciences.* New York: Columbia university press, 1989.

PIAGET, J. *The moral judgment of the child*. New York: The Free Press, 1932.

PIAGET, J. *The origins of intelligence in children*. New York, 1952.

PIAGET, J. Need and significance of cross-cultural studies in genetic psychology. In: P. Dasen & Berry, J. (Eds.), *Culture and cognition* (pp. 299-310). London: Methuen & Co., 1974.

RADDING, C., M.*A. world made by men. Cognition and society 400-1200.* Chapel Hill: The University of North Carolina Press, 1985.

ROSENBERG, S. et al. *Political reasoning and cognition. A Piagetian view.* Durham & London: Duke University Press, 1988.
ROUSSEAU, J.-J. *Vom Gesellschaftsvertrag oder Grundsätze des Staatsrechts*. Stuttgart: Reclam, 1983.
TOPITSCH, E. *Mythos – Philosophie – Politik*. Freiburg, 1969.
WERNER, H. *Comparative psychology of mental development*. New York: Follet, 1948.

The Petroleum Law in Poland in the 19th and 20th Centuries

*Tomasz Chłopecki**

Abstract

The article „Petroleum law in Poland in the 19th and 20th centuries" presents the development of petroleum legislation during the partitions and the Second Polish Republic. The concepts of legal solutions presented in the article allow for stating that the subject of petroleum law and its institutions aroused great interest of lawyers and politicians both in the period of partitions and after Poland regained its independence. Undoubtedly, the provisions of the petroleum law had an influence on the development of solutions of the Polish economy and economic law.

Keywords: *law; mining law; oil law; Poland; Second Republic; concepts; codification.*

1. Introduction

On the basis of Roman mining law[1], a medieval regal right was established and evolved in the Polish territories into an autonomous legal institution[2]. Although mining in Poland, as evidenced by historical data, has existed since ancient times, the legal norms regulating it were not of native origin, they emerged, as well as mining art itself, in the west, namely in the territories of Hungary, the Czech Republic and Germany[3]. The first known mining law regulations recognized the regal right – Jan Długosz wrote that Bolesław I the Brave gave the monasteries the right to search for and extract all minerals except for gold[4]. German, Czech and Hungarian mining law standards were important for learning about the old Polish mining law, not only as an indirect source from which it drew its rules, but also a direct source recognized by the Polish authorities, who often, among others, in the decision of Władysław Jagiełło of 1426, relied directly on foreign laws[5]. In turn, legislative activity developed on a large scale in the mid-14th century during the reign of King Casimir III the Great; subsequently, the mining law was codified by Jan Olbracht[6], and announced by his successor Alexander in 1505[7].

It is worth pointing out that in Poland, the rule of the royal domain (regal)[8] was initially applicable to mining, as in other European countries[9]. In 1567[10], the privilege of Stefan Batory[11] was issued, which granted the nobles the ownership of the mineral deposits that were located in their estates[12]. The adoption of the regal rule was facilitated, especially in German countries, by the Germanic Ancestral Community preceding the individual ownership of land, and denying all personal ownership of the property[13]. The above regal rule did not correspond to the general legal sense, not recognizing the essence of the regal since the 16th century, because since the aforementioned Ste-

* Dr. Tomasz Chłopecki, College of Law, Faculty of Law and Administration, Wroclaw, Poland.

1 ŁABĘCKI, H., *Górnictwo w Polsce. Opis kopalnictw i hutnictwa polskiego pod względem technicznym, historyczno-statystyczny i prawnym,* vol. 2, Warszawa 1841, p. 4-5.

2 ROSENBERG, M., *Rozwój pojęcia własności górniczej w prawie francuskiem,* Kraków 1921, p. 5.

3 BUKOWIECKI, S., *Główne zasady cywilistyczne prawa górniczego na ziemiach polskich,* In: *Kwartalnik Prawa Cywilnego i Handlowego*, vol. 1, Nr 1, Warszawa 1916, p. 4.

4 BUKOWIECKI, S., *Główne zasady cywilistyczne prawa górniczego na ziemiach polskich,* In: *Kwartalnik Prawa Cywilnego i Handlowego*, vol. 1, Nr 1, Warszawa 1916, p. 4.

5 BUKOWIECKI, S., *Główne zasady cywilistyczne prawa górniczego na ziemiach polskich,* In: *Kwartalnik Prawa Cywilnego i Handlowego*, vol. 1, Nr 1, Warszawa 1916, p. 6.

6 ŁABĘCKI, H., *Górnictwo w Polsce. Opis kopalnictw i hutnictwa polskiego pod względem technicznym, historyczno-statystyczny i prawnym,* vol. 2, Warszawa 1841, p. 198.

7 ŁABĘCKI, H., *Górnictwo w Polsce. Opis kopalnictw i hutnictwa polskiego pod względem technicznym, historyczno-statystyczny i prawnym,* vol. 2, Warszawa 1841, p. 198.

8 ŁĄBĘCKI, H., *Początki nauki kopalnictwa,* Warszawa 1843, p. 3-8.

9 ROSENBERG, M., *Kodeks naftowy,* vol. 1, Kraków 1908, p. 2.

10 ROSENBERG, M., *Zarys urządzeń prawnych górnictwa w Polsce pod koniec XVI w.,* Lwów 1912.

11 ŁABĘCKI, H., *Górnictwo w Polsce. Opis kopalnictw i hutnictwa polskiego pod względem technicznym, historyczno-statystyczny i prawnym,* vol. 2, Warszawa 1841, p. 122.

12 ROSENBERG, M., *Kodeks naftowy,* vol. 1, Kraków 1908, p. 2.

13 ROSENBERG, M., *Rozwój pojęcia własności górniczej w prawie francuskiem,* Kraków 1921, p. 5.

fan Batory's privilege confirmed in Pacta Conventa, all mineral deposits found in landed estates have constituted the property belonging to the land[14]. The 17th century was the period of the collapse of the mining industry in Poland – it existed only in the royal estates and the estates of the Cracow bishopric[15]. In the second half of the 18th century, under the rule of Stanisław August, no changes were made in the field of mining and petroleum law[16].

This paper will present concepts of the development of petroleum law in the Polish lands in the 19th and 20th centuries. Broad discussions on the development of petroleum law, separation of its provisions from mining law regulations and considerations regarding land ownership and property rights from the point of view of civil law allow for emphasizing the importance of the discussed topic. The issues raised are also important from the point of view of economic development in the period of the Second Polish Republic because the petroleum industry was very important for the development of motorization and the country's defense sphere.

2. Concepts of petroleum legislation during the partitions

Concerning the issue of petroleum, during the partitions, the Viennese Government repeatedly attempted to return to the regal rule, for instance in the decisions of the Court Chamber of 17 October 1838, November 20, 1848, or the Ministry of the Treasury's ordinance of April 18, 1854[17]. The advocate of the opposite views was the Galician Sejm, which in a unanimous resolution of 1861, stressed that petroleum had to be considered as an element not belonging to the regal right[18]. The above Sejm resolution, supported by the petition of the national department, was partly met with the favorable attitude of the Austrian government, which, by the highest order of January 22, 1862, ruled that petroleum and tar did not fall into the regal right and belonged to the land if used for the production of light oils[19].

Art. 5 of the French Mining Act of April 21, 1810, constituted the principle that the mines could only be operated on the basis of a concession act granted by the state[20]. However, the granted concession act was not only an administrative act, but also constitutive private and legal act giving rise to mining rights on the part of the concessionaire as well as regulating the rights of landowners with respect to the production of the given mine[21]. The Act of 1810 introduced into the modern legislation the concept of mining property, separate from land property – the introduction of the concept of mining property was considered by Stanisław Bukowiecki as a breakthrough in the general development of mining law in Europe[22]. Recognition of the mining right, that is the right to exploit the interior of a given space as a separate property that could be subject to all types of civil transactions and that could be the collateral for a mortgage loan, corresponded to the needs of modern mining as an industry demanding much more extensive work and capital in comparison with the old times[23]. It was after the French Act that the Austrian Mining Act of 23 May, 1854, introduced the notion of a separate mining property, determining the reserved mineral rights concerning minerals occurring within the marked field, the mine owner, the mining entrepreneur, granting of the mining field and determining in general the mining rights[24].

The Prussian Mining Act of June 24, 1865, introduced not only the concept of mining property but also regulated its statutory definition, similarly to the Saxon Mining Act of August 31, 1910, and the Bavarian Mining Act of August 13, 1910[25]. This act was considered by many researchers to be the most perfect regulation of mining work on the basis of the miner's consent for the extraction of minerals and separate property of the interior in the discussed period[26]. The mining regulations of the Kingdom of Poland of June 28, 1870, on the search and designation of space for extracting fossil resources[27] introduced the principle of miner's consent only applying to three fossil resources: coal, galman and galena; the Act of 1892 supplemented this catalog with iron ore, and all other fossil resources, on the basis of miner's consent, constituted an inseparable part of landed property and could be exploited only by the owners or with their permission[28].

On the basis of the above considerations, it can be seen that the majority of European laws of that time, usually following

---

[14] *Ankieta w sprawie Kodyfikacji Polskiego Prawa Naftowego,* Lwów 1925, p. II.
[15] BUKOWIECKI, S., *Główne zasady cywilistyczne prawa górniczego na ziemiach polskich,* In: *Kwartalnik Prawa Cywilnego i Handlowego*, vol. 1, Nr 1, Warszawa 1916, p. 11.
[16] BUKOWIECKI, S., *Główne zasady cywilistyczne prawa górniczego na ziemiach polskich,* In: *Kwartalnik Prawa Cywilnego i Handlowego*, vol. 1, Nr 1, Warszawa 1916, p. 12.
[17] *Ankieta w sprawie Kodyfikacji Polskiego Prawa Naftowego,* Lwów 1925, p. II.
[18] *Ankieta w sprawie Kodyfikacji Polskiego Prawa Naftowego,* Lwów 1925, p. II.
[19] *Ankieta w sprawie Kodyfikacji Polskiego Prawa Naftowego,* Lwów 1925, p. II.
[20] ROSENBERG, M., *Rozwój pojęcia własności górniczej w prawie francuskiem,* Kraków 1921, p. 17.
[21] ROSENBERG, M., *Rozwój pojęcia własności górniczej w prawie francuskiem,* Kraków 1921, p. 17.
[22] ROSENBERG, M., *Rozwój pojęcia własności górniczej w prawie francuskiem,* Kraków 1921, p. 23.
[23] ROSENBERG, M., *Rozwój pojęcia własności górniczej w prawie francuskiem,* Kraków 1921, p. 23.
[24] ROSENBERG, M., *Rozwój pojęcia własności górniczej w prawie francuskiem,* Kraków 1921, p. 24.
[25] ROSENBERG, M., *Rozwój pojęcia własności górniczej w prawie francuskiem,* Kraków 1921, p. 24.
[26] BUKOWIECKI, S., *Główne zasady cywilistyczne prawa górniczego na ziemiach polskich,* In: *Kwartalnik Prawa Cywilnego i Handlowego*, vol. 1, Nr 1, Warszawa 1916, p. 16.
[27] BUKOWIECKI, S., *Główne zasady cywilistyczne prawa górniczego na ziemiach polskich,* In: *Kwartalnik Prawa Cywilnego i Handlowego*, vol. 1, Nr 1, Warszawa 1916, p. 16.
[28] GRABSKI, W., WALISZEWSKI, J., BUKOWIECKI, S., KORSAK, Z., BOUFFAŁŁ, B., KŁOBUKOWSKI, S., RADZISZEWSKI, H., *W naszych sprawach. I. Szkice w kwestyach ekonomiczno-społecznych,* Warszawa 1899, p. 68 - 69.

the old tradition, introduced the principle of miner's consent, which is generally attributed to the development of mining[29]. I would also like to point out that in terms of the property rights to the mines, there were 2 systems: the first granted property rights to fossil resources to the state – *ius regale*, while the second granted property rights to the interior to the owner of the land[30]. Legislation of Austria, Germany and Sweden, among others, was based on the first system, while France, Belgium, England, Spain and Italy relied on the second system[31].

At the time of Galicia's transition into the Austrian partition, oil mining was very poorly developed and regulated by the patents of 9 September 1773 and 18 December 1786[32]. For the first time the regulations of the petroleum law were introduced by the decree of the Court Chamber of August 2, 1810, addressed to the then mining court in Drohobych[33]. In subsequent years, statutory regulations on petroleum affairs were subject to significant changes. The petroleum law emerged as a breach that was made in mining legislation[34]. The Ministry of the Treasury, the highest authority in mining affairs at that time, issued an ordinance of 18 April 1854 stating that rock oil was subject to the regal right[35]. The imperial patent of 23 May 1854, in § 3 included the concept of the regal right as the sovereign's right to exclusive disposal of mineral deposits, including resin bitumen[36]. The petroleum laws (state[37] and national[38]) of 1884 were based, similarly to the unsanctioned Act of 1878, on the principle of the belonging of resin minerals[39] to the land property[40]. One of the most important provisions of the petroleum laws was the departure from the concession-industrial system unsanctioned by the Act of 1878[41]. An important novelty for petroleum mining was the introduction of police-mining supervision of mining authorities as opposed to non-sanctioning of this scope in the Act of 1878[42]. The above outline shows that the petroleum laws of 1884 abolished the regal right, as a result of which the legislative competence of the legislature was also changed[43]. The state petroleum law of 1884 subjected petroleum extraction to the supervision of mining authorities – the competence of the mining authorities was included in § 33 of the national petroleum law of 1884, which subjected all searches to their control[44].

In Prussia and the areas incorporated into it, the Mining Act of 24 June 1865 was in force and, as has already been stated, this legislation was one of the most modern in Europe. This manifested itself in the organization of mining authorities and their bodies, as well as the issues of property rights which, not theoretically, as in Austrian regulations, but through an exhaustive list, identified minerals owned by the State Treasury, including gold, silver, iron, nickel, arsenic or manganese[45]. Further provisions of the Act also stipulated the issues of consolidation, that is a combination of several mines, after obtaining legally required permits. In addition, the Mining Act of 1865 contained numerous and detailed order provisions concerning, inter alia, mining industry, relations of the owner and workers, conducting an operational plan, excavation plans, and entrusting the board to duly qualified people or keeping statistics[46].

The basic assumption of French legislation of 1791 and 1810 was the principle that the owner of land was the owner of its interior[47]. A characteristic feature of French legislation was art. 32 of regulations of 1810, which stipulated that the mining industry did not constitute trade if it dealt with the extraction of „raw material", whereas its further processing was already a commercial activity[48]. This concept resulted in the principle that mining was not subject to trade fees but to special mining tax, which was divided into fixed and proportional[49]. The mining law in force in the Russian Empire was collected in the seventh volume of Swod Zakonow, as the second part of this volume. However, it was not codified legislation, but a set of laws systematized based on the content and containing provisions issued from 1719 to 1893[50]. The Russian legislation

[29] GRABSKI, W., WALISZEWSKI, J., BUKOWIECKI, S., KORSAK, Z., BOUFFAŁŁ, B., KŁOBUKOWSKI, S., RADZISZEWSKI, H., *W naszych sprawach. I. Szkice w kwestyach ekonomiczno-społecznych,* Warszawa 1899, p. 68.
[30] KOCZANOWICZ, M., *Prawo górnicze obowiązujące w Królestwie Polskiem,* Warszawa 1896, p. 13.
[31] KOCZANOWICZ, M., *Prawo górnicze obowiązujące w Królestwie Polskiem,* Warszawa 1896, p. 13.
[32] ROSENBERG, M., *Uprawnienia górnicze i naftowe w swym stosunku wzajemnym,* Lwów 1906, p. 30.
[33] ROSENBERG, M., *Kodeks naftowy,* vol. 1, Kraków 1908, p. 2.
[34] ROSENBERG, M., *Ustawodawstwo naftowe wobec Powszechnej Ustawy Górniczej,* Lwów 1904.
[35] ROSENBERG, M., *Kodeks naftowy,* vol. 1, Kraków 1908, p. 4.
[36] ROSENBERG, M., *Ustawodawstwo naftowe wobec Powszechnej Ustawy Górniczej,* Lwów 1904, p. 6.
[37] HIBL, J., *Ausryacko – galicyjskie prawo naftowe. Zbiór ustaw i rozporządzeń dotyczących górnictwa, przemysłu i handlu naftowego, opodatkowania i oclenia nafty, ustroju i postępowania władz w sprawach naftowych, poprzedzony wstępem historycznym,* Lwów 1888, p. 1-12.
[38] HIBL, J., *Ausryacko – galicyjskie prawo naftowe. Zbiór ustaw i rozporządzeń dotyczących górnictwa, przemysłu i handlu naftowego, opodatkowania i oclenia nafty, ustroju i postępowania władz w sprawach naftowych, poprzedzony wstępem historycznym,* Lwów 1888, p. 13-59.
[39] With the exception of bituminous coal.
[40] ROSENBERG, M., *Ustawodawstwo naftowe wobec Powszechnej Ustawy Górniczej,* Lwów 1904, p. 13.
[41] ROSENBERG, M., *Ustawodawstwo naftowe wobec Powszechnej Ustawy Górniczej,* Lwów 1904, p. 13.
[42] ROSENBERG, M., *Ustawodawstwo naftowe wobec Powszechnej Ustawy Górniczej,* Lwów 1904, p. 16.
[43] ROSENBERG, M., *Ustawodawstwo naftowe wobec Powszechnej Ustawy Górniczej,* Lwów 1904, p. 21.
[44] ROSENBERG, M., *Kodeks naftowy,* vol. 1, Kraków 1908, p. 25.
[45] KOCZANOWICZ, M., *Prawo górnicze obowiązujące w Królestwie Polskiem,* Warszawa 1896, p. 27.
[46] KOCZANOWICZ, M., *Prawo górnicze obowiązujące w Królestwie Polskiem,* Warszawa 1896, p. 31.
[47] KOCZANOWICZ, M., *Prawo górnicze obowiązujące w Królestwie Polskiem,* Warszawa 1896, p. 34.
[48] KOCZANOWICZ, M., *Prawo górnicze obowiązujące w Królestwie Polskiem,* Warszawa 1896, p. 42.
[49] KOCZANOWICZ, M., *Prawo górnicze obowiązujące w Królestwie Polskiem,* Warszawa 1896, p. 42.
[50] KOCZANOWICZ, M., *Prawo górnicze obowiązujące w Królestwie Polskiem,* Warszawa 1896, p. 43.

regulated the principle that the landlord was the owner of the interior[51].

I would also like to point out that the elements characteristic of mining[52] in the period discussed here were: subjecting the exploration and extraction of minerals to the supervision of special professional (mining) authorities, with whose consent search and exploitation could only have taken place, granting, in favor of and in the interest of mines, the right to expropriate foreign property in order to allow or facilitate making a move by the mine, taking into account the primary importance of the mining industry for the collective economy, issuing special protective standards for the miners working at the mines as well as for foreign property and life, taking into account the special danger associated with mining, distinction and separate normalization of the so-called mining damage arising from the negative, and only proper for mining, impact on foreign property and compensation in this respect in a much wider scope than in the case of civil legislation[53].

3. Refining industry

The cradle of mining and oil industry were the United States – the home of the first American trust and the Rockefeller's Standard Oil Company[54]. The dominant position on the world market, on which the Standard Oil Company was able to carry out its monopolistic goals with relentless consistency, regarded the organization and mastery of retail petroleum trade in Germany, which led to a real trade monopoly[55]. The issue of the sale of petroleum products in Germany, which was, apart from Czechoslovakia, a natural and the nearest outlet for the Małopolska petroleum, was extremely important for the Galician lands from the economic point of view[56].

The Galician refining industry can be dated back to 1856, when the first petroleum refinery in Poland was established in Ulaszowice near Jasło[57]. The refinery movement[58] in Galicia in the first years of its existence was concentrated in the Gorlice and Krosno poviats; in 1884, there were already 57 refineries in Galicia[59]. The first oil wells were ordinary wells from which oil was drawn with a bucket. Significant progress took place with the introduction of a drill bit in 1862, which was first started in Barbórka and Boryslav[60]. The Małopolska petroleum mining industry could be described as follows: apart from a few large petroleum companies, there was a large number of smaller petroleum companies, mostly domestic ones, each of which had a small number of oil wells[61].

The system of mining authorities was governed by the Act of July 21, 1871, distinguishing three authorities subordinated to each other: the district mining office, the mining starosty and the Ministry of Agriculture[62]. According to the directive of the Ministry of Agriculture of February 22, 1886, there was a mining starosty in Galicia, Jasło, Drohobych, and Stanisławów[63]. Therefore, in all mining cases, the district mining office judged in first instance unless the law clearly indicated the higher instance[64].

The abundance of mineral oil in Galicia created a powerful branch of the mining industry in the country. In order to enable the mining authority to control the extraction of bitumens, it was necessary to submit a notification at least 4 weeks before the intended opening of the mine, which had to include, among others, name, surname and place of residence of the eligible entity, that is the owner of the mine, or their representative, proof of entitlement to extract oil, that is a mortgage extract or mortgage certificate, and if the lessee was entitled to search for mineral resources, also the original or certified copy of the lease contract, an exact designation of the company's location, the land area and the exact marking of the mine's boundaries by enclosing a situational drawing prepared in cadastral system[65]. The provisions of the petroleum law were based on the assumptions opposite to the mining law – the royal domain was abandoned, giving high importance to mining freedom, leaving the right to dispose of non-proprietary minerals to the landowner, and providing police supervision for mining authorities[66]. The right of disposal also included the right to search for and extract non-proprietary minerals that the owner could exercise in person, or they could separate it from the land property right and pass it to another person – the separation could only take place on the basis of the parties' agreement and conclusion of a notary contract or agreement authenticated by the court since only on the basis of this type of contracts the entry of the acquired right could have been made in the oil book[67]. When it comes to the oil books, these were books in which the subject

51 KOCZANOWICZ, M., *Prawo górnicze obowiązujące w Królestwie Polskiem,* Warszawa 1896, p. 43.
52 Including oil mining.
53 *Ankieta w sprawie Kodyfikacji Polskiego Prawa Naftowego,* Lwów 1925, p. V.
54 ROSENBERG, M., *Międzynarodowa polityka naftowa,* Dąbrowa Górnicza 1925, p. 2.
55 ROSENBERG, M., *Międzynarodowa polityka naftowa,* Dąbrowa Górnicza 1925, p. 6.
56 ROSENBERG, M., *Międzynarodowa polityka naftowa,* Dąbrowa Górnicza 1925, p. 6.
57 RYMAR, L., *Galicyjski przemysł naftowy,* Kraków 1915, p. 82.
58 ZUBER, R., *O pochodzeniu nafty,* In: *Odbitka z czasopisma Polskiego Towarzystwa Przyrodników im. Kopernika „Kosmos"* XL, Nr. 1-6, Lwów 1915, p. 76-110; ZUBER R., *Geologiczne podstawy występowania oleju skalnego,* In: *Z Księgi Pamiątkowej Ku Czci Bolesława Orzechowicza*, Lwów 1916, p. 629-638.
59 RYMAR, L., *Galicyjski przemysł naftowy,* Kraków 1915, p. 82 - 83.
60 ROSENBERG, M., *Międzynarodowa polityka naftowa,* Dąbrowa Górnicza 1925, p. 21.
61 ROSENBERG, M., *Międzynarodowa polityka naftowa,* Dąbrowa Górnicza 1925, p. 24.
62 ROSENBERG, M., *Kodeks naftowy,* vol. 1, Kraków 1908, p. 27.
63 ROSENBERG, M., *Kodeks naftowy,* vol. 1, Kraków 1908, p. 27-28; DĘBICKI, I., *Krótki wykład austryackiego prawa górniczego,* Kraków 1897, p. 86.
64 SZAJNOCHA, W., *Nasze górnictwo,* Kraków 1904, p. 26.
65 ROSENBERG, M., *Przepisy górniczo – policyjne dla kopalń oleju skalnego w Galicyi,* Lwów 1904, p. 7.
66 DĘBICKI, I., *Krótki wykład austryackiego prawa górniczego,* Kraków 1897, p. 106.
67 DĘBICKI, I., *Krótki wykład austryackiego prawa górniczego,* Kraków 1897, p. 106 -107.

of entry were oil fields, rights granted to them (easement), right of lien and obligations[68]. The oil books consisted of three lists marked with the letters: A, B and C; section A was divided into two parts: the subject of entry in the first part of section A was the name of the oil field and the designation of the site with reference to the location plan as well as belonging of the entered field, while in the second part the easements pertaining to the mining right were entered; in section B, the name and surname of the owner of the oil field were entered, while section C included all the obligations of the easement, that is mining easements, granted to another mining right and the rights of lien for other benefits[69]. The oil books were kept by the court having competent subject matter jurisdiction for the real estate, from which the right to extract minerals was disconnected[70].

The petroleum law was covered by the land property right, or it appeared independently: in the first case, the entrepreneur was the owner of the land, in the second case, the entrepreneur acquired their petroleum rights from the owner of the land for a specified period of time[71]. The basic contracts for the acquisition of petroleum rights by the entrepreneur from the owner of the oil field were called in practice, as well as in the literature, lease contracts[72]. According to the Austrian Civil Act, the concept of a lease meant that the owner of an unusable item gave the third party the use of such a thing for a specified period of time and for a certain price[73]. The entrepreneur acquired the petroleum right only at the moment of intabulation until the entry into force of the petroleum law of 1907, or relatively 1908; the Court allowed the intabulation of petroleum rights originally as an easement, then as a lease with a legal effect against every third person[74].

In 1924, petroleum production in Poland amounted to 0.57% of world production, but due to low internal consumption, which was less than 40% of production, it was very much dependent on global systems and relations[75]. The problems of the Polish petroleum industry consisted, among others, in the following issues: the natural depletion of oil deposits in Boryslav, exploited from 1897, entry of water in Tustanowice in August 1909, the most abundant oil field discovered at that time, not discovering new areas rich in oil that would replace the Boryslav basin, war losses, losses resulting from contracts for the supply of oil and petroleum products concluded during the sequestration by the government, the withdrawal of a significant part of foreign capital and the resulting lack of interest in the Polish industry of the most important European markets, high transport costs to foreign sales markets, in particular due to the considerable distance from the Baltic ports, small consumption on the domestic market, double property tax, which deprived the enterprises of significant financial liquidity, and not taking into account the special relations of the petroleum industry with the amount of income tax until 1925[76].

In years 1924-1926, Poland underwent slow economic and political stabilization. The proper stabilization of the economy began in connection with political and systemic changes in the second half of 1926, and after the new wave of depression caused primarily by the customs war, the economy also revived[77]. An inevitable consequence, and at the same time a factor and an indicator of the economic upturn in this period, was the increase in the prices of industrial goods – in 1926, there was also a very serious increase in minimum prices, especially in the field of heavy industry products[78]. Significant progress in prices of coal and other heavy industry products was not only caused by the general improvement of the economic situation or specific manifestations of it, but, above all, the coal export situation in connection with the ongoing strike in the English mining industry[79].

4. Petroleum legislation

The mining law regulated some special legal relations, the subject of which was a certain section of things referred to as „minerals", which defined: the mutual relations of the land owner and the miner, as well as miners to each other, legal system of mining associations and mining companies, organization and system of the Miners Brotherhood Fund, settling the case of mining fees and receivables, and determination of supervision over the mining industry and the period of activities of mining authorities[80].

An important issue in the development of the discussed topic were also mining books, which were introduced on the basis of the Act of May 23, 1854[81]. There were two types of books: the first type concerned the books which were kept for those rights that were not subject to an entry in the forensic mining books, and the second type concerned those books which were

[68] DĘBICKI, I., *Krótki wykład austryackiego prawa górniczego,* Kraków 1897, p. 112.
[69] DĘBICKI, I., *Krótki wykład austryackiego prawa górniczego,* Kraków 1897, p. 113.
[70] DĘBICKI, I., *Krótki wykład austryackiego prawa górniczego,* Kraków 1897, p. 113.
[71] HOPFINGER, M., *Przemysł naftowy w zarysie,* Lwów 1923, p. 67.
[72] HOPFINGER, M., *Przemysł naftowy w zarysie,* Lwów 1923, p. 68.
[73] HOPFINGER, M., *Przemysł naftowy w zarysie,* Lwów 1923, p. 69.
[74] HOPFINGER, M., *Przemysł naftowy w zarysie,* Lwów 1923, p. 71.
[75] BATTAGLIA, R., *O programie gospodarczym Polski oraz o warunkach rozwoju poszczególnych gałęzi wytwórczości,* Warszawa 1927, p. 205.
[76] BATTAGLIA, R., *O programie gospodarczym Polski oraz o warunkach rozwoju poszczególnych gałęzi wytwórczości,* Warszawa 1927, p. 217-218.
[77] POPKIEWICZ, J., RYSZKA, F., *Przemysł ciężki Górnego Śląska w gospodarce Polski międzywojennej (1922 – 1939). Studium historyczno-gospodarcze,* Opole, 1959, p. 164.
[78] POPKIEWICZ, J., RYSZKA, F., *Przemysł ciężki Górnego Śląska w gospodarce Polski międzywojennej (1922 – 1939). Studium historyczno-gospodarcze,* Opole, 1959, p. 165.
[79] POPKIEWICZ, J., RYSZKA, F., *Przemysł ciężki Górnego Śląska w gospodarce Polski międzywojennej (1922 – 1939). Studium historyczno-gospodarcze,* Opole, 1959, p. 166.
[80] DĘBICKI, I., *Krótki wykład austryackiego prawa górniczego,* Kraków 1897, p. 11.
[81] DĘBICKI, I., *Krótki wykład austryackiego prawa górniczego,* Kraków 1897, p. 90.

maintained due to other rights, whose subject was all property rights (except for the right of lien), which were entered into the forensic mining book[82].

I would like to point out that the content of the state petroleum law of 1884 was strongly influenced by German legislation, for instance, when normalizing the issue of joining bordering fields, or when regulating the construction of auxiliary buildings, as the law resulting directly from the right to extract minerals generally useful[83]. To confirm this thesis, the provisions of the state petroleum law should be compared with the provisions of German legislation, and in particular with the provisions of the Prussian General Mining Act of June 24, 1865[84]. The petroleum legislation initiated by the Petroleum Law of May 11, 1884, showed, after forty years of practical experience, the enormous vitality of legal institutions under petroleum legislation, and at the same time showed the negative sides of some legal solutions[85]. Although the amendments to the Petroleum Law of 1907 and 1908, in relation to the petroleum legislation of 1884, meant significant progress, they were insufficient at the time of issuance and in many ways revealed gaps, sometimes directly inhibiting the free development of economic life[86]. While preparing the draft amendment to a number of provisions of the then current Petroleum Law of March 22, 1908, the government dealt in particular with provisions regarding: the size of the acceptable minimum of mining areas and the distance of oil wells from the boundaries of the area, proceedings to protect enclaves from being depreciated by being closed among foreign oil fields, mining authorities' rights to issue in certain cases, in particular in times of overproduction, prohibitions on setting up new oil wells[87]. The aim of the intended reform, according to Władysław Długosz, was to create for the petroleum industry the conditions for a great industry, that is what it supposed to be in fact, and based on strong and healthy foundations[88].

Responding to the need for changes in the existing legal status, the Chamber of Industry and Commerce in Lviv in 1921 established a committee headed by Alexander Doliński, based on a questionnaire prepared by Marian Rosenberg, which created a questionnaire examining two fundamental issues: whether codification of provisions was needed in the petroleum provisions, or whether it was enough to amend the existing statutory solutions[89]. By a resolution of May 14, 1924, the State Petroleum Council entrusted conducting a questionnaire regarding the amendment or the possible new codification of the Polish petroleum law to the National Petroleum Society[90]. The reform of the petroleum law was subject to public discussion for many subsequent years (1925 and 1929) – the President of the Higher Mining Office Juliusz Mokry and lawyer Marian Rosenberg shared the standpoint on the validity of the accession principle, justifying their views with the inability to move to the regal right „because it would be tantamount to negation of the development of petroleum legislation, it would be a negation of rights acquired by landowners, it would be an experiment that would not mean improvement but a confiscation of rights acquired in a proper way"[91].

On February 28, 1927, petroleum survey was held at the Ministry of Industry and Trade, initiated by the Minister of Industry and Trade. In the ongoing discussions on petroleum legislation during this period, attention should be focused on the following opinions. Stefan Bartoszewicz pointed out that the draft law on the support of drilling was to aim at creating facilitations and privileges for investment capital[92]. Stanisław Unger stressed that the condition for obtaining profitability was the abolition, or reduction of public burdens, and among them, above all, those that were exclusively burdensome to the petroleum industry – such burdens included, among others, municipal tax on oil mines[93]. Stanisław Schatazl emphasized that mining legislation in general, and petroleum legislation in particular, was supposed to be based on the combination of ownership of underground mineral deposits, including bitumens, with the ownership of the land surface, and in that case it was possible to talk about the accession principle[94]. Marian Rosenberg pointed out that it could have been considered both from the economic viewpoint and especially from the state defense viewpoint since the petroleum industry was primarily a defense industry for the state[95]. Zygmunt Bielski stressed that the leading idea, by which the authors of the act were guided, was ensuring that the landowner makes profit from production by imposing gross levy on the petroleum rights[96]. Izydor Kreisberg drew Bielski's attention to the essence of the property right

[82] DĘBICKI, I., *Krótki wykład austryackiego prawa górniczego,* Kraków 1897, p. 91.
[83] ROSENBERG, M., *O wpływie prawa niemieckiego na ustawy naftowe ze szczególnem uwzględnieniem instytucyi pól naftowych,* Lwów 1905, p. 3-4.
[84] ROSENBERG, M., *O wpływie prawa niemieckiego na ustawy naftowe ze szczególnem uwzględnieniem instytucyi pól naftowych,* Lwów 1905, p. 4-26.
[85] *Ankieta w sprawie Kodyfikacji Polskiego Prawa Naftowego,* Lwów 1925, p. I.
[86] *Ankieta w sprawie Kodyfikacji Polskiego Prawa Naftowego,* Lwów 1925, p. I.
[87] DŁUGOSZ, W., *O nowelę do ustawy naftowej,* In: *odbitka z „Kurjera Lwowskiego" nr 14 i 15),* Lwów 1910, p. 3.
[88] DŁUGOSZ, W., *O nowelę do ustawy naftowej,* In: *odbitka z „Kurjera Lwowskiego" nr 14 i 15),* Lwów 1910, p. 15.
[89] *Ankieta w sprawie Kodyfikacji Polskiego Prawa Naftowego,* Lwów 1925, p. I.
[90] *Ankieta w sprawie Kodyfikacji Polskiego Prawa Naftowego,* Lwów 1925, p. 3.
[91] LAUER, J., *Uwagi o projekcie reformy prawa naftowego,* Lwów 1938, p. 7.
[92] BARTOSZEWICZ, S., *Ogólna sytuacja przemysłu naftowego i środki zapobiegawcze przeciwko spadkowi produkcji* In: *Ankieta w sprawie aktualnych potrzeb przemysłu naftowego z dnia 27 lutego 1927 r.,* Warszawa 1927, p. 21.
[93] UNGER, S., *Przemysł rafineryjny i jego stosunek do przemysłu kopalnianego,* In: *Ankieta w sprawie aktualnych potrzeb przemysłu naftowego z dnia 27 lutego 1927 r.,* Warszawa 1927, p. 27.
[94] SCHATZEL, S., *Ustawodawstwo naftowe,* In: *Ankieta w sprawie aktualnych potrzeb przemysłu naftowego z dnia 27 lutego 1927 r.,* Warszawa 1927, p. 89.
[95] ROSENBERG, M., *Przemówienie,* In: *Ankieta w sprawie aktualnych potrzeb przemysłu naftowego z dnia 27 lutego 1927 r.,* Warszawa 1927, p. 95.
[96] BIELSKI, Z., *Przemówienie,* In: *Ankieta w sprawie aktualnych potrzeb przemysłu naftowego z dnia 27 lutego 1927 r.,* Warszawa 1927, p. 96.

guaranteed by the constitution – the landowner was the owner of not only the surface but also everything that was under the surface[97]. The constitution guaranteed full private ownership to all landowners.

It is worth noting that Polish mining law in the period of the Second Polish Republic was regulated by the President's Ordinance of 29 November 1930 and repealed the acts of the partitioning powers that were binding until then[98]. This ordinance, however, did not codify the provisions of the petroleum law – in this respect, the provisions issued under the Austrian partition were in force in Małopolska[99]: petroleum law of 1884 and the Galician petroleum law of 1908[100].

In addition to the regulations from the time of the partitions, a number of Polish acts related partially to issues of petroleum legislation were in force; in terms of the licensing of certain production processes of the petroleum industry, Polish regulations were in force alongside Austrian law – what should be mentioned here is the Act of 18 March 1932 on regulating relations in the petroleum industry[101], which provided the Minister of Industry and Trade with a number of important powers that allowed him, among others, to regulate the import and export of petroleum products, centralize the total circulation of foreign petroleum products as well as create and dissolve compulsory petroleum industry organizations[102]. In 1932, the Ministry of Industry and Trade submitted to the Sejm a draft law on regulating the production and trade of rock oil, natural gas and petroleum products as well as other liquid propellants, in which in Art. 2 it authorized the Minister of Industry and Trade to issue regulations and ordinances aiming at the implementation of articles of the Act, in particular concerning: creation of compulsory organizations of petroleum industry enterprises, including their whole or individual departments (statutes of these organizations were approved or issued by the Minister of Industry and Trade)[103]. The draft law was published as the Act of March 18, 1932, on regulating relations in the petroleum industry[104]. In the cartel legislation at the time, this act was one of the best examples of the legislator's adaptation to economic relations that this act was to regulate[105].

In 1934, the Ministry of Industry and Trade[106] put forward a draft of the petroleum law that was clearly based on the rule of the regal right, but due to many objections, further work on the act was abandoned[107]. In the autumn of 1937, a new draft law of the Ministry was presented, representing the circles of petroleum industry – its basic principle and the central idea was removal of the system of accession and its replacement with the regal right[108]. Stanisław Unger pointed out that the conditions which the draft law required for the granting of exclusive exploration rights by the mining authorities were much tighter than those laid down in Austrian or German mining law. The draft law introduced this institution with limitations that were an expression of a two-track approach of reconciling two contrary principles, that is the principle of mining freedom and accession, and with further restrictions which were an expression of its desire to extend the interference of mining authority beyond the limits set for its subject matter jurisdiction by mining law[109]. The draft law also excluded from the granting of exploration rights the land: on which exploration or exploitation works were carried out by the owner themselves in the manner prescribed by law, and land for which notarized certified contracts on the abandoning of petroleum rights had been concluded[110]. The draft law based on the principle of miner's consent, making the petroleum law similar to mining law, contained some of the rights of landowners, however, it was not implemented either[111].

From a legal point of view, the issue of „notariality of petroleum contracts" is also important in this subject. Alfred Jendl pointed out that the petroleum contract was of a private-legal nature; through this contract, from the land property right, the landowner distinguished a certain set of rights that they transferred to the entrepreneur – this was the petroleum law[112]. At the moment of this transfer, these rights took on features of the self-existent law because not only the subject, but also the reason for their creation changed, since they were not part of the land ownership, but they had a separate, strictly defined content based on the contract[113].

Article 82 of the Law on Notaries of 1933 stipulated the application of the form of a notarial deed on the territory of

[97] KREISBERG, I., *Przemówienie,* In: *Ankieta w sprawie aktualnych potrzeb przemysłu naftowego z dnia 27 lutego 1927 r.,* Warszawa 1927, p. 98.
[98] JOŃCZYK, J. *Historia Państwa i Prawa Polski 1918 – 1939,* vol. I, ed. RYSZKA, F., Warszawa 1962, p. 397-398.
[99] There was an oil industry there.
[100] JOŃCZYK, J. *Historia Państwa i Prawa Polski 1918 – 1939,* vol. I, ed. RYSZKA, F., Warszawa 1962, p. 397-401.
[101] Dz. U. Nr 30, poz. 306.
[102] JOŃCZYK, J. *Historia Państwa i Prawa Polski 1918 – 1939,* vol. I, ed. RYSZKA, F., Warszawa 1962, p. 397-402-403.
[103] ROSENBERG, M., *Organizacja przedsiębiorstw. Część ogólna*, Lwów 1932, p. 175.
[104] ROSENBERG, M., *Organizacja przedsiębiorstw. Część ogólna*, Lwów 1932, p. 175.
[105] ROSENBERG, M., *Organizacja przedsiębiorstw. Część ogólna*, Lwów 1932, p. 183.
[106] UNGER, S., *Uwagi o projekcie do statutu Centralnej Organizacji Polskiego Przemysłu,* Warszawa 1931, p. 5-8.
[107] LAUER, J., *Uwagi o projekcie reformy prawa naftowego,* Lwów 1938, p. 7.
[108] LAUER, J., *Uwagi o projekcie reformy prawa naftowego,* Lwów 1938, p. 7.
[109] LAUER, J., *Uwagi o projekcie reformy prawa naftowego,* Lwów 1938, p. 7.
[110] LAUER, J., *Uwagi o projekcie reformy prawa naftowego,* Lwów 1938, p. 7.
[111] JOŃCZYK, J. *Historia Państwa i Prawa Polski 1918 – 1939,* vol. I, ed. RYSZKA, F., Warszawa 1962, p. 397-402-403.
[112] ROSENBERG, M., *Kodeks naftowy,* tom pierwszy, Kraków 1908, p. 59.
[113] ROSENBERG, M., *Kodeks naftowy,* tom pierwszy, Kraków 1908, p. 59.

the entire Polish state when concluding a certain category of agreements regarding the real estate property right, but it did not unify the provisions of the existing laws from the period of partitions[114]. Therefore, the question had to be posed whether the abovementioned contracts included a contract of transfer, limitation or encumbrance of the right to explore and extract resin minerals.[115] The answer to this question depended on whether, on the basis of petroleum law and the provisions of other acts binding in former Austrian partition, the contracts listed in art. 82 of the Law on Notaries could in general be regarded as the property right, and in particular the real estate property right, since other terms used in this article did not raise any doubts[116]. Thus, it should be noted that the petroleum law recognized the differences between property rights and petroleum rights in a way that was consistent with the provisions of the Civil Code and its scientific comments, and that the term „property rights" contained in art. 82 of the Law on Notaries did not include the exploration and extraction rights in relation to resin minerals[117].

5. Conclusion

Summing up, it should be noted that in the discussed period in Poland, the principle of mining property was in force, that is the so-called royal domain (regal). With time, however, the concepts of minerals belonging to the land (accession) began to come into force, which were applicable from the privilege of Stefan Batory of 1576, almost until the period of the partitions[118]. After the territories of Małopolska came under Austrian rule, legislation did not regulate the issue of resins – mining patents from 1773, 1786, and 1804 did not mention them[119]. The temporary state based on occasional provisions expressing the legal sense of the population against the wording of the mining law was finally consolidated on the basis of the state petroleum law of May 11, 1884, and the national petroleum law of December 17, 1884 – both laws amended by the state law of 9 January 1907, and the national law of March 22, 1908, formed the basis of the Małopolska petroleum law[120]. The petroleum legislation from 1884 was the basis for the development of the petroleum law during the Second Polish Republic and set out the guidelines for its development, recognizing the principle of minerals belonging to land ownership[121].

The petroleum industry located in Galicia began to play a role in international petroleum policy only after the discovery of the areas of Boryslav and Tustanowice, that is only at the end of the 19th century[122]. Oil fields in Galicia attracted the attention of foreign industrialists much earlier – the first foreign company interested in the Galician oil industry was the company Bergheim and Mac Garvey, whose founders came to Galicia from Canada in 1884 and introduced the Canadian drilling system into the Galician mining industry[123].

Juxtaposing the most important mining legislation in force in the Polish territory during the partitions, namely the Austrian Act of 1854, Prussian Act of 1865 and Act of the Kingdom of Poland of 1892, it should be emphasized that the first two differed from the last one mainly because they did not derive mining property from the property of land surface, and a different concept of the relationship of the landowner to the mining rights resulted from this difference. In addition, the Austrian legislation differed from the Prussian legislation and that of the Kingdom of Poland as it defined the territory excluded for one prospector and the mining permit covered all the reserved minerals[124].

During the interwar period, the authorities of the country faced a very difficult question, namely whether there were undiscovered, rich oil deposits in Poland or not[125]. Certainly, answering this question was difficult but necessary, and the importance of this matter was, as it seems, underestimated for too long[126]. The issue of the existence or disappearance of Polish oil mining was one of the most important economic issues in the period of the Second Polish Republic, affecting both the economic and defense sphere[127].

Simultaneously, the most important features of mining legislation (including petroleum legislation) of the period discussed involve the miner's consent in relation to the reserved minerals, discovery of the minerals as a source of mining property and the concept of a mine as a separate immovable thing, which is the self-contained subject of all civil acts and mortgages[128].

[114] UNGER, S., *Notarjalność kontraktów naftowych,* odbitka z „Przemysłu Naftowego", Lwów 1934, p. 4.
[115] UNGER, S., *Notarjalność kontraktów naftowych,* odbitka z „Przemysłu Naftowego", Lwów 1934, p. 4.
[116] UNGER, S., *Notarjalność kontraktów naftowych,* odbitka z „Przemysłu Naftowego", Lwów 1934, p. 4.
[117] UNGER, S., *Notarjalność kontraktów naftowych,* odbitka z „Przemysłu Naftowego", Lwów 1934, p. 5.
[118] LAUER, J., *Uwagi o projekcie reformy prawa naftowego,* Lwów 1938, p. 3.
[119] LAUER, J., *Uwagi o projekcie reformy prawa naftowego,* Lwów 1938, p. 4.
[120] LAUER, J., *Uwagi o projekcie reformy prawa naftowego,* Lwów 1938, p. 5.
[121] ROSENBERG, M., *Kodeks naftowy,* vol. 1, Kraków 1913, p. 1.
[122] PĄCZEWSKI L., *Międzynarodowa polityka naftowa,* Warszawa 1921, p. 34.
[123] PĄCZEWSKI L., *Międzynarodowa polityka naftowa,* Warszawa 1921, p. 34.
[124] BUKOWIECKI, S., *Główne zasady cywilistyczne prawa górniczego na ziemiach polskich,* In: *Kwartalnik Prawa Cywilnego i Handlowego*, vol. 1, Nr 1, Warszawa 1916, p. 39.
[125] BIELSKI, Z., *W sprawie przyszłości polskiego kopalnictwa naftowego,* odbitka z „Przeglądu Górniczo – Hutniczego", Nr 2, Katowice 1939, p. 3.
[126] BIELSKI, Z., *W sprawie przyszłości polskiego kopalnictwa naftowego,* odbitka z „Przeglądu Górniczo – Hutniczego", Nr 2, Katowice 1939, p. 3.
[127] BIELSKi, Z., *Zagadnienie poszukiwań ropy naftowej w Polsce,* odbitka z „Przeglądu Górniczo – Hutniczego", Nr 6, Katowice 1939, p. 1.
[128] BUKOWIECKI, S., *Główne zasady cywilistyczne prawa górniczego na ziemiach polskich,* In: *Kwartalnik Prawa Cywilnego i Handlowego*, vol. 1, Nr 1, Warszawa 1916, p. 39.

Bibliography

Ankieta w sprawie Kodyfikacji Polskiego Prawa Naftowego, Lwów 1925.
BARTOSZEWICZ, S., *Ogólna sytuacja przemysłu naftowego i środki zapobiegawcze przeciwko spadkowi produkcji* In: *Ankieta w sprawie aktualnych potrzeb przemysłu naftowego z dnia 27 lutego 1927 r.,* Warszawa 1927.
BATTAGLIA, R., *O programie gospodarczym Polski oraz o warunkach rozwoju poszczególnych gałęzi wytwórczości,* Warszawa 1927.
BIELSKI, Z., *Przemówienie,* In: *Ankieta w sprawie aktualnych potrzeb przemysłu naftowego z dnia 27 lutego 1927 r.,* Warszawa 1927.
BIELSKI, Z., *W sprawie przyszłości polskiego kopalnictwa naftowego,* odbitka z „Przeglądu Górniczo – Hutniczego", Nr 2, Katowice 1939.
BIELSKI, Z., *Zagadnienie poszukiwań ropy naftowej w Polsce,* odbitka z „Przeglądu Górniczo – Hutniczego", Nr 6, Katowice 1939.
BUKOWIECKI, S., *Główne zasady cywilistyczne prawa górniczego na ziemiach polskich,* In: *Kwartalnik Prawa Cywilnego i Handlowego*, vol. 1, Nr 1, Warszawa 1916.
DĘBICKI, I., *Krótki wykład austryackiego prawa górniczego,* Kraków 1897.
DŁUGOSZ, W., *O nowelę do ustawy naftowej, (odbitka z „Kurjera Lwowskiego" nr 14 i 15),* Lwów 1910.
GRABSKI, W., WALISZEWSKI, J., BUKOWIECKI, S., KORSAK, Z., BOUFFAŁŁ, B., KŁOBUKOWSKI, S., RADZISZEWSKI, H., *W naszych sprawach. I. Szkice w kwestyach ekonomiczno-społecznych,* Warszawa 1899.
HIBL, J., *Ausryacko – galicyjskie prawo naftowe. Zbiór ustaw i rozporządzeń dotyczących górnictwa, przemysłu i handlu naftowego, opodatkowania i oclenia nafty, ustroju i postępowania władz w sprawach naftowych, poprzedzony wstępem historycznym*, Lwów 1888.
HOPFINGER, M., *Przemysł naftowy w zarysie,* Lwów 1923.
JOŃCZYK, J., *Historia Państwa i Prawa Polski 1918 – 1939,* vol. 1, ed. RYSZKA, F., Warszawa 1962.
KOCZANOWICZ, M., *Prawo górnicze obowiązujące w Królestwie Polskiem,* Warszawa 1896.
KREISBERG, I., *Przemówienie,* In: *Ankieta w sprawie aktualnych potrzeb przemysłu naftowego z dnia 27 lutego 1927 r.,* Warszawa 1927.
LAUER, J., *Uwagi o projekcie reformy prawa naftowego,* Lwów 1938.
ŁABĘCKI, H., *Górnictwo w Polsce. Opis kopalnictw i hutnictwa polskiego pod względem technicznym, historyczno-statystyczny i prawnym,* vol. I, Warszawa 1841.
ŁABĘCKI, H., *Górnictwo w Polsce. Opis kopalnictw i hutnictwa polskiego pod względem technicznym, historyczno-statystyczny i prawnym,* vol. II, Warszawa 1841.
ŁĄBĘCKI, H., *Początki nauki kopalnictwa,* Warszawa 1843.
PĄCZEWSKI L., *Międzynarodowa polityka naftowa,* Warszawa 1921.
POPKIEWICZ, J., RYSZKA, F., *Przemysł ciężki Górnego Śląska w gospodarce Polski międzywojennej (1922 – 1939). Studium historyczno-gospodarcze,* Opole, 1959.
ROSENBERG, M., *Kodeks naftowy,* vol. 1, Kraków 1908.
ROSENBERG, M., *Kodeks naftowy,* vol. 2, Kraków 1913.
ROSENBERG, M., *Międzynarodowa polityka naftowa,* Dąbrowa Górnicza 1925.
ROSENBERG, M., *O wpływie prawa niemieckiego na ustawy naftowe ze szczególnem uwzględnieniem instytucyi pól naftowych,* Lwów 1905.
ROSENBERG, M., *Organizacja przedsiębiorstw. Część ogólna*, Lwów 1932.
ROSENBERG, M., *Przemówienie,* In: *Ankieta w sprawie aktualnych potrzeb przemysłu naftowego z dnia 27 lutego 1927 r.,* Warszawa 1927.
ROSENBERG, M., *Przepisy górniczo – policyjne dla kopalń oleju skalnego w Galicyi,* Lwów 1904.
ROSENBERG, M., *Rozwój pojęcia własności górniczej w prawie francuskiem,* Kraków 1921.
ROSENBERG, M., *Uprawnienia górnicze i naftowe w swym stosunku wzajemnym,* Lwów 1906.
ROSENBERG, M., *Ustawodawstwo naftowe wobec Powszechnej Ustawy Górniczej,* Lwów 1904.
ROSENBERG, M., *Zarys urządzeń prawnych górnictwa w Polsce pod koniec XVI w.,* Lwów 1912.
RYMAR, L., *Galicyjski przemysł naftowy,* Kraków 1915.
SCHATZEL, S., *Ustawodawstwo naftowe,* In: *Ankieta w sprawie aktualnych potrzeb przemysłu naftowego z dnia 27 lutego 1927 r.,* Warszawa 1927.
SZAJNOCHA, W., *Nasze górnictwo,* Kraków 1904.
UNGER, S., *Notarjalność kontraktów naftowych,* odbitka z „Przemysłu Naftowego", Lwów 1934.
UNGER, S., *Przemysł rafineryjny i jego stosunek do przemysłu kopalnianego,* In: *Ankieta w sprawie aktualnych potrzeb przemysłu naftowego z dnia 27 lutego 1927 r.,* Warszawa 1927.
UNGER, S., *Uwagi o projekcie do statutu Centralnej Organizacji Polskiego Przemysłu,* Warszawa 1931.
ZUBER, R., *Geologiczne podstawy występowania oleju skalnego,* In: *Z Księgi Pamiątkowej Ku Czci Bolesława Orzechowicza*, Lwów 1916.
ZUBER, R., *O pochodzeniu nafty,* In: *odbitka z czasopisma Polskiego Towarzystwa Przyrodników im. Kopernika „Kosmos" XL*, vol. 1-6, Lwów 1915.

Legal Status of Women in Codes Binding in Central Polish Lands in the Early Nineteenth Century*

*Piotr Z. Pomianowski***

Abstract

The article describes the position of women pursuant to the codes adopted in the territories of contemporary Poland at the beginning of the nineteenth century (Allgemeines Landrecht für die Königlich Preussischen Staaten, Code civil des Français, Allgemeines Bürgerliches Gesetzbuch). According to all three codes wives were subordinate to their husbands, but there were many differences in specific matters. The husband usually administered common marriage property, or in case of separate property regime, he had a significant influence on his wife's property. In all the analysed codes, parental authority was exercised mainly by the father, although children had to obey their mother, too.

The relations between the spouses could be fundamentally changed by prenuptial agreements. Moreover, the legal practice changed the letter of law many times and in numerous cases it differed between the territories where the same code was in force (e.g. France and the Congress Kingdom of Poland – in both countries the Napoleonic Code was in force). Thus, time-consuming research on sources like notarial deed, as well as court records should precede a complex analysis covering the application practice of all three codes on the Polish lands.

Keywords: *legal status of women; Napoleonic Code; Landrecht of 1794; ABGB; Poland.*

1. Introduction

In this article I would like to address the legal status of married women under private law binding in territories of contemporary Poland in the nineteenth century. To achieve this goal, I will compare three codes which were in force on the Polish lands on the west bank of the Bug River: the Prussian *Landrecht* of 1794,[1] the Napoleonic Code of 1804 (hereafter CC)[2] and the Austrian civil code of 1811 (hereafter ABGB).[3] I will analyse the original version of each code (without amendments – it should be noted that French and Austrian codes are still in force in these countries, but of course they have been changed many times). What is more, significant changes in favour of married women were not implemented until the second half of the nineteenth century. The legal status of husband and wife were made fully equal after the Second World War. It must also be noted that the status of *Landrecht*[4] formally was subsidiary (its provisions were only used when there were no regulations dealing with a specific problem in the legal system of the province in which it arose). On the contrary, the CC and the ABGB had priority over all earlier sources of law (but it should be noticed that in the Habsburg Empire private law was defined very strictly – e.g. relations between manor-owners and peasants or between employers and employees were treated as a part of the administrative law).[5] My analysis will not address the Lithuanian Statute of 1588 which remained in force until 1840 in partitioned lands (on the east bank of the Bug River). It was a code from a distant past, changed many times by the judiciary and by lawmakers.[6] Thus, a brief description of women's legal status in those territories is much more complicated.[7]

* This publication was prepared as part of the project *National Codification – a Phantasm or a Realistic Alternative? In the Circle of Debates over the Native System of Law in the Constitutional Kingdom of Poland, supported by the National Science Centre (NCN), grant number UMO-2015/18/E/HS5/00762.*

** dr hab. Piotr Z. Pomianowski, Institute of the History of Law, Faculty of Law and Administration, University of Warsaw, Warsaw, Poland.

1 *Allgemeines Landrecht für die Königlich Preussischen Staaten*, Berlin, 1794.

2 *Code civil des Français : édition originale et seule officielle*, Paris, 1804.

3 *Allgemeines Bürgerliches Gesetzbuch*, Wien, 1811.

4 For more about relations between *Landrecht* and the legal system of formerly independent Poland, see RADWAŃSKI Z. and WĄSICKI J., Wprowadzenie pruskiego prawa krajowego na ziemiach polskich, *Czasopismo Prawno-Historyczne* 6, no.1 (1954): p. 184–222. About the legal status of married women pursuant to the Polish code of 1825, see MACHUT-KOWALCZYK J., Panny, mężatki i wdowy przed sądem pokoju. Prawo a praktyka w Królestwie Polskim na przykładzie akt sądów pokoju okręgu łęczyckiego, zgierskiego i łódzkiego, *Studia z Dziejów Państwa i Prawa Polskiego* 16 (2013): p. 201–14; DOLATA T., Kilka uwag o sytuacji prawnej kobiety zamężnej na ziemiach b. Królestwa Kongresowego z punktu widzenia osobowego prawa małżeńskiego, *Pozycja prawna kobiet w dziejach*, ed. Stanisław Rogowski, Wrocław, 2010, p. 139–45; ZOLL F., Małżeńskie prawo majątkowe, *Encyklopedia podręczna prawa prywatnego założona przez Henryka Konica*, ed. ZOLL F. and WASILKOWSKI J., Warszawa, 1937, p. 806–42.

5 SÓJKA-ZIELIŃSKA K., *Wielkie kodyfikacje cywilne*, Warszawa, 2009, p. 98–9, 123.

6 The need to study the changes introduced in the Statute by Sejm constitutions has also been pointed out by ZAKRZEWSKI A. B. *Wielkie Księstwo Litewskie (XVI-XVIII w.): prawo, ustrój, społeczeństwo*, Warszawa, 2013, p. 231. Cf. also GODEK S., *III Statut Litewski w dobie porozbiorowej*, Warszawa, 2012, p. 711.

7 ZIELIŃSKA T., Noblewomen's Property Rights In 16th-18th Polish-Lithuanian Commonwealth, *Acta Poloniae Historica* 81 (2000): p. 89.

While *Landrecht* explicitly stipulated gender equality,[8] there were no similar provisions in the CC or in the ABGB. Indeed, the ABGB (§ 16) guaranteed inherent rights to all people regardless of their gender[9] but some, like children and the insane, did not have the capacity to enter into legal transactions.[10] It should be underlined that women were not one of the categories of people deprived of this capacity. Article 8 of the Napoleonic Code functioned similarly to § 16 of the ABGB.[11] Although its literal interpretation could suggest otherwise, according to the widely accepted reading, this provision should be applied to both sexes with exception for categories deprived of capacity to enter into legal transactions, such as minors, interdicted persons or married women.[12]

However, upon a closer look at the detailed provisions, it must be concluded that in each of the three analysed codes, the legal status of men surpassed women's in many aspects. On the other hand, there also existed some regulations that favoured women in respect of men: for example the obligation to pay alimony, a very strong presumption of legitimacy.[13]

2. Status of married and unmarried women

The most important distinction between the Napoleonic Code and the ABGB were regulations concerning married women. As already mentioned, the *Code Civile* deprived wives of the capacity to enter into legal transactions, equating them to minors and the insane. The ABGB did not contain an equivalent provision. The general rule of the *Landrecht* suggests that the Prussian lawmaker shared the attitude of the Austrian one in this matter. Nevertheless, the *Landrecht* stipulated so many exceptions from this general principle that it was weakened to the point of making the legal status of married women in Prussia and in France similar.

Under private law, the legal status of unmarried adult women (single and never married, widows and divorcees) was similar to the position of adult men.[14] There were a few exceptions, for example regarding the capacity to act as a legal guardian to unrelated children or as a witness to testaments and some other transactions.[15] It should be noted, however, that some commentators attributed this problem to the public law rather than to the private one.[16]

To a lesser or greater degree, in each of the three compared systems, wives were subordinate to their husbands, deemed the heads of families.[17] Wives were obliged to live with their husbands, who chose the place of residence.[18] They were also expected to obey their husbands, although none of the discussed

[8] *Landrecht*, part 1, § 24. "Die Rechte beider Geschlechter sind einander gleich, soweit nicht durch besondre Gesetze, oder rechtsültige Willenserklärungen, Ausnahmen bestimmt worden"; VICK B., Liberalism, Nationalism, and Gender Dichotomy in Mid-Nineteenth-Century Germany. The Contested Case of German Civil Law, *The Journal of Modern History* 82, (September 2010): p. 557; CHLEBOWSKA A. *„Stare panny," wdowy i rozwiedzione. Samotne szlachcianki w Prusach w latach 1815-1914 na przykładzie prowincji Pomorze*, Szczecin, 2012, p. 99.

[9] ABGB, § 16. "Jeder Mensch hat augeborne, schon durch die Vernunft einleuchtende Rechte, und ist daher als eine Person zu betrachten. Sklaverei oder Leibeigenschaft und die Ausübung einer darauf sich beziehenden Macht wird in diesen Ländern nicht gestattet."

[10] ABGB, § 21. "Diejenigen, welche wegen Mangels an Jahren, Gebrechen des Geistes oder anderer Verhältnisse wegen, ihre Angelegenheiten selbst gehörig zu besorgen, unfähigsind, stehen unter dem besonderen Schutze der Gesetze. Dahin gehören: Kinder, die das siebente, Unmündige, die das vierzehnte, Minderjährige, die das einundzwanzigste Jahr ihres Lebens noch nicht zurück gelegt haben; dann: Rasende, Wahnsinnige und Blödsinnige, welche des Gebrauches ihrer Vernunft entweder gänzlich be raubt oder wenigstens unvermögend sind, die Folgen ihrer Handlungen einzusehen; ferner: diejenigen, welchen der Richter als erklärten Verschwendern die fernere Verwaltung ihres Vermögens untersagt hat; endlich Abwesende und Gemeinden."

[11] Article 8 CC: "Every Frenchman shall enjoy civil rights"; All the articles of the Napoleonic Code quoted in this paper come from the translation: *The Code Napoleon or the French Civil Code Literally Translated from the Original and Official Edition Published at Paris in 1804*, London, 1827.

[12] DELSOL J. J., *Explication élémentaire du Code Napoléon, mise en rapport avec la doctrine et la jurisprudence*, vol. 1, Paris, 1867, p. 35– 6.

[13] *Landrecht*, part 2, title 2, § 1-2; CC, Art. 312; ABGB, § 138; see CZEMERYŃSKI I. S., *Powszechne prawo prywatne austriackie: dla użytku podręcznego*, vol. 1, Kraków, 1861, p. 77; UNGER J., *Österreichischen allgemeinen Privatrechts*, vol. 1, Leipzig, 1876, p. 280.

[14] *Landrecht*, part 1, title 5, § 23. This equality between adult men and spinsters, widows and female divorcees was common in Europe of the nineteenth century, with the exception of the laws in some cantons of Switzerland, which obliged single adult women to have a legal guardian; OKOLSKI A., Kwestia kobieca w świetle najnowszego prawodawstwa, *Biblioteka Warszawska*, no. 4 (1888): p. 218.

[15] *Landrecht*, part 1, title 12, § 115 (witness to testament); *Landrecht*, part 2, title 18, § 143 (legal guardianship); CC, Art. 37 (witness to certificates of birth, death or marriage); CC, Art. 442 (guardianship and membership in family councils); CC, Art. 980 (witness to testament); ABGB, § 192 (legal guardianship), ABGB, § 434 (witness to real estate transactions); ABGB, § 591 (witness to testament). Moreover, many restrictions applied to entailed estate (*fidei commissum*); *Landrecht*, part 2, title 4, § 134 et seq.; ABGB, § 624. Napoleonic Code abolished the institution of entailed estate (CC, Art. 896), but the ban was soon lifted; SENKOWSKA-GLUCK M., *Donacje napoleońskie w Księstwie Warszawskim. Studium historyczno-prawne*, Wrocław, 1968, p. 31–2.

[16] HOLEWIŃSKI W., *O zobowiązaniach podług Kodeksu Napoleona*, Warszawa, 1875, p. 82, footnote 4; Roman Wierzchlejski classified these acts as falling between public and private law, see WIERZCHLEJSKI R., O prawach kobiety wedle ustaw u nas obowiązujących, *Biblioteka Warszawska* 3, no. 8 (1883): p. 179.

[17] *Landrecht*, part 2, title 1, § 184. "Der Mann ist das Haupt der ehelichen Gesellschaft; und sein Entschluß giebt in gemeinschaftlichen Angelegenheiten den Ausschlag"; CC, Art. 212. "Les époux se doivent mutuellement fidélité, secours, assistance"; CC Art. 213. "Le mari doit protection à sa femme, la femme obéissance à son mari"; ABGB, § 91. "Der Mann ist das Haupt der Familie. In dieser Eigenschaft steht ihm vorzüglich das Recht zu, das Hauswesen zu leiten; es liegt ihm aber auch die Verbindlichkeit ob, der Ehegattin nach seinem Vermögen den anständigen Unterhalt zu verschaffen und sie in allen Vorfällen zu vertreten"; ABGB, § 92. "Die Gattin erhält den Namen des Mannes und genießt die Rechte seines Standes. Sie ist verbunden, dem Manne in seinen Wohnsitz zu folgen, in der Haushaltung und Erwerbung nach Kräften beizustehen, und soweit es die häusliche Ordnung erfordert, die von ihm getroffenen Maßregeln sowohl selbst zu befolgen, als befolgen zu machen"; see also LINDEN J., *Das österreichische Frauenrecht*, Wien, 1834, p. 115 et seq.

[18] *Landrecht*, part 2, title 1, § 175; CC, Art. 214; ABGB, § 92; LEPSIUS S.,"Die privatrechtliche Stellung der Frau im Deutschland des 19. Jahrhunderts," *L'Homme. Europäische Zeitschrift für feministische Geschichtswissenschaft* 14, no. 1 (2003): p. 116.

codes authorised the husband to discipline his wife by whipping her or placing her in custody (*ius castigandi*).[19]

3. Matrimonial property regimes

Regulations concerning the matrimonial property regimes are as important as those regulating personal relations between wife and husband. In each of the three analysed codes the statutory default matrimonial regimes differed, but future spouses could always modify this regime by prenuptial agreement. Owing to the brevity of this article, I will only address the statutory default regimes, which applied in absence of prenuptial agreement, or when such agreement did not modify the marital regime.

Under *Landrecht* the statutory default was a separate property regime, but husband administered the property of his wife.[20] Pursuant to the Napoleonic Code, joint property regime was applied in absence of prenuptial agreement and husband administered over the entire property belonging to the couple.[21] Under the rules of the Austrian code, separate property regime was in force.[22] It may at first seem as though separate property regime is more beneficial for married women than joint property regime.[23] Yet in reality the matter was much more complex. Naturally, separate property regime minimised the risk of the husband squandering his wife's fortune.[24] On the other hand, however, when the husband died or the couple divorced, joint property regime could often be more advantageous for the wife than separate property regime. In such cases, common property was divided between the wife and the husband's successors, or between the divorced couple (Art. 1474 CC). We should remember that in the nineteenth century, the husband's income was usually higher than the wife's, who often mainly took care of their home.[25] It should be underlined that under each of the three codes, widows and widowers had very weak rights to inheritance from the deceased spouse.[26]

Each of the compared systems granted married women a different scope of capacity to perform acts in law. Under the ABGB, married women had full capacity, with the aforementioned exceptions, i.e. limitations connected to guardianship over children and capacity to act as a witness, but these applied to all women, not only married ones.[27] According to the general principle the wife administered over her property by herself, but the husband, as her statutory representative, also had some power over her assets.[28]

Conversely, in the French legal system, the capacity to perform acts in law was strictly limited. A woman could not make or receive any donations, give declarations on accepting suc-

[19] However, William Blackstone wrote that in England "in the politer reign of Charles the Second, this power of correction began to be doubted and a wife may now have security of the peace against her husband; or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim, and exert their ancient privilege : and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior"; BLACKSTONE W., *Commentaries on the Laws of England*, vol. 1, New York 1827, p. 353–54. In some other countries *ius castigandi* was still in force in the nineteenth century; Juliusz Bem, "Kobieta wobec władzy w rodzinie," *Gazeta Sądowa Warszawska* (1882), no. 46, 367. We should also notice that in French law there were some methods of forcing a wife to live with her husband; BURZYŃSKI P., *Wykład prawa cywilnego francuzkiego*, vol. 1, Kraków, 1852, 263; ZACHARIÄ v. LINGENTHAL K. S., *Le Droit civil français*, vol. 1, Paris, 1854, p. 229.

[20] *Landrecht*, part 2, title 1, § 205; VICK, "Liberalism, Nationalism, and Gender," p. 555. The Prussian lawmaker usually secured wife's property; *Landrecht*, part 2, title 1, § 199; the exception is *Landrecht*, part 2, title 5, § 3.

[21] DELSOL J.J., *Explication élémentaire du Code Napoléon*, vol. 3, p. 6–10. Moreover, we must note that pursuant to article 1388 CC "Married persons cannot derogate from the rights resulting from the power of the husband over the persons of his wife and of his children, or which belong to the husband as head, nor from the rights conferred on the survivor of the married parties by the title 'Of the Paternal Power' and by the title 'Of Minority, Guardianship, and Emancipation' nor from the prohibitory regulations of the present code".

[22] ABGB, § 1237. "Haben Eheleute über die Verwendung ihres Vermögens keine besondere Übereinkunft getroffen, so behält jeder Ehegatte sein voriges Eigentumsrecht, und auf das, was ein jeder Teil während der Ehe erwirbt, und auf was immer für eine Art überkommt, hat der andere keinen Anspruch. Im Zweifel wird vermutet, daß der Erwerb von dem Manne herrühre."

[23] BOGUCKA M., *Białogłowa w dawnej Polsce: kobieta w społeczeństwie polskim XVI–XVIII wieku na tle porównawczym*, Warszawa, 1998, p. 44.

[24] It should be noted that joint property regime could not be absolute; CC, Art. 1404. In addition, under the Napoleonic Code husband's debts usually did not burden personal property of the wife; DELSOL, *Explication élémentaire du Code Napoléon*, vol. 3, 40–2.

[25] See CC, Art. 1401.

[26] Under *Landrecht*, a widow or a widower could only inherit after a deceased spouse if she or he had no surviving relatives; BARDACH J. and SENKOWSKA-GLUCK M., eds., *Historia państwa i prawa Polski*. *Od rozbiorów do uwłaszczenia*, vol. 3, Warszawa, 1981, p. 640. Pursuant to the Napoleonic Code, the surviving spouse could only inherit in absence of relatives to the twelveth degree of consanguinity; CC, Art. 755, 767. The ABGB was the most favourable for widows (widowers), as it stipulated that the surviving spouse inherited concurrently with children, in which case he or she was entitled to a lifetime use of a quarter of the inheritance (ABGB, § 757), but when there were no children, he or she inherited half of the estate (ABGB § 758).

[27] KURATÓW-KURATOWSKI R., "O zdolności prawnej mężatek według Kodeksu Cywilnego Polskiego," *Gazeta Sądowa Warszawska* [XLVII, no. 39] (1919), p. 376.

[28] In practice, husbands' rights were interpreted broadly, see Arne Duncker, *Gleichheit und ungleichheit in der ehe: persönliche Stellung von Frau und Mann im Recht der ehelichen Lebensgemeinschaft 1700-1914* (Köln: Böhlau Verlag, 2003), 813; ABGB, § 1034. Husbands' rights were not limited by § 1008 (ZOLL F. et al., *Prawo cywilne: opracowane głównie na podstawie przepisów obowiązujących w Małopolsce*. *Prawo familijne i spadkowe*, vol. 4 (Poznań: Wojewódzki Instytut Wydawniczy, 1933), 78; dissenting opinion in Czemeryński, *Powszechne prawo prywatne austriackie*, vol. 2, 95; see also: FORSTER E., "Die Spiegelung widersprüchlicher Vorstellungen über die Geschäftsfähigkeit von Frauen im österreichischen Privatrecht um 1800," in *Kontinuität im Wandel 200 Jahre ABGB (1811-2011)*, ed. BARTA H. et al., Innsbruck, 2012, p. 269–93; FORSTER E., "Gesellschaftliche Neuordnung am Ende des 18. Jahrhunderts? Ein Vergleich der österreichischen und toskanischen Rechtsentwürfe," *Geschichte und Region/Storia e regione*, no. 2 (2011): p. 35–6; Ute Gerhard, "Civil Law and Gender in Nineteenth-Century Europe," *Clio. Women, Gender, History*, no. 43, "Gender and the Citizen" (2016): p. 263; FLOSSMANN U., *Österreichische Privatrechtsgeschichte*, Wien-New York, 1992, p. 27–30.

cession, nor transfer or encumber real estate[29] without the authorisation of her husband. However, the position of wife was stronger if separate property regime had been established by prenuptial agreement (Art. 1536 CC), court verdict (Art. 1538 CC) or during the separation process (Art. 1449 CC). Yet also under the joint property regime she could perform certain acts by herself.[30] If the husband refused to authorise his wife to pass an act, she could sue him in court (Art. 219 CC).

Despite all the limitations described above, the position of married women was strengthened by the institution called *Schlüsselgewalt* in German and by the similar French institution (*mandat tacite*).[31] It allowed the wife to represent her husband in acts of ordinary management needed to run their common household.[32] In all three compared systems, the legal basis of this institution was based rather on practice, doctrine and jurisprudence than on the letter of the law. Nevertheless, in both the Prussian and the Austrian codes, we can find the same grounds, which were interpreted broadly. There were provisions in *Landrecht* stipulating that the wife should manage the common household on the level adequate to the status of her husband[33] and authorising the wife to take out a loan for ordinary household needs.[34] In the original version of the ABGB we can find some foundations of this institution in § 92.[35] On the other hand, the French *mandat tacite,* which had a similar function to that of *Schlüsselgewalt*, did not have any grounds in the *Code Civil*. It was created by practice and accepted by doctrine and jurisprudence. Its essence was that in issues associated with ordinary management needed to run the common household, the wife was treated as a plenipotentiary of her husband. Her authorisation was usually tacit, but the husband could cancel it.[36]

In the last part of these detailed considerations on the legal status of married women, I will address their capacity to appear in court and to conduct a business or a trade. In both French and Prussian legal systems married women generally did not have the capacity neither to sue nor to be sued (their husbands acted as their statutory representatives).[37] Interestingly, there were no similar limitations in the Austrian law.[38]

Pursuant to French and Prussian laws, the wife needed her husband's authorisation for conducting a business or a trade.[39] Conversely, there were no analogical provisions in the ABGB, but some similar limitations were stipulated in acts of lower ranks.[40] When a husband gave his wife permission to trade, she achieved full legal capacity for transactions linked to her business.

4. Personal relations between spouses and between children and parents

Having analysed the material aspects of marriage, I will make some remarks on personal relations between spouses and between children and parents. Firstly, it must be stated that all the compared systems distinguished the legal status of children born in wedlock and of natural children (born out of wedlock).[41] This distinction was additionally reinforced by a rule according to which legitimate children bore surnames of their fathers, while natural ones took on the last name of their mothers.[42] Further considerations will be limited to legitimate children.

[29] HLEWIŃSKI W., *O zobowiązaniach podług Kodeksu Napoleona*, 83; LEPSIUS S., "Die privatrechtliche Stellung der Frau," p. 115. Articles limiting the wives' capacity were scattered all over the Napoleonic Code; CC, Art. 776. "Married women are incapable of a valid acceptance of a succession without the authority of their husbands"; CC, Art. 905. "A married woman cannot make donation during life without the assistance or the special consent of her husband"; CC, Art. 934. "A married woman shall not be allowed to accept a donation without the consent of her husband"; CC, Art. 1029. "A married woman shall not be allowed to accept testamentary executorship except with her husband's consent"; CC, Art. 1124 (inability to enter into legal transactions).

[30] Exceptions in the Napoleonic Code were Art. 241 (bringing divorce action into the court), Art. 940 (if the husband did not satisfy certain formalities connected with donation, the wife could proceed without authorisation), Art. 1096 (revoking the donation in favour of the husband), Art. 1990 (possibility to make the wife her husband's representative). Moreover, note Art. 865, 875 and 878 of the *Code de procédure civile: édition originale et seule officielle*, Paris, 1806.

[31] LONGSCHAMPS de BERIER R., "Ograniczenia kobiet w prawie cywilnem obowiązującem na ziemiach polskich", *Przegląd prawa i administracji* 45, no.2 (1920): p. 177–78; ZOLL F., *Prawo cywilne*, 75, footnote no. 2.

[32] Contemporary version of the ABGB regulates this institution in § 96 (it is gender neutral now).

[33] *Landrecht*, part 2, title 1, § 194.

[34] *Landrecht*, part 2, title 1, § 321; DUNCKER, *Gleichheit und ungleichheit in der ehe*, p. 815; VICK, "Liberalism, Nationalism, and Gender," p. 558. The wife's capacities strengthened in times of her husband's absence (*Landrecht*, part 2, title 1, § 202–204).

[35] "Die Gattinn erhält den Nahmen des der Ehe. Mannes, und genießt die Rechte seines Standes. Sie ist verbunden, dem Manne in seinen Wohnfitz zu folgen, in der Haushaltung und Erwerbung nach Kräften beyzustehen, und so weit es die häusliche Ordnung erfordert, die von ihm getroffenen Maßregeln sowohl selbst zu befolgen, als befolgen zu machen." DUNCKER, *Gleichheit und ungleichheit in der ehe*, p. 814.

[36] S. P., "Kobieta i prawo cywilne," *Gazeta Sądowa Warszawska* 22, no. 27 (1894): p. 422; KURATÓW-KURATOWSKI, "O zdolności prawnej mężatek," p. 325.

[37] *Landrecht*, part 2, title 1, § 189. "In der Regel kann daher die Frau, ohne Zuziehung und Einwilligung des Mannes, mit Andern keine Prozesse führen." See also *Allgemeine Gerichtsordnung für die Preußischen Staaten* (Berlin: Pauli, 1795), part 1, title 1, § 16. "Ehefrauen können ohne Beytritt ihrer Männer vor Gericht nicht erscheinen"; CC, Art. 215. "La femme ne peut ester en jugement sans l'autorisation de son mari, quand męme elle serait marchande publique, ou non commune, ou séparée de biens"; CC, Art. 216. "L'autorisation du mari n'est pas nécessaire lorsque la femme est poursuivie en matičre criminelle ou de police."

[38] KURATÓW-KURATOWSKI, "O zdolności prawnej mężatek," p. 376.

[39] *Landrecht*, part 2, title 1, § 195; CC, Art. 220; *Code de commerce*, Paris, 1807, Art. 4.

[40] LINDEN J., *Das österreichische Frauenrecht* 115 et seq., p. 162. The Austrian Commercial Code of 1862 contained a similar provision; CZEMERYŃSKI, *Powszechne prawo prywatne austriackie*, vol. 2, 7.

[41] BOBIŃSKI M., "Władza rodzicielska w prawie francusko-polskim w XIX wieku," (PhD diss., University of Warszawa, 2015), p. 232; PIETRZAK M., "Sytuacja prawna kobiet w Drugiej Rzeczypospolitej," in *O ustroju, prawie i polityce II Rzeczypospolitej*, ed. BORECKI P. et al., Warszawa, 2018, p. 188.

[42] *Landrecht*, part 2, title 2, § 58; ABGB, § 146. There were no similar provisions in the Napoleonic Code because it authors thought that it was obvious; GULCZYŃSKI A., *Nazwisko dziecka. Ewolucja ukazywania relacji rodzinnoprawnych*, Poznań, 2010, p. 112, 126, 132.

Pursuant to the Napoleonic Code, during the time of marriage legitimate children were under the father's control (*puissance paternelle*).[43] Nevertheless, both German codes recognized not only "father's power" (*väterliche Gewalt*) but also parental authority (*Gemeinschaftliche Rechte und Pflichten der Eltern*). Therefore, German lawmakers gave the mother some scope of authority over the children, but that authority was weaker than "father's power."[44] Moreover, in Prussia and Austria courts could deprive parents of parental authority for serious reasons.[45] In France this option was not introduced until 1889.[46]

5. Summary

On the whole, in all three compared systems wives were subordinate to their husbands, and children to their fathers, but there were many differences in specific matters. The status of married women was most strictly limited by the Napoleonic Code. In contrast, under the ABGB the position of the wife was relatively strong.[47] However, the practice mitigated some distinctions: on the one hand, by strengthening the position of French wives (*mandat tacite*), and on the other hand by weakening the status of Austrian wives (authority of husband as the statutory representative of his wife). In order to determine the actual legal situation on the Polish lands (as in the case of other countries governed by the same codes) in the nineteenth century, systematic archive research is needed. It must also be kept in mind that occasionally the same articles of the Napoleonic Code were interpreted differently in Paris and in Warsaw. The same sometimes happened with the practice of the ABGB, for example in Galicia and Tirol.

Bibliography

Published primary sources

Allgemeine Gerichtsordnung für die Preußischen Staaten. Berlin: Pauli, 1795.
Allgemeines Bürgerliches Gesetzbuch. Wien: Hippolyt-Verlag, 1811.
Allgemeines Landrecht für die Königlich Preussischen Staaten. Berlin, 1794.
Code civil des Français : édition originale et seule officielle. Paris: Imprimerie de la République, 1804.
Code de commerce. Paris: Imprimerie des frčres Mame, 1807.
Code de procédure civile: édition originale et seule officielle. Paris: Imprimerie impériale, 1806.
"Loi sur l'abolition du divorce (loi Bonald) (8-10 mai 1816)." In *Collection complčte des lois, décrets, ordonnances, réglements, avis du Conseil d'État*, edited by Jean-Baptiste Duvergier, Vol. 20, 464–5. Paris: A. Guyot, 1827.
The Code Napoleon or the French Civil Code Literally Translated from the Original and official Edition Published at Paris in 1804. London: William Benning, 1827.

Literature

BEM, Juliusz "Kobieta wobec władzy w rodzinie." *Gazeta Sądowa Warszawska* [rocznik X, no. 46] (1882): 363-367.
BLACKSTONE, William. *Commentaries on the Laws of England*. Vol. 1. New York: E.Duyckinck, G. Long, Collins & Hannay, Collins & CO, O. A. Roorbach, John Grigg, 1827.
BOBIŃSKI, Mariusz. "Władza rodzicielska w prawie francusko-polskim w XIX wieku." PhD diss., University of Warsaw, 2015.
BOGUCKA, Maria. *Białogłowa w dawnej Polsce: kobieta w społeczeństwie polskim XVI–XVIII wieku na tle porównawczym*. Warszawa: "Trio," 1998.
BURZYŃSKI, Piotr. *Wykład prawa cywilnego francuzkiego*. Vol. 1. Kraków 1852.
CHLEBOWSKA, Agnieszka. *"Stare panny," wdowy i rozwiedzione. Samotne szlachcianki w Prusach w latach 1815-1914 na przykładzie prowincji Pomorze*. Szczecin: Wydawnictwo Uniwersytetu Szczecińskiego, 2012.
DELSOL, Jean Joseph. *Explication élémentaire du Code Napoléon, mise en rapport avec la doctrine et la jurisprudence*. Vols. 1, 3. Paris: Cotillon, 1867.
DOLATA, Tomasz. "Kilka uwag o sytuacji prawnej kobiety zamężnej na ziemiach b. Królestwa Kongresowego z punktu widzenia osobowego prawa małżeńskiego." In *Pozycja prawna kobiet w dziejach*, edited by Stanisław Rogowski, 139–45. Wrocław: Kolonia Limited, 2010.

[43] CC, Art. 373. In the case of the father's death, *puissance paternelle* was exercised by the mother, yet with certain limitations; JAWORSKI W. L., *Prawo cywilne na ziemiach polskich. Rodzice i dzieci*, vol. 2, part 1, Warszawa, 1920, p. 120; DUNIN K., *Prawa kobiet w nowym kodeksie cywilnym szwajcarskim*, Warszawa, 1909, p. 16; FORSTER E., "The Construction of 'Male Capability' and 'Female Inability' to assume Guardianship of Children in the Austrian 'Allgemeines Bürgerliches Gesetzbuch' (ABGB) in the 19th Century," in *Less favoured – more favoured. Proceedings from a Conference on Gender in European Legal History. 12.–19. Century, September 2004*, Kopenhagen 2005, ed. Grethe Jacobsen et al., 13, http://www.kb.dk/da/nb/publikationer/fundogforskning-online/less_more/.

[44] *Landrecht*, part 2, title 2, § 61. "Kinder sind beyden Aeltern Ehrfurcht und Gehorsam schuldig"; § 62. "Vorzüglich aber stehen sie unter väterlicher Gewalt."; ABGB, § 139. "Die Eltern haben überhaupt die Verbindlichkeit, ihre ehelichen Kinder zu erziehen, das ist, für ihr Leben und ihre Gesundheit zu sorgen, ihnen den anständigen Unterhalt zu verschaffen, ihre körperlichen und Geisteskräfte zu entwickeln, und durch Unterricht in der Religion und in nützlichen Kenntnissen den Grund zu ihrer künftigen Wohlfahrt zu legen"; § 141. "Es ist vorzüglich Pflicht des Vaters, so lange für den Unterhalt der Kinder zu sorgen, bis sie sich selbst ernähren können. Die Pflege ihres Körpers und ihrer Gesundheit ist hauptsächlich die Mutter auf sich zu nehmen verbunden."

[45] ABGB, § 177 and § 178; *Landrecht*, part 2, title 2, § 90–91.

[46] S. P., "Kobieta i prawo cywilne," 453. Jean Joseph Delsol, however, asserts that courts sometimes deprived parents of their parental responsibility also prior to 1889; DELSOL J.J., *Explication élémentaire du Code Napoléon*, vol. 1, 280.

[47] But on the other hand it must be noted that in Napoleonic France wives could receive divorce, which was forbidden for Catholic women in the Hapsburg Empire, where the majority of subjects were Roman Catholics. In France divorce was abolished in 1816; *Loi sur l'abolition du divorce (loi Bonald) (8-10 mai 1816.)*, in DUVERGIER J.B., ed., *Collection complčte des lois, décrets, ordonnances, réglements, avis du Conseil d'État*, vol. 20, Paris, 1827, p. 464–5.

DUNCKER, Arne. *Gleichheit und ungleichheit in der ehe: persönliche Stellung von Frau und Mann im Recht der ehelichen Lebensgemeinschaft 1700-1914*. Köln: Böhlau Verlag, 2003.
DUNIN, Karol. *Prawa kobiet w nowym kodeksie cywilnym szwajcarskim*. Warszawa: Gebethner i Wolff, 1909.
ZOLL, Fryderyk, et al. *Prawo cywilne: opracowane głównie na podstawie przepisów obowiązujących w Małopolsce. Prawo familijne i spadkowe*. Vol. 4. Poznań: Wojewódzki Instytut Wydawniczy, 1933.
FLOSSMANN, Ursula. *Österreichische Privatrechtsgeschichte*. Wien–New York: Springer, 1992.
FORSTER, Ellinor. "Die Spiegelung widersprüchlicher Vorstellungen über die Geschäftsfähigkeit von Frauen im österreichischen Privatrecht um 1800." In *Kontinuität im Wandel 200 Jahre ABGB (1811-2011)*, edited by Heinz Barta et al., 269–93. Innsbruck: Innsbruck University Press, 2012.
FORSTER, Ellinor. "Gesellschaftliche Neuordnung am Ende des 18. Jahrhunderts? Ein Vergleich der österreichischen und toskanischen Rechtsentwürfe." *Geschichte und Region/Storia e regione*, no. 2 (2011): 15–39. https://storiaeregione.eu/attachment/get/up_91_14684001234278.pdf.
FORSTER, Ellinor. "The Construction of 'Male Capability' and 'Female Inability' to assume Guardianship of Children in the Austrian 'Allgemeines Bürgerliches Gesetzbuch' (ABGB) in the 19th Century." In *Less favoured – more favoured. Proceedings from a Conference on Gender in European Legal History. 12.–19. Century, September 2004*, Kopenhagen 2005, edited by Grethe Jacobsen et al., 1–13. http://www.kb.dk/da/nb/publikationer/fundogforskning-online/less_more/.
GERHARD, Ute. "Civil law and gender in nineteenth-century Europe." *Clio. Women, Gender, History*, no. 43, "Gender and the Citizen" (2016): 250–75.
GODEK, Sławomir. *III Statut Litewski w dobie porozbiorowej*. Warszawa: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, 2012.
GULCZYŃSKI, Andrzej. *Nazwisko dziecka. Ewolucja ukazywania relacji rodzinnoprawnych*. Poznań: Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu, 2010.
BARDACH, Juliusz, and Senkowska-Gluck, Monika, ed. *Historia państwa i prawa Polski. Od rozbiorów do uwłaszczenia*. Vol. 3. Warszawa: Państwowe Wydawnictwo Naukowe, 1981.
HOLEWIŃSKI, Władysław. *O zobowiązaniach podług Kodeksu Napoleona*. Warszawa: Redakcja Umiejętności Prawnych, 1875.
JAWORSKI, Władysław Leopold. *Prawo cywilne na ziemiach polskich. Rodzice i dzieci*. Vol. 2, Part 1.Warszawa: J. Czernecki, 1920.
KURATÓW-KURATOWSKI, Roman. *O zdolności prawnej mężatek według Kodeksu Cywilnego Polskiego*, „Gazeta Sądowa Warszawska" [rocznik XLVII, no. 39] (1919): [375-377].
LEPSIUS, Susanne. "Die privatrechtliche Stellung der Frau im Deutschland des 19. Jahrhunderts." *L'Homme. Europäische Zeitschrift für feministische Geschichtswissenschaft* 14, no. 1 (2003): 110–23.
LINDEN, Joseph, *Das* österreichische Frauenrecht. Wien: C. Gerold, 1834.
LONGSCHAMPS de Berier, Roman. "Ograniczenia kobiet w prawie cywilnem obowiązującem na ziemiach polskich," *Przegląd prawa i administracji* 45, no.2 (1920): [173-196].
MACHUT-KOWALCZYK, Joanna. "Panny, mężatki i wdowy przed sądem pokoju. Prawo a praktyka w Królestwie Polskim na przykładzie akt sądów pokoju okręgu łęczyckiego, zgierskiego i łódzkiego." *Studia z Dziejów Państwa i Prawa Polskiego* 16 (2013): 201–14.
OKOLSKI, Antoni. "Kwestia kobieca w świetle najnowszego prawodawstwa." *Biblioteka Warszawska*, no. 4 (1888): 1–21.
PIETRZAK, Michał. "Sytuacja prawna kobiet w Drugiej Rzeczypospolitej." In *O ustroju, prawie i polityce II Rzeczypospolitej*, edited by Paweł Borecki et al., 182–96. Warszawa: Wolters Kluwer, 2018.
CZEMERYŃSKI, Ignacy Szczęsny. *Powszechne prawo prywatne austriackie: dla użytku podręcznego*. Vol. 1. Kraków 1861.
RADWAŃSKI, Zbigniew, and Wąsicki, Jan. "Wprowadzenie pruskiego prawa krajowego na ziemiach polskich." *Czasopismo Prawno-Historyczne* 6, no. 1 (1954): 184–222.
S. P. "Kobieta i prawo cywilne." *Gazeta Sądowa Warszawska* 22, no. 27 (1894): 418–24, no. 28 (1894): 434–41.
SENKOWSKA-GLUCK, Monika. *Donacje napoleońskie w Księstwie Warszawskim. Studium historyczno-prawne*. Wrocław: Zakład Narodowy im. Ossolińskich, 1968.
SÓJKA-ZIELIŃSKA, Katarzyna. *Wielkie kodyfikacje cywilne*. Warszawa: Liber, 2009.
UNGER, Joseph. *Österreichischen allgemeinen Privatrechts*. Vol. 1. Leipzig: Breitkopf und Härtel, 1876.
VICK, Brian. "Liberalism, Nationalism, and Gender Dichotomy in Mid-Nineteenth-Century Germany. The Contested Case of German Civil Law." *The Journal of Modern History* 82, (September 2010): 546–84.
WIERZCHLEJSKI, Roman, *O prawach kobiety wedle ustaw u nas obowiązujących*, *Biblioteka Warszawska* 3, no. 8 (1883): 176–88.
ZACHARIÄ von Lingenthal, Karl Salomo, *Le Droit civil français*, vol. 1 (Paris: Auguste Durand, 1854)
ZAKRZEWSKI, Andrzej B. *Wielkie Księstwo Litewskie (XVI-XVIII w.): prawo, ustrój, społeczeństwo*. Warszawa: Campidoglio, 2013.
ZOLL, Fryderyk. "Małżeńskie prawo majątkowe." In *Encyklopedia podręczna prawa prywatnego założona przez Henryka Konica*, edited by Fryderyk Zoll, and Jan Wasilkowski, 806–42. Warszawa: Instytut Wydawniczy „Bibljoteka Polska," 1937.
ZIELIŃSKA, Teresa. "Noblewomen's property rights in 16th-18th Polish-Lithuanian Commonwealth." *Acta Poloniae Historica* 81 (2000): 79–89.

Consent to a Jewish Marriage in Legislation of the Free City of Cracow (1815–1846)*

*Piotr Michalik***

Abstract

The aim of this paper is to present an analysis of the legislation of the Free City of Cracow (1815-1846) concerning an institution of a consent to a Jewish marriage. From the analysis it occurs that the so-called emancipation of Jews, introduced in Cracow with the enlightened reform of Austrian rulers after the third partition of Poland in 1795, was continued under the autonomous government of the Free City. The process was significantly supported in 1810 by the introduction of the Napoleonic Code in Cracow, then a part of the Duchy of Warsaw. The implementation of civil marriage and civil registry required by the Code was also conducted against the Jews, which was underlined in the Statute of organizing Orthodox Jews of 1817. Due to the resistance of the most of the Jewish community, the act of 1821 made performing an exclusively religious marriage a crime, and legitimization of illegitimate children born of such a marriage inadmissible. However, these and other strict measures introduced by the subsequent acts of 1838 and 1844 did not fulfil their aim up to the end of the existence of the Free City in 1846.

Keywords: *Jewish marriage; consent to marriage; legislation of the Free City of Cracow; legal status of Jews; Poland.*

1. Introduction

Together with the incorporation of Cracow and its vicinity into Austria within the third partition of Poland in 1795, Jews residing there were subject to the regulations of the Austrian Law. It meant the inclusion of the previously autonomous Jewish community[1] in Maria Theresa's and Joseph II's emancipation reforms.[2] Among numerous regulations issued by Vienna there were also the regulations concerning Jewish marriages. For instance, in 1773 in order to limit their number, concluding marriage depended on obtaining a special permit from the government authorities and paying a marriage fee.[3] However, these rules were not complied, and Jews concluded marriage exclusively in the religious form (the so-called ritual one).[4] After next legislative changes, finally in Joseph II's Patent of Toleration of 1789, the previous limitations were lifted and Jewish marriages were subject to common civil law.[5] Simultaneously, the obligation was introduced to use a fixed surname by all heads of family and keep Jewish birth, marriage and deaths certificates by chiefs of communes together with rabbi.[6] These changes were also met with resistance which led to further compromises, for example, kinship impediments were adjusted to Jewish law and limitations of Jewish divorces to the procedure of the divorce letter in the circular of 1791.[7]

The aforesaid legal status was upheld after the implementation of the west-Galician civil code in Cracow in 1797, which similarly to the previous civil code of Joseph II of 1786 did not include particular regulations concerning Jewish marriages.[8] Napoleonic wars brought changes to it, which resulted in the

* This article has been prepared in realisation of Polish National Science Centre research project no. 2017/27/B/HS5/01308.

** Piotr Michalik, Ph.D., Chair of Legal and Constitutional History, Faculty of Law and Administration, Jagiellonian University, Cracow, Poland.

1 Until 1795 the political system of the autonomous commune of Cracow had been regulated by the statute of 1595 – JAKIMISZYN, A., The Jewish Community in Cracow – analysis based on the Cracow Community Charter of 5355 and supplements. In: *Scripta Judaica Cracoviensia*, vol. 3, 2005, pp. 41-49.

2 See GRODZISKI, S., Stanowisko prawne Żydów w Galicji: reformy Marii Teresy i Józefa II (1772-1790). In: GRODZISKI, S., *Studia Galicyjskie. Rozprawy i przyczynki do historii ustroju Galicji*, Kraków, 2007, pp. 73-85. Regarding the 18th-19th century emancipation of Jews in Central and Eastern Europe see EISENBACH, A., *Emancypacja Żydów na ziemiach polskich 1785-1870 na tle europejskim*. Warszawa, 1988.

3 *Continuatio Edictorum et Mandatorum Universalium in Regnis Galiciae et Lodomeriae*. PILLER, T. (Ed.), Lwów, 1794, no. 1, p. 4.

4 GRODZISKI, p. 77.

5 *Continuatio Edictorum et Mandatorum Universalium in Regnis Galiciae et Lodomeriae*. PILLER, T. (Ed.), Lwów, 1789, no. 44, p. 105.

6 Ibidem, p. 106. Certificates should have been written in German. Till the present day the Jewish certificates from the Kazimierz district from the years 1798-1809 have been preserved written in Latin and German. See, for example: *Geburtsbuch für der kasimirer Judengem 1798.-ANNO-1809*. In: *Akta stanu cywilnego Izraelickiego Okręgu Metrykalnego w Krakowie* (hereafter *Akta IOM*), Archiwum Państwowe w Krakowie (hereafter APwK), reference no. 29/1472/0/1/1, https://szukajwarchiwach.pl/29/1472/0/1/1#tabJednostka (access 25. 11. 2019).

7 *Continuatio Edictorum et Mandatorum Universalium in Regnis Galiciae et Lodomeriae*. PILLER, T. (Ed.), Lwów, 1791, no. 13, pp. 29-30.

8 DZIADZIO, A., *Powszechna Historia Prawa*. Warszawa, 2008, p. 157.

inclusion of Cracow to the Duchy of Warsaw pursuant to the peace of Schőnbrunn of the 14th of October 1809. It also meant the inclusion of the Jewish population in the new governing law, the framework of which was marked by the constitution of the Duchy of the 22nd of July 1807 octroyed by Napoleon. Formally, it implemented equality of all citizens before the law in art. 4.[9] Nonetheless, in practice under the royal decrees of the 7th of September and the 17th of October 1808, this regulation in the scope of political laws was suspended regarding Jews for 10 years, "hoping that they will destroy in themselves characteristics which distinguish them so much from other inhabitants".[10] But the above restriction did not concern civil law which was regulated in the Duchy by the Napoleonic Code since the 1st of May 1808, commonly introducing the secular model of marriage.[11] Therefore, formally the latter was implemented against the Jews of Cracow on the 15th of August 1810.[12]

The implementation of the Napoleonic Code in the Duchy of Warsaw was connected with the necessity to appoint registrars authorised to draw up vital records required by the code. According to the French model, they should be laypersons. The government of the Duchy tried to execute this principle, but the administrative reality of the Duchy required entrusting this function also to clergymen. Initially, they were Catholic rectors exclusively who were to perform duties of registrars in the country.[13] However, pursuant to § 24 of the decree of the 9th of May 1808 on conscription, "priests of the Greek Catholic rite, pastors of Evangelic religions [and] Rabbis" were made responsible to "keep books of certificates" *expressis verbis*.[14] This rule was confirmed by art. 1 of the decree on the 23rd of February 1809 on fees for registrars, claiming that "The registrars are to be Clergymen performing parish duties".[15] However, owing to the suspension of Jews in the political rights, the regulations of this decree did not apply to Jewish rabbis.[16] Consequently, the civil registry for the followers of Judaism were probably drawn up by either clergymen of other religions or lay officials.[17] The regulation adopted in the Duchy started to be applied in Cracow from August 1810, and the function of the registrars was performed mainly by Catholic clergymen.[18] Yet, the separate vital records for Jews were kept by appointed officials of the city hall.[19]

Although the government of the Duchy of Warsaw worked to regulate Jewish persons' legal status comprehensively which was to be based on the solutions already adopted in the Prussian Partition,[20] they were not introduced to the end of the existence of the Duchy.[21] Instead, numerous partial administrative and legal regulations were implemented, restricting the rights of the Jewish population. For example, they were: decrees restricting civil rights such as the decree of the 19th November 1808 on depriving Jews temporarily of the right to purchase land property,[22] decrees restricting freedom of residence such as the decree of the 16th of March 1809 on prohibition of Jewish people's residence in some streets in Warsaw,[23] or decrees imposing special taxes on the population of Judaism such as the decree of the 25th of March 1809 on the kosher tax.[24] Together with the incorporation of Cracow into the Duchy, the "Jewish" regulations binding in it replaced the previous Austrian regulations,[25] but some of the latter were maintained in force, for instance, the Jewish family tax made effective pursuant to the patent of the 20th of August 1806.[26] Additionally, the rules of Jewish residence in the territory of Cracow and Kazimierz were regulated pursuant to the decree of the 19th of March 1812.[27]

Napoleon's defeat also finished the existence of the Duchy of Warsaw, and consequently, Cracow changed the political belonging for the third time during the generation. Under the treaty between Russian, Austria and Prussia of the 3rd of May 1815, attached to the final act of the Congress of Vienna signed

[9] *Ustawa Konstytucyjna Księstwa Warszawskiego*. In: *Dziennik Praw Księstwa Warszawskiego*, Warszawa, 1810 (hereafter *DPKW*), vol. 1, p. II.
[10] *Ustawodawstwo Księstwa Warszawskiego. Akty normatywne władzy najwyższej*. BARTEL, W., KOSIM, J., ROSTOCKI, W. (Eds.), Warszawa, 1964-1969 (hereafter *Ustawodawstwo KW*), vol. 1, pp. 142 and 148.
[11] *Dekret z 27 stycznia 1808 r.* In: *DPKW*, vol. 1, pp. 46-47.
[12] Binding force of the Napoleonic Code was extended to the areas taken from Austria in 1809 (including Cracow) since the 15th of August 1810 – *Dekret z 9 kwietnia 1810 r.* In: *DPKW*, vol. 2, pp. 220-221.
[13] POMIANOWSKI, P. Z., Funkcjonowanie francuskiego modelu rejestracji stanu cywilnego w Polsce. In: *Czasopismo Prawno-Historyczne*, vol. 67, no. 1, 2015, pp. 95-97.
[14] *DPKW*, vol. 1, p. 54.
[15] Ibidem, vol. 1, pp. 195-196.
[16] POMIANOWSKI, p. 100.
[17] The issue is still waiting to be studied comprehensively.
[18] SZPAK, J., Inwentaryzacja metryk parafialnych Krakowa z XVI-XIX w. oraz ksiąg stanu cywilnego z pierwszej połowy XIX w. In: *Studia Historyczne*, vol. 16, no. 1, 1973, p. 60.
[19] See, for example: *[Akta] Urodzin Wyznania Moyżeszowego 1812 R*. In: *Akta IOM*, APwK, reference no. 29/1472/0/1/10, https://szukajwarchiwach.pl/29/1472/0/1/10#tabJednostka (access 25. 11. 2019).
[20] Exactly on *Generalnym Urządzeniu Żydów w prowincjach Prus Południowych i Nowo-Wschodnich* of the 17th of April 1797.
[21] FILIPIAK, Z., Projekt urządzenia ogólnego ludności żydowskiej w Księstwie Warszawskim z 1809 r. In: *Czasopismo Prawno-Historyczne*, vol. 68, no. 2, 2016, pp. 147-149.
[22] *Ustawodawstwo KW*, vol. 1, p. 159.
[23] Ibidem, vol. 2, pp. 26-30.
[24] *DPKW*, vol. 2, pp. 34-36.
[25] *Dekret z 22 maja 1810 r. wprowadzający podatek od mięsa koszernego w departamentach „galicyjskich" i dotyczący środków na umorzenie długów kahalnych*. In: *DPKW*, vol. 2, pp. 189-192.
[26] Ibidem; *Dekret z 14 czerwca 1810 r. ustalający na rok 1810 zasady uiszczania rozmaitych podatków w nowo do Księstwa Warszawskiego wcielonych departamentach galicyjskich*. In: *Ustawodawstwo KW*, vol. 4, pp. 179-181.
[27] *Dekret zezwalającym Żydom krakowskim na zamieszkanie zarówno na Kazimierzu żydowskim, jak i katolickim*. In: *Ustawodawstwo KW*, vol. 3, pp. 235-237.

on the 9th of June 1815, Cracow together with its territory received the status of a free, independent and strictly neutral city protected by three partitioning powers.[28] Under the treaty, the initial political and legal framework of the Free City of Cracow was established by the constitution also of the 3rd of May 1815 attached to it.[29] Its decisions were to be specified by the Organizational Committee constituted by the protective powers on the 4th of July 1815.[30] It happened through the declaration of the new developed constitution on the 11th of September 1818.[31] It was binding until 1833 when the Reorganizational Committee appointed by the protective powers prepared the text of the new third constitution of the Free City, announced on the 11th of September that year.[32] The constitution of 1833, amended many times, was binding until the 6th of November 1846 when the protective powers annulled the decisions of the treaty of the 3rd of May 1815, ending the existence of the Free City of Cracow, the territory of which was incorporated into Austria on the 16th of November 1846.[33]

2. Statute of organizing Orthodox Jews[34]

Like the constitution of the Duchy of Warsaw, article III of the constitution of 1815 guaranteed equality of all citizens and legal protection for tolerated religions. This norm was confirmed by art. III of the constitution of 1818 and art. VI and III of the constitution of 1833. The latter *expressis verbis* granted legal protection for Judaism.[35] However, at the same time the constitutions of the Free City of Cracow excluded Jewish people from equality of "the use of civil and political rights," to which only Christians were entitled.[36] In consequence, the constitution of 1818 in art. VII deprived Jews of franchise until "they acquire political rights," and the constitution of 1833 upheld it solely in art. X.[37] Furthermore, it simply excluded Orthodox Jews from holding offices of a senator, judge, representative and head of a commune in art. XII and XXI. It meant that on the strength of the constitution only, unlike the ruler's decree in the Duchy of Warsaw, Jews were second-class citizens in the Free City.

The above constitutional regulations made up only the framework for reshaping of a legal status of Jews in Cracow, especially that they did not establish the scope of the use of civil rights by them. Based on Josephinism's reforms and the attainment from the times of the Duchy of Warsaw, Cracovian political elites believed that such an establishment has to be provided for within the continuation of the emancipation process of Orthodox Jews. For this purpose as early as the end of 1815, the Senate of the Free City started work to prepare a complex regulation of rights and obligations of the Jewish community subordinate to it. The effect of almost-one-year-long work was the preparation of two projects which were delivered to the Organizational Committee after being approved by the Senate. Within the Committee, the final project of the regulation was drawn up by Józef Sweerts-Spork, its Austrian member, entitled *Rapport sur le systčme futur de Juifs*.[38] In April 1817 it was finally accepted by the other members of the Committee and made public by the Senate in the Official Gazette of Government Regulations as *The Statute of organizing Orthodox Jews in the Free City of Cracow and its Territory*, with the effect from the 1st of June 1817.[39]

As it was indirectly indicated in the complex preamble and § 23 of the act, the implementation of its regulations was to lead to the gradual "civilization" of Jewish population which should happen by accepting "general customs" by them.[40] In the long term, they were to obtain complete civil and political rights. The latter *de lege lata* were only for the group of individuals who were the most "useful" for society. For instance, they were eminent artists and significant merchants, but on condition that they had already assimilated with the Christian

[28] *Traktat tzw. dodatkowy, dotyczący Krakowa zawarty przez Austrię, Prusy i Rosję*. In: *Pomniki prawa Rzeczypospolitej Krakowskiej 1815-1818*. TOKARZ, W. (Ed.), Kraków, 1932 (hereafter *Pomniki*), pp. 3-9.

[29] *Konstytucja Wolnego Miasta Krakowa*. In: *Pomniki*, pp. 10-15.

[30] *Instrukcja trzech mocarstw opiekuńczych dla Komisji organizacyjnej*. In: *Pomniki*, pp. 15-22. The Committee consisted of three representatives of powers and three citizens of the Free City of Cracow, but only in an advisory capacity.

[31] *Konstytucja Wolnego Miasta Krakowa i Jego Okręgu*. In: *Historia ustroju i prawa w Polsce 1772/1775-1918, wybór źródeł*. KALLAS, M., KRZYMKOWSKI, M. (Eds.), Warszawa, 2006, pp. 183-190.

[32] *Konstytucja Wolnego Miasta Krakowa i Jego Okręgu*. In: *Dziennik Praw (Wolnego Miasta Krakowa)*. Kraków, 1833-1846, https://jbc.bj.uj.edu.pl/dlibra/publication/125635#description; access 25. 11. 2019; (hereafter *Dziennik Praw*), 1833, no. 4711.

[33] See GOCLON, J. A., *Konstytucje Wolnego Miasta Krakowa z 1815, 1818 i 1833 r.* Warszawa, 1990. On the political system and law of the Free City of Cracow see BARTEL, W. M., *Ustrój i prawo Wolnego Miasta Krakowa (1815-1846)*. Kraków, 1976; MACIEJEWSKI, T., *Ustrój konstytucyjny Wolnych Miast (Państw, Terytoriów) Europy w latach 1806-1954. Studium prawno-historyczno-porównawcze*. Warszawa, 2018; CICHOŃ, P., O rządach prawa w Wolnym Mieście Krakowie uwag kilka. In: *Krakowskie Studia z Historii Państwa i Prawa*, vol. 5, no. 3, 2012, pp. 241-254.

[34] The terms *Orthodox Jew*, *Orthodox Jews* were used for Jewish people in Polish official documents of the Free City of Cracow.

[35] „La loi protčge les Cultes tolérés, au nombre desquels est compris celui des Israëlites".

[36] Art. IV of the Constitution of 1833: „La différence des Cultes Chrétiens n'en établit aucune dans la jouissance des droits civils et politiquep." Art. II of the constitution of 1815 and 1833 refers to social laws (*les droits sociaux*).

[37] „Ne jouissent pas du droit politique d'élection, męme lorsqu'ils posséderaient d'ailleurs les qualités prescrites […] Les individus professant des religions seulément tolerées, tells que les Juifs et autres non-chrétiens, avant d'avoir acquis les droits politiques."

[38] JAKIMYSZYN, A., *Żydzi krakowscy w dobie Rzeczypospolitej Krakowskiej. Status prawny. Przeobrażenia gminy. System edukacyjny*. Kraków - Budapeszt, 2008 (hereafter JAKIMYSZYN), pp. 63-67.

[39] *Statut urządzający starozakonnych w Wolnym Mieście Krakowie i Jego Okręgu* (hereafter the Statute). In: *Dziennik Rozporządzeń Rządowych Wolnego Miasta Krakowa i Jego Okręgu*. Kraków, 1816-1822, https://jbc.bj.uj.edu.pl/dlibra/publication/117530#description; access 25. 11. 2019; (hereafter *Dziennik Rozporządzeń*), 1817, no. 1358. The date of the entry into force of the regulations of the Statute was established by the Senate in the decision of the 28th of May 1817 – *Dziennik Rozporządzeń*, 1817, no. 20.

[40] The Statute, the preamble; § 23.

society.[41] In order to accelerate the process of assimilation, the Statute abolished a number of civil and administrative separations, which so far the Jewish population had been subject to. Firstly, it liquidated the qahal, reintroduced in the period of the Duchy of Warsaw, submitting Jews to "the power and surveillance" of head of communes.[42] The cases "strictly religious" were only excluded from the competences of the heads of communes, which still were subject to rabbis. Among them, the rabbi's right and obligation to record "any Religious acts, done in the Commune owing to Births, Marriages, Divorces or Deaths" [43] and issue religious verdicts were retained. However, with the stipulation that they should also be recorded in Polish (as authentic) and sent to the Senate every month.[44]

Similarly to the case of the qahal, the Statute also reintroduced the obligation that each Jew has to have "a permanent family surname, inherited from Father to Son".[45] In order to meet this obligation, the act called for conducting the census of the Jewish population, in which each family was to be ascribed ex officio a defined surname, but families with the surnames given in Austrian times kept them.[46] The possession of such a surname was the basis to obtain a certificate of "local-nationality" by the family head or an unmarried person, including "the description of a person, age, profession, status or employment." According to the act, the certificate made up an elementary identity document of a holder, confirming the status of the resident of the Free City of Cracow and entitling to handle any administrative issues. However, the lack of the certificate was an offence which carried a penalty of 15-day arrest, and in case of persistence even a crime.[47]

Continuing the legal status during the time of the Duchy of Warsaw, the Statute obliged registrars to keep separate records of Jewish birth, marriage, divorce and death.[48] These records were to be kept subject to the general conditions, i.e. in accordance with the appropriate regulations of title II of the first book of the Napoleonic Code *On civil registry* (art. 34-101). Some of them, specifically art. 41, 43-45, 49, 53, 70-72, were changed in order to adjust them to the reality of the Duchy of Warsaw, becoming legally effective from the 18th of March 1809.[49] In accordance with art. 57 of the Napoleonic Code, in the birth certificate there were inscribed the date, hour and place of birth of a child, his sex and first names as well as parents' and two witnesses' first names, surnames, status of life (a job) and residence. Moreover, a registrar also recorded a date of notification and data of an informant if it was not a child's father.[50] According to art. 76 of the Napoleonic Code, in the marriage certificate apart from the data of future spouses including first names, surnames, age, status of life (a marital status and possibly a job) as well as a place of birth and residence confirmed by birth certificates, parents' and 4 witnesses' analogous data were provided. In case of an underage bride or an underage groom, an official was obliged to affirm in the marriage certificate that parents gave their permission to it.[51] Moreover, the notice of reported opposites, their abolition or lack, as well as dates of announcing 2 banns and a declaration on concluding marriage itself were entered into the records.[52] While in case of death certificates, in accordance with art. 79 of the Napoleonic Code, a date of death, data of a deceased person, their spouse and witnesses, including an informant's data were given.[53] The entries in vital records were provided in the continuous way, keeping numbering of next certificates.

Regardless of still a common obligation of civil registration, § 17 of the Statute also imposed an obligation to obtain a special permission of a head of a commune by Jewish spouses-to-be wanting to conclude marriage.[54] This permission could be issued on condition of meeting three cumulative prerequisites. The first one was having a marriage capacity according to the Napoleonic Code and meeting other prerequisites of civil law.[55] Secondly, "the Spouse-to-be should present a secure way

[41] Ibidem, § 28. The confirmation of assimilation were to be residing (with the previous consent) in the Christian part of Cracow, the conduct of Polish or German, wearing Christian clothes and sending children to public schools (pursuant to § 13 Jewish public schools in the Free City of Cracow were liquidated).

[42] Ibidem, § 1.

[43] Ibidem, § 3.

[44] Ibidem, § 7.

[45] Ibidem, § 16.

[46] In accordance with the Statute the census was conducted as early as 1817, and in 1818 the issuance of the certificates started – JAKIMISZYN, p. 76.

[47] The Statute, § 16 and 20.

[48] Ibidem, § 17.

[49] *Dekret z 18 marca 1809 r. dotyczący zastosowania przepisów Kodeksu Napoleona w sprawie aktów stanu cywilnego*, *DPKW*, vol. 1, pp. 231-236.

[50] See, for example: *Xięga I. Akt Stanu Cywilnego obeymująca Akta Urodzenia Przyznania i przysposobienia Osob Starozakonnych w Gminie VI. X i XI. Miasta Wolnego Krakowa zamieszkałych na Rok 1820*. In: *Akta IOM*, APwK, reference no. 29/1472/0/1/66, https://szukajwarchiwach.pl/29/1472/0/1/66#tabJednostka (access 25. 11. 2019).

[51] In accordance with art. 144 of the Napoleonic Code, the age of a marriage capacity was respectively 18 for men and 15 for women. However, the persons of legal age had a possibility to get married independently as defined in provisions of art. 148 of the Napoleonic Code, i.e. those who turned respectively 25 and 21. Furthermore, art. 151 of the Napoleonic Code ordered the prospective spouses of legal age to turn to their parents before concluding marriage with the act of respect, i.e. a request for advice as for the concluded marriage. The mention of the act of respect should have been entered in the marriage certificate.

[52] See, for example: *Akta Stanu Cywilnego Księga I. Akt Stanu Cywilnego obeymująca. Akta Zapowiedzi Małżeństw i Rozwodów między Osobami Starozakonnemi Gminy VI. X. i XI. Miasta Wolnego Krakowa. na 1820. Rok*. In: *Akta IOM*, APwK, reference no. 29/1472/0/2/68, https://szukajwarchiwach.pl/29/1472/0/2/68#tabJednostka (access 25. 11. 2019).

[53] See, for example: *Xięga I. Akt Stanu Cywilnego obeymująca Akta Zeyscia Osob Starozakonnych w Gminie VI. X. i XI. Miasta Wolnego Krakowa zamieszkałych na Rok 1820*. In: *Akta IOM*, APwK, reference no. 29/1472/0/3/71, https://szukajwarchiwach.pl/29/1472/0/3/71#tabJednostka (access 25. 11. 2019).

[54] The Statute, § 17.

[55] Ibidem, letter a). See footnote 53. JAKIMISZYN wrongly indicates the age of a marriage capacity as 21 for women and 30 for men (p. 81).

of living, for instance: that he owns land entered in the land registry, he deals with craft, he is a merchant, he is a son of a wealthy capitalist (a Rentier) or finally he earns a living as a farmer or a handicraftsman (Main d'Oeuvre).[56] Thirdly, postponed for six years from the announcement of the Statute, each "young man" was required to be able to read and write in Polish or German and know "first beginnings of arithmetic", which should be confirmed by "the certificate issued by Superiors over schools".[57] Formally, the consent of the head of the commune was not required for the marriage conclusion, but to conclude a prenuptial agreement (an engagement). Nonetheless, a sanction of an official deposition introduced in the same regulation for "permitting unlawful marriages" unambiguously indicates that it functionally referred to the marriage conclusion itself.[58] It is also confirmed by later regulations referring to this institution, which was named "a consent to conclude marriage".[59]

3. Act of 1821

The aim of the introduction of the consent was not only to control if Jews followed the regulations and to stimulate their assimilation, but first of all, to limit the number of marriages, and consequently the growth of the Jewish population as it had already been under the Austrian rule.[60] Yet, it occurred quickly that this goal would not be reached. It was already indicated in the preamble of the act dated on the 20th of December 1821 that "Orthodox Jews concluding Religious Marriages secretly and frequently overusing benefits of law, allowing to substitute evidence of their age with Acts of Notoriety,[61] are trying to frustrate an intended aim in this way set up in the regulations of Civil Acts and the Statute of organizing Orthodox Jews".[62] Consequently, the regulations of the Statute were not observed as Jews either did not conclude civil marriages at all[63] or evaded the law with the use of doubtful testimonies of relatives and acquaintances. Furthermore, because of the fact that the term of "a wealthy capitalist", whose son could get permission to conclude marriage, was indeterminate by § 17 letter b of the act as well as a sanction provided for the head of the commune for granting it against the regulations of the Statute, the consents were issued for unauthorized persons.[64]

To counteract "similar abuses", the act of 1821, obligatory from the 1st of February 1822, stipulated a lot of sanctions for breaking the rules regulating Jewish civil marriages. Firstly, it modified the institution of act of notoriety in relation to Orthodox Jews.[65] It was to exclude bypassing civil prerequisites, and especially the age of capacity to marry. According to the amendment, the witness statements given for the needs of drawing up the act of notoriety were to be made under oath and in a prospective spouse's presence for whom the testimony was given. Moreover, giving or trying to give a false testimony was qualified as a crime pursuant to § 178 of the first part of the penal code (the so-called *Franciszkana*), and in case "if it occurred that another person was substituted for the proper Person in order to circumvent the law" as a perjury pursuant to § 183 of this code.[66] The range of punishment for these crimes was very wide as it was from 6 months to a year of imprisonment in the basic type (§ 178 in relation to § 188 of the penal code) to life sentence in severe prison in the qualified type (§ 183).[67] However, the type of criminal offence itself, i.e. a crime and an amount of a potential sanction proves a highly preventive character of this regulation.

Not according to the penal code, but pursuant to art. 5 of the act of 1821, "Orthodox Jews concluding marriage in the Religious way, openly or secretly, not having concluded earlier a Marriage Agreement in the Civil way before the competent Registrar" were to be punished".[68] A financial penalty at the amount of one thousand Polish zloty, half of which was paid for an informer,[69] was imposed by the court on not only prospective spouses but also the clergy and witnesses assisting the religious ceremony. In case of the failure to pay it, which would concern most of the prospective spouses due to the amount of the financial penalty,[70] the court changed it into reformatory arrest at the amount of five days for each thirty Polish

[56] The Statute, § 17 letter b).
[57] Ibidem.
[58] Ibidem, *in fine*.
[59] *Dziennik Rozporządzeń*, 1822, no. 4831.
[60] See above, p. 2.
[61] The institution of an act of notoriety was stipulated in art. 70 of the Napoleonic Code in case when the prospective spouses were not able to submit the birth certificate required to conclude marriage. The act of notoriety was made by the mayor or the head of a commune of the birthplace or residence (in the original text of the Napoleonic Code the local Justice of the Peace). In accordance with art. 71 of the Napoleonic Code, the act included the signed statements of two witnesses (in the original text seven) as to the personal data of the prospective spouse. Having made the act of notoriety, it was to be submitted before the justice of the peace court (in the original text the tribunal of the first instance), which having heard the file writer appearing then as a prosecutor (in the original text a prosecutor) approved of or refused to approve of the act (art. 72).
[62] *Prawo o zapobieżeniu nadużyciom starozakonnych*. In: *Dziennik Rozporządzeń*, 1822, no. 4831 (hereafter Act of 1821).
[63] For instance in 1819 Cracow's Jews making up about 29% of the population of the city, concluded only 47 civil marriages, but Christians as many as 1161 – JAKIMYSZYN, pp. 56 and 85.
[64] Act of 1821, the preamble.
[65] See above, footnote 63.
[66] Act of 1821, art. 3.
[67] *Księga ustaw na zbrodnie i ciężkie policyjne przestępstwa, cz. 1: O zbrodniach, cz. 2: Księga ustaw o ciężkich przestępstwach policyjnych i o sposobie z temiż postępowania*. Kraków, 1804 (hereafter *Franciszkana*). The Austrian penal law was in force in the Free City of Cracow. See PAULI, L., Austriacki kodeks karny z 1803 r. w Wolnym Mieście Krakowie (1815–1833), cz. 1 i 2. In: *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Prawnicze*, vol. 40, 1968 and vol. 46, 1970.
[68] Act of 1821, art. 5.
[69] Whose surname was to be classified.
[70] CICHOŃ, P., Z orzecznictwa Dyrekcji Policji Wolnego Miasta Krakowa – casus Oszyków. In: *Studia Iuridica Lublinensia*, vol. 25, no. 3, 2016 (hereafter CICHOŃ), p. 182.

zloty of the unpaid financial penalty. The additional sanction stipulated by art. 5 was an inadmissibility of legitimization of illegitimate children born in an exclusively religious marriage, both *per subsequens matrimonium* and by adoption. Consequently, the registrar who would write a legitimate descent in the birth certificate of such a child would also be subject to a financial penalty at the amount of five hundred Polish zloty, and in case of the second offence also a deposition.[71]

This last regulation was an element of specifying the range of clerical criminal offence "permission of unlawful marriages" in § 17 of *the Satute* postulated in the preamble of the act.[72] Unlike this regulation which stipulated indeterminate punishment of vacating an office, the act of 1821 introduces a wide range of individuated sanctions against officials breaking its provisions. Furthermore, in order to decrease room left for possible abuses, a term of a wealthy capitalist from § 17 letter b of the Statue was specified.[73] Pursuant to art. 1 of the act of 1821, this was a person proving free of debt property at the amount of minimum twenty-five thousand Polish zloty. The son of such a capitalist had a right to claim a consent on condition of receiving "a gained fund" from his father at the amount of minimum five thousand Polish zloty.[74] Consequently, art. 2 of the act stipulated a financial penalty for heads of communes at the amount of one thousand Polish zloty and even a suspension or vacating an office if "they dared to issue a consent to conclude Marriage to Orthodox Jews who did not possess Qualifications under the Statute […] and transcribed by this Act".[75] Similarly, art. 4 of the act penalizes registrars for writing a Jewish marriage certificate earlier than after expiration of 30 days from the issuance of the consent by a head of a commune, but a financial penalty amounted to two hundred Polish zloty and vacating an office was permissible only after the third offence.[76]

The amendments implemented by the act of 1821 to the regulation of § 17 of the Statute ultimately constituted the institution of a consent about marriage conclusion by Orthodox Jews in the Free City of Cracow. According to the act, the agreement was already issued not to conclude the prenuptial agreement but directly to conclude marriage. Additionally, obtaining a consent was a civil prerequisite of marriage validity, and in the result its lack determined it invalidity. *Expressis verbis* art. 5 establishing children procreated in "the invalid marriage with respect to Civil regulations",[77] and art. 4 implementing a sanction "under pain of nullity of the Act" for issuing a marriage certificate earlier than after expiration of 30 days from the issuance of the consent by a head of a commune.[78] The restrictions of statutory prerequisites to obtain a consent proved the importance of the amendments implemented by the act of 1821, and especially the penal sanctions established in it, the severity of which expressly indicates the preventive purpose. The additional formal requirements to issue an act of notoriety had an analogical aim, especially because of the fact that in practice it was a fundamental document confirming a marriage capability of prospective spouses.[79]

4. Act of 1838 and its amendments

Similarly to the regulations of the Statute, the regulations of 1821 also did not produce the expected result. The majority of Jewis h marriages were still concluded exclusively in the religious form.[80] In spite of that the authorities of the Free City of Cracow maintained the previous regulations. In addition, in connection with the expiry of 6-year binding force of the Statute on the 31st of May 1823, the obligation to confirm elementary Christian education by a groom stipulated in § 17 "was reminded" by the regulation of the Senate of the 15th of September 1824.[81] The verification procedure of this prerequisite was also established in this regulation.[82] The Assembly of Representatives decided to change regulations governing the institution of a consent after over 16 years, the 30th of January 1838.[83] The preamble of the new act admitted that the act of 1821 "was not sufficient to restrain Orthodox Jews from concluding Marriages secretly in the religious way, without the previous Certificate issued by registrars." However, it also admitted that the reason of that state of affairs was the lack of "some rules to constitute evidence to convince of the Marriage concluded secretly" and that "the pain of penalty defined by this act […] was not appropriate".[84] Whereas in light of the content of this act, the last statement should have been understood as the conviction that the sanctions previously stipulated were too lenient.

---

71 Act of 1821, art. 5.

72 See above, footnote 60.

73 See above, footnote 58.

74 Act of 1821, art. 1.

75 Ibidem, art. 2. If there were any doubts with regard to fulfilment of the requirements of the act by the prospective spouses, the head of a commune was obliged to put forward a request to the Governing Senate for a decision binding for him.

76 Ibidem, art. 4.

77 Ibidem, art. 5.

78 Ibidem, art. 4.

79 See, for instance: *[Alegata do akt małżeństw z 1820 r.]*. In: *Akta IOM*, APwK, reference no. 29/1472/0/2/70, https://szukajwarchiwach.pl/29/1472/0/2/70#tabJednostka (access 25. 11. 2019). The issue of the application of the provisions concerning the consent, in spite of the preserved archives, has not been studied comprehensively so far.

80 In 1822 the Jews concluded only 31, and in 1823 only 44 legal marriages in Cracow – JAKIMYSZYN, p. 87.

81 See above, p. 8.

82 In: *Dziennik Rządowy Wolnego Miasta Krakowa i Jego Okręgu*. Kraków, 1816-1846, https://jbc.bj.uj.edu.pl/dlibra/publication/124812#structure; access 25. 11. 2019; (hereafter *Dziennik Rządowy*), 1824, no. 41-42. Also see ibidem, 1830, no. 36-37.

83 In: *Dziennik Praw*, 1838, no. 539 (hereafter Act of 1838). JAKIMISZYN does not mention this act, and CICHOŃ gives the date of passing it by mistake on the 9th of March 1838 (p. 183).

84 Act of 1838, the preamble.

Art. 1 of the new act stipulated that the fine would remain as a penalty for concluding a public or secret religious marriage without the previous conclusion of "the Marriage Agreement" before the registrar, but its amount was doubled up to the amount of one thousand Polish zloty from each prospective spouse.[85] Similarly, the length of the reformatory arrest penalty was increased up to 6 months for each prospective spouse. Yet, the penalties for the clergy and witnesses assisting the religious ceremony were not sharpened, stipulating it at the amount equal to the one stipulated for one of prospective spouses.[86] What is more, the new legal procedural measures were introduced in art. 2, which was by its nature legal evidence of the fact of the conclusion of an illegal religious marriage. Because the act provided that "legal evidence of this type of infringement in the light of lack of defendants' own confession or evidence obtained from Witnesses or accessories, will also be two coincidences happening together with shared life. a) Upbringing offsprings. b) Cutting hair by a Woman, and c) the use of the Tallis (Tallith) by a Man".[87]

According to the will of the legislator, the regulations of the new act, being in force from the 1st of April 1838, substituted art. 5 of the act of 1821 overturned in whole. It meant that the authorities of the Free City of Cracow did not intend to amend the other regulations of the institution of the consent, and thus their previous policy towards Jewish marriages. However, the preamble of the act of 1838 itself indicated that the abolition of art. 5 of the act of 1821 resulted in an essential change in the status of the children coming from the religious marriages concluded without the consent. For "undeserved succession" which was a ban on legitimization of these children both *subsequens matrimonium* and adopted was abolished. The sanctions imposed on the registrars for entering such children as legal into birth certificates were also derogated.[88]

The next amendments of the regulations concerning the consent were quite frequent, and their cause was still an effective resistance of Orthodox Jews to conclusion of civil marriages. Pursuant to the regulation of the Senate of the 9th of April 1839 announced on the 30th of April 1839, the competences to issue the consents were transferred to the Department of Interior and the Police,[89] to which the applications should be applied through the medium of the Police Directorate in Cracow or the district superintendents in the District.[90] The regulation also ordered to submit prospective spouses the certificate of "local nationality" and allowed to substitute a birth certificate with an act of notoriety exclusively after submitting a registrar's appropriate certificate about lack of the first one.[91] Besides, the groom's qualifying prerequisites from § 17 letter b of the Statute were tightened successively both in this regulation and next ones of: the 28th of December 1839 (announced on the 12th of February 1840),[92] the 10th of December 1841 (announced on the 31st of December 1841)[93] and the 23rd of June 1843 (announced on the 15th of July 1843).[94] The new regulations required, for example, the confirmation of owned real property with a mortgage register or a notarial deed, and a performance of a job with the status of a guild foreman, suitable permits or payment of taxes or reliable witnesses' testimonies. Additionally, the regulation of the 10th of December 1841 refused "to accept in this country" a wife of a citizen of the Free City of Cracow who married her abroad without the previously obtained consent.[95]

5. The act of 1844

The numerous amendments of the regulations concerning the consent over the period of 1838-1843, similarly to the previous status quo in the years 1822-1838, also did not result in the increase in the number of Jewish civil marriages.[96] The reason for this was traditionally seen in "insufficiency" of adopted solutions as well as the lack of unification of the binding regulations. According to the preamble for the act of the Assembly of the Representatives of the 3rd of July 1844, this problem was to be finally solved by the new complex regulation, fully substituting § 17 letter b of the Statute and the acts of 1821 and 1838.[97] The new act, in force from the 1st of August 1844, maintained the institution of "permit to conclude marriages" issued Orthodox Jews by the Department of Interior and the Police in the Governing Senate.[98] The prerequisites necessary to obtain the consent were listed enumeratively in the comprehensive art. 1 of the act on the basis of the previous solutions, starting from lodging "certificates of the ability to read, write in Polish or German and the first beginnings of arithmetic".[99]

---

[85] The abolition of the provision referring to the transfer of half of the financial penalty for the informer probably indicates inefficiency of this means against cohesion of the Jewish community.
[86] Act of 1838, art. 1.
[87] Ibidem, art. 2.
[88] Ibidem, the preamble *in fine*. Also see above, pp. 9-10.
[89] Having abolished the organ of the head of a commune on the 1st of December 1838, his competences considering Jews, including the issuance of the consents, were transferred to the city or district superintendents. These organs were subject to the Police Directorate. See more CICHOŃ, P., *Dyrekcja Policji Wolnego Miasta Krakowa 1827-1846. Studium historyczno-prawne*, Kraków, 2014.
[90] *Dziennik Rządowy*, 1839, no. 25, point 1.
[91] Ibidem, point 2.
[92] Ibidem, 1840, no. 6.
[93] Ibidem, 1841, no. 13.
[94] Ibidem, 1843, no. 93-94.
[95] Ibidem, 1841, no. 13, point 2.
[96] In 1831 the Jews concluded 50, and in 1834 – 75, and in 1843 only 67 legal marriages - JAKIMYSZYN, pp. 88 and 90.
[97] In: *Dziennik Praw*, 1844, no. 3106 (hereafter Act of 1844), the preamble and art. 5.
[98] Ibidem, art. 1 *in principio*.
[99] Ibidem, art. 1 points I-III.

Among the regulations accepted in 1844 there were also new ones which tightened or mitigated rigorism of the old ones suitably depending on the age of a groom. Because, on the one hand, in accordance with the act, each "Orthodox Jew who wanted to get married before reaching the age of thirty" was obliged to prove that "he has not differed from Christians in terms of clothes since the day of the announcement of this Act".[100] On the other hand, "an Orthodox Jew after reaching the age of thirty, in spite of not having certificates of scientific nature" could receive a consent if he proved that "he has any way to earn money". In this last case, however, on condition that he has not concluded a religious marriage previously and has not been cohabiting with the future wife.[101] Additionally, a farmer was not subject to the requirement of fundamental Christian education who "personally has been doing farm work for three years, owned or leased a house and five morgen of ground", but he was also required to wear Christian clothes before turning thirty.[102]

The abolition of the act of 1821 and 1838 eliminated crimes from the legal system of the Free City of Cracow typified there. Nonetheless, the act of 1844 did not completely resign from the protection of its provisions in criminal matters. According to its art. 2, the conclusion of a religious marriage by Jews openly or secretly, but without the previous civil marriage was still a crime. But unlike under the previous acts, the act of 1844 referred to major police crimes in this respect of § 252 and § 253 part II of the penal code. Consequently, prospective spouses and "all Persons providing help in and enabling this type of marriage" answered for their action as for "the conclusion of marriage without dispensation against law" (§ 252), and their parents and guardians for "forcing their children to get married illegally according to the acts" (§ 253). The close arrest from three to six months was the sanction provided for by the code in both cases.[103] Although the substitutive penalty of reformatory arrest was similar to the one stipulated by art. 1 of the act of 1838 in terms of the length,[104] this punishment was a stricter penalty because the close arrest as a qualified form was applied with a lot of restrictions, especially with chained legs and a ban on uncontrolled visits.[105]

Apart from the next restriction of prospective spouses' responsibility for concluding the religious marriage, the act of 1844 also punished them for the failure to report a birth of a child to a registrar in order to issue a birth certificate. The sanction for this action was a fine from 20 to 200 Polish zloty or an arrest from 3 to 20 days.[106] The last punishable act stipulated by the act of 1844 was also in connection with drawing up a child's birth certificate. Art. 4 of the act ordered his parents to lodge a marriage certificate at the same time, about which a registrar was obliged to make a reference in a birth certificate under the pain of a fine at the amount of 500 Polish zloty. If the marriage certificate was not submitted, the child was registered as natural which like in the act of 1838 did not finish the process of his legitimization.[107] Similarly to substantive law, the act of 1844 also referred to the provisions of § 360 part II of the penal code in the scope of proceedings in the offence of the conclusion of a religious marriage. Consequently, circumstantial evidence indicating the conclusion of such a marriage calculated in art. 2 of the act of 1838[108] was qualified as "circumstances", "coincidence" of which already constituted complete evidence of committing a crime from § 252 and § 253 part II of the penal code.[109]

6. Conclusions

The regulations of the act of 1844 indicate that the purpose of the authorities of the Free City of Cracow was first of all to standardize the regulations governing the consent for the conclusion of marriage by Orthodox Jews. In spite of the abolition of § 17 letter b of the Statute and the acts of 1821 and 1838, the basic form of the institution of the consent was not amended. From the civil law perspective, the consent remained a non-code prerequisite of the validity of marriage, which is proved by the penal regulations of the act of 1844, regarding its failure as an impediment to marriage. Similarly, from the administrative law perspective, it remained to be a means stimulating assimilation of the Jewish community. Due to its preventive and repressive nature, it was the measure highly ineffective, which is proved by the statistics of Orthodox Jews' civil marriages concluded in Cracow under the presented regulations.[110] In spite of this, the Act of 1844 was retained in force after the incorporation of the Free City of Cracow to Austria in 1846.[111] The wider and more thorough evaluation of the institution of the consent could be made after doing research on practices of applying it, but this issue still awaits to be realized.

[100] Ibidem, art. 1 *in fine*. JAKIMYSZYN (p. 91) interprets this regulation incorrectly as general legitimacy to obtain a consent in the situation when it is an additional requirement in case of a groom under 30.
[101] Act of 1844, art. 1 pkt IV. JAKIMYSZYN (p. 91) interprets this regulation incorrectly as the one including the requirement of general non-punishability or not being in the bigamous union in a case when the act only mentions charges of concluding marriage secretly (i.e. religious) or cohabiting.
[102] Act of 1844, art. 1 point V.
[103] Ibidem, art. 2; *Franciszkana*, part II, § 252-253.
[104] See above, pp. 12-13. Act of 1844 did not stipulate a financial penalty at all, which in practice was not applied a lot – CICHOŃ, p. 188.
[105] *Franciszkana*, part II, § 12.
[106] Act of 1844, art. 4.
[107] Ibidem.
[108] See above, p. 12.
[109] Act of 1844, art. 3; *Franciszkana*, part II, § 360.
[110] After the exceptional year of 1844 when Orthodox Jews concluded the record number of civil marriages in in the history of the Free City of Cracow, i.e. 102, the previous tendency did not change. In 1845 the number decreased to 40, and in 1846 to 37 – JAKIMYSZYN, p. 91.
[111] See MATANIAK, M., *Rada Administracyjna Miasta Krakowa i jego Okręgu (1846-1853)*. Kraków, 2019, p. 338-339.

Die (beschleunigte) Evakuierung des Sondergerichts Kattowitz im Jahre 1945*

(The /Accelerated/ Evacuation of the Special Court in Katowice in 1945)

*Konrad Graczyk***

Abstract

The text tackles the issue of evacuation of the Special Court in Katowice carried out in 1945 before the advancing Soviet troops. It discusses the regulations adopted on the central level drawn up in the ministry of justice of the Reich regarding procedures to be followed by judicial authorities in the face of the oncoming enemy and moves on to their enforcement by judicial authorities in the Katowice administrative district, with particular focus on the special court. In practice, contrary to the ministerial guidelines, case files were neither evacuated not destroyed, which enables the use of court rulings in the research.

Keywords: *evacuation; special court; Upper Silesia; Sondergericht Kattowitz; judicial branch; files; Poland.*

Das Sondergericht Kattowitz hat seine Tätigkeit am 20. September 1939 begonnen[1]. Damals dauerten noch auf dem polnischen Gebiet Kämpfe zwischen der Wehrmacht und der polnischen Armee. Das Sondergericht wurde nach dem Modell von Sondergerichten des Dritten Reiches gegründet, die auf Grund der Verordnung über Bildung von Sondergerichten vom 21. März 1933 tätig waren[2]. Es war also ein Strafgericht, das einzelinstanzlich in politischen, wirtschaftlichen und kriminellen Sachen auf dem Gebiet von Regierungsbezirk Kattowitz erkannte[3]. Im Lichte des zur Verfügung stehenden Aktenmaterials ist festzustellen, dass das Sondergericht Kattowitz mindestens 2394 Sachen erledigt hat, in denen 3625 Personen angeklagt waren[4]. Verurteilt wurden 3180 Personen, davon 1391 Personen zu einer Gefängnisstrafe (ggf. zu gleichwertiger Straflagerstrafe), 1506 – zu einer Zuchthausstrafe (ggf. zu gleichwertiger verschärfter Straflagerstrafe) und 247 Personen zur Todesstrafe. Freigesprochen wurden 333 Personen, in Bezug auf 49 Personen wurde das Verfahren eingestellt und gegenüber 42 – vorläufig eingestellt[5].

Evakuierungspläne und Richtlinien

Da das Sondergericht sein Bestehen der Eroberung des polnischen Territoriums durch die Wehrmacht verdankte, musste sein Ende eine Folge der Vertreibung der Deutschen aus diesen Gebieten sein. Die Frage der Evakuierung aus den eingegliederten Ostgebieten nahm mit jedem Fortschritt der sowjetischen Truppen an Aktualität zu. Die Offensive, die im Sommer 1944 gestartet wurde, hat die Rote Armee im November bis an die Reichsgrenze gebracht, die zunächst in Ostpreussen überschritten wurde[6].

Die Gestaltung des Geländes, Verteilung der Kräfte an der Front und die Entfernungen hatten zur Folge, dass Oberschlesien das letzte Industriegebiet des Reiches war, das ohne größere Störungen arbeiten konnte[7]. Die Frage der Evakuierung der Provinz kam zum ersten Mal bei der Konferenz des Staatssekretärs im Ministerium des Inneren, Wilhelm Stuckart, mit den oberschlesischen Regierungspräsidenten am 20. Juli 1944 auf. Vom Umfang der geplanten Evakuierung zeugt, dass man nicht nur die drei Millionen Einwohner, sondern auch ausländische

* Der Artikel wurde im Rahmen des vom Nationalen Zentrum der Wissenschaft in Polen (National Science Centre, Poland) finanzierten Forschungsprojekts (2017/27/N/HS5/00423) bearbeitet.

** Konrad Graczyk, Fakultät für Rechts- und Verwaltungswissenschaften, Schlesische Universität in Kattowitz, Polen.

1 Geheimes Staatsarchiv Preußischer Kulturbesitz Berlin-Dahlem (weiter: GStAPK), XVII. HA Schlesien, Rep. 201 e Regierung zu Kattowitz (z.T. Dep.) 1927-1945, Nr. Ost 4 Kattowitz 4, o. Pag., Urteil gegen den Schlosser Alfons Barczyk vom 20. September 1939.

2 Verordnung der Reichsregierung über die Bildung von Sondergerichten vom 21. März 1933. RGBl. 1933, S. 136.

3 Im Lichte des zur Verfügung stehenden Aktenmaterials ist festzustellen, dass 49% aller vor dem Sondergericht Kattowitz erhobenen Anklagen kriminelle, 26% politische und 25% wirtschaftliche Straftaten betrafen.

4 Das Aktenmaterial umfasst vor allem die Strafakten des Sondergerichts, die in Staatsarchiv in Kattowitz verwahrt werden, einzelne Urteile des Sondergerichts von 1939 (Abschriften dieser Urteile werden im Geheimen Staatsarchiv Preußischer Kulturbesitz Berlin-Dahlem verwahrt) sowie ca. 100 Abschriften der Urteile des Sondergerichts aus dem Bundesarchiv Berlin.

5 Gegen 6 Personen hat das Sondergericht Kattowitz auf Unterbringung in einer Heil- oder Pflegeanstalt erkannt. In Bezug auf 15 Personen wurde in den Akten kein Urteil oder ein anderes Dokument gefunden, das die Feststellung der Entscheidung ermöglichen würde.

6 BECKER, M., *Mitstreiter im Volkstumskampf. Deutsche Justiz in den eingegliederten Ostgebieten 1939-1945*. München 2014, S. 251.

7 MEISSNER, B., *Ewakuacja niemieckich władz administracyjnych i niemieckiej ludności z okupowanych ziem polskich w latach 1944-1945*. Warszawa 1987, S. 131.

Arbeiter (165.000), Gefangene (127.000) und Häftlinge von K.L. Auschwitz (über 100.000 Personen) sowie verschiedene materielle Güter evakuieren wollte[8]. Da die Fachliteratur zum Thema Evakuierung der oberschlesischen Provinz umfangreich ist[9], kann man auf diese verweisen und die weiteren Ausführungen auf die Evakuierung der Justizorgane des gefährdeten Gebiets einschränken.

Im Sommer 1944 begannen im Reichsjustizministerium Arbeiten zur Regulierung der Verhaltensweise der unterstellten Ämter und ihres Personals beim Feindeseinmarsch. Deren Anfang wurde gewissermaßen durch Mahnbriefe der Reichsverteidigungskommissare an die Oberlandesgerichtspräsidenten erzwungen, in denen man die Juristen fragte, worauf man im Bereich der Justiz verzichten könnte. Im Reichsjustizministerium hat man jeden Vorschlag verboten und erklärt, dass eine Entscheidung in diesem Bereich zentral fallen würde[10].

Ein vierseitiges Dokument, das die Verhaltensweise der Justizbehörden in Operations- und Kampfgebieten ganzheitlich regulierte, wurde am 15. September 1944 erlassen. Es handelte sich dabei um die „Richtlinien für Maßnahmen bei Justizbehörden in Operations- und Kampfgebieten“[11].

Die Richtlinien drückten das Grundprinzip aus, dass die Justizbehörden die Entscheidungen, die der örtlich zuständige Reichsverteidigungskommissar in Bezug auf die gesamte öffentliche Verwaltung traf, einhalten mussten. Unabhängig davon war die Aufgabe der führenden Persönlichkeiten zu prüfen, ob angesichts der Änderung der Lage diese Maßnahmen ausreichend sind oder ob eine Abweichung von den Richtlinien des Kommissars notwendig erscheint. Die aufsichtführenden Richter, Landgerichtspräsidenten, Oberstaatsanwälte und Leiter der Justizvollzugsanstalten sollten ihren Vorgesetzten nach Möglichkeit Auskunft über beabsichtigte Handlungen erteilen. Wenn es keine Möglichkeit gab, sich mit den übergeordneten Organen in Verbindung zu setzen, sollte man die Entscheidung mit den Oberhäuptern anderer Behörden und der Partei vereinbaren. Als Interpretationshinweis verweist das Dokument auf die militärische Maxime, dass entschlossenes Handeln besser ist, als untätig zu warten.

Gerichte und Staatsanwaltschaften, in deren Bezirken Kämpfe stattfanden, sollten grundsätzlich ihre Amtstätigkeit fortsetzen. Alle Dienstkräfte sollten auf ihren Posten verbleiben, soweit ihre Rückführung nicht ausdrücklich angeordnet würde. Sollte der Sitz einer Justizbehörde in Folge der Kriegshandlungen (z.B. Luftangriff) zerstört worden sein, so sollte man in erster Linie auf anderweitige Unterbringung der Behörde in demselben Ort hinwirken. War das nicht möglich, so sollte der Sitz der Behörde an einen anderen Ort ihres eigenen oder eines benachbarten Bezirkes verlegt werden. Die Entscheidung über Verlegung des Sitzes, solange eine Verbindungsmöglichkeit bestand, blieb dem Oberlandesgerichtspräsidenten und dem Generalstaatsanwalt vorbehalten. Die verlegte Justizbehörde sollte an ihrem neuen Sitz ihre Amtstätigkeit unter der bisherigen Bezeichnung fortsetzen.

Die Leitlinien weisen auf die Notwendigkeit einer rechtzeitigen Evakuierung von Personen und Geräten hin. Zu frühes Handeln hätte zu Besorgnis in der Bevölkerung führen und dem Geist und der Abwehrhaltung schaden können, aber zu spätes Handeln hätte eine ordnungsgemäße Evakuierung aufgrund von Verkehrsbedingungen verhindern können. Es wurde festgestellt, dass alle Evakuierungsbefehle einer sorgfältigen Prüfung und Vorbereitung bedürfen.

Es ist zu betonen, dass in den Leitlinien dem Export von Wertsachen auf Kosten des Personals Vorrang eingeräumt wurde. Dies wurde durch den Wunsch gerechtfertigt, nützliche Ausrüstung vor der Zerstörung durch den Feind und dem Fall in seine Hände zu schützen. Es wurde auf mögliche Schwierigkeiten bei der Organisation des Transports großer Mengen von Ausrüstung hingewiesen. Die Energie und das persönliche Engagement des lokalen Managements waren darauf gerichtet, diese Schwierigkeiten zu überwinden. Zur Evakuation wurden folgende Gegenstände angerechnet: Akten politischer Strafsachen, politische Generalakten, Geheimvorgänge, ungeöffnete Testamente, Grundbuchtabellen, öffentliche Register, Personalakten oder Personalbogen, Unterlagen für die Zahlung von Dienst- und Versorgungsbezügen[12]. Man sollte auch die Schreibmaschinen, Bettwäsche, Möbel und weiteres Inventar mitnehmen[13].

Die Akten und Gegenstände (z.B. Stempel), die nicht in die Hände des Gegners fallen durften, sollten vernichtet werden, falls ihre Wegschaffung nicht möglich war. Die transportierten Gegenstände sollten in einem vom Oberlandesgerichtspräsidenten oder Generalstaatsanwalt rechtzeitig bestimmten Ort hinterlegt werden. Dieser Ort sollte weiter vom Gefahrenbereich entfernt sein als der von der betreffenden Behörde zur Erfüllung ihrer Aufgaben bestimmte Sitz.

Die Rückführung des Personals war nur dann möglich, wenn das Gericht oder die Staatsanwaltschaft gezwungen war, ihre Tätigkeit einzustellen. Diese durfte nur auf ausdrückliche Anordnung des Reichsverteidigungskommissars oder der höheren Reichsjustizbehörde durchgeführt werden. Falls es an einer Verbindung zum Oberlandesgerichtspräsidenten oder zum Generalstaatsanwalt fehlte, sollte man mit den Leitern anderer örtlichen Ämter zusammenwirken. Vor Einstellung der Dienststätigkeit durch die Justizbehörde durfte man nur den weiblichen Teil des Personals und Kranke heimschicken.

[8] WĘCKI, M., *Fritz Bracht (1899-1945). Nazistowski zarządca Górnego Śląska w latach II wojny światowej*. Katowice 2014, S. 440.

[9] U.a.: KONIECZNY, A., Przygotowania władz hitlerowskich do ewakuacji Górnego Śląska w końcowej fazie II wojny światowej. In: *Studia Śląskie*, Bd. XXXII, 1977, S. 261-278; *ders.*, Ewakuacja niemieckich więzień na Dolnym Śląsku w 1945 r. In: *Studia Śląskie*, Bd. XLII, 1983, S. 223-245; WĘCKI, *Fritz*, S. 440-451; KACZMAREK, R., Województwo śląskie pod okupacją niemiecką. In: DZIUROK, A., KACZMAREK, R. (Hrsg.), *Województwo śląskie 1945-1950. Zarys dziejów politycznych.* Katowice 2007, S. 36-37; MEISSNER, *Ewakuacja*, S. 131-141.

[10] Bundesarchiv Berlin (weiter: BA), R 3001/24698, Bl. 4, Schreiben des Reichsministers der Justiz vom 11. August 1944 an den Reichsverteidigungskommissar für den Gau Westfalen-Süd.

[11] BA, R 3001/24698, Bl. 13-14, Richtlinien für Maßnahmen bei Justizbehörden in Operations- und Kampfgebieten.

[12] Ebenda.

[13] BECKER, *Mitstreiter*, S. 252.

Wo es notwendig war, einige Mitarbeiter für die Ausübung gerichtlicher Tätigkeiten für die restliche Bevölkerung nach dem Eintritt des Feindes so weit wie möglich und notwendig zu überlassen, mussten insbesondere ältere Menschen ausgewählt werden, die nicht politisch beteiligt, aber von der Bevölkerung vertraut waren. Andererseits war es nicht möglich, aufgrund ihrer Partei- oder Staatsbeteiligung besonders gefährdete Beamte zurückzulassen. Das evakuierte Personal war auch verpflichtet, sich an die von seinen Vorgesetzten festgelegten Sammelplätze zu begeben.

Der letzte Punkt der Richtlinien betraf der Evakuierung der Justizvollzugsanstalten. Besonders beachtenswert war die Amtsbefugnis des Generalstaatsanwalts, Gefangene freizulassen, die nur kurze Strafen zu verbüßen hatten und von denen weder eine politische noch eine sonstige Gefährdung zu befürchten war[14].

Die Praxis der Evakuierung

Die praktische Ausführung der Richtlinien wurde zunächst durch die sowjetischen Truppen in den nord-östlichen Gerichtsbezirken des Reiches getestet. Im September 1944 wurden aus Danzig wichtige Akten (politische Prozesse, Verfahren zu den sog. Septemberverbrechen) ins Oberlandesgerichtsbezirk Stettin ausgeführt. Später hat man z.B. die Guillotine und den Galgen demontiert sowie manche Akten vernichtet[15].

Leider verfügen wir über kein direktes Zeugnis zur Evakuierung des Sondergerichts Kattowitz, obwohl solche Dokumente mit Bezug auf benachbarte Sondergerichte in Oppeln[16] und Bielitz[17] erhalten geblieben sind. Deswegen werden wir zur Rekonstruktion der Evakuierung des Sondergerichts Kattowitz vor allem auf Restinformationen aus verschiedenen Dokumenten zurückgreifen müssen.

Der schnelle Angriff der sowjetischen Truppen[18] und die dadurch auf oberschlesischem Gebiet erkämpften Siege[19] waren für die deutschen Behörden eine Überraschung[20]. Dies konnte nicht ohne Folgen für die Evakuierung des Sondergerichts Kattowitz bleiben. Am 20. Januar 1945 wurde die Evakuation aller Beamten, die zum Dienst in Volkssturm nicht verpflichtet waren, in den Kreisen östlich der Oder, angeordnet[21]. Am 25. Januar wurde der Befehl zur Evakuierung der Stadt Kattowitz erlassen[22]. Die Hauptstadt Oberschlesiens wurde am 28. Januar 1945 durch die Rote Armee besetzt[23].

Aus dem Zuständigkeitsbereich des Oberlandesgerichts Kattowitz östlich der Oder ist es gelungen, einen nur geringen Teil der Gerichtsakten wegzubringen. Es handelte sich dabei hauptsächlich um Besoldungsunterlagen der Oberjustizkasse in Beuthen. Diese Unterlagen wurden mit einem Pferdewagen unter Beamtenbegleitung aus Beuthen nach Neisse und dann mit einem Güterwagen nach Dresden befördert[24]. In die Nähe von Dresden wurden die meisten Personalakten der Mitarbeiter der oberschlesischen Gerichte evakuiert, ebenso wie einige Gegenstände, vor allem Testamente und Schreibmaschinen[25]. Während dieser Zeit erhielten die Mitarbeiter entgegen den geltenden Regeln Zugang zu ihren eigenen Personalakten (sie wollten sie vernichten, was letztendlich nicht geschah), die einige von ihnen verwendeten, um die Informationen politischer Natur zu „löschen“[26].

Ausgehend davon, dass die meisten Akten des Sondergerichts Kattowitz im Staatsarchiv in Kattowitz aufbewahrt wurden, ist der Schluss zu ziehen, dass die Evakuierung der Behörde nicht ordnungsgemäß durchgeführt wurde. Während der Mangel an Rechtsprechung von 1939 darauf hindeutet, dass Akten der politischen Sachen und sog. Septemberverbrechen rechtzeitig zurückgeschickt oder früher vernichtet wurden, wurden alle übrigen Strafakten (mehr als 2000 Sachen) nicht weggebracht und richtlinienwidrig nicht vernichtet. Wahrscheinlich waren die Kattowitzer Justizbehörden von dem Tempo des Fortschritts der Roten Armee überrascht, da der Befehl zur Vernichtung der restlichen Akten nicht erteilt (oder ausgeführt) wurde.

Die Vorgehensweise der Leiter der Justizbehörden in Bielitz[27] und Bendsburg[28] deutet darauf hin, dass die Möglichkeit der vorzeitigen Entlassung von weiblichem Personal und Kranken schon vor der Evakuierung der Behörde recht weit verbreitet war[29]. Wahrscheinlich ist dies auf die tatsächliche Einstellung

14 BA, R 3001/24698, Bl. 13-14, Richtlinien für Maßnahmen…
15 BECKER, *Mitstreiter*, S. 253.
16 BA, R 3001/22730, Bl. 11, Bericht über die Vorgänge in Oppeln seit dem 20. Januar 1945.
17 GStAPK, XVII. HA Schlesien, Rep. 222a, P. 296 Walter Jerothe, Bl. 4, Bericht des Justizangestellten Walter Jerothe über die dienstlichen Verhältnisse der Staatsanwaltschaft Bielitz vom 22. März 1945; Bl. 5, Erklärung des Justizangestellten Walter Jerothe unter Vorlage des anliegenden vom Amtsgericht Riesa ausgestellten Marschbefehls vom 22. März 1945.
18 KACZMAREK, *Województwo*, S. 37.
19 WARZECHA, B., Działania wojenne na Górnym Śląsku w 1945 roku. In: DZIUROK, A., KACZMAREK, R. (Hrsg.), *Województwo śląskie 1945-1950. Zarys dziejów politycznych*. Katowice 2007, S. 39.
20 MEISSNER, *Ewakuacja*, S. 133.
21 WĘCKI, *Fritz*, S. 448.
22 Ebenda, S. 136.
23 WARZECHA, *Działania*, S. 45.
24 BA, R 3001/22730, Bl. 14, Schreiben des Oberlandesgerichtspräsidenten in Kattowitz z.Zt. Neisse vom 16. Februar 1945 betr. Rückführung von gerichtlichen Behördengut aus Oberschlesien.
25 Ebenda.
26 RIEGEL, P., *Der Tiefe Fall des Professors Pchalek – Diener dreier Unrechtssysteme. Ein Thüringer Jurist zwischen NS-Justiz, Besatzungsmacht, Rechtsprofessur und Spitzeldienst*. Erfurt 2007, S. 25, 13, 68.
27 GStAPK, XVII. HA, Rep. 222a, P. 296 Walter Jerothe, Bl. 5, Erklärung des Justizangestellten…
28 BA, R 3001/22730, Bl. 15-17, Schreiben des Amtsgerichtsdirektors in Neustadt vom 16. Februar 1945 betr. Bericht über die Räumung des Amtsgerichts Bendsburg.
29 BA, R 3001/23372, Bl. 304, Lagebericht des Oberlandesgerichtspräsidenten und des Generalstaatsanwalts in Kattowitz z.Zt. Neisse vom 1. Februar 1945.

der Tätigkeit zurückzuführen – im Falle des Gerichts Bendsburg verursacht durch die Unterbringung einer Militäreinheit und der Polizei in einem Gerichtsgebäude ab dem 15. Januar[30]. Ein Teil des männlichen Personals wurde dagegen zum Volkssturm einberufen[31].

Der Abschrift einer Notiz, die nach einem Telefongespräch mit einem Vertreter der Generalstaatsanwaltschaft in Kattowitz gemacht wurde, ist zu entnehmen, dass diese Justizbehörde Kattowitz am 24. Januar 1945 (Mittwoch) als letztes Organ verlassen hat[32]. Wir können also ableiten, dass das Sondergericht Kattowitz die Stadt etwas früher, aber am demselben Tag, ebenso wie andere Gerichte, in Zusammenhang mit dem um 8 Uhr erhaltenen Evakuierungsbefehl verlassen hat[33]. Vor der Abreise hat man einen Teil der Unterlagen und Fernschreiber, die nicht mitgenommen werden konnten, vernichtet sowie die Guillotine demontiert und vergraben.[34].

Die Evakuierung der Leitung der Kattowitzer Gerichte hatte im Gegensatz zur Leitung der Staatsanwaltschaft wahrscheinlich nicht den Charakter einer Flucht. Ein negatives Beispiel gab in diesem Bereich der Leiter der Staatsanwaltschaft beim Sondergericht Kattowitz, Oberstaatsanwalt Felix Menzel. Dieser hat seinen Posten ohne Erlaubnis der Vorgesetzten und ohne Evakuierungsbefehl verlassen und dadurch eigene Untergebene aufgegeben. Nachdem man ihn festgenommen und verhört hatte, erschoss er sich[35].

Der erste Sammelort war für die aus Kattowitz evakuierten Gerichte Neisse[36]. Die Beamten sind auch in Neustadt angekommen[37]. Mit der Entwicklung der Kriegslage sind der Oberlandesgerichtspräsident und der Generalstaatsanwalt mit ihren Mitarbeitern nach Gera gezogen, wo ein Verwaltungsstab (d.h. Liquidationsstab) für beide Behörden gebildet wurde[38]. Der Reichsminister der Justiz hatte den Bedarf an solchen Ämtern bereits 1944 vorausgesehen[39]. Schon damals hat er sich keine Hoffnungen darauf gemacht, die verlorenen Ostgebiete zurückzuerobern. Die Verwaltungsstäbe hatten die anhängigen Verfahren an die Reichsgerichte zu übergeben, Kassengeschäfte abzuwickeln und den Aufenthalt der Gefangenen und Beamten zu klären[40].

Es gibt keinen Grund zur Behauptung, dass die Evakuierung des Personals des Sondergerichts Kattowitz nicht gelungen ist. Anders sieht aber die Frage der Sicherung und Wegschaffung der Gerichtsakten aus. Es ist zwar gelungen, fast alle Personalakten wegzubringen, die Mehrheit der Strafakten – mit Ausnahme der Akten von 1939 – ist aber in Kattowitz geblieben. Dies könnte auf einen Mangel an Transportmitteln sowie auf die Lagerung an verschiedenen Orten zurückzuführen sein. Die Zurücklassung der Akten der erledigten Strafsachen und deren Nicht-Vernichtung bedeutete eine Verletzung der ministeriellen Richtlinien, ermöglicht aber eine ausführliche Erforschung der Rechtsprechung des Sondergerichts. Das Sondergericht Kattowitz wurde nach Angaben der verfügbaren Quellen am Morgen des 24. Januar evakuiert. Faktisch wurde seine Amtstätigkeit sicherlich früher eingestellt – zwischen dem 17. und 24. Januar. Der 17. Januar folgte auf den Tag, an dem die letzte bekannte Amtshandlung, wie sie sich in den Gerichtsakten widerspiegelt, zustande kam[41].

[30] BA, R 3001/22730, Bl. 15-16, Schreiben des Amtsgerichtsdirektors in Neustadt vom 16. Februar 1945…
[31] RIEGEL, *Der Tiefe*, S. 68.
[32] BA, R 3001/24698, Bl. 23, Notiz vom 28. Januar 1945.
[33] BA, R 3001/23372, Bl. 304, Lagebericht des Oberlandesgerichtspräsidenten und des Generalstaatsanwalts…
[34] Ebenda.
[35] BA, R 3001/24300, Schreiben des Reichsministers der Justiz an die höheren Justizbehörden vom 7. Februar 1945 betr. Verhalten bei Feindannäherung.
[36] BA, R 3001/24698, Bl. 23, Notiz…
[37] MEISSNER, *Ewakuacja*, S. 140.
[38] BA, R 3001/22741, Bl. 5, Verzeichnis der Verwaltungsstäbe für Justizbehörden aus Freimachungsgebieten.
[39] Allgemeinverfügung des Reichsministers der Justiz vom 21. November 1944. Deutsche Justiz 1944, S. 289-290.
[40] BA, R 3001/22741, Bl. 4, Schreiben des Reichsministers der Justiz an die höheren Justizbehörden vom 19. Februar 1945 betr. Justizbehörden aus Freimachungsgebiet.
[41] Archiwum Państwowe w Katowicach (Staatsarchiv in Kattowitz), Sondergericht Kattowitz, Az. 776, Bl. 37, Datumsstempel vom 16. Januar 1945.

Perpetrators and Victims. Sex Crime on the Territory of Middle Odra Region in the Early Years after the World War II.*

Karol Siemaszko **

Abstract

The author presents and analyses rulings of the Regional Court in Zielona Góra in years 1945-1948, which refer to sex crimes, paedophilia and rapes. The author primarily focuses on victims and perpetrators, mentioning their age, social background, paying attention to motives of their actions. He also pinpoints that sex crime was one of signs of post-war demoralization during the period after the end of the World War II. He also emphasizes that sexual crime was difficult to detect in the period of post-war reconstruction of state.

Keywords: *paedophilia; rape; post-war period; so called Recovered Territories; victims of sex crime; Poland.*

Introduction

For many years researches on various aspects of sex crime in a historical perspective have been performed both in Poland and abroad. The works worth mentioning are: Renato Barahona, *Sex Crimes, Honour, and the Law in Early Modern Spain: Vizcaya 1528 – 1735*[1], and also Stephen Robertson, *Crimes against Children: Sexual Violence and Legal Culture in New York City 1880 – 1960*[2]. Polish scientists who have been interested in that particular matter are, inter alia Mateusz Rodak *Przestępstwo zgwałcenia i jego sprawcy w II Rzeczypospolitej. Próba wstępnej charakterystyki*[3]. Marcin Zaremba also researched the subject of post-war demoralization in his monograph *Wielka Trwoga. Polska 1944 – 1947*[4]. On the other hand, Bartłomiej Międzybrodzki focused on research problems connected with post-war sex crime in his article *Problematyka przestępczości seksualnej w latach 40. i 50. XX w. Trudności badawcze*[5]. In particular, it is worth mentioning Zygmunt Wizelberg among other earlier Polish researchers and his article *Uwagi na tle praktyki sądowej w sprawach o przestępstwach z art. 203-204 k.k.*[6]

So far no detailed research on sex crime and jurisprudence regarding it has been carried out on the area of so-called Recovered Territories after World War II. That region was incorporated into Poland after the end of war under decisions of the Yalta and Potsdam conferences.[7] In the years 1945 -1947 almost complete population exchange of the people living on so-called Recovered Territories took place. In 1947 5,238,000 residents lived there, including 4,985,000 of Polish descent.[8]

Except for significant towns such as Wrocław, Szczecin or Gdańsk there were several smaller ones, which only later became more significant towns. Undoubtedly, Zielona Góra was that kind of a small town which had a population of 15,788 after the end of World War II.[9] Nevertheless, that town experienced instant population growth and on 31st August 1947 there were 31,889 residents.[10] The majority of them were former inhabitants of Wielkopolska region, on the other hand migrants from former Eastern voivodeships constituted 30% of total number of residents of Zielona Góra at that time[11]. Gorzów Wielkopolski, which was an important town for the Polish administration in the mid-western region of the Recovered Territories after the end of World War II, had a similar status.

* The article is financed by the funds granted for young scientists' research by Department of Administration and National Security of the Jacob of Paradies University in Gorzów Wlkp., decision no. 1/2018.

** Dr Karol Siemaszko, Departament of Administration, Faculty of Administration and National Security, The Jacob of Paradies University in Gorzow Wielkopolski, Poland.

1 R. Barahona, *Sex Crimes, Honour, and the Law in Early Modern Spain: Vizcaya 1528 – 1735,* Toronto 2003,ps.*280.*

2 S.Robertson, *Crimes against Children: Sexual Violence and Legal Culture in New York City 1880 – 1960,* University of North Carolina 2005, p. 337.

3 M. Rodak, *Przestępstwo zgwałceniai i jego sprawcy w II Rzeczypospolitej. Próba wstępnej charakterystyki*, „Studia z dziejów Państwa i Prawa Polskiego", no. XVIII, y. 2015, p. 131-148.

4 M. Zaremba, *Wielka trwoga. Polska 1944 – 1947*, Kraków 2012.

5 B. Międzybrodzki, *Problematyka przestępczości seksualnej w latach 40 i 50 XXw., Trudności badawcze* „Sensus Historiae, y. 2013, vol. 10, p. 39-62.

6 Z. Wizelberg, *Uwagi na tle praktyki sądowej w sprawach o przestepstwo z art.203-204 k.k.,* „Palestra", y. 1968, no. 12, p. 58-73.

7 P. M.H.Bell, M. Gilbert, The World since 1945. An International History, London 2017, p. 51.

8 R. Skobelski, *Ziemie zachodnie i północne Polski w okresie realizacji planu sześcioletniego 1950-1955*, Zielona Góra 2002, p. 33.

9 Common summary census of 14th February 1946., Warszawa 1947, table no. 3, p. 51.

10 H. Kurowska, *Liczba mieszkańców Zielonej Góry w latach 1945-2010*, „Studia Zachodnie", y. 2013, v. 15, p. 145.

11 *Ibidem*, p. 146.

The scope of the this study is sex crime and its victims and perpetrators occurring on the territory of the Middle Odra Region which is a part of mid-western lands incorporated into Poland after World War II (so called Recovered Territories). Before 1945 that particular area had constituted eastern part of Brandenburg and northern part of Silesia. The analysis shall include sentences in cases of crimes against sexual freedom issued by Regional Court in Zielona Góra.

The post-war sex crime rate in western lands of Poland is difficult to estimate due to weak structures of the state that was in the process of post-war reconstruction, mainly with regard to judicial, law enforcement and public safety authorities. According to available statistic data from 1947 – altogether 195,000 criminal cases were filed to all Polish regional courts [12]. It must be pointed out that not all crimes, including acts against sexual freedom, were reported to relevant authorities.

Most of acts of that type remained undetected. So called 'dark number' of crimes includes acts against sexual freedom which were committed by Soviet soldiers and demobilized marauders. As a matter of fact, on the area of Recovered Territories during the earliest period after the end of World War II there were no government institutions which were in charge of seeking and apprehending perpetrators committing crimes including crimes against sexual freedom. The military courts did not seem to do it either as women who lived on the incorporated area were treated as a peculiar form of 'war trophy' [13].

Sexual violence towards women, both Polish women who were returning from places of forced labour in Germany and displaced German women, was common [14]. It was a part of a broader tendency of the post-war banditry and rapid growth of the crime rate mainly caused by the post-war demoralization and demobilized soldiers.[15]

Materials and Methods

Structures of Polish judicial system emerged on the areas taken by Poland from Germany as late as the second half of 1945, though for a long time there were problems with shortage of staff and premises as far as functioning of courts on that area was concerned [16]. In years 1945 – 1950 the Regional Court in Zielona Góra operated on the area of jurisdiction of the Court of Appeal in Wrocław [17]. Courts of appeal examined appeal measures against rulings of regional courts but also supervised their rulings and organizational activity as courts of higher instance. Periodical inspections of the regional courts performed by inspecting judges were organized to monitor functioning of the courts.

The Regional Court in Zielona Góra in 1946 sentenced to imprisonment in total 401 people accused of committing fiscal, criminal and political offences. The majority of the convicts were people who committed fiscal offences, they constituted 68% of the total number of the convicts [18]. At the same time, it should be noted that among the people convicted by the court in Zielona Góra in 1946 there were none convicted of a crime against sexual freedom, whereas 5 people were convicted of bigamy [19]. On the other hand, in 1947 514 people were convicted, including 2 persons who were convicted for the crime of rape under art. 204 of the penal code and one was convicted for the crime of paedophilia under art. 203 of the penal code [20]. In 1948 a Regional Court in Zielona Góra examined at least three cases concerning paedophilia.

A decree of 13th November 1945 concerning administration of the Recovered Territories extended criminal law legislation valid within the territorial jurisdiction of a Regional Court in Poznań to the area of the Recovered Territories [21]. This way the matter of criminal liability was mainly regulated by the Polish penal code of 1932 on the area of the western lands.

The chapter XXXII of that penal code provided several types of prohibited acts in which the subject of criminal protection was sexual freedom. It shall be pointed out that inter alia, art. 203 of the penal code of 1932 (the crime of paedophilia), art. 204 of the penal code of 1932 (the crime of rape), art. 205 of the penal code of 1932 (abusing a relation of dependence or taking advantage of the person's critical situation in order to submit to an indecent act), art. 206 of the penal code of 1932 (incest), art. 207 of the penal code of 1932 (homosexual prostitution), art. 208 of the penal code of 1932 (facilitating prostitution), art. 209 of the penal code of 1932 (deriving material benefits from prostitution).

As stated in art. 203 of the penal code of 1932, the definition of that crime is satisfied when a perpetrator forced a sexual intercourse or other sexual activity towards a person who was under the age of 15 or a person considerably or partially unable to recognize the significance of his/her actions or govern his/her own conduct. Accordingly, the subject of the crime under art. 203 of the penal code from 1932 may not have been only minors but also mentally ill people, unconscious people or people being under the influence of alcohol [22].

As far as minors or people mentally ill were concerned it did not matter whether a victim encouraged a perpetrator to have a sexual intercourse with him/her or any other sexual conduct to satisfy the definition of that crime. The code assumed that

[12] Statistical yearbook 1948, chapter XIX: Judiciary. Advocates. Crime; tab. Actions of common courts in 1947.
[13] B. Międzybrodzki, *Problematyka przestępczości seksualnej…*, p. 51
[14] Cf., J. Jagodzińska, *Wyzwoleni przemocą* [in:] B. Halicka [ed.], *Mój dom nad Odrą. Pamiętniki osadników Ziem Zachodnich po 1945*, Kraków 2016, p. 149-152.
[15] M. Zaremba, *Wielka trwoga…*, p. 337.
[16] K. Siemaszko, *Trudne początki. Organizacja Sądu Okręgowego w Zielonej Górze w pierwszych latach po zakończeniu II wojny światowej*, ' Journal of Law and History", v. LXVIII, y. 2016, c. 2, p. 184-186.
[17] *Ibidem*, s. 185.
[18] Record of inspection in the Regional Court in Zielona Góra, National Archive in Zielona Góra, ref. act 89/433/28 k. no pagination.
[19] *Ibidem*
[20] *Record of III inspection of the Regional Court in Zielona Góra,* AP ZG, ref. act 89/433/28, no pagintion.
[21] Journal of Laws 1945 no. 51, pos. 295.
[22] J. Makarewicz, *Kodeks karny z komentarzem*, ed. V, Lwów 1938, p. 486.

each sexual activity taken towards the above mentioned people happens against their will[23].

Legal literature of the 1960 s emphasized the necessity of having opinions of physicians and psychologists appointed by the court for such cases. Particularly, in cases when a defendant explicitly stated that he/she was convinced that the victim was over the age of 15, and that this belief was corroborated by the degree of the victim's physical development then an opinion of a court appointed physician would be necessary[24]. The court examining such case cannot solely rely on its own opinion regarding the degree of physical development of a victim[25]. Before verification and evaluation of credibility of testimony given by victims who were children it would be advisable to have an opinion of court-appointed psychologists due to the fact that children are often prone to be influenced and manipulated which, in turn, is the reason why an additional verification should be implemented[26].

One of the cases archived in the fonds of the Regional Court in Zielona Góra is a paedophilia case of E.S. At the moment of committing the crime the suspect was 20 years old, he had completed 3 years of a primary school and he was a farm worker. During the war he served in the German Army[27]. In May 1948 E.S. raped a 4-year-old girl who was a daughter of his employers he lived with. After a sexual intercourse was over, he told the girl not to say anything to her parents about the incident[28]. A temporary detainment order was issued against the suspect. He defended himself by saying that after he returned from the army he repeatedly happened to have "brain fog and then he does not know what he is doing"[29]. The following arguments, however, did not raise any doubts concerning sanity of the suspect. On 28th July 1948 the Regional Court in Zielona Góra found E.S. guilty of committing an act of paedophilia under art. 203 of the penal code and sentenced him to 1 year of imprisonment including temporary detention period since 3rd May 1948 as part of the sentence[30]. Neither the convict nor prosecutor lodged an appeal against the sentence.

The second case regarding an act of paedophilia examined by the Regional Court in Zielona Góra is a case of a 43-year-old shoemaker F.M. In April 1948 being under the influence of alcohol he attempted to rape the daughters of his life partner, however the girls escaped from home where they lived with F.M. jumping out of the window which was on the first floor[31]. During the investigation a temporary detainment order against F.M. was issued. During the investigation it was established that F.M. had assaulted sexually the daughters of his life partner repeatedly, also in 1944, so before they had been forced to leave Vilnius which was caused by national border change. He forced one of the girls to engage in a sexual conduct. Finally, on 1st September 1948 the Regional Court in Zielona Góra found F.M. guilty of committing an indecent act towards the minor which took place in 1944 in Vilnius and he was sentenced to 1 year and 6 months of imprisonment[32].

The third of the cases is a case of M.C, a 58-year-old uneducated farmer. In April 1948 he allegedly forced his 14-year-old daughter to a sexual intercourse. The girl said that her father forced her to engage in a sexual conduct while she was helping him saw wood. Then he told her not to say anything to her ill mother about the incident[33]. According to the case records that incident resulted in considerable impairment of the victim's mental condition. After the incident, she moved to her older sister's place, however, as it was recorded "(…) since that moment the child has not been able to enjoy anything and has been in a great pain(…)"[34]. The Regional Court in Zielona Góra found the suspect guilty of alleged charge under art. 203 of the penal code and sentenced him to 2 years of imprisonment[35]. No appeal against the sentence was lodged.

Another crime against sexual freedom which was the subject of rulings of the Regional Court in Zielona Góra, was the crime of rape under art. 204 of the penal code from 1932. According to the regulation cited above, the definition of the crime of rape would be satisfied when a perpetrator would make other person engage in or commit an indecent act by force, unlawful threat or by trickery. The code provided for the penalty of imprisonment up to 10 years for the crime. The perpetrator would satisfy the criteria of a prohibited act by making the victim helpless using physical or mental force[36]. According to the literature of that time the victim of the crime may have been either a woman or a man[37]. Unlike the crime under art. 203 of the penal code described above, in case of a crime under art. 204 of the penal code from 1932 it was the victim who was obliged to issue a motion for prosecuting, therefore that type of a prohibited act was considered neither a public nor fiscal crime.

Legal literature indicated that in order to identify the crime of rape under art. 204 of the penal code from 1932 a perpetra-

[23] *Ibidem*, p. 484.
[24] Z. Wizelberg, *Uwagi na tle praktyki sądowej…*, p. 59.
[25] Ibidem, p. 59-60.
[26] Ibidem, p. 60.
[27] Record of interrogation of the suspect AP ZG, ref.no. 89/433/77, no pagination.
[28] Indictment E.S., ref.no. AP ZG 89/433/77.
[29] Ibidem.
[30] Sentence of the Regional Court in Zielona Góra of 28th July 1948, II K 199/48, AP ZG,ref.no. 89/433/77
[31] Public document in the case of E.S., ref.no. AP ZG 89/433/78.
[32] Sentence of the Regional Court in Zielona Góra of 1st September 1948 I K 238/38, AP ZG ref.no. 89/433/78.
[33] Record of interrogation of the suspect, ref. no. AP ZG 89/433/80.
[34] Interrogation records, ref.no. AP ZG 89/433/80.
[35] Sentence of the Regional Court in Zielona Góra, II K 250/48, ref. no. 89/433/80.
[36] J. Makarewicz, *Kodeks karny z komentarzem*, ed. V, Lwów 1938, p. 486.
[37] *Ibidem,* p. 486.

tor would have to overcome the real resistance of a victim before a sexual intercourse.[38] Even if a victim initially would resist but later would stop resisting voluntarily and not being violently influenced by a perpetrator and would express even an implied consent to have a sexual intercourse with a perpetrator, then he/she could not be regarded as a victim of the crime of rape[39].

In the fonds of the Regional Court in Zielona Góra there was case records of a 29-year-old teacher W.M. who in 1946 allegedly committed rape of a 15-year-old E.K. According to the facts which were established in this case W.M. had been dating both the victim's mother and older sister, and after a few months he asked to marry E.K. In May 1946 W.M. asked E.K. to visit his aunt's place. During the meeting the suspect was wearing only bathing trunks and T-shirt[40]. Then W.M. asked her to sit close to him on the sofa and when she said 'yes' W.M. threw her over on the sofa and laid on the top of her pinning her with his body. Then he tore her pants and had a sexual intercourse with her[41]. The victim E.K. resisted actively kicking W.M. in his abdomen and biting his hand, whereas the perpetrator threatened to beat her. According to E.K.'s testimony after she was let go she got up from the sofa and lost consciousness. When she regained her consciousness she realized she was lying on the sofa under the blanket. It shall be noted that E.K. did not break off contacts with him as he promised her to marry him. In autumn 1946 the girl's physician said she was pregnant which was likely caused by the rape. W.M. pressured her to undergo abortion but when E.K. and her sister went to hospital in Zielona Góra a physician in charge of admitting stated that abortion was a crime and therefore refused to perform it[42]. In February 1947 she gave birth to a child.

More importantly, it shall be pointed out that the physician who refused E.K. to perform an abortion was wrong thinking that by doing so he would commit a crime. The penal code from 1932 under art. 233 clearly and explicitly stipulated that abortion was not illegal if the pregnancy was a result of a crime. Even though the only way to verify the fact if the pregnancy was caused by a crime was a court sentence[43], which in that particular case was issued as late as in April 1947 but the physician did not take any actions to verify if the girl was really the victim.

After all the facts of the case were established by the Regional Court in Zielona Góra, on 26th April 1947 W.M. was sentenced to 3 years of imprisonment for the crime of rape under art. 204 of the penal code and to 1 year of imprisonment for the crime of incitement to abortion under art. 26 of the penal code and art. 231 of the penal code of 1932. Nevertheless, pursuant to the amnesty act of 22nd February 1947 the court mitigated the penalty for the rape up to 1 year and 6 months of imprisonment, whereas the crime of incitement to abortion was remitted completely.

The accused W.M. appealed against the sentence of the Regional Court in Zielona Góra. The Court of Appeal in Poznań confirmed the sentence of the first instance court on 26th August 1947. According to the substantiation: "the accused who was 28 years old when he committed the crime, is a totally corrupted man of a little social value. Initially, as a soldier, later as a civilian, instead of doing pioneering work on the Recovered Territories where he lives, trying to improve the state of Polish culture and rebuilding the Recovered Territories, he sinks into moral putrefaction by his immoral behaviour, going as far as sexual perversion"[44].

W.M. filed for cassation against the sentence of the Court of Appeal. Additionally, E.K. wrote a letter to W.M.'s defender stating that she would be testifying in favour of W.M. in the cassation proceedings as she intends marry him[45]. On 4th June 1948 the Supreme Court, however, dismissed the cassation of the accused W.M. Stating in its substantiation that the first instance court considered the circumstances, contrary to what he claimed, of the fact that he slept in one bed with E.K. and her mother and also the fact that the victim did not break off contacts with the perpetrator after what he had done to her[46]. The convict served the prison sentence until the day of 10th February 1949[47].

Conclusions

The above mentioned four cases are not enough to draw any general conclusions regarding post-war sex crime on the territories incorporated to Poland in 1945. The main reason for that situation is, as it was mentioned earlier, so called 'dark number' of crimes. Majority of crimes against sexual freedom committed just after the end of WW II on those territories was not reported to any law enforcement authorities, what is more, even when some cases were reported and became the subject of criminal proceedings, their files cannot always be found in the fonds. Due to that fact, this study is based on relatively scarce research material. Nevertheless, it allows to reconstruct certain trends concerning rulings or make preliminary establishments regarding perpetrators of these crimes.

It is worth mentioning that in the cases described above, perpetrators were mainly people who were familiar to their vic-

[38] Z. Wizelberg, *Uwagi na tle praktyki sądowej*…, p. 67.
[39] Ibidem, p. 68.
[40] Substantiation in the case of W.M., AP ZG, ref.no. 89/433/50.
[41] Ibidem.
[42] Ibidem.
[43] J. Makarewicz, *Kodeks karny*…, p. 530.
[44] Sentence of the Court of Appeal in Poznań of 26th August 1947., ref.no. AP ZG 89/433/50.
[45] E.K.'s letter to W.M.'s defendant of 11. 09. 1947, AP ZG ref.no. 89/433/50.
[46] Sentence of the Supreme Court of 4th June 1948, AP ZG, ref.no. 589/433/50.
[47] It shall be noted that the convict was serving his sentence on a Prison Farm in Targowa Góra, where prisoners produced food for the needs of the Polish prison system.

tims – they were family members or acquaintances, living often in the same place, giving the impression that they some extent they could be trusted. It shall be emphasized that all victims in the above mentioned cases were women, and all perpetrators were men. It was impossible to find a single case in the court files in which a man or a male minors were victims.

Majority of women who were victims of those crimes and also all perpetrators settled down on the western lands just after the end of WW II during mass population exchange on that area. Mostly, they came from former eastern lands, incorporated after 1945 to the Union of Soviet Socialist Republics. It seems that to some extent wartime and post-war demoralization and also lack of respect for women may have had influence on the behaviour of perpetrators. Moreover, all perpetrators were rather poorly educated. Only one of them had actual education which entitled him to be a teacher, whereas other men completed only a few years of a primary school. Most of them were relatively young men, their age ranged between 20-40 year of age. Only one man was more than 50 years old.

The victims in all the cases presented here were girls, mainly they still were children, between 4 to 15 years of age. Only one girl was more than 15 year old. The court files show that they were undereducated, presenting some naivety or even 'little intelligence' as in the opinion found in a case of the Court of Appeal[48]. Nonetheless, none of the victims were regarded as demoralized by the court, which in opinion of one of the perpetrators, was supposed to be regarded as a mitigating circumstance.

As it was mentioned above, perpetrators of the crimes were people who were family members or acquaintances of the victims. So it can be said that the victims trusted them to some extent, not being scared of them whatsoever. Sometimes in court files there was some information about the victims' serious mental condition caused by the crime. Moreover, in none of cases of the crime of paedophilia analysed here a psychologist was appointed by the court. That resulted from difficulties connected with finding specialists having that kind of qualifications during post-war period.

At the same time, it shall be pointed out that the perpetrators were treated very leniently by the Regional Court in Zielona Góra. The penal code of 1932 stipulated that the perpetrators who committed a crime under art. 203 (paedophilia) may be sentenced to the penalty of imprisonment up to 10 years, nevertheless none of the sentences passed by the Regional Court in Zielona Góra exceeded 2 years of imprisonment. Such lenient sentences passed by the Regional Court in Zielona Góra for the crime of paedophilia and rape are an element of a certain ruling trend adopted by the Polish judicial authorities in the 1940 s and 1950s[49]. According to research performed at that time Polish courts passed sentences ranging from 6 months to 2 years of imprisonment for 60% of perpetrators who committed the crime of rape, more severe sentences constituted only 4,5% of the cases[50]. Taking into consideration the above mentioned conditions, it may be presumed that the crime against sexual freedom, primarily acts of paedophilia and rapes, were not regarded as very serious crimes. Additionally, for committing political crimes, e.g. insulting the communist party, Polish regional courts very often would pass sentences up to 2 years of imprisonment as well[51].

The cases mentioned above show that the situation of women also in the early years after the end of the WW II was difficult, and the state did not always seem to protect them properly.

[48] Substatntiation of the sentence concerning E.K., AP ZG, ref.no. 89/433/50.
[49] B. Międzybrodzki, *Problematyka przestępczości seksualnej…,* p. 43.
[50] Ibidem, p. 43.
[51] K. Siemaszko, *W trudnym okresie odbudowy państwa. Tak zwany mały kodeks karny w świetle orzecznictwa Sądu Okręgowego w Krakowie w latach 1946-1950,* Warszawa 2015, p. 208.

A Centenary of Legal Education at the University of Lublin. The Early-Stage Challenges

*Magdalena Pyter**

Abstract

Catholic University of Lublin (until 1928 named University of Lublin) is the oldest university in Lublin and one of the oldest Polish universities. It was established in 1918, at a time of huge significance to the Polish statehood. It was then, after 123 years of captivity, that Poland regained its independence. The founder of the university, Father Idzi Radziszewski, assumed that the new academic centre would educate lawyers alongside the specialists in theology, humanities and church studies. Therefore, the moment when the university was established was also when the Faculty of Law and Socio-economic Sciences came into being.

Despite the enormous enthusiasm that accompanied the establishment of the university, its various faculties, and the emerging opportunities to educate law students, severe difficulties were looming over the new legal faculty. The most acute of these difficulties were the lack of professorial staff and the lack of authorization to award law degrees and diplomas. If it were not for the appropriate actions taken by the University and Faculty authorities, these problems could have led to the rapid shutdown of the Faculty.

In the former case, the professors of other Polish universities were asked to assist the didactic endeavours of the Lublin Faculty of Law through temporary or full-time employment at the Catholic University of Lublin. A positive response came from various academic centres, among which the Faculty of Law and Political Sciences of the Jan Kazimierz University in Lviv deserves special recognition. It were the Lviv professors in particular who commuted to Lublin to work at the Faculty of Law, and in many cases also performed diverse administrative functions.

The latter problem was also solved with the help of the Lviv University. When the graduates of the Lublin Faculty of Law were not able to obtain their graduation diplomas locally, these were issued by the Lviv Faculty of Law. As a result, during the first few years of the academic activity in Lublin, the students educated at the Catholic University of Lublin earned a diploma from the University of Lviv. It was a solution that led to certain organisational complications, yet it was the only feasible option in the circumstances when the state authorities constantly delayed granting KUL full rights to confer academic degrees.

Naturally, the outbreak of World War II was another challenge for the existence of the University and the Faculty. After twenty years of its early-stage organizational effort and activity, the University of Lublin had to suspend its operation for a few years, to finally resume its life it in more advantageous times. To this day, the Catholic University of Lublin has been functioning and developing dynamically, and the problems that occurred several decades ago contributed to its development. This difficult history paved the way for the university and the Faculty of Law to function and thrive for over a hundred years.

Keywords: *KUL; Faculty of Law and Socio-economic Sciences; examination board; teaching staff; legal science; Lublin; Poland.*

Introduction

Located in what is contemporary south-eastern Poland, the John Paul II Catholic University of Lublin is one of the oldest Polish universities.[1] It was founded in 1918 and for over a century has been educating and developing research interests of young people from all over the world in numerous scientific disciplines. The Faculty of Law was created at the very beginning of its operation, and despite numerous difficulties and reorganisations that took place at the beginning of its existence, the Faculty continues to function today.

The aim of the article is to present how professors and students of the Faculty of Law of the Lublin-based university contributed to its organization and development. Faced with a difficult social and political situation, they had to overcome several problems in order to achieve a European level of legal education. This text also presents the efforts they undertook in order to

* Dr hab. Magdalena Pyter, University Professor, Faculty of Law, Canon Law and Administration, Catholic University of Lublin, Poland.

[1] The borders of the Republic of Poland in 1918 differed significantly from those of today. This was a result of the post-war political decisions. As a result, Lublin found itself in the very centre of the interwar Poland. In that period, the city flourished in terms of administrative growth, trade and industry. In the 1930 s, a Jewish Talmudic Academy *Yeshivah Hakhmei* was launched here, as well as a branch of General Motors and the Lublin Aircraft Factory. Lublin was also an important cultural centre. For more on the history of Lublin, see: *Lublin. 700 lat dziejów miasta*, Figiel G., Szczygieł, R., Śladkowski, W. (eds.), Lublin 2017.

overcome these obstacles to enable students to pursue their educational aspirations and obtain a master's degree in law.

That the department started its activity in 1918 is worth noting, since it was a particularly difficult time in the history of the Polish state. Firstly, the Great War ended, resulting in the destruction of the Polish nation in almost every aspect of its functioning. Secondly, 1918 was the year in which the Polish state was liberated from the rule of its three partitioners. For more than 123 years Poland was under the protectorate of Russia, Prussia and Austria. These historical events, among others, opened a pathway for a university in Lublin, and a Faculty of Law within its structure. The operation of the University and the Faculty was hampered by enormous difficulties of both economic and organizational nature. The main problem for the Faculty of Law was the lack of its own professorial staff and the lack of state authorization to grant degrees and titles. Therefore, it is interesting to explore the solutions implemented by the University and Faculty authorities to overcome these difficulties. There can be little doubt that the solutions adopted at that time gave impetus to the development of the Faculty and provided grounds for its future dynamic activity.

The article uses materials extracted from the Archives of the Catholic University of Lublin. This valuable resource offers extensive content on the origins of the University, establishment of the Faculty of Law, correspondence between the university authorities and the Minister of Religious Affairs and Public Education, who was the supreme authority over universities in the interwar Poland, as well as correspondence between the particular representatives of the University authorities. In addition, the article mentions the legal acts referenced herein and to the essential literature on the subject. The article employs the legal-historical method.

1. The origins of the University and the Faculty of Law

As remarked on the occasion of its 50th anniversary, the establishing of the Catholic University of Lublin faced multiple adversities that came amid exceptional circumstances.[2] The fundamental problem was how to set up a university "from scratch" almost immediately after World War I. The challenge was taken up by Father Idzi Radziszewski,[3] who had previously held the post of the Rector of the Catholic Theological Academy in St. Petersburg,[4] Russia. Radziszewski's advantage was his enthusiasm for the idea of a new university and his belief that Lublin would make the best possible location. During his stay in St. Petersburg, Radziszewski was deeply involved in the life of the local Polish community. An intensive network of social and scientific activities facilitated establishing numerous acquaintances. These proved to be extremely useful for the implementation of the scheme to launch the University of Lublin. Radziszewski's main problem was the lack of material resources necessary to start a new venture. During one of the meetings held in St. Petersburg, he met people who expressed their willingness to participate as the university founders.[5]

These were the entrepreneurs and financiers Franciszek Skąpski[6] and Karol Jaroszyński.[7] Both of them donated huge amounts to support the launch of the Lublin academic centre. In February 1918, the Organisational Committee was appointed and put in charge of the organization work.

Founding a university required the consent of the state authorities. Since it was to be a Catholic university, the approval of the Polish Episcopate[8] was indispensable, too. Addressing the state and church authorities, the founders justified their intention to establish a university with the need to renew religious, cultural and educational ideals and to contribute to the economic development of the city and the country.[9] On 6 September 1918, a positive response came from the Ministry of Religious Affairs and Public Education, in which the Ministry granted "…a tentative concession for the establishment and opening in the autumn of this year of a private university in Lublin."[10]

The first official inauguration of the academic year 1918/19 took place on Sunday, 8 December 1918. Due to complications in securing the University venues, in the first few years the university was hosted in the premises of the Lublin seminary. It was not until 1922 that the university was granted a magnificent – yet largely devastated – building for its own seat. The first name of the university was: University of Lublin. In 1928, the name was changed to Catholic University of Lublin. During the inauguration, the line-up of the first Academic Senate was announced. Father Idzi Radziszewski was appointed Rector. It is worth mentioning that since its early days, the University of Lublin has been gaining recognition. This is evidenced by the fact that the next inaugurations were attended by distinguished guests, representatives of the ministry, politicians, clergymen, representatives of the legal profession and professors from other universities. In January 1920, the university was visited by the Head of the Polish State, Józef Piłsudski. This visit was of paramount importance for the academic community.

To have an appropriate legal status, the University had to be able to award degrees. Obtaining a relevant permission to

[2] *Księga jubileuszowa 50-lecia Katolickiego Uniwersytetu Lubelskiego* (a collective volume), Lublin 1969, p. 5.
[3] KUL Archives (henceforth AKUL), Rep. 124, No. 198, Fr. Prof. dr Idzi Radziszewski; Karolewicz, G. *Ksiądz Idzi Benedykt Radziszewski i jego dzieło – Katolicki Uniwersytet Lubelski*, Lublin 2000.
[4] For more details on the Catholic Theological Academy in Petersburg, see: Wodzianowska, I. *Rzymskokatolicka Akademia Duchowna w Petersburgu 1842–1918*, Lublin 2007.
[5] Zięba, J. *Katolicki Uniwersytet Lubelski Jana Pawła II – Narodziny uczelni*, Lublin 2008.
[6] For more details on F. Skąpski, see: Kokczyńska, E. *Pamiętnik Ewy*, Warszawa 1998.
[7] For more details on S. Jaroszyński, see: Wasyl, F. "Karol Jaroszyński (1878-1929) europejski finansista i wizjoner z Kresów," *Krakowskie Pismo Kresowe* 6 (2014), pp. 107-151.
[8] AKUL, Rep. 124, No. 3, *Statut Katolickiego Uniwersytetu Lubelskiego*.
[9] AKUL, Rep. 124, No. 2, *Erekcja Uniwersytetu Lubelskiego i ogólna organizacja od 1919 r.*
[10] Op. cit.

grant these degrees was a priority from the very beginning. Yet, reaching this legal status turned out to be complicated. The complications resulted mainly from the fact that Lublin's university was launched as a private entity and that its structure incorporated Church-related faculties, whose status was subject to the regulations of the Catholic Church. The process was also problematic for the government, owing to the circumstances of a renewed statehood, under which the legislative process for regulating science and higher education – among so many other legal acts of a reborn state – needed to be carried out gradually and took time. After many years of efforts to obtain state authorization, pursuant to the Act of the Sejm of the Republic of Poland of 9 April 1938, the Catholic University of Lublin was granted full rights to confer doctorates and carry out habilitation procedures at all its faculties.[11]

At its starting point, the University comprised the Faculties of Theology, Humanities, Canon Law and Moral Sciences as well as of Law and Socio-economic Studies (henceforth as Faculty of Law or WPiNS-E).[12] The date of the launching of WPiNS-E coincides with the launching of the University, i.e. 8 December 1918.[13] Law was researched and taught within the Section of Legal Studies, which made part of the Faculty. The Economics made the second section. Due to the lack of formal organisational structures of the Faculty, the first decisions were taken by the General Meeting of Professors. It was a university body which – among its numerous activities – appointed the first Dean of the Faculty. It was Stanisław Zachorowski, professor of Church Law, who came to Lublin from the Jagiellonian University in Kraków.[14] Due to his illness and death on 21 December 1918, he failed to be effectively appointed to the post. Under these circumstances, the post of the Dean of the Faculty of Law was filled by Antoni Peretiatkowicz.[15]

From the very beginning, the structure of the Faculty was subject to numerous transformations. This was due to the organizational and staffing difficulties. Initially, the Faculty was structurally divided into departments, which were both research and education units. The Faculty's Section of Legal Studies was divided into 16 departments that were active until their dissolution. These were the departments of Roman Law, Polish Political System and History, Polish History, History of Judicial Law, History of Law in Western Europe, Theory of Law, Church Law, State Law, Law of Nations, Treasury and Financial Law, Criminal Law and Criminal Procedure, Administration and Administrative Law, History and Philosophy of Law, 1st Department of Civil Law, 2nd Department of Civil Law, Civil Procedure, Commercial and Promissory Notes Law and Private International Law.[16]

This constitution of the Faculty and of the University remained unchained throughout the first two decades of its operation until the outbreak of World War II in 1939.

2. The issue of professorial staff shortages

As mentioned above, a newly established Faculty of Law and Socio-economic Sciences had its Section of Legal Studies with the constitutive sixteen departments. From the very beginning, the Faculty had to meet the standards set by the Ministry of Religious Affairs and Public Education. In the period of the first several months, the Faculty operated on ad hoc legal solutions. The lack of central regulations cannot be regarded as the Faculty authorities' fault. The situation was caused by the difficult political and legal conditions of the renewed state. The organisation of legal studies on a national level was regulated for the first time by the Minister of Religious Affairs and Public Education in 1920.[17] Based on this legal solution, the first Faculty of Law in Lublin also began to operate. Its framework encompassed the related departments. Also, the regulation defined legal studies as a four-year academic course. Apart from the subjects indicated in the regulation,[18] the Faculty Council expanded the curriculum to cover lectures on psychology, logic, social and agrarian policy, while recommending completing additional courses in: economic history of Poland and Western Europe, sociology, military criminal law and forensic medicine.[19]

The number of students who enrolled for the first year at WPiNS-E equalled around 200. It was a very large group of young people, who had to be provided with appropriate education from qualified professorial staff.[20]

The extensive department structure required appropriately qualified staff. Considering the circumstances of the inter-war period and of the Polish state just recently regaining independence after the Partitions, ensuring proper professorial staff con-

[11] Act of 9 April 1938 r. on Granting to the Catholic University of Lublin the Full Legal Status of a State Academic Institution (Journal of Laws of 1938, No. 27, item 242).

[12] Faculty of Law and Socio-economic Sciences was among six legal units active at Polish universities in the interwar period. The other units were held at the Jagiellonian University in Kraków, the John Casimir University of Lviv, the Stephen Bathory University of Vilnius, University of Warsaw and University of Poznań.

[13] The Faculty of Law witnessed different turns of fate. First of all, twenty years after its opening, it was affected by the outbreak of World War II. During the war, clandestine teaching took place, since formal academic education was not permitted by the occupant. After World War II, the Faculty entered a phase of dynamic development. For more details, see: Dębiński, A. *Prawo w Katolickim Uniwersytecie Lubelskim. Historia i współczesność*, Lublin 1999, pp. 55-67.

[14] Izdebski, H. "Zachorowski, Stanisław" in: *Słownik historyków polskich*, Prosińska-Jackl, M. (ed.), Warszawa 1994, p. 569.

[15] Gulczyński, A. "Antoni Peretiatkowicz, 1.IX.1936-31.VIII.1939," in: *Poczet rektorów Almae Matris Posnaniensis*, Schramm, T., Marciniak, A. (eds.) Poznań 2004, pp. 113-124.

[16] Dębiński, A., Pyter, M. "Wydział Prawa, Prawa Kanonicznego i Administracji," in: *Encyklopedia 100-lecia KUL* (eds. Dębiński, A. et al.), vol. II, Lublin 2018, p. 595.

[17] Regulation by Minister of Religious Affairs and Public Education of 16 October 1920 (Ministry Official Journal of 1920, No. 22, item 140).

[18] The subjects taught were matched precisely to the names of the Departments.

[19] Wojtkowski, A. "Katolicki Uniwersytet Lubelski 1918-1944," in: *Księga jubileuszowa 50-lecia Katolickiego Uniwersytetu Lubelskiego*, p. 34.

[20] Strzeszewski, Cz. "Bilans pięćdziesięciolecia Katolickiego Uniwersytetu Lubelskiego," w: *Katolicki Uniwersytet Lubelski*, p. 62.

stituted the most significant challenge at that time. Personnel problems could undoubtedly undermine the chances of a new faculty. It was then that the Faculty authorities decided to turn to other university centres with a request of a temporary "lease" of individual professors to Lublin. The John Casimir University in Lviv and its Faculty of Law responded to this request with a great deal of enthusiasm.[21] Apart from being relatively close to Lublin in terms of geographical distance, the University of Lviv enjoyed a reputation of an academic institution with rich scientific traditions. The Lviv Department of Law could boast of a thriving community of academics whose scientific achievements were of international rank. Undeniably, the fact that the Lviv lawyers agreed to support the emerging Lublin Faculty of Law increased the chance its survival, but it also was a source of unquestionable prestige.[22]

The Lublin Faculty of Law was guest-visited by, among others, the following law professors: Roman Longchamps de Bérier - civilist, Zbigniew Pazdro - expert in administrative law, Przemysław Dąbkowski – law historian, Zdzisław Papierkowski - specialist in criminal law, Antoni Deryng - expert in international law, Edward Dubanowicz - specialist in state law, Kamil Stefko and Kazimierz Przybyłowski – civilists, and the criminal law expert Ludwik Dworzak.[23]

The Lublin Faculty of Law also hosted prof. Zygmunt Cybichowski – a renowned researcher of international public law and a regular professor at the University of Warsaw. The Faculty was also supported by ministry officials from Warsaw: Cezary Berezowski – an officer of the Board of the Council of Ministers, Michał Orzęcki – an employee with the Ministry of Internal Affairs and an attorney (advocate), as well as representatives of the judiciary and law practitioners: Stanisław Bryła – expert in administrative law, Andrzej Modrzewski and Władysław Łukaszewicz – civilists.[24]

It is worth noting that professors commuting to Lublin from other academic centres had to reconcile their work at the Catholic University with their own professional duties. Moreover, the journey took many hours and involved numerous inconveniences. The academics also had to face separation from their loved ones. In Lublin, they were accommodated in university buildings of nothing but a rather poor standard. Many times, they also had to yield to the customs and conditions prevailing at the Lublin university. For example, Prof. Roman Longchamps de Bérier, announcing his arrival from Lviv for lectures, wrote to the dean of the Lublin Faculty of Law not to schedule the lecture before 10 a.m., due to regular low attendance of students in the morning.[25]

Apart from the staff shortages, frequent changes of the departmental authorities posed a serious problem for the new university unit. Of course, this problem also resulted from the insufficient number of professors. From its early days, the Faculty of Law faced problems with ensuring permanent appointments of its authorities. After Professor Peretiatkowicz's sudden resignation from the post, Professor Edward Dubanowicz was appointed to take over already in 1918. Prof. Dubanowicz managed the department until the middle of the academic year 1919/20. His resignation was due to his own appointment to the position of the Chairman of the Constitutional Committee of the Sejm (Parliament). For the next two years, the Faculty was headed by Prof. Leon Waściszewski. In 1922, he was appointed Vice-Rector of the Catholic University of Lublin, which entailed the termination of his tenure as Dean. Hence, Prof. Roman Longchamps de Bérier was appointed in his place, formerly performing as Deputy Dean of the Faculty of Law.[26] Longchamps de Bérier was intensively involved in the functioning of the Lublin Faculty of Law and Socio-economic Sciences in the years 1920-1939, giving lectures and performing diverse administrative functions. The next deans were professors: Stefan Glaser, Bronisław Bouffał, Ignacy Czuma, Ludwik Górski, Jan Wiślicki, Antoni Szymański, Witold Krzyżanowski, Antoni Deryng and Zdzisław Papierkowski. An evident high frequency of fluctuation in the line-up of the Faculty authorities cannot go unnoticed. This fluctuation certainly did not contribute to the stability and growth of the Faculty of Law, even though each of the deans tried their best to secure his Faculty's optimal position at the University.

Both the dependence on professorial staff from other universities and the exercise of administrative functions by representatives of other academic circles lasted continuously almost until the outbreak of World War II. Undoubtedly, it is right to say that the Faculty of Law owed a great deal to the abovementioned scientific and didactic staff. This team's efforts were decisive for its survival and development.[27]

3. Lack of state authorisation for granting scientific degrees and titles

Despite various difficulties, the particular deans of the Faculty of Law worked towards its development. The academic per-

[21] The University of Lviv and its Faculty of Law and Political Sciences enjoys a long academic tradition. The university was founded by the Polish king John Casimir in 1661 as the Lviv Academy. In the interwar period, it operated under the name of the John Casimir University, and as a result of changes in state borders after World War II, it fell within the territory of the USSR. Currently it is located in the territory of Ukraine. For more details on the Lviv University and its Faculty of Law, see: *Academia Militans*. *Uniwersytet Jana Kazimierza we Lwowie*, Redzik, A. (ed.) 2nd edition, Kraków 2017; Redzik, A. *Prawo prywatne na Uniwersytecie Jana Kazimierza we Lwowie*, Warszawa 2009; Redzik, A., *Wydział Prawa Uniwersytetu Lwowskiego w latach 1939–1946*, Lublin 2006.

[22] Also see: Dębiński, A., Pyter, M. "The role of Jan Kazimierz University in the process of development of legal studies at the Catholic University of Lublin (1918–1939)," *Visnyk of the Lviv University, Historical Series*, 2013, vol. 49, pp. 143–163.

[23] Dębiński, A. *Prawo w Katolickim Uniwersytecie Lubelskim*, pp. 51-53.

[24] Op. cit., p. 54.

[25] Dębiński, A., Pyter, M. *Roman Longchamps de Bérier (1883-1941). Profesor lwowski i lubelski*, 2nd edition, Lublin 2015, p. 110.

[26] Bednaruk, W. "Organizacja i funkcjonowanie Wydziału Prawa i Nauk Społeczno-Ekonomicznych pod kierunkiem lwowskich prawników sprawujących funkcje administracyjne," in: *Nauki prawne pomiędzy tradycją a współczesnością. Prace dedykowane Profesorowi Romanowi Longchamps de Bérier w 70. rocznicę śmierci*, Dębiński, A., Pyter, M., Czech-Jezierska, B. (eds.) Lublin 2011, pp. 187-189.

[27] Cf. Dębiński, A. *Prawo w Katolickim Uniwersytecie Lubelskim*, p. 54.

sonnel became more and more stable and the educational offer was expanded. The number of students was steadily growing. Pursuant to the relevant ministerial regulations, the first group of graduates of the Faculty of Law was to leave the university in the academic year 1922/23. In accordance with the abovementioned Regulation of the Minister of Religious Affairs and Public Education of 16 October 1920, legal studies were conducted as a four-year curriculum. Graduates could obtain the Master of Law degree after passing all the annual examinations. Such examinations had to be taken every year before a special faculty examination board. The board was elected at the meetings of the Council of the Faculty of Law and then the list was sent to the Minister of Religious Affairs and Public Education for approval. Pursuant to these regulations, the board consisted of full and extraordinary professors who taught examination subjects.[28]

The teaching system that developed this way worked efficiently and was virtually unproblematic. The largest and most difficult to overcome were issues related to the graduation examinations – the ones that enabled the graduates of the Faculty of Law to obtain diplomas and master's degrees. The Lublin Faculty of Law was not originally authorised to confer the title of Master of Law. Hence, the graduates were faced with a real problem since on completing four years of legal studies they were not able to get a formal confirmation of their professional qualifications. Therefore, they could not exercise the legal profession, or apply for the degree of Doctor of Law. The Catholic University of Lublin was a private university – a status that thwarted its ability to acquire the graduation capabilities vested in public universities. Despite the continuous efforts of the University authorities to acquire state authorisation to grant titles and degrees, this legal status had not been achieved by 1922. The consequence was, among others, the inability to award the title of Master of Law to graduates of the Faculty of Law.[29] In view of the above, the Faculty authorities requested the Ministry of Religious Affairs and Public Education for a permission to organise a dedicated graduation examination board. However, the ministerial reply stated that under the applicable law, it was not lawful to set up examination boards at private universities.[30]

As a result of a failure in talks with the Ministry, the authorities of the Faculty of Law decided to pursue alternative solutions. Similarly, to the request for professorial support, the authorities of the Lublin WPiNS-E asked the relevant authorities of the Faculty of Law and Political Sciences at the University of Lviv for support in solving their graduation problems. The authorities of the Lviv Faculty of Law again came to aid. They proposed establishing an examination board which was to conduct graduation examinations for the students of the Lublin Faculty of Law until the Faculty in Lublin becomes fully licensed in that respect. The board was to formally operate within the Lviv Faculty of Law and was to be composed of professors of both Lviv and Lublin Faculties.[31] In consequence, the students who completed legal studies at the Faculty of Law of the Catholic University of Lublin were to obtain a Master of Law degree from the Jan Kazimierz University in Lviv. This somewhat unusual situation turned out to be the only viable solution to the problem faced by the graduates of the Lublin Faculty of Law.

The Ministry of Religious Affairs and Public Education approved the option. The relevant legal acts were issued. On 28 June 1922, a ministerial regulation came out concerning the scope of activity of the Examination Board for the Faculty of Law and Socio-economic Sciences of KUL.[32] In June 1922, the members of the examination board were appointed pursuant to a relevant legal act.[33] Professor Oswald Balzer[34] became the first chairman of the board, while Władysław Abraham,[35] Juliusz Makarewicz[36] and Stanisław Starzyński[37] were chosen for his deputies. The board was divided into three thematic domains: legal-historical, judicial and political. In the first domain, the students had to pass exams in the following subjects: Roman Law, Church Law, History of the Polish Political System and the Polish Judicial Law as well as History of Western European Law. In the judicial domain there were the following exams to take: Civil Law, Civil Court Procedure, Commercial and Promissory Notes Law, Criminal Law and Criminal Procedure. Examinations in State Law, Political Economy, Political

[28] Ministry of Religious Affairs and Public Education, Ministry Official Journal of 1920, No. 22, item 140, pars. 5-6.

[29] Czech-Jezierska, B. "Uniwersytet Jana Kazimierza w tworzeniu Państwowej Komisji Egzaminacyjnej dla studentów prawa lubelskiej uczelni," in: *Nauki prawne pomiędzy tradycją a współczesnością*, p. 202.

[30] Wojtkowski, A. "Katolicki Uniwersytet Lubelski 1918-1944," p. 35.

[31] Dębiński, A. "Z dziejów Wydziału," in: *Wydział Prawa, Prawa Kanonicznego i Administracji – Katolicki Uniwersytet Lubelski*, Dębiński, A., Szczot, E. (eds.), Lublin 2004, p. 15.

[32] Regulation by the Minister of Religious Affairs and Public Education of 28 June 1922 on the Graduation Examination for Legal Studies at the Faculty of Law and Political Sciences of the John Casimir University in Lviv (Ministry Official Journal of 1922, No. 25, item 276) [henceforth as Regulation of 28 June 1922]. This Regulation was later substituted with an equivalent Regulation by the Minister of Religious Affairs and Public Education of 25 February 1927 on the State Examination for Legal and Economic Studies at the Faculty of Law and Political Sciences of the John Casimir University in Lviv (Ministry Official Journal of 1927, No. 5, item 65).

[33] A communique of the Department of Research and Higher Education Institutions on the Line-up of Examination Boards at the Faculty of Law and Political Sciences of the John Casimir University in Lviv of 28 June 1922 (Ministry Official Journal of 1922, No. 25, item 285).

[34] For more details on O. Balzer, see: Pyter, M. *Oswald Balzer i lwowska szkoła historycznoprawna*, Lublin 2010.

[35] For more details on W. Abraham, see: Pyter, M. "Władysław Abraham – historyk prawa kościelnego," *Czasopismo Prawno-Historyczne* 58(2006), f. 2, pp. 305-319.

[36] For more details on J. Makarewicz, see: Zoll, A. "Juliusz Makarewicz (1872-1955)," in: *Złota Księga Wydziału Prawa i Administracji Uniwersytetu Jagiellońskiego*, Stelmach, J., W. Uruszczak, W. (eds.), Kraków 2000, pp. 276-279.

[37] For more details on S. Starzyński, see: Redzik, A. "Stanisław Starzyński – nestor polskich konstytucjonalistów z okresu Drugiej Rzeczypospolitej," in: *Stanisław Starzyński, Współczesny ustrój prawno-polityczny Polski i innych państw słowiańskich*, Warszawa 2010, pp. VII-XLV.

Economics, Financial Law, Fiscal Law and Administrative Law belonged to the political domain.[38] Each of the domains comprised a team of professors-examiners.[39]

Under the Regulations for the Graduation Examination, introduced by the Regulation of the Minister of Religious Affairs and Public Education of 28 June 1922 on the State Examination in Law at the Faculty of Law and Political Abilities of the Jan Kazimierz University in Lviv, the examination could be taken by students who held a maturity (secondary school graduation) certificate and were able to prove that they had successfully completed their legal studies. The candidate also had to submit a relevant application to the chairman of the board, at least two weeks before the scheduled date of the exams. The examination was oral. Each student had two hours to present their knowledge in the above-mentioned thematic domains. Examinations in each domain were assessed in such a way that the student received a collective grade per domain. In this way, after passing all subjects in the three domains, he obtained three final grades. The examination certificate was the basis for the Master of Law diploma. Graduates of the Lublin Faculty of Law received a diploma issued by the Faculty of Law and Political Sciences at the Jan Kazimierz University in Lviv.[40]

The first graduation examination was held in January 1923, and the second in June. The results were positive, and the examiners concluded that the competence levels of the students at the University of Lublin, which was a private university, did not diverge from the level of students at state universities.

After a few examination sessions, it was decided that the examination board should proceed at the University of Lublin. The aim was to make it easier for students to apply for the Master of Law degree. Yet, owing to the fact that - as mentioned above - the examination committee consisted mainly of the Lviv University professors, they were now obliged to come to Lublin for the exams. This solution caused many complications, as it recurrently happened that some of the examiners were unable to get to Lublin on time. This was due to personal and professional reasons, and sometimes even because of bad weather. In this context, minor misunderstandings between the professorial staff from Lublin and Lviv[41] began to arise. As a result, what was supposed to be a solution to student problems became another hurdle.

The difficulties caused by the fact that the examination board for graduates of the Lublin Faculty of Law operated in Lviv and was composed mainly of professors from outside Lublin, ended as late as 1933. It was when the *Act on Academic Schools*[42] was introduced into the Polish legislation. Of utmost importance for the University of Lublin was the fact that thanks to the new provisions, the University was allowed to grant "lower scientific degrees." This first legal act was complemented by a regulation, under which the graduates of the Faculty of Law could obtain professional titles of Master of Law[43] at their home University. Formally, it was not until 10 May 1933 that the first local graduation board[44] was set up at the Faculty of Law and Socio-economic Sciences of the Catholic University of Lublin. From that moment on, the graduates of the Faculty of Law and Socio-economic Sciences obtained graduation diplomas issued by the Catholic University of Lublin.

Conclusions

The establishment of the (Catholic) University of Lublin was of great importance for the history of the Polish state, which revived in 1918 after 123 years of captivity. It was not only an event of a huge scientific significance, but it also had a great social and religious impact. Faculty of Law was among the original units, launched at the very beginning of the University's operation. It was intended to educate specialists in the field of law and qualified administrative staff. These specialists were an indispensable resource in the reconstruction of a reborn Polish state.

From day one, both the University and the Faculty struggled with numerous difficulties: lack of financial resources, lack of own seat, inability to secure adequate research staff, or lack of state authorization to confer degrees. The university authorities were extremely committed to maintaining the prestigious Faculty of Law, and therefore, together with the Faculty authorities, they sought to overcome the obstacles that were piling up.

The two major problems faced by the Faculty of Law, i.e. the lack of adequate professorial staff and the inability to confer the title of Master of Law on graduates of the Faculty, were solved ultimately. In the former case, professorial staff from other universities were "leased." The institution which particularly helped in this respect was the Jan Kazimierz University in Lviv and its Faculty of Law. The law professors from the Lviv Faculty were very committed to lecturing on an ad hoc basis, as well as to performing numerous administrative functions at the Catholic University of Lublin. Thanks to their dedication, the Lublin Faculty of Law could continue to function and, moreover, to gain a growing recognition amongst diverse academic milieus. These professors should also be credited with having educated subsequent generations local academic staff.

[38] Pars. 3-5, Regulation of 28 June 1922.

[39] These included: professor of Roman Law - Aleksander Doliński, professors of Church Law – Alfred Halban and Marceli Chlamtacz, professor of the History of Poland's Political System – Józef Rafacz, professors of History of Law– Przemysław Dąbkowski, Leon Halban and Stanisław Starzyński, civilists – professors Ernest Till and Roman Longchamps de Berier, criminal law expert – prof. Stefan Glaser.

[40] Czech-Jezierska, B. *Uniwersytet Jana Kazimierza w tworzeniu Państwowej Komisji Egzaminacyjnej*, p. 208.

[41] Op. cit., p. 209.

[42] Act on Academic Schools of 15 March 1933 (Journal of Laws of 1933, No. 29, item 247).

[43] Regulation of the Minister of Religious Affairs and Public Education of 9 May 1933 on Granting the Catholic University of Lublin the Right to Confer Lower Level Scientific Degrees" (Ministry Official Journal of 1933, No. 41, item 327).

[44] Resolution by the Minister of Religious Affairs and Public Education of 10 May 1933 on Organization of Legal and Socio-economic Studies at the Catholic University of Lublin (Ministry Official Journal of 1933, No. 10, item 144).

The second major issue was also solved with the help of the Lviv Faculty of Law. When it was not legally possible to obtain a diploma in law in Lublin, the graduation board for Lublin lawyers convened in Lviv. As a result, lawyers educated at the Catholic University of Lublin obtained a master's degree from the Lviv University. This move solved the fundamental problem for the graduates, but it also paved the way for the graduation exams to be held in Lublin, when – ultimately – the Lublin Faculty of Law obtained an authorisation to grant master's degrees to its students.

It can thus be claimed that the organizational problems discussed herein were the most difficult to overcome in the first two decades following the establishment of the Faculty of Law in Lublin. The University prevailed and this is one of the reasons why the current Faculty of Law, Church Law and Administration (WPPKiA), which operates within the structure of The John Paul II Catholic University of Lublin, boasts a hundred years of tradition and the opportunity to educate countless generations of young specialists in law.

Debates in Articles (Positions in the Legal Literature on the Possibilities of Private Law Codification, 1866-1900)

Judit Balogh *

Abstract

Hungarian private law codification proceeded very slowly and with difficulties also by European comparison. The work of codification in Hungary started in the second third of the 19th century. Slowly, but steadily, in the professional articles of the legal journals started to outline the Hungarian opportunity for private law codification, followed by discussions of the possible directions, purposes, methods, successes and effects of the same. In the 'reception versus codification' debate, it was eventually the notion of creating an independent code that prevailed, work on which finally commenced in 1876.

The process of codification in Hungary was determined (unfortunately) by the attitudes of the ministers of justice, following each other in quick succession, towards private law and the notion of codification. The issue of the general part was raised and became accepted on the basis of the German model. The notion, however, that a code of law would require a part containing the basic principles that would be applicable to the entire code would not take roots in Hungarian legal thinking.

The journal Jogtudományi Közlöny, in its first few decades, was a specialized journal dedicated to the issue of legal development, featuring a wide range of opinions and not classifiable as belonging to a single school. It provided an overview of the efforts of the age, the most results of legislation, as well as the wide range of professional debates, in which professors and scholars of law, as well as legal practitioners also participated with the intention of facilitating the creation of the Hungarian code of private law.

Keywords: *civil law; codification; reception; consuetudinary law, civil code; legal journals; Hungary; general part; ABGB; BGB; Jogtudományi Közlöny; late 19th century.*

The notion of private law codification was first promoted by Ferenc Deák [1], whose notions had a number of ardent followers (Szalay, Kölcsey, Szentkirályi and others) by the end of the Reform Era. Striking evidence of the above is the very creation and the spirit of Act 1848:XV [2], which spirit, however, could not come to full fruition due to the events in public history. It was only the stabilisation in terms of public law (1867) that once again created an atmosphere in Hungary in which the excellent legislators of the age, trained in versatile ways, could take upon themselves the huge task of creating a comprehensive, tight, logically round and whole code of law. The lawyers, predominantly belonging to the young generation, who were able to gain a universal perspective of the development of European private law of their age (also taking into consideration the tendencies and experiences of the preceding period) and to read, in the original languages, the laws of the states that could serve as examples, and who also new the histories and ideological backgrounds of these major states, created the study of comparative law in our country, and by the turn of the century developed it into a high-level, one could even say leading discipline.

1. The Legal Journals of the 19th Century

Much is revealed of how much significance contemporaries attributed to this question by the fact that the first article in the very first issue of the legal journal titled *Jogtudományi Közlöny* [Gazette of Jurisprudence], launched in 1866 – after a welcoming editorial article discussing the objectives and proposed role of the journal – was the first in a series of articles by the editor-in-chief, Bálint Ökrös, with the title *Codificatio*, discussing the issue of law and statutes from the perspective of the theory of law, finally arriving to the question of legislation [3]. As early as in the first volume of the periodical, also joining

* Dr. Judit Balogh, Ph.D. habil, Department of History of Law, Faculty of Law, University of Debrecen, Hungary.

1 At its meetings held on 24-25 May 1834, the States and Orders requested that all proposals concerning civil laws be submitted at the same time, in the form of a civil code, for confirmation. FERENCZI, Z., *Deák élete*, vol. I, Budapest, 1904, p. 124.; KÓNYI, Manó (ed.): *Deák Ferencz beszédei* (hereinafter: KÓNYI). Vol I (1829-1841) 2nd edition, Budapest, 1903, p. 82-84.

2 More details on the antecedents of the notion of codification and the birth of the Act: BALOGH, J., A magyar magánjogi kodifikáció gondolata és az 1848-as jogi forradalom. In: MEZEY B. – VÖRÖS I. (eds), *Forradalom vagy reform? Tanulmányok az 1848/49-es szabadságharc állam- és jogfejlődéséről*. Budapest, 1999, p. 148-160., HOMOKI-NAGY, M., Egy új nemzeti kódex szükségessége: megjegyzések a polgári jogi kodifikáció történetéhez. In: *Jogtörténeti Szemle,* vol. 19, 2017, p. 45-48.

3 ÖKRÖSS, B., Codificatio. (Hereinafter: ÖKRÖSS, Codificatio) In: *Jogtudományi Közlöny* (hereinafter: *JK*), vol 1, 1866, No. 1, 6, 10, 14, 19, 23, 27, 32, 36, 40, 45, 49 and 53.

the above series was another one written by János Suhayda, which was equally voluminous and thorough, but devoted to a presentation and evaluation of the practical implementations of codification.[4] The studies, shorter writings, commentaries, and occasionally pamphlet-style declarations of opinions provides a nuanced view of the contemporary ideas of the jurists of the age (a rather active and interested community, keen on shaping opinions), even if we keep in mind that it was not this journal, *Jogtudományi Közlöny*, that served as the major factor determining the codification processes in the last third of the 19th century.

The absence of written codes, the ad hoc creation of law, and the concomitant legal uncertainty led to the point that by the last third of the 19th century almost all appliers of law have realized the necessity of legal unification and codification. The method of the solution, however, continued to be debated for a long time in courtrooms, in professional journals and in the ministry alike. There was no uniform opinion even on the question whether the Hungarian legal profession was for such large-scale work. According to some opinions, it had long been ready, since the golden age of Hungarian codification occurred in the 1840s[5], while others were of the conviction that (even though the work itself was necessary, but in term of the timing) the issue must be approached ever so carefully, since "*in a place where the nation is still at the first steps of legal development, we would consider codification as a dangerous experiment. However, once a nation has arrived at its established principles; if its relations and legal resources are so developed that the only task of codification is the processing, ordering and refining of those resources… the permanent and welcome work of legislation can only be achieved through codification*".[6] Several legal practitioners[7], Ökröss, Suhayda or Sándor Dárday, who published extensively approaching the issue from the economic side and opportunities[8], and even the rather conservative Mihály Herczegh[9] were convinced that private law and the jurists of their age were already prepared to undertake this task. On the other hand, Grosschmid was of the opinion, even at the end of the century, that "*without exception, we are small – in the field of the civilis – in comparison with the sizes that are presumed for the creation of an even a mediocre code built on independent bases.*"[10]

Throughout the period, the process of codification in Hungary was determined (unfortunately) by the attitudes of the ministers of justice, following each other in quick succession, towards private law and the notion of codification. Ups and downs alternated, with the question of codification sometimes *coming* to the focus and sometimes pushed into the background[11]. It was always the current minister in office who determined the activities of the codification committees created in the framework of the Ministry of Justice.[12]

2. Reception versus Codification

For the execution of the work, however, many questions had to be clarified first. One of the most important of these was to decide concerned the fundamental direction of the work, namely the choice between *reception* versus *codification*. Entire groups of theoretical jurists and legal practitioners rallied around both positions, depending on their professional and personal orientations.

In the 1870 s and 1880 s, reception appeared to be an easier path to follow. This was because, on the one hand, they were aware what a difficult task it would be to create an independent code; and on the other hand, because they were of the conviction that many outstanding works have already been created across Europe, *"that have fully exhausted all standards applicable to private law relations,"*[13] for which reason in would have been impossible and at the same time also unnecessary to create a new one, as existing codes for transplantation were readily available. Such a model was, first and foremost, the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, hereinafter: "ABGB"), due to the fact that ever since the Provisional Judicial Regulations (Ideiglenes Törvénykezési Szabályok, hereinafter: "ITSZ") entered into effect, no-one had been able to provide an exhaustive list of which provisions of the code remained in

[4] SUHAYDA, J., Tanulmányok a polgári magánjogi codificatio terén (hereinafter: SUHAYDA, Tanulmányok…). In: *JK,* vol. 1, 1866, No. 8, 9, 12, 13, 15, 16, 18, 19, 21-27, 31, 34, 35, 38, 40, 42 and 43.

[5] E.g. SÁNDORFY, K., *Törvényalkotásunk hőskora.* Budapest, 1935, especially the Foreword and Part III, p. 86-140; SZLADITS, K.: A magyar magánjog jellegváltozásai az utolsó száz év alatt (1840-1940). In: ECKHART, F. and DEGRÉ, A. (eds.): *Emlékkönyv Dr. Viski Illés József tanári működésének 40. évfordulójára*. Budapest, 1942, p. 478.

[6] ÖKRÖSS, Codificatio, p. 835.

[7] E.g. in the writing of S. HALMÁGYI, president of the royal court of justice, titled A magyar codificatioról, In: *JK,* vol 13, 1878, No. 49-50, especially p. 404.

[8] E.g. DÁRDAY, S., Az igazságügyi budget, In: *JK,* vol. 6, 1871, p. 61-62.; idem, A törvényelőkészítő bizottság, In: *JK*, vol. 7, 1872, p. 213-214.

[9] HERCZEGH, M., Magánjogi codificátiónk hajdan és mostan, In: *JK,* vol 12, 1877, No. 48-52, especially p. 393-394.

[10] GROSSCHMID, B. (= ZSÖGÖD, B.), Az örökösödési törvénytervezetről (1882), qtd. by: MENYHÁRTH, G., Polgári törvénykönyvünk javaslatának nemzeti jellege, In: *Jogi dolgozatok a Jogtudományi Közlöny 50 éves fennállásának emlékére (1865-1915).* Budapest, 1916 (hereinafter: MENYHÁRTH), p. 464.

[11] To what extent this was the case is clearly indicated also in an open letter by Boldizsár Horvát, minister of justice, in Vol. 2 of *JK*, in which he writes: *"… even though codification must extend to the whole of our legal system in Hungary, it is my conviction that settling our substantive law demands priority…"* HORVÁT, B., Nyílt level, In: *JK*, vol. 2, 1867, p. 2.

[12] The various committees set up for the drafting of the Hungarian civil code already operated from 1866. The phenomenon that the progress of the cause of Hungarian codification depended, at all times, on the concepts and the orientation of the minister in justice then in office was also identified as a fault of the procedure, contrasting it with the more successful operation of the German permanent committees tasked with legislative preparation, which were independent from the government, and subordinated only to the Bundesrat. See by SZÁSZY-SCHWARZ, G., *A magánjogi törvénykönyvről. Tanulmányok és bírálatok*. Budapest, 1909. (hereinafter: SZÁSZY-SCHWARZ), p. 5-8. In contrast with this contemporary evaluation, it must be noted here that the modern research in German legal history identified the strong influence of the government bodies also in this case. SCHULTE-NÖLKE, H., *Das Reichsjustizamt und die Entstehung des Bürgerlichen Gesetzbuchs*. Frankfurt/M., 1995.

[13] HÓDOSSY, I., Nyílt szó az osztrák polgári törvénykönyv recepciója mellett, In: *Az első magyar Jogászgyűlés Évkönyve,* 1870.

effect and which were no longer applicable[14]. Based on this reasoning, a radical group (chiefly practitioners) argued for the immediate and entire taking over of the ABGB[15], which would have meant, in their opinion, the applicability of a unified, written (and due to its effect, also known and applied, therefore not so alien) code without further delay.

Another group of jurists, by contrast, criticized this approach on the grounds that it would not appreciate the provisions of law sufficiently from the point of view of national culture, but would rather focus on their practicality, thereby striving to replace also the applicable domestic law with the simpler, "modern" rules. Among those accusing the former group with being "un-national" were some of the defining individuals of the late 19th century. Their aim was to draw up our customary law based on Werbőczy's *Tripartitum* in writing, and to preserve our corresponding traditional institutions as far as possible, which they only wanted to supplement with foreign legal institutions where the satisfaction of modern needs would have been altogether impossible (e.g. the law of contracts, commercial law). They were the proponents of the historical legal school, who thought in terms of restoring pre-1848 law. They fundamentally opposed codification, as well as the taking over of any element of law from abroad. Part of their argumentation included that such reception would also entail adaptation, and once we need to adapt a rule to our condition, the subject of such efforts should rather be an original Hungarian law than a foreign one[16].

Neither of these two defining schools of the early codification period, however, succeeded in achieving their aims. The partial codification efforts of the period mainly drew up the judicial practice into writing, and in the course of the above, they used a mixture of Hungarian and foreign institutions, built rather on legal principles than on individual provisions of law, while being increasingly characterised by a distancing from Austrian law and looking back on the old – and, in fact, already obsolete – Hungarian institutions. From the late 1870 s, therefore, a new direction emerged in jurisprudence, which was in opposition with both of the former groups. Its proponents demanded changes satisfying the needs of the middle class and promoted the cause of a new, independently created Hungarian code of law[17]. They turned away from the historical school, refuted the tenet on the pre-1848 laws that was created by representatives of the historical school, and proved that it can be largely traced back to influences of German, Roman or canon law. Representatives of this radical school included Rezső Dell' Adami and István Teleszky, and later partly also Gusztáv Szászy-Schwarz. The jurists belonging to this smaller group are among the most prolific in terms of professional writings in the last quarter of the 19th century, and their names are linked to drawing up the most important drafts, eliminating many remnants of feudalism, and following Austrian, German and Swiss examples through the use of Roman law.

These were, therefore, the main schools of thought in the writings of the late 19th century. In the reception versus codification debate, it was eventually the notion of creating an independent code that prevailed, work on which finally commenced in 1876. The authors of the various partial drafts were guided by the aim of creating an independent, Hungarian code of law that would better satisfy the Hungarian needs (i.e. real codification), the experiences for which, they believed, had to be taken from already completed works abroad[18], primarily on the levels of principles and methods.[19]

3. Debates about the Content of the Code

With the first question thus decided, editors – as well as other jurists and legal practitioners following the codification efforts and publishing on the topic – were faced with the substantial problem of codification. This question occurred throughout the history of modern codification; it is only characteristic of the so-called "third-generation" codification works that the purpose of the code is to regulate an entire legal area (in the case at hand, civil or private law) in all-encompassing, systematic way, as a whole logical unit, rather than to provide a manual or

[14] A surprising example for this phenomenon is the case published in *JK,* vol. 21, 1886, No. 13, p. 112, in which one of the royal courts of justice in Hungary, in its judgement, declared an article of the ABGB as being effective and based the judgement on in. The same happened also at a royal district court according to a writing published in vol. 28, 1893, No. 6, p. 48. See more: BALOGH, J., Österreichisches Recht in Ungarn und in Siebenbürgen: Westeuropäische Einflüsse auf die ungarische Zivilrechtskodifikation im 19-20. Jahrhundert. In: POLASCHEK, M. – ZIEGERHOFER, A. (eds), *Recht ohne Grenzen – Grenzen des Rechts*, NY-Wien-Berlin-Paris_Frankfurt/M.-Bern, 1998, p. 123-135. and HOMOKI-NAGY, M., Das Allgemeine Bürgerliche Gesetzbuch in der ungarischen Rechtspraxis der Richter. In.: BÉLI, G., DUCHONOVÁ, D., FUNDARKOVÁ, A., KAJTÁR, I., PERES, ZS. (eds.), *Institutions of Legal History with Special Regard to Legal Culture and History*, Pécs-Bratislava, 2011, p. 137-152.

[15] HÓDOSSY, I., ibid; also 'Nyílt szó az osztrák polgári törvénykönyv recepciója mellett' (anonymously). In: *JK*, vol. 11, 1876, p. 475-477, but also closely related are the ideas of J. SUHAYDA, *Tanulmányok…*, especially p. 296, 405.

[16] Nyílt szó az osztrák polgári törvénykönyv receptiója ellen (anonymously), In: *JK,* vol. 12, 1877, p. 1-2.

[17] A forerunner of the above appeared in some opinions already in the Reform Era, in the speeches of István Széchenyi delivered in the National Assembly, when he spoke against the historical view of the law as follows: "*Es müßte neun zehntel des Werbőczyschen Tripartitums verbrennen, bevor wir überhaupt weiterkommen*" - qtd. by MÁDL, F., *Das erste ungarische Zivilgesetzbuch – das Gesetz IV vom Jahre 1959 – im Spiegel der Geschichte der zivilrechtlichen Kodifikation.* Budapest, 1963, p. 9-102, quote 99.

[18] HERCZEGH, M., *Családi és öröklési jog.* Budapest, 1874. Foreword, page IV, and DAEMPF, S., *A magánjog és tárgya, különös tekintettel a magyar általános magánjog codificatiojára*. Pécs, 1877 (hereinafter: DAEMPF) 298-299. With respect to marital property law, Herczegh emphasized the uniqueness and expressly national character of the same; by contrast, the objective that Daempf set is that "*we should not strive to have institutions of special Hungarian characters, but instead such that purely satisfy the interests of economic life, without any national traits*…".

[19] According to Sándor Daempf, for example, the Code Napoleon could serve as a model for the drafters of the Hungarian code in terms of the principle of independence, the ABGB in terms of its brevity and drafting, the codes of Zurich and Switzerland in the way the basic principles are drawn up while the Civil Code of Saxony with its proper system. DAEMPF, 289-290.

textbook-style description of it[20]. The position taken by jurists in the last third of the 19th century was that, as far as possible, *it is the existing and widely used law, together with the changes and amendments determined by political and economic needs* that must be included in the code to be created that will be intended to establish legal certainty in the field of Hungarian private law. The aim of the Hungarian codifiers was no longer the same as the aim of the "first-generation" codifiers, such as the writers of the General State Laws for the Prussian States (Allgemeines Landrecht für die Preußischen Staaten, ALR), namely that the code will render jurists and lawyers all but superfluous, but rather the objective to create a certain and authentic source of law for those working in the legal professions. As they said, it is not necessary to explain to a lawyer the individual elements of the provisions of law, since he has already learnt them as a law student. They agreed that it is not a textbook or a book on law that is needed, but rather they must create a clean, systematized collection of the fundamental principles and itemized rules, without any explanations.[21]

After the clarification of the frameworks, the bigger task was to define how a better and more complete code could be created from the point of view of substantive law. The approach from the perspective of content came to the foreground in the period examined in two stages and in two forms. The question was first dealt with by general writings on codification, which was followed by the critical discussion of the individual drafts completed and the offering of comments, where the debates concerning content elements fired up with respect to the given partial draft.

3.1 Principles

In the framework of general concepts, the legal literature of the time was strongly determined by the tenet of László Szalay drawn up during the Reform Era concerning "guiding principles."[22] We can find "basic principle"-type definitions in case of many authors, which were aimed at identifying the directions of the codification work. It was in this spirit that Suhayda stated that a *Hungarian* code must be created, in the course of the preparation of which *"the foreign and Hungarian directions of practice and scholarship must be appreciated in accordance with their respective merits"*. Taking over the reasoning used by Johann Bluntschli, writer of the code for the canton of Zurich, he argued that old rules must be reformed and renewed "in the interest of preservation"; in the course of the above, however, a "*conservative* approach must be applied." *"The legislator must also take into consideration the tenets of the school, but… must nevertheless occupy a more independent and freer position."*[23]

The debate over the content fired up, for the second time, in the course of the interpretation, discussion and evaluation of the drafts. This was because the completeness taking shape on the basis of the guiding principles mentioned above had to be supplemented in these drafts by the itemized rules of substantive law. In this respect, however, opinions were absolutely not unified concerning what rules the entire code or individual partial drafts of it should include. This proved to be the main point of conflict between the two groups of jurists, those cherishing the national elements and those in favour of radical changes. The material of law available was extremely diverse: our body of law included old Hungarian institutions (matrimonial property right, lineal inheritance, etc.), as well as elements conceived elsewhere, but taken over, accepted and incorporated into the Hungarian legal system (guardianship, compulsory share in inheritance, etc.). Thirdly, certain elements of law coming from abroad have also been imported into our legal system that served the purpose of making up for our domestic deficiencies (institutions of commercial law, real estate registry, etc.), and finally, attention had to be devoted to some then current novelties awaiting "naturalization" into Hungarian law (e.g. certain institutions of contract law). These four layers represented a mass that was almost impossible to encompass and manage in the field of private law. Very often, the most difficult question to decide was which should be included in the future code: the indigenous Hungarian rule, which has been applied for centuries, or the foreign one, which satisfies the new needs better, but has not yet been properly established in practice.

Representatives of the national, one could say more conservative school, of course, favoured the first solution. *"Legislation must first and foremost rely on the body of law already established in the bosom of the nation, to all materials lying before it; in other words, on the relationships in legal life, the space in which law has put down its roots, as well as the direction that schools and scholarship represent,"* János Suhayda wrote on this topic in his fundamental study[24]. More radical voices, however, called for not simply a compilation or consolidation of laws on the partial areas, but were

[20] On the generations of codification in the earlier legal literature EÖRSI, GY., *Összehasonlító polgári jog (Jogtípusok, jogcsoportok és a jogfejlődés útjai).* Budapest, 1975 (hereinafter: EÖRSI), p. 495. and DÖLEMEYER, B., Zur Kodifikation des Zivilrechts im Europa des 19. Jahrhunderts. In: SZABÓ, B. and PÉTER, O. M. (eds.), *A bonis bona discere (Festgabe für János Zlinszky zum 70. Geburtstag).* Miskolc, 1998, p. 329-343.

[21] This is also what Gyula Sághy says, for example, in his writing which was published as a review of the draft of the general part prepared by Pál Hoffmann. SÁGHY, GY., Általános magánjogi törvénykönyvnek tervezete Magyarország számára. In: *JK,* vol 6, 1871, p. 235-240, and also – critically – by the conservative ZLINSZKY, I., A magyar magánjogi törvénykönyv tervezetének első (általános) része. In: *JK,* vol. 6, 1871, p. 271.

[22] The significance of the elaboration of the "guiding principles" is discussed by László SZALAY ("Codificatio" in: *Publicistai dolgozatok Szalay László által*. First volume, 1839-1844, Pest, 1847. p. 19-90), especially p. 37-39. In his opinion *"all areas of law has such parts through which the others are already generated… To explore these, and starting from this position to investigate the internal interrelationships and degrees of relation between all legal concepts and tenets belongs among the most difficult tasks of jurisprudence…"* He expounded that in case of a code created as the result of failing to perform this task would result in apparent legal security only, meaning that jurisprudence would appear to be based on the code, but the actual sources of law would be different (natural law, analogy, customs, etc.). An additional threat would be that in a code based on insufficiently elaborated principles, the provisions of casuistic substantial law would be self-contradictory, giving rise to a useless, inanimate body of law.

[23] SUHAYDA, *Tanulmányok*… p. 485-486.

[24] SUHAYDA, *Tanulmányok*… p. 485.

proponents of new legislation and objective regulation[25]. Bálint Ökrös, for example, was of the following opinion: *"A collection of the existing provisions of law would only encompass in itself what the nation possesses in reality at the present time – and knowledge of this would only qualify one to be as a person who is familiar with the law. What we expect from codification, by contrast, is everything that a nation must possess – and this necessitates an ability to create. Legislators must, therefore, elevate themselves to a proper knowledge of the subject and to the higher standards of jurisprudence."*[26]

Since the question remained undecided on the level of ideas and legal literature, the positions of the authors were reflected in their individual drafts and partial drafts in the most varied way. The content of the code itself, as well as the definition of the areas of law to be covered by the code and by separate individual acts, constituted the subject of a major debate in the legal literature of the age. The starting point of the dispute was the decision of the national assembly whereby, on the basis of the twelve-member committee appointed in charge of the tasks of the national assembly, the tasks of the subcommittee of codification were defined and the subject areas of codification work were determined. Accordingly, at its meetings held on 25 and 28 May 1866, the subcommittee established its own work order, according to which the preparation of the codification work would take place in eight subcommittees[27]. From among these, addressing issues of substantive private law in the actual, narrower sense of the word, was designated as the task of two, while the other subcommittees were put in charge of preparing certain acts in the areas of mining law, commercial law, copyright, etc. This system itself generated criticism and debates, even before the actual work would have been started[28].

3.2 Statutory Law or *consuetudo*

Within questions of content – already with respect to the actual tasks – the mutual relationship of statutory law and *consuetudo* emerged as a further topic of debate. Since in the debate of "unwritten consuetudinary law" versus "written code of statute law" the latter prevailed – sources seem to suggest, by the 1870 s, in a final way – now the proportion of the two became debated. Can the existence of the code exclude the further application of customary law, or should there still be some leeway for the application of the latter also? Monoists (those who consider statutes as the exclusive source of law) and dualists (those who would, in addition to statutes, would also acknowledge the effect of particular or national *consuetudo*[29]) were in a struggle, and as examples, they quoted the results of codification so far. Based on an examination of these results, we can differentiate between three stages of development in the history of codifications in the modern era[30]: the first codes, such as the Prussian ALR and the Austrian Civil Code (ABGB) did not raise the problem of the conflict between the two sources of law: they considered it evident that statutory law overwrites customary law.[31] Second-generation codes of statute contained no provisions concerning customary law: the period of prohibition was replaced by "toleration." Works in the third stage, and especially openly the Swiss code, directly declare that judicial law-making is even desirable.[32] (Huber, the editor of ZGB, abandoned the conviction that a few thousand sections of law could possibly cover the wealth of situations that life could present.)

The decision of Hungarian lawmakers was made more difficult by the fact that judicial practice has played an extraordinary role in the unification of Hungarian law. The decisions of the Curia (Supreme Court) eliminated legal loopholes, as well

---

[25] The opposition of the two schools is shown, for example, by the contrast between the positions represented in the remark on page IV of the Preface to the book of M. HERCZEGH titled *Családi és öröklési jog* (Budapest, 1874) and on page 298-300 of the work by S. DAEMPF quoted above. With respect to marital property law, Herczegh emphasized the uniqueness and explicitly national character of the same; by contrast, the objective that Daempf set is that "*we should not strive to have institutions of special Hungarian characters, but instead such that purely satisfy the interests of economic life, without any national traits…*"

[26] ÖKRÖSS, Codificatio. In.: *JK,* vol. 2, 1867, p. 98.

[27] The report of the meeting of the subcommittee is discussed by B. HORVÁT, committee raporteur, in *JK,* vol 1, 1866, p. 382-384.

[28] E.g. ÖKRÖSS, Codificatio. In: *JK,* vol. 2, 1867, p. 347.

[29] HOMOKI-NAGY, M., A szokásjog hatása a magyar magánjog fejlődésére. In: NAGY, J. (ed.), *Szokásjog és jogszokás I-II*., Szekszárd, 2016, p. 165-175., BALOGH J., Magánjog a XIX. század végén Magyarországon. Katona Mór 1899-es kiadású rendszeres magánjoga elé. In: KATONA, M., *A mai érvényű magánjog vezérfonala.* Budapest, 2008, p. 9-24. and HOMOKI-NAGY, M., A polgári kori magánjog kialakulása, In: MÁTHÉ, G. (ed.), *A magyar jog fejlődésének fél évezrede*, Budapest, 2014, 269-290.

[30] EÖRSI, p. 495.

[31] ALR: I. Introduction 3.§ *"Gewohnheitsrechte und Observanzen, welche in den Provinzen und einzelnen Gemeinheiten gesetzliche Kraft haben sollen, müssen den Provinzial-Landrechten einverleibt sein."*
4.§ "Insofern aber durch Observanzen etwas bestimmt wird, was die Gesetze unentschieden gelassen haben, hat es, bis zum Erfolge einer gesetzlichen Bestimmung, dabei sein Bewenden."
60.§ *"Sowenig durch Gewohnheiten…neue Gesetze eingeführt werden können, ebenso wenig können schon vorhandene Gesetze auf dergleichen Art wieder aufgehoben werden."*
ABGB 10.§ *"Auf Gewohnheiten kann nur in den Fällen, in welchen sich ein Gesetz darauf beruft, Rücksicht genommen werden."* (This way, the ABGB practically eliminated the application of customary law, and derogated all previous laws and lawful customs not included in the code.)

[32] ZGB: Art.1 *"Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut oder Auslegung eine Bestimmung enthält.*
Kann dem Gesetze keine Vorschrift entnommen werden, so soll der Richter nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die er als Gesetzgeber aufstellen würde."
In the German BGB, this issue was regulated by the enacting law, in accordance with the local characteristics: EGBGB (18 August 1896): Art.1 Abs.2*: "Soweit in dem Bürgerlichen Gesetzbuch oder in diesem Gesetze die Regelung den Landesgesetzen vorbehalten oder bestimmt ist, daß landesgesetzliche Vorschriften unberührt bleiben oder erlassen werden können, bleiben die bestehenden landesgesetzlichen Vorschriften in Kraft und können neue landesgesetzliche Vorschriften erlassen werden."*

as further developed old institutions. Its in-principle decisions were binding on the courts, and therefore, the application of this type of *consuetudo* has put down deep roots in Hungarian legal thinking.

3.3 General Part

From among the content-related characteristics of the code, the biggest debate was caused by the creation of the structure itself, and together with this, the necessity or superfluousness of the general part. In accordance with the tradition approach, legal scholars so far divided private law into three parts. This division was based on Roman law, as well as on the fact that this branch of law addresses, on the one hand, property-related, and on the other hand, on personal issues. Therefore, a distinction was made between the parts dealing purely with persons, purely with property, and with a mixture of the two, thereby establishing the classic division of 'persons – things – obligations'. The new codification efforts at the end of the 19th century, however, abandoned this classic triad, and established a new system (Pandektensystem), in which inheritance law, and in certain codes also a general part, was also included. The Hungarian authors also followed this division, and worked accordingly in all phases of the codification – with a little change.

The creation of a general part was already part of the tasks assigned to Boldizsár Horvát, minister of justice, for 1869, and works in this respect already started in that year.[33] During the debate on the budget of 1870, the minister of justice requested the allocation of fifty thousand forints for the purpose of codification, and also expressed his desire and plans for setting up a separate codification committee. His proposal, however, did not proceed in a direction that would have been favourable for him: the general assembly did set up the committee, but placed it under the supervision of the minister of interior, rather than the minister of justice, and put them in charge of quite different tasks. The committee lost the actual concept and meaning of codification not only in its name, but also in its activities: it (merely) became a legislative preparatory committee.[34]

Even in this environment, however, it remains a fact that, as the first completed part of the Hungarian code of private law, on commission by Dr. Pál Hoffman, minister of justice, he prepared and published in 1871, the draft of the first (general) part of the Hungarian code of private law, together with its commentary. The direct antecedents of the legislative tasks to be carried out with the code – as also discussed by the author on the pages of *Jogtudományi Közlöny*[35] – were the most recent, approximately 40-year-long development of public life; however, a mode of solution (similarly to the earlier, pre-1848 period) was not offered by this period either[36].

Pál Hoffmann summarized the general principles applicable to the entire code in 225 sections, which – as also emphasized by the abundant criticism published on the pages of *Jogtudományi Közlöny* – is quite a profuse number. As the author claimed, the weight and significance of the general part is inherent exactly in the fact that Hungarian jurisprudence had not dealt with this issue previously. As models, the author used the ALR, the Code Civil, the ABGB, the Civil Code of Saxony, as well as the code for the canton of Zurich, and in the general justification he enumerated exactly on the basis of what criteria he decided on these.[37] This completed draft of the general part, however, became definitely worthy of remembering by posterity because its author laid down some basic principles and general rules which could then become guiding for the entire code.[38]

As a result of the long debates on the question of the general part, this notion was finally abandoned in 1895, in the third major wave of the works. As the reason for voting against it, the aimlessness of the general part was identified: on the one hand, since it is not a textbook, there is no need for an explanatory part of general nature; on the other hand, a code of law must contain specific rules, and the place of these is where they belong most strongly on the basis of logic and the content of the provision, and then in case they are also applicable somewhere else, this can be indicated, but it is not necessary to create a separate part for this purpose. As further arguments quoted by the codifiers participating in the preparation of the first complete code and its explanatory notes, the introduction of such a chapter would make the rules too abstract and colourless.[39] Abstract laws are quite difficult to understand even for trained jurists, and are altogether incomprehensible for an educated layperson. The advantage that can be derived from creating general legal concepts is mostly apparent only, since the general rules may change in the particular part to such a great extent that they may even lose their general significance. The creation of such rules could only be justified by the definition of the effect of the law, as well as the relationship between the code and other sources of law. This, however, can be done in the a few sections in the introductory provisions, and does not require a separate chapter.

3.4 Form and Language of the Code

After the decision on issues of substantive law, there were still a few questions of form before the Hungarian code of law

[33] Report in *JK*, Vol. 7, 1872, p. 282.
[34] DÁRDAY, S., A törvényelőkészítő bizottság. In: *JK*, Vol. 7, 1872, p. 213.
[35] HOFFMANN, P., Általános indokok a m.k. igazságügyminiszter megbízásából Dr. Hoffmann Pál egyet. jogt ur által kidolgozott magánjogi törvénykönyv (Általános rész) tervezetéhez. In: *JK,* Vol. 6, 1871, No. 31-32; the text of the draft was published by the Ministry of Justice, Pest, 1871.
[36] The condemning contemporary criticism given by the permanent committee of the 3rd Hungarian Assembly of Jurists was phrased as follows: "in the present (i.e. post-1867) operation of legislation, one cannot recognize any systematic planning and logical, sequential structuring." See in *JK*, Vol. 7, 1872, p. 282.
[37] HOFFMANN, P., Általános indokok a m.k. igazságügyminiszter megbízásából Dr. Hoffmann Pál egyet. jogt ur által kidolgozott magánjogi törvénykönyv (Általános rész) tervezetéhez. In: *JK,* Vol. 6, 1871, p. 232 -233.
[38] Ibid p. 232. The basic principles listed: clarity, legal equality, the freedom of provision ("in the matters of property"), as well as codification in the actual sense and pertaining to the entire body of substantive private law.
[39] *Indokolás a magyar általános polgári törvénykönyv tervezetéhez*. Vol. I-V. Budapest, 1901. (hereinafter: Indokolás), Vol. I, Introduction, p. XII-XIII.

could be born. The first concerned the actual form in which the material devised in accordance with the above would be cast. The elaboration of the general principles and directions of the drafting of the law was also laden with difficulties, as a middle way had to be found between an excessively vernacular style and a code written in almost incomprehensible jargon. The writers of the code eventually settled on simple language and brevity in the provisions, striving at the same time for professional clarity, conciseness and definitive phrasing. Following in the footsteps of Savigny, already Szalay found this as an important requirement[40], and summarized his recommendations for the drafters of the text in four points[41]. The text should be:

- *clean*, containing only the will of the legislators, and no contradictory opinions;
- *simple*, effecting the reader not in a visual way and avoiding unnecessary repetitions;
- *succinct*, in other words, duly short and concise, and finally
- *dignified*, inherently expressing the truth, communicating calmness and strength, thereby commanding respect.

Concrete expressions must be given precedence over any exuberant or excessively abstract phrasing. However, this task was made more difficult by the lack of many technical expressions and legal terminology in the Hungarian language. Although in comparison with the products of the large wave of codification in the Reform Era, such as those in the area of commercial law written in the 1840 s, the drafts created in the last third of the 19th century, including the draft of the general part, were written in ornate Hungarian language (and dispensing with providing the German equivalents in parentheses), critics still found fault with it[42]. Based on the assumption that it was not a textbook that Hungary needed, subsequent codification committees already tried to consciously eliminate definitions and other explanations, and adhered to the principle of *"lex imperet et ne disputet."* As also demanded by Szalay, the aim was to lay down the guiding principles, and therefore, legislators tried to avoid casuistic regulation. Many studies dealing with the issue of codification set forth that a code is not able to regulate everything, and it cannot be its purpose either; therefore, it attempts to provide a flexible regulatory framework, thus making it easier to adapt to changing conditions.

4. Organizational framework

Laying down the principles of good drafting, however, was still not sufficient to guarantee a successful code. The next important question of form concerned the organizational framework in which the drafts would be created. Two methods of codification emerged in Europe, both of which were studied by the Hungarian codifiers: either they put a single person, someone enjoying the trust of those in power, in charge of drafting the entire code (e.g. Eugen Huber, the writer of the code for the canton of Zurich), or they set up a committee with a certain number of members (e.g. in the course of the drafting of the German BGB), who will divide the work among themselves, and then align the results.

In Hungary, ministers of justice always used this latter approach, as a result of which more or less permanent committees with numerous members operated in the various stages of the codification process.

There was a lengthy debate on which of these approaches are better. Those arguing for a single person being in charge of writing the code insisted that by ensuring the logical unity and evenness in the drafting, there is a better likelihood for avoiding any areas to be missed or overlaps to be included.[43] Opponents of this approach, on the other hand, claimed that the resulting code would reflect the way of thinking of a single individual, together with all imperfections inherent in such a situation. By contrast, if several people were put in charge of the drafting, multiple views could be incorporated into the text.[44]

It should also be added, however, that the practice in case of the work done by a committee was also that each member of the committee would be put in charge of a part of the draft code, and as a result the individual, personal perception and approach of that individual would be reflected in the given part, and on the other hand, the entire legislative and codification process contained opportunities for control that could counterbalance a one-side approach.

Finally, among the formal tools we should also mention what is the most important stage from the perspective of the final product of the codification effort, the actual process of creation, namely the mechanism as a result of which the code was produced. After the decision on the person(s) who would submit the draft versions, the path had to be drawn up through which the draft code would be shaped and eventually approved in its final version, which was likely to be quite different by that time. Several models were available for Hungarians also in this respect. It was primarily the German model that was taken into consideration, as the one best reflecting the spirit of the times. German codifiers proceeded with due thoroughness: the work of the various codification committees was often reviewed, published, and modified by the commit-

[40] Szalay: *Codificatio* p. 39.

[41] Ibid p. 90.

[42] In the course of the critical review of Hoffmann's draft, e.g. Gyula Sághy *JK* Vol. 6 (1871) p. 235-240; while on the draft of the specialized committee of 1884-85 on inheritance law, e.g. Konrád Imling, *JK* Vol. 22 (1887) p. 97-98.

[43] E.g. SZALAY, L., p. 49-58 and DAEMPF, S., p. 290-291. Although Szalay (emphasizing that of course this would be the most desirable) comments that in case this method was difficult to realize, it is not indispensable, while Daempf also adds that the hands of the drafters of the text should not be too bound too strictly by giving them specific instructions, but that the creation of the system and the basic principles should be left to a decision at their own option.

[44] Serving as the basis of this consideration was the work of the German codification committees, which was discussed and analysed in the contemporary issues of *Jogtudományi Közlöny* and *Magyar Igazságügy* by numerous authors.

tees of various compositions appointed by the Bundesrat.[45] The Austrian method was also noteworthy, which used several stages of review, asking the opinions of various persons, ranging from the committee of justice appointed by the court, the state council and also the public. The practice of disclosing the draft version to the wider public was also deemed suitable by Hungarian jurists, and they drew up their proposals accordingly. In terms of professional aspects, the position of Szalay (relying on the concepts of Jeremy Bentham) proved to be quite future-proof, as it was also evoked by legislators at the end of the century – with adjustments to the circumstances of the age. The opinion of Szalay was that an elected committee should be put in charge of elaborating the principles of the code, since the parliament "would not be a suitable forum for the discussion of the code, due to the large number of members, which would result in a disruption of the unity of the system". Within the elected committee, each member should be put in charge of drawing up a first draft, who would then serve as the rapporteur of the given passage, similarly to the system of "Referat" used in Germany. An important element of the concept was that the state should publish the draft in order to allow sufficient opportunities for the expression of opinions, and then the text – taken together with the criticism – should be reworked, and only submitted to the Parliament for voting afterwards[46].

Sándor Daempf, who devoted an entire monograph to the topic of codification in 1877, submitted his own proposal. In his opinion, the first draft, drawn up by a person put in charge of the given part, should be published immediately. A competition with an award should then be announced for the "evaluation" of these, thereby contributing to more effective work. A respectable committee, consisting primarily of legal practitioners should then review the draft, which would be followed by yet another round of disclosing to the public, but this time also including the minutes of the committee discussing the draft.

All of these principles were put into practice to varying degrees in the course of debating the codification drafts in the 1870 s and 1880 s. The periodical *Jogtudományi Közlöny*, which is in the focus of this study, gave a wide scope of publicity to all drafts prepared, and also to the criticisms they received.

5. The Drafts of a Hungarian Civil Code

As mentioned before, the first real appointment for codification work was given by Boldizsár Horvát, minister of justice, to professor Pál Hoffmann, to draw up the general part. The proposal, however, was found useless both by the Supreme Court and by the critics mentioned above. Still in the same year, Ignatz Dietrich, attorney-at-law, prepared his own counterproposal. The comparing of these two concepts generated fierce professional debates on the necessity of the general part, which lasted until 1895.

After the unfavourable reception of Hoffmann's draft, codification appeared as a lost cause. Jurisprudence rather concentrated on partial areas, such as on commercial law. After the creation of the Act on Commerce, however, the issue once again came to the surface, as lawyers demanded a unification of the different areas of private law. The work aimed at the creation of an independent Hungarian code of law finally commenced in 1876. From this time forward, it was the technique of committee-based work that was used in Hungary. Four experts were put in charge of drafting the parts. *Elek Győry* was responsible for creating the general part, *István Teleszky* was put in charge of inheritance law, *Endre Halmossy* of property law, while *István Apáthy* was tasked with writing the part on the law of contracts. This committee published the competed partial drafts between 1880 and 1885.

The general part and the part on inheritance law were completed first (1880-82), followed by the other two chapters two years later. The drafts generated very fierce debates and strong criticism from contemporary experts. On the whole, the legal profession was mainly negative in its opinion, emphasising that even though the individual chapters were written as a part of a theoretically unified code, but in practice they are not built upon each other either technically or from a legal aspect.

The criticism concerning the individual parts was not much better either. There was fierce debate concerning the general

[45] The brief outline of the German mechanism: MOLITOR, E. - SCHLOSSER, H., *Grundzüge der Neueren Privatrechtsgeschichte* 2. Aufl. Karlsruhe, 1975, p. 84-89. and WESENBERG, G. - WESENER, G., *Neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Rechtsentwicklung* 3. Aufl. Lahr/Schwarzwald, 1976, p. 189-192, as well as SCHULTE-NÖLKE, ibid.:

- 1874: the Bundesrat set up a five-member preparatory committee to elaborate the proposal for the civil code, the task of which is to lay down the principles to take into account in the creation of the code, as well as to establish the applicable time schedule;
- on the basis of the above, still in the same year, a committee was set up with eleven members, in which the selection of five editors was dictated by the system of the work itself: one was needed for each of the areas of the law of contracts and for family law, one for the combined area of marital property law and inheritance law, and two for the area of property law. Members of the committee included both theoretical experts and legal practitioners (six judges, three counsellors in the ministry and two teachers), but they did not hold regular meetings. Therefore, a permanent secretary's office also had to be organized alongside the committee;
- 1887: the drafts have been completed, which were delivered, together with the justification (*Motiven*) to the chancellor. This was the basis of the first reading;
- in order to allow the drafts to be critiqued, the texts were also published in print;
- 1890: due to public pressure, a new committee was set up, and the result of their work, the decisions and the partial drafts are published in the specialized periodicals weekly;
- 1895: the second draft is submitted to the legislative body;
- 1897-99: The Protokolle, the justification given to the second draft appears in print;
- 1896: after some further modifications are introduced, the Bundesrat approves the final text.

[46] SZALAY, *Codificatio* p. 53-58.

part written by Győry[47] (including in respect of the question of necessity mentioned before), while the part written by Teleszky in inheritance law was blamed for being "un-national."

In a series of articles published in *Jogtudományi Közlöny* over the course of half a year, István Teleszky already outlined his ideas concerning the role and evaluation of inheritance law, as well as the possible systems of inheritance and the Hungarian traditions.[48] As proof of its thorough preparation, the articles present, interpret and contrast the principles and the practice used internationally and in modern codes, after which Teleszky puts forward his own propositions. He provides a survey of the works and declarations of authors supporting the individual systems of inheritance (and of the traditions thoroughly upset by the ITSZ, e.g., in case of the issue of lineal inheritance, a question of particular significance, he also discusses the arguments of Pósfai and Vida, who were in favour of it), after which he puts forward a very progressive proposal (as far as the evaluation by posterity would see it), which turned out to be the only draft prepared in the period that would be submitted for a debate before the Parliament (in 1886-87). In his work, Teleszky used general, abstract principles, avoided casuistic regulation, and found a way of keeping such elements of inheritance law (considered to be traditional Hungarian, despite their foreign origins) as, for example, family fee tails, which were intended to ensure that "*the large estates of a few Hungarian families shall be preserved, and the alienation of such estates be prevented*"[49]. His reform ideas grounded in contemporary international developments of law and new theories of legal scholarship – exactly due to this reason – were obviously criticised very harshly by representatives of the nationalist school of thought (Herczegh, Zlinszky Imre,[50] Grosschmid), and Szladits also wrote disapprovingly about him as someone who "ill-treated our country's system of inheritance."[51] This criticism, however, can be considered as unfair in light of the author's own position: *"neither in general, nor in case of the large work of private law codification do we desire that the legislation should prepare a* tabular rasa *by way of ignoring the entire development of legal history, or that the steps of legislation be governed only by stiff theories and foreign institutions; instead, what we wish is that in the drafting of the code, with due consideration given to our given conditions, the criteria of rightfulness and expediency be taken into account, if possible, in harmony with the development of legal history and the people's perception of what is just; but that in cases where the latter is conflict with the requirements of rightfulness and expediency, they should be abandoned as competing criteria."*[52]

The draft code consisting of 467 sections, along with the explanation, were published by Teleszky in 1880-81 in *Jogtudományi Közlöny.*[53] This text, as well as the draft reworked by the expert committee and published in 1884-85 served as the basis of professional discussions and criticism for years. Otherwise, the reworked version – apart from the fact that it altogether abandoned the notion of lineal inheritance – did not significantly differ from Teleszky's draft in terms of its principles and main provisions. The result of the above was, however, that inheritance law (as the part of the civil private law code that jurists of the time expected as the first part to enter into force) was subjected to international and domestic reviews. *Jogtudományi Közlöny* published the review of professor Kohler of Würzburg, which was based on a rough translation, but was essentially to the point,[54] as well as the proposed amendments submitted by Pfaff and Hoffmann, professors in Vienna and authors of the prestigious commentators of the ABGB, or "reviewing marginal notes,"[55] as they called it, as well as other reviews of the Hungarian draft(s) that had appeared abroad. From among the domestic commentary on the draft, some of the most significant proposed amendments were submitted, among others, by the Budapest Bar Association,[56] in the issue of lineal inheritance by Gusztáv Szászy-Schwarz, and in his lecture given at the Association of Jurists, by Ignác Barna.

The image of the codification process was subsequently shaped by Dezső Szilágyi, minister of justice, who brought the systematization of the partial areas into the foreground. It was during his mandate that the Act on Marriage (1894) was passed, the basis of which was the part of the code on family law, completed in 1891. This was the work of four jurists: the section on personal family law was drafted by *Elek Győry*, the one on marital property law by *Béni Grosschmid*, the part on guardianship and conservatorship by *László Sipőcz*, while the part on the legal relationship between parents and their children by *Lajos Králik*, which means that these parts were the work of practising legal professionals (and, also importantly, showed a strong influence of the ABGB).

The provisions governing marital law were also hotly debated by the legal professionals publishing in *Jogtudományi Közlöny*. A large number of writings were produced partly in the 1880 s, and partly (in connection with the adoption of some acts on church policy) in the early 1890 s.

Based on the writings of *Jogtudományi Közlöny*, however, codification efforts seem to have come to a standstill in this period.

---

[47] In 1880, the author published his draft consisting of 186 sections, as well as its general and detailed justification. GYŐRY, E., *Az általános magyar magánjogi törvénykönyv tervezete Általános rész Általános indokok*.

[48] TELESZKY, I., Öröklési jog. In: *JK,* vol. 11, 1876. No. 25-52.

[49] TELESZKY, I., ibid. In: *JK*, vol. 11, 1876, p. 458.

[50] ZLINSZKY, I., A törvényes örökösödési rend kérdéséhez. In: *JK,* vol. 11, 1876, p. 425-426. The starting point of his reasoning, however, in which he criticizes Teleszky based on an evaluation of the rules of lineal inheritance as being "un-national", are in fact based on a misinterpretation of the quoted provision of the ITSZ.

[51] SZLADITS, K. (ed.), *Magyar magánjog.* Budapest, 1941, vol. I, p. 99.

[52] TELESZKY, I., ibid. In: *JK*, vol. 11, 1876, p. 405.

[53] *JK,* vol. 15, 1880, No. 41-42, 44, 46, 49, 51.

[54] *JK,* vol. 22, 1887, No. 48-51.

[55] KOHLER, J., In: *JK,* vol. 23, 1888, No. 4, 8, 14, 19, 23, 29, 44, 44, 49, as well as vol. 24, 1889, No. 3, 5, 8, 13, 25, 31, 33 and 35.

[56] See in *JK,* vol. 27, 1892, No. 25-26.

Writing on the debate of the budget of the Ministry of Justice for 1894, one of the authors was disappointed to report that "*we can conclude that, apart from the proposed law on inheritance, all codification reforms have been postponed…*"[57]

At the end of 1894, Sándor Erdélyi followed Dezső Szilágyi as minister of justice, and he once again rekindled the efforts aimed at the creation of a general collection of civil law provisions drawn up in a code of law. In 1895, he set up a permanent committee under the supervision of the Ministry of Justice. The task of this committee was "*to prepare the unified and systematized draft of the civil code, with attention to and building upon the laws in the field of private law and currently in effect in Hungary, the statutory customs and existing draft bills, the writings of jurisprudence and legal literature, as well as the legal developments of civilized foreign states*"[58]. *Béla Vavrik* was appointed as the chairperson of the committee, while its editor members included, for example, *Grosschmid* (marital property law), *Sipőcz* (relatives, legal capacity), *Konrád Imling* (property law), *Lajos Thirring* (law of contracts), and *Gusztáv Szászy-Schwarz* (personal law, inheritance law).[59] From April 1897, the committee continued its work under the leadership of *Bertalan Lányi* (personal law), and its consulting members also included *István Teleszky* and *Elek Győry*. The work of the committee was also assisted by supplementary members, such as secretaries, clerks, and junior clerks of the Ministry of Justice, such as *Károly Szladits*. The organization, relying mainly on the work of legal scholars (their ranks included six professors) worked very actively, on the basis of its own rules of procedure, from 1897.[60]

In February 1899, however, the person of the minister of justice changed once again. Under the supervision of the new minister, Sándor Plósz, the cause of substantive private law was once again pushed into the background. Although in 1899 the members of the committee – in a new setup and partly along amended guiding principles – started the writing of the first draft, after the presentation of their work to the minister of justice, the issue was once again put on hold. The only result accomplished was that that text of the first draft, together with the commentary, was made publicly available with "criticism invited."

6. Text and Content of the "First Draft" of the General Hungarian Civil Code (1900)

If we examine the so-called "first draft," i.e. the 1900 draft version of the general Hungarian code of private law from the point of view of the previously discussed criteria, we can find the following:

As mentioned before, the question between reception versus codification was finally decided in favour of the latter. This is undeniable even if the global effect of the German BGB, as well as the partial effect of the civil codes of Zurich, Switzerland and in some places of the Austrian Civil Code can be clearly felt on it. In addition, in some places, where possible, the traditional, national legal institutions were also kept. With respect to the national character of the code, there were jurists defending it as Hungarian in character as well as critics blaming it for being foreign and un-national, even though it was a clear and accepted tenet that the national character may not be an objective that must be aimed for at all cost, as there are objective obstacles in the way of such efforts. Nevertheless, it should be noted that in areas where it was most possible, the draft strove to preserve as much from the existing national law as possible. This can be best observed (and in view of the affiliations of the author, this is also natural to some extent) in case of the part on marital property law edited by Grosschmid. This area, however, is such a part of private law that, as a consequence of the traditions and of judicial practice, is altogether different from both the German and the Swiss system. In the provisions concerning women's property, dowry and jointly acquired marital property, the aim set by the example was the restoration and preservation of the nature of these institutions they had under the earlier system of law.[61] From this perspective, Imling deserves praise, since in the drafting of the provisions concerning property rights, and especially those governing real property, he hardly departed from the foundations inherent in the existing legal basis.[62] The next noteworthy conservation of older legal institutions occurred in the field of inheritance law, for example, in connection with the compulsory share in inheritance, legacy, the acquisition of inheritance *ipso iure*, etc.[63] Szászy-Schwarz implemented some radical innovations, however, by way of not including in the statutory regulations the institution of family councils, which was earlier established on the basis of the German model, but the practical utility of which was not justified, and he also abandoned the concepts of *dos regalis*, the natural and statutory guardianship of the mother, as well as an already obsolete institution of the old law, widow inheritance (*successio vidualis*).

In the eyes of the committee, the maxim of "entire code" was manifested in the creation of the "entire code of substantive law." The members agreed that the areas regulated by separate laws (e.g. the laws of fisheries, forestry, mining, expropriation, marital and commercial law, etc.), as well as the now obsolete

[57] Az igazságügyi költségvetés vitája, (anonymous, signed *x.y.*) In: *JK,* vol. 28, 1893, p. 369. The author gave voice to his disappointment that all legislative preparatory action was halted until such time when the acts on church policy are passed by Parliament, and doubts whether this would take place in the foreseeable future.

[58] *A magyar általános polgári törvénykönyv tervezete*. First draft, 2nd ed. Budapest, 1900, Preface, page III.

[59] According to information received by *Jogtudományi Közlöny*, the minister of justice also invited Arthur Jellinek into the committee – see in: *JK,* vol. 30, 1895, p. 417. – however, in 1897, the final list of the committee members are also published (p. 352), and in the introduction to the justification of the published draft, the name of Jellinek is not included as an editor.

[60] In its issues in 1898 and 1899 (volumes 33 and 34), in the column titled "Különfélék" (Various items), *Jogtudományi Közlöny* published writings on the various questions discussed and positions adopted, and then the draft itself was also printed in vol. 35, 1900, No. 45.

[61] *Indokolás I.*, p. 193-246, MENYHÁRTH, p. 453-454., etc.

[62] E.g. in the provisions concerning the acquisition of property, the change in the owner, easement rights and pledges. *Indokolás II.*, p. 201-348, 442-492, 595-597.

[63] *Indokolás V.*, p. 173-195, 284-341, 342-383.

parts of the national law (e.g. legal relations surviving from copyhold tenures, joint tenancy) could not constitute part of the code, and therefore, these were omitted from it. When defining the scope of the code in terms of content, therefore, the drafters were guided by the notion of private law being a separate branch of law. Elements of public, administrative and procedural law also had to be omitted. These objectives, however – especially in terms of procedural law – could not be satisfied in 1900. This is how, for example, personal law also included rules governing administrative and civil procedures related to children.

Based on research into the relationship between statutory and customary law, we can conclude that the Hungarian proposal no longer proclaimed, on the level of principles, the antagonistic opposition or subsidiary relationship between these two sources of law. Győry's proposal originally recognized customary law as a subsidiary legal norm,[64] but later, during the debate of the draft in the Ministry of Justice, the decision was made to erase this measure, which position remained the defining one also subsequently.[65] It was not considered as necessary to lay down as a general rule which is primary and which is subsidiary. In case of the existence of a code, it clearly has priority, in fact the authors would also claim exclusivity. This question never emerged with such force that it would have been necessary to separately address it in the text of the law, and if there had been a need to address it, the question of where to include it would have been problematic.

This was because even though the problem of structure was solved by the drafters by way of taking over the German *Pandektensystem*, but – as a result of the debates mentioned above – by 1900, the general part was omitted from this structure. Therefore, any rules applicable to the entire code could not be summarized at the beginning of the code either. Instead, moving beyond the reasons for the omission of the general part, as discussed above, the editors argued for the justification of an independent chapter on personal law. In the course of this, they primarily referred to traditional codifications (ALR, ABGB, Code Civil), as well as to Roman law as the ultimate foundation (the classic division of '*personae-res-actiones*'), thereby going against the previous drafts and the German model. The latter rejected the separate personal law part on the basis of the reasons quoted by Savigny, who emphasized that the existence of such an independent part is not justified because "*we cannot talk about subjective personal (personality) law, and personality itself is only a precondition of the other areas of law*."[66]

By contrast, the Hungarian drafters would have considered it mistaken if the code had dispensed with an independent part on personal law, arguing that the entirety of personality law could not have been included in the general part, while covering it in scattered parts would have resulted in mistakes, deficiencies and a loss of interrelationships. The relevant part of the Justification reflects a surprisingly modern perception of law, a claim for the universal, complete protection of rights attached to the personality. As it writes, dispensing with the part on personal law "*would have entailed the disadvantage that it eclipses, or at least does not properly express, the real nature of such rights, and it also fails to satisfy the criterion of legislation, otherwise meriting equitable treatment, that these rights, aimed at the protection of the most general and most precious rights of all human beings, should be given the attention in a way comparable to their significance.*"[67]

Also related to the question of editing is the distinction between natural and legal persons. The BGB, which was the main model used, reached back to the traditions of Roman law, and also influenced by natural law and Savigny, discussed the two separately. Hungarian legislators, however, decided otherwise, mainly following in this respect the codes of Zurich and Switzerland. The reason for this can be sought, on the one hand, in their rejection, on the level of principle, the distinction between a "natural person" (human being) and a fictitious person (legal person), with the latter "having no natural existence", and the argument that human beings gain their personality from the legal system, just as legal persons. On the other hand, they wanted to avoid the verbosity of the German code, which they considered unnecessary for not really containing actual, specific provisions. Such critical differences can be otherwise found in the entire structure of the draft.[68]

As discussed above, in terms of the technique of drafting, the legislators followed the method of working in committees. What has not yet been discussed, however, is the coordinating activity of the editorial committee, which consisted of ensuring harmony between the individual parts in terms of both content and style. For the purpose of clarifying their disputes arising in the course of preparing their drafts, members held two types of forums: editorial committee meetings and full committee meetings. From late April 1897 until September 1899, a total of eighty editorial committee and twelve full committee meetings were held, which was followed by an additional thirty-five committee meetings to harmonize the partial drafts. The minutes of these meetings were also published in print, and every week *Jogtudományi Közlöny* reported on the progress made in the editorial committee of the Hungarian general civil code. The objective of the committee would have been the creation of a *whole* from the individual works, but as the criticism of the draft, also published in subsequent years in *Jogtudományi Közlöny*, this was not fully accomplished.

It is worth saying writing briefly, however, on the disclosure mechanism, which was a much debated topic in our country.

---

[64] In the 1880 issue of *Általános indokok*, customary law may be taken into consideration in the scope of private law with attention to Sections 2-4 of the first title. It is interesting to note that, according to Győry, appliers of law should reach to customary law in all such cases where "the text of the law is obscure" and its meaning cannot be determined "relative to the otherwise apparent will of legislation" either.

[65] *A szaktanácskozmány jegyzőkönyve*, Vol. I, p. 8., as well as KISS, M., A német polgári törvénykönyv tervezete, különös tekintettel a magyar általános magánjogi törvénykönyv tervezetére. In: *Magyar Igazságügy,* vols. XXX. and XXXI, serialized, 1888, vol. XXX, p. 84.

[66] *System des heutigen Römischen Rechts*, Vol I., p. 335 *ff*. Qtd. in: Indokolás p. i, Bevezető p. ix.

[67] *Indokolás* p. i, Bevezető p. xi.

[68] Hedemann, Justus Wilhelm: "A magyar tervezet és a német polgári törvénykönyv." *Jogállam* 1916. p. 536-547, as a positive evaluation of the German influence.

An article was published already in connection with Hoffmann's draft, which complained about the lack of possibilities and sharing criticism.[69] In the course of 1901 and 1902, in addition to the text of the first draft, an extended commentary, in five volumes, was also published, thereby creating the opportunity for "criticism arising in the widest possible circle"[70] to appear. The evaluation and processing of the abundant critical material lasted all the way until 1906, and this served as the basis of the reworking, for example, of the part on property law, as well as for the subsequent second text.

7. Conclusions

It could not have been our intention in the confines of this short article to provide a comprehensive analysis of the influence of *Jogtudományi Közlöny*, and therefore, we did not extend the scope of our discussion to areas outside of substantive private law in the strictest sense of the word (even though *Jogtudományi Közlöny* was similarly active also in other areas of law; for example, one could highlight its regular publications on substantive and procedural criminal law, the real estate registry system, as well as important international events in the world of law and its reviews of the most important foreign publications). It has acquired particular significance, however, on the topic of the creation of the code of private law, despite the fact that a host of other contemporary legal journals also undertook the same task[71]: it published articles by the most prestigious authors, including those involved in the codification process, and also frequently by ministers of justice. All of the above support the claim that, on the wide scale of legal periodicals of the age, *Jogtudományi Közlöny* can be considered to have defining importance.

[69] A polgári törvénykönyv általános részének tervezete és a Kritika (no author). In: *Magyar Igazságügy,* 1875, vol. 3, p. 149-150.

[70] With the phrasing of Bertalan. Lányi. LÁNYI, B., A Polgári Törvénykönyv javaslata a Parlament előtt. In: *Jogállam,* 1916, p. 20-33.

[71] A non-comprehensive list of the rich offering of legal journals published at the time: *A Jog, Jogállam, Jogi Értekezések, Jogi Szemle, Jogtudományi Szemle, Magánjogi Kodifikáczión k, Magyar Igazságügy, Magyar Jogász-Újság, Magyar Themis, Ügyvédek Lapja*, and – in order to make Hungarian legal developments known also abroad, also appearing in German from 1895: *Zeitschrift für ungarisches öffentliches und Privatrecht*.

The Relationship between Economic Crises and Criminality from the 18th Century to Today

*István László Gál**

Abstract

Looking for a correlation between economic indicators and crime is not a recent research topic. This essay examines the relationship between the economic crisis and the criminality from the 18th century to nowadays, and the role of the economic criminal law fighting and managing economic crisis. Economic criminal law is a behavioural control tool. It is suitable for directing the actions of economic operators in a certain direction expected by the society. However, this role can only be fulfilled if the majority of people either voluntarily comply with the prescribed rules or, out of fear of being sanctioned, do not exceed the limits set by the criminal law. Economic criminal law loses its role as a behavioural regulator if it is not respected by the majority.

Keywords: *economic crisis; criminality; criminal law; crime; conjuncture; cycle; market economy; crime trends; crime rate.*

1. Cyclicality and crisis in the economy

It is a rare phenomenon when two disciplines are born almost at the same time. The study of criminal law was born in 1764, when Cesare Beccaria's work titled „Dei delitti e delle pene" was published. Economics in the modern sense was born in the same period, also with the publishing of a book. Adam Smith wrote The Wealth of Nations (its full title: An Inquiry into the Nature and Causes of the Wealth of Nations) in 1776. According to Smith, everybody acts in their own self-interest, and these actions collectively lead to the common good. The precondition of this is that the economy should not be interfered with because the „invisible hand" will solve the problems. However, Adam Smith also referred to –albeit sketchily - the price of particular goods and the possibility of the emerging of economic crises: „When we are in want of necessaries we must part with all superfluities, of which the value, as it rises in times of opulence and prosperity, so it sinks in times of poverty and distress. It is otherwise with necessaries. Their real price, the quantity of labour which they can purchase or command, rises in times of poverty and distress, and sinks in times of opulence and prosperity, which are always times of great abundance; for they could not otherwise be times of opulence and prosperity. Corn is a necessary, silver is only a superfluity."[1] According to Smith, however, these crises are automatically solved by market mechanisms.

Although Karl Marx in the second half of the nineteenth century emphasized several times in a workless cited today, that economic crises are immanent in the capitalist system, but until 1929, the „mainstream" economists of capitalist countries did not really make statements like this seriously: „So long as trade is good, the capitalist is too much absorbed in money-grubbing to take notice of this gratuitous gift of labour. A violent interruption of the labour-process by a crisis, makes him sensitively aware of it."[2] The cause of the crisis according to Marx is insufficient demand and the essence of capitalist production is the production of goods. From this buying and selling results a division of the aggregate demand and total supply, and from this, the abstract possibility of the crises. „This division appears in the crisis; it is an elemental form of that. Explaining the crisis from this elemental form means as much as explaining the existence of the crisis by stating its existence by its most abstract form, so we are explaining the crisis with the crisis. "[3] „That the wealth of the developed countries is produced by the exploitation of the periphery is a shop-worn leftist idea. But after the fall of the Berlin Wall, this was little talked about. It seemed everything went well, everybody lived well (poorly), the way the best of all worlds ordered. Now the crises made the proportion of demand visible, that who benefited from the way leading there…"[4]

Following the great crises that unfolded in 1929, the state became an important economic actor too, as a factor responsi-

* Prof. Dr. habil. István László Gál, PhD, Department of Criminal Law, Faculty of Law, University of Pecs, Hungary.

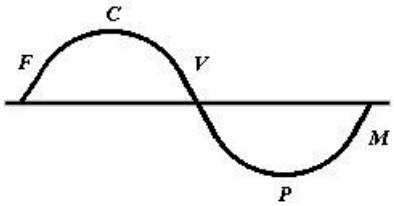
1 SMITH, A., *An Inquiry Into The Nature and Causes of the Wealth of Nations*. (A nemzetek gazdagsága) Budapest, 1959, p. 153.

2 MARX, K., *Capital: A Critique of Political Economy. Volume I: The Process of Capitalist Production.* p. 146.

3 *Marx és Engels Művei (The Works of Marx and Engels).* Szerkesztette (edited by): GUT, Ferencné, Budapest, 1965-1985. p. 469.This separation is reflected in the crisis; it is the basic form of it. To analyze this we can say that crises can be explained by crisis.

4 ALMÁSI, M., *Hová tűnt az a rengeteg pénz? (Where all that money went?).* Budapest, 2009, p. 163.

ble for the general state of the national economy correcting and regulating the „invisible hand's'" imperfections.[5] As the Great Depression of 1929-33 proved, the market economy that is left on its own without the state's intervention presents serious dangers. Ass the father of the next great economic theory, John Maynard Keynes stated: „moves toward devastation". Based on Keynes, the particular sections of conjuncture cycle are the following[6]:



F – the rising phase of the cycle boom, good conjuncture,
C – the good prosperity or the peak of the boom,
V – recession, decreasing phase, crisis, bad conjuncture,
P – the slump,
M – the recovery.
The English choice of words is not consistent in every case, but approximately matches the following:
F, *C* – boom, prosperity
V – recession, crisis,
P – slump,
M – recovery.

„The essence of *Keynes'* conjuncture theory is that out of the system's three independent variables, the marginal efficiency of capitalism, the rate of interest and the prosperity to consume, mainly the change in the first of the three causes the cycles. According to this, the cause of the fluctuations of the economy is the fluctuation of the anticipation regarding the yield of the capital goods. The multiplicator effect explains the cumulative nature of the rising and recessing phase of the cycle. However, *Keynes* differs from his predecessors dealing with the conjuncture theory, in that according to him in the 20th century because of the slowing of the population growth and the growth of the capitalism, the conjuncture cycle even at the peak of prosperity will not reach the state of total employment in the circumstances of capitalism's traditional economic policy based on free market. Thus, the main problem of the economic policy is not the restraint of the cycle, but the defeating of the century old stagnating slump."[7] With equivalent force on the effect on the 1930's economic thinking as the drastic effects of the world economy crisis, John Maynard Keynes' (1883-1946) „The General Theory" came out in 1936 and was aimed at the expansion and correction of the neoclassical theory. The book can be regarded as the main work of macroeconomics, and Keynes can be regarded as the first theorist of macroeconomics.[8] According to Keynes, if people have more income with the increase of prosperity, then they save bigger and bigger parts of this income and the savings are loaned to producing capitalists by banks. From this an overproduction crisis can emerge.

„When explaining the crisis, we usually emphasise that the demand after money – both with business and speculative purposes – grows, and this causes the interest rate to increase. This factor can also surely play at times an aggravating, or sometimes maybe an initiating role. Despite this, I state that the more typical and often times dominating cause of the crisis firstly not the increase of the interest rate, but the sudden collapse of the marginal efficiency of capitalism. The advanced stages of the boom are characterised by optimistic expectations regarding the future yield of the capital goods, and these are strong enough to neutralize the growing surplus of the capital goods, their growing costs of production, even maybe the increase of the interest rate, too. Organized investment markets are influenced by buyers who virtually do not even know what they are buying, furthermore speculators, who do not really deal with the sober evaluation of the capital goods' future yields, but they only try to foresee the direction of the next change in the market's morale. The nature of these investment markets results that if a too „optimistic" market, where most do not wish to sell, but buy, suddenly loses its illusions, then this strike has to be sudden and catastrophic. Added to this, following the collapse of the marginal efficiency of capitalism, the losing of the morale and insecurity regarding the future naturally increases the demand for liquidity in a drastic rate and with this increases the interest rate. The circumstance that the collapse of the marginal efficiency of capitalism usually goes hand in hand with the increase of the interest rate makes the decrease of the investment even more severe. The essence of the situation is however that the marginal efficiency of capitalism collapses, especially those capital types which mostly took part int he former phase's large scale investments. The demand for liquidity – if we do not take into account the behaviour regarding the increase in business and speculatory activity– only increases *after* the collapse of the marginal efficiency of capitalism."[9]

„Keynes also noted that in finance markets rationality only takes effect on a micro level, namely in particular deals. But this can not be extended to the national economy at all, even less to the world's whole economy."[10] It is thus not true that the „invisible hand" solves everything: Sometimes crises occur in unregulated market conditions. Keynes' proposal for a solution against crisis was to include a big consumer, and this is the state. The state subtracts a certain proportion of income in the form of taxes and spends it in a non-productive way. It builds roads, public buildings, dams, etc. By doing this, it can alleviate economic fluctuations; it cools and warms the economy by the stop and go principle. The way American President Franklin

[5] BARANCSUK, J., *Mikrogazdaságtan (micro-Economics).* Pécs, 2007, p. 40.
[6] KEYNES, J. M., *A foglalkoztatás, a kamat és a pénz általános elmélete. (General theory of employment, interest and money)* Budapest, 1965, p. 337-338.
[7] Ibid p. 337-338.
[8] HAUSMANN, P., *Bevezetés a közgazdaságtanba. (Introduction to economics).* Pécs, 2009, p. 43.
[9] KEYNES, J. M., *A foglalkoztatás, a kamat és a pénz általános elmélete. (General theory of employment, interest and money)* Budapest, 1965, p. 340-341.
[10] CSABA, L., „Más ez a válság" ("This crisis is different") In: *História,* vol. 32, Nr. 9-10, 2010, p. 5-6.

Delano Roosevelt spoke about the New Deal: „I shall ask the Congress for the one remaining instrument to meet the crisis – broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe."[11]

Keynes and his followers presumably were not right when they stated that consumption's most important factor is income. Keynesian economists see income as the factor governing consumption. Though the fluctuation of income really does have an effect on consumption, it is not the most important factor. People know that the fluctuation of income is often only temporary. If the income decreases for six months because the breadwinner is in between jobs at the moment, the household often takes a loan or borrows money to maintain its level of consumption.

However, at the end of the 20th century, Keynesian theory based on the financial policy was no longer able to play its role. The budget was no longer able to regulate economy, because the revenue and expenditure side of the budget became too rigid. If any government wanted to increase revenues by raising taxes, then unions protested, if it wanted to cut expenditures, then social policy tensions arose. The solution seemed to come from a monetarist trend, with Milton Friedman as its chief proponent. According to Friedman, the main cause of the troubles is state intervention. Therefore there was a need to shift from fiscal policy to monetary regulation and e two conditions had to be created: 1) currency stability, 2) a steady supply of money (equivalent to inflation) for the economy.[12]

Economic liberalism, based on the belief in the "omnipotence" of the market, an economic philosophy that once pervaded economic thinking, is far from having clear hegemony. The great crisis that erupted in 1929 has forever suppressed the illusions of self-regulation of the capitalist economy.[13]

In the second half of the 20th century, "a wave of deregulation abolished regulations based on the great crisis of the 1930 s and the lessons of war. Free flow and unregulated business of capital gained freeway. "[14]

At the beginning of the 21st century, it seems that international terrorism will be the cause of main economic troubles. Nonetheless, at the end of 2007, we were greeted by a "classic" global economic crisis. By 2007-2008, the world economy turned into the descending branch of the so-called Kondratyev cycle and many disasters worsened the situation, for example, the hurricane in New Orleans. Because of the impregnation of credit market, banks turned to secondary debtors. There was no serious credit review, real estate prices continuously rose. In 2006, more and more credit collapsed, so several real estate agencies went bankrupt taking some banks along. The Lehman Brothers' bankruptcy is probably the most well-known. Crisis soon spilled over into the real economy. The root causes of the crisis are still being debated by leading economists, but President Bush's big tax cuts program, which suddenly left billions of dollars with the population, has certainly played a role, further boosting credit supply to banks. (American small persons were never encouraged to save. When, for example, President Eisenhower was asked in the 1950 s what a real American could do for his country, the answer was, "Purchase!") Besides this, a significant increase in spending on defense could also played a role in the USA's economic crush. For example, in 2008, 45% of the world's total expenditure was spent by the USA on weapons and related goods and services.[15]

In 2001, the famous Enron scandal, a series of crimes, which also caused the failure of audit firms, had an influence on the market. In 2001 a significant number of investors turned from securities to the real estate market because of accounting scandals. "At least, they weren't forced to rely on auditors of the residential real estate market."[16] The consequences are well known: In 2007, with the bubble burst of the real estate market, the world crisis started. Too much credit was given to the most insolvent as well as to poorer social groups, which in itself has led to the proliferation of some forms of crime (such as credit fraud).[17] "The public opinion did not foresee, and still does not fully understand the crisis, as do not many key decision-makers, because traditional economic theories do not contain statements about psychological factors. Traditional economic theories exclude changing thought schemes and business action shapes that are the causes of crisis. They do not even deal with loss of trust and faith. They exclude equity, which hinders price and wage flexibility, which could stabilize the economy. They do not deal with corruption and the sale of low-quality products during the boom, nor with the function it takes, that it becomes known when the bubble bursts. "[18]

2. Correlation between changes in economic indicators and changes in the number of known crimes

Statistics and economic criminal law meet each other in two fields: economic and (business related) crimes. Besides the analysis of law enforcement statistics, another field is the infiltration of economic methodology into criminal law through the usage of more complex statistical methods (such as regression analysis). Complex methods of general statistics can also be used in judicial statistics, mainly for economic analysis of crime. Here is an example[19]:

[11] FRANKLIN D. R., „We should fear one thing: only fear" Washington D.C., 1933. March 4. In: *A XX. század nagy beszédei (The big speeches of the 20th century)*. Budapest, 2006. p. 71.
[12] FARMER, R. E. A, *Hogyan működik a gazdaság? (How the economy works?)* Budapest, 2010. p. 120.
[13] BARANCSUK, J., *Mikrogazdaságtan (micro-Economics).* Pécs, 2007, p. 212.
[14] BEREND T. I., Európa két válsága (The two answers of Europe). In: *História,* vol. 32, Nr. 9-10, 2010, p. 27.
[15] GAZDAG, L., *Marxnak lesz igaza: A kapitalizmus elérte lehetőségei határait? (Marx will be right: Capitalism has reached its limits?)* http://www.neplap.net/blog/marxnak-lesz-igaza-a-kapitalizmus-elerte-lehetosegei-hatarait (2011. 01. 19.)
[16] AKERLOF, G. A., – SHILLER, R., J., *Animal Spirits.* Budapest, 2011. p. 61.
[17] DEFLEM, M., *Economic Crisis and Crime*. London, 2011. p. 3-4.
[18] AKERLOF, G. A., – SHILLER, R. J., *Animal Spirits.* Budapest, 2011. p. 61.
[19] FADEI-TTAHRANIÉS, R. – M. GREEN, T., Crime and Society. In: *International Journal of Social Economics* Vol. 29. No 10. 2002. p. 785-788.

Looking for a correlation between economic indicators and crime is not a recent research topic. Between 1835 and 1861 based on Bavarian data series, Georg von Mayr showed a quantifiable relationship between changes in grain prices and the number of thefts. The rise in the price of grain has led to an increase in thefts and vice versa.[20]

In the 1880 s, Lacassagne, a famous French criminal lawyer and criminologist, also examined the relationship between economic factors and the development of crime. He sought to discover that changes in wheat prices go in parallel with changes in the number of crimes against property, and that the effects of economic crises are also demonstrable.[21]

Crime statistics indicated similarly during the USA's economic crisis of the 1890 s. "At the start of the crisis, newspapers reported on huge increase of corruption. In a January 1, 1895, article, the Chicago Daily Tribune reported the largest number of embezzlement schemes in 1894 since 1878, which had also been a year of serious depression."[22]

According to a German research leaded by Exner after the First World War[23], the following correlation was found: an increase in the number of unemployed people with one million is expected to increase the number of people convicted by theft with an average of ten thousand.

Between 1882 and 1914, rye and bread prices moved almost entirely together with the number of known thefts in Germany, according to research by Eduard Joachim[24].

At the beginning of the 20th century, between the two world wars, Dorothy Swaine Thomas examined the correlation between economic cycles and various categories of crime between 1865 and 1915.[25] She proved that economic cycles (top row) move almost in the opposite direction to each crime category: crime decreases in the case of recovery and increases in recession.

During the Great Depression of 1929-33, according to research[26], while crime in overall in Germany decreased, the increase after 1929 is clearly visible for certain crime groups.

After the Great Depression, the relationship between economic crises and crime has also been examined in the United States. Thorsten Sellin draws attention to the following interesting contexts in her book on the subject[27]:

1. Not all types of crime respond sensitively to changes in economic indicators; therefore, investigations should be carried out separately for certain types of crime.
2. Economic changes do not affect all areas to the same extent.
3. Not all classes of society are equally adversely affected by the economic crisis. The impact of the crisis is more visible in the crime of groups more affected by the crisis.
4. Finally, it is important to underline that less strong economic downturns have less effect on crime rates than greater ones.

It is interesting to note that Thomas Robert Malthus had come to the same conclusion centuries earlier as the American author in the first half of the 20th century that not all classes of society are equally adversely affected by economic crises. "Unfortunately, although working classes benefit from the general boom, but not as much as in the general downturn. They suffer the greatest need in times of low wages, but cannot receive adequate compensation in times of high wages neither. For them, (economic) surges always do more harm than good, and keeping the well-being of the majority of the society in mind, our goal has to be to maintain peace and equal spending. "[28]

After World War II, crime rates and the number and duration of prison sentences increased along with economic indicators. There seemed to be no connection between economic crises and crime.

In 1978, Ulrich Martens took a critical look at previous research and stated that "it is impossible to make a general statement, neither in time, nor in space, whether it has an effect and, if so, how powerful is the economic situation, and in particular unemployment, in crime development. "[29] In the literature, hesitation can be seen in the 1970's, when researchers began to question the effect of economic crises on crime. "In the early 1970's, as the value system controlling the whole society in economic crises changed, the relationship between economic conditions and crime was again on the agenda. The most comprehensive research - including international comparisons - was conducted within the framework of the Council of Europe and its results were published in 1985. "[30] Research of the 1970's and 1980's did not prove any correlation between economic crises, recessions, recessions and crime in time, as Katalin Gönczöl points out in a study:

"Contrary to the usual methods of investigation so far, they have not been based on indicators of the social status of offenders, but have sought to show the impact of changes in the above factors, which are most characteristic of the economies of the countries concerned. The analysis covers the period from 1963 to 1981. During this period, the number of perpetrators per 100,000 people at fault in the Federal Republic of Germany increased from 2,920 to 6,600, in France from 1,350 to 5,370,

[20] MARTENS, U., *Wirtschatfliche Krise, Arbeitslosigkeit und Kriminalitätsbewegung*. Freiburg, 1978. p. 5-6.
[21] LACASSAGNE, A. Marche de la criminalité en France 1825-80. In: La revue scientifique de la France et de l'étranger, Paris, 1881, 1, p. 684.
[22] AKERLOF, G, A., – SHILLER, R. J., *Animal Spirits.* Budapest, 2011. p. 91.
[23] EXNER, F., *Krieg und Kriminalität Kriminalistische Abhandlungen.* Leipzig, 1926. p. 5.
[24] JOACHIM E., *Konjunktur und Kriminalität.* Offenburg, 1933. p. 19.
[25] THOMAS, D. S., *Social Aspects of the Business Cycle*. New York, 1927. p. 15.
[26] GLEITZE, B., *Die Konjunkturkriminalität in der Zeit der Weltwirtschaftskrise*. W. Kohlhammer Verlag, Stuttgart und Berlin, 1941. p. 7.
[27] SELLIN, T., *Research Memorandum on Crime in the Depression.* New York, 1937. p. 19-20.
[28] Cited by SZENTES, T., *Ki, és miért van válságban? (Who is in crisis and why?).* Budapest, 2009. p. 108.
[29] MARTENS, U., *Wirtschatfliche Krise, Arbeitslosigkeit und Kriminalitätsbewegung.* Freiburg, 1978. p. 36.
[30] GÖNCZÖL, K., *Válság – munkanélküliség – büntetőpolitika. (Crisis, unemployment, criminal policy)* In: Munkanélküliség, megoldások és terápiák Szekrkesztette (edited by): GYEKICZKY Tamás, Budapest, 1990. p. 160.

and in England and Wales from 2,250 to 5,660. In addition to the steady rise in crime, economic development was not even in any country. While national incomes increased to varying degrees between 1950 and 1960, they increased in all three countries, and then declined to a stagnating level in the second half of the 1970's. Unemployment reached 10% and then declined strongly as a result of favourable developments. In the early 1960 s, for example, the Federal Republic of Germany did not reach the 1% level. From 1975, however, it rise again, and in 1980 it approached its former highs.

Researchers have found that the cyclical development of the economy has no direct correlation with the evolution of crime. The delayed response to the improvement or deterioration of economic conditions in crime changes is not apparent. Thus, the research did not confirm the hypothesis that the effect of economic conditions does not appear in the actual crime, but in the statistical series of a later period. In fact, crime has steadily increased in all three countries. This increase, in turn, resulted in countries starting from very different situations in terms of per 100,000 offenders by the end of the investigation period, 1981. Specifically, crime has risen by 400% in France, 230% in the Federal Republic of Germany and 250% in England and Wales in 18 years to reach roughly the same level by 1981. From Katalin Gönczöl: Contrary to the findings of the cited works, international scientific literature based on research completed in the second half of the 1970's once again confirms that crimes against property and economic crime are on the increase during the economic crisis.

In 1976, UNSDRI (United Nations Social Defense Research Institute), based in Rome, showed that during special economic downturns and crises, some specific forms of economic crime are increasing. In such cases, effective countermeasures must be taken, which, of course, are not limited to criminal law enforcement.

In 1983, a German study showed the inverse relationship, that is, during the economic boom, the prison population and the number of people in psychiatric treatment decreased.

The author of a monograph published in 1987 found the following correlations between the occurrence of unemployment and certain serious crimes:

- Burglary 0.572
- Violent crimes against persons
- damage 0.494
- theft 0.423
- robbery 0.342
- fraud 0.338
- sexual offenses 0.158

From this, it can be seen that, apart from sex crimes, there is a significant relationship between crises and several types of serious crime. Indeed, high unemployment has a very strong correlation with economic recessions, a typical and systemic consequence of the crisis.

Another American study aimed to develop a model that explains the evolution of the crime rate against property by using economic variables. Dependent variables used to measure the rate of property crime were obtained from the FBI's Uniform Crime Reporting Program. Independent variables include public education, the unemployment rate, the GDP rate, the poverty rate, the average income and the amount of heroin and cocaine seized.

A correlation model was used for dependent and independent variables. Using a linear regression model, all independent variables were analysed. The results were as follows:

	Rate of crime against property	Amount spent on public education	Average Income	Rate of Poverty	Level of Unemployment	Indicator of GDP	Amount of heroin and cocaine seized
Rate of crime against property	1.000	-0.518*	-0.533**	-0.246	-0.028	-0.525*	-0.175
Amount spent on public education	-0.518	1.000	0.990**	-0.068	-0.368	0.987**	0.838*
Average Income	-0.533	0.990**	1.000	-0.125	-0.407	0.995**	0.845**
Rate of Poverty	-0.246	-0.068	-0.125	1.000	0.905**	-0.175	-0.069
Level of Unemployment	-0.028	-0.368	-0,407	0.905**	1.000	-0.469*	-0.313
Indicator of GDP	-0.525	0.987**	0.995**	-0.175	-0.469	1.000	0.843**
Amount of heroin and cocaine seized	-0.157	0.838*	0.845**	-0.069	-0.313	0.843**	1.000

Note: * The correlation is significant at 0.05; ** Correlation is significant at 0.01 level
Source: International Journal of Social Economics Vol.

A negative correlation can be found, for example, in the following way: As the amount spent on public education increases, the rate of crime against property decreases. So there is an inverse relationship between the two variables. These relationships are usually felt or inferred by intuition, with the exception of the negative correlation between the unemployment rate and the rate of crime against property. Although we can immediately add that the correlation is very weak (-0.028). However, many independent variables are closely related. To avoid multicollinearity problems, the model creators selected three variables for the analysis: the GDP indicator, the poverty rate and the amount of heroin (or cocaine) seized and arrested in the country.

The regression model uses the following formula
$Y=b_0 + b_1X_1 + b_2X_2 + b_3X_3 + e$
ahol
Y = rate of crimes against property
b_0=constans
X_1= indicator of GDP
X_2= Rate of Poverty
X_3= quantity of seized drog
e= standard mistake
The result of the regression calculation was the following:
$Y = 9985.626 - 0.554\ X_1 - 172.016\ X_2 + 2.396$
t =(-3.132)(-5.913)(19.975)(4.323)
R^2 =0.704
R = 0.860

The three independent variables of the model are responsible for 74% of the change in the crime rate between 1980 and 1997. This is an unusually robust model.

After 2007, the picture is varied, but most Western studies claim that the current economic crisis has affected and is still affecting crime today. After the outbreak of the current economic crisis in Greece, for example, the fear of property and violence has increased significantly in society. This is supported by criminal statistics, as there is a significant increase in the number of thefts, burglary and robberies. Between 2009 and 2011, the number of known theft and burglary thefts increased by 33%, from 72,658 to 96,925. Meanwhile, the robberies increased by 41%, from 4,708 to 6,636. Of course, there are counter-examples as well.[31] In France, recent news contradicts this: "Crime has declined in the past nine consecutive years, the Interior Minister said on Tuesday morning and then explained that crime fell by 0.34% in France in 2011. Although property crimes fell by 1.74% in 2011, Claude Guéant also recognized a negative tendency, an increase of 16% in the number of burglary thefts. "[32]

According to a report of the United Nations Office on Drug and Crime 2010, monitoring the Impact of Economic Crisis on the Crime (Rapid Impact and Vulnerability Analysis Fund), the economic crisis that broke out in 2007 can be proven by statistical models (especially ARIMA models). volume. This conclusion was reached on the basis of statistics from 15 countries. The conclusion of the research was:

- Economic factors have a demonstrable impact on crime statistics and crime trends.
- In the case of 11 out of the 15 countries examined, there was a significant change in the economic indicators during 2008/2009, which can be called an economic crisis. In 8 of these 11 countries, the deterioration of economic indicators had an impact on crime.
- Crimes of violence, such as robbery, have shown the closest correlation with economic factors. In addition, in the case of deliberate killings and motorcycle thefts, the relationship was confirmed by statistical methods.
- The model always indicates a time lag between a change in economic indicators and a change in crime statistics. On average, adverse economic events in criminal statistics show a 4-6 month time shift.
- On average, for three months, you can predict well the prospective future development of crime at national level or for a city based on historical crime statistics and economic variables.[33]
- The model always shows a time lag between the change of the economic figures and the change of the crime statistics. On average, adverse economic events appear in crime statistics with a time lag of 4 to 6 months,
- We can predict the crime rates three months before on a national level. In the case of a town, we predict the crime rates from the earlier data of the crime statistics and with the change of the economic indicators.[34]

We agree with the concept that not only economic crises, but economic recovery can often act as a factor in increasing crime rate.

"A sudden unfavourable change of the economy – the increase in poverty, the increasing number of poor people – can be blamed for the cause of deviance, and rise of crimes, as well as the positive economic growth, if the process is very quick."[35]

A modern market economy also requires state involvement beyond the legal framework in the 21st century. This was first brought to the attention of the economists by the Great Depression of 1929-33. "Since then it is not arguable that the need for the governmental intervention, thus, the focus of the discussions between different economics schools is on whether the state should remain active or passive in coordinating economic processes and in which areas, means, and weight should the state interfere with the economic processes."[36]

Stricter regulation is therefore necessary, not in itself sufficient. The economic trend can be changed only in two steps. First, you need to prevent the economic crash by issuing money, writing off bad loans and bank recapitalisation. Excessive supply of money should then be withdrawn from the economy very quickly to prevent inflation getting out of control. The question remains whether this will succeed.

Helmut Schmidt, former German Chancellor, saw the way out from the economic crises with a strict regulation in connection with financial institutes. His suggestions were summarized in 2009:

(1) The supervision of all private financial institutions and all financial instruments should be subordinated to a single supervisory body.
(2) Banking Supervision should require a uniform minimum capital requirement for private financial institutions.
(3) All off-balance-sheet transactions of financial institutions should be prohibited and punishable.
(4) Forbid financial institutions from trading securities not issued and listed on a non-official stock exchange.
(5) All financial institutions should be prohibited from selling securities and financial instruments that are not owned at the time of sale.
(6) All financial institutions should be prohibited from managing deposits or loans legally established in countries that are considered tax havens.

I also consider as a means for therapy within the stricter regulation, the criminal law regulation as international cooperation against the offshore industry, which started from the United States after the crisis erupted. The world's GDP – with the

[31] The politics of crime and the financial crisis in Greece Sappho Xenakis and Leonidas K.Cheliotis, 2 August 2012 http://www.opendemocracy.net/sappho-xenakis-leonidas-kcheliotis/politics-of-crime-and-financial-crisis-in-greece (18. 08. 2019.).
[32] http://www.lejdd.fr/Politique/Actualite/Gueant-annonce-des-chiffres-de-la-delinquance-a-la-baisse-458868/ (17. 08. 2019.).
[33] www.unodc.org/documents/data-and-analysis/statistics/crime/GIVAS_Final_Report.pdf (18. 08. 2019.).
[34] www.unodc.org/documents/data-and-analysis/statistics/crime/GIVAS_Final_Report.pdf (18. 08. 2019.).
[35] DURKHEIM, É., *Az öngyilkosság. (The suicide).* Budapest, 1967. p. 250-251.
[36] HAUSMANN, P., *Bevezetés a közgazdaságtanba. (Introduction to economics).* Pécs, 2009, p. 75.

stock and other virtual securities – is estimated to be 500.000 Billion dollars, while without the virtual / speculative "bit money" is only 50,000 billion dollars. More than half of these capital flows involve offshore companies.[37]

In my view, there is a need for a unified European criminal law in connection with the most serious economic crimes. Globalization is getting more dangerous; it produces forms of transnational crime which are hard to combat with national criminal law measures alone.

3. Concluding thoughts

We may ask the question of whether criminal law has any role in the economy? Based on the research results we can conclude that is has a role if at least two conditions are fulfilled:

- high moral financial culture on a consolidated basis,
- setting a ceiling on the prospective financial penalties so that they are multiplied by the amount of illegal profit the offender has achieved or seeks to obtain. Only in this way can punishment achieve its purpose.

Under such somewhat utopian circumstances, there would be no need for economic criminal law to protect the capital market. In Eastern-Europe, however, none of the conditions is met in 2020, and realistically, only the second part can change in the near future. However, it is not advisable to make constant changes to the criminal law. Economic criminal law is a behavioural control tool. It is suitable for directing the actions of economic operators in a certain direction expected by society. However, this role can only be fulfilled if the majority of people either voluntarily comply with the prescribed rules or, out of fear of being sanctioned, do not exceed the limits set by the criminal law. Economic criminal law loses its role as a behavioural regulator if it is not respected by the majority (for example, regular insider trading on the capital market) and rarely known perpetrators can almost legitimately feel victimized.

There were disturbances at the beginning of the 21st century in the field of economic criminal law. New types of crimes have emerged for example abuse of cryptocurrency, money laundering in cyberspace etc. The fight against these crimes is a very difficult task for the law enforcement agencies. The economic crisis has not disappeared, for example, the last was in 2007, which shocked the world.

The statistics show the same as what the last three hundred years of research have shown: the economic crisis – though with some delay – affects crime. It does not affect all crimes, but some economic and property crimes increase significantly, around half a year after the outbreak of crises. Besides – due to impoverishment – certain types of violent crimes may become more common if the period of the economics crises getting longer.

Criminal and economic policies must therefore mutually supported by governments, and we always have to remember the words of the famous criminal lawyer, Franz Liszt: „Eine gute Sozialpolitik ist die beste Kriminalpolitik" (The best criminal policy is a good social policy).

[37] LAYMAN, B., *Az offshore halála (The death of offshore).* Budapest, 2010. p. 108.

Development of the Nationality Law in Hungary

Csaba Cservák, György Tamás Farkas***

Abstract

This present study endeavours to offer a comprehensive overview of minorities and minority-related legislation in both the historical Kingdom of Hungary, as well as the current republic, a member state of the European Union. The first half of the essay is dedicated to historical matters in its entirety, for it is necessary to have a clear knowledge of the spring before we can understand the flow of a river. Likewise, the second section presents the reader with a detailed analysis of current-day regulations and their immediate ramifications.

Keywords: *Hungary; Croatia; legal history; ethnic minorities; personal rights; collective rights; autonomy; new Fundamental Law of Hungary; self-governments; parliamentary representation.*

1. Introduction, historical background

At the time of the Hungarian conquest, most parts of the Carpathian Basin were sparsely inhabited by different peoples. The only place where significant Western Slavic population lived was the northwestern mountain areas and we can mention some other groups of Slavs in the southwestern and northern area of Lake Balaton. In the 9th century, Theotmar, the Archbishop of Salzburg, wrote about Pannonia where he mentioned that it was completely extinct and deserted [1].

The invading and conquering Hungarians relatively quickly assimilated the smaller number of Slavic and Avar peoples living in the Carpathian Basin, took over some of their words, traditions enriching the common culture of the Carpathian Basin and making Hungarians a particularly diverse nation. Adopting habits or ways of behavior can be spotted in the formation of the administration of the Kingdom of Hungary, where St. Stephen implemented the former Slavic-Avar governing system which was based on farms. It should also be noted that up until the 20th century a significant position in the central administration called "ishpan" (comes in Latin) is originated from the Slavic word "zhupan" which was a kind of a smaller Slavic administrative region.

The first major source of law, which refers to the essential role of ethnic minorities and the spirit of fundamental rules affected them, can be found as the King of St. Stephen's Sixth Admonition to his son, Imre (Emeric) and it goes like this:

"In strangers and men from abroad there is such great utility that it can be held worthy the sixth place in regal dignity. Why did the Roman Empire first grow, and why were the Roman kings exalted and glorious, except because many noble and wise men congregated there from diverse region! Rome, in truth, would be a hand-maiden to this day, if Eneades had not made her free. For as strangers come from diverse regions of the provinces, they bring with them diverse languages and usages, and diverse learning and arms, all of which not only adorn the royal palace and render magnificent the court, but also abash the arrogance of aliens. For a kingdom of one tongue, or of one custom, is weak and fragile. Wherefore I bid you, my son, support those persons with a good will, and treat them fairly, that they may prefer to continue with you rather than to live elsewhere. For if you destroy what I have built up or strive to disperse what I have gathered together, without doubt your kingdom will suffer the greatest damage. Lest that be, augment your kingdom daily, that your crown may be held august by all.[2]*"*

The 12th century and the following ones brought demographic developments in Western Europe, so there was a significant overpopulation there which caused a flow of large number of immigrant settlers from the west to the Kingdom of Hungary for whom the Hungarian state granted privileges, such as the exemption from the jurisdiction of the royal judge in the lower courts, the administrative exemption from the lower level of regal jurisdiction or right to elect their priests freely. The term Hungarians used to name these newcomer settlers was "hospes" which also marked their legal and social status.

* Csaba Cservák, Chief Academic Associate at the National University of Public Service and Docent at Department of Constitutional Law, Faculty of Law, Károli Gáspár University of the Reformed Church in Hungary, Budapest, Hungary.

** György Tamás Farkas, Assistant Lecturer at Department of Constitutional Law, Faculty of Law, Károli Gáspár University of the Reformed Church in Hungary, Budapest, Hungary.

[1] ÁCS, Z., *Nemzetiségek a történelmi Magyarországon.* Kossuth Könyvkiadó, 1996, p. 15 (Hungarian).

[2] http://mek.niif.hu/00200/00249/00249.htm

From the West, primarily German, Italian, and French (Walloon) people came, who enriched our country with advanced agricultural, vinicultural techniques and also introduced a way of town-dweller, civic life. We can distinguish different migration waves coming from the west, not just on the basis of the time of their arrival but also on the basis of the typical legal-social status of the settlements. In the first wave, after the foundation of the state, missionaries, knights and farmers came mainly from German territories. Later, and in the second wave, townsfolk arrived, who laid the foundations of domestic urban citizenship in Hungary.

In addition to immigration from the West in the Middle Age, Serbs entered from the south into the country and settled down mainly along the river Danube. Romanians arrived in Transylvania through the Carpathian Mountains and from the Balkan Peninsula Roma people showed up in the Kingdom of Hungary. All these processes were accelerated by the expansion of the Ottoman Empire in the Balkans.

There is a need for a special mention of the Croats in Hungary, since we cannot speak of immigration in their case. The Croatian royal Crown was acquired by Kálmán Könyves, one of the early kings of Hungary (ruled between 1095-1116) and made Croatia one of the constituent states of the Hungarian Holy Crown. This relation lasted until 1918.

Kuns and Jasz people came to Hungary from the eastern direction, and by now they practically melted into the Hungarian population, lost their own language long ago, but preserved some of their cultural traditions. Kuns and Jasz people were settled down by King Béla IV. around this time in Hungary. Kuns, typically on the banks of the Danube and Tisza. They were first mentioned as independent people in 1323. They had wide administrative privileges up to the 1876 administrative reform (with minor interruptions) and their separate administrative Jászkun district existed for centuries. Up until to present day the Hungarian administration system preserves the memory of these two peoples and their former privileges. It can be found in the name of Jász-Nagykun-Szolnok County as an administrative unit and can also be seen in the names of many settlements.

Severe wars and raids in Hungary's history led to demographic catastrophes and resulted depopulation in certain areas of the country. This caused the rising of the immigrations waves for the peoples outlined above. At the same time, it resulted an overall decline in the population of Hungarian nationality. In particular, the Tatar Raid (1241-1242) and the period of Turkish occupation (1526-1699) were the serious historical events that resulted this declining shift in proportion of the Hungarian population.

After recapturing the country from the Turks, German people moved to the deserted territories since the Hungarian throne was occupied by the Habsburg house. Also large number of Slovak people appeared in different areas of the country as a result of a kind of inner relocation movement. In addition, the number of Romanians and Serbs rose in Hungary.

The awakening of national consciousness emerged in the 18th century through culture and literature. Literary works written in native languages, - other than German and Latin - begun to chisel the language that was typically used only in lower classes in the society and become the carriers of expressing nationality identity. It was particularly significant for the Hungarians to differentiate themselves from the Austrians when Hungary was part of the Habsburg Empire. In this way cultural issues become political and legal issues. In this way language became the first serious frictional point in ethnic policy.

In 1848 with the so-called April Laws, Hungary entered on the path of civic transition abolishing the legal framework of feudalism. The April Laws among other things ended serfdom, tithe, abolished a special Hungarian institution called Acviticum which was an old feudal, obsolete and anomalous land-tenure, introduced universal and equal taxation, made steps towards the freedom of the press and declared the recognized Christian churches equal.

There was no law made in connection with ethnic groups because of the idea of one political nation – the Hungarian - prevailed. Leading lawmakers believed that granting civil and political freedoms for everybody provided sufficient freedom for non-Hungarians too. A year later this position was reviewed as it was no longer sufficient in the multi-ethnic Hungary at the high point of the century of nationalism and during the freedom fight against the Habsburgs. The Habsburg Court, recognizing and exploiting this one-political-nation idea, turned the ethnic groups against the Hungarians by which they successfully drew significant Hungarian military forces away by the Romanians in Transylvania and Croat forces led by Josip Jelacic, Ban of Croatia in southern part of the kingdom in Croatia-Slavonia.

During the summer of 1849 the Hungarian state took steps towards ethnic groups, but it was too late hence the defeat of the freedom fight. One of the steps was a draft of a peace agreement between the Hungarians and the Romanians, the so-called Reconciliation Plan. In this document, among other things, a wide range of forward-looking linguistic[3], educational[4] and religious rights[5] were granted for the Romanians of Transylvania.

Shortly after the Reconciliation Plan, the House of Representatives decided on the rights of ethnic peoples, which mostly regulated the language use of ethnic minorities. The essence of the law was that the Hungarian language was exclusively used at the highest levels in national administrative, legislative and military matters, but at lower levels languages of national minorities were allowed. The decision provided linguistic rights in public administration, in front of courts and in schools[6].

After the defeat of the revolution and freedom fight, Hungary was governed centrally from Vienna, the National Parliament was not convened and mostly Austrian legislation, such as

[3] Peace agreement between Hungarians and Romanians in Transylvania (14 July 1849) Points 3, 4, 14.
[4] Peace agreement between Hungarians and Romanians in Transylvania (14 July 1849) Point 5.
[5] Peace agreement between Hungarians and Romanians in Transylvania (14 July 1849) Points 9, 12.
[6] Decision of the House of Representatives on the rights of nationalities (Szeged, 28 July 1849) Point 7.

the Austrian Civil Code, was introduced in Hungary. Ethnicity as an issue was not on the agenda for more than a decade.

1867 is a significant year in the history of the Hungarian public law because it was the year of Austro-Hungarian Compromise. Due to reasons in foreign affairs, such as the Habsburgs' loss of the Italian territory or a defeat from Prussia in 1866, the Empire was forced to put its structure on new legal bases. The dualist Austro-Hungarian monarchy, which was legally composed of two parent states of Austria and Hungary, was established and which were independent, except foreign military and finance affairs and had a common sovereign.

From the point of view of ethnic minorities, the following year, 1868, had a paramount importance, because a new law, - Act XLIV of 1868, On the Equality of Nationality Rights- was enacted introduced by József Eötvös. This act was a very progressive act in international comparison too. It was in the same year when Act XXX of 1868 intended to achieve the Hungarian-Croatian compromise, which regulated relations of the Croatian-Slavonian country to the Kingdom of Hungary, also ensured the political rights of the Croats.

This act ruled that Croatia and Hungary constitute a commonwealth towards both to other states of the Austro-Hungarian Monarchy and foreign states. Croatian was made the official language in the territories of Croatia, the Croatian National Assembly (called Sabor) was reinstituted, local self-government was granted, which was headed by their own officers called "ban". Croatia has enjoyed autonomy in its internal judicial, religious, linguistic affairs and its public education. The other ones, so-called common affairs, remained in the scope of the Hungarian Parliament and the Hungarian Government. The Croats could send representatives to both chambers of the Hungarian Parliament who could have right to speak in Croatian there. Their officers, the Bans, were appointed by the sovereign based the recommendation and a required countersignature of the Hungarian Prime Minister. The law also decided on territorial issues and recognized the Croatian demand for the country of Slavonia thus it became a part of Croatia, but a lot of disputed questions remained unresolved in this field. The issue of Fiume (now called Rijeka) was settled in 1870, so Rijeka County became a part of Croatia, but the city of Fiume became a separate body – corpus separatum – belonging to the Hungarian Holy Crown and headed by a governor answered for the Hungarian Government. The status of Dalmatia was not solved during the years of dualism. Act XXX 1868 acknowledged the Croatian demand for the area, but officially it belonged to the Hungarian Holy Crown yet administratively it was ran by the Austrian half of the Empire until the end of the Austro-Hungarian Monarchy.

Act XLIV of 1868 established the rights of many other national minorities living in the Hungarian Kingdom. This law did not provide political rights or autonomy for ethnic minorities in Hungary. The usage of Hungarian was required as official language for speeches and for general case-management in the Hungarian Parliament, but it allowed the usage of other languages if front of courts and other authorities, with a restriction that official documents to the Government and in the case of documents of bureaucracy, it required at least a two-column bilingual version, one in Hungarian and in the other native language[7]. Bureaucrats were required as far as they could make it possible to use the native language of the territory in public and office affairs[8]. In the area of justice, the law allowed to use the native language in the case of a party acted without professional legal representation. In other cases, the official language of the courts was Hungarian. In addition to this, it also allowed minorities to use their own language in schools.

In 1918, at the end of World War I, with the collapse of the Austro-Hungarian Monarchy, ethnic minorities declared their secession from Hungary after one by one and their supporting „mother countries" like Romania or Serbia occupied the areas they wished to annex. They did it totally irrespectively to the national composition of the area but taking only military and economic aspects into account.

In 1918, at the time of the Károlyi Government, the Act X of 1918 regulated the autonomy of the minorities, and as the first one, the autonomy of the Ruthenian nation. It may seem interesting why Ruthenians became the first to enjoy the nationality rights guaranteed by autonomy. The answer might lie in the fact that the Ruthenians were much less secessionists than other nationalities, and were not backed by any mother state, unlike in case of Romanians or Serbs. This was followed by the Act VI of 1919, which ensured the right for self-government for the German minorities. This act differed from the previously mentioned law made for the Ruthenians because the situation of the German groups was different. Ruthenians lived in a well-defined area, but Germans were essentially scattered across the country.

The last act relating to the rights of nationalities during the Károlyi Government was Act XXX of 1919 which provided the right for self-government for Slovenská-Krajina. We can say about all three acts that they did not represent a realistic alternative to the national movements seeking independence from Hungary and supported by their mother states. Also, it should be noted that there was no chance for the enforcement of these acts due to the territorial annexation by the neighboring countries.

In the period following 1920, the nationality provisions previously described in the earlier chapter on international law were in force in Hungary and the Act XXXIII of 1921 raised it to a constitutional level and also proclaimed the Trianon Peace Treaty. It definitely should be noted that owing to border alterations theoretically Hungary remained a multi-national country but practically turned to a homogeneous one-nation-state, with only one nationality being relevant, the German with more than half a million people. Based on the census of 1920 the ratio of ethnic minorities amounted to a total of seven per cent of the entire population[9]. In 1941, the ethnic civism became protected by criminal law[10].

[7] Act XLIV of 1868 Section 4-5

[8] Act XLIV of 1868 Section 6

[9] BINDORFFER, Gy. *Kisebbség, politika, kisebbségpolitika – Nemzeti és etnikai közösségek kisebbségi önkormányzati autonómiája Magyarországon.* Gondolat Kiadó-MTA Szociológiai Kutatóintézet, 2011, p. 53.

[10] Act V of 1941, Section 1.

At the time of the Communist dictatorship, the Act XX of 1949 - The Constitution in connection of ethnic minorities only proclaimed that the State provides the opportunity for the education in mother tongue and cultivating the national culture [11]. In 1989 in Hungary, like many places in Central Europe, a transition period for a political system change begun eliminating the dominance of the Soviet Union, the communist establishment of the Central European states, and opened the way for the democratic transformation.

Act XXXI of 1989 which virtually rewrote the previous Constitution and as the foundation of the change in the political system created a democratic, state-of-the-law framework in Hungary in public law. Regarding ethnic minorities it ruled that ethnic and linguistic minorities are parts of the nation and recognized as constituent components [12]. This new rewritten Constitution also stipulated that the state protects linguistic, national minorities and, inter alia, ensures their collective rights in public life [13].

Since the Constitution defined national minorities as constituent components of the state, it concluded that the issue of the representation of these minorities required seats in the highest representative body, in the Parliament and also at municipal levels. This resulted a new constitutional amendment. Act XVI of 1990 said that further paragraph had been added to Section 68 of the Constitution which ruled that in the Parliament and in other types of council minority groups were required to be represented. The act also said that the "ethnic representatives" would have been elected by the Parliament, i.e. mandates would not have been won during general elections, as was the case for other representatives but defined by a separate act [14].

According to the foregoing, Act XVII of 1990 became that separate act. The law proclaimed which linguistic and national minorities could have representatives. These were the Roma, Croatian, German, Romanian, Serbian, Slovak, Slovenian and Jewish minorities. Within thirty days after the inaugural session, the Parliament should have elected a nominating committee which would have made proposals for candidates who would have been elected by the Parliament. The status of the elected representatives would have been the same as the other elected members of the Parliament [15].

After the fundamental change of the political system, during the summer of 1990, the so-called MDF (Hungarian Democratic Forum)-SZDSZ (Alliance of Free Democrats) Pact definitively crystallized our country's public-law system, which was revealed in the Act XL of 1990. Among other things, they abandoned the idea of the direct election of the head of state, the scope laws required the votes of the 2/3 of the representatives was reduced in order for more effective governance They repealed Act XVII of 1990 removing even the practically nonexisting parliamentary representation of national minorities.

The Act XL of 1990 amended the Constitution's Section 68, subsection (3) in such a way that Hungarian law only ensures the representation of national minorities, but the word "Parliament" was omitted from the text. The law as an addendum to the chapter of the ombudsman in the Constitution created the Office for National and Ethnic Minorities led by a Parliamentary Commissioner. Thus, the system of the representation of ethnic minorities changed in its basic concept because instead of parliamentary representation the ethnic minorities received only an ombudsman-type representation and protection. Besides the above mentioned, Act LXIII of 1990 amended the Constitution with the right for minority groups to elect their own local and national minority self-governments [16].

For the ethnic minorities the transition process of political changes peaked when the Parliament voted for the Act LXXVII of 1993 called Rights of National and Ethnic Minorities. This was the second act on minorities in the Hungarian legal system after the one in 1868. Before the introduction the Council of Europe reviewed the bill and expressed its high appreciation. The nationality law established, among other things, the criteria and procedure by which the Parliament may declare a group as an ethnic minority, and along with the Constitution, the laws of education and international conventions guaranteed the rights of minorities and regulated the norms of minority self-governments. The law was more of a framework law, and it did not expand the rules in detail. The scope of the nationality act recognizes thirteen ethnic-national minorities: Roma as ethnic and Greek, Bulgarian, Croatian, Polish, German, Armenian, Romanian, Ruthenian, Serbian, Slovak, Slovenian and Ukrainian national minorities.

2. Current legislation on national minority rights in Hungary

National and ethnic minorities may be granted personal rights, collective rights and – the greatest benefit – autonomy.

Autonomy itself can range from territorial to personal. The legitimacy of the former arises especially where members of an ethnic minority are living together in a territorial block, forming the majority population there. While countries tend to show less reluctance in granting personal autonomy, the notion of territorial autonomy often causes strong aversion.

The new Fundamental Law of Hungary has received numerous attacks from the political landscape of Europe, partly from legal professionals, but mainly from politicians. Act CLXXIX of 2011, the legislation currently in effect on national and ethnic minority rights states that „cultural and linguistic diversity are wellsprings of prosperity, rather than division, and Hungary considers the cultural feats of its national minorities an organic part of its cultural heritage".

[11] Act XLIX of 1949, Section 3.
[12] Act XX of 1949 Section 68, Subsection (1) modified by Act XXXI of 1989.
[13] Act XX of 1949 Section 68, Subsection (2) modified by Act XXXI of 1989.
[14] Act XX of 1949 Section 68, Subsection (3) modified by Act XVI of 1990.
[15] Act XX of 1990, Section 1-2, 5.
[16] Act LXIII of 1990, Section 5.

According to international legal classifications, national and ethnic minorities may be granted personal rights, collective rights and – the greatest benefit – autonomy.[17]

Autonomy itself can range from territorial to personal.[18] The legitimacy of the former arises especially where members of an ethnic minority are living together in a territorial block, forming the majority population there. While countries tend to show less reluctance in granting personal autonomy, the notion of territorial autonomy often causes strong aversion.[19]

Examples for personal autonomy can be found in the legal status of Lapps in Sweden, of Danes, Sorbs and Frisians in Germany, of Russians in Latvia and Lithuania and – soon to be detailed – in the case of Hungary's minorities.[20]

Regarding territorial autonomy, further differentiation can be made based on whether this autonomy is embedded into the administrative framework of the state itself. If this isn't the case, success requires a great deal of flexibility and active tolerance on the county's part. For the first category, examples include the Íland Islands in Finland, Corsica in France, as well as Catalonia and the Basque Country in Spain. The second case entails, among many others, the Feröer-Islands in Denmark and 225 Native American communities in the USA.[21]

The new Fundamental Law of Hungary has received numerous attacks from the political landscape of Europe, partly from legal professionals, but mainly from politicians. This begs an important question. Given that Hungary is a sovereign and independent nation, with no other polity possessing a right to influence its internal affairs, objections from other nations would only be justified if our country would infringe upon the rights of their own compatriots. Taking into account the number of grievances Hungarians living outside the country's borders are subjected to, the treatment of national minorities within Hungary itself could be deemed exemplary. The historical constitution[22] of Hungary already carried significant traditions of minority protection[23], such as the privileges issued to the Jassic and Cuman peoples[24], as well as the special legal status of the Saxons[25] in Transylvania.[26]

Act CLXXIX of 2011, the legislation currently in effect on national and ethnic minority rights states that „cultural and linguistic diversity are wellsprings of prosperity, rather than division, and Hungary considers the cultural feats of its national minorities an organic part of its cultural heritage".[27]

The new law in Hungary replaces the former terminology of „minority" with „national minority", due to previous resentment about the Roma community being referred to as an ethnic minority group, as opposed to national minorities with nations of their own. „National minority" intends to signify that the group in question receives its privileges not only because it constitutes a numerically inferior group within society, but also because it is valuable to the nation. This value is something unique and distinct from the majority population; the cultural nuances embodied by the identity, the language and the historical traditions of national minorities.[28]

Although it rarely surfaces in public speech, international jurisprudence usually distinguishes three types of minorities:

- those originally having belonged under the jurisdiction of one state, but annexation or border changes forced them under another,
- the inhabitants of a given area before the state of the current majority was founded there, and lastly,
- those who attained their citizenship after immigrating into the country.[29]

---

[17] Although there used to be historical periods when the collective aspects of national minority law were completely marginalised. See: FÁBIÁN, Gy. - ÖTVÖS, P., *Kisebbségi jog I. kötet.* Kolozsvár, 2003. p. 35.

[18] See: DOMONKOS, E., *Nemzetközi autonómia-modellek és kisebbségi kérdés A katalán regionális autonómia és tapasztalatai*, *Ph.D. értekezés.* 2010, p. 24-25.

[19] See: CSERVÁK, Cs., The distribution of Power in Europe and in Central Europe - Separation of Power, Checks and Balances of the Power. In: *Central European Political Science Review*, Vol. 15., 2014. Winter

[20] DOMONKOS, p. 34-37.

[21] DOMONKOS, p. 31-33.

[22] Part of our historical constitution is a collection of lessons written by Saint Stephen, the first king of Hungary to his son, Prince Imre; the sixth of which highlights the role played by national minorities, as well as their correct treatment from the part of the state.

[23] Further reading on minority regulations in a historical context (in Hungarian): BÚZA, L., *A kisebbségek jogi helyzete.* Budapest, 1930; BALOGH, S., *A magyar állam és a nemzetiségek – A magyarországi nemzetiségi kérdés történetének jogforrásai 1848-1993.* Budapest, 2002; BINDORFFER, Gy., *Kisebbség, politika, kisebbségpolitika – Nemzeti és etnikai közösségek kisebbségi önkormányzati autonómiája Magyarországon.* Budapest, 2011.

[24] The Cumans received their privileges in 1279 and the Jassics in 1323. They lost these privileges during the Habsburg era in 1702, but purchased them back from Queen Maria Theresa in 1745. This is called *redemptio*, or self-redemption. Their administrative privileges endured as long as the administrative reform of 1876. In 2014, the Hungarian parliament designated May 6 – the day Maria Theresa signed the document affirming the *redemptio* in 1745 – the memorial day of Jassic-Cuman self-redemption (Resolution 4/2014. (II. 7.)).

[25] The Transylvanian Saxons settled in Transylvania during the reign of Géza II (r. 1141-1161). The *Andreanum*, their document of privileges originates from 1224, the reign of Andrew II. Also called *Goldener Freibrief* by the Saxons, the *Andreanum* granted all land between Szászváros (current-day Orăștie) and Barót (current-day Baraolt) to the Saxons and designated the Hungarian king and the count of Szeben (current-day Sibiu) their principal judges. The ruler was not allowed to give out the lands of the Saxons to anyone else and also granted the Saxons the right to select their own priests and judges. In exchange, they were required to pay a monetary tax, provide quarters and create a significant (around 500-strong) military force, when necessary. (See: *Erdély és népei*. Budapest, 1941. (MAKSAY, F., *A szászság megtelepülése*) – HANZÓ, L., *Az erdélyi szász önkormányzat kialakulása*. Szeged, 1941.).

[26] It is to be noted that Hungarian legislation bore a pioneer role in an international context regarding minority protection, especially with its 16th-17th century policies guaranteeing the rights of religious minorities. See: FARKAS, Gy. T., *A nemzetiségek alkotmányos jogállása Magyarországon, különös tekintettel a nemzetközi jog Hazánk szempontjából releváns jogforrásaira*. Budapest, 2014. p. 15-16.

[27] See the preamble of Act CLXXIX of 2011. The text of the law here harkens back to the lessons of Saint Stephen referring to national minorities as an enrichment to our country and its culture.

[28] See: Act CLXXIX of 2011, Section 1, Subsection (1).

[29] SZABADFALVI, J., Nemzetállam és szuverenitás. In.: *Államelmélet*, ed.: TAKÁCS, P., Mikolc, 1997, p. 137.

It goes without saying that in terms of personal rights, there can be no differentiation between individuals across these groups. When it comes to collective rights, however, further protection is necessary in the order of the list above, as justified by the more solidly formed identities of the former groups, not to mention their potential historical grievances, such as those of the Hungarians who found themselves outside the country's current borders. While under a democratic rule of law, nobody may be discriminated against based on their ethnic origins, it is important to note that a state's decision on which groups it favours with what benefits, particularly autonomy itself, remains a matter of efficiency and viability. (Jurisprudence could further diversify these categories, such as whether or not the home country of a national minority itself hosts a minority consisting of the other country's compatriots. Under these terms, Hungarians and Romanians are effectively mutual minorities. It is also an important consideration whether a minority possesses a mother country at all, the lack of which necessitates even steadier protection.[30])

Regarding national minority rights, the author classifies them as either positive or negative rights. In this context, negative rights are understood as a lack of prohibition on the support a minority group can receive from its mother country. In the 21st century, it is unacceptable that possessing, for example, Hungarian citizenship would forfeit its bearer's citizenship in the country of their residence. It should be a given, at least, that states refrain from restricting the ability of their national minorities in maintaining contact with their brethren. (We are given an interesting synthesis between the issuing of citizenship to compatriots living abroad and the protection of national minorities in a recent Spanish proposal that endeavours to grant favourable citizenship acquisition procedures to the descendants of Sephardic Jews expelled during the 16th century.[31])

Although it remains exceedingly hard to vindicate minority rights in an international context, a state's willingness to provide and reinforce these rights beyond the bare minimum on its own initiative is a hallmark of its progressiveness.

The former Minority Act of Hungary stood on legal principles roughly identical to the current one. Accordingly, national minorities are „all groups of people who have lived in the territory of Hungary for at least one century, who represent a numerical minority in the country's population, whose members are Hungarian citizens, who are distinguished from the rest of the population by their own languages, cultures and traditions, who demonstrate a sense of belonging together that is aimed at preserving all of these and at expressing and protecting the interests of their historical communities".[32] The new legislation preserved the previously existing list of thirteen official minorites in its entirety, composed of the Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma, Romanian, Ruthenian, Serb, Slovak, Slovene and Ukrainian communities.[33] These national minorities enjoy full legal equality.[34] On the other hand, international treaties also created a group of so-called „chartal minorities" in Hungary. This group includes the Croatian, German, Romanian, Serb, Slovak and Slovene minorities, as well as Gypsies speaking Romani or Boyash as their first language; their legal protection[35] being a result of the signing of the European Charter for Regional or Minority Languages.[36] (This was extended in 2008 to include the Romani and Boyash languages.)[37]

The current law lists Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma/Gypsy (Romani and Boyash, hereinafter: Roma), Romanian, Ruthenian, Serbian, Slovakian, Slovenian and Ukrainian as national minority languages. Within the Roma and the Armenian communities, the Hungarian language is also counted as such.[38]

Consequently – even though practice on the matter is less than consistent – we can distinguish between the protection of national minorities, and that of their languages. The law takes note of the fact that for many Roma and Armenians, Hungarian is their true mother language. (The question begs itself whether the possession of a distinct language can even be a requirement to being categorised as a national minority.)

After the fall of Communism, the participation of minorites in public affairs, as guaranteed by the Constitution, was intended to be realised in the form of a collective ombudsman, into which all thirteen minorities were to delegate one representative. Under the aegis of the new Fundamental Law, the office of the ombudsman became monocratic („one-headed").[39] This brings it under an unified direction, with the role of a separate minority affairs ombudsman being taken over by a deputy nominated by the singular ombudsman himself and confirmed, as before, through a two-thirds parliamentary vote. This deputy commissioner of fundamental rights is responsible for the legal protection of national minorities living in Hungary, monitoring their situation, guaranteeing their rights and taking all measures prescribed by law. In the event that

[30] The external support of national minorities can naturally be amplified by way of heavy cooperation with their mother country. This is at its most efficient when the two countries border each other. See: FEJES, Zs., *Határok nélkül? A határon átnyúló együttműködések jogi és közigazgatási környezete Európában és Magyarországon*, Budapest, 2013, p. 239 and FEJES, Zs., Határtalan lehetőségek: az együttműködés jogi feltételei a magyar-román-szerb hármashatár mentén. In: SOÓS, E. - FEJES, Zs., *Régió a hármashatár mentén*. Szeged, 2010, p. 158.

[31] This proposal ended up being active legislation. See: http://www.hirado.hu/2014/02/09/szefard-zsidok-leszarmazottai-spanyol-allampolgarok-lehetnek/

[32] See: Act CLXXIX of 2011, Section 1, Subsection (1).

[33] See: Act CLXXIX of 2011, Appendix 1.

[34] As a curiosity, a Ministry of Interior draft in 1992 – while leaving the rest of them in a status similar to the current one – intended to classify Gypsies, Armenians and Jews as ethnic, rather than national minorities, with less numerous privileges. This was met with great outrage and the Jewish community – upon its own request – ended up being deemed a religious, rather than a national minority. (See: multiple chapters of BINDORFFER.

[35] Further reading on the role of the European Charter for Regional or Minority Languages in the international system of minority protection: SZALAYNÉ, E., *A kisebbségvédelem nemzetközi jogi intézményrendszere a 20. században.* Budapest, 2003.

[36] See: Act XL of 1999, Section 3.

[37] See: Act XLIII of 2008, Section 3.

[38] See: Act CLXXIX of 2011, Section 22, Subsection (1).

[39] See: The Fundamental Law of Hungary, Article 30, Section (1).

the deputy possesses a degree of independence – the Hungarian law currently in effect allows for this – this model is well-suited to provide efficient legal protection for national minorites.

Observing the individual aspect of national minority law, it is clear that the right of the individual to identify with a national minority is exclusive and inalienable. No one can be forced to make a statement regarding their identification with national minorities, although certain legislation may require such definitive statements in order for the citizen to exercise certain national minority rights.

Personal national minority rights are the following. The right of national identification and the right to declare oneself belonging to a national minority – with certain exceptions explicitly stated by the law – do not prevent the recognition of dual or multiple national identities.

Members of a national minority are entitled to use their family- and personal names according to the rules of their mother language, which entails naming and registering their children the same way. In addition, members of a national minority must have their national family traditions respected, and be allowed to cultivate their familial connections, conduct their family celebrations in their own language and organise any religious ceremonies pertaining to the above. Their participation in public life – based on their national identity – may not be restricted. Finally, within the appropriate legal boundaries, they are allowed to form associations and political parties in order to express and defend their collective interests.

The current law names the following communal (collective) national minority rights. To preserve, cultivate, strengthen and pass on their identity, to safeguard and advance their historical traditions and their language, and to protect and prolificate the material and spiritual aspects of their culture are all inalienable rights of national minorities.

While practicing their naming rights, national minorities are also entitled to use historical settlement names, street names and geographical markers. It is also within their right to create and direct certain institutions, or to take them over from other administrative units, as well as to organise national minority kindergartens, primary schools, secondary- and high schools, specialised schools and higher education. In addition to this, their respective national self-governments may initiate and participate in the organisation of supplementary national minority education.

Within the limits of its laws, Hungary guarantees the rights of national minorities to hold undisturbed public events and celebrations, to maintain and preserve their architectural, cultural, funerary and religious traditions, and to use their various symbols. National minority organisations may also establish and maintain extensive and direct international connections.

National minorities have the right to *access and relay information* in their own language, whether it be *through traditional press or modern mass-communication and media services*. The state is obligated to provide access for recurring national minority-language broadcasts in both radio and audiovisual format in a way that enables full access to such services in all relevant regions inhabited by the respective national minority.

Local national minority self-governments – under the principle of cultural autonomy – have, among others, the following matters in their jurisdiction example, the creation of national minority institutions, the creation of awards and the determination of the requirements and rules of their issuing, the creation of national minority scholarships and contests.

In addition to the above and excepting matters purely within the purview of central authorities, local national minority self-governments may take on voluntary tasks pertaining to educational and cultural administration, local traditional and electronic media, the cultivation of traditions, the dissemination of information, social integration, cultural-, social- and youth activity administration, public employment programmes, urban planning and other areas.

The new electoral law of Hungary has managed to settle an old debt[40] in creating the possibility of preferential parliamentary[41] representation[42]. National self-governments may run a national minority list, allowing voters to cast their ballots here, instead of traditional party lists.[43] With a little simplification[44], the process can be summarised in that a preferential mandate is acquired when a national minority list manages to attain one-fourth of the proportional quota (calculated from the number of votes per mandate).[45] This presents an extraordinary opportunity. One of the great questions of elections to come will be the extent to which national minorities will be able to influence public life thanks to this policy.

As a conclusion, we can consider the level of national minority protection more than sufficient and in tune with our historical traditions in this regard. Consensus on the need to preserve this protection is wide-scale. It goes against the values of every decent person to offend minorities. The problem begins only when certain people use their national (minority) status as a shield against completely legal procedures. This custom can potentially erode said consensus on minority protection. From this point forward, however, it is their personal behaviour, and not their origins that falls subject to rightful criticism.

[40] See: FARKAS, Gy. T., A nemzetiségek parlamenti képviselete Hazánkban és a környező országokban. In: *Jog és Állam X. Jogász Doktoranduszok Országos Szakmai Találkozója,* Vol. 2015/20. Budapest, 2015, p. 16-18.

[41] Section 68, Subsection (1) of the Constitution of Hungary, modified by Act XXXI of 1989, defined national minorities as constituent elements of the Hungarian state (this terminology was later copied by the Fundamental Law replacing the Constitution). From this wording, in Resolution 35/1992 (VI. 10.), the Constitutional Court of Hungary (AB) ruled that national minorities are entitled to parliamentary representation and found the legislature's neglect in providing for it unconstitutional. This was only recently remedied, when an electoral law (Act CCIII of 2011) made it possible to create national minority lists during general elections. This already underwent „live testing" during the parliamentary elections of 2014.

[42] Immediately after the fall of Communism, a law was enacted that (would have) provided national minorities with parliamentary representation, but it was repealed before it could be realised. See: FARKAS 2014, p. 63-64.

[43] See: Act CCIII of 2011, Section 12, Subsection (2).

[44] See in greater detail: CSERVÁK, Cs., Választási rendszerek – és az új magyar megoldás. In: RIXER, Á., *Válogatott közjogi tanulmányok Magyarország Alaptörvénye tiszteletére.* Budapest, 2012, p. 291-307.

[45] See: Act CCIII of 2011, Section 16/D.

SC Claudianum: a Positive Feedback on Property or Defence of Family Bonds?

*János Erdődy**

Abstract

SC Claudianum decreed that any free woman, Roman or Latin, pursue relationship with the slave of another, and she fails to abandon the relationship after the denouncement of the slave's master, will become the slave of the master denouncing her deed. In this paper we are aiming to discover the actual content of this decree of the Senate, as well as trying to determine whether the goal of the decree was to defend or even promote social morals, or to defend sexual morality, or even to give protection to certain interests and authorities of the parties involved.

Keywords: *Roman law; Senatusconsultum; SC Claudianum; Emperor Claudius; Emperor Vespasian; Gaius; Paulus; Tacitus; Suetonius; status; slavery; slave; citizenship; Roman citizen; Roman woman; slave.*

1. Introduction

SC Claudianum [1] is an intriguing enactment on enslavement of women as a punitive measure. Stemming from the Claudian era of Roman Principate, this decree brought in the severe punishment of any free woman choosing to maintain a relationship whatsoever with the slave of another, after the formal denouncement of the slave's master.[2] In general, these rules seem fully comprehensible; however, after a deeper scrutiny, a less unanimous image is beginning to take shape with regard to the details of this senatorial legislation. The first difference occurs in connection with the date of this SC: there are some who date it to 52 AD, whereas others believe that it stems from the year 54 AD.[3] Any attempt to decide for any of these opinions seems to lack probability, let alone necessity at all. What seems to be

* János Erdődy, Associate Professor, Faculty of Law and Political Sciences, Pázmány Péter Catholic University, Budapest, Hungary.

1 The literature of this topic is overwhelming. For the most important ones, cf. BUCKLAND, W. W., *The Roman Law of Slavery. The Condition of the Slave in Private Law from Augustus to Justinian*. Cambridge, 1908, p. 401 et al.; MAY, G., L'activité juridique de l'empereur Claude. In: *Revue Historique de Droit Français et Étranger*, XXXVI (1936), pp. 213–254.; RADO, T., Le senatus consultum Claudianum. In: *Ann. Fac. Droit d'Istanbul*, III (1954), pp. 44–55.; HOETNIK, H. R., Autour du « Sénatus-Consulte Claudien ». In: (ed.), *Droits de l'antiquité et sociologie juridique. Mélanges Lévy-Bruhl.* Paris, 1959, pp. 153–162.; WEAVER, P. R. C., Gaius i. 84 and the S.C. Claudianum. In: *The Classical Review*, XIV (1964), pp. 137–139.; CROOK, J., Gaius, Institutes, I. 84–86. In: *The Classical Review*, XVII (1967), pp. 7–8; VOLTERRA, E., Senatus consulta. In: AZARA, A. (ed.), *Novissimo Digesto Italiano*. 1969, pp. 1047–1078.; ROBINSON, O., Slaves and the Criminal Law. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, XCVIII (1981), pp. 213–254.; GAUDEMENT, J., Esclavage et Dépendance dans l'Antiquité. Bilan et Perspectives. In: *Tijdschrift voor Rechtsgeschiedenis*, CXIX (1982), pp. 119–156.; TALBERT, R. J. A., *The Senate of Imperial Rome*. Princeton, 1984, pp. 431–459.; ALBANESE, B., Apunti sul Senatoconsulto Claudiano. In: MARRONE, M. (ed.), *Scritti giuridici vol.1.* Palermo – Torino, 1991, pp. 29–39.; MICHEL, J.-H., Du neuf sur Gaius? In: *Revue Internationale des Droits de l'Antiquité*, XXXVIII (1991), pp. 176–217.; HERRMANN-OTTO, E., *Ex ancilla natus. Untersuchungen zu den „hausgeborenen" Sklaven und Sklavinnen im Westen des Römischen Kaiserreiches*. Stuttgart, 1994, p. 29 et al.; SIRKS, A. J. B., Ad senatus consultum Claudianum. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, CXI (1994), pp. 436–437.; MUNZINGER, M., *Vincula deterrimae condicionis. Die rechtliche Stellung der spätantiken Kolonen im Spannungsfeld zwischen Sklaverei und Freiheit*. München, 1998, pp. 49–87.; STORCHI MARINO, A., Restaurazione dei mores e controllo della mobilità socialea Roma nel I secolo d.C. Il senatusconsultum Claudianum "de poena feminarum quae servis coniugerentur". In: REDUZZI MEROLA, F. – STORCHI MARINO, A. (ed.), *Femmes–Esclaves. Modèles d'interprétation antropologique, économique, juridique. Atti del XXI colloquio internazionale GIREA. Lacco Ameni, Schia 27–29 ottobre 1994*. Napoli, 1999, pp. 391–426.; WIELING, H., *Die Begründung des Sklavenstatus nach ius gentium und ius civile.* Stuttgart, 1999, p. 20 ssq.; MASI DORIA, C., In margine a PS. 2.21a.11. In: ZABŁOCKA, M. (ed.), *Au-delà des frontières. Mélanes W. Wołodkiewicz I*. Varsovie, 2000, pp. 507–519.; SIRKS, A. J. B., Der Zweck der Senatus Consultum Claudianum von 52 n. Ch. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, CXXII (2005), pp. 138–149.; BUONGIORNO, P., *Senatus consulta Claudianis temporibus facta*. Napoli, 2010, 310–325.; HERRMANN-OTTO, E., *Sklaverei und Freilassung in der griechisch-römischen Welt*. Darmstadt, 2017, p. 226 sq.

2 Cf. SMITH (ed.), *Dictionary of Greek and Roman Antiquities*. Boston, 1870, s. v. 'senatusconsultum'.

3 The date 52 AD is suggested by MOMMSEN, T., *Römisches Strafrecht*. Darmstadt, 1899, p. 854.; BUCKLAND, W. W., op. cit. pp. 401. and 412.; HOETNIK, H. R., op. cit. p. 153.; WEAVER, P. R. C., op. cit. p. 138.; CROOK, J., op. cit. p. 7.; HERRMANN-OTTO, E., op. cit. (1994) p. 29.; HERRMANN-OTTO, E., op. cit.(2017) p. 226.; STORCHI MARINO, A., op. cit.p. 399.; MASI DORIA, C., op. cit. (2000) p. 507.; MASI DORIA, C., 'Ancilla efficitur'… 'in eo statu manebit'. Le conseguenze del SC. Claudianum per le donne di status libertino. In: LÓPEZ, R. R. – BOSCH, M. J. B. (ed.), *Mulier. Algunas historias e instituciones de derecho romano*. Madrid, 2015, p. 158. The year 54 AD is stated by the following authors: KASER, M., *Das römische Privatrecht*. München, 1971, p. 289.; WIELING, H., op. cit. p. 20.; whereas Albanese and Robinson simply omit issues of dates; cf. ALBANESE, B., op. cit. pp. 29–39.; ROBINSON, O., op. cit. pp. 242. and 245.

sure is that this SC dates back to the mid-1st century AD, more specifically, to the reign of Emperor Claudius.[4]

Besides certain issues regarding the determination of the proper date, the actual content is also debated (mostly in aspects of slavery, or the social status of the affected children). Terminology describing the relationship between the slave and the free woman is also challenging enough to be analysed. There are some hot points, such as *denunciatio*, *pactio,* equally worth examining.

2. SC Claudianum: different approaches and evaluations in secondary literature

Despite categorised as a probably low-profile issue, still there is one related to the systematic classification of SC Claudianum. The question arises amongst secondary authors whether the rules of SC Claudianum, according to *ius civile* or *praetorium,* constitute a sub-category for becoming a slave. Certain authors (e.g. Földi – Hamza in Hungarian literature)[5] consider these cases belonging to the group of *ius praetorium*, whereas other authors (e.g. Buckland Albanese, Hoetnik, Wieling, Hermann-Otto)[6] expressly qualify it as belonging to *ius civile*. Max Kaser's approach seems to resolve the apparent dissent; the renowned Romanist enumerates cases of enslavement in a chronological order, and in this list SC Claudianum is mentioned amongst the cases pertaining to the Principate.

With regard to the topics of the decree, it is notable how secondary authors reflect to its actual content, with reference mainly to the relationship between the woman and the slave of another. Certain works refer to such a connection as a carnal relationship[7], whereas others refer to it simply as a partnership.[8] Again, another interpretation focuses on the fact that the slave and the woman live together without putting an emphasis neither on the carnal, nor the conjugal nature of their relationship.[9]

On the international level, translations are worth lingering at: all of them contain a certain level of interpretation quite useful in the overall comprehension of the primary sources. First, when citing the often criticised translation by William P. Scott[10], we have to admit that there are manifold mistakes and doubtful formulations in the text. Nevertheless, it exists as a version of translation, thus it cannot be set aside as such. At some instances, the term "intercourse" (Gai. 1, 91) and "sexual intercourse" (Gai. 1, 84) comes up, whereas the expression "forms a union" also occurs on two occasions (cf. Paul. 2, 21a, 1; Ulp. 11, 11). In comparison with this, Poste's translation[11] unanimously applies the term "intercourse" (Gai. 1, 84 és 91). Amongst secondary authors, Buckland[12] uses the general term "live with a slave", Berger, however, is more precise in this topic; "living in a conjugal union with a slave".[13] Sirks applies the term "cohabit" in the English version of his paper in the topic.[14] In a rather recent paper, Kyle Harper refers to the "union between free female citizens and slave men".[15] He then uses a broader term than the previously cited authors, though his reference to female citizens may be misleading. In German literature, Max Kaser covers the topic as follows: „[n]ach dem SC Claudianum wird die Bürgerin versklavt, die mit einem Sklaven wider Willen seines Herrn trotz dessen (dreimaliger?) Warnung geschlechtlich verkehrt."[16] In another instance he uses the expression „Geschlechtsverkehr".[17] The manual by Kaser – Knütel translates the register *contubernium* with the German term "Lebensgemeinschaft".[18] A moral evaluation seems to be reflected from a work by Munzinger, because, on following Tacitus's report, he presents the content of the senatorial decree as follows: "[…] eine Frau, die so weit gesunken ist, sich mit einem Sklaven zu verbinden, zur Strafe versklavt wird[…]".[19] Elisabeth Herrmann-Otto uses the verb "verkehren" when she describes the relationship between the woman and the slave.[20] Amongst Italian authors, both Talamanca and Guarino specify in depth the background for this case of becoming a slave. As Talamanca sees it, this SC

[4] In connection with this statement, however, an excerpt by a primary author, Suetonius is by all means to be referred to. In his biographies of certain emperors, Suetonius, mentions this decree with a tie-in to Emperor Vespasian (cf. Suet. Vesp. 11). This fact is going to be dealt with later on.

[5] Cf. FÖLDI, A. – HAMZA, G., *A római jog története és institúciói*. Budapest, 2013, p. 214.

[6] Cf. BUCKLAND, W. W., op. cit. p. 412 sqq.; HOETNIK, H. R., op. cit. p. 153 sqq.; ALBANESE, B., op. cit. p. 29 sqq.; WIELING, H., op. cit. p. 81.; HERRMANN-OTTO, E., op. cit.(2017) p. 226.

[7] FÖLDI, A. – HAMZA, G., op. cit. p. 214.

[8] MOLNÁR, I. – JAKAB, É., *Római jog*. Szeged, 2004, p. 125.

[9] BENEDEK, F. – PÓKECZ KOVÁCS, A., *Római magánjog*. Budapest – Pécs, 2014, ed., p. 113.

[10] Cf. W. P Scott: *The Institutes of Gaius*. Cincinnati, 1932.

[11] Cf. E. Poste: *The Institutes of Gaius*. Oxford, 1904.

[12] Cf. BUCKLAND, W. W., op. cit. p. 412. This approach is also reflected by Weaver and Crook; see also WEAVER, P. R. C., op. cit. p. 138.; CROOK, J., op. cit. p. 7.

[13] See also BERGER, A., *Encyclopedic Dictionary of Roman Law*. New Yersey, 2010. s. v. "Senatusconsultum Claudianum". This idea is reflected in a later work by Weaver, where he repeatedly mentions marriage; cf. WEAVER, P. R. C., *Familia Caesaris. A Social Study of the Emperor's Freedmen and Slaves*. 1972, p. 162 sqq.

[14] Cf. SIRKS, A. J. B., op. cit. p. 436. It is also notable, however, in his German paper, in which he seeks to find the goal of SC Claudianum, he doesn't even mention this aspect of the regulations. On this see SIRKS, A. J. B., op. cit. pp. 138–149.

[15] Cf. HARPER, K., The SC Claudianum in the Codex Theodosianus: Social History and Legal Texts. In: *The Classical Quarterly*, LX (2010), p. 610.

[16] KASER, M., op. cit. (1971) p. 292. He notes that the threefold denunciation is based on the text by Paul (Paul. 2, 21a, 17), the originality of which is doubtful. Besides Paul, he also has reference to Gai. 1, 191, Tac. Ann. 12, 53 as well.

[17] Cf. Ibid.(1971) p. 289.

[18] Cf. KASER, M., *Römisches Privatrecht*. München, 2014, p. 101.

[19] Cf. MUNZINGER, M., op. cit. p. 49.

[20] See e. g. HERRMANN-OTTO, E., op. cit.(2017) p. 226.

"[…] faceva diventare la donna schiava del proprietario del *servus* con cui la donna stessa aveva una relazione sessuale […]".[21] Guarino seems to be somewhat nuanced when he states as follows: "[u]no dei casi di riduzione in schiavitů del *civis Romanus* č quello della cittadina romana che avesse avuto un figlio da uno schiavo contro l'esplicito divieto di padrone costui […]".[22] Buongiorno's approach is different from that of other authors'; he always uses the appropriate Latin term when analysing the report given by certain primary authors. Consequently, he refers to the relationship between the woman and the slave as *contubernium* when analysing Tacitus, whereas he applies the term "*se iunxerit*" presenting Paul's description.[23] This approach is all the more important because via this a fundamental problem is avoided: namely, that translations also imply interpretations at the same time. Such an expert attitude is also characteristic of Carla Masi Doria, who also uses the Latin terms, however, she describes the situations falling under the regulation of SC Claudianum with the reserved expression "unioni".[24]

French literature. in comparison. takes a more distant stance when Gaudemet claims: "[…] la disposition du sénatus consulte Claudien (52 aprčs J. C.) en vertu duquel la femme libre qui vit avec l'esclave d'un tiers, malgré la défense de ce tiers, devient l'esclave de ce dernier".[25]

Even this brief and general outline points out clearly that modern views and approaches do contain a certain amount of interpretation; even when it comes to translations. It seems highly likely that all authors are right insofar as all views can be maintained by a set of sources, data and conclusions. What we can see at this point is that secondary authors consider the union between "a free woman and the slave of another" differently. The original Latin terms not only enable but also even encourage such a diversity of perceptions, views and concepts. One might as well say that each and every author holds a shard of the philosophers' stone; none errs, primarily due to the fact that even the primary sources on this topic use rather vague formulations. Consequently, the analysis of the primary sources always plays a preponderant role in the process of understanding a particular regulation.

2.1 Issues covered by primary sources

In the primary sources, there are three topics emerge frequently as legally relevant issues linked to this SC: one is the legal status of the child born from a relationship between a Roman woman and a slave, another is the institution of *denuntiatio*, and a third one is the possibility of *pactio* and the status of the woman in this context.

Pertaining to the status of the child, secondary authors claim that primary sources report on an exception from the rule in accordance with which a child born from an extra-matrimonial relationship should follow the mother's status.[26] If a child is born from a Roman marriage, paternal authority applies, therefore the child is bound to follow the father's status. If, however, the child isn't born from a legitimate marriage, they won't have a father, thus lack paternal authority, consequently can only follow their mother's status.[27]

In his monograph on Senatus Consulta Claudiana, Pierangelo Buongiorno[28] explicitly mentions two major topics related to SC Claudianum. One is *denuntiatio*, that is the slave's master should denounce the behaviour carried out by the Roman woman in order that she should be enslaved. Kaser mentions a presumably threefold denunciation.[29] In connection to this, he also examines the procedural steps towards the enslavement of the woman in question. After examining mainly the works by Carla Masi Doria, ha asserts that *denuntiatio* as such was nothing else but a "prodromal" step towards enslavement.[30]

Pactio is also an interesting element in the sources to contemplate about: the term refers to an opportunity of the woman to conclude an agreement with the slave's master to avoid enslavement. The result of such an agreement is that the woman remains free, yet she gives birth to a slave.[31]

In addition, there are some instances when the whole topic of SC Claudianum is regarded as a gender issue. This approach is to be taken into account later, in connection with Roman institutionalism and natural law thinking; not because of its importance (if any), but because of the fact that such views are becoming more and more widespread ideas.

3. Primary sources at a glimpse: Tacitus and Suetonius; the legal texts

Primary sources come into two main groups: the first are those by *auctores*, mainly Tacitus, senator and historian in imperial Rome, as well as Suetonius, a historian in favour of Emperors Trajan and Hadrian. These sources are also referred to as non-legal sources.[32] The other group contains legal sources, mainly the treatises by Gaius and Paulus. Additionally, Ulpian and certain excerpts from the Codex Theodosianus, Codex Iustinianus and the Institutes of Justinian are also taken into ac-

[21] Cf. TALAMANCA, M., *Istituzioni di diritto romano*. Milano, 1990, p. 90.
[22] Cf. GUARINO, A., *Diritto privato romano*. Napoli, 1992, p. 681.
[23] Cf. BUONGIORNO, P., op. cit. p. 314 and p. 317, respectively.
[24] Cf. MASI DORIA, C., op. cit. (2015) p. 159 sqq. A similar approach is reflected in another work by the same author; cf. MASI DORIA, C., op. cit. (2000) p. 507–519., even though in the introduction, she uses the term "congiunte", that is kinswomen. Cf. Ibid. p. 507.
[25] Cf. GAUDEMENT, J., *Le droit privé romain*. Paris, 1974, p. 42.
[26] Cf. e.g. KASER, M., op. cit.(1971) pp. 279–280., and specifically footnote 11; SIRKS, A. J. B., op. cit. p. 138.
[27] In the primary sources cf. for instance Gai. 1, 65–96 with regard to the diversity of cases.
[28] See reference in footnote 1.
[29] KASER, M., op. cit.(1971) 292: "[…] (dreimaliger?) Warnung […]". See also HERRMANN-OTTO, E., op. cit.(2017) p. 226.
[30] Cf. BUONGIORNO, P., op. cit.p. 319–322.
[31] See for instance Gai. 1, 84.; WEAVER, P. R. C., op. cit. p. 138.
[32] Cf. e. g. RADO, T., op. cit. p. 45., using the term "littérature extrajuridique".

count; the latter ones are extremely useful for the analysis of postclassical changes.[33]

3.1 Tacitus and Suetonius

Historian and biographer Tacitus gives a brief glimpse of the content of this decree in his work *Annales*.

Tac. Ann. 12, 53

Inter quae refert ad patres de poena feminarum quae servis coniungerentur; statuiturque ut ignaro domino ad id prolapsae in servitute, sin consensisset, pro libertis haberentur.

Probably one of the most famous accounts[34] given by Tacitus is substantially different[35] from the one in the legal sources, as it claims that the Emperor submitted a motion to the senate, penalizing women who cohabited or married slaves. From this excerpt it turns out that even the consent given by the slave's master results in the fact that the woman becomes a *libertina*, a freedwoman. According to Gaius' report (Gai. 1, 9–11), men could be freemen or slaves. Again, freemen obtain freedom by birth (freeborn) or by manumission (freedmen). Consequently, an *ingenua* and a *libertina* both fall into the category of *homines liberi*; yet if we consider the measures of *lex Pappia Poppaea,* for instance, a differentiation between *libertinae* and *ingenuae* is distinct.[36]

In addition to this, the substantial difference mentioned above can be traced in three instances. The first one lies in the fact that Tacitus is the only author to explicitly mention a *poena* in connection with the activity described in the decree (though enslavement as such could be regarded as a *poena*). The second one is the term "*ignaro domino*", which implies that the master was unaware of the relationship. Thirdly, the clause introduced by "*sin consensisset*", that is if the master isn't against the relationship, the woman will be a *libertina*.[37] Again, the term "*coniungerentur*" won't help us to better understand the nature of the relationship between the woman and the slave. In addition, the historian then states that, according to the senate's resolution, if anyone maintains such a relationship without the knowledge of the slave's owner, that person should be regarded as a slave; whereas, if the master consented, the woman was to be classed as a freedwoman.

Suetonius deals with this SC in connection with Emperor Vespasian:

Suet. Vesp. 11

"Libido atque luxuria coercente nullo invaluerant; auctor senatui fuit decernendi, ut quae se alieno servo iunxisset, ancilla haberetur […]."

In this text, Suetonius examines the reasons for this senatorial decree. He claims that licentiousness and extravagance had flourished without any restraint, therefore the Emperor Vespasian convinced the senate to pass measures; that any woman who entered into a relationship with the slave of another person should herself be treated as slave herself.

Interestingly, Suetonius is the only primary author to attribute SC Claudianum to Emperor Vespasian (69 – 79 AD), whereas all other literary and legal sources link it to the reign of Emperor Claudius (41 – 54 AD). It could easily be treated as a mistake or a misconception, however, in secondary literature Sirks regards this report totally consistent with other sources. He basically regards this coverage as the description of a reinforcement of the former measures by Emperor Claudius a generation earlier.[38] In addition, the presumable reason for this regulation is explicitly declared here. Suetonius mentions *libido* and *luxuria* as direct decisive factors, as a result it is safe to conclude that the *senatus consultum* was generally aiming to halter the moral fall in society, more specifically, to prevent certain sexual offences and abuses. Amongst primary sources, Suetonius is the only author to deal with the aims and background of this decree, whereas secondary authors hasten to surpass other opinions in this particular topic. At this point, suffice it to cite the generally accepted contemporary approach according to which the main effort behind the regulation was to defend the interest of the slave's master.[39] This opinion seems all the more grounded because there are primary sources to directly underpin such a view.[40] However, it should also be noted that secondary opinions practically thrive in connection with this topic; as a consequence, it may be worthwhile outlining this diversity of views as well.

With regard to the terminology used in the literary sources, we can see that Tacitus uses the verb *coniungerentur*, Suetonius applies the terminus *se iunxisset* when it comes to the description of the relationship between the woman and the slave. As a result, approaches in secondary literature cannot be discarded on the basis of primary source terminology at this point.

3.2 Paulus and the Sententiarum Libri

In Paul's work[41], a long text covers the topic of SC Claudianum: a whole title is dedicated to women related to the slave of another, whatever the actual form of this relation might be.[42]

---

[33] WIELING, H., op. cit. p. 22.; BUONGIORNO, P., op. cit. pp. 311–314.; MASI DORIA, C., op. cit. (2015) p. 162.; STORCHI MARINO, A., op. cit. p. 391. On the postclassical "afterlife" the primary readings are HARPER, K., op. cit. pp. 610–638.; MUNZINGER, M., op. cit. pp. 49 – 87.; as for the abolition by Justinian specifically p. 79 sqq.

[34] Cf. MASI DORIA, C., op. cit.(2015) p. 162.

[35] SIRKS, A. J. B., op. cit. 139.; BUONGIORNO, P., op. cit.p. 314.; MASI DORIA, C., op. cit.(2015) pp. 162–163.

[36] Cf. e.g. Gai. 3, 42–53.

[37] Similarly see MASI DORIA, C., op. cit.(2015) pp. 162–163.

[38] Cf. SIRKS, A. J. B., op. cit. p. 142.; correspondingly STORCHI MARINO, A., op. cit.p. 411–412.

[39] Cf. WIELING, H., op. cit. p. 20.; HERRMANN-OTTO, E., op. cit.(2017) p. 226.

[40] See mainly Gai. D. 22, 1, 28, 1 (2 rer. cott.). In detail see also below in connection with Gai. 1, 91, with literature included.

[41] Concerning Pauli Sententiarum Libri V the literature is copious; suffice it to refer to works by Detlef Liebs. On this see mainly LIEBS, D., Römische Jurisprudenz in Africa. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, CVI (1989), 210–247.; LIEBS, D., *Römische Jurisprudenz in Africa. Mit Studien zu den pseudopaulinischen Sentenzen*. 1993,; LIEBS, D., Die pseudopaulinischen Sentenzen I. Versuch einer neuen Palingenesie. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, CXII (1995), 151–171.; LIEBS, D., Die pseudopaulinischen Sentenzen II. Versuch einer neuen Palingenesie, Ausführung. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, CXIII (1996), 132–242.

[42] On this see also MASI DORIA, C., op. cit. (2015) p. 161.

The text focuses mainly on the position of the free women and *servi alieni*, and, due to the possible combinations, it contains several case variations.[43] Additionally, the institution of *denuntiatio* is specifically taken into account.

Paul. 2, 21a, 1–5

[1] Si mulier ingenua civisque Romana vel Latina alieno se servo coniunxerit, si quidem invito et denuntiante domino in eodem contubernio perseveraverit, efficitur ancilla. [2] Si servo pupilli ingenua mulier se coniungat, denuntiatione tutoris efficitur ancilla. [3] Mulier et si [deferre non possit], tamen ei quae se servo iunxerit denuntiando adquirit ancillam. [4] Procurator et filius familias et servus iussu patris aut domini denuntiando faciunt ancillam. [5] Si peculiari servo filii familias libera se mulier coniunxerit, nulla disquisitione paternae voluntatis iure sollemni decurso adquiret ancillam.

The SC Claudianum, as a regulation pertaining to *ius civile,* was applicable exclusively to Roman and Latin women. First, the text contains the basic, well-known rule, then § 2–5 discuss the legal status of the woman and the slave. If the slave's master is a *pupillus*, then the denunciation should be performed by the guardian. On the occasion, however, if the relationship is sustained with the slave of a woman under guardianship, then the woman under guardianship is also entitled to denounce the free woman. In addition, by denouncing the free woman who has formed a union with the slave of the woman under guardianship, she will acquire the free woman as her slave. By the order of the *pater familias*, the *filius familias* or even the slave is permitted to denounce the woman.[44] If, however, the slave in question is part of a *peculium* handed down by the *pater familias* for administration, then the *filius* is free to denounce the woman regardless of his father's consent, despite the fact that the components of the *peculium* belong *ex iure Quiritium* to the *pater familias*. The following excerpt, § 3 of the text is incomplete: „*Mulier et si […], tamen ei quae se servo iunxerit denuntiando adquirit ancillam*". The suggested substitution for the lacunae is as follows: *tutorem habeat*, or *sub tutela sit*.[45]

Paul. 2, 21a, 6–10

[6] Liberta sciente patrono alieni servi secuta contubernium eius qui denuntiavit efficitur ancilla. [7] Liberta si ignorante patrono servo se alieno coniunxerit, ancilla patroni efficitur ea condicione, ne aliquando ab eo ad civitatem Romanam perducatur. [8] Filii familias servo, quem ex castrensi peculio habet, si se ingenua mulier coniunxerit, eius denuntiatione efficitur ancilla. [9] Filia familias si invito vel ignorante patre servo alieno se iunxerit, etiam post denuntiationem statum suum retinet, quia facto filiorum peior condicio parentum fieri non potest. [10] Filia familias si iubente patre invito domino servi alieni contubernium secuta sit, ancilla efficitur, quia parentes deteriorem filiorum condicionem facere possunt.

If a *libertina* pursues a relationship with the slave of another, then she becomes a slave as a result of denunciation on the proviso that the *patronus* knew about the relationship. If this isn't the case, the *libertina* cannot become the slave of another, because, due to her becoming the slave of another, her *patronus* would lose his *ius patronatus* over the *libertina*. Consequently, if the relationship was pursued without the *patronus'* knowledge, the *libertina* is more likely to become his slave again.[46] Should he free her again, the, the woman would be unable to achieve Roman citizenship, only *ius Latii*.[47]

If a freeborn woman forms a union with a slave included in the *peculium castrense* of a son under paternal control, she becomes his female slave if he denounces her. If a daughter under paternal control, without the consent or knowledge of her father, forms a union with a slave belonging to another, she will retain her position even after being denounced, for the reason that the condition of a parent cannot become worse through any act of his children. If all this took place by the father's order, the daughter becomes a slave, as parents can render the condition of their children worse.

Paul. 2, 21a, 11–14

[11] Liberta servi patroni contubernium secuta etiam post denuntiationem in eo statu manebit, quia domum patroni videtur deserere noluisse. [12] Errore quae se putavit ancillam atque ideo alieni servi contubernium secuta est, si postea liberam se sciens in contubernio eodem perseveraverit, efficitur ancilla. [13] Si patrona servo liberti sui se coniunxerit, etiam denuntiatione conventam ancillam fieri non placuit. [14] Mulier ingenua, quae se sciens servo municipum iunxerit, etiam citra denuntiationem ancilla efficitur: non item si nesciat. Nescisse autem videtur, quae comperta condicione contubernio se abstinuit, aut libertum putavit.

A *libertina* pursuing relationship with the slave of her own patron will remain a *libertina* after having been denounced because she isn't supposed to abandon the house of her *patronus*. In comparison with the general rule, Masi Doria regards this case as an exception, the reason of which is that manumission wouldn't ruin the link between the *libertina* and the *domus* of her *patronus*.[48]

Any woman who believes erroneously to be a female slave, and on this account forms a union with the slave of another, and, after having become aware of being free, wouldn't abandon the relationship, becomes a slave.

---

[43] Correspondingly see also MASI DORIA, C., op. cit. (2000) pp. 507–508, and especially footnote n. 3 with abundant literature.

[44] ROBINSON, O., op. cit. p. 242.

[45] WIELING, H., op. cit. p. 81.

[46] Cf. ROBINSON, O., op. cit. p. 245.

[47] On this see also KASER, M., op. cit. (1971) p. 282.

[48] "[…] la manomissione non avesse rotto la relazione tra l'ex schiava e la *domus* […]". See explicitly MASI DORIA, C., op. cit. (2000) pp. 508–510. As she sees it, the text hints at *contubernium*, that is a quasi-matrimonial link between the slave and the freedwoman. She also notes that it is highly unlikely to be able to determine whether the passage in question made its original appearance in the *senatus consultum* itself, or its content is merely due to subsequent interpretations, though she personally deems this excerpt to stem from classical times. Cf. in details ibid. pp. 508–511. See specifically footnote 10, where she gives plenty of references to archeologic findings to underpin her idea.

If a *patrona* pursues a relationship with the slave of her own *libertinus*, she won't become the slave by his denunciation, as a result of the *reverentia,* the *libertinus* is due to his formal mistress.[49]

Paul. 2, 21a, 15–18

[15] Libera mulier contubernium eius secuta, qui plures dominos habuit, eius fit ancilla, qui prior denuntiavit, nisi forte ab omnibus factum sit. [16] Si mater servo filii se iunxerit, non tollit senatus consultum claudianum erubescendam matris etiam in re turpi reverentiam exemplo eius, quae se servo liberti sui coniunxerit. [17] Tribus denuntiationibus conventa etsi ex senatus consulto facta videatur ancilla, domino tamen adiudicata citra auctoritatem interpositi per praesidem decreti non videtur: ipse enim debet auferre qui dare potest libertatem. [18] Filia familias mortuo patre si in servi contubernio perseveraverit, pro tenore senatus consulti Claudiani conventa efficitur ancilla.

A free woman in relationship with a slave belonging to multiple masters becomes the slave of the first one who denounces her, unless this is done by all of them at a time.

If a mother forms a union with the slave of her son, *reverentia* is also taken into account by the provisions of the decree.

As a postclassical reference, the last fragment of this title mentions the institution of the threefold denunciation, as well as a hint to the fact that enslavement won't take place *eo ipso*.

3.3 Other legal sources: Gaius and the Institutes of Justinian

The text of this senatorial decree is only available to us due to republications in subsequent juridical works: on the one hand, the previously examined excerpts by Paulus are to be taken into account here, as well as the Gaius' and Justinian's Institutes. Additionally, *Tituli ex corpore Ulpiani* also mentions some aspects of this decree.[50] These texts are important because through them we can get access to a detailed and nuanced picture of what the actual content of SC Claudianum was or could be, with special reference to those so-called institutional nodes where other legally relevant problems may have a tie-in.[51]

Gai. 1, 160

Maxima est capitis diminutio, cum aliquis simul et civitatem et libertatem amittit; quae accidit incensis, qui ex forma censuali venire iubentur: quod ius […], qui contra eam legem in urbe Roma domicilium habuerint; item feminae, quae ex senatus consulto Claudiano ancillae fiunt eorum dominorum, quibus invitis et denuntiantibus cum servis eorum coierint.

This first text by Gaius treats the topic *capitis deminutio*, more specifically *capitis deminutio maxima*.[52] As the text states, it occurs when someone loses citizenship and freedom at once. The excerpt then enumerates many examples, amongst which SC Claudianum is also mentioned with regard to women.

Gai. 1, 91

Item si qua mulier civis Romana praegnas ex senatus consulto Claudiano ancilla facta sit ob id, quod alieno servo invito et denuntiante domino eius coierit, conplures distinguunt et existimant, si quidem ex iustis nuptiis conceptus sit, civem Romanum ex ea nasci, si vero volgo conceptus sit, servum nasci eius, cuius mater facta esset ancilla.

The text describes a potential case where a Roman woman becomes a slave under the SC Claudianum while being pregnant. As the fragment describes it, this could occur when the woman had intercourse with the slave of another, and she is denounced by the slave's master. The result is that the woman becomes a slave. Yet, the Gaian text isn't about the woman and her enslavement, instead it focuses on the child born from such a relationship.[53] According to Gaius, there's a common view (*conplures distinguunt et existimant*) according to which if a child was conceived in lawful marriage, he/she will be born a Roman citizen. If, however, was conceived in a promiscuous intercourse, the child will be born as the slave of the person to whom his mother belongs. Beyond the actual content, this text is particularly useful because here we can trace a glimpse of institutional attitude, similar to the case where an owner and a usufructuary of a pregnant female slave contested for whom the child of the female slave should belong.[54] In this latter case, the central institution analysed was *fructus*, examined from the point of view of both the female slave's owner and her usufructuary. When Gaius was to give a response on this particular issue, he examined this complex case exclusively from a legal aspect, using legal arguments and legal institutions. When it comes to institutional thinking, Gaius reduced the whole complex issue to one simple question: whether the offspring of a female slave could be regarded as *fructus*, or not.[55]

Gai. 1, 84

(84) Ecce enim ex senatus consulto Claudiano poterat civis Romana, quae alieno servo volente domino eius coiit, ipsa ex pactione libera permanere, sed servum procreare; nam quod inter eam et dominum istius servi convenerit, ex senatus consulto ratum esse iubetur. sed postea divus Hadrianus iniquitate rei et inelegantia iuris motus restituit iuris gentium regulam, ut cum ipsa mulier libera permaneat, liberum pariat.

---

[49] As for *reverentia* cf. KASER, M., op. cit. (1971) p. 299., where he mentions this institution in the list of morally established obligations bearing direct legal consequences; amongst such notions as *obesquium* and *honor* as legally binding obligations of a *libertinus*.

[50] These texts cover the classical and early post-classical rules, however, there are further primary sources, mainly imperial constitutions, such as for example C. 6, 59, 9; C. 7, 16, 3 and C. 7, 24, 1. In the secondary literature cf. mainly MUNZINGER, M., op. cit. pp. 49–87.; HARPER, K., op. cit. pp. 610–638.

[51] With regard to the textual criticism concerning the Paulian text, see Detlef Liebs: Die pseudopaulinischen Sentenzen I – II. Versuch einer neuen Palingenesie. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* CXII – CXIII. pp. 167, and 161–162.

[52] See also STORCHI MARINO, A., op. cit.p. 405., and specifically footnote n. 46; MASI DORIA, C., op. cit. (2015) p. 164.

[53] Correspondingly see also STORCHI MARINO, A., op. cit. p. 405., and footnote n. 45.

[54] Cf. Gai. D. 22, 1, 28, 1 (2 rer. cott.): *Partus vero ancillae in fructu non est itaque ad dominum proprietatis pertinet: absurdum enim videbatur hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparaverit*.

[55] See also KASER, M., Partus ancillae. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, LXXV (1958), pp. 157–158.; KASER, M., *Ius gentium*. Köln – Wien – Weimar, 1993, pp. 79–80.; ERDŐDY, J.: *In rerum natura esse videtur. Egy klasszikus római jogi toposz margójára*. Budapest, Pázmány Press, 2018., pp. 114–117., with literature.

From among the three texts by Gaius, this one gives a brief summary of the content of the *senatus consultum* however, this description outlines a situation different from those described in other sources. As the text puts it, if a Roman woman has sexual intercourse[56] with a slave belonging to another, she will remain free herself while she gives birth to a slave, should she conclude an agreement (*pactione*) with the slave's master.[57] Logically, the agreement serves as the expression of the master's consent.[58] This rule seems somewhat astonishing, as children born from an extra-matrimonial relationship are to follow the mother's status *iure gentium*. In this case we still experience that an exception is constituted by means of the senate's decision, resulting in a solution which was abolished by Emperor Hadrian, who deemed this regulation as injustice and impropriety.[59]

Inst. 3, 12, 1

Erat et ex senatus consulto Claudiano miserabilis per universitatem adquisitio, cum libera mulier servili amore bacchata ipsam libertatem per senatus consultum amittebat et cum libertate substantiam: quod indignum nostris temporibus esse existimantes, et a nostra civitate deleri et non inseri nostris digestis concessimus.

Justinian's Institutes cites the famous rule of the senatorial decree, mentioning that a free woman who is (as the wording puts it) frenzied by love for a slave of another, will lose her own liberty along with her property. Justinian generously adds that he considers this measure to be unworthy of his times, therefore he has determined to abolish this decree omitting it from the Digest as well.

Ulp. 11, 11

Maxima capitis diminutio est, per quam et civitas et libertas amittitur, veluti cum incensus aliquis venierit, aut quod mulier alieno servo se iunxerit denuntiante domino et ancilla facta fuerit ex senatus consulto Claudiano.

Just like Gaius, Ulpian mentions SC Claudianum as an example of *capitis deminutio maxima*.[60] As other sources, he talks about the enslavement of a woman, should she live with the slave of another (*se iunxerit*). In addition, he also emphasises the fact that enslavement takes place as a result of a denunciation by the master (*denuntiante domino*).[61]

4. Conclusions

After the examination of the sources pertaining to this senatorial decree, the content of the decree is apparently referred to unanimously. However, few thoughts are linked to the actual background and reason for this legislation. When it comes to the true reasons for this *senatus consultum*, it is already stated that Suetonius is the sole author amongst literary sources to outline a straightforward reason for this enactment. The aim of this decree, as he puts it, is to restrain luxury and licentiousness (*libido atque luxuria coercente*). Besides this hint, there aren't any further indications as to what the Senate was supposed to achieve here, at least in the primary sources.

This, however, hasn't deterred secondary authors to speculate on the possible reasons of the enactment. Amongst these speculations, there are some far-fetched ones, to say the least. In Cambridge Ancient History it is supposed, for example, that sort of an incentive could have been the fright of contamination of free by slave blood.[62] This supposition is appalling because manumission was a legally regulated institution; consequently, slaves eventually "produced" Roman citizens.

Another fear as motivation could have been, as Weaver sees it, the fear from less home-born slaves.[63] This assumption is based on false pretences, though.[64] Again, there are ideas which cite sound reasons, at least from one aspect or another. Pólay believed that the Senate was aiming to sanction any unsolicited influence on private property.[65] Crook speculated that the reason for this enactment was to secure the property rights of masters over the slave's offspring.[66] In one of his early works, Weaver sustained the opinion that the point for *senatus consultum* here was to penalize women by enslavement, giving women the opportunity for an agreement with the master, thus keeping their freedom.[67] Herrmann-Otto emphasises the economic aspects of the regulation, as it was always deeply related to financial issues, or inheritance interests in comparison to the less likely moral grounds.[68]

There could be many other instances to cite here with ideas concerning the reasons for the SC. If we take time to think over those mentioned above, it is easy to see which are scandalous, or based on false preconceptions, or may be plausible. Still, the answer lies close to the analytic approach of SC Claudianum: what we can see here is the fact that the Romans never got far from their roots neither in a social and economic, nor in a legal sense. The reason for this is simple: very early on, they recognised the importance of living in accordance with the nature of things. This approach, this point of view gave them a certain

[56] The verb "*coiit*" could be understood in this sense here, especially if the text is about the status of the child born from such a relationship.
[57] SIRKS, A. J. B., op. cit. p. 141.; BUONGIORNO, P., op. cit. p. 314.; MASI DORIA, C., op. cit. (2015) p. 163.
[58] A similar approach appears in STORCHI MARINO, A., op. cit. p. 418.
[59] On this text see also WEAVER, P. R. C., op. cit. (1964) pp. 137–138.; PLESCIA, J., The Development of the Doctrine of Boni Mores in Roman Law. In: *Revue Internationale des Droits de l'Antiquité*, XXXIV (1987), pp. 297. and 302.; MICHEL, J.-H., op. cit. pp. 190., 214.; GAUDEMENT, J., op. cit., p. 138.
[60] Correspondingly BUONGIORNO, P., op. cit.p. 314.; MASI DORIA, C., op. cit.(2015) pp. 164–165.
[61] In details see also STORCHI MARINO, A., op. cit.p. 403.
[62] Cf. Cambridge Ancient History (1934) Vol. X. p. 693. Critically see CROOK, J., op. cit. p. 137.; SIRKS, A. J. B., op. cit. p. 143.
[63] WEAVER, P. R. C., op. cit.(1972) p. 163.
[64] Cf. SIRKS, A. J. B., op. cit. p. 144., and specifically footnote n. 27.
[65] PÓLAY, E., *Die Sklavenehe und das römische Recht*. Szeged, 1967, pp. 33 and 48.
[66] CROOK, J., op. cit. p. 137.
[67] WEAVER, P. R. C., op. cit. pp. 138–139. As one additional remark to be made here, Weaver's statement is perfect when it comes to covering what this SC was about, but what he says here is not a reason it's the outcome.
[68] Cf. HERRMANN-OTTO, E., op. cit.(2017) pp. 226–227.

edge in legal thinking, namely they always managed to find the heart of the actual problem. In addition to this, if there was any issue likely to provoke an ample range of emotions, they were keen to stick to institutions as a solid means of staying lucid and clairvoyant during decision making.

When we return to the question raised in the title of this paper, we can say that a defence of interests is very palpable. When we examine the reasons for this enactment, the most impressive, or even grandiloquent is the remark by Suetonius, who put the restraint on luxury and licentiousness in the centre. Surely, this was a substantial theme of the decree, but far from being dominant, though. Pólay is right that there was an unsolicited influence, but not on private property as he saw it, but rather on the slave, who was under his master's authority. Consequently, it's the master's *potestas* which is subject to influence. With this regards, Herrmann-Otto correctly states that the senatorial measures defended the economic and financial measures of the slave's master. Paul's report on the rules applicable to a *libertina* nicely underpin this idea. Thus, the primary result of these measure was to defend the master's interests, which interests are embodied in his *potestas* over the slave, instead of any sort of property rights. An additional outcome of the regulation could be the protection of marital bonds, and to a certain extent, morals, as well.

Formation of the Constitutional and Legal Status of National Minorities in the Second Polish Republic

Ihor Lohvynenko, Igor Nevzorov**, Gennadii Dedurin****

Abstract

The study of the features formation of the constitutional legal status of national minorities in interwar Poland was identified as the scientific goal of the article. To achieve this goal the author team used a number of methods where the basic are historical, dialectical and comparative legal methods. The application of these methods was complex. This made it possible to fully reflect the formation peculiarities of the constitutional and legal status of national minorities in interwar Poland.

The main law documents that influenced this process were also analyzed: the Little Treaty of Versailles, the relevant provisions of the Polish Constitutions of 1921 and 1935, as well as the Treaty of Riga.

The main shortcomings and contradictions of these documents were identified as they did not allow creating an effective state-legal mechanism for protecting the rights of national minorities in Poland. In particular the authors came to the conclusion that since the late 1920 s authoritarian tendencies prevailed in the leadership of the Polish state and no one hid the unwillingness to respect the provisions of the Little Treaty of Versailles.

It was found that in practice certain gaps in the formation of the constitutional legal status caused among the other things by the imperfection of international agreements in the field of protecting the rights of national minorities. This allowed both the central and local Polish authorities to ignore the democratic principles on which the Constitution of 1921 and other basic legislative acts of the country were based.

Undoubtedly a study of the origins of the constitutional legal status of national minorities in interwar Poland is synthesizing for the development of Polish and Ukrainian legal cultures. It will objectively contribute to the rule of law in modern Ukraine which must learn from the mistakes and draw the right conclusions from the shortcomings of national policy in the Second Polish Republic.

Keywords: *national minorities; Poland; the Little Treaty of Versailles; constitutional rights; the Treaty of Riga.*

1. Introduction

In today's context there is an active convergence of life activities of different spheres of the Ukrainian and Polish peoples. As a result there is an active public dialogue at all levels. This situation inevitably determines the interest in various aspects of joint humanitarian cooperation. Within such cooperation the issue of national peace and harmony is one of the defining factors which have not only regional but also pan-European significance.

The problem of pursuing an effective and balanced national policy towards national minorities is urgent for any not monoethnic country. For the international community the extreme severity of this problem first became apparent after the end of the First World War when a number of new countries emerged in the region of Central and Eastern Europe and a significant proportion of their population obtained the status of national minorities. Naturally this required both the international community and the governments of certain countries to take concrete steps to determine the constitutional and legal status of such population groups.

In this context the experience of the Polish state is extremely relevant. Reborn in November 1918, Poland became one of the countries with the largest percentage of national minorities, accounting for almost a third of its population. According to the 1921 census the most numerous were Ukrainians who made up 14.3% of the population, Jews — 7.8%, Belarusians — 3.9%, Germans — 3.9%[1]. In fact, these figures could have been even higher considering that some Ukrainians and Belarusians did not yet have a stable national identity and associated themselves as "local"[2]. In these circumstances the legal status of na-

* Ihor Lohvynenko, Ph.D., associate professor, Department of Theory and History of State and Law, Kharkiv National University of Internal Affairs, Kharkiv, Ukraine.

** Igor Nevzorov, Ph.D., Department of Theory and History of State and Law, Kharkiv National University of Internal Affairs, Kharkiv, Ukraine.

*** Gennadii Dedurin, Ph.D., associate professor, Department of Theory and History of State and Law, Kharkiv National University of Internal Affairs, Kharkiv, Ukraine.

[1] TOMASZEWSKI, J. Mniejszości narodowe w Polsce XX wieku. Warszawa, 1991, s. 23.

[2] MATELSKI, D. Administracja publiczna Drugiej Rzeczypospolitej wobec mniejszości narodowych oraz migrantów i cudzoziemców. In: Między tolerancją a niechęcią. Polityka współczesnych państw wobec migrantów i mniejszości, Poznań 2017. S. 236

tional minorities is of great interest not only to local scholars but also to foreign specialists. The additional importance to the study of the constitutional and legal status of national minorities in the Second Polish Republic gives the fact that due to the Treaty of Riga of 1921 between Soviet Russia and Poland Ukrainians became the largest national minority in Poland.

The purpose of the presented article is to determine the peculiarities of the constitutional and legal status of national minorities in the Second Polish Republic on the basis of an analysis of the relevant norms of international law and certain provisions of the Polish national legislation of that time.

The research methods were chosen by the author team based on the goal of the scientific work. Among the basic methods should be noted historical, dialectical, comparative legal etc. An analysis of the legal nature of the constitutional and legal status of national minorities during the interwar decades was made possible by the use of a dialectical method of cognition which helped to reveal the essential characteristics of the phenomenon studied in the work. The historical method made it possible to build studies on the fact that the formation of the constitutional and legal status of national minorities in the Second Polish Republic was determined by the historical conditions in which it originated and evolved. The comparative-legal method made it possible to compare the features of international legal acts and Polish law in the context of the place in which they belonged to determine the legal status of national minorities. The application of these methods was complex. This made it possible to fully reflect the peculiarities of the constitutional and legal status of national minorities in interwar Poland.

Both theoretical and practical issues related to the formation of the constitutional and legal status of national minorities, in particular in interwar Poland, were at various stages of interest to a wide range of scholars from Poland, Ukraine, Russia, Belarus and other countries. According to the interdisciplinary nature of these issues some contribution to its development was made by both "pure" historians and specialists working in the historical and legal field. Particularly noteworthy is the contribution to the study of the problems of such Ukrainian and foreign scientists as Y. Hrytsak, S. Plokhii, Y. Dashkevych, T. Snyder, J. Rothschild, Y. Myronovych, A. Chojnowski, J. Tomaszewski, A. Zagidulin, K. Gomolka, S. Dnistryansky and others.

Most of them preferred to study the peculiarities of the socio-economic status of national minorities such as E. Tomashevsky[3] or A. Chojnowski[4]. Some emphasized the national-cultural component like T. Snyder in his works "The Reconstruction of Nations: Poland, Ukraine, Lithuania, Belarus" and "Bloodlands: Europe between Hitler and Stalin"[5].

Also it's worth noting a group of studies on the characterization of the situation including the legal status of certain national minorities. Thus, S. Pototski and A. Kotowski[6] have published a number of works regarding the situation with the German minority. B. Makowski[7] studied the situation of Lithuanians in interwar Poland, K. Gomolka[8] — Belarusians, and E. Ognowski[9] described the situation about Jews.

However, analysis of the state of scientific development of the problem showed a significant advantage of historical work over historical and legal. Considering that these issues require a more thorough study in the historical and legal context.

2. The beginning of an independent Polish state and the problem of national minorities

Research into the problem of national minorities logically begins with determining who should belong to them. In our opinion T. Browarek and H. Chalupczak offered a successful definition: "a national or ethnic group that became dependent on another national group as a result of the violation or change of political boundaries"[10].

As for international law it does not provide a universal definition of "national minorities". However it is appropriate in the historical and legal context to give an opinion on this point made by the members of the Permanent Court of International Justice in July 1930: "A national minority is a group of persons resides in a given country or territory, has its own religious, racial, linguistic or cultural background and awares of its affiliation with a particular group on religious, racial, linguistic or cultural grounds. It reflects in a sense of community and a desire to preserve their own traditions, religious beliefs, to teach and educate children in the spirit of the traditions of their national group… "[11].

Ukrainian constitutional practice is based on the fact that the constitutional basis of legal status in Ukraine is determined at the level of the Fundamental Law. All fundamental rights

[3] TOMASZEWSKI, J. Ojczyzna nie tylko Polaków: mniejszości narodowe w Polsce w latach 1918 – 1939. Warszawa: Młodzieżowa Agencja Wydawnicza, 1985. 223 s.

[4] CHOJNOWSKI, A. Koncepcje polityki narodowościowej rządów polskich w latach 1921–1939. Polska myśl polityczna XIX i XX wieku, vol. 3. Wrocław: Polska Akademia Nauk, 1979. 262 s.

[5] SNYDER, T. The Reconstruction of Nations: Poland, Ukraine, Lithuania, Belarus. Kyiv, 2012. 624 p.; SNYDER, T. Bloodlands: Europe between Hitler and Stalin. Kyiv: Laurus, 2018. 492 p.

[6] POTOCKI, S. Położenie mniejszości niemieckiej w Polsce 1918-1938, Gdańsk: Wydawn. Morskie, 1969. 502 s.; KOTOWSKI, A. Polska polityka narodowościowa wobec mniejszości niemieckiej w latach 1919–1939. Toruń: Wydaw. Adam Marszałek, 2003, 328 s

[7] MAKOWSKI, B. Litwini w Polsce 1920-1939. Warszawa: Państwowe wydawnictwo naukowe, 1986. 352 s.

[8] GOMÓŁKA, K. Białorusini w II Rzeczypospolitej, «Zeszyty Naukowe Politechniki Gdańskiej. Ekonomia», Gdańsk, 1992, t. XXXI, 178 s.

[9] OGNOWSKI, J. Sytuacja prawna Żydów w Rzeczypospolitej Polskiej 1918-1939: prawa cywilne i polityczne, Warszawa: Żydowski Instytut Historyczny, 2012. 161 s.

[10] BROWAREK, T., CHAŁUPCZAK, H. Mniejszości narodowe w Polsce. Warszawa: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2000, s. 54.

[11] BOBROWSKI, K., KUŁAGA Ł. Status prawny mniejszości narodowych w Polsce. Polskie prawo stosunków międzynarodowych. Torun: Tnoik Toruń, 2018, s. 268.

are provided in Chapter II of the Constitution [12]. While in the jurisprudence of other countries there were precedents when the constitutional-legal status was determined not only by the Constitution itself, but also by other legal acts that had the same legal force. Such a country was the Second Polish Republic where the legal status of national minorities was determined by a number of acts (both international agreements and acts of national legislation).

It should be noted that the origins of the legal protection of national minorities on the European continent should be traced back to the 19th century. One of the first steps in this direction was the Paris Convention of 1858 and the Berlin Congress of 1878. Mostly these documents were about protecting the right of minorities to freedom of religion. During the second half of the 19th and beginning of the 20th centuries several international conferences were held in Paris, Lausanne and Philadelphia where various aspects of protecting the rights of national minorities were considered [13]. But at a qualitatively new level also in the legal sense this problem came after the end of the First World War.

For the first time the problem of the legal status of national minorities in the new Polish state and the protection of their rights were raised by German organizations. Their concern was quite clear as even before the settlement of the new frontiers in Eastern Europe was resolved in the international level it became quite clear that the territories dominated by the ethnic German population would become part of the Second Polish Republic. It was at the insistence of the representatives of these organizations that the protocol of the Inter-Allied Commission of March 3, 1919 in Poznan stated: "The Commission will consider the task set by the representatives of the German organizations in order to secure the rights of the German minority in Poland" [14]. However the same protocol noted the need for similar steps on the part of Berlin regarding the protection of the rights of the Polish minority in Germany.

Jewish organizations also were actively involved in developing the new concept of international protection for the rights of national minorities. Much of their attention was paid to Poland — the home to one of the largest Jewish communities in Europe. For example, in a resolution of the American Jewish Congress of March 2, 1919 it was emphasized: "Many people who do not speak the national language live in Poland and Romania… At their home, in their religious institutions they use their own languages… Appropriate guarantees should be provided that in the future national minorities in those countries could use their traditional languages and were not forced to use only official one [15]". The appeals of organizations representing the interests of national minorities should prepare the international community for the adoption of documents that would become the legal basis for the protection of their rights.

During the Paris Peace Conference which laid the foundations for a new system of international relations a number of important documents were drawn up, including the so-called the Little Treaty of Versailles. Poland signed it on June 28, 1919. It entered into force on 31 July 1919 after the ratification of the Treaty of Versailles. It laid down the legal foundations for regulating the situation of national minorities in the Second Polish Republic [16]. This treaty was considered to be part of the Treaty of Versailles and was binding on all the States which joined it. The victors of the First World War were the guarantors of the treaty. Let us dwell in more detail on its most important provisions.

Thus according to Article 2 the Polish Government undertook to provide all citizens regardless of their place of birth, nationality, linguistic, racial or religious affiliation guarantees of full protection of their life and liberty. At the same time Article 3 obliged the Polish authorities without any conditions to recognize as the citizens of the new country Germans, Austrians, Hungarians and Russians who at the time of signing the treaty were permanently resident in the territories that had fled to Poland. Article 7 stated that all Polish citizens regardless of their place of birth, nationality, linguistic, racial or religious affiliation should be equal before the law and enjoy the same civil and political rights.

The provisions of the Article 7 were developed in Article 8 where, in particular, it was stated that with respect to Polish citizens belonging to ethnic, religious or national minorities, the legislative acts would be interpreted in the same way as ethnic Poles. It concerned to the free usage of one's native language, the practice of religious services, the establishment of charity organizations, etc. [17]

In cities and districts with a compact residence of non-Polish speakers the Polish authorities were tasked with setting up special office in education departments to take care of the conditions that would enable children to receive primary education in their native language. The contents of this Article 8 only pertain to German-speaking Polish citizens who resided in Polish areas which were the property of Germany until August 1, 1914.

In Article 9 it was stated that this did not deny the right of the Polish authorities teaching the Polish language in such educational institutions. By the way, this reservation was repeatedly used by the authorities transforming the right of national minorities to receive primary education in their native language into legal fiction.

---

[12] Constituion of Ukraine. Act 254к/96-BP, curerent, amended on February 21, 2019. URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.

[13] GOŁASZEWSKA, D. Mniejszości narodowe II RP. URL: http://o-historii.pl/mniejszosci-narodowe-ii-rp/.

[14] TOMASZEWSKI, J. Ojczyzna nie tylko Polaków: mniejszości narodowe w Polsce w latach 1918 – 1939. Warszawa: Młodzieżowa Agencja Wydawnicza, 1985, s. 27.

[15] TOMASZEWSKI, J. Ojczyzna nie tylko Polaków: mniejszości narodowe w Polsce w latach 1918 – 1939. Warszawa: Młodzieżowa Agencja Wydawnicza, 1985, s. 27.

[16] KUTRZEBA, S. Polskie prawo polityczne według traktatów. Część 1. Kraków: Drukarnia Uniwersytetu Jagiellonskiego, 1923, c. 113.

[17] GARDOCKA,T., JAGIEŁŁO, D. Pojęcie mniejszości narodowych w prawie polskim a rzeczywistość społeczna. Rocznik SNPL, Wilno, Litwa, 2018, T. 18, s. 147 – 148.

Articles 10 and 11 referred to the provision of state support to Jewish educational institutions. But the state had the right to control how the funds allocated for this purpose were distributed. It also discussed the special rights of the Jewish population which were maintained on the day of Shabbat. Nevertheless it was emphasized in the document that these rulings did not exempt Polish citizens of Jewish origin from their duties of military service, protection of the state and respect the public order.

The content of Article 12 also draws our attention. In it the Polish party agreed that the control of the fulfillment of its obligations under the Little Treaty of Versailles should be intrusted to the League of Nations. None of the provisions of this document could be amended without the consent of the majority in the Council of the League of Nations[18]. Any misunderstandings that may have arisen between Poland and the international community regarding minorities' rights were considered to be international and subject to the jurisdiction of the International Court of Justice.

Let's note an interesting detail. Only a member of the Council could pay attention in the Council of the League of Nations for violation or threat of violation of any of the provisions of the treaty. In this way representatives of national minorities were denied the right to apply to the Council of the League of Nations on their own. And this, in turn, called into question the effectiveness of the whole legal mechanism of protection of their rights proposed by the Little Treaty of Versailles.

The appearance of this treaty as part of the Treaty of Versailles with Germany does not seem to us to be accidental. Under this treaty Germany's eastern borders were redefined in the interests of Poland. And whole groups of the ethnic German population were within Polish borders. Thus, in our view, the reason for the emergence of the Little Treaty of Versailles was the desire of the Western states to provide certain legal guarantees for the German minority. Despite the fact that part of the Belarussian and Ukrainian lands in 1919 was not yet the part of the restored Poland the terms of the treaty extended to Western Belarusians and Ukrainians then.

The Polish political establishment which was influenced by nationalist phraseology was extremely negative about the terms of the treaty. Western leaders were blamed for desire to limit the country's national sovereignty[19]. Of particular concern was the fact that the treaty's articles could be used to transform the German national minority into a kind of "fifth column" in Poland[20]. So it's not surprising that from the very beginning Warsaw's compliance with its international obligations raised a lot of objections within the country.

Besides there were some disadvantages in the document from its creators. First of all, there was not any definition for the term "national minority" at all. Instead it was replaced by the term "racial, linguistic and religious minorities". The treaty did not mention the right to autonomy for the minorities. We can agree with the modern Belarusian researcher A. Zagidulin who noted that the document did not specify the quantity of members of linguistic minorities in order could claim the opening of a school with native language teaching[21]. The ambiguity of many of the wording of the treaty created the preconditions for the emergence of double standards in the interpretation of certain articles.

However, the ratification by the Polish party of the Little Treaty of Versailles provided that national minorities would be accorded the appropriate constitutional and legal status at the level of Polish law. Indeed, the very next day the Sejm passed a law which provided for the establishment of the rule of Polish law in the former German lands of East Prussia. Article 3 of the said law stated that it repealed all laws and decrees that had previously been in force on those lands and could discriminate against representatives of any nationality or religion[22].

In the context of the researched problem the Constitution of the Second Polish Republic, adopted on March 17, 1921, is of primary interest. The preamble to the document guaranteed not only equality of all citizens before the law and granting them protection by the state regardless of different ethnic origin, language, race or religious affiliation, but also the rights of national minorities[23].

Even at the stage of discussing the Fundamental Law the vast majority of Polish politicians were convinced that the guarantee of the rights of national minorities was an integral element of a democratic state as Second Polish Republic positioned itself. This was also evidenced by the decree of November 28, 1918 which laid down the procedure for holding elections to the Sejm and emphasized the full equality of all citizens regardless of their national origin[24].

The legal status of national minorities was determined in Articles 95–96 and 109–110 of the Polish Constitution, adopted on March 17, 1921. In particular, Article 95 referred to the protection of the lives, liberties and property of minorities. And in Article 96 the equality of representatives of minorities and the titular nation before state authorities was guaranteed. Article 109 established the norm according to which every citizen

[18] Traktat między Głównemi Mocarstwami sprzymierzonemi i stowarzyszonemi a Polską, podpisany w Wersalu dnia 28 czerwca 1919 r., Dz.U. 1920, Nr 110, poz. 728.

[19] KUMANIECKI, K. Odbudowa państwowości polskiej. Najważniejsze dokumenty (1912 – styczeń 1924). Warszawa – Krakow, 1924, s. 242.

[20] TOMASZEWSKI, J. Ojczyzna nie tylko Polaków: mniejszości narodowe w Polsce w latach 1918 – 1939. Warszawa: Młodzieżowa Agencja Wydawnicza, 1985, s. 29.

[21] ZAGIDULIN, A. The formation of the constitutional legal status of Belarusians as a national minority in Poland in 1921 - 1939. Man and society in the system of modern scientific paradigms: a collection of scientific articles IV International Scientific and Practical Conference, Ufa, September 15-16, 2018. Ufa: Nika-center. 2018, p. 3. (in rus.)

[22] DROZDOWSKI, M. The national minorities in Poland in 1918 – 1939. Acta Poloniae Historica, 1970. № 22, p. 229.

[23] Ustawa z dnia 17 marca 1921 r. - Konstytucja Rzeczypospolitej Polskiej, Dz.U. 1921, Nr 44, poz. 267.

[24] TOMASZEWSKI, J. Ojczyzna nie tylko Polaków: mniejszości narodowe w Polsce w latach 1918 – 1939. Warszawa: Młodzieżowa Agencja Wydawnicza, 1985, s. 29.

had the right to preserve his or her own national and cultural characteristics and to develop native language. It was pointed out that specific laws would ensure the full and free development of their national characteristics in the Polish state. And it would be done through the establishment of public law nature autonomous links between minorities and local authorities. At the same time, the state with respect to local authorities' activities retained the right to control and to provide, if necessary, financial assistance.

Article 110 guaranteed Polish citizens belonging to national, religious or linguistic minorities an equal rights with other citizens to establish, supervise and maintain at their own expense public, charitable, religious institutions, schools and other educational institutions, as well as to use their native language and follow their religion. As for religion it should be noted that although the Constitution emphasized the main position of the Catholic Church (Article 114) it also guaranteed the granting of wide freedoms and other religious denominations, in particular, emphasizing the non-interference of the state in their internal affairs (Articles 111–113)[25]. Additionally Article 115 guaranteed the independence of the church and religious organizations of national minorities.

In general, the first Constitution of independent Poland in terms of guaranteeing the rights of national minorities became a kind of compromise between the views of the Polish right, led by Roman Dmowski, who advocated the absolute domination of the interests of ethnic Poles, and leaders of the Polish parties of the socialist movement (T. Holowko, L. Wasilewski) who wanted to support national and cultural inspirations of minorities in exchange for their loyal attitude to the Polish state[26].

Thus, the Constitution envisaged the need to enact laws that would enable national minorities to develop their nationalities freely through the creation of autonomous unions that would operate within the framework of universal local government with the right of control by the state. However, as noted by O. Turchak, the implementation of these norms had been less than ideal. In this context, it is worth mentioning the law of September 26, 1922 "On the principles of general voivodeship local government, in particular Lviv, Ternopil and Stanislavsky provinces"[27]. In particular, this act prohibited any form of violent captivity and provided guarantees for the opening of a Ukrainian (Russian) university, as well as the free usage of the Ukrainian language in public life and education. It's interesting that Articles 20 and 21 prioritized the formation of the administrative apparatus in these provinces by ethnic Ukrainians[28]. In the case of adoption, this act, which is fully consistent with the content of Article 109 of the Constitution, would grant Eastern Galicia the rights of an autonomous region by analogy with Upper Silesia.

In our view, the emergence of the mentioned law was made possible by the unresolved international legal status of Eastern Galicia at that time. From the Polish authorities' point, the declaration of such liberality with respect to national minorities living in the region was made rather "for export" and should have been an additional argument in favor of securing these lands as part of the Second Polish Republic. This tactic, considering the decision of the League of Nations' ambassadors in March 1923 about belonging of the region in fact justified itself. At the same time, J. Pilsudski's supporters blamed the right-wing parties and the centrists for the failure of this law.

In the context of the rights of the Slavic minorities of interwar Poland, the relevant articles of the Treaty of Riga, concluded between Poland and Soviet Russia on March 18, 1921, are of great interest. In addition to the items on border issues and defining the nature of interstate relations of the Russian Socialist Federative Soviet Republic and the Ukrainian Socialist Soviet Republic with Poland, Article 7 guaranteed: "… Russians, Ukrainians and Belarussians who reside on the territory of Poland, on the basis of the principle of equality of representatives of all nationalities, will be granted rights that will provide conditions for the free development of culture, usage of national languages and observance of religious rituals…"[29]. It is interesting that the treaty did not say the Polish state itself should open schools with national minorities' language teaching.

The Geneva Convention on Upper Silesia, signed on May 15, 1922, confirmed the same rights of the German minority. The purpose of the Convention was to regulate cross-border cooperation between those regions that remained within Germany and those that became a part of Poland. The Special Upper Silesian Commission, consisting of both Germans and Poles, had arbitration functions in case of disputes over the implementation of the Convention[30]. Unlike the Treaty of Riga, this Convention also recognized the autonomy of the region in the Polish state[31]. Features of functioning of the autonomy of Upper Silesia were determined in the Organic Statute of Silesian Voivodeship. The autonomy extended to certain aspects of administrative, economic, cultural and educational life. The autonomous status of Upper Silesia reflected the long-standing traditions of self-government that prevailed in the region.

None of the legal acts mentioned above, except the Geneva Convention on Upper Silesia, provided to national minorities even a territorial-cultural autonomy. However consistent adherence to the principles declared in those legal acts would enable national minorities to maintain their own cultural autonomy within the Second Polish Republic. Unfortunately, in practice, the national policy of the Polish governments and especially the actions of the local administration (voivodoships and powiats)

[25] Ustawa z dnia 17 marca 1921 r. - Konstytucja Rzeczypospolitej Polskiej, Dz.U. 1921, Nr 44, poz. 267.
[26] ADAMCZYK, A., KAŹMIERCZAK, K. The national minorities in the polish politics. The past and the present. Humanities and Social Sciences. 2015. vol. XX, 22 (4/2015), p. 10.
[27] TURCHAK, A. March Constitution of 1921 in Poland: Polish Government and Parliamentarism. National Law journal: theory and practice. 2014. Nr. 6, p. 69. (in rus.)
[28] GELIASH, M. National question in Poland (1918 – 1939): problems of state regulations. Military Scientific Bulletin. 2013. Vol. 20, p. 213. (in rus.)
[29] Documents and materials on the history of Soviet-Polish relations. Moscow: Nauka, 1965. Vol. 3, p. 527. (in rus.)
[30] DAVIES, N. Boże Igrzysko – Historia Polski, Kraków: Znak, 2006, s. 863.
[31] GOŁASZEWSKA, D. Mniejszości narodowe II RP. URL: http://o-historii.pl/mniejszosci-narodowe-ii-rp/

called into question the validity of the provisions which guaranteed the rights of representatives of a non-titular nation[32].

In this context, the opinion of D. Matelsky seems quite right. He noted that state policy is implemented by the local administration which should not participate in political struggle but concentrate its efforts on solving social, ethnic or migration problems[33]. However, in the Second Polish Republic the practice significantly diverged from the theory as local administrations, especially in the eastern voivodoships, often did not solve but created problems in relations with national minorities.

3. The Legal Status of National Minorities in the 1920s and 1930s: theory and practice

In the first half of the 1920 s, the Polish government's policy on the national issue focused mainly on the Slavic minorities — Ukrainians and Belarussians. In April 1923, the then Prime Minister and Minister of the Interior W. Sikorski drafted a document entitled "General Guidelines for Government Policy in the Eastern Kresy"[34]. Among other things, it stated that acting within the limits of constitutional norms the authorities should always follow Polish national interests trying to integrate the population of Kresy into the Polish state as much as possible. With this in view the language question was the key issue.

March Polish Constitution guaranteed the use of minorities' languages only in the private sphere of civil relations while in the public sphere it was restricted. First of all, these restrictions were related to periodicals and public events. At the same time, it is undeniable that the language issue in the Second Polish Republic became a subject of constitutional regulation and received a fairly high status of constitutional guarantees which did not extend to all spheres of public relations[35].

While W. Grabski was the prime minister the Polish party developed a number of legislative acts that provided for the possibility of using Belarusian and Ukrainian languages in the administrative and judicial bodies. Then the law "On the Organization of Schooling for National Minorities in Poland" appeared. It was adopted by the Sejm on July 31, 1924. The law guaranteed the right of national minorities to open schools with their native language teaching in areas where they were at least 25% of the population and parents of at least 40 children would require the opening of such a school. If there were even 20 children whose parents would support the Polish school the teaching should be bilingual[36].

We believe that by voting for the above-mentioned law the vast majority of Polish politicians did not see it as means of increasing the number of Belarusian or Ukrainian schools. Its purpose was to found educational institutions for children of different nationalities. This would create prerequisites for the rapprochement of the peoples who lived on the "Eastern Borderlands" of the Second Polish Republic. Bilingual schools should help to find understanding on mixed-population lands and to educate the younger generation in a spirit of respect for different cultures and traditions.

"Bilingualism" (the creation of Polish-Belarusian schools) was to become one of the effective means of integrating the local population into Polish society. At the Voivodes' meeting in January 1925 it was explicitly stated on this occasion that this law would help to accelerate the cultural and state assimilation of the population of the Eastern Kresy[37]. In addition, it should not be forgotten that due to this law the Poles tried to make a positive impression on the international community, to convince it that there was a sufficient legal basis to protect the rights of national minorities[38].

However, in practice, the Law "On the Organization of Schooling for National Minorities in Poland" did not live up to the expectations that were attached to it by both representatives of national minorities and liberal-minded Polish politicians. In particular, it was sharply criticized by the members of the Polish Socialist Party and Polish People's Party "Wyzwolenie". The imperfection of the law was found in the fact that in bilingual schools it was mostly taught by Polish teachers who had little knowledge of the language of the local population.

In these circumstances, bilingual learning often became an illusion which covered the process of extrusion of national languages from Western Belarus and Western Ukrainian lands. Such learning was the object of permanent criticism both from the representatives of the Ukrainian movement and the Polish left-wing parties. As noted by the Polish historian M. Drozdowski: "The conduct of school plebiscites under the supervision of the Polish administration was accompanied by numerous violations that directly contradicted the norms of Article 110 of the Constitution"[39].

---

[32] DEDURIN, G. On the peculiarities of the legal status of the Belarusian national minority in interwar Poland. Bulletin of Kharkiv National University of Internal Affairs. 2007. Vol. 39, p. 87. (in ukr.)

[33] MATELSKI, D. Administracja publiczna Drugiej Rzeczypospolitej wobec mniejszości narodowych oraz migrantów i cudzoziemców. In: Między tolerancją a niechęcią. Polityka współczesnych państw wobec migrantów i mniejszości, Poznań 2017. S. 235.

[34] KOZYR, W. Polityka administracyjna ministrów spraw wewnętrznych wobec życia społeczno-politycznego w Polsce w latach 1922-1926. Studia z Dziejów Państwa i Prawa Polskiego. 2009. Vol. 12, s. 257.

[35] MARKOVSKYI V. Legislation and judicial practice of the Second Rich Pospolyta on the status of the Ukrainian language in Eastern Galicia in the interwar period (1919–1939): srect of thesis for candidate's degree: 12. 00. 01 – Theory of state and law, history of political and legal studies Lviv: National University «Lvivska Polytechnica», 2014, p. 15. (in ukr.)

[36] YAREMCHUK, V. The legal status of the Ukrainian schools in Republic of Poland in 1919 – 1939. Scientific Bulletin of Lviv State University of Internal Affairs. 2009. Vol 2, p. 6. (in ukr.)

[37] KOZYR, W. Polityka administracyjna ministrów spraw wewnętrznych wobec życia społeczno-politycznego w Polsce w latach 1922-1926. Studia z Dziejów Państwa i Prawa Polskiego. 2009. Vol. 12, s. 257.

[38] DEDURIN, G. On the peculiarities of the legal status of the Belarusian national minority in interwar Poland. Bulletin of Kharkiv National University of Internal Affairs. 2007. Vol. 39, p. 88. (in ukr.)

[39] DROZDOWSKI, M. The national minorities in Poland in 1918 – 1939. Acta Poloniae Historica, 1970. № 22, p. 230.

The implementation of this law became even more problematic after the adoption of the annexes in January 1925. They said that, even if all the legal requirements were met, opening a school with the national language teaching should call for the permission of the local Polish administrative authorities[40]. This actually put insurmountable obstacles in the way of the local population who wished to teach children in their native language. For example, if there were 835 Ukrainian-language schools in Poland in 1927 s and 1928 s, then in 1936 s and 1937 s their number had dropped to 496[41]. Equally disappointing for Ukrainians and Belarusians was the practical side of many others legislative acts which, at first sight, guaranteed fairly broad national and cultural rights to minorities.

Throughout the interwar period international commitments to protect the rights of national minorities were perceived by the Polish leadership as a heavy and unnecessary burden. In the period from January 1920 to December 1930 155 complaints were lodged with the League of Nations against Poland for harassment of the rights of national minorities[42]. Mostly they were from Germans and Ukrainians. When authoritarian tendencies became increasingly apparent in the leadership of the Polish state from the late 1920 s, no one hid the reluctance to follow the provisions of the Little Treaty of Versailles.

However, after J. Pilsudski returned to power in Warsaw in May 1926, establishing a so-called "sanitation" regime, there were some hopes for the improvement of the status of national minorities. Even more hope was given to the first steps of Pilsudski's followers: criticism of the uncertainty of the national policy of the previous governments, development of the agrarian reform project, imposing limitations on the osadnik settlement process in the eastern provinces and so on. But all this was only a tactic of the authorities which soon launched a new offensive on the rights of national minorities.

Belarusians were among the first to suffer. In January 1927 the Polish authorities liquidated their largest organization, the Belarusian Peasants' and Workers' Union, which numbered about 100,000 members. The reason was the relationship of some Union's members with the illegal communist underground. Its leaders were arrested and imprisoned[43]. At the same time, the leaders of the Community were deputies of the Polish Sejm, so their arrest was a clear violation of the principles of the March Constitution.

The cooperation of the Marshal of the Sejm M. Rataj with J. Pilsudski and Minister of Justice O. Meysztowicz in preparing the justification for the necessity of arresting the leaders of the Union, and thus, in violation of the Constitution called into question the effectiveness of the entire parliamentary system[44]. Nevertheless, the majority of the Sejm deputies supported the arrest of Belarusian deputies and deprivation of the legal status of the Union. Later the leaders of the Union were transferred to the USSR, where they could not escape the Stalinist repression.

Since 1927, according to researcher A. Kotowski, the anti-German course in national politics has been strengthened. It is evidenced by numerous decrees of the Ministry of Internal Affairs to the local administration with calls to strengthen control over the activities of public and cultural organizations of the German minority[45]. The systematic polanization of the Polish Germans was a clear violation of their constitutional rights.

A shameful example of the violation of the rights of Ukrainians in Eastern Galicia was the so-called "pacification" (carried out in September and November 1930) which was called by J. Pilsudski. It was the response to the wave of arson of Polish estates which swept through the region in 1929 and 1930. Many representatives of the Ukrainian national movement were illegally repressed. In particular about 30 former Ukrainian deputies of the Polish Sejm were arrested, three gymnasiums were closed, the Plast youth organization was outlawed, mass audits were carried out in villages which were repeatedly accompanied by the destruction of property of Ukrainians[46]. This action led to an even greater radicalization of Ukrainian society and created the preconditions for successful agitation, especially among young people, for the transition to terrorist methods of struggle, which, in particular, was organized by the Organization of Ukrainian Nationalists (OUN) in 1929.

In June 1934 the members of this organization successfully attempted to assassinate the then Minister of the Interior, B. Pieracki who was one of the authors of "harmonious coexistence of all citizens of the Commonwealth" concept. Instead, on June 17, 1934, J. Pilsudski signed the order to identify persons who "pose a threat to public safety and security"[47]. This order was the basis for the detention camp which was established at Bereza Kartuska Region soon where these persons could be held out of court. From 1934 to 1939 there were many representatives of Jewish, Ukrainian and Belarusian national movements. Thus, the path of terror chosen by OUN leaders was wrong and only caused new restrictions on the rights of national minorities.

---

[40] DEDURIN, G. On the peculiarities of the legal status of the national minority in interwar Poland (on the example of Belarusian). Autumn of 1939 in historical forest of Belarussia. Minsk: The Institute of History of the National Academy of Sciences of Belarus, 2010, p. 96.

[41] TOMASZEWSKI, J. Ojczyzna nie tylko Polaków: mniejszości narodowe w Polsce w latach 1918 – 1939. Warszawa: Młodzieżowa Agencja Wydawnicza, 1985, s. 65.

[42] ZAGIDULIN, A. The formation of the constitutional legal status of Belarusians as a national minority in Poland in 1921 - 1939. Man and society in the system of modern scientific paradigms: a collection of scientific articles IV International Scientific and Practical Conference, Ufa, September 15-16, 2018. Ufa: Nika-center. 2018, p. 4. (in rus.)

[43] МІРАНОВІЧ, Я. Белорусы у Польшчы (1918 – 1949). Вільня: Інстытут беларусістыкі, 2010, с. 39.

[44] GARLICKI, A. Od majado Brzescia. Warszawa: Czytelnik, 1986, s. 96.

[45] KOTOWSKI, A. Polska polityka narodowościowa wobec mniejszości niemieckiej w latach 1919–1939. Toruń, 2004, s. 117 – 122.

[46] TOMASZEWSKI, J. Ojczyzna nie tylko Polaków: mniejszości narodowe w Polsce w latach 1918 – 1939. Warszawa: Młodzieżowa Agencja Wydawnicza, 1985, s. 73.

[47] KOZYR, W. Polityka administracyjna ministra spraw wewnętrznych Rzeczypospolitej Polskiej Bronisława Wilhelma Pierackiego w latach 1931-1934. Studia Iuridica Lublinensia. 2016, Vol. 25, s. 469.

Changes in national minority policies have also been facilitated by Poland's foreign policy moves. In January 1934 a Polish-German non-aggression pact was concluded. Although it had no direct reference to the problem of national minorities, the point of concern of the interests of the German national minority was of considerable importance as the possibility of bringing to the interstate consideration any controversial issues that would arise in Polish-German relations[48]. Bearing in mind A. Hitler's stance on "Volksdeutsche" it is not difficult to assume that the Polish government should be very cautious about the German national minority. This attitude remained until the end of 1938, until the Nazis began to openly express territorial claims to Warsaw.

At the same time during the 15th Congress of the League of Nations in September 1934 Polish Minister of Foreign Affairs J. Beck stated that before the universal and unified system of protection of the rights of national minorities was enacted, the Polish party refused to cooperate with international bodies for monitoring the observance of minority rights as required by the relevant provisions of the Little Treaty of Versailles. Although the Polish party emphasized that it ceased to adhere only to Article 12 of this document, which concerned control by the League of Nations, since that time the interests of minorities was governed mostly by Polish legal acts[49]. Thus, Poland distinguished itself even from the slight deterrent in national politics that this document was.

We cannot say that the actual denunciation by Warsaw of the Little Treaty of Versailles fundamentally have changed the position of national minorities in Poland. The terms of the treaty were largely ignored by the Polish government in previous years. Probably once again this decision demonstrated the declarative nature of the activities of the League of Nations in addressing the problems of national minorities.

Some scholars connect Poland's refusal to comply with the Little Treaty of Versailles with Germany's withdrawal from the League of Nations in October 1933[50] or with entry of the USSR into this organization in 1934[51]. It is motivated by the fact that the Soviet Union was able to bring to the international discussion the situation with national minorities in the Second Polish Republic. However, it should not be forgotten that the Poles could draw the attention of the international community to the anti-Polish campaign that took place in the USSR. In the summer of 1933 the Institute of Polish Culture was destroyed in Kyiv; in early 1934 NKVD "exposed" a terrorist "Polish Military Organization". This was a signal to the mass purge in the Polish national districts named after F. Dzerzhinsky and J. Marchlewski, which existed in the territory of the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic respectively[52]. So the information about the USSR's entry into the League of Nations probably speeded up the decision of the Polish diplomatic service, but in any case did not determine it.

The main factor here, according to the authors, was the internal changes in the Polish state, which also left their mark on policy formulation on the national issue. Anyway such a move was undoubtedly wrong as it not only enabled Hitler's Germany to launch propaganda against the German minority's oppression in Poland, but also significantly reduced the chance of constructive dialogue with Slavic minorities.

An important stage in the transformation of Poland into an authoritarian country was the adoption in April 1935 of the revised Constitution. It substantially limited the powers of the legislative branch in contrast to the opposite situation with executive one. Citizens' responsibilities were placed above their rights. As for the legal regulation of the situation with national minorities the revised Constitution did not formally repeal the relevant provisions presented in March Constitution[53]. Article 7 explicitly stated that neither origin nor religion, nor nationality could be a cause for restriction of civil rights. However, already in the preamble, in comparison with the Constitution of 1921, the word "people" was completely displaced by the definition "Polish citizens". This had to emphasize that all constitutional norms were applied equally to ethnic Poles and representatives of national minorities. Such approach was intended to facilitate their assimilation[54].

In Article 1 it was accentuated that the state is the achievement of all citizens who, according to Article 6, were obliged to maintain loyal attitude to it and honestly perform their duties, while the volume of their rights directly depended on the value of their contribution to development of the state (Article 7). The Constitution declared that the state would make every effort to unite all citizens for the sake of harmonious cooperation for the benefit of it (Article 9). At the same time, no action could conflict with the interests of the state (Article 10, paragraph 1)[55]. If the state met resistance to the realization of its program goals, then it would get the right to apply coercive measures (Article 10, paragraph 1). It is easy to guess that in this way the authorities tried through the Constitution to prevent any socially significant activities of minorities that would contradict the state interests.

[48] Deklaracja polsko-niemiecka o niestosowaniu przemocy z 26 stycznia 1934. Dziennik Ustaw RP. 1934, nr 16 poz. 124, s. 276–277.
[49] DEDURIN, G. On the peculiarities of the legal status of the Belarusian national minority in interwar Poland. Bulletin of Kharkiv National University of Internal Affairs. 2007. Vol. 39, p. 88. (in ukr.)
[50] GARDOCKA,T., JAGIEŁŁO, D. Pojęcie mniejszości narodowych w prawie polskim a rzeczywistość społeczna. Rocznik SNPL, Wilno, Litwa, 2018, T. 18, s. 149.
[51] ŻARNOWSKI, J. Polska a międzynarodowy system ochrony mniejszości 1919 – 1934. In: Studia z najnowszej historii Niemec i stosunków polsko-niemieckich, ed. by S. SIERPOWSKI. Poznań 1986. s. 232.
[52] KEN, O., RUPASOV, A. Politburo of the Central Committee of the VKP (b) and relations of the USSR with neighboring western states. Part I: 1928 – 1934. St. Petersburg: Evropeyskiy Dom, 2000, p. 489.
[53] MICHOWICZ, W. Problemy mniejszosci narodowych. Polska odrodzona 1918 – 1939. Warszawa, 1988, s. 299.
[54] KUNDERA, W. Mniejszości narodowe: zarys historyczno-prawny. Studia Prawa Publicznego. 2016. № 4, s. 114.
[55] KUNDERA, W. Mniejszości narodowe zarys historyczno prawny. Studia Prawa Publicznego. 2016. № 4, s. 115.

The national minorities' greatest complaints were caused by the changes in the procedure for the elections to the Sejm and the Senate, which were envisaged in the Constitution. When the new version of the Constitution the came into force some of the deputies in multi-member electoral districts had to be elected from minority groups. For example, in two-member constituencies one ambassador was chosen from a minority nation and another one from a majority. Thus, a withdrawal from the proportional system made it possible to substantially limit the presence in the Sejm and Senate of deputies who would represent the interests of national minorities [56].

In the second half of the 1930 s, the legal status of the Slavic minorities continued to deteriorate. The Polish authorities tried to subordinate all the processes that took place on the territory of the Eastern Borderlands through various methods, often far from legal. A clear indication of such trends was the government program "Polish strengthening in the region", which was implemented in 1936–1939. It recognized as hostile to the Second Polish Republic the various forms of political, social and cultural activities of national minorities [57].

In the summer of 1939, several draft laws were considered at once to legitimize the strengthening of state control over society in order to counteract the dangerous trends in Polish statehood. First of all, it was about the danger posed by organized Ukrainian and German movements.

4. Conclusions

The legal status of national minorities in interwar Poland was determined both by international and national law. The system of national minorities' international protection, proposed by the victors in the First World War, divided the countries belonging to the League of Nations into two groups. The first group, consisting of politically weak, emerging countries, had to fulfill a number of international obligations to respect the rights of racial, linguistic and religious minorities. The countries of the second group were exempted from such obligations, but at the same time they were given control over the countries of the first group. This approach was undoubtedly wrong. It allowed the Poles to consider themselves an offended with treaty on the protection of national minorities by the victors in the First World War, who dictated their conditions for the organization of the post-war world. This led to Poland's refusal to implement its provisions.

As for the national legislation of the Second Polish Republic, it should be noted that the Polish laws and the Polish legal opinion about the status of national minorities operated a scientific and conceptual apparatus identical to the modern one. But this status according representatives of the non-titular nation was narrower. At that time there were a number of legal acts that were supposed to regulate the position of national minorities and to help in identifying their constitutional and legal status.

In case of observance of the declared legal norms, the Polish state had every chance to avoid open confrontation with representatives of the non-titular nation. However, in practice, certain gaps in constitutional status (due to the imperfection of international agreements in the field of protection of national minority rights) allowed both central and local Polish authorities to ignore the democratic principles underpinning the Constitution of 1921 and others basic legislative acts of the country.

This situation was caused by a number of factors: a difficult economic situation that provoked permanent tension in society and Poles' disrespect towards representatives of national minorities. After the First World War the artificially created borders also gave rise to interethnic conflicts. Finally, we should bear in mind that the vast majority of Poles were adherents of the nation-state concept. It was promoted by the National Democrats with their leader Roman Dmowski and envisaged the assimilation of national minorities.

The study of the origins of the constitutional and legal status of national minorities in interwar Poland is undoubtedly importance for the development of Polish and Ukrainian legal cultures. It will objectively favour the formation of the rule of law in modern Ukraine, which has to take into account mistakes and draw correct conclusions from the shortcomings of national policy in the Second Polish Republic.

[56] ZARNOWSKI, J. «Lewica sanacyina» w latach 1935 – 1939. Przeglad Historyczny (PH). 1958. № 4, s. 729.

[57] HEJWOSZ-GROMKOWSKA, D. Swoi i obcy w Drugiej Rzeczpospolitej – sytuacja mniejszości narodowych. Próba zarysowania problemu, http://liberte.pl/swoi-i-obcy-w-drugiej-rzeczpospolitej-sytuacja-mniejszosci-narodowych-proba-zarysowania-problemu.

Kosovo Judicial Position from the Second World War until 1974

*Bashkim Rrahmani**

Abstract

This work aims at retracing, explaining and analyzing the Kosovo legal-political status within the constitutional system of former Yugoslavia. Reading, review and analysis of Yugoslav Constitutions, Serbian Constitutions and Kosovo Constitutions adopted from 1946 to 1974 by Federal Parliament, by the Parliament of Serbia and by the Kosovo Parliament. Kosovo as an entity starts with a dual position within Yugoslavian constitutional system, by being a federal unit in one side and the part of constitutional system of Serbia on the other side (first Yugoslav Constitution); Kosovo status has no dual position by being only the part of Constitutional system of Serbia (second federal constitution) and Kosovo becomes equal to other federal units of Yugoslavia (third Constitution). Kosovo entered into the constitutional system of Yugoslavia, since the Resolution of Bujani Conference (held on December 1943-January 1944) adopted by Kosovo representatives was not implemented. That Resolution aimed realization of the right of Kosovo people for self determination after the war. This was not made possible based on the created circumstances; based on the military curfew deployed by Yugoslav/Serb authorities and based in some other geo-political reasons. Foundations of People's Federative Republic of Yugoslavia (later on The Socialist Federative Republic of Yugoslavia) were established in 1943 during the Second Conference of the National Committee for Liberation of Yugoslavia held in Jajce (November 1943), where Kosovo was not represented. Kosovo status within Yugoslavia changed few times but it never fulfilled completely Kosovo people's will. Changes in the legal political status of Kosovo within Yugoslavia came based on the reports of forces and political circumstances at all levels which had always two tendencies: tendencies for more democracy, freedoms and economic development in one side and tendencies for more hegemony and supremacy over the others held mainly from Serbia. These tendencies finally lead towards the process of non-consensual dissolution of Yugoslav from which there were created seven independent states. Kosovo is the last stated created from that process.

Keywords: *Kosovo; constitution; status; Yugoslavia; amendment.*

1. Introduction – general reviews

Kosovo one more time, without being asked and without respecting the will of Kosovo people, "voluntarily" joined Federal Serbia within the Peoples Federal Republic of Yugoslavia. "Voluntarily" Declaration of the Prizren Parliament was directly against the Project of the Communist Party of Kosovo and Metohia. It also fall in opposition to the promises of the Communist Party of Yugoslavia, which was that, after the liberation from fascism, all would determine their future by declaring their will. This was also in contradiction with the orientations of the State of Albania. Finally this was also in contradiction with the attitudes of the International Community before movements and the hopes of the Kosovo people. But "after Tito consolidated his power and the role of the Communist Party in the entire Yugoslavia, for the political reasons he favored Kosovo within Serbia because he needed the Serbian support and in this way he would gain them towards communism".[1] Whereas, as Academic Stavileci says, "based on agreement between party central committees of Yugoslavia and Albania, Kosovo was not covered at all with the AVNOJ[2] decisions (1943) with the purpose of self determination, whereas the Bujani Conference[3] adopted a document by which the right to the self determination was recognized to the Albanian people".[4]

Bujan Resolution which expressed clearly people's will and the aspirations of Kosovo people, not only was not taken into the consideration, but this resolution in some determined moments of political developments will be used as a basis for imposition of oppressive measures which were taken by the central authorities against those who spoke out mentioning this

* Dr. Bashkim Rrahmani, Associate Professor, Faculty of Law, Faculty of Public Administration, AAB College Prishtina, Kosovo.

1 JANSEN G.,Richard, htt://lamar.colostate.edu/-grjan/kosovohistory.html, pg.5 (accessed on: 29. 12. 2013).

2 Antifasisticko Vece Narodno g Oslobodjenje Jugoslavije- The Anti-Fascist Council for the National Liberation of Yugoslavia, known more commonly by its Yugoslav abbreviation AVNOJ, was the political umbrella organization for the national liberation councils of the Yugoslav resistance against the Axis occupation during World War II.

3 Konferenca Krahinore Nacionalçlirimtare e Kosovës – Kosovo Province Conference for National Liberation, was held on 31. 12. 1943 and 01 and 02 January 1944.

4 Esat Stavileci, Vepra I, *Kosova në ish Jugosllavi*, Dardania, Prishtinë, 2013, p. 45.

resolution. Bujan-i Conference [5] was organized and held under the difficult war circumstances and it formalized the attitudes of the anti fascist movement in Kosovo. Approved Resolution in this conference established foundations of a Kosovo constitutional settlement which will ensure the Kosovo right to self determination. It was a document of the constitutive character, which Yugoslavia didn't want to accept because this resolution devastated the projection of Federal Yugoslavia adopted in the Conference of Anti Fascist Council for National Liberation of Yugoslavia, where Kosovo representatives dit not take part. In a fragment of the Resolution it is stated

"Kosova and Metohija is a region with the Albanian population as the majority, which now, and as always in the past, liked to join Albania…The only way to join the territories of Kosova and Metohija with Albania is the joint war with the other people of Yugoslavia against occupants and their servants. This because the only way to achieve liberty/freedom is, if all people, including Albanians have the possibility to decide about their faith, with the right to self determination up to secession". [6]

From this citation we can draw un-denied arguments which at that time and now argue the right to self determination of Kosova and that as follows:

- First, Albanians were always majority in Kosovo,
- Second, it had clearly defined territory,
- Third, it had its representative organs, and
- Fourth, its organs have executed their power on these territories in proportion with the existing circumstances under the fascist occupation and that these organs were directly engaged in the anti fascist war.

AVNOJ in November 1943 had decided that after the war, Kosovo would be be given status of autonomy.[7] This was the second meeting of AVNOJ held in Jajce, where without Kosovo representatives being present, the foundations of Yugoslavia were established. The main reasons of why Kosovo representatives were not present in the conference where basically political and not as Yugoslav theorists argue justifying this with the extraordinary circumstances, difficult geographical circumstances, the lack of communications, etc. But apart from the non participation of Kosovo representatives in the conference, AVNOJ however has not managed to keep in the silence the specificity of Kosovo, its population, its territories and that's why the autonomous status for Kosovo was mentioned as something to be recognized after the war.

But foundation of the KACK in the Bujani Conference and its Resolution created a basis vis-ŕ-vis Yugoslav federalist decisions, which indeed wanted to express positioning and aspirations determining the future according to the will of the majority population of Kosovo.

In the conference there was a comprehensive representation and from the preamble we see that there were Albanians, Serbs, Montenegrins, nationalists, communists, antifascist youth, communist youth, representatives of national liberation army, etc.,[8] and all of these were agreeing to determine the future status of Kosovo. This however immediately after the war was refused by Communist Party of Yugoslavia in various forms of manifestation. Objections started immediately and continued until the dissolution of Yugoslavia.

Pavle Joviçeviç and Zekeria Rexha were both sent to a meeting with Tito in order to explain him the Bujan Conference. Tito had no negative reaction (…) official respond came on March 28, 1944 through a letter signed by Milovan Gjilas. He named conference and the decisions to be a mistake, stating:

"today we should not talk about joining with Albania, because in these moments we are not talking about determining the borders between Yugoslavia and Albania, since both states are occupied by Germany". [9]

Thus in Kosovo starts to be created a terrain where the Resolution will be seen as a document without value, as a regressive one, as an obstacle for the future, etc. And being like that, this resolution should not be taken into the consideration. In this way the concrete acts of annexation of Kosovo were undertaken. These, in a created difficult political clime started to be seen especially during the second half of 1944. During 1944 and in the beginning of 1945 some talks between some communist leaders were developed regarding the issue to which federal unit Kosovo should join. Monte Negro and Macedonia came out with their requests, but the dominant idea was always that Kosovo should join Serbia.[10]

In this situation, under the difficult political, economic, social and military circumstances, under the weak organization of the power in Kosovo, under the unfavorable international circumstances for Kosovo aspirations, promises that in future Kosovo would have the right to determine its own future, without visible support by the motherland, etc., the possibilities for implementation of determined goals by the Resolution were very little. At the meantime the political, military forces, etc., and the Communist Party of Yugoslavia that led the war and that now was holding the Yugoslav federation was very strong and very big. This brings out the opponence against the Resolution and opponence against the orientations of majority in Kosovo towards self determination and towards national unifications. Yugoslavia was decisive to prevent the practical application of Bujan Resolution and the realization of the right of Kosovo people to self determination. This federation in fact was undertaking acts which led toward Kosovo annexation, when and where among the other Kosovo was put under the curfew and

[5] Bujani Conference was held on December 31, 1943 and January 1-2,1944 with the participation of 49 delegates (42 were Albanians) from 61invited. Conference adopted an important document which by its content shows clearly the will of Kosovo people for self-determination, respectively the will to join Albania. Albanian people of Kosovo joined the anti-fascist war whereas representatives of Kosovo people adopted an important document for projection Kosovo future.

[6] Malcolm Noel, *Kosova një histori e shkurtër* (Albanian edition), p. 320-321.

[7] Marc Weller, *Shtetësia e kontestuar*, Koha, Prishtinë, 2011, p. 78.

[8] For more about this, see the text of preamble of the Bujani Conference Resolution

[9] Blendi Fevziu, *100 vjet – një ekskursion në politikën e shtetit shqiptar nga 1912 – 2012*, Klan & UET/Press, Tiranë, 2012, p. 172.

[10] Malcolm Noel, *Kosova një histori e shkurtër*, botimi shqip, Koha, Prishtinë, 2001, p. 328.

the military administration for several months period of time. Under the pretext that in Kosovo the contra-revolution was being developed, especially in the Drenica region, in the period from February 08 until the half of May 1945, by the order of Supreme Commander Tito[11], the military administration was established in Kosovo. Application of the military administration in Kosovo by the Yugoslav authorities after the World War II, "via facti" made invalid promises of respecting the right to self determination of Kosovo people, for its political faith.[12]

Military administration deployed in Kosovo and the repressive measures undertaken vis-à-vis forcefully sedation of Kosovo people, prepared the terrain of organizing the people's representative Assembly, where Kosovo "voluntarily" declared its future within federal Serbia.

Assemble was held in Prizren on July 10, 1945. In this Assemble which was known as the meeting of the Province Council of Kosovo People, took place members who were not elected and 33 members out of 142 were Albanians. Province Assemble of Kosovo and Metohija decided for a "Resolution for annexation of Kosovo and Metohija by federal Serbia", by which at the same time it was decided to create this entity as the province within the Democratic Federative Yugoslavia.[13] Here, based on the mentioned circumstances; based also in the composition without elected representatives (instead of being treated as they were, as majority, Albanians were treated as minority) who voted "freely" and by "representing the will of the people"; we had a clear imposition by the stronger to a weaker and here it starts the installment of Kosovo in the settlement of the Yugoslav federation, for what Kosovo indeed, was not asked at all. Province People's Assembly of Kosovo and Metohija "expresses the will of the entire population to join federal Serbia as its integral part"[14]. Of course, there was not volunteer declaration. The immediate post war situation was a period of repression and after Tito separated from Moscow in 1948, Kosovo Albanians were put under very harsh repressive measures, who were blamed like they were expressing sympathy for the Albanian leader, loyalist to Stalin, Enver Hoxha.[15]

Right after the Prizren Council decision by which Kosovo "voluntarily integrated" in the constitutional system of federal Serbia, Kosovo began to be determined as autonomous "oblast", named Kosovo and Metohija. In August 1945 KACKJ in its third session approved Resolution of Kosova and Metohija Assemble on joining federal Serbia. Based on this, the Presidency of the People's Assemble of Serbia, on September 02, 1945 adopted Decision on establishing and organizing KAKM.[16] The entire process of annexation or integration of Kosovo in the Federal Yugoslavia finally was sanctioned with the Constitution of People's Federation of Yugoslavia, promulgated on January 31, 1946.

Bujani Resolution and the Resolution of Prizren, as quite different documents, adopted under different conditions and circumstances and with quite different goals, are anyway documents that have something in common:

- Both express and promote the right to self determination;
- Both came from organs which were being created to be the representatives of peole of Kosovo;
- Both were adopted under the extraordinary circumstances (one in the state of anti fascist war and the other under the circumstances of pressure and political violence against Albanians);
- Both caused consequences for the majority popullation in Kosovo; first, from the fact that all who called upon and who aimed its implementation suffered and were subject of repressive measures from the Yugoslav state aparatus and second, it did not present really the requests of the majority whereas its non implementation caused consequences for generations and for many decades;
- But both are documents that from inside have enough legal-constitutional arguments, not only of historical character.

Resolution of Prizren Assemble notes the beginning of Kosovo integration in the constitutional system of federal Yugoslavia and Serbia, whereas Bujani Resolution remained as not implemented for quite a long period of time. In addition to what was said, to Kosovo was not recognized status of republic partially since Serbia opposed that, but it is obvious that Kosovo Albanians never liked to be part of Yugoslavia.[17]

2. Kosovo within Yugoslav Federation according to the 1946 Constitution

Constitution of the Peoples's Federal Republic of Yugoslavia (which was adopted on January 31, 1946) has enumerated people's republics as constituents of federation and it had also determined the position of two provinces: Autonomous Province of Vojvodina and Autonomous Province of Kosovo and Metohija.[18] Thus, both provinces were determined to be within People's Republic of Serbia, but provinces remained to be constitutive elements of Yugoslav federalism and moreover Constitution foresees and guarantees for provinces realization of their rights. Kosovo had its political subjectivity. It was represented

[11] See Stipe Mesiç, *Si u shkatërrua Jugosllavia*, Prishtinë, 2011.

[12] Gazmend Zajmi, *Rrjedhat kryesore të konfliktësisë shqiptaro-serbe në rrafshin kushtetues të ish-Federatës multinacionale të Jugosllavisë*, taken from: Esat Stavileci, Vepra V, *Çështja e Kosovës në veprën e Gazmend Zajmit, Prishtinë*, 2013, p. 225.

[13] Kurtesh Saliu, *Lindja, zhvillimi, pozita dhe aspektet e autonomitetit të Krahinës Socialiste Autonome të Kosovës në Jugosllavinë Socialiste*, Prishtine 1984, pg.31.

[14] ASHAK, Fondi: Komiteti Krahinor i L.K. të Kosovës, viti 1945,kutia 23/A,dokumenti nr.2352.f.1-2.Rezolucion i Asamblesë Krahinore të Kosovës e Metohisë (sipas Sabit Syla, Disertacion doktoral-*Qëndrimet e shtetit shqiptar ndaj çështjes kombëtare të Kosovës*, Universiteti i Tiranës, Fakulteti: Histori-Filologji, Departamenti i Historisë, Tiranë 2011, p. 87

[15] See INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO: The Kosovo Report, pg.11, available at http://www.reliefweb.int/library/documents/thekosovoreport.htm, Published on June 21, 2006.

[16] Kurtesh Saliu, *Lindja, zhvillimi, pozita dhe aspektet e autonomitetit të Krahinës Socialiste Autonome të Kosovës në Jugosllavinë Socialiste*, Prishtinë 1984, pg.31.

[17] John V.A.Fine, *Rasti i jashtëzakonshëm i Josip Broz Titos*, AIIS, Tiranë, 2010, p. 37.

[18] See article 2, paragraph 2 of People's Republif of Yugoslavia Federation 1946 (full text downloaded from: http: //www. arhivyu. gov. rs /active/ sr-latin/home/ glavna_navigacija/leksikon_jugoslavije/konstitutivni_akti_jugoslavije/ustav_fnrj.html

directly in the People's Assembly of FPRY with 15 members of Parliament in the Peoples Chamber.[19]

Constitution of People's Republic of Serbia which was adopted in January 1947 repeated disposal of federal constitution related to autonomy, but it also determined details, the rights and duties as well as the organization of provinces. Article 106 of Constitution determines competences of KAKM starting with economic and cultural competences, plans and the budget of province, implementation of laws, protection of the rights of citizens, protection of national rights, ensuring the education at the elementary and secondary level according to the plans of People's Republic of Serbia, social protection, national health as well as the other competences which are determined by the federal constitution.

The statute was the highest legal act of province which had to be in accordance with the People's Republic of Federative Yugoslavia and in accordance with the People's Republic of Serbia and it has to be verified from the People's Republic Assemble.[20] Based in this legal regulative Kosovo adopted its statute in May 1948 which in a way was more a repetition of disposals of the constitution of Peoples Republic of Serbia.

The highest organ of power in Kosovo under this context of legal and constitutional regulations was Province People's Council which was elected by citizens for three years mandate. It was councils mandate to promulgate statute and other lower acts. Executive organ was Provincial Executive Council. Executive Council had the authority to adopt: orders, guidelines and decisions. Administrative organs were organized in form of directorates. Kosovo had no judicial autonomy at this period of time. Courts were organized and they were courts of districts and courts of second instance.[21]

No matter of the fact that the position of Kosovo was sanctioned also with the federal constitution, however with the constitution of Serbia the issues within the context of the rights and obligations of Kosovo were in more details regulated with the Serbia's constitution whereas symbolically with the Kosovo statute. Based on the Serbia's Constitution, Republican Assemble had the right to dissolve Province People's Council and to declare elections for new council. It had also the authority to discharge Province Executive Council.[22]

3. 1953 Constitutional Law

The above described position of Kosovo at the federal level and at the republican level of Serbia, even though far from aspirations of the majority of the population, was not being accepted by chauvinist Serbian circles.

Kosovo of this period of time was the most underdeveloped economically region, with a population with high degree of illiteracy. In Kosovo every single Albanian was seen with a doubt from the Yugoslav-Serbian power under the pretext of tendencies of joining Albania. In 1950 s a oppression of a very specific form against Albanian population began. This pressure was manifested in forms beginning with collectivization, interrogation and persecutions up to ethnic cleansing (forceful displacement) of Albanians towards Turkey. State security known as UDB[23], degenerated drastically. In 1950 s obsession of collecting arms from Kosovo Albanians increased; numbers of villages were surrounded by police cordons, villagers were interviewed and beaten up by Serbian police. Due to the fact that the treatment was so hard, it happened that those who had no arms to deliver were obliged to buy arms, so they deliver something in order to at least soften the oppression against them.

Under the pretext of collecting arms from the Albanian population 1.100 persons were killed or died as a consequence of tortures, whereas 100.000 were tortured.[24] UDB officers in Kosovo, according to statistics of 1956 were Serbs with 58%, Monte Negrians with 28% and with Albanians with only 13% and in this way UDB operations increased dissatisfaction within Albanians and increased ethnic polarizations in Province[25]. As a result of oppression, of persecutions, of the fabricated trials, etc., a hopeless situations was created so a big number of Albanians start thinking to emigrate.

This exactly goes in favor of old ideas and new ideas of displacing Albanians from their ethnic territories. Thus the ideas of Vaso Cubrilovic and his supporters for displacing Albanians were being re-actualized again and factually began to be implemented again. It is estimated that from former Yugoslavia during the period 1946-1966 there were expelled 246.000 persons.[26] Again a program of emigration of "Turks" based on the treaty of 1953 between Belgrade and Ankara started to be implemented. Whereas the 1944 program of Serbian nationalist Vaso Cubrilovic dedicated to "New Yugoslavia" after the World War II stated that "Kosovo should change ethnically from its foundations" and that "displacing of Albanians should be done quickly and in that way that Europe should be put before the finished act.[27] In the context of prosecution of Albanians we see a practical implementation of new and old programs. Many ethnic Albanians who practiced Islam started declaring themselves as Turks so the number of Turks in Kosovo increased from 1300 based on 1948 census to 34500 as seen with the 1953 census.[28] If a supposed number of 100.000 displaced Albanians is taken into the consideration then if this number is compared to the

[19] See article 54 of People's Republif of Yugoslavia Federation 1946.
[20] See article 104 of People's Republif of Yugoslavia Federation 1946.
[21] Kurtesh Saliu, *Lindja, zhvillimi, pozita dhe aspektet e autonomitetit të Krahinës Socialiste Autonome të Kosovës në Jugosllavinë Socialiste*, Rilindja, Prishtinë, 1984, p. 41.
[22] Ibid.
[23] Unutrašnja Drzavna Bezbednost (State Inner Security) was notorious secret service from which suffered many Albanians. It was a service similar to those from former communist countries-securitatea in Rumania or Sigurimi in Albania.
[24] Jakup Krasniqi, *Kosova në kontekst historik*, Buzuku, Prishtinë, 2010, p. 33.
[25] Noel Malcolm, *Kosova një histori e shkurtër*, Koha, Prishtinë & shtëpia e librit Tiranë 2001, p. 334.
[26] Ibid, p. 336.
[27] Esat Stavileci, Vepra V, *Çështja e Kosovës në veprën e Gazmend Zajmit*, Dardania, Prishtinë, p. 277-278.
[28] Geert-Hinrich Ahrens, *Diplomaci mbi tehun e thikës*, Toena, Tiranë, 2010, p. 303.

total number of population of that time, it comes that this was an extraordinary big number of people and this displacement of Albanians according to the international law could be classified similar to genocide.

Under the circumstances of no perspective, oppression against Albanian population in Yugoslavia some processes which were called decentralization and de-etatization processes began to be applied, and with these processes the relations between federal and republican organs began to change, but these processes start to take competences from autonomous provinces in favor of republics. Thus in 1953 the Constitutional Law of Yugoslavia was adopted. This Constitutional Law didn't abolish article 2 of the Constitution by which the entirety of Yugoslavia was determined. But this Constitutional Law notes a dismantling of the autonomy of provinces in favor of republics. With the Constitutional Law the federation doesn't determine even not in the general manner competencies of provinces, and it authorizes republic to do this with the republican Constitutional Law. Thus, Constitutional Law of People's Republic of Serbia determined the position of provinces in a detailed manner, compared to the Republican Constitution of 1947. So Constitutional Law of 1953 "reduces the autonomy of Kosovo even with more repression against Albanians".[29] Regulation of the autonomous rights and the obligations and regulation of the basis of organizing the competences of the autonomous units organs was "connected with the Constitution of the Republic".[30] Republican Constitutional Law recognized the following rights to provinces: issues of general interest for province in the field of economy, in the field of education, in the field of people's health, in the field of culture, in the field of social care, etc. Thus, these rights are not of their origin any more, but they are competences which the republic has given to province and which will be implemented by provinces. Province has its statute which is in accordance with the Republican Constitution and it is not said that the statute has to be in accordance with the federal constitution. The highest organ in province is People's Council composed of the chamber of province and the chamber of producers. Based on the republican constitutional law statute determined competences of the people's council.[31] People's Council has its organs as committees and councils whereas acts of People's Council are decisions, resolutions and guidelines. The Executive organ of province is the Executive Council who represents province, who takes care on the implementation of laws, supervises the implementation of laws, supervises the legality of the work od people's councils, etc.[32] Administrative organs based on their titles/names were similar with the republican ones: secretaries and councils.

With the constitutional law the republican executive council exercises supervision of legality of the work of the representative organ of Kosovo and consequently had the right to abolish province acts which from the republic were considered as unlawful. As the conclusion, the constitutional law of RFPJ narrows the competences of provinces and the provinces were left more in the mercy of republic that gained more competences. As it is seen there are no more the rights of origin for provinces which are transferred to the republic. The supremacy of republican organs over provinces has been increased very visibly. All of this dimmed autonomy of Kosovo which was named the Autonomous Province of Kosovo and Metohia. The further activities had even more regressive tendencies under the context of legal position of Kosovo within the Yugoslav Federation.

4. Constitution of 1963

After 1953 Constitutional Law and until 1963 when the new federal constitution was adopted, many debates were developed related to the relations within the federation and related to the position of federal units within the federation. The Central Committee of Communist League was more loudly and it had prepared concrete materials by which the position of provinces was requested to be reduced in order to put them at the level of districts. And those [provinces] are categories of socialist republics and that the rights and duties as well as the basic principles are determined with the Constitution of Republic.[33] It was also requested that the issue of autonomy is something to be dealt with by republics and not by federation. This indeed was sanctioned with the RSFJ Constitution of 1963. Yugoslavia adopted new constitution which gave Kosovo the status of province (pokrajina) similarly to Vojvodina, instead of region (oblast).[34] With the 1963 constitution, status of provinces will be reduced to the minimum from what was left with the previous constitution in sense of autonomy, which will be reduced even more by putting it more under Serbia and not at the federal level.[35] Federal constitution stripped out provinces from the federal character by leaving them in the exclusivity of Serbia. With the federal constitution it is concluded that "in Serbia there exist two provinces: Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija which were formed with the decision of People's Parliament of Peoples Republic of Serbia in 1945, based on the expressed will of the population of these regions".[36] This formulation puts under the question the decision of Prizren Council according to which Kosovo joined federal Serbia by being at the same time constitutional part of federation.

This constitution had only one guarantee, in sense of saving Kosovo from total stripping from autonomy and that was with the article 111 which said: "Constitution foresees that the formation and/or dissolution of autonomous provinces enters

[29] JANSEN G.,Richard, http://lamar.colostate.edu/-grjan/kosovohistory.html, fq.5 (accessed on December 29, 2013)
[30] Esat Stavileci, Vepra I, *Kosova në ish -Jugosllavi*, Dardania, Prishtinë, 2013, p. 61.
[31] Article 10 of Kosovo Province Statute.
[32] Article 53 of Kosovo Province Statute.
[33] Esat Stavilevi, Vepra I, *Kosova në ish Jugosllavi*, Dardania, Prishtinë, 2013, p. 62.
[34] Geert-Hinrich Ahrens, *Diplomaci mbi tehun e thikës*, Toena, Tiranë, 2010, p. 303.
[35] JANSEN G.,Richard, http://lamar.colostate.edu/-grjan/kosovohistory.html, p. 5 (accessed on December 29, 2013).
[36] Kurtesh Saliu, Lindja, zhvillimi, pozita dhe aspektet e Autonomitetit të Krahinës Socialiste Autonome të Kosovës në Jugosllavinë Socialiste, Rilindja, Prishtinë, 1984, p. 48.

into the force when it is verified with the Constitution of Yugoslavia". In paragraph 3 of article 111 it is concluded that "in the Socialist Republic of Serbia there exist autonomous provinces of Vojvodina and autonomous province of Kosovo and Metohija which were established with the decision of Peoples Parliament of Serbia, based on the will of the population of these zones".

It is very difficult to be said, if this guarantee was possible to be realized. This because practice has shown that when issues had to deal with Kosovo the Serbian will in most cases was accepted easily at the federal level, or indeed it was quite easily imposed at the federal level. Tendencies for changing relations in the federation aimed decentralization and the transfer of powers from federation to republics, but this was not a case with the provinces. At this time the security organs continued with the activities of oppression and discrimination and now Albanians continue to be the most politically oppressed part of Yugoslavia.

Fifties and early sixties of XX Century were the most difficult years for Albanians during the Tito era. A big ethnic inequality continued: Serbs and Montenegrians who make up 27% of population according 1953 census, compiled 50% of the membership in the party [communist] and 68% of the administration and the leading positions.[37] During this period of time, Kosovo was the most economically undeveloped region of Yugoslavia. Int 1958 in Kosovo there were in total 49 industrial enterprises with 16.000 employees; Slovenia at the same time, in comparison, had 465 such enterprises.[38] It would not be correct if we say from nowadays viewpoint that Kosovo and its people could have done more at that time so its subjectivity could have been defended within that's time federation and that the Kosovo people at that time could have prevented Kosovo integration within the Serbian constitutional system. Described circumstances, mentioned and some cited facts go more in favor of impossibility to defend the subjectivity of Kosovo. However The Socialist Republic of Serbia adopted its constitution in 1963, by which the rights and duties of provinces were determined. According to this constitution province regulates issues of general interest for province in the field of economy, education, culture, health, social protection, municipal/communal relations and those of housing. Province adopts its social plan and budget, it could establish working organizations and other self-governing enterprises which will exercise their duties within the framework of their rights and duties; it takes care about the rule and order as well as other works determined with the republican law.[39]

According to the 1963 Constitution and Kosovo Statute (the third in order) as the highest organ in province was the Province Assemble. Whereas in the federal constitution the name of Kosovo (autonomies) as the integral part of federation doesn't exist.[40] The province assemble exercises its duties based on the constitution of republic, based on the republican laws and based on the statute of province. Province assemble was made up of five chambers: province chamber, economic chamber, cultural – education chamber, social and health chamber and organizative political chamber. Parliamentarians were elected indirectly and not from the direct vote of citizens. The Executive Council was the executive body of the Assemble. Province Assemble established the organs of administration who conducted administrative work. Kosovo province in this period had elected five parliamentarians to serve in the federal chamber of nations but this delegation was not independent. This was a delegation within the delegation of the Republic of Serbia.

As the conclusion, with this constitution provinces lost their character of being the federal units of the Yugoslav federation and became the republican categories. Provinces now are more similar to the forms of local governance rather than to those forms of political-territorial autonomies. Thus provinces can be abolished in the same way as the local social-political units could have been abolished. This shows clearly the stage to which the position of Kosovo autonomy and also Vojvodina autonomy were brought with the republican constitution of 1963. But this constitution or better said these constitutions will not be of long life, since social relations will change after few years and especially after the famous meeting known as "Brione Plenum" which in fact was the Fourth Meeting of the Central Committee of Yugoslav Communist Party, held in Brione[41] in 1966. In this plenum Aleksander Rankovic was fired from the position of Vice President of Yugoslavia and he was fired also from all other political functions and state functions.[42] Brione plenum and changes at the top Yugoslav state and political leadership created new circumstances which lead towards a democratization of reports within the Yugoslav federation, and by this a new process of decentralization starts which now incorporates also provinces.

4.1 Constitutional amendments in the 1963 constitution

Over the years at the different party and state level discussions about the needs for constitutional changes were devel-

[37] Noel Malcolm, *Kosova një histori e shkurtër*, Koha, Prishtinë, &shtëpia e librit Tiranë, 2001, p. 336-337.
[38] Ibid.
[39] See article 129 of 193 Constitution of Socialist Republic of Serbia.
[40] See article 2 of 1963 Constitution of Socialist Federative Republic of Yugoslavi where in paragraph 2 it is said that the territory of Yugoslavia is unseperated and it is compose of the territories of socialist republics.
[41] Island in Croatia and it is known to be one of the Tito's residences.
[42] Aleksandar Rankoviç was the main representative of unitary, dogmatic and centralist forces who by many was considered to be Tito's successor. He was a high ranked communist leader with a "popular" background. He was founder of Drzavna Bezbednost and OZNA (military secrete service) and for many years as chief of this service and at the same time known as the dominant figure in the secrete police. Kosovo is not a reason for his departure from the yugoslav party and from the political scene but anyway his departure brought an atmosphere of socialist democracy in a society characteristic for Yugoslavia. This Serbian nationalist departed from the scene as a consequence of peeking made by security service against high level state and political officials and even against Tito. Relate Brione Plenum see more at: *Ocjene i prikazi, Fontes Izvori za Hrvatsku Povijest*, No.3 (Zagreb) 3, p. 333-371. For Albanians he will be remembered as a criminal who practiced terror and violence causing killings, ill treatments, confinements, tortures, forceful displacements of Albanians especially forcing them to go Turkey.

oped. Thus in 1967 commission for constitutional changes and amendments were created at all levels: federation, republican and province levels. These discussions were developed at the time when dogmatic – centralistic or bureaucratic-etatist forces in Serbia lost their influence. Changes were initiated not only as a result of Brione Plenum. Changes were initiated also by a favored clime created within Yugoslavia, and abroad as well. A push for constitutional changes was given by the movements in Kosovo, especially Albanian protests in 1968. During these protests of November 27, 1968 requests for creating Kosovo university were submitted, protests against politics which protesters considered as colonialist politics. They [protesters] expressed people's revolt against policy of discrimination and against policy of repression that was being undertaken against Albanians in Kosovo during a long period of time. In this way, a change in the Constitution done in 1968 enhanced connection with the federation after what Albanians protested requiring status of republic whereas at the meantime some of them asked unification with Albania.[43] Constitutional changes- amendments were supported by Tito who declared: these amendments were a step forward in the direction of overcoming existing jarring and these changes brought broad opportunities for development of self-governance and for the realization of the entire equality between nations and nationalities of Yugoslavia.[44] These changes will make an advancement of Kosovo position in the federation by strengthening connections with the federation but changes did not grant Kosovo the status of republic. This was made known also from Albanian Diplomatic Mission in Belgrade which reported to Enver Hoxha and Mehmet Shehu as stated

> *"during the meeting with some members of commission for changing the Kosovo status, Bujar Hoxha learned that Kosovo will not be declared republic, but its autonomy will be enhanced and in most problems it will be directly linked with the federation and not with the Republic of Serbia. Kosovo communist leadership didn't propose creation of the Republic of Kosovo which according to them was not possible under the existing circumstances".*[45]

At the conditions when request for republic was well received by population, and when that request was abandoned by Kosovo politicians, members of illegal movement requested status of republic made as new objective and duty for what, it was worth it to sacrifice and fight. Students as the most sensitive and most serving part of the population, became the main carriers and that put themselves in the first lines for activities in the efforts for the status of Republic for Kosovo. In the end of 1968 they go for protests…[46] And without a doubt the contribution of protests of 1968 were the most important in advancing, if not the main, the position of Kosovo.

Constitutional Amendments cover fields which will change Constitution essentially. Thus with the amendment VII the constitutional position of provinces was sanctioned which made provinces belong to two constitutional systems: Yugoslav and republic of Serbia. With this amendment disposals of article 2 of Yugoslav Constitution were changed.[47] In addition from now on, Kosovo will not be named Autonomous Province of Kosovo and Metohija and instead Kosovo will be named only as Kosovo. A very strong amendment in the federal constitution was the amendment XVIII according to which provinces were determined as: *"socialist democratic, social and political society with a special national content and with other specifics"*,[48] and moreover with this, provinces became quite similar to the republics. Autonomous provinces exercise all functions that are executed by republics. There was an exception, in cases which presented a joint interest for nations and nationalities in Serbia and which were determined with the constitution of republic. Province with the mentioned constructional changes ensured the right to defend its territorial integrity. Now province adopts its own constitution that is the highest act by which the rights and duties as well as organization of province were determined. The highest representative body of province adopts laws instead of decisions which were adopted up to this moment. With these changes the Supreme Court was established which originally exercised its judicial functions in the entire territory of Kosovo. Within the Kosovo Supreme Court the branch of constitutional court was created which will be competent with the constitutionality and legality issues. As equal subjects, provinces were directly represented in the federation. Thus in the federal chamber of nations of the federal parliament, republics were represented with 20 parliamentarians whereas provinces were represented with 10 MPs. MPs were selected at the same way as they were elected in the republics.[49]

Constitutional changes continued also in 1971 when amendments XX-XLII in the federal constitution were adopted. These changes in the context of time, in the context of legal order and in the political system context have noted something that was characteristic of Yugoslav system - the so called system of socialist self-governance and the system that ensured the dominant position of working class. Constitutional changes brought delegation of a number of competences from federation to the republics and to the provinces. Provinces in the equal way were subjects to determine the foreign policy of Yugoslavia. This was done by taking part in the mechanisms of giving consent for concluding international agreements.[50]

Changes through the constitutional amendments in the formal-legal aspect sanctioned the created social relations which

---

[43] Geert-Hinrich Ahrens, *Diplomaci mbi tehun e thikës*, Toena, Tiranë, 2010, p. 306.
[44] Izbor materiala za javnu debate o ustavnim amandmanima, Tanjug, Beograd, 1971, p. 6.
[45] AMPJ, viti 1968,dos.360, f.51.Relacion nga Legata e Beogradit drejtuar Enver Hoxhës dhe Mehmet Shehut, maj 1968, cited by: Sabit Syla, *Shteti shqiptar dhe çështja e Kosovës 1939-1981*, Instituti i Historisë, Prishtinë, 2012.
[46] Ana Lalaj, *Kosova, rruga e gjatë drejt vetëvendosjes 1948-1981*, Mësonjëtorja e parë, Tiranë, 2000, cited by Esat Stavileci, Vepra I, *Kosova në ish- Jugosllavi*, Dardania, Prishtinë, 2013, p. 69.
[47] RSFJ Gazzette, nr.55,1968.
[48] Amendment XVIII, point 2 in the 1974 Constitution of Socialist Republic of Federative Yugoslavia.
[49] Amendment VIII in the 1974 Constitution of Socialist Republic of Federative Yugoslavia.
[50] See article Shih 271 of in the 1974 Constitution of Socialist Republic of Federative Yugoslavia.

were not quite easily accepted in Serbia. However, no matter of acceptance or refusal by Serbia, social relations in the form of Yugoslav democracy, democracy of socialist self-governance type opened the door for more and deep social changes and for democratization of relations in the federation. This lead towards adoption of federal constitution of 1974 and consequently the adoption of republics and province constitutions at the same time. Solution with the constitution of 1974 according to Gazmend Zajmi aimed the balance between conflictual tendencies which manifested interethnic sphere of Yugoslavia and between concept of centralized federation and the confederal tendencies, exposed without mentioning term confederation at that time.[51] This constitution notes the culmination in the development od socialist democracy of the Yugoslav federation in one side and this will note also the beginning of the end of this federation which unfortunately will be dissoluted through an unconsensual process accompanied with a terrible war, whose dimensions where not seen in Europe since the World War II.

5. Legal-political developments in Kosovo after the adoption of the 1974 until 1981

5.1 Review of 1974 Constitution of Socialist Autonomous Province of Kosovo

Constitutional amendments of 1968 and 1971 present basis for sanctioning of the new position of Kosovo within Yugoslav federation. This position is strengthened with the 1974 constitution. Kosovo is determined as an autonomous political and territorial unit in one side and as the constitutive element of Yugoslav federalism, on the other side. Kosovo would be known as:

- Broad autonomous policial-social and selfgoverning society;
- Society of nations and nationalities;
- Constitutive element of Yugoslav federation and
- With its position in the constitutional system of Serbia.[52]

Difference in name between republics and provinces was not big by the content. Even though still not the republic, its authority [Kosovo] within the federation was now similar to that of Serbia.[53] Reasons which made changes to the 1963 constitution with the mentioned amendments could be categorized as political, economic, social amendments, etc, but political ones were of more importance. Within political amendments two can be distinguished: those that belong to the Yugoslav context and those that belong to the Albanian people in Kosovo. It could be drawn some connection to the movements of Europe of the seventies even though by content this had almost nothing in common with the movements in Yugoslavia. But anyway a wave of protest was seen.

The fall of Rankovic and the Brione Plenum fasted democratization of social reports in Yugoslavia and they encouraged a process of decentralization through which federal power will delegate authority to federal units. New social relations should be sanctioned with the formal-legal mechanisms and this process could not have been done only with the amendments in the 1963 constitution. A new constitution should be adopted. Political environment changed significantly after the Brione Plenum but this doesn't mean that in Serbia would be easily accepted. On the other side during October 1968 protests erupted in Kosovo during which economic and political requests were expressed with the aim of achieving the equal position of the Albanian population to position of other populations in Yugoslavia. Albanian protests will be followed by the protests of Albanians in Macedonia and in Ulqin [Monte Negro] and during the following years they will be remembered similarly with open manifestations of citizens.[54] During protests, protesters requested free use of Albanian flag, opening of university and the status of republic for Kosovo.

RSFJ Constitution which is in fact the last constitution of the federation (which will be dissolved) has been approved in February 21, 1974. This is known as of the more voluminous constitutions in the world. Constitution is composed of 10 basic principles and it is divided into six parts. Finally federal constitution of 1974 determined the twin nature of provinces: as federal units and as the part of Serbia…[55] Immediately after adoption of the federal constitution, two other constitutions were adopted: Kosovo Constitution in February 27, 1974 and Serbia Constitution in February 25, 1974.

Federal Constitution of 1974 together with the Constitution of KSAK Kosovo sanctioned reports in the Yugoslav federation by what Kosovo was defined as an independent political and territorial unit equal to all units of the Yugoslav federation. Autonomous province according to the federal constitution is determined as autonomous, democratic social-political and selfgoverning society based in the power of self government of the working class and all employees.[56]

Yugoslav system

Made a distinction between nations and nationalities and under this context Albanians in Yugoslavia were considered as nationality. This distinction is explained by the fact that Albanians, like Hungarians in Vojvodina, are considered nationalities (narodnosti) instead of nation (narod). Distinction is supposed to be made because of the fact that there is one state of Albanian (Albania) and one state of Hungarians (Hungary). Thus nations have the right to have their own republics which is not the case with the nationalities.[57]

---

[51] Gazmend Zajmi, *Rrjedhat kryesore të konfliktësisë shqiptaro-serbe në rrafshin kushtetues të ish-Federatës multinacionale të Jugosllavisë*, taken by Esat Stavileci, Vepra V, *Çështja e Kosovës në veprën e Gazmend Zajmit*, Dardania, Prishtinë 2013, p. 230.

[52] Kurtesh Saliu, *Lindja, zhvillimi, pozita dhe aspektet e autonomitetit të Krahinës Socialiste Autonome të Kosovës në Jugosllavinë Socialiste*, Rilindja, Prishtinë, 1984, p. 63.

[53] JANSEN G.,Richard, http://lamar.colostate.edu/-grjan/kosovohistory.html, fq.5 (accessed on December 29, 2013).

[54] Sabit Syla, *Shteti shqiptar dhe çështja e Kosovës 1939 – 1981,* Instituti i Historisë, Prishtinë, 2012, p. 173.

[55] Geert-Hinrich Ahrens, *Diplomaci mbi tehun e thikës*, Toena, Tiranë, 2010, p. 306.

[56] See article 4 in the 1974 Constitution of Socialist Republic of Federative Yugoslavia.

[57] See INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO: The Kosovo Report, p. 12, available at http://www.reliefweb.int/library/documents/thekosovoreport.htm, published on June 21, 2006.

On the other side according to the federal constitution nations and nationalities were equal in SFRJ.[58] No matter of the distinction in the name, by the federal constitution it was determined that "workers and nations and nationalities realize their sovereign rights in republics and in the socialist autonomous provinces, whereas in RSFJ when it is of a general interest for all."[59]

Regarding Kosovo inherence as the constitutive element of Yugoslav federalism there could be numerated many components of it, without mentioning historical arguments. This can be done based on the formulation given in the constitution according to what nations and nationalities in the federation decide upon the principles of agreement between republics and provinces, solidarity and reciprocity, equal participation of republics and provinces in the federation and the principle of responsibility of republics and provinces for their own development and for the development of the socialist society, entity as the whole.[60]

Province, in this case was equal within the federation, among the others, as follows:

- In determining competencies of the federation and determining its own competence;
- In being represented in the federatin in the fields reserved for federation and its functions;
- In its presentation in the organs of federation;
- In implementation of decisions taken in the federation and the responsibility that has for them.[61]

With the changes which constitution brought, federation and its competences were determined by its components, which now are eight, equal federal units even though from the name were a bit different and not so by the content. The division of federal competences were done by federal organs but with the equal participation of republics and provinces as the constitutive parts of federation. Federal constitution had determined the rights and the duties of the federation for the interest of realizing joint interests and goals. These rights and duties federation had realized through its organs, through the organs of republics and through organs of provinces and through direct decision-making. How strong were federal units it could be seen from the fact that federal constitution could change in the federal chamber of the federal parliament with the consent of republic and province parliaments. And if Kosovo would not give the consent the federal constitution could not changed. However, apart from formal equality that was sanctioned, the situation changed based on the relations of forces at the determined period of times, especially in the political sense. Problem was a dis-harmony between the reality and the normative. Said in the other form, vis a vis legal formal life Kosovo as the constitutive unit of Yugoslav federation, life in the province was so that often it looked like similarly to the sights from "nine circle of hell"[62] Hegemony and chauvinism were present all the time when Yugoslavia existed and these were manifested especially against Albanians and Kosovo.

Nonetheless, Kosovo was represented in all federal organs. The fact that it was represented in the federation with a smaller number compared to other republics doesn't dim and doesn't reduce equality with the republics. This especially based on the fact that in the Chamber of Republics and Provinces of the federal parliament, decisions were based on the delegations and not on the MPs individually. One special mechanism of decision-making was so called the prior decision. This is a case when consent was given individually by each republic and province. This mechanism was used in the Chamber of Republics and provinces when decisions were taken for political economy and planning at the federal level; for determining the entire volume of federal budget; for entering into the obligation of federation; ratification of international treaties which implicate promulgation of laws based in these treaties or changes of the laws based on the treaties being ratified.[63]

In cases when between republics and provinces the consent was not achieved, the federal constitution gave a temporary solution for necessary cases. In these cases federal government which was known as Federal Executive Council proposes the Presidency of RSFJ application of the Temporary Measures[64], but this law could not serve as a permanent solution. This was only a temporary solution until the agreement was achieved according the regular procedure in the chamber of republics and provinces. The maximum duration of this law was one year. This shows clearly that even in the aspect of agreement Kosovo was totally equal with the other federal units.

At the federal level there existed and functioned the Fund for developing not well developed Republics and Provinces, and here Kosovo also had the equal position with all other republics of the federation. Kosovo cooperated with other republics and Province of Vojvodina independently. With the new constitutional changes and by promulgation of federal, republican and province constitutions, as highlighted above federal units equalized by position in the federation. However for position of autonomous provinces some articles of constitution of the Republic of Serbia will remain, by which provinces were seen as the parts of the constitutional system of Serbia. Reasons why these legal formal mechanisms remained were basically political since by this an attempt to stop Serbian nationalistic and bureaucratic etatist forces from opposing constitution changes in 1974. These forces indeed very quickly would come up with the request for constitutional changes aiming change of con-

[58] See article 245 in the 1974 Constitution of Socialist Republic of Federative Yugoslavia.
[59] See the Basic Principles of the 1974 Constitution of Socialist Republic of Federative Yugoslavia.
[60] See the Basic Principles I, paragraph 3 of the 1974 Constitution of Socialist Republic of Federative Yugoslavia.
[61] Kurtesh Saliu, *Lindja, zhvillimi, pozita dhe aspektet e autonomitetit të Krahinës Socialiste Autonome të Kosovës në Jugosllavinë Socialiste*, Rilindja, Prishtinë, 1984, p. 68.
[62] Ekrem Avdic & Azem Vllasi, *Shtegu njëqindvjeçar i lirisë, lufta antikolonialiste e shqiptarëve të Kosovës në vitet 1912-2012*, Koha, Prishtinë, 2013, p. 178.
[63] See article 286 of the 1974 Constitution of Socialist Republic of Federative Yugoslavia.
[64] See article 301 of the 1974 Constitution of Socialist Republic of Federative Yugoslavia.

stitutional position of provinces. Thus, after 11 months after the 1974 constitution was adopted, in January 16, 1975 Serbian Presidency asked revision of constitution. Requested revision's goal was "to turn back the power over provinces" and to "realize the right of building the Serbian state" within the Yugoslav federation. Moreover for these issues raised by Serbian politics related to the reports republic-province were summarized in an elaboration named "Blue Book".[65] These attitudes and this elaboration at the time when they were presented did not get the support from the Yugoslavian political elites as well as not from that's time President Tito. However disposals from the article 300, 301 and 305 of the Socialist Republic of Serbia Constitution will be disposals which will bring a lots of difficulties and headaches to Albanians of Kosovo. These will be articles which later Serbia will use, in order to initiate constitutional changes and which will bring to bloodshed in Kosovo. These will be articles which will be used as "arguments" arguing that Kosovo was the part of constitutional system of Serbia at the time when the process of building the State of Kosovo was opposed.

Formulation of article 300 of the Socialist Republic of Serbia gave the possibilities for various interpretations: depending in the moments or depending in the political circumstances. With this article several issues were regulated by which republic was shown as the state society in the fields of: Organization and the election of republican states; republic nationality, holidays, etc.

Constitutionalists not rarely gave different interpretations regarding disposals of the mentioned articles of the Serbia Constitution, but none could go in dis-favor of the inherence of Kosovo as the equal unit of the Yugoslav federalism. Kosovo was put in that way, based in 1974 federal constitution, based on the requests of Albanians for equal position with the other nations asking for the status of republic in one side, and Serbian tendencies of refusing the advancement of legal- constitutional position of Kosovo and the position of Albanians within Yugoslavia. Thus Kosovo maximalist requests under that time context were not fulfilled formally (the name republic was not given to it) whereas Serbia was kept calm with the formulation of articles 300, 301 and 305 of the Serbian Constitution. Kosovo with its constitution had regulated every issue for the interests of its citizens and at the meantime it was able to use a constitutional mechanism to prevent changes of the constitution of Serbia, according to which Serbia's constitution could not change without Kosovo consent, whereas Kosovo could change its constitution according to procedure regulated with its own constitution. This made Kosovo quite independent in every aspect and before these characteristics are presented, a very important fact should be highlighted: Kosovo had complete independent territory.

5.2 Territorial independence of Kosovo

Territorial independence of federal units was a special characteristic of Yugoslav federalism. Kosovo according to the constitution had the right to itself decide for its territorial independence. No territorial changes could have been made for the territories of Kosovo, without Kosovo consent and at the same time territories of former Yugoslavia could not have been changed without the consent of Kosovo Parliament.[66] This was the right which was regulated with the federal constitution[67] and consecutively this was also regulated with Kosovo Constitution. Hence the territory of the Autonomous Socialist Province of Kosovo is composed of territories of municipalities that existed at the time of adoption of the constitution and it could not be changed without the consent of Kosovo Parliament.[68]

6. Autonomy of Kosovo[69]

The autonomy of Kosovo and its rights to go on its way of development, after the federal constitution was adopted would be more easily to be understood, if the fields where the autonomy was manifested are presented. And these fields were:

- autonomy in the field of self-organizing;
- autonomy in the field of legislation;
- autonomy in the field of execution;
- autonomy in the field of judiciary;
- autonomy in the field of finances;
- autonomy in the field of international relations;
- autonomy in the field of defending legality and constituality;
- autonomy in the field of defense and the state secuirity;
- autonomy in the field of NGO.

6.1 Autonomy in the field of self organizing

The organization of Kosovo was regulated with its constitution and it was done independently. Kosovo could change its

[65] Blue book made an analysis of the Constitution of Serbia and the positions of provinces. Very quickly it came out that the position of provinces was not the main goal of changes. Position of provinces was used as a means for destabilizing relations in Yugoslavia. Right after the death of Tito the head of state became General Nikola Ljubicic, who transformed from an army personality to a political and state high level official. Before coming in this position he served in the federal army as the head of federal army over 13 years. His attitude that "Serbs and Yugoslav army will defend Yugoslavia" shows that Yugoslavia was considered to be a Serbian state which will be defended by its solders. More about this could be found in: Sonja Biserko, *Kovanje antijugoslavenske zavere*, Libri 1, Svedocanstvo, Beograd, 2006, p. 23.

[66] Gazmend Zajmi, *Dimensionet e çështjes së Kosovës në Ballkan* (manuscript-note ES), taken from Esat Stavileci, Vepra V, *Çështja e Kosovës në veprën e Gazmend Zajmit*, Dardania, Prishtinë, 2013, p. 17.

[67] Article 5 of the 1974 Constitution of Socialist Republic of Federative Yugoslavia.

[68] Article 3 of the 1974 Constitution of Socialist Republic of Federative Yugoslavia.

[69] Professor Arsim Bajrami during the explanation of the fields where Kosovo was considered to be equal to the other republics of the federation uses the term *independence*. Professor Kurtesh Saliu for this issue uses the term *autonomy*. For the needs of this paper the notion (word) is used based on the Albanian Vocabulary (Fjalori Shqipes së Sotme), second edition, published in 2002 in Tirana. Here word autonomy means: 1.the right of a country (province or republic) to be governed by its laws within frameworks of an administrative system of a bigger state; self-governance. Province Autonomy. Gained Autonomy. 2.Possibility to work or to act in an independent way; state of independence, Independence: being independent; independency. Independence of Albania.

structure and the procedure for changing its structures were regulated with its own constitution. The fact that in the federal constitution it was expressively said that the constitutions of federal units cannot be opposite federal constitution doesn't put into the discussion the originality of the Kosovo Constitution. This is a characteristic of federal system where constitutions of federal units shall be in accordance with the federal constitution.

Kosovo with its constitution determines its functions and in this way, according to the constitution citizens and working people realize their sovereign rights, equality, national liberty, ensure the social development and many other rights which in the constitutional vocabulary had legal – socialist colors.

Kosovo has its governing organs which were determined with its constitution. These organs are The Autonomous Socialist Parliament of Kosovo Province as the highest organ. Parliament was consisted of three chambers: Chamber of United Work with 90 MPs, Social Politic Chamber and the Chamber of Municipalities. Each chamber 50 MPs.

Kosovo Assemble creates auxiliary organs, councils or forums which could be long term or temporary. Kosovo Parliament ratifies agreements signed between Kosovo and organs/organizations from the other states as well as with the international organs and organizations.[70] Presidency of Autonomous Socialist Province of Kosovo as a new and representative organ reviews issues of importance in the political, economic, cultural life and realization of the equality between nations and nationalities, reviews issues of cooperation between republics and provinces, issues amnesty in accordance with the law, realizes special works in the field of people defense in the time of peace, in the time of war and in the time of danger of war. In these situations presidency leads the resistance in the territory of Kosovo.

Presidency of Autonomous Socialist Province of Kosovo has its president and eight members who were elected by the Kosovo Parliament, whereas The Head of Communist League of Kosovo becomes the member of presidency according [based] to its function.[71]

Executive Council of the Autonomous Socialist Province of Kosovo (Kosovo Government) is elected from Kosovo Parliament. Within Kosovo competences the administrative organs are created and their duties were implementation of the laws and acts promulgated by government. Administrative organs decide on administrative issues, supervise administrative issues, etc. The main administrative organs are province secretariats, committees, directorates, inspectorates and organizations that exercise activities of interests by exercising determined administrative acts.[72]

Constitutional Court of Kosovo dealt with protection of legality and constitutionality.[73]

As the highest court instance in Autonomous Socialist Province of Kosovo was the Supreme Court whereas the Public Prosecutor of Kosovo was the highest position in the prosecution system of Kosovo.

6.2 Autonomy in the field of legislation

In this field Kosovo was the sovereign and original carrier of the legislative regulation. Legislative functions of Kosovo were regulated similarly to those of other federal units. Thus Kosovo adopted its own constitution as well as laws based on the competences determined with the constitution. The legislative power was not limitied with the exception in the cases which had to be covered with the federal laws.

6.3 Autonomy in the field of executive power

In principle executive functions have to do with the execution of politicies and the norms of Kosovo organs. But Kosovo organs had to execute also the federal disposals which were reserved to be executed by the federal units. Federal organs could execute policies and disposals only for cases determined by federal constitution.

Executive functions within Kosovo were conducted by Kosovo Executive Council [Kosovo Government]. This organ now had more executive attributes and not as it was before, having political attributes even though some political attributes remained since the political system of Yugoslavia was one of the socialist democracy type and a type of one party system. Based on the constitution Executive Council was responsible before Parliament for as follows: for the situation in all fields; for realization of policies and for the execution of laws and other disposals and other general acts of the parliament; for orientation of province administrative organ works.[74] Executive Council proposed laws to the parliament; it proposed budget; it adopted decrees; supervised the work of administration and exercise functions which were characteristic for each federal unit. For its work Executive Council was held responsible before parliament or before each chamber of the parliament.

6.4 Autonomy in the field of judiciary

In the field of judiciary like in all republics there were regular courts and the courts of the self governance to conduct the judiciary functions. In Kosovo system of courts, there were courts of general competences and economic courts. Regular courts were: municipal courts and district courts of whereas the highest instance court was the Kosovo Supreme Court. In Kosovo there were district economic courts with their residences in Prishtina and in Gjakova. Related to the courts of self governance in Kosovo were created courts of united work. These courts were created in the way of dividing municipalities per one court. Thus for nine municipalities one court in Gjakova was established and for thirteen other municipalities, one court in Prishtina was established. The other organs of jurisprudence were public prosecutor offices, public attorney and the social attorney of self governance.

[70] Article 301 of the Constitution of Autonomous Socialist Province of Kosovo, Gazzette, nr. 04.1974.
[71] Article 147 of the 1974 Constitution of Socialist Republic of Federative Yugoslavia foresees creation of Presidency in republics and in provinces.
[72] More about the organs of the administration could be found at: The Law on Administration, Gazzette, nr. 40/75.
[73] Article 223 of the Constitution of Autonomous Socialist Province of Kosovo, Gazzette, nr. 04.1974.
[74] Article 356 of the Constitution of Autonomous Socialist Province of Kosovo, Gazzette, nr. 04.1974.

6.5 Autonomy in the field of finances

Kosovo self remedies and expenditures were determined independently with the Kosovo budget. National Bank of Kosovo was unique institution of monetary system which executed joint emission policy which was determined by the Yugoslavia Parliament.[75] Based on the fact that Kosovo according to all statistics remained to be the most underdeveloped region and the most poor in the federation, a part of finances Kosovo ensured from an institution known as Fund for development of zones not well developed and from this fund Kosovo has ensured means from 1974 to 1981.

Existence of this fund from Serb nationalistic circles was quite early politicized and the presented data regarding the amounts of funds in most of time were exaggerated, said in the other way, given wrongly with political intentions. It is difficult to give the exact data for investments in Kosovo from federation and this is a matter of discussion even though from nowadays viewpoint it is difficult to be verified. However, this could be found in a note: "apart from the means of the fund there were ensured means from the federal budget for developing social activities and public services in the not well developed republics and Kosovo. Thus means from the federal budget for these goals in the period 1966-1984 reached 149,4 billion dinars (as for that time prices). In addition to these means with the special rules in this period were given 13 billion dinars destined for Monte Negro and Kosovo".[76]

6.6 Autonomy in the field of international affairs

Even in the field of foreign affairs Kosovo was equal with other federal units. Until constitutional amendments by which 1963 constitution was changed, the field of foreign affairs was very centralized and with the foreign affairs dealt exclusively the federation. But since 1971, as mentioned, thanks to the constitutional amendments the federal units began to be engaged in the field of foreign affairs, so the federal units started to execute foreign affairs activities. Later on with the 1974 Federal Constitution there are basic principles determined regarding foreign policies and the participation of federal units in this field. Federal units are those that through determined organs and forms took part in executing these functions. Thus they were held responsible for determining and realizing the foreign affairs and the international relations of Yugoslavia.[77] Based on 1974 Kosovo Constitution, Kosovo Parliament reviews issues on the foreign policies and international relations; it gives consent for concluding international agreements in the cases foreseen with the Federal Constitution; it ratifies agreements which Kosovo has concluded with the organs and organizations of other states and with the international organizations.[78] Federal Constitution under this context regulates that "republics and autonomous provinces realize cooperation with the organs and organizations from other states and with the international organizations within the volume of the foreign policy, determined as RSFJ and international agreements".[79]

Initially for the international affairs in 1972 in Kosovo was created Secretariat for Relations with the Foreign affairs which worked as the professional service of the Executive Council of Province and which later on was transformed to the professional service also for the Parliament, at the same time. In 1978 this institution worked as the secretariat whereas in 1982 it was known as the Province Committee. In this context it should be noted that within Kosovo Parliament a Commission for International Affairs was created and within the Kosovo Presidency a Council for Foreign Affairs was created, as well. New constitutional solutions and the solutions made by the new constitution offer a variety of organs which deal with the foreign affairs and this variety shows that Kosovo takes part in creating the Yugoslav foreign affairs. This clearly expresses needs of Kosovo as the federal unit to be equal part in creating foreign policies of Yugoslavia, and this shows that Kosovo as the federal unit worked independently within its responsibilities in this field for its interests. With these activities Kosovo position was advanced and affirmed in the world and the cooperation was intensified, especially in the field of education, culture, science, technology, etc, and within a short time Kosovo has managed to establish direct economic, cultural and scientific relationships with the organs and organizations from more than 80 countries of the world. On the other side there were 6 ambassadors[80] that served as Yugoslav ambassadors in different countries of the world. As province of former Yugoslavia, Kosovo had the rights as well as needed capacities to exercise international affairs. Within the frameworks of former Yugoslavia, Federal Parliament was the center of formulation of joint interests for international affairs. Decisions were taken through detailed harmonization of politics between "social-politics societies, respectively republics and autonomous provinces" (Hasani 1988: 243). Kosovo also could develop negotiations with the international subjects.[81]

6.7 Autonomy in the field of protecting constitutionality and legality

Constitutional Court as an institution worked as one instance court and for the first time appeared in Kosovo in 1969. This court was more strengthened with the 1974 constitution. This institution is the main one to deal with the issues of constitutionality and legality and its decisions were final which means that against them there were no means of appeal. Decisions of the constitutional court were adopted after the public review,

[75] Article 260 of the 1974 Constitution of Socialist Republic of Federative Yugoslavia.
[76] More about this can be found at: http://www.znaci.net/00001/120_8.pdf.
[77] Article 244 of the 1974 Constitution of Socialist Republic of Federative Yugoslavia.
[78] Article 301 of the Constitution of Autonomous Socialist Province of Kosovo, Gazzette, nr. 04.1974.
[79] Article 271 paragraph 2 of the 1974 Constitution of Socialist Republic of Federative Yugoslavia.
[80] Kurtesh Saliu, *Lindja, zhvillimi, pozita dhe aspektet e autonomitetit të Krahinës Socialiste Autonome të Kosovës në Jugosllavinë Socialiste*, Rilindja, Prishtinë, 1984, p. 128.
[81] KIPRED, Analizë politike, nr.6, *Kosova shtet i paprecedencë*, Prishtinë, 2007, p. 14.

but based on the Regulation for the work of the constitutional court there were decisions that could have been taken without the public review. Constitutional Court decisions were published in the Kosovo Official Gazette. Kosovo was represented in the Federal Constitutional Court with one judge[82], whereas in the federal constitutional court it was represented based on the principles determined in the federal organs of republics and provinces.[83]

6.8 Autonomiteti in the field of people defense and the state security

Functions of Kosovo in this field were executed according to the solutions given by Federal and Kosovo Constitution. Functions in this field were similar to the other federal units. According to the Kosovo Constitution biggest responsibilities in the field of people defense belonged to Kosovo Parliament and after the Parliament to the Kosovo Presidency. Kosovo Presidency was responsible to lead the armed resistance in the territories of Kosovo. Later on with this responsibility were burdened Kosovo Executive Council and Kosovo Parliament. It was the duty of Kosovo Presidency to create Council for People Defense giving to it also determined competences. In Kosovo existed the Headquarters of Peoples Defense as well as the Kosovo Headquarters for civil defense. At the end, it should be noted that within this field, administrative work was conducted by the Secretary of Peoples Defense.

Regarding the state security, competences were similar to those of the other federal units with the exception of those that were competences of the federation.

6.9 Autonomy in the field of nongovernmental activities[84]

In RSFJ system there appeared some forms of organizing named as organs, social organs, political-social organizations and social and citizens associations. The way these were named shows their character and the role they could have played within Yugoslav system, which in the time context was different of those from the former socialist block. Obviously, also in this field Kosovo was very similar to the other federal units.

Conclusions

Kosovo joined anti fascist war led by Kosovo Communist Party with and anti fascist forces (partisans) joined the Yugoslav forces in the war for liberation. This was the time when people from old Yugoslavia were being positioned in order to determine their future. The Communist Party of Yugoslavia led by Tito managed to organise anti fascist war whereas Kosovo Communist joined the Yugoslav party with the hope and with a promise that after the war Kosovo people will decide for their future.

The foundations of Yugoslavia were established during the Second World War and the creation of Yugoslavia in a way was dominated by Serbia. Right after the war the federation got established and the main institutions of that federation were decided to be positioned in Belgrade.

Federation within a very short perido of time adopted the first yugoslav constitution by which the communist federation was formalised. The faith of yugoslav people was not the faith of joining the western democratic world and this federation felt to the communist block, even though from various viewpoints the communist system was not as strong as it was in the other countries from the communist block. No matter of this still Yugoslavia was not a democracy system. And it was a federation whose dissolution could have been foreseen since its establishment. Ever since its establishment until the total dissolution of the federation two were the main tendencies that caused the dissolution. First, more democracy and more freedoms and Second, hegemony and domination over the others.The carrier of the second tedency was Serbia and Serbian nationalism. Yugoslav communist democracy was formally sanctioned with three constitutions, whereas Kosovo during the life of Yugoslavia adopted only one constitution and that was in 1974. The proclaimed equality of people and the federal units was not the reality in this federation. Constitutional mechanisms were not in accordance with the will of various people (nations and nationalities). Kosovo position changed from a moment to a moment and this position was not in accordance with the will of its people. But its position advanced substantially with the 1974 federal constitution which came more as a resut of compromises between political forces nationally coloured. But constitutions cannot make a system sustain if that system within itself is composed of many units differently developed and with different aspirations for the future. The western republics were economically more developed democracy and freedom oriented whereas southern part was not well economically developed and less oriented towards democracy. Yugoslavia case shows clearly that constitutional mechanisms cannot ensure sustainability of the federation if that was not created based on the original expressed will of people especially when they are compoused of various ethnicities and religions. The federation existed some decades more as a result of the geographical position of Yugoslavia in between two blocks rather than as a desire of people and federal units which composed that federation. As soon as the communist system felt down this creature unfortunately entered into the process of dissolution which unfrtunatelly brough atrocities that were not seen in Europe since the Second World War. So constitutions can be wrtedn and designed in whatsoever forms but if they do not sanction the reality, then they easily become house of glasses when members of that house are full of stones.

[82] Article of the 1974 Constitution of Socialist Republic of Federative Yugoslavia.

[83] Article 370 of the 1974 Constitution of Socialist Republic of Federative Yugoslavia.

[84] More about this at: Kurtesh Saliu, *Lindja, zhvillimi, pozita dhe aspektet e autonomitetit të Krahinës Socialiste Autonome të Kosovës në Jugosllavinë Socialiste*, Rilindja, Prishtinë, 1984, p. 76-157, Arsim Bajrami, *Sistemi kushtetues i Republikës së Kosovës*, Artini, Prishtinë, 2011, p. 47-52 and Esat Stavileci, Vepra I, *Kosova në ish -Jugosllavi*, Dardania, Prishtinë, 2013, p. 84-89.

The Human Rights, Canonic Law and the Impact of Religion from the Perspective of Vatican II

*Jiří Bílý**

Abstract

Vatican II wanted to achieve its human rights updating objective. With this in mind, the article addresses three issues.

The first concerns political democracy and the separation of the Church and the State as two conditions for the development of human rights. On this point, GS developed a compromise by starting, on one side, by affirming the divine foundation of the state, and on the other, by leaving the choice of political structure and the election of the rulers to the free will of the citizens.

The second question concerns the right to religious freedom. It is the right to freedom to change religion or to have no religion. What is missing in DH, while present in the Universal Declaration of Human Rights, drafted in 1948 by the United Nations, is the right to freedom to change religion or not to have religion. This absence is probably due to the fact that the second part of DH deals with an act of faith (actus fidei) as a search for the truth - the truth of God that underlies religion - and does not present religion from public reason.

The third issue is the question of human rights in the Church. It must be made clear that the fundamental rights enjoyed by ordinary members of the Church, according to the Code of Canon Law, inspired by GS, do not deserve this name. In the context of human rights laws, they are based on the irreducible values of human dignity, freedom and justice. Nevertheless, the canons of the Canon Law Code limit these rights by asserting that their application must contribute to the common good, and adding that it is ecclesiastical authority that is competent to interpret the common good, and, therefore, to regulate these rights.

Keywords: *human rights; religious liberty; theology; church; state; lumen gentium; dignitatis humanae; gaudium et spes; Codex iuris canonici; United Nations.*

1. Vatican II – Turning point

Cardinal Roncalli, a former Vatican diplomat enjoying the honourable semi-retirement of the Patriarchate of Venice, was elected John XXIII. in 1958 largely because he had few enemies, and because no one involved in the election thought that he could do much harm; he was seventy-six and it was (rightly) thought that he would not enjoy a long period in office. After the last exhausted years of Pius XII., it was sensible to look for a man of peace who would give the Church a chance to find a decisive leader to set an appropriate direction for the future. Certainly Roncalli had proved good at defusing conflict throughout his career, but that might have provided a hint that he was unlikely to perpetuate the embattled, adversarial style which had characterized the papacy since its trials in the French Revolution - one need only recall the combative, denunciatory language of the Syllabus of Errors, or the frightened tirades against Modernism and Communism from Pius X. and Pius XI.

The new pope's ebullience and boundless curiosity, so disconcerting to churchmen conscious of papal protocol, was matched by a shrewd ability to get what he wanted. What he wanted did not coincide with the wish of prominent members of the Vatican's Curia to defend old certainties without much further discussion. Instead, to the horror of Curial officials, in 1959 he threw everything open to discussion by announcing his intention of calling a new council to the Vatican.[1] The Vatican machine, resigned to the inevitable meeting, knew what to do in such circumstances: keep strict control of the agenda through the Holy Office (the more emollient term then preferred for the Roman Inquisition). The spirit would not simply be that of Vatican I but rather that of Trent, with its stern anathemas of ideas which no good Catholic should hold. As Cardinal Ottaviani of the Holy Office spelled out to the council in its early stages, 'You need to be aware that the style of councils is concise, clear, brief, and is not the same as for sermons, or for some bishop's pastoral letter, or even for the encyclicals of the Supreme Pontiff. The style proper to a council is the style that has been sanctioned by the practice of the ages'.[2]

There were three obstacles to this. One was Pope John's recall to Rome of a long-standing Vatican civil servant, Giovanni

* Doc. JUDr. PhDr. Jiří Bílý, CSc., University of Finance and Administration, Department of Administrative Law and Public Administration, Prague, Czech Republic.

1 ALBERIGO, G. (eds.), History of Vatican II. (5 vols., Maryknoll, 1995-2006).

2 O'MALLEY, J. W., Trent and Vatican II: Two Styles of Church. In: R. F. BULMAN and F. J. PARELLA (eds.). *From Trent to Vatican II: Historical and Theological Investigations.* Oxford, 2006, p. 301-20.

Battista Montini, who had been close to Pius XII. until his broad sympathies brought him disfavour and decorous exile to the Archbishopric of Milan. Montini, now rewarded with the cardinal's hat denied him on his departure from Rome, knew how the Vatican worked, and he had good reason to find the outwitting of former colleagues a congenial task. Second was the arrival in 1962 of more than two thousand bishops in Rome, with Europe contributing less than half of their number. The bishops had been consecrated from within an ecclesiastical system paranoid about Modernism, but they brought with them a myriad of different practical experiences of what it was to be a Catholic in 1962. Third was the glare of publicity in which the council's proceedings took place. At Trent, the Holy Office had not faced the problem of journalists. Now the Vatican was forced to employ a press officer, although, with a disdainful symbolism, he was not actually given anywhere to sit during his attendance at the council's proceedings.[3]

This unprecedented gathering of Catholic leaders listened with fascination to a pope who in his inaugural address spoke excitedly of the providential guidance of the world's inhabitants to 'a new order of human relationships', and, far from lecturing the world, criticized those 'prophets of misfortune' who viewed it as 'nothing but betrayal and ruination'. It was important actually to have heard the address, since the subsequent published Latin version was substantially bowdlerized. More remarkable still were invitations to and the palpable presence of Protestant observers, who would have run the risk of being burned at the stake if they had dared to set foot in Rome during the Council of Trent - and, as an afterthought, even some Catholic women, mostly nuns, were asked to attend. None of these invitees could vote, but their presence was a symbol that the Church was going to reach out beyond its traditional fortifications. All the defensive draft documents so carefully prepared by the Curia were rejected and replaced with completely different texts. Two crucial agreed documents have remained central to the council's legacy - they have provided a springboard for action to some Catholics, an obstacle course to others.

The first, Lumen Gentium, was a decree on the nature of the Church. This document was one of those which had been transformed from the first draft prepared under the direction of Cardinal Ottaviani, the original being openly criticized for its lack of coherence by Cardinal Montini, while a Belgian cardinal dramatically expressed his scorn for its 'triumphalism', 'clericalism' and 'juridicism'.[4] The utterly different document which emerged, complete with that new title suggested by the great Belgian ecumenist Cardinal Leo J. Suenens, represented a significant break with previous Roman Catholic statements in its careful choice of a verb: instead of a simple identification between the Church of Christ and the Church presided over by the pope, it stated that the Church 'subsisted in' the Roman Catholic Church. What did that say about other Churches - indeed, how does 'subsist in' differ from 'is'? The decree also made a fresh attempt to tackle that question of authority which had nearly destroyed Trent, and to which Vatican I had given a partial (and partisan ultramontane) answer. Its second chapter was entitled 'The People of God', all of whom, according to the Book of Revelation, Christ the High Priest had made 'a kingdom, priests, to his God and Father' (Revelation I.6). The ordained priesthood 'forms and rules the priestly people', but the royal priesthood of the people was exercised in a whole variety of aspects of the Church's life, both liturgical and everyday in the world. What were the implications of this for episcopacy? The decree added the concept of 'collegiality' to papal primacy: a reaffirmation of the authority of other bishops alongside that of the Bishop of Rome - or a replacement for his authority? The decree's reaffirmation of papal infallibility did not suggest the latter interpretation. Cardinal Ottaviani observed with graveyard humour that the only 'collegial' act recorded in the Gospels was the flight of Jesus's disciples from the Garden of Gethsemane before his Passion.[5]

Then came Gaudium et Spes, an attempt to place the Church in the context of the modern world.

So much else tumbled open in conciliar statements, much of it discovered earlier by the separated Protestant brethren of the Western Church: the value of vernacular liturgy, an adventurous engagement with the previous two centuries of biblical scholarship, an openness to ecumenism, an affirmation of the ministry of laypeople. There was also open apology to the Jewish people for their sufferings at the hands of Christians in Nostra Aetate, which in its final draft bluntly dismissed the traditional Christian idea that the Jewish people had committed deicide - the killing of God. One bishop amidst the crowds who found the whole proceedings thoroughly uncongenial and dismayingly chaotic, and whose vote was consistently in the small minority against such statements as Gaudium et Spes, was a Pole who during the council's sessions became Archbishop of Cracow, Karol Wojtyła. Also expressing his private disapproval of what he saw as the facile sunniness of Gaudium et Spes was one of the attendant German theologians, Joseph Ratzinger.

By the time these crucial documents were agreed and promulgated by the papacy, John XXIII. was dead.

Did the Second Vatican Council realise the goal pope John XXIII set for it? The goal was "aggiornamento", which means: bringing the church up to date. In some circles the appreciation of this council changed from euphoric joy at the end of it in 1965 into passive resignation now, almost 50 years later, although Pope Francis has been well received. This attitude originated, so it is felt, from the understanding that most of the council's documents are characterized by compromises between conservative and progressive wings. These compromises, so the reasoning goes, may be considered the cause of the church's stagnation in the domain of religious and moral convictions, its policy and structure. This negative view, I think, is restricted to the church ad intra, her inner life and practice, whereas generally the positions the council took in relation to the world ad extra remain unchallenged. Most people, for instance, are of

[3] CHADWICK, H., *Paul VI and Vatican II.* In: JEH, 41, 1990, p. 463-9.
[4] McBRIEN, R. P., The Church (Lumen Gentium). In:, M.A. HAYES and L. GEARON, *Contemporary Catholic Theology.* A Reader. Leominster, 1998, p. 279-93.
[5] SHORTT, R., *Benedict XVI: Commander of the Faith.* London, 2005, p. 37.

the opinion that the Pastoral Constitution on the church in the modern world (Gaudium et Spes) painted a more or less correct picture of society at large, at least society in the western world. Only a minority said and still says that at that moment social reality was already in a process of transformation in the direction of postmodernity. So they deplore that the council did not keep pace with that new trend. In this paper I am not walking the road in that postmodern direction, letting aside whether it existed then and still exists today. I focus on three interrelated topics that refer to modern society: the relation between church and state; the right to freedom of religion; and fundamental rights in the church.

2. The relation between church and state

All through its history, the relation between church and state was one of unity. It began within the Constantinian shift: in the fourth century and continued during both the Middle Ages and the confessional period of the Protestant reformation and the Catholic reformation or counter-reformation. It was a unity not without competitors and rivals, fears and threats, blazing rows and armed conflicts. It sometimes was a unity vehemently contested, but also by and large vehemently wanted. But in 1789 the French revolution took place and pub-lished the Declaration of Man and of the Citizen. This text introduced the separation of church and state by no longer recognising religious vows, robbing them of their public status and attributing to citizens the right to elect their ministers of religion, which altogether destroyed age-old Gallicanism. Rome condemned everything that harmed her power structure. She especially attacked all political rights as far as they did not fit into the church's doctrine of the state. According to this doctrine, church and state operate directly under natural law and divine law, meaning that there is no superiority between them, but only co-equality. The church is politically as perfect as the state is: a societas perfecta, a term she had already introduced from the 16th century in order to defend her political position against control by the principalities over the churches in Germany, and continued to use that term to the mid-1950s.

Interestingly Vatican II not only gave up the term societas perfecta, but also her attitude of protest and rivalry. She adapted herself to the autonomy of the state, albeit with one exception. She claimed to possess the competence to pass moral judgments if the fundamental rights or spiritual life of people required her to do so (GS 76). She positively emphasized some fundamental characteristics of the democratic state, like the right of citizens to meet and form associations, express their opinion, take part in the development of the state's constitution, the direction of public affairs and the election of political leaders (GS 75). However, despite recognising both the autonomy of the state and democracy, she did not explicitly use the terms "separation of church and state" or "liberal democracy".[6] But the separation of Church and State has in practice, of course, more than enough different shapes.

To my mind, from a theoretical perspective, both omissions - if "omissions" is the right word for not explicitly having mentioned both terms just referred to - are correlated. From a political perspective, in democracy sovereignty is with the people, it is not with the divine. "We, the people", is the author of constitutional law - God isn't that anymore, nor is the church. This means that the democratic state consists of the freedom of the state from ecclesiastical involvement and interventions, and the other way around. Logically speaking, whoever argues for democracy, argues for the separation of church and state. But what did the council say? Interestingly, on the one hand Vatican II did not give up "divine law" or "natural law" on which the state, as the council sees it, is based. So it said in the first half of a basic sentence in number 74 in Gaudium et Spes: "It is clear, therefore, that the political community and public authority are founded on human nature and hence belong to the order designed by God (…)." But on the other hand, which is typical of the compromise-based character of Vatican II, in the second half of this sentence, the council nuanced its traditional point of view by having followed this first part of the sentence by the second part, that reads as follows: "even though the choice of a political regime and the appointment of rulers are left to the free will of citizens." What this means is that the council ideologically maintained its traditional doctrine on natural law and divine law being the very foundation of the state, but when it comes to constitutional law and state law it left the full competence to the will of the citizens. Independently of all speculative considerations, whoever stresses the traditional doctrine cannot see any role for the free will of the people because the state exists under natural and divine law, whereas whoever leaves designing and approving constitutional law to the free will of the people, which is about the very foundation of the state, cannot accept any reference whatsoever to natural law and divine law in this domain. In other words, both wings in the church can quote this "despite" sentence and interpret to their own liking.

Perhaps, the council suppressed the term "separation of church and state", because at that time some churches were still state churches or were assigned privileges by the state, whether or not on the basis of concordats. Moreover, some states with state churches were built upon a democratic structure, whereas others were at a pre-democratic stage.

My first desideratum for Vatican III is that the church explicitly clarifies its position towards both democracy and the separation of church and state, and does so in principle. However, existing circumstances in various states might require a more pragmatic-political approach.

3. The right to freedom of religion

One of the fundamental rights people have is the freedom of religion. In article 18 of its Universal Declaration of Human Rights, the UN proclaimed this right decisively. About 20 years later the Catholic Church followed with her Declaration on

[6] "Democracy" in "liberal democracy" is mainly the effect of the historical movement of republicanism and "liberal" in "liberal democracy" is mainly the outcome of liberalism as a political movement as well. In accordance with a long tradition, Vatican II doesn't make a choice of any political movement or form of government, so it doesn't mention republicanism or liberalism. The only thing the pastoral constitution does is to condemn those political systems that "hamper civic and religious freedom, victimize large numbers through avarice and political crimes, and divert the exercise of authority from the service of the common good to the interests of one or another faction or of the rulers themselves" (GS 73).

the Freedom of Religion (Dignitatis Humanae).[7] It took many vehement consultations and deliberations before both wings in the church reached an agreement. Question is whether it is possible to apply the same standards on church and state at one go. I think yes. Opinions vary in this point.

In this perspective it is interesting to compare the Vatican II declaration with UN article 18, which is substantially identical with article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Comparing both documents brings a multitude of similarities to light, but also some differences. I only mention those that are relevant for this paper. The text of article 18 in the Universal Declaration runs as follows: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief [forum internum], and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance, [forum externum]"

It is interesting to see that the Universal Declaration refers to both religion and belief; let me call this here "religious and non-religious world views".[8] The point I want to make is that in the Vatican II declaration an important aspect is missing, although it belongs to the forum internum, which is mentioned explicitly in the UN Declaration that I just referred to, which is: "this right includes freedom to change one's religion or belief to another religion or belief." This not only implies that people have the right to move, for instance, from Christianity to Islam and from Islam to Christianity, but also from any religion to a nonreligious belief, be this agnostic, atheist or antitheist.

I think it is informative to report how Islamic states have successfully replaced the words "change his religion or belief" in article 18 with a version of their own liking, later on, in both a specific UN treaty and a specific UN declaration. In 1966, in regard to article 18 of the International Covenant of Civil and Political Rights, the Islamic states lobbied so successfully that the words "change his religion or belief' has been replaced by "have or adopt a religion or belief". Then, in 1981 they were able to change the formulation of article 1 in the Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief. The words "change one's religion or belief', having already been replaced by "have or adopt a religion or belief', underwent a second replacement, now with the words "have a religion or whatever belief'. Period! No "change" anymore, no "adopt" anymore, but only "have a religion or belief".[9]

If this "petite histoire" of UN policy is compared with the Vatican II Declaration on religious freedom, then, substantially, the wording in the UN declaration of 1981, although a product of Islamic lobbying, is identical with that in the Vatican II document. This is to say that in both documents the wording "right to change one's religion or belief' is missing.

Why is this? I think an answer might be found in the composition of the Vatican II declaration, which in fact is a small booklet. This declaration is divided into two parts. The language-game in the first part is what John Rawls would call "public reason", which means that it is understandable and reasonably acceptable to any person of any religion or belief, or as he would say: of any "comprehensive doctrine".[10] The second part of the Vatican declaration operates from a fundamentally different language-game: that of Catholic theology, especially the theology of "the action of faith". This theology, rooted in High Middle Ages, is about the act of faith as striving for and dedicating oneself to divine truth, that is to say: the one and all-encompassing truth of God. There is no other truth than divine truth. In this perspective the right to change one's Catholic religion to another religion or (even!) belief can simply not be a right to be attributed to any human being. Even more strictly, in the domain of searching for the truth of God and God himself there simply are no rights but only obligations, of which the most important is to obey, which is to say: obey the right that truth has. The right that truth has exists in the claim to be obeyed. In this perspective, religious deviations, errors, heresies do not have a right. In other words, the so-called objective right of the truth of God applies here, not the subjective right of people, certainly not the subjective right of erring people. Here, the objective right of truth trumps the subjective human right. The objective right of truth does not tolerate an erring conscience.

In the Catholic doctrine of conscience, which does not belong to the domain of faith but that of morality, a conscience can err, but it does not lose its binding power, except in the case of failing knowledge. Here we have a first complication between the UN declaration that only recognizes the right to the freedom of conscience - period - and the Catholic doctrine that distinguishes between a true and an erring conscience, as well as between a binding and a non-binding conscience. But another complication comes to the fore when we add the text on moral conscience from the Vatican II constitution Gaudium et Spes as a possibly helpful hermeneutic tool. This text also distinguishes between a true and an erring conscience, but it does not say that the latter keeps its binding power in the case of failing knowledge and information, but it introduces another category, which happens to be the theme of the whole of chapter I of part I of that constitution, i.e. human dignity. So Gaudium et Spes says that an erring conscience does not lose its

[7] In the first instance the members of the council decided to add the freedom of religion in a special section to the constitution on the church (Lumen Gentium), but because it was considered not to fit in it, as it might contaminate the theological principles of this constitution, this idea was cancelled. (GREEN, V. H., *A New History of Christianity.* Stroud, 1996, p. 337.) Then they decided to enter it into the Decree on ecumenism (Unitatis Redintegratio), but that was not realised either, because it might not be acceptable to the other Christian churches (or 'Christian communities' as these churches were officially denigrated in this decree). In the last resort it was decided to make a special document on it, the Declaration on Religious Freedom (Dignitatis Humanae).

[8] EVANS, M., *Religious Liberty and International Law in Europe.* Cambridge: Cambridge University Press, 1997; VAN der VEN, J. A., *Human Rights or Religious Rules.* Leiden: Brill, 2010.

[9] This last document is not a treaty but only a declaration, so it does not have legal force. But in the meanwhile it influences people's mindset.

[10] RAWLS, J., *Political Liberalism. Expanded edition.* New York: Columbia University Press, 2005.

human dignity. By the way, remarkably the text seems to hold that human conscience entails human dignity not just the human person. But apart from that, the text not only complicates the erring conscience theme by replacing its binding character with human dignity, but also starts to theologize by saying that conscience could lose human dignity in the case where it "by degrees grows practically sightless as a result of habitual sin" (GS 16), whatever this might mean. In this text, an erring conscience, whether it loses its binding power or not, remains in the dark. It seems to be that when it results from habitual sin, it can lose human dignity. To my mind it is a confusing text in which several heterogeneous aspects are mixed up. In short, it is an untidy and most probably a slapdash text.

The council should clarify the erring conscience theme, including its relation to its binding quality, human dignity and sin[11], and from there should decide clearly what position to take in relation to the right to freely change one's religion.[12]

4. Fundamental rights

In itself it is a remarkable fact that the church is applauded all over the world because of her support of human rights in whatever states, although she does not recognize them within her own walls. However remarkable this may be, it might be understandable from the fact that the church does not have a constitution in which such rights are inscribed.[13] Generally a constitution fulfils three functions: The first is that it constitutes offices within the domains of the legislative, administrative and judicial powers. The second function relates to attribution of competences to these offices. And the third function refers to regulating or restraining the competencies of these offices among one another and in relation to the citizens. This last aspect is about fundamental rights, as they protect citizens against the power of the state and its officers.[14]

It seems that in 1904 when deliberations began on designing the Codex Iuris Canonici that was published in 1917, a proposal came up for a church constitution, but it was never effectuated. Sixty years later, during Vatican II the idea of a constitution emerged again, for two reasons. The first was that the Codex of 1917 needed to be renewed as it consisted confusingly of first- and second-order bodies of law together. The first-order bodies contained private and public law.[15] The second-order bodies were about rule-making or rules about making rules. The second reason for a constitution was to transcend the local bodies of law in the Latin Church and those in the Oriental Church by developing one fundamental law (lex fundamentalis) for both churches.[16] A special subcommittee of the pontifical committee for the revision of the Codex Iuris Canonici began its work in May 1965.[17] It had to answer the question "whether one or two codices should be made, one for the Orientals and one for the others, preceded by [only one], in any sense, fundamental law".[18] It took a long period of rime before this subcommittee came to the conclusion that it failed to come up with an adequate answer. One of the problems was the confusion about theological and juridical definitions of terms like "divine law", "constitution", "fundamental rights". The questions in regard to the last term circled around the relation between concepts, such as (a) the principle of human dignity and human rights, (b) divine law and positive law, (c) human rights from natural law and fundamental rights in fundamental positive law, (d) fundamental rights and the common good, (e) individual rights and community rights, and (f) rights and obligations. Next to these basic problems, there was a substantive question: what fundamental rights should be recognised in such a constitution, like equality (non-discrimination), freedom of expression, freedom of assembly and association, freedom of research especially in theology, and due process of law? In fact, 16 years later, the

[11] To my mind, conscience can only adequately be approached when the following questions are clarified: In what sense is conscience more than the application of general moral rules on concrete situations?; What is the relation between cognitive, affective and volitive aspects in conscience?; Under what circumstances can conscience err?; Under what circumstances does erring conscience, if it exists, keep or lose its binding force?; Under what circumstance has an immoral life a negative influence on the binding character of erring conscience?; Under what circumstances can the voice of moral conscience, erring or not erring, be interpreted in terms of a divine voice?

[12] By doing so Vatican III could relatively easily reaffirm the notion of religious pluralism that has been proclaimed in the Vatican II document on the non-Christian religions (Nostra Aetate), but, if I may add this, by no longer using the Christian-centric term "non-Christian religions", but "other religions" and so changing self-centred universalism into decentred universalism (HABERMAS, J., *Reply to my Critics.* In: CALHOUN, C./MENDIETA, E./VAN ANTWERPEN, J. (eds.): *Habermas and Religion. Polity.* Cambridge: Cambridge University Press, 2013, p. 347-390).

[13] Some people are of the opinion that the church has a constitution already, being inscribed in two types of documents (J. A. VAN der VEN, H.-G. ZIEBERTZ). The first is the collection of texts in the Bible and the second the collection of texts by the councils. In regard to the first type there are the so-called law books in the Jewish Bible, like the book of the covenant (Ex 20:22-23:33) that regulates various social relations, and the book of deuteronomic law (Deut 12-28) that correlates broadly with the book of the covenant and expands concern for widows, orphans, strangers and the poor, and finally the holiness lawbook which presupposes the book of deuteronomic law on the premise that its social programme had failed and adopted a more pragmatic approach. The first book is about the protection of freedom, the second about solidarity and the third about the sanctification of daily life. But by and large they relate to moral law rather than strictly juridical law. This means that they cannot be considered constitutional law in any sense, which is understandable from the fact that the distinction between moral and juridical law is a modern invention altogether. The texts of the second type, those of the councils, are of a mixed character. The majority of them is full of theological reasoning and speculation, a part of which is about church order, including offices and their competencies. Texts with explicit juridical rules and norms in the technical sense are a minority only.

[14] KORTMANN, C., *Constitutioneel recht.* Deventer: Kluwer, 2001.

[15] Private law includes for instance personal law, property law, contract law, while public law contains for instance penal law and administrative law.

[16] BOELENS, O., *De "Lex Fundamentalis" een gemiste kans of een kansloze misser?* Utrecht: Katholieke Theologische Universiteit, 2001.

[17] Pontifica Commissio Codici Iuris Canonici Recognoscendo (PCCICR).

[18] "utrum unus an duo Codices faciendi sunt, unus pro Orientalibus et alter pro aliis praemissio Codice quodam Fundamentali" (BOELENS O.c., 2001, p. 11).

constitutional idea, raised during the Vatican II council, died a gentle death.

5. In conclusion

However understandable it might be that the subcommittee didn't come up with an answer, one may regret that today the church doesn't have any list of fundamental rights that matches human-rights law outside the church, all the more because the popes in their speeches kept hammering on about their importance outside the walls of the church, while failing to recognise them inside her walls. But that is not the only issue here. It would also be important for the life and internal structure of the church herself to have such a list of fundamental rights officially recognised. In the long term the church may be pushed even further to the margins of society because people in their family, professional, civic and recreational life are getting used more and more to the rights inscribed in their laws, whereas the same people participating in the life of the church are confronted with power structures that they have left behind, but are obliged to re-enter them every time they walk into the church. This broadens the gap between church life and people's day-to-day life in society. Surely, today's church law does contain some so-called rights of the Christian faithful, like the right to create and govern associations, to protect one's reputation and privacy, to make known one's needs and manifest one's opinions to the church leadership (CIC can. 208-223). Exercising these rights is bound by the common good of the church, whereas the ecclesiastical authority has the competence to interpret this common good and from there to regulate these rights for the faithful (CIC can. 223, § 1 and § 2). Moreover, these rights are not superior to all other norms in church law and, because they are not superior, they cannot trump any other norm. According to the Louvain church lawyer Rick Torfs they are merely ornamental.[19] They altogether lack the standards of rights in modern society at large.[20]

From all this my third desideratum for „Vatican III" is that the council should clarify the status, content and relevance of fundamental rights in the church.

Can the many faces of Christianity find a message which will remake religion for a society which has decided to do without it?

[19] TORFS, R., *Human Rights in the History of the Roman Catholic Church.* In: VAN der VEN, J. A./ZIEBERTZ, H.-G. (eds.): *Human Rights and the Impact of Religion.* Leiden: Brill, 2013, p. 55-74.

[20] If a comparison would be made with the so-called ladder of democratic rights in society at large, the rights of the faithful in the church would get stuck on the first two steps. The first step relates to the right of having access to relevant information, which does not exist in the church so far. The second step on the ladder is the right to contribute one's ideas, which indeed is mentioned in the catalogue of rights of the faithful in the Codex of 1983, like the right to make known one's needs and manifest one's opinions (can. 212, § 2 and § 3). However, the articulation of these rights is preceded by the obligation of Christian obedience to follow what the sacred pastors, as representatives of Christ, declare as teachers of the faith or determine as leaders of the church (can. 212, § 1). The other three steps of the ladder do not feature at all in this list of rights: joint discussion is omitted, hence joint decision-making as well, and autonomous decision-making is manifestly ruled out. (SONNBERGER, K., *Die Leitung der Pfarrgemeinde. Eine empirisch-theologische Studie unter niederländischen und deutschen Katholiken.* Kampen: Kok, 1996.) What is lacking also is the obvious requirement that church leaders at whatever level are accountable for their policies and administration and have to engage in debate on these. Accountability is fundamental to democracy. Rights are based on it and express it. (FUKUYAMA, F., *The Origins of Political Order.* New York: Farrar, Straus and Giroux, 2011.)

The Failure of the Weimar Constitution: Institutional Keys and Lessons to be Drawn

*David Parra Gómez**

Abstract

The Weimar Constitution is a milestone in the history of constitutionalism, being the founding document of a new historical type of constitution that came to replace the liberal constitution of the nineteenth century: the democratic and social constitution, which has been acting as a model to imitate in the "second moment" of democratic constitutionalism, identified with the values and principles of the Social State of Law. It was not, therefore, the text, but the economic, social and political context of the Weimar Republic that determined its tragic fate. However, it is no less true that certain institutions and constitutional structures contributed significantly to its inability to exercise an effective integrative function and to consolidate a democratic republic in Germany.

Keywords: *Weimar Republic; Germany; constitution; constitutional framework.*

1. Introduction

The Weimar Constitution is a milestone in the history of constitutionalism, being the founding document of a new historical type of constitution that came to replace the liberal constitution of the nineteenth century: the democratic and social constitution, which has been acting as a model to imitate in the "second moment" of democratic constitutionalism, identified with the values and principles of the social rule of law.

It is a technically sound and politically advanced constitutional text. In its organic part it established a semi parliamentary and federal regime, with a very considerable centralizing impulse. And its dogmatic part, the main contribution of the Weimar Constitution to universal constitutionalism, contained a broad catalogue of rights that included, for the first time, many of economic and social content.

It was not, therefore, the text, but the economic, social and political context of the Weimar Republic that determined its tragic fate. In this sense, Christoph Gusy says "the Weimar Constitution was a good constitution, only it came at a bad time"[1]; and Professor Javier Tajadura reminds us that "to be viable, a democratic system has to be effective. The first German experience was not due to the irresponsible behaviour of the political parties that had to structure the model"[2]. However, it is no less true that some institutions and constitutional structures contributed significantly to their inability to exercise an effective integrating function, as we will have occasion to analyze in this paper.

2. The historical context of the elaboration of the Weimar Constitution

The German Constitution of 1871 designed a federal empire in which the member states retained their monarchies and considerable power in domestic affairs, while foreign policy and war were considered areas of national competence. The new nation-state was characterized by its conservative model, which retained many of the characteristics of the Old Regime, but gave representation, through Parliament, to the aristocracy and the bourgeoisie. It also laid the foundations for the consolidation of a powerful bourgeois sector, capable of mobilizing industry and the national economy. Moreover, unlike the English commercial liberalism, in times of the Empire Germany tried to build a system with some intervening characteristics in its economic aspects.

At the same time, the country experienced a population explosion, which represented an increase in population of almost 63% between 1871 and 1914, from 41 million to 67.7 million in 43 years. This, in turn, led to rapid urbanization, where the labor force increased and the social divide became more tangible. This encouraged the electoral balance to start leaning towards worker-union parties, due to the weight of the urban population growth rates and, with it, the increase of the proletariat in the main German cities, so it was not a coincidence that social-democratic parties, such as the Social Democratic Party (SPD), key in the formation of the Weimar Republic, obtained convincing victories in Reichstag: by 1912, it was the

* David Parra Gómez, PhD, Professor of Constitutional Law at the University of Murcia, Spain.

1 C. GUSY, G., Weimar–Die wehrlose Republik? JCB. Mohr, Tübingen, 1991.

2 BÁRCENA J.M. /TAJADURA TEJADA, J., Kelsen y Schmitt: dos juristas en Weimar. In: Revista Electrónica de Historia Constitucional, Nr. 20, 2019, p. 367-400.

most voted party in Germany, with 1.1 million members, while the trade unions had 2.5 million.

In 1914, the First World War came as the most anticipated news in Europe. Not in vain had the states prepared their war machinery well in advance and the traditional patterns of armed clashes led one to believe that the long-awaited confrontation would last just over a few months. They never imagined that the new technologies would turn rivers into blood; much less that months would turn into years. By mid-1918, the end of the war was already inevitable; a war from which the German Empire had emerged defeated. The Great War accentuated the internal divisions of German society, and partially erased the middle classes, further marking the industrial elite and the impoverished working class.

It was then necessary to recompose Germany's structure, which was under pressure from the great internal upheaval in the country. By October 1918, the first reforms tended to demilitarize the leadership of the State -in part to delay the pointing out of the Army's responsibility for the loss of the war- so a civilian government took partial control. From there, steps were taken towards reforms of the electoral system, the Parliament and the monarchical system, which would be subject to a Constitution, aspects that William II never accepted and his only path was abdication and exile in Holland, which finally happened on November 9 of the same year. Ebert, leader of the SPD, was in charge of forming a new government.

Uprisings began to appear all over Germany. Military sectors rebelled against some aspects of their hierarchical structure and took over localities. Also, through the figure of "councils", of Marxist inspiration, the workers mutinied and took away from the State the control of some populations, where the objective became to establish socialism. The revolutionary movement spread throughout the nation. News came from everywhere about the formation of Workers' and Soldiers' Councils. In general, however, the revolution slipped through without any essential alteration of the economic order and without bloodshed, so that although the conditions for the Marxist-style revolution were served, they were cooled by a series of compromises.

It should be noted that a large part of social democracy saw parliamentarianism as the mechanism for achieving its political ideals, within the framework of order, tranquillity and legality, for which it was necessary to reach agreements with conservative sectors. Ebert himself invited people to adopt the parliamentary system otherwise "social revolution will be inevitable. Of course, I don't want it; in fact, I hate it as a crime". In December 1918, the Congress of Workers and Soldiers of the Reich, meeting in Berlin, with an overwhelming majority of the SPD, approved the convocation of a National Constituent Assembly, rejecting the motion that the permanence of the council system should be assured as the foundation of the coming Constitution.

On 19 January 1919, elections to this Assembly were held, the first in Germany after the introduction of women's suffrage (active and passive) and after the Prussian "three-class" electoral system (based on the fiscal capacity of the voters) was replaced by proportional representation. The legal age for voting was reduced from 25 to 20 years. Overall, these changes resulted in a number of new voters of approximately 20 million. The participation rate was 83 per cent, slightly lower than in last Reichstag elections in 1912. Among women, the participation was 90 per cent and almost 9 per cent of the elected parliamentarians were women.

The SPD won 165 representatives (39% of the Assembly); the Catholic Centre Party or Zentrum 90 (21%); and the Democratic Party or DDP 75 (18%), out of a total of 423 members, so a necessary coalition between these three parties -the so-called Weimar Coalition- consolidated control of 78% of the parliamentarians. On February 6, the city of Weimar was the epicentre of the beginning of the discussions that would create the Constitution. The Assembly commissioned the Democrat Hugo Preuss to prepare a draft for discussion. The parliamentary debates were intense.In the end, the final text was approved on 31 July. On August 11, 1919, the Constitution was proclaimed[3].

3. An equivocal institutional architecture

The Preamble to the Weimar Constitution is short, precise and accurate. Faithful to the function of every constitutional preamble, which must indicate the spirit of the constitutional work, it states that: "The German nation, in accordance with its various races and animated by the will to renew and consolidate its Reich in the name of freedom and justice, to serve internal and external peace and to promote social progress, has given itself this Constitution".

This preamble mentions a German people consolidated in the form of a nation, which recognized its various branches or "races", a proposal that sought to overcome the historical ethnic division represented by the fragmentation of Germany into regional entities in a federal state style of Prussians, Bavarians, and Saxons, among others, and became a state of Germans. It was here that unity manifested itself, including the recognition of the diversity that brought together the Germanic.

Furthermore, the following mention: "will to renew and consolidate" makes direct reference to the extension of what the past German Reich represented, which showed per se that the new Constitution would be tied to some traditions coming from the Old Regime. It is therefore important to understand the Weimar text as an attempt to reform the state from within. Consequently, the State is maintained, but profoundly reorganized. It also formulates current values: "with the inspired will to renew the Empire in freedom and justice" and looks to the future by setting objectives: "to serve internal and external peace, and to facilitate social progress". In this way, a piece of the "constitutional right to peace" is expressed.

[3] There are many works that have analysed the context and circumstances surrounding the drafting of the Weimar Constitution. For this article we have found it particularly useful RÜRUP, R., Génesis y fundamentos de la Constitución de Weimar. In: Ayer, Nr. 5, 1992, p. 125-158, which, in turn, includes outstanding literature on the subject, such as DIETRICII BRACIIER, K., Entstehung der Weimarer Verfassung, in DIETRICII BRACIIER, K., Deutschland zwischen Demokratie und Diktatur, 1964, p. 11-32, a work that deals, above all, with the history of the genesis of the Republic. See, also, WEITZ, E., La Alemania de Weimar. Presagio y tragedia, Turner, 2009.

3.1 Main defects of the designed semi-parliamentary system

The Weimar Constitution maintains the federal structure, but the states are reduced from 25 to 17. The legislative branch consisted of two houses. Reichstag was the lower house, elected by universal suffrage for a four-year term. It voted on the budget, drafted and passed federal legislation, and controlled the government. The upper house -Reichsrat- was composed of the representatives of the states. Representation was proportional to the demographic weight of each state. It was a less important, second-reading chamber.

However, the constitutional design of these chambers largely discouraged any real possibility of parliamentary control of the executive branch (Reichsrat and government), allowing the latter to govern and legislate outside Parliament.

3.1.1 The peculiar dependence of the Government of the confidence of the Parliament

In the legal articulation of the dependence of the Government of the confidence of the Parliament, the Weimar Constitution followed the October 1918 proposals of Hugo Preuss (DDP)[4] for the reform of the 1871 Constitution. In fact, already in the last stages of the Empire, the 1871 Constitution was subject to some reforms, one of which was the requirement that the Chancellor - later appointed by the Kaiser - needed the trust of the Reichstag and was responsible to it. In Preuss's proposal for the parliamentarisation of the system of government, the question of the formation and election of suitable political leaders was of particular importance. A parliament with the capacity to form a government would make it easier for politicians present in parliament with leadership qualities to gain access to the government body, rather than simply officials without political affiliations. The German people could thus finally find their desired strong political leader[5].

The Weimar Constitution attributed to the Reichstag a binding influence on the government through the manifestation of its mistrust. In other words, a parliamentary election or other positive expression of trust by Parliament was not required for the formation of the Government (Article 53), but the dependence of the Government on the trust of the Reichstag proclaimed in the constitutional text (Article 54) was therefore, in essence, only a dependence as long as the Reichstag did not express its distrust. This often allowed minority governments and during the final phase of the Republic even presidential cabinets imposed on Parliament.

3.1.2 The President of the Reich as a counterweight to Parliament

The most peculiar construction of the Weimar Constitution, and the least predictable in terms of its results, was the institution of the President of the Reich. The President was elected by universal suffrage every 7 years and could be re-elected without limit. Beyond the parliamentary trust that the Weimar Constitution demanded, the government also needed the trust of the President, as his appointment and tenure in office depended on it. Indeed, just like the Kaiser during the time of the 1871 Imperial Constitution, the Reich President could dismiss the Chancellor and the ministers (Article 53).

In principle, the Weimar Constitution opted for a legislative power with important powers, especially in its lower house, but on the other hand, the Constitution gave a strong power to the President of the Reich, something that must be taken into account to understand part of what happened from 1930 onwards when those powers were used to govern and legislate outside the parliament. This allowed the Nazis to gain access to the circles of power much more than by their irruption into parliament.Indeed, we must dispel the myth that the Nazis were brought to power exclusively by the vote of the Germans. They never had a sufficient majority in Reichstag during the time of democracy and, in fact, lost electoral support just before taking over the chancellery (January 33).

The President of the Reich was responsible for promulgating and sanctioning laws (Article 70). This implied a certain competence to control their constitutionality -the legal scope of which was discussed- which was repeatedly used to deny presidential enactment and sanction. It could also dissolve Parliament and submit a legislative decision to a referendum before publication (Article 73), although this last power was not used in practice. The Constitution also provided for the President of the Reich to be the supreme commander of the armed forces (Article 47).

The President of the Reich could occupy the space of the legislator through emergency decrees (Article 48)[6]. In fact, the parliamentary power to approve budgets experienced a significant restriction under the Weimar Constitution, especially during the last years of validity of the Constitution, since budgetary competence was included within the scope of those decrees, which went so far as to completely replace the budget law.

The powers of exception in Article 48 covered the case where a Land failed to comply with its obligations under the Constitution or the laws of the Reich, and could even act with the help of armed force (so-called federal execution or coercion). Armed intervention was also recognised in the event of a serious threat to or impairment of public order and security and, in such circumstances, fundamental rights could be suspended in whole or in part on a transitional basis without prior authorisation from Parliament.

Article 48 was also subject to an extraordinarily broad interpretation. The law provided for in Article 48.5, which would have limited the exceptional powers of the President of the Reich, was never adopted and could have put an end to the adoption of emergency legislative decrees as a universal remedy to replace legislation. Thus, under the first President of the Re-

[4] Who would produce the first draft of the Weimar Constitution at the request of Friedrich Ebert.

[5] PREUß, H., Freiheit und Macht, 1917, in Lothar Albertin and Christoph Müller (edits.), Gesammelte Schriften, vol. 1, Politik und Gesellschaft im Kaiserreich, Tübingen 2007, p. 675–678 (678).

[6] On the right of exception Article 48 see, among others, HATSCHEK, J., Deutsches und Preußisches Staatsrecht, vol. II, 2ª ed., Berlin 1930, p. 184 and following; and LÜBBE-WOLFF, G., The concept of democracy in the Weimar Constitution. In: Revista Electrónica de Historia Constitucional, Nr. 20, 2019, p. 253-274.

ich, Friedrich Ebert (SPD), exceptional powers were used on as many as 113 occasions between 1919 and 1925.

The potentially ruinous consequences of the extensive interpretation and application of emergency powers if they were ever to fall to people less loyal to the Constitution were not apparent to either political actors or observers. After a pause in subsequent years due to the relative consolidation of the economy, during the last years of the Hindenburg Republic and its cabinets took advantage of the practical application of the emergency powers to set it up as an instrument of presidential dictatorship not dependent on Parliament.

It is important to note that this configuration of the Reich President's powers to deal effectively with a whole constellation of exceptional circumstances exempted the groups present in parliament from the pressure of forming majorities. Especially those who had hoped that the Reich President's dictatorship would realize its political objectives gave up building parliamentary compromises. Circumstances were going on towards his objectives, however.

Finally, the power of Reichstag to demand the repeal of emergency ordinances proved to be a weak weapon in practice, since the power of the President to dissolve Reichstag was interpreted in such a way that it could be exercised even after such a request for repeal had been made or even in anticipation of such a request. The first dissolution of Reichstag, decreed by President Ebert in March 1924, was already linked to the parliamentary debates on the need to demand the repeal of the emergency decrees that both the Chancellor and the President of the Reich considered necessary.After Reichstag had requested the repeal of two decrees on July 18, 1930, President Hindenburg, at the behest of Chancellor Brünning, dissolved Reichstag by decree on the same day. In the end, the so-called Reichstag Fire Decree of 1933, issued by Hinderburg at the behest of Hitler, who had been Chancellor since January 1933, was particularly harmful to the Republic.

3.1.3 The enabling laws

The legislative function of Reichstag was not only undermined by emergency decrees passed on the basis of the joint will of the President and the Government, but also to a large extent by enabling laws passed under Article 76, which allowed for the reform of the Constitution through legislation and thus the accumulation of power by the Government or the President of the Reich. This was because Reichstag decisions on constitutional amendments were only valid if two thirds of the legal number of members were present and at least two thirds of those present said yes; Reichsrat decisions on constitutional amendments also had to be taken by a two-thirds majority.

The ill-fated enabling law of 24 March 1933, which transferred the functions of Reichstag to the Chancellor for a period of four years, was only the last of these, unprecedented in its scope in the chain of constitutional ruptures. Since then, the Weimar Republic has ceased to exist, since with the enabling law Hitler obtained a legal basis for his dictatorship.

3.2 The absence of Constitutional Justice

The Weimar Constitution also lacked a constitutional jurisdiction that could have decided in a binding manner on the constitutionality of laws and on the validity and applicability of fundamental rights. The State Court for the Reich (Staatsgerichtshof) provided for in the Constitution (Article 108) had only limited powers, relating to constitutional disputes between the Länder and the Reich, as well as between the Länder themselves. This Court was not competent to review the constitutionality of laws by means of an abstract or concrete control of rules. The only review provided for in the Weimar Constitution was limited to the review of the constitutionality and conformity of laws issued by the Länder with the laws of the Reich (Article 13), a review which was assigned to the Reich Supreme Court or the Reich Financial Court (Reichsfinanzhof).

The lack of an institutionalized constitutional jurisdiction was furthermore not compensated for by the use of a substantive right of review by the Reich Supreme Court. Despite the fact that the Weimar Constitution did not include any express regulation in this regard, this Court extended the right of review of ordinary judges to the review of material constitutionality. However, although other Supreme Courts also recognized the extension of the judges' right of review, in practice its meaning was reduced during the Weimar period, mainly for two reasons. Firstly, the enforcement of laws that differed from the Constitution was not in question. All imperial laws passed with the majority required to amend the Constitution were removed from the substantive right of review by the courts. Secondly, the legal thinking of that time was very much marked by positivism. For the conservative magistracy of the time, the idea of revising -and eventually rejecting- the material provisions of civil or criminal law under the glass of the rather vague and programmatic fundamental precepts of the Weimar Constitution must have seemed revolutionary[7].

In addition, the direct applicability and validity of fundamental rights gave rise to considerable difficulties of interpretation. Based on the wording, meaning and purpose of the relevant provisions, the Weimar state law doctrine repeatedly affirmed the direct applicability of fundamental rights vis-ŕ-vis the administration and justice. A number of fundamental rights were considered to be "resistant to police power". Instead, the way in which the legislator should be subject to the law was discussed to the end. The fact that fundamental rights, apart from being amendable by constitutional means (Article 76), could be abrogated by means of the right of the President of the Reich to issue emergency decrees in the event of considerable disruption or threat to public safety and order (Article 48, paragraph 2), rather impaired their effectiveness.

Furthermore, the Weimar Constitution provides the legislator with a tool in the form of reservations to laws and limits with which he can restrict fundamental rights. Since no strict control of the proportionality of fundamental rights interventions had been recognized and their essential content declared

[7] On the theory and practice of law and the configuration of the Judicial Branch in the Weimar Republic, see, among others, PÉREZ GALLEGO, R., Constitución, derecho y poder judicial en la República de Weimar. In: Revista JPD, Nr. 37, 2000, p. 56-67

inviolable, the Weimar public law doctrine ended up considering fundamental rights to be "running on empty" [8].

4. Other causes of the disaster

Despite its failure, the Weimar Republic contributed substantially to the further development of the principles of the rule of law. As we noted at the outset, and despite the misguided design of some institutions, it was not the text but the Weimar context that determined its tragic fate. The Republic was the child of defeat. The signing of the Treaty of Versailles -imposed on Germany after its defeat by the winners of the First World War- marked the collective feeling. A feeling of humiliation because of Article 231 which established German guilt in the conflict and opened the door to demands for economic reparations which, among other effects, caused the hyperinflation of 1923. The country overcame that moment, but could not successfully face the consequences of the 1929 crisis that led to the unemployment of one third of the German workforce.

Indeed, the Great Depression gave the final blow to the Weimar Republic. Analyzing the economy and the 1928 elections, we observe that there was a political return to the centre and signs of a significant economic recovery. 1928 was the last of the Republic's "golden years". Without the Great Depression, the Republic would have had a chance to survive. It was able to overcome the hyperinflation of 1923, which was an extremely traumatic and disorienting experience. The depression, which passed from the United States to Germany very quickly and with great force, dealt it the coup de grâce.

At the same time, we cannot forget that few democracies were founded in such difficult circumstances as the Weimar Republic. The Republic would have needed more breathing space, a more generous attitude on the part of the Western Allies, economic stability and progress. And all of this existed very soon after the First World War. In 1928, the Nazis were a marginal political group with very little resonance. But the Republic was undermined and politically paralysed. In times of crisis, people wanted solutions and the Republic offered none to the economic situation. From 1930, Germany was governed under a dictatorial presidential system, because the political system was so fragmented that it was impossible to govern with parliamentary majorities. From the spring of 1930, Chancellor Heinrich Brüning and his successors governed with extraordinary powers granted by the president, Paul von Hindenburg.

But it must be stressed again that the Nazis never received a majority of votes in free elections. In the summer of 1932 they won 37.4 percent of the vote, the highest percentage in their history. That's a significant figure, but not a majority. In the next election, in the fall of 1932, they lost a significant portion of the support they had received in the summer. Confusion reigned within the Nazi party. In the end it came to power because the conservative elite around President Hindenburg handed it over. It was this alliance that ultimately killed the Republic.

5. By way of conclusion: what lessons can be drawn from the first German democratic experience?

The first is that a democratic system has to be effective if it is to be viable. Weimar was not effective because of the irresponsible behaviour of the political parties that had to structure the system. As Friesenhahn points out, if the Weimar Reich had had political parties of the kind presupposed in a parliamentary democracy, with the will to sign agreements and the capacity to form coalitions, and the electorate had given a majority of votes to these parties, the Weimar Republic would have survived even with that Constitution.

Between 1919 and 1933 there were 20 governments in Germany. The most lasting, the grand coalition of H. Müller (1928-1929), lasted 21 months. Only two parliaments completed their five-year term. It was considered a two-year success, because there were many whose existence was counted by months. The Social Democrats -disregarding Ebert's lucid warnings- preferred the comfort of opposition to the responsibility of government, and from 1923 to 1928 they refused to participate in coalition governments.

Even when a government coalition was formed, the support of the deputies of the parties in the coalition was not guaranteed. Forty-five Social Democratic deputies refused to support the first Stresemann government, which included four ministers. The anti-parliamentary "no is no" that so many supporters have in the current European political class destroyed Weimar's democracy.

The second is that democracy is based on citizens' trust in the institutions. The ineffectiveness of the system led inexorably to the erosion of citizens' trust in it. Insofar as Parliament was only capable of bringing about negative coalitions and did not serve to channel and resolve the country's serious problems, the citizens ceased to trust it.

The third is that a democratic system must defend itself against its enemies, which must necessarily include all those who call for violence and aspire to its destruction. Weimar did not do this. Many parties had paramilitary forces. The revolutionary violence of the extreme left was combated forcefully and effectively, but not that of the extreme right. The latter perpetrated hundreds of political assassinations in a climate of impunity.

[8] Indeed, the doctrine vividly discussed whether the Weimar Constitution was a binding document in all its parts, a debate that would focus very much on the case of fundamental rights. There was also a debate as to whether the Constitution could be a supreme law for the legislator, given that article 76 of the Constitution allowed it to be amended by legislation, but did not require that such amendments should be made explicit. In this regard, and without wishing to be exhaustive, see the work of THOMA, R., "Allgemeine Bedetung der Grundrechte", in H.-C. Nipperdey (edit.), Die Grundrechte und Grundpflichten der Reichsverfassung, Kommentar zum zweiten Teil der Reichsverfassung, vol. I, Ferdinand Keip, Frankfurt, 1975, p. 8-9; as well as "Grundbegriffe und Grundsätze", in en G. Anschütz y R. Thoma (edits.), Handbuch des Deutschen Staatsrechts, tomo I, ed. JCB Mohr, 1930, p. 144. Remember also the work of KELSEN, H., Vom Wesen und Wert der Demokratie, 1923; or the controversy that the Austrian author held in his Wer soll der Hüter der Verfassung sein?, Die Justiz, 1931, with work previously published by SCHMITT, C., Der Hüter der Verfassung, Archiv des Öffetlichen Rechts (1929).

The fourth is that the functioning of the democratic state always requires the loyalty -to its values and institutions- of both civil and military officials. In Weimar, both high officials and army officers, as well as most of the judiciary, considered the democratic republic as the only option that, by 1918, could avoid a communist dictatorship. But they never committed themselves to its values. In the end, they had no qualms about opting for National Socialism as the definitive bulwark against Communism.

In short, the first democratic experience in Germany's history highlighted the inherent fragility of any democracy. Insofar as -as Kelsen warned in those days- the essence of democracy is agreement and compromise, it requires a certain political culture to survive.In Weimar, extreme polarisation made compromise impossible, and democracy was broken. Remembering this today is a good way to commemorate the recent centenary of the adoption of the founding text of democratic constitutionalism[9].

[9] On the lessons to be drawn from the failure of the Weimar Republic, see, among others, TAJADURA TEJADA, J., La Constitución de Weimar en su centenario. In: Claves de razón práctica, Nr. 268, 2020, p. 76-87; WEITZ, E., La Alemania de Weimar…opus. cit.; and MILIÁN QUEROL, J., Las lecciones de Weimar (23/08/2029), in El debate de hoy. Recovered from: https://eldebatedehoy.es.

Hans Petter Graver

Der Krieg der Richter. Die deutsche Besatzung 1940–1945 und der norwegische Rechtsstaat

Baden-Baden: Nomos Verlag, 2019, 338 S., ISBN 978-3-8487-5475-5

Ins Deutsche übersetzt, ist nun die Arbeit des Osloer Rechtsprofessors Hans Petter Graver erschienen, in der aus zahleichen Quellen die Geschichte der norwegischen Richterschaft und ihrer Rechtsprechung unter deutscher Besatzung nicht nur erzählt, sondern in all ihren politischen und psychologischen Facetten ausgeleuchtet wird. Dem Verhältnis zwischen beiden Ländern wurde durch die deutsche Besatzung ein schwerer Schlag versetzt, woran auch die neuen Protagonisten in Norwegen, die Männer der faschistischen Nasjonal Samling (NS) unter Vidkun Quisling, mitwirkten. Im Gegensatz zur Lage in Deutschland repräsentierten sie aber nur eine Minderheit der Bevölkerung und auch der norwegischen Juristen. Die Innenansicht des Rechtsstaats, durch die Besatzer und ihre Helfer der NS in schwere Bedrängnis gebracht, zeigt dieses hintergründige Werk, zu dessen Autor, Entstehung und Originaltitel man allerdings gern eine Notiz im Buch gefunden hätte.

Graver untersucht, wie die NS, die dem Großteil der Bevölkerung verhasst war und anscheinend auch nur auf wenige Juristen anziehend wirkte, das ‚neue' Recht durchzusetzen versuchte. Obwohl das Regime die richterliche Unabhängigkeit offiziell anerkannte, bereitete ihm die Findung NS-naher und zugleich qualifizierter Persönlichkeiten für Richterämter Kopfzerbrechen. Das galt vor allem für den Obersten Gerichtshof von Norwegen, den Hřyesterett, dessen Richter auch persönlich Widerstand leisteten und Ende 1940 geschlossen zurücktraten. Das war die Zäsur, an der, wie die norwegische Nachkriegsrechtsprechung feststellte, sich alle Richter der Gefahr, dem Unrecht Dienst zu leisten, hätten bewusst werden müssen. Die ordentlichen Gerichte der unteren Instanzen blieben noch am ehesten ein Refugium rechtsstaatlicher Ordnung, weil sie wenig mit politischen Fällen und Fragen von Krieg und Besatzung befasst wurden. Sie arbeiteten im Großen und Ganzen einfach „fügsam" weiter; dennoch kann Graver nicht nur von den Versuchen einiger Richter berichten, Maßnahmen administrativ zu sabotieren, sondern auch von mutigen Protesturteilen.

Dass selbst der Kreis der Sondergerichte differenziert zu beurteilen ist, zeigt der zur Aburteilung „staats- und volksfeindlicher" Delikte 1940 eingerichtete Spruchkörper mit dem berüchtigten Namen „Volksgerichtshof". Für die Machthaber wurde er zum Misserfolg, weil seine Richter auf ihre Unabhängigkeit bestanden; die verhängten Strafen erwiesen sich als eher moderat – höchstens einmal vier Jahre Haft –, es wurden immer weniger Fälle verhandelt und relativ viele Freisprüche verkündet. Man wandte sich daher vom Volksgerichtshof ab und brachte das „SS- und Polizeigericht Nord" in Stellung. Dieses deutsche Sondergericht war zuständig für Straftaten, die Interessen der Besatzer betrafen, also nicht nur politische Delikte, sondern in Einzelfällen etwa auch gewöhnliche Diebstähle. Auch von diesem Gericht gab es in den insgesamt 2.000 geführten Verfahren Freisprüche, die durch 150 verhängte Todesurteile aber völlig überschattet wurden. 1943 kamen norwegische Sondergerichte hinzu, welche wohl dem größten Druck des Regimes ausgesetzt waren und noch mehr Härte demonstrierten. Ergänzt wurde die politische Justiz durch das auch nach Norwegen reisende deutsche Reichkriegsgericht; nicht zuletzt brachte man zahlreiche Norweger zur Aburteilung nach Deutschland, ohne dass norwegische Richter dagegen das Geringste hätten ausrichten können.

Für die Vielgestaltigkeit der Deutungsmöglichkeiten richterlichen Verhaltens ist der deutsche Buchtitel eine gut gewählte Mehrdeutigkeit. Graver versucht auf der Grundlage umfangreichen Fallmaterials und in allen Teilen des Buches, Motivationen der Richter herauszuarbeiten. So konnte Ausfluss einer bestimmten Haltung etwa sein, so streng wie noch vertretbar zu urteilen, um eine Devolution an deutsche Gerichte zu verhindern, oder gerade im Gegenteil, eine Entscheidung abzulehnen, um die Verantwortung auf die Besatzer zu verlagern. Psychologische Momente lassen sich heute freilich nur mehr noch plausibilisieren, es ist aber dennoch eine Stärke des Buches, dass allgemeinen Überlegungen zur Rolle der Dritten Gewalt unter Regimen der Gewalt, zu Verhalten von Willfährigkeit bis Widerstand, breiter Raum gegeben wird. Auch das Schlusskapitel ist ganz diesem Themenkreis gewidmet, wobei die Überlegungen mehr essayistisch als systematisch präsentiert werden. Die Bewertung der einzelnen Gerichte in der Besatzungszeit und der in ihnen wirkenden Richter erscheint im Verlauf des Buches manchmal unterschiedlich. Eine Bilanz, die sich durch etwas mehr Konturen auszeichnet, wäre zu wünschen gewesen; dies gerade auch deshalb, weil Graver angenehm sachlich, ruhig und sehr ausgewogen bewertet, immer differenziert und fernab jeder Polemik bleibt.

Ausgehend von der Annahme Gravers, dass Richter in demokratischen Staaten absurderweise oftmals großes Verständnis für ihre Kollegen unter autoritären Regimen haben, muss die Aufarbeitung nach dem Krieg in Norwegen als internationaler Ausnahmefall, da besonders konsequent, beeindrucken: Norwegische Richter, die der NS bereitwillig zu Diensten waren, wurden wegen Landesverrats verurteilt, einige auch gerade wegen richterlicher Tätigkeiten. Für manchen stand die Todesstrafe im Raum. Die Richter des Volksgerichtshofs wurden nicht prinzipiell belangt, die der Sondergerichte nicht, soweit sie nur allgemeine Straftaten abgeurteilt hatten, im Regelfall auch die Richter an den ordentlichen Instanzgerichten nicht, während an Todesurteilen beteiligte Richter der Sondergerichte wegen Mordes verurteilt wurden. Betroffen waren vor allem die Richter des umbesetzten Hřyesterett, die mit langjährigen Haftstrafen oder Zwangsarbeit büßen mussten. Interessant ist auch, dass im Wege der Vermögensabschöpfung

von den Richtern Wertersatz eingezogen wurde und sie unter Umständen auch Entschädigungszahlungen zu leisten hatten. Graver schildert Episoden aus der weiteren Biografie dieser Richter, die teils überraschen. In diesem Kapitel berichtet er auch über die bei der juristisch komplexen Aufarbeitung nötigen Rechtsgrundlagen, die vorgenommenen Differenzierungen sowie unvermeidlich unterschiedliche Rechtsauffassungen. Nur von einer Sperrwirkung des Rechtsbeugungstatbestandes, die in Deutschland so manchen gerechten Schuldausgleich verhinderte, war dabei übrigens nicht die Rede.

Die Übersetzung aus dem Norwegischen gelang solide. Sie trübt nur gelegentlich die Lesefreude, wo sie sich offenbar recht nah an den Originaltext hält und daher eine sprachliche Glättung vertragen hätte. Dennoch muss man der sachverständigen Übersetzerin für die Übertragung dieses wichtigen Buches ins Deutsche dankbar sein.

Julian Lubini*

* Dr. Julian Lubini, Staatsanwalt/Gruppenleiter, Dresden, Deutschland.

Christian Baldus, Wojciech Dajczak (Hrsg.)

Der allgemeine Teil des Privatrechts: Historische Wurzeln – Leistungsfähigkeit im 21. Jahrhundert

(= 12. Band der Schriften zur Entwicklung des Privatrechtssystems, herausgegeben von Christian Baldus und Christian Pohl)

Berlin, Bern, Bruxelles, New York, Oxford, Warszawa, Wien: Peter Lang GmbH, 2018. 221 S., ISBN 978-3631740330

'*The General Part of Private Law: Historical Roots – Efficiency in the 21st Century*' is the collected papers published as the 12th volume in the series '*Writings on the development of the system of private law*' edited by Christian Baldus und Christian Pohl. It is a follow-up to '*Der allgemeine Teil des Privatrechts: Erfahrungen und Perspektiven zwischen Deutschland, Polen und den lusitanischen Rechten*' (= The general part of private law: experience and perspectives between Germany, Poland and Justinian's legal legacy; by the same editors), Peter Lang GmbH, 2013 – 556 S., ISBN 978-3631628317. For this reason, it makes sense to present the second volume against the backdrop of the first one.

The collected papers result from two conferences and two research seminars held in Poznań and Heidelberg in 2010–2016 in order to investigate the efficiency of the general part of private (civil) law for lawmaking, legal scholarship, education, and, to lesser extent, judicial decision-making in the historical and comparative perspective.

The general part of civil law hardly needs to be presented to lawyers from such jurisdictions where it was enshrined in the dogma of civil law and even became part of the national civil codes since the 19th century. It definitely shapes the style of lawmaking, statutory interpretation, adjudication, and legal education in Germany and Poland where the majority of the contributors to the reviewed volumes come from.

Yet the general part needs to be revisited for it gradually loses its uncontested position in every sphere of its application. The general provisions of the civil codes are being tested through national decodification, digitalization, as well as regulatory competition and accelerated harmonization within the European Union and worldwide. The courts and legal scholars discover instances of tension between legal certainty and substantial justice due to formalistic application of the abstract rules of the general part. These and many other issues are difficult enough to attract the attention of legal scholars who secure their prominent place in the continental jurisdictions thanks to a pro-active attitude to seek out and resolve complicated matters.

The first volume definitely sets the tone and the conceptual framework for though-provoking debates on the issues of the general part in civil legislation and dogma. Its 24 papers are grouped into four major topics (sections):

1) philosophical and historical foundations of the general part;
2) the rational background of the generalization of legal norms;
3) the idea of the universally valid general part of private law and its national variations;
4) the general part against the backdrop of selected issues of legal methodology.

The first volume raised multiple issues and provided several valuable insights into the study of the general part of private law. Tomasz Giaro's contribution deserves special mentioning. He set the conceptual framework for the whole research project by outlining its dogmatic origins and gradual impact on the codified civil legislation (via so-called 'scientification') and by grappling with the complicated core issue with the help of a catchy metaphor of 'physics' and 'metaphysics' of the general part. The former embodies the existing legal norms and doctrinal provisions while the latter indicates the rationale or theoretical justification behind it. This 'metaphysics' included securing of the basic principles of private law, arrangement of its particular provisions into a coherent system of rules, the modern 'scientific' charm of generalization leading to the uniform deductive dispute-resolution (via so-called '*Subsumption*') that ensures legal certainty and spares judges' efforts.

The complexity of the issue and the diversity of the contributions in the first volume seemed to prevent the editors from summarizing the results. Perhaps, the only *communis opinio doctorum* (including Baldus, Dajczak, Giaro, Zoll) read that the major problem with the general part was not its abstract concepts but its outdated (formalistic and positivistic) methodology that no longer answered the social needs of the 2010 s.

Instead of other conclusions, Christian Baldus indicated the outlook on further research:
- to investigate how the contexts (especially politics) defined the variations of the general parts; in the national codes;
- to assess the contribution of other countries (i.e. beyond Germany and Poland);
- to analyze the practicability of the general part on the level of the European Union.

The second volume presents the proceedings of the two research seminars in Posnań (2016) and in Heidelberg (2017). According to the editors' introduction, it builds on the first one but modifies the original agenda in four ways: 1) it zooms in on the tension between legal certainty and material justice in the general provisions of private law with regard to the methodology and legal dogma; 2) it aims at identifying the historical elements of the generalizing model that laid the groundwork for the general part; 3) it provides for a cooperation of the experienced and young scholars, mostly from Germany and Poland; 4) it paves the way to the papers of young scholars on the topics of their dissertations. In other words, this volume offers no clear verdict regarding the usability (efficiency) of the general part of private law. Instead, its eight single-authored contributions raise particular dogmatic and methodological issus which gave the names to each part of the volume.

In part 1 Prof. Dr. Francesca Lamberti investigates the origins of the legal incapacity of minors under the age of 7 years under § 104 BGB which she claims to be derived from an arbitrary simplification of historical development of private law from Roman times on. Prof. Dr. Wojciech Dajczak convincingly shows how incorrect reading of the mathematics in the legal methodology of the 17th and 18th centuries inspired the rise of general provisions (generalization) in private law and produced tension between this arbitrary generalization and the diversity of actual social relations.

Part 2 illustrates methodological issues of generalization and exclusion (*Ausklammerung*) with regard to provisions on limitation period and replacement rules. According to master student Joanna Kruszyńska-Kola, the Pandectist model of the legal order can't be well justified from the point of view of the limitation period due to the limited flexibility of the interpretation of the provisions of the general part, since such a placing commands its application to claim and delivery (German *Herausgabeanspruch*). Dr. Thomas Raff contemplates the rules on reimbursement of outlays (*Verwendungen*) and concludes that generalization of the relevant legal rules in BGB would run against the practical need to differentiate the ways to reimburse outlays.

Part 3 brings in three examples of a tension between legal certainty and justice in the context of general part which could be resolved through an efficient microsystem. Prof. Dr. Jürgen Kohler looks into the obligation of the purchaser to refund the goods he / she possesses after the resolutive condition happens and the period of uncertainty begins. The author holds the general rules of BGB on unjust enrichment and withdrawal from a contract inapplicable and proposes to resolve a dispute on the basis of the rules regarding settlement between an owner and a possessor for the period of a recovery dispute which he outlines as a 'sequential test'. Another example is about unresolvable tension between protection of private property and the principle of legal certainty in the case of the limitation period of recovery claims. Prof. Dr. Hans-Georg Knothe looks into this tension considering recovery claims to the works of art confiscated by the Nazi authorities and recovery claims to other things. Neither the legislative elimination of time limits nor the exclusion of such claims only with regard to cases from the Nazi period can effectively eliminate the tension and the phenomenon of a permanent state of ownership without the thing (*dominium sine re*). As the best practical solution, the author proposes to derogate from the provision of the general part and to acknowledge a particular limitation period for such claims. Lastly, Prof. Dr. Bruno Rodríguez-Rosado analyses the abstract nature of the legal transaction as a challenge for the right balance between justice and legal certainty. In his opinion, the abstract transfer of ownership under German law offers excessive protection in these cases. The solution might be the microsystem of acquisition of ownership in good faith which is enough to protect the purchaser from the application of the general rule on the abstract transfer of the ownership (under § 929 BGB).

Part 4 summarizes the papers and offers the editors' opinion on the efficiency of the general part of private law to match legitimate expectations of the actors: 1) to reinforce the logical link between the general part and the microsystems (groups) of other norms in private law; 2) to limit if not to remove the general part from the civil codes. Yet both options are not perfect. The first one means updating the methodology of a uniform application of the notions from the general part which makes it applicable only in the legal cultures with highly formalistic argumentation. The second solution would increase decodification and uncertainty in private law in the absence of an updated methodology. The volume ends with a call for more reflection on the link between the systematic thinking about private law and adjudication.

Even this brief overview makes it clear that both volumes cover multiple important issues of the phenomenon called 'the general part' which became substantial for many codified legal systems following the lead of German scholars and lawmakers since the late 19th century and still marks their legal style. Such a multi-faceted approach is even more welcomed in times of decodification, regulatory competition, internationalization of private law when the general part of civil law loses its axiomatic status and begs for updated justification.

As a result, legal scholarship is split between skepticism and traditionalism. Skeptics often draw inspiration from postmodern diversity and transnational trends in private law. It is enough to mention Hein Kötz's textbook on European contract law (Mohr Siebeck; 2nd ed., 2015) where he prefers the notion of contract over a more abstract 'legal transaction'. Fryderyk Zoll advocates the same opinion in his contribution to the first volume on the general part. Traditionalists still hold their ground in the national dogmatic jurisprudence. For them, the general part is to be updated, not dismantled in the new context of the 21st century. This leitmotiv echoes in both volumes and further afield. Even the on-going re-codification of Russian civil law since 2008 results in multiple amendments to the general provisions of part 1 of the Civil Code (including the scope of its applications, the principle of acting in good faith, the procedure of amending the code, types of legal persons and things, modes of legal transactions etc.). This

massive reform rests on the firm conviction of the leading consultants (like Alexander Makovsky) to the lawmaker that new general provisions are the sign and the measure of progress in civil legislation.

Contributors to both volumes do their best to analyze the dogma of various general rules (its 'physics') and to put their justification in context (its 'metaphysics'), linking it with the ideal of justice, uniform and prompt application of law, legal certainty corresponding to social expectations etc. However, the implementation of this ambitious agenda is not without its flaws. One can't help noticing several biases that limit the reach the presented conclusions:

- the accent on the historical roots and the present of the general part rather than its prospects in the 21st century (despite the subtitle of the second volume);
- the focus on the general provisions in the legislation and legal doctrine rather than their application in judicial practice (which might rarely draw on such abstractions, as the paper of Ulrich Ernst in volume 1 showed for Polish courts);
- a limited number of jurisdictions that zooms in on Germany and Poland in the second volume (obviously, it precludes comparison with other variations of the general part in and beyond Central Europe, as well as its critique from the part of common law lawyers who tend to believe that 'general principles do not decide concrete cases' yet acknowledge restatements of private law).

These limitations are more perceptible in the second volume which finds itself in the shadow of the first one, also by modifying its eventual agenda: to investigate how the contexts (especially politics) defined the variations of the national general parts; to assess the contribution of other countries; to analyze the practicability of the general part on the level of the European Union; to work out a new methodology of resolving cases through *Subsumption* in the 21st century. The second volume gives no clear reply as to the efficiency of the general part of private law in the world which no longer believes in the objectively best legal solutions. Yet it shows very well the relevant issues and forcefully calls for such studies where dogmatic approach will be supplemented with functional and contextual studies in a broader comparative perspective.

Dmitry Poldnikov*

* Dmitry Poldnikov, Professor of legal history at the School of general and inter-branch legal disciplines, Faculty of Law, National Research University 'Higher School of Economics', Moscow, Russia.

Reidar Maliks, Johan Karlsson Schaffer (eds.)

Moral and Political Conceptions of Human Rights: Implications for Theory and Practice

Cambridge: Cambridge University Press, 2017, 312 pp., ISBN 978-1107153974

This timely book is a well-researched collection of key discussions in the field of human rights and *international legal human rights* (ILHR) investigating the philosophy of human rights and contributing to the methodology of political and legal theory. The field of human rights is an expanding transdisciplinary research vector, bringing together scholars in law, political science, education, anthropology, history, sociology, and many other disciplines. The Article 1 of the Universal Declaration of Human Rights (the UDHR) states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (the UN). The idea of equal status has been crucial throughout the human history of constant struggles for their individual rights. First and foremost, human rights movement is a resource for mobilization and "compelling moral principles" as well as human rights may give reasons for a call for action; it is interconnected with the idea of equal status (49). According to Raz, human rights are "rights which all people living today have, a feature that is a precondition of, and a result of, the fact that they set limits to state sovereignty and justify accountability across borders" (Raz 2010, 31). John Simmons argues that "[H]uman rights are those that are inane and that cannot be lost (i.e., that cannot be given away, forfeited, or taken away)" (26). Social contract theories that are essential to the history of law consider human rights as part of moral norms. Moral rights are pre-institutional, timeless; human rights are not only the rights of others, however.

This splendid book discusses the recent moral-political divide in human rights approaches and offers an advancement of a philosophical theory of human rights enriching human rights practice and legal theory. This collection has two distinct parts that are set in the context of the distinction between the *political* and *moral* approaches; the Kantian dichotomy is an organizing principle of the entire book structure. The dual nature of human rights is an impetus for this scholarship. Kant's categorical imperative provided with the "best theoretical tools" (127). Kant's notion of freedom opposes the domination of one nation over another and one individual—over another (151). Howard Williams notes that: "Kant thinks his general moral philosophy can be made accessible to all reflecting human beings because of the skill in moral thinking already demonstrated in everyday life" (147).

The first part of this book discusses the recent debate on *moral* and *political* approaches to international human rights conceptions (Kant, Rawls, Griffin, Beitz) and the second part challenges this debate concentrating on the practical sides of these complex issues. The *moral approach* to human rights (orthodox, natural law, naturalist, ethical, or humanist) views human rights as universal moral rights. In contrast, the *political approach* to human rights gives reason of sovereign state interference in cases of human rights

violations. The *moral approach* presupposes a "preexisting philosophical concept of moral human rights" (16). Griffin rejects the idea that collective rights could be human rights; human rights are individual. John Rawls's *Law of Peoples* (1999) was a contribution to the *political approach* in the field of human rights.

The UDHR is an important document in the history of human rights and is part of domestic and international law. After the WWII, this Declaration was proclaimed by the United Nations General Assembly in Paris in 1948 (the UN). It was drafted by representatives of various cultural as well as legal backgrounds. The UDHR states that "human beings shall enjoy freedom of speech and belief" and that "human rights should be protected by the rule of law" (the UN). Human rights should be acknowledged by international law, "who bears the correlative duties for human rights" (19). The representatives of human rights duties may be individuals, military, government officials, nongovernmental political groups, etc. Joseph Raz and Charles Beitz belong to the group of philosophers that defend *practical* approach. Luise Katharina Müller argues, for example, that Rawls's human rights conception does not fall exclusively into either the moral or the political category (59). Rawls considers that human rights enable people to be full and practicing members of society (67). James Griffin is regarded as an example of *traditionalist* philosophers. Kristen Hessler also distinguishes between "practice-sensitive" and "practice-insensitive" approaches: "this distinction defines a spectrum, in the sense that different views can be responsive to the practice in degrees" (17). Practice-insensitive approaches concentrate on existing philosophical problems independent of the practice. Hessler argues that some philosophical views combine elements of moral and political perspectives and the "distinction between political and moral views…is (like the distinction between more and less practice-sensitive views) a matter of degree, partly because political morality is a subset of morality generally, so ideas like moral rights can be applied in both interpersonal and political contexts" (20). Andreas Follesdal also argues that practical and moral theories share some features: "They are meant to serve as critical standards to assess existing institutions" (81). David Ingram examines the ambiguity of moral-legal status of human rights as well as political and legal theories. Jelena Belic explores the implications of universality of human rights for conceptualizing migrants' political role; Belic draws implications for conceptualizing the relation between migrant and states. Migrants are entitled to human rights as all other human beings. Kerstin Reibold writes that "[T]he indigenous right to self-determination is often called a third-generation human right" (204). Reibold discusses the cases of indigenous people and the history as well as current situation of indigenous people in Australia, the U.S., Canada, South America, and New Zealand. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly on Thursday, 13 September 2007 by a majority of 144 states. Daniel P. Corrigan examines various political conceptions of human rights and corporate human rights obligations. The European Convention system reinvented itself as a "*supranational* constitutional court in the human rights area" (53; my emphasis).

In conclusion, the philosophical underpinning of ILHR is a currently developing sound theory of international human rights and has two distinctive methodological critical lenses—*traditionalist* and *practical* approaches. These distinct two approaches are well described in *Moral and Political Conceptions of Human Rights*: *Implications for Theory and Practice*. Philosophical theories of ILHR serve an important role in the human rights practices. The advancement of human rights theories is interconnected with the promotion of social justice, the facilitation of international peace, and advancing theories of international law; the pursuit of freedom could be harmonized with social justice. According to the UDHR, "it is essential to promote the development of friendly relations between nations" (the UN). The representatives of the United Nations expressed their faith in fundamental human rights, in the "dignity and worth of the human person and in the equal rights of men and women" (the UN). This book addresses such urgent issues as policy making at the international level. This work attempts to extend and nourishes the debate about moral and legal-political dimensions of human rights connecting the philosophy of human rights with recent works on human rights in international political and legal theory.

Elena V. Shabliy*

* Elena V. Shabliy, Ph.D., Davis Center for Russian and Eurasian Studies, Harvard University, USA.

Vitalii Voropanov

Sud i pravosudie v provincii Rossiiskoi imperii vo vtoroi polovine XVIII v. (na primere oblastei Povolzh´ia, Urala, Zapadnoi Sibiri i Kazachstana)

[Gericht und Recht in der Provinz des Russischen Reichs in der zweiten Hälfte des 18. Jh. (am Beispiel der Wolgaregion, des Urals, Westsibiriens und Kasachstans]

Moskau: Iurlitinform, 2016, 456 S., ISBN 978-5-4396-1141-6

Fernziel des Gouvernementsstatuts der Zarin Katharina II. (1762-96) war es „Staat und Gesellschaft in ihrer Gesamtheit eine neue Verfassung aus einem Guss und nach gleichen Prinzipien, eine „gute Ordnung" zu geben" (M. Hildermeier). Darüber herrscht in der Geschichtswissenschaft Konsens. Zwischen 1775-85 wurde das Russische Reich einer administrativ-territorialen und gerichtlichen Neugliederung unterzogen. Verkleinerung der Regierungsbezirke sowie ein personalintensivierender Ausbau der

lokalen Selbstverwaltung verkürzten die Distanz zwischen den Hauptstädten, St. Petersburg und Moskau, und der Provinz. Im verwaltungsmäßig bisher nur vage durch die Gouvernements Kazan und Sibirien zusammengefassten asiatischen Landesteil wurde letztere erstmals überhaupt als solche funktionstüchtig. Die zeitgleich durchgeführte Gerichts- und Justizreform verlagerte den Schwerpunkt der Judikative vom Zentrum in die Gouvernements- und Kreisstädte. Dort entstand ein vertikal drei Instanzen beschreibendes und horizontal in den ersten beiden Instanzen ständisch gegliedertes System regulärer Gerichte.

Die Ereignisse der 1990-er Jahre in Russland lösten eine Neubewertung der Vergangenheit aus. Gewürdigt werden seitdem Tragweite und Potential des letztendlich nicht vollendeten Reformprojekts. „Profitiert" von der Akzentverschiebung vom Defizitären auf das tatsächlich Erreichte hat vor allem Katharinas Reorganisation des Justizwesens. In der älteren Historiographie als „Stärkung des Adelselements" und „aufgeklärte Demagogie" gewertete Schlüsselmomente der Reform - die durch eine konsequentere Trennung von Verwaltung und Jurisdiktion ermöglichte *Gesetzmäßigkeit* sowie das die persönlich freie Landbevölkerung ins reguläre Gerichtssystem integrierende Prinzip der *innerständischen Gleichheit* – werden in der Retrospektive als innovative, mit Blick auf die Entwicklung bis 1917 richtungsgebende Impulse angesehen.

Der wohl unermüdlichste Revisionist jener Reform ist der russische Rechtshistoriker Vitalii Voropanov. Im Sinne der neuen Imperiums-Forschung argumentierend propagiert er die These von der Lebensfähigkeit der zaristischen Reformvorhaben der sogenannten Vorreform-Periode (bis 1864) unter Rückgriff auf lokalen Besonderheiten Rechnung tragende *flexible Reaktionen*. Dieses ehrgeizige Ziel verfolgt der Verfasser auch in seiner neusten 2016 im Moskauer Iurlitinform Verlag erschienen Monographie „Gericht und Recht in der Provinz des Russischen Reichs in der zweiten Hälfte des 18. Jh.". Ihm ging es um nichts weniger als unter Beweis zu stellen, dass es der Monarchie gelang die gesamte Bevölkerung rechtlich-administrativ in Vielfalt zu einen. Im Fokus seiner bisherigen Untersuchungen stand der *Große Ural*, eine soziodemografisch sowie ethno-konfessionell heterogene Region, dessen geografische Eckpunkte im Nordwesten und Südosten Vjatka (heute Kirov) und der russische Vorposten am Rand der kasachischen Steppe Orenburg beschreiben sowie in entgegengesetzter Richtung das baschkirische Ufa und die Hauptstadt des Gouvernements Sibirien, Tobolsk. Nun, wie bereits der Untertitel „am Beispiel der Wolgaregion, des Urals, Westsibiriens und Kasachstans" verrät, erfährt der Betrachtungshorizont eine gleichzeitig nach innen und außen gerichtete territoriale Erweiterung. Ausgleichen soll dies die chronologische Konzentration auf die Regierungszeit von Katharina II. und Paul I.

Thematisch lässt sich die Monographie in einen allgemeinen und einen besonderen Teil gliedern. Die ersten drei Kapitel rekonstruieren minutiös die Reformbemühungen und -absichten der Jahre 1762-1801. In der auf Archivdokumenten und Gesetzestexten basierenden Darstellung geht es um Modernisierung und Rationalisierung der Justiz (S. 6-106) sowie gegen das (kulturelle) Infrastrukturdefizit gerichtete Maßnahmen, welche die Funktionstüchtigkeit eben jener Ordnung garantieren sollten (S. 107-51 und S. 152-204). Die Kapitel vier bis sechs hingegen widmen sich Fragestellungen der Integration bzw. Integrierbarkeit der lokalen Bevölkerung in das neue Gerichts- und Rechtssystem. Hier gilt das Hauptaugenmerk der Umsetzung der Reformen in den Randgebieten des Russischen Reichs. Den Verfasser interessieren die Methoden der Personalrekrutierung im Ural und Sibirien (S. 205-25) sowie die sich regionalbedingt gestaltende aktive und passive Teilhabe abgabepflichtiger Bevölkerungsgruppen am regulären Gerichtssystem (S. 226-308). Das letzte Kapitel stellt ein Novum dar; aus rechtshistorischer Sicht wird die Beziehung zwischen Obrigkeit und die Peripherie des Reiches besiedelnden Berg- und Nomadenvölkern erstmalig analysiert (S. 309-51).

Voropanov entwirft ein Bild von einer nahezu perfekt funktionierenden, die Untertanen zu einer einheitlichen Schicht zusammenschließenden Gerichtsmaschinerie. Effizienzgefährdende Defizite, allem voran das Nichtvorhandensein eines juristischen Expertenstands, gelang es dank umfassender Regierungsinitiativen (dem Aufstellen eines Kontroll- und Strafsystems bei gleichzeitiger Erweiterung des bildungspolitischen Angebots und Schaffung materieller Anreize) wirksam aufzufangen. Beinahe gewagt sind die Ausführungen zur Partizipation(sbereitschaft) erstmals vom regulären Gerichtssystem erfasster Bevölkerungsgruppen. Jane Burbanks in vieler Hinsicht wegweisende Studie „Russian Peasants go to Court" wird hier beim Wort genommen. Auch in Bezug auf die nichtrussischen Völkerschaften bleibt es bei einer Darstellung staatlich gelenkter Offerten. Ein den Abbau von Schwellenängsten beabsichtigendes staatliches Entgegenkommen (das Stellen von Dolmetschern, die Einrichtung lokale Rechtstraditionen berücksichtigender (konfessioneller) Sondergerichte oder Übertragung von Eidesformeln ins Tatarische, Baschkirische oder Armenische) lässt letztendlich nur begrenzt Rückschlüsse auf deren Absorbierungskraft zu.

Der Verfasser leistet Überzeugungsarbeit. Dafür führt er ein schier überwältigendes Quellenaufgebot ins Feld: die nahezu lükkenlose Reproduktion das kaiserliche Reformvorhaben manifestierender Gesetzesakte sowie unzählige in russischen und kasachischen Regionalarchiven in akribischer Kleinarbeit zusammengetragene Justizverwaltungs- und Prozessakten sollen belegen, dass „die Bevölkerung die Reform zweifellos annahm und von den vom Gesetzgeber gewährten Rechten Gebrauch machte" (S. 289). Dennoch wirkt die Menge der erbrachten Beweislast zuweilen eher erdrückend als überzeugend. Eine weniger kompilative Darstellung wäre hier eventuell die glücklichere Wahl gewesen.

„Normal´na li Rossia?" diese allen Debatten um den Sonderweg der russischen Geschichte zugrunde liegende Frage scheint Voropanov zu beschäftigen, wenn er eine „innere Logik der Staatsbildung" (S. 360) feststellt. Einem wenn auch multiplen Modernisierungsparadigma fest verhaftet behält er dessen Kehrseite, den Rückständigkeitsbegriff, stets besorgt im Auge. Dabei scheint ihm eines entgangen zu sein: Russland ist normal. In der russischen Geschichtswissenschaft hat die Idee vom einem rationalen „Masterplan" folgenden Gesetzgeber inzwischen ihre Ausschließlichkeit verloren. In Frage gestellt werden nicht nur Normendurchsetzungskapazität und -intention des frühneuzeitlichen Policey-Staats, sondern auch die Auswirkung von deren (Nicht)befolgung auf die Funktionstauglicht vormoderner Gesellschaften.

Voropanovs Verdienst liegt im Neuanfang. Als einer der ersten vom liberalisierten Zugang zu Archivgut profitierenden russischen Rechtshistoriker betreibt er keine rein binnenperspektivische Normenanalyse. Durch eine stärkere Einbeziehung des Empfängerhorizonts zeigt er, dass die Reformbemühungen der zweiten Hälfte des 18. Jahrhunderts dank Anpassung an regionale Erfordernisse tiefer als zuvor angenommen in die Gesellschaft des Russischen Reichs vordrangen: lokale Selbstverwaltungsorgane waren weder aufoktroyierte Fremdkörper, noch waren Gericht und Recht eine *cultural fiction*.

Dennoch ist es Zeit für einen neuen Neuanfang. Gemeint ist nicht eine abermalige Revision der positiven Bilanz, sondern eine Neubetrachtung des Quellenmaterials. Indem Voropanov wichtige in den Themenkomplex der *informellen Beziehungen* fallende Probleme wie Amtsmissbrauch, Vetternwirtschaft, Korruption oder auch Rechtspluralismus ausklammert, bleibt es leider weitgehend bei der Schilderung einer *staatlich verordneten Gesellschaft*. Das ist schade, denn, dass sich die Frage nach Effizienz und Funktionalität der zaristischen Verwaltungs- und Justizreformen keineswegs erschöpft hat, beweist ein Blick ins Literaturverzeichnis. Die Geschichte der Reformen wurde von der jüngeren russischen Geschichtswissenschaft, wo sie gewissermaßen als Antithese zum Klassenkampf der sowjetischen Historiographie fungiert, mehr als gut erforscht. Deren Umsetzung hingegen ist bisher lückenhaft erschlossen.

Elena Borodina*, Alice Plate**

* Elena Borodina, PhD, Forschungsstelle für die Veröffentlichung von Primärquellen (Laboratory for the Study of Primary Sources), Uraler Föderale Universität, Jekaterinburg, Russische Föderation

** Alice Plate, PhD, Forschungsstelle für die Veröffentlichung von Primärquellen (Laboratory for the Study of Primary Sources), Uraler Föderale Universität, Jekaterinburg, Russische Föderation.

Mona Hasenritter

Wilhelm Theodor Kraut (1800–1873), Ein Leben für die Lehre

Berlin: Duncker & Humblot, 2018, 332 S., ISBN 978-3428151691

Die Arbeit, eine juristische Dissertation verteidigt 2017 an der Universität Kiel, ist einem Rechtslehrer gewidmet, der die Erfüllung seines juristischen Daseins nicht in der Theorie, d.h. der wissenschaftlichen Forschung, sondern im Praktischen, d.h. in der universitären Lehre sah. Das Werk umfasst zwei Teile. Der erste Teil enthält die Biographie von Kraut, ferner die Kommentierung seiner Vorlesungsnachschriften, ein Literaturverzeichnis und Personenregister, ein Anhang mit Publikationsliste, Briefwechsel, Vorlesungsnachschriften.

Der zweite Teil enthält die Nachschriften der Vorlesungen Krauts.

Wilhelm Theodor Kraut, 1800 geboren, lehrte fast fünfzig Jahre an der Universität Göttingen Deutsches Staatsrecht und Deutsches Kirchenrecht, vor allem aber Deutsches Privatrecht. Er erfreute sich hoher Wertschätzung bei Kollegen und Studenten. Warum er gerade diesen Schwerpunkt, sich auf die Lehre zu konzentrieren, wählte, kann nur vermutet werden, so die Autorin. Sein zweiter Schwerpunkt war sein patriotischer Geist: Er war Befürworter eines mehr freiheitlich orientierten Gedankenguts, sowie des Nationalgedankens, der damals, in den Zeiten des Vormärz, in den akademischen Zirkeln sehr verbreitet war.

So setzte er sich für die „Göttinger Sieben" ein, die gegen die Suspendierung der einigermaßen freiheitlichen Verfassung in Hannover durch den Landesherrn protestiert hatten. Die Professoren Dahlmann, Albrecht, Jakob und Wilhelm Grimm, Gervinus, Ewald und Weber kritisierten die Suspendierung als unrechtmäßig. Daraufhin entließ der König 1837 die Professoren und verwies sie des Landes (einige gingen an die Universität Bonn). Immerhin erhielt Kraut wegen seines Engagements nur noch gekürzte Dienstbezüge, die weit unter dem üblichen Entgelt lagen.

Es folgt eine Kommentierung der Autorin zu Nachschriften der Vorlesungen Krauts, die aus einem Kollegheft von 1860 stammen. Verfasser ist der Jurastudent Heinrich Brandt. Die im Anhang wiedergegebene Liste der Publikationen von Kraut ist schmal (insgesamt 12 Aufsätze zum Kirchenrecht und zum deutschen Privatrecht), sein Schwerpunkt war mithin eindeutig die Lehre. Die Vorlesungsnachschriften selbst sind sehr ausführlich ausgefallen. Sie umfassen 586 Seiten und befinden sich in der Universitätsbibliothek Kiel.

Die Vorlesungsnachschriften enthalten eine Gliederung, die auch dem heutigen Leser vertraut ist; sie spiegelt in etwa die Systematik des später eingeführten BGB wider: Einleitung, Personenrecht, Sachenrecht, Obligationenrecht, Erbrecht, Familienrecht. Es folgt dann das damals noch teilweise geltende Lehnsrecht und zum Abschluss das Handelsrecht.

Das Skriptum zeichnet sich durch große Klarheit aus. Mit Genuss liest man die geschichtliche Übersicht in dem Abschnitt Quellen des deutschen Privatrechts (Einf. 2. Kap., S. 101-104), in der Kraut die Entstehung des Deutschen Privatrechts aus dem Partikular- und Gewohnheitsrecht darlegt.

Kraut war in dieser Darstellung sehr ausführlich. Dazu muss man wissen, dass die Privatrechtswissenschaft im 19. Jahrhundert vom Gegensatz zwischen Romanisten und Germanisten geprägt war. Die Germanisten hoben die Originalität des Deutschen Rechts hervor (so z.B. das Genossenschaftswesen, das gegenüber dem Römischen Recht eigenständig sei). Kraut war engagierter Germanist. Die Gleichberechtigung mit dem Römischen Recht führte immer wieder zu Konflikten in der Rechtsfindung, d.h. in der Rechtsauslegung. Kraut folgte der historischen Rechtsschule, wie sie von F.C. de Savigny begründet wurde. Danach ist die Rechtswissenschaft eine geschichtliche Wissenschaft, die im Volk ihre Wurzeln hat. Diese Wurzeln sind der Ursprung des Gewohnheitsrechts, das der zentrale Rechtserzeuger ist. Das Gewohnheitsrecht steht im Gegensatz zum Römischen Recht; Kraut nahm diesem gegenüber eine kritische Haltung ein. Er forderte damit die Gleichberechtigung des Deutschen Rechts mit dem Römischen Recht. Die Priorität des letzteren lehnte er ab.

Die Vorlesungen von Kraut sind selbst wissenschaftliche Leistungen ersten Ranges, wie die Autorin zutreffend hervorhebt. Die Trennung zwischen Forschung und Lehre wird dadurch aufgehoben, dass sie die Lehrleistung der Wissenschaft zuordnet. Dieses Fazit einer Aufwertung und Gleichstellung der Lehre gegenüber dem traditionellen Forschungsbegriff, der bis heute als „reine Forschung", d.h. als Nicht-Lehre verstanden wird, ist überzeugend. Das Buch kann daher uneingeschränkt empfohlen werden. Es ist ein Plädoyer für die Gleichstellung der akademischen Lehre mit der wissenschaftlichen Forschung, die bis heute nicht erreicht ist. Es ist eine der wenigen Informationen, wie die Vorlesungen früherer Jahrhunderte tatsächlich (im besten Fall) aussahen.

Diemut Majer*

* Diemut Majer, emeritierte Universitätsprofessorin. Sie ist Rechtsanwältin in Karlsruhe, Deutschland.

Wilhelm Güde

Max Güde (1902–1984), ein Juristenleben im 20. Jahrhundert

Karlsruhe: Verlag der Gesellschaft für Kulturhistorische Dokumentation e.V., 2019, 155 S., ISBN 978-3-922596-29-5

1. Juristenporträts 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) sowie jüngst den badischen Juristen Reichlin von Meldegg (Heft 35, 2019). Detlev Fischer bearbeitete bereits die Karlsruher Juristenportraits aus der Vorzeit der Residenz des Rechts (Heft 9, 2004).

Es seien noch genannt: „Theodor Mommsen – Gedanken zu Leben und Werk des großen deutschen Rechtshistorikers" von Fritz Sturm (Heft 11, 2006), „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), dem just 2019, im Jubeljahr der badischen Verfassung gedacht wurde, so im Vortrag von Detlev Fischer in den „Karlsruher Begegnungen zu Wissenschaft, Politik und Kultur – Gespräche am Tor 2019" am 20. März 2019 mit dem Vortragstitel „Erinnerung an die badische Revolution 1918/19: Der Karlsruher Jurist Eduard Dietz als Vater der badischen Verfassung vom 21. März 1919".

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 im Jahre 2013. Vorgenannte Beiträge wie die Hommage (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.

Erwähnt werden soll des Weiteren die Hommage an Guido Kisch von Wilhelm Güde (Heft 18, 2010). Selbiger hat nun seinen Vater Max Güde und dessen Juristenleben porträtiert; hierauf wollen wir im Folgenden kurz eingehen.

2. Autor und Studie

Der Autor, Jahrgang 1940, studierte Rechtswissenschaft in Freiburg/Br. und München. Er schloss seine Staatsexamina 1966 und 1970 ab. Nach dem Referendarsexamen war er bereits wissenschaftlich bei Guido Kisch tätig, der die Dissertation „Die Rechtsstellung der Juden in den Schriften deutscher Juristen des 16. und 17. Jahrhunderts" angeregt hatte. Nach dem Assessorexamen erfolgte Güdes Eintritt in den baden-württembergischen Justizdienst, zunächst als Staatsanwalt, dann als Amtsrichter

in Freiburg, ab 1980 am Oberlandesgericht Karlsruhe. Von 2000 bis 2005 war Wilhelm Güde Vorsitzender Richter am Landgericht Freiburg.

Seine an Quellen reich belegte und flüssig zu lesende Studie ist kritisch-liebevolle Hommage an seinen Vater und wichtige Bereicherung der Aufarbeitung der juristischen Zeitgeschichte der Bundesrepublik zugleich. Auf der Grundlage persönlicher Dokumente und zahlreicher Fotographien aus dem Familienbesitz schildert der Autor den facettenreichen Lebensweg seines Vaters. In sieben Beiträgen des Annexes kommt Max Güde selbst zu Wort. Der Leser erfasst dadurch eine Persönlichkeit, die am Wiederaufbau einer rechtsstaatlichen Justiz in der unmittelbaren Nachkriegszeit entscheidend mitwirkte und vor allem die Anfangsjahre des Bundesgerichtshofes und der Bundesanwaltschaft mitgestaltete. Denn 1956 wurde Max Güde Oberbundesanwalt, wenig später änderte sich die Dienstbezeichnung in Generalbundesanwalt.

„Das Thema des Naziunrechts, des eigenen Versagens, des Versagens der Justiz insgesamt und der feste Wille, alles tun um dem für alle Zukunft vorzubeugen, hat ihn nicht losgelassen und kehrte auch in seinen öffentlichen Äußerungen der folgenden Jahre in vielfältigen Facetten wieder." (S. 48) Damit charakterisiert Wilhelm Güde sehr treffend die nicht nachlassenden Bemühungen seines Vaters, auf das Versagen der Justiz im Dritten Reich hinzuweisen. Alle Stationen von Schul- und Studienzeit, in der Justiz vom Amtsrichter bis zum Generalbundesanwalt, als Mitglied des deutschen Bundestages und „Nochmals stürmische Jahre" (Kampf um die Rehabilitierung seines Sohnes Fritz Güde ab der Mitte der 1970er Jahre) werden bis zum „Abendfrieden" und den letzten Jahren in Werl/Westfalen (S. 77-82) minutiös beleuchtet. Mehr soll an dieser Stelle nicht verraten werden, denn die sehr empfehlenswerte Lektüre dieses Bandes obliegt nun der Leserschaft.

Thomas Gergen*

* Univ.-Professor Dr. Dr. Thomas Gergen, Institut Supérieur de l'Economie, ISEC Université Luxembourg.

Hans Hugo Klein

Vor- und Entstehungsgeschichte des Bundesverfassungsgerichts

2018, 46 Seiten, ISBN 978-3-922596-27-1 = Heft 34 der Schriftenreihe des Rechtshistorischen Museums Karlsruhe, herausgegeben von Detlev Fischer und Marcus Obert.

Hans Hugo Klein, Jahrgang 1936, studierte Rechtswissenschaft in Heidelberg und München und schloss seine Staatsexamina 1957 und 1961 ab. Im Anschluss an seine Promotion im selben Jahr und Habilitation 1967 hatte Hans Hugo Klein an der Universität Göttingen von 1969 bis 2001 eine Professur für Öffentliches Recht inne. Nach seiner Zeit als Mitglied des Deutschen Bundestages von 1972 bis 1983 war er Parlamentarischer Staatssekretär beim Bundesminister der Justiz von 1982 bis 1983, ehe er danach als Richter des Bundesverfassungsgerichts bis 1996 im Zweiten Senat Recht sprach.

Es gelingt dem Verfasser, eine präzise Vor- und Entstehungsgeschichte des Bundesverfassungsgerichts zu schreiben (zu den Quellen S. 41-46). Der Band geht auf einen öffentlichen Vortrag in der Badischen Landesbibliothek vom 13. März 2018 zurück und beinhaltet vier Kapitel. Eingangs referiert Hans Hugo Klein die Vorformen moderner Verfassungsgerichtsbarkeit in Deutschland, wobei er bereits mit der Goldenen Bulle von 1356 beginnt. Das erste Reichsgrundgesetz bestimmte nämlich in seinem Kapitel V, dass der Pfalzgraf bei Rhein das Verfahren gegen den König nur auf einem Reichstag und in der nicht erzwingbaren Gegenwart des Reichsoberhauptes durchführen konnte.

Lesenswert sind sodann die Kapitel zum Status des Bundesverfassungsgerichts in den Verfassungsberatungen und in seiner Anfangszeit sowie die Verabschiedung des Gesetzes über das Bundesverfassungsgericht, dessen erste Jahre sodann Gegenstand des vierten Kapitels sind. Hier scheinen Persönlichkeiten auf wie Willi Geiger (Richter des Bundesverfassungsgerichts von 1951-1977), Theodor Ritterspach (1951-1975), Gebhard Müller (1959-1971), Erna Scheffler (1951-1963), Hans Joachim Faller (1971-1983) sowie natürlich der erste Präsident Hermann Höpker Aschoff (1951-1954). Dabei sei der Konflikt zwischen letzterem und Bundesjustizminister Thomas Dehler herausgegriffen, in dem es um den Anspruch Dehlers ging, die Rechtsprechung „zu überwachen", was sich Höpker Aschoff entschieden verbeten hatte (S. 35, 45). Insoweit liegt in diesem Punkt und in den weiteren Ausführungen Kleins ein wichtiges Zeugnis der juristischen Zeitgeschichte der Bundesrepublik Deutschland vor.

Thomas Gergen*

* Univ.-Professor Dr. Dr. Thomas Gergen, Institut Supérieur de l'Economie, ISEC Université Luxembourg.

Detlev Fischer

Maklerrecht

Frankfurt am Main: Deutscher Fachverlag GmbH, Fachmedien Recht und Wirtschaft, 2019, 372 S., ISBN 978-3-8005-1706-0

Bei der Rechtsmaterie des Maklerrechts handelt es sich um ein gesetzlich nur rudimentär geregeltes, aber höchst praxisrelevantes Teilgebiet des Wirtschaftsrechts. Dr. Detlev Fischer, ausgewiesener Kenner und Richter am Bundesgerichtshof a.D. legte im Jahr 2019 die 5. völlig neu bearbeitete und erweiterte Auflage seines bisher unter dem Titel „Maklerrecht anhand der höchstrichterlichen Rechtsprechung" erschienenen Standardwerks vor.

Die Darstellung beginnt mit der allgemeinen Einordnung des Maklervertrags in das deutsche Rechtssystem sowie der Erläuterung wichtiger Begriffsbestimmungen und zeichnet sodann ausgehend von einer Darstellung der Rechtsnatur des Maklervertrags die Entwicklung des Rechtsverhältnisses zwischen (potentiellen) Kunden und Makler beginnend mit dem Abschluss des Maklervertrages bis hin zur prozessualen Behandlung von Streitigkeiten im Zusammenhang mit der Tätigkeit des Maklers nach. Hierdurch ist es auch dem Neuling möglich, sich mittels der Durcharbeitung des Buches systematisch die Rechtsmaterie zu erschließen, was noch durch die im Anhang abgedruckten einschlägigen Regelungen des BGB und des Gesetzes zur Regelung der Wohnungsvermittlung unterstützt wird. Personen, die bereits intensiv mit dem Maklerrecht befasst und daher mit der systematischen Abfolge vertraut sind, ermöglicht das in der Tradition der Vorauflagen detailliert gestaltete Inhaltsverzeichnis den leichten Zugang zu den im konkreten Einzelfall relevanten Aspekten, wobei ein ausführliches Stichwortregister den Zugang ebenfalls erleichtert, sodass die Erschließung des Buches sehr leserfreundlich über beide Wege erfolgen kann.

Obwohl der aktuelle Titel den Zusatz „anhand der höchstrichterlichen Rechtsprechung" nicht mehr trägt, könnte das Werk diesen Zusatz aber weiter zu Recht führen, da die vom Autor umfänglich herangezogene Rechtsprechung der Instanz- und Obergerichte für den Praktiker von großem Interesse ist – in den Fällen, in denen dieser umfassender Überblick über die Rechtsprechung zum Maklerrecht dennoch einmal nicht genügen sollte, gibt der Verfasser dem Leser im Anhang (S. 359) eine Auflistung von Rechtsprechungsübersichten beginnend mit dem Jahr 1991 zum Maklerrecht an die Hand, durch die der über das Buch hinausgehende Zugang zur einschlägigen Rechtsprechung erleichtert wird.

Die Erweiterungen und Ergänzungen der 5. Auflage des vorliegenden Werks betreffen den Abschnitt über die wirtschaftliche Identität zwischen beabsichtigtem und tatsächlich geschlossenem Hauptvertrag (S. 165ff.) und die Haftung des Maklers, wobei in diesem Zusammenhang insbesondere die Nebenpflichten des Maklers (S. 259ff.) sowie der den Maklerkunden treffende Mitverschuldenseinwand des Maklers (S. 273ff.) eingehend dargestellt werden. Des Weiteren wird auch dem Recht des Versicherungsmaklers gegenüber der Vorauflage ein erweitertes und stark herausgestelltes eigenes Kapitel gewidmet (S. 315ff.). Darüber hinaus finden in dem Werk auch von der Rechtswissenschaft noch wenig beachtete und daher auch noch nicht abschließend geklärte Rechtsfragen Behandlung, so zum Beispiel im Rahmen der Maklerhaftung die Frage, wie sich die Provisionsverwirkung im Rahmen der Strafsanktionen des Zivilrechts einordnen lässt (S. 225-228). Die Provisionsverwirkung ist eine sehr interessante Thematik, quasi eine Strafsanktion im Zivilrecht, mit der sich der Autor bereits in seinem NZM-Aufsatz 2001, S. 873 befasst und darin die Provisionsverwirkung als gesetzliche Vertragsstrafe qualifiziert hat. Dies ist bislang im rechtswissenschaftlichen Schrifttum - außer Ina Eberts Habilitationsschrift - noch nicht hinlänglich diskutiert worden. Die Schrift von Hans Reichel (1878-1939) hat insofern leider keine Nachfolge gefunden, sodass § 654 BGB wissenschaftlich noch sehr viel hergibt. Die Erwägungen Fischers aus NZM 2001, S. 873 sind in der 5. Auflage seines Buches in aktualisierter Fassung anschaulich präsentiert. Rechtsgeschichte und geltendes Zivilrecht sind auf diese Weise eng verzahnt.

Abgerundet werden die Ausführungen Detlev Fischers dadurch, dass der Verfasser auch dem Zivilprozessrecht ein eigenes Kapitel widmet, um die hinsichtlich des Maklerrechts geltenden Besonderheiten darzulegen (S. 335ff.). Hier wird die prozessrechtliche Seite des Mitverschuldens des Maklerkunden (S. 344ff.) erläutert, und im Vergleich zur Vorauflage werden insbesondere Beweisaufnahme, Bestreiten mit Nichtwissen sowie das hilfsweise und verspätete Vorbringen im Prozess verstärkt aufgegriffen sowie schließlich die prozessualvertraglichen Pflichten des Rechtsanwalts im Provisionsprozess (S. 339ff.), wobei der Verfasser abschließend nochmals auf die Bedeutung der Kenntnis der Rechtsprechung für die Tätigkeit des Juristen im Rahmen des Maklerrechts abhebt.

Der Band „Maklerrecht" bietet einen konzisen, vollständigen und für den Neuling wie den Experten gut zugänglichen Leitfaden, der sowohl die gesetzlichen Grundlagen, als auch die bereits bestehende Literatur wie auch die zum Maklerrecht ergangene Rechtsprechung in einer Weise erschließt, die den Leser für alle Fragen des Maklerrechts rüstet.

Claudia Lydorf*

* Ass.iur. Claudia Lydorf, M.A. (Saarbrücken), Deutschland.

Christoph Sorge

Verpflichtungsfreier Vertrag als schuldrechtlicher Rechtsgrund. Das Rechtsgeschäft der *condictio ob rem* gemäß § 812 Abs. 1 S. 1 Alt. 2 BGB jenseits von Erfüllungszwang und Markttausch

Göttingen: V & R unipress, 2017, 938 S., ISBN 978-3847107569

Das Bereicherungsrecht kennt einen seltenen und nicht oft so intensiv und gründlich wie grundlegend diskutierten Rückforderungsanspruch. Die Übersetzung des lateinischen Begriffs lautet Zweckverfehlungskondiktion, was ins Deutsche übertragen dem glücklichen Hoffnungsträger verheißt: Eine Leistung darf zurückverlangt werden, wenn der nicht zum Inhalt des Geschäfts gewordene Zweck eines Rechtsgeschäfts verfehlt wird.

Ist die Befassung mit einer gelegentlich frech als „Fossil" oder freundlich als „Institutsorchidee" bezeichneten Erscheinung rechtshistorisch, dogmatisch, pragmatisch und überdies mit einem *opus magnum* von fast 1000 Seiten, von denen allein die „Zusammenfassung" mehr als 60 zählt, wirklich notwendig? Die Arbeit des am Lehrstuhl für Zivilrecht und Rechtsgeschichte der Leibniz-Universität Hannover wirkenden Rechtshistorikers und Rechtstheoretikers Christoph Sorge, eine juristische Dissertation (Betreuer: Stephan Meder) reicht über schlichtere Anwendungsbereiche der jüngeren Judikatur – etwa Rückabwicklung von Zuwendungen gescheiterter nichtehelicher Paarbeziehungen - ganz weit hinaus. Die Reichweite in älteste römische und in sehr lebensnahe Rechtszustände, oft in sog. Dreieckskonstellationen, lässt den opulenten Umfang durchaus als notwendig erscheinen.

Das „Störungsinstitut mit liquidierender Wirkung" wird in zwölf fein gewebten Thesen entfaltet. Sie gipfeln in einer fiduziarischen Sozialtypik. Damit ist der Rahmen für eine rechtsgeschäftliche Interpretation gesetzt. „Geschichte und System" durchdringen sich in dieser methodisch wie inhaltlich überaus geglückten dogmen- und systemkritischen Arbeit. Ein produktiver Dialog - von enormer Weite und Tragweite - mit der Vergangenheit soll die Früchte für die Gegenwart hervorbringen. Ist ein forderungsfreier Kausalvertrag möglich? Wie sind im gegenwärtigen Vermögens- und Verkehrsrecht die Zuweisungen zu sehen? Dies führt unter anderem zu einer sinnfälligen Kritik moderner *causa-finalis*-Lehren und zu düsteren Warnungen vor einer Hypostasierung des Austauschzwecks als dräuende Quelle von Un-Art und Ab-Art rechtlicher Kunstfertigkeit.

Im „Besonderen Teil" der Studie ist Kern die Rekonstruktion des „Rechtsgeschäfts" im Tatbestand dieser *condictio*, von den vertraglichen Grundstrukturen bis hin zu den finalen Fragen der Entgeltlichkeit. Das ist keine Selbstverständlichkeit. Denn ein vermögensrechtlicher Vertrag dogmatisch als Vereinbarung ohne Rechtspflichten erscheint mancher Schulweisheit als merkwürdig stilisiertes Produkt hochgelehrter Dogmatik ohne rationalistische Sinngebung, es sei denn aus der Schule der Scholastik.

Der „Allgemeine Teil" der ausladenden Abhandlung widmet sich den Prinzipien der vom Verf. sog. *conventio ad rem*. Das führt zurück zur hohen Schule des Säulenheiligen Savigny: fundamental und differenziert zu den neueren Erklärungsansätzen für forderungsfreie „Zuordnungsverhältnisse" und materielle Rechtsgeschäfte. Im „Besonderen Teil" genießen wir die wiederbelebte „conventio ob rem" in ihren kundig und zart gewürzten dogmatischen Verfeinerungen („gewollte Rechtsfolgen sind auch empirische Phänomene, keine dogmatischen Dinge an sich"), mit etwa relevanten Rechtsbindungs- bzw. Rechtsfolgewillen. Ist aber z.B. der Spielvertrag wirklich ein Paradigma fürs gesetzlich anerkannte Behaltendürfen? (Ein von mir hochgeschätzter englischer Jurist hielt den Verlagsvertrag für ein Exempel des nichtigen, aber im risiko- und spielfreudigen Land ganz sozialadäquaten Wett-Kontrakts.) Aber auch Fragen der Ökonomietheorie geraten in den scharfsinnigen Blickwinkel. Da verliert sich der Autor keineswegs in beklagenswerten Verlustzonen, sondern leuchtet arge Untiefen des listenreichen Kunstrechts aus: am bekannten Beispiel des Kaufs eines Ölgemäldes, statt des echten Meisters Ruidsdael ein minderes Machwerk des schlechten Nachahmers, jenes gleichnamigen, so gar nicht gleichwertigen Cousins - ein bis heute bedenkenswerter Kasus von enormem, nicht nur pädagogischem Nutzen für die Lehre - anhand des plötzlich aufgedeckten, kommerziell fehlenden Mehrwerts ein Leckerbissen fürs Reichsgericht.

Da kann so mancher, der Flohmärkte frequentiert, im Nachhinein in tiefschürfende Gedanken verfallen über die Grausamkeiten der Irrtumsanfechtung oder krass-positivistischen Gewährleistung, wenn ein schäbiger antiquarischer Bodensatz sich als echter Cellini oder als unbekanntes Noten-Notat von Mozart erweist, unversehens hochgepriesen und von unerwartet hoher Preisgestaltung. Welche Zwecke sind von vornherein ein integraler Part oder im Nachhinein dazu interpretierter Anteil des „Grundgeschäfts"? Der verschmitzte Heuristiker legt bekanntlich am besten hinein, was er als eigenen Gedankenertrag aus der Norm- oder Vertragsbasis alsdann gewitzt herausholt. Aber so flach und simpel geht's bei Sorges Interpretationen niemals zu.

Schließlich gerät die Untersuchung keineswegs aus Versehen zur Phylogenese der Geschäftsgrundlagendogmatik. Wir erleben die in schweren Zeiten fällige, notdürftige Einhegung der *condictio ob rem* durchs Reichsgericht - immanente Gesetzesfortbildung -, die nicht des tieferen Sinns entbehrende Ausweitung auf gegenseitige oder nicht gegenseitige Verträge, und die der Deutung bedürfenden Zurückdrängungen der *condictio* durch den BGH in den 1970er Jahren.

Meine an dieser Stelle eher kleinteiligen Wiedergaben des vielstimmigen, vielschichtigen Gehalts der monumentalen Abhandlung verwöhnen im Original implizit und explizit durch geistreiche Reflexionen über Schenkungen als „Etwas gegen Nichts"

im römischen Recht. Wie verfährt ein römischer Prätor, wenn der fröhliche Käufer eines erwünschten bärenstarken männlichen Sklaven entdeckt: er hat in Wahrheit eine nie obligatorisch-synallagmatisch intendierte, gerade ihm nicht taugliche schwächliche Sklavin von zartester Schönheit erworben? Weitere römische Reflexionen über die „res" enden nicht im begriffshistorischen Niemandsland, sondern beim fiduziarischen Charakter der Sache „Grundgeschäft". Was in der stilsicheren Sprache des Verfassers sich als eigenartige Transzendenz des archaisch-römischen Sachenrechts ausnimmt, als anthropologisch zu deutendes System geistiger Bindungen, lässt sich mit ihm auch als Gewährleistung von Friedenssicherung durch Eigentumsordnung deuten und verstehen (S. 718). Im Angesicht der psychischen und finanziellen Spätfolgen von Trennungs-Tragödien könnte ein dürrer, illusionsraubender Einwand lauten: Friedens-Sicherungen hätten empirischer Erfahrung nach oftmals die permanente, unselige Neigung, allzu schnell und heftig durchzubrennen – in den einst lieblichen, verlustig gegangenen heimischen Villenanwesen mangelt es unversehens am genügenden aushelfendem Vorrat vom Produkt „Sicherung". Vorsorgende Eheverträge werden selten im siebten Himmel geschlossen und haben allzu selten die § 812, 313 BGB im verträumten Blick.

Würde sich ein solches *opus magnum* in einer rückwärts gerichteten Analyse des Fortlebens, der Weiterentwicklung und dem Modellcharakter römisch-rechtlicher Denkfiguren erschöpfen, wäre schon das ein höchst relevanter Ertrag. Doch ist die „Entdeckung" des gleichartigen materiellen Prinzips im alten wie im gegenwärtigen Rechtsdenken und seiner divergierenden Lösungswege von hohem Interesse. Wenn die wohlbestallten „Hüter des Zivilrechts" über einen Zeitraum von 2000 Jahren hinweg in dem Gesichtspunkt der fiduziarischen Charakteristik der Zuwendung – und sei es *mutantis mutandis* – *in summa* sich verblüffend ähneln, sich vergleichen und diskutieren lassen, dann ist die beim Ehebündnis eingehändigte „dos" eine Art treuhänderisch gebundenes Eigentum zur gemeinsamen Nutzung, und somit am Ehe-Ende teilweise zeitlich durch Zweckerreichung nicht mehr in vollem Umfang „bereicherungsfähig". Hier wirkt dann auch der kritische Rückgriff auf Savignys „Bereicherungsabschöpfung" ebenso erhellend wie die -ggf. fiduziarischen - Momente in der Rechtsprechung des BGH zu Lebensgemeinschaften.

Will man ein Minimum von Ergebnissen in diesem komprimierten Besprechungs-Elaborat in dieser unvollständigen, sehr pauschalen und von mir versimpelten „Zusammenfassung" (als eine Art „readers digest") pressen, so ist jedenfalls auch fürs aktuelle Recht die spezifische Charakterisierung von Treuhandgeschäften bemerkenswert:

Die vom Autor formulierte „conventio ob rem" ist weder überwiegend eigen- noch überwiegend fremdnützig, sondern solidarisch gemeinnützig. Ein gemeinsam bezweckter Erfolg begründet keine Gemeinschaft in Form verdinglichter oder obligatorischer Interessenverbindung. Er ist „neutral" in den Rechtsfolgen, erzeugt weder einklagbare Rechtspflichten noch primäre Forderungsrechte.

Das sollte auf jeden Fall und am Ende manch früherer forensischer Konflikte nicht frommes Wunschdenken bleiben. Wer immer bei der belastenden Aufarbeitung verflossener Beziehungen und nun in der emotionsgeladenen monetären Reduktion von Komplexität aufs schnöde Bereicherungsrecht setzt, um sich für vergangenes, fortwirkendes Leid und jede schwer zu tragende Unbill der schal gewordenen Beziehungsgefüge in Seele und Geldbeutel schadlos zu halten, kann mit Fug und Recht an der Ideal-Form trreuhänderisch verstandener „Geschäfts"-Beziehungen und deren Aufarbeitung mittels Rückforderungen nach § 812 BGB kläglich scheitern.

Christoph Sorge bleibt freilich zu allem grundgescheiten Überfluss niemals bei mehr oder weniger komplexen Interpretationen und dem sonst allzu oft geübten Nachwirken römischer Juristenweisheiten stehen. Seine soziologisch und ökonomisch abgesicherte Betrachtung des klassischen römischen wie des geltenden Rechts lässt die frühen nichtrechtlichen Perspektiven und die heutigen „offenen Wertungsbegriffe" der Zumutbarkeit schärfer hervortreten. Er übersieht in seiner komplexen Architektur nicht, dass die neuere Rechtsprechung vorzugsweise zum Lösungsmodell der Geschäftsgrundlagenstörung tendiert. So wird für ihn die eingreifende *ultima ratio* „Unzumutbarkeit" zum Nadelöhr - sozusagen das schmale Einfallstor für Willkür und Beliebigkeit. Oder anders gesagt: Eine wie aus dem Nichts oder dem Off auftretende Erscheinung eines freischaffenden *deus ex machina* -oft mit der subjektiv als kritikwürdig und zutiefst ungerecht gesehenen Seite der unanfechtbaren bitter bejammerten Gerichtsfolge, auf welche von des Richters geneigter Hand unvorhergesehen *mehr* pekuniärer Aufstrich für die eine oder den anderen gefallen ist. So mag dann zuweilen die auf friedfertige Fort-Existenzen zielende Ordnung zu einem System dauerhafter Kriegszustände führen – und sei es nur in der Form ewigwährender Umkehr libidinöser Bindungen in puren Hass.

Die weiter reichenden Potentiale dieses Denkmodells könnten die engeren der „condictio ob rem" doch vielleicht innerhalb einer präziser gefassten Theorie von der Geschäftsgrundlage kompensieren. Die Differenzen liegen für Sorge auf der Hand: höchstpersönliche Lebensgemeinschaften, die er allerdings als nicht widersprüchlich und als nicht egoistisch postuliert (S. 873), sind keine schuldrechtlichen Kooperationsverträge, sondern feinziselierte Sozialgebilde, welche nicht dem schieren Synallagma folgen, sondern dem „fiduziarischen" Geist höchstpersönlich verbundener Personen. Hier müssen exakt messbare Ausgleichs-, Entschädigungs-, Bereicherungs- und Harmonie-Ansprüche versagen. Das System ist vom Prinzip her weniger auf Versöhnung, auf Harmonie im Trennungs-Modus geeicht. Der karge Mittelweg der Sühnetermine vermag eher in dem für schlichtere Trennungsprozeduren angelegten Arbeitsrecht sich eignen, wo engere fiduziarische Beziehungen Seltenheitswert haben.

Man sollte sich nicht schwermütig, sondern sehr gefasst, allenfalls mit melancholischen Anwandlungen (über die in der trauten Verbindung einstmals treuen Hände von Beteiligten), der Lektüre dieses gedankenreichen Kompendiums voll des rechtshistorischen und dogmatisch imprägnierten Forschergeistes, am liebsten frohgemut überlassen. Normabweichungen *in flagranti*, Entfremdungs- oder Abnutzungserscheinungen sind über *pecunia* und Profit schwer in den posthumen Griff zu bekommen. Der Leser wird über die fast kurzweilig zu nennende „Zusammenfassung" der Themen und Thesen durch ein ungleich verknapptes lakonisches „Fazit" reich belohnt:

Historisch-dogmatisch ist das Rechtsgeschäft der *condictio ob rem* ein eigenständiger, von Verfügung und Leistungsgeschäft losgelöster *forderungsfreier* Vertragstypus, mit einer notwendigerweise „bedingungsähnlichen" Struktur der Verknüpfung von „Leistung" und Erfolgszweck.

Ein weiterer kritischer Ertrag ist die Entlarvung der langwierigen, fast unendlich scheinenden Konflikte zwischen Geschäftsgrundlage (§ 313 BGB) und Bereicherungslösung - § 812 I 2, 2. Alt. BGB – als ein fehlender, der dogmatischen Aufklärung geschulderter bloßer Schein-Konflikt. Diese Erkenntnis gehört subito mit Brief und Siegel in so manches dogmatische Forum und forensisches Stammbuch.

Für die Lektüre der weit mehr als soliden Fundamentierung des sehr speziellen, generell hoch bedeutsamen und kostbaren Bereicherungsrechts ist, selbst wenn diesem geneigten Leser die vagen Erinnerungsfetzen an profunde Vorlesungen von Caemmerers, Fritz Pringsheims, Wieackers, H.J. Wolffs & Wolfs sowie Detlef Liebs hilfreich waren, kann neben einem Sinn für Systematik und Kasuistik älterer und neuer Denkungsarten eine auch rudimentäre Lateinkenntnis aus solidester Wiener Schule nur von Vorteil sein.

Das Literaturverzeichnis hat einen Umfang von 34, das Personen- und Sachregister von 18 Seiten.

Albrecht Götz von Olenhusen*

* Prof. Dr. jur. Albrecht Götz von Olenhusen, Heinrich-Heine-Universität Düsseldorf, Deutschland.

Richter am Bundesgerichtshof a.D. Dr. Detlev Fischer erhält Verdienstkreuz am Bande des Verdienstordens der Bundesrepublik Deutschland

(Pressemitteilung des BGH vom 04. 12. 2019, Nr. 156/2019 – Abdruck mit freundlicher Genehmigung der Pressestelle des Bundesgerichtshofs Karlsruhe)

In Würdigung seines Engagements als Vorsitzender des Vorstands des Vereins Rechtshistorisches Museum e.V. hat Herr Bundespräsident Frank-Walter Steinmeier am 2. September 2019 Herrn Richter am Bundesgerichtshof a.D. Dr. Detlev Fischer das Verdienstkreuz am Bande des Verdienstordens der Bundesrepublik Deutschland verliehen. Der Orden wurde Herrn Dr. Fischer am 4. Dezember 2019 durch Frau Staatssekretärin im Ministerium für Wirtschaft, Arbeit und Wohnungsbau des Landes Baden-Württemberg Katrin Schütz in den Räumlichkeiten des Bundesgerichtshofs übergeben.

In ihrer Begrüßungsansprache würdigte Frau Präsidentin des Bundesgerichtshofs Bettina Limperg insbesondere die Verdienste des Geehrten um die Aufarbeitung und Vermittlung der Rechtsgeschichte und die Bedeutung dieses Wirkens für den Bundesgerichtshof: „Kaum ein anderer kennt die Geschichte des Bundesgerichtshofs und die badische Rechtsgeschichte besser als Herr Fischer und kaum jemand kann so mitreißende Geschichten darüber erzählen wie er. Er war und ist mir stets in Belangen, die die Geschichte des Bundesgerichtshofs angingen, ein überaus wertvoller Berater und Begleiter.“ Frau Staatssekretärin Schütz führte in ihrer Laudatio aus: „Als passionierter Richter und Rechtshistoriker, als Publizist und Ausbilder wie auch als engagierter Bürger setzen Sie sich in vorbildlicher Weise für das Verständnis und die Wertschätzung des Rechts ein. Dieses großartige persönliche Engagement erfährt nun seine verdiente Würdigung.“ Herr Oberbürgermeister der Stadt Karlsruhe Dr. Frank Mentrup hob Herrn Dr. Fischers „Einsatz zur Schärfung des Rechtsbewusstseins der Öffentlichkeit auf Basis der Rechtshistorie“ hervor. Als Bereicherung empfinde er, mit ihm auch im Initiativkreis des Karlsruher „Forum Recht“ einen starken Befürworter und Motor dieses Vorhabens zu wissen.

Herr Dr. Fischer wurde am 22. Februar 1950 in Göttingen geboren. Nach Abschluss seiner juristischen Ausbildung trat er am 1. März 1979 in den höheren Justizdienst des Landes Baden-Württemberg ein. Im Januar 1982 wurde er zum Staatsanwalt bei der Staatsanwaltschaft Karlsruhe und im März 1983 zum Richter am Landgericht Karlsruhe ernannt. Von Oktober 1989 bis Oktober 1992 war er als wissenschaftlicher Mitarbeiter an den Bundesgerichtshof abgeordnet. Ende 1995 wurde er zum Richter am Oberlandesgericht Karlsruhe befördert. Von Januar 1999 bis April 2002 war er zugleich Mitglied des Anwaltsgerichtshofs Baden-Württemberg. Ebenfalls im April 2002 wechselte er als Vorsitzender Richter an das Landgericht Karlsruhe. Am 10. November 2005 wurde Herr Dr. Fischer zum Richter am Bundesgerichtshof ernannt. Er gehörte seither dem schwerpunktmäßig für Rechtsstreitigkeiten auf den Gebieten des Zwangsvollstreckungs- und des Insolvenzrechts sowie über Schadensersatzansprüche gegen Rechtsanwälte und steuerliche Berater zuständigen IX. Zivilsenat an. Mit Ablauf des 30. Juni 2015 trat er nach Erreichen der Altersgrenze in den Ruhestand.

Besondere Verdienste hat sich Herr Dr. Fischer durch sein langjähriges und äußerst erfolgreiches Wirken im „Verein Rechtshistorisches Museum e.V.“ erworben, dessen erster Vorsitzender er seit mehr als 14 Jahren ist. Der im Jahr 1988 gegründete Verein verfolgt den Zweck, das Rechtsbewusstsein der Bevölkerung auf der Grundlage der historischen Entwicklung des gesetzten Rechts in Verbindung mit dem Naturrecht durch Vorträge, wissenschaftliche Veröffentlichungen und Wanderausstellungen zu stärken und zu fördern. Der Verein versteht sich auch als Karlsruher Rechtshistorische Gesellschaft und organisiert jeweils im Frühjahr und im Herbst einen öffentlichen Vortrag, der Themen aus dem Bereich der Rechtsgeschichte und der juristischen Zeitgeschichte aufgreift. Regelmäßig gestaltet Herr Dr. Fischer auch eigene rechtshistorische Vorträge, wie jüngst zum Thema „Reformorientierte Karlsruher Juristen in der Weimarer Republik“.

Der Verein ist insbesondere Träger und Förderer des seit 1984 in Karlsruhe bestehenden Rechtshistorischen Museums, das jährlich von etwa 4.000 Personen aus dem In- und Ausland besucht wird. Herr Dr. Fischer führt sachkundig Besuchergruppen durch die Dauerausstellung „Von Babylon zur heutigen Rechtsordnung“ und durch Sonderausstellungen. Insbesondere die von Herrn Dr. Fischer konzipierte Sonderausstellung „Vom Privilegienbrief zur Residenz des Rechts – Einblicke in 300 Jahre Karlsruher Rechtsgeschichte“ stieß auf erhebliches Interesse in der Karlsruher Bevölkerung. Daneben begleitet Herr Dr. Fischer persönlich rechtshistorische Stadtspaziergänge sowohl zu festen Terminen als auch anlassbezogen, etwa für offizielle Besuchergruppen des Bundesgerichtshofs. Auf diesen etwa zweistündigen Rundgängen werden Erinnerungsorte des Rechts in der Karlsruher Innenstadt aufgesucht und deren Bedeutung anhand der Themen (Rechts-)Einheit, Verfassungsordnung und Freiheitsrechte im Rahmen der über 300-jährigen Rechts- und Justizgeschichte Karlsruhes näher erläutert. Das hierzu von Herrn Dr. Fischer

verfasste Buch „Rechtshistorische Rundgänge durch Karlsruhe – Residenz des Rechts“ ist bereits in dritter Auflage erschienen. In einer Rezension wurde das Werk als ein „in Deutschland singuläres Buch voller Entdeckungen“ und „als Geschenk für jeden Juristen“ bezeichnet. Daneben tritt Herr Dr. Fischer auch als Autor zahlreicher weiterer Veröffentlichungen in der vom Verein verantworteten Schriftenreihe des Rechtshistorischen Museums in Erscheinung. Die Reihe umfasst gegenwärtig 36 Hefte; weitere sind in Vorbereitung. Herr Dr. Fischer tritt selbst als Autor zahlreicher Veröffentlichungen zur Rechtsgeschichte innerhalb und außerhalb der Schriftenreihe in Erscheinung.

Foto: Roland Fränkle - Presseamt Stadt Karlsruhe

Guidelines for authors

The **Journal on European History of Law** publishes posts from the field of history of law, history of legal thought and Roman law. The length of a post cannot exceed 90.000 characters. It must be written in English or in German languages. All the works are reviewed. The executive editor decides on whether to publish the materials and in which order. After the review, the decision will be sent to the author by email.

The authors are responsible for the lingual and formal level of submitted papers. These levels are checked by the editorial office and some small necessary changes can be done by the editor. Corrections are possible only upon prior request.

Corrections done by the author must be returned within 4 days and no significant changes are permitted.

The papers must be sent to the email address of editor's office: info@historyoflaw.eu

The papers must be in the formats DOCX, DOC or RTF (MS Word). In the Word editor, use the font Times New Roman, font size 12, spacing 1,5.

If your text contains pictures or tables (only black and white), mention their meaning in the text. If the pictures are sent by electronic mail, they must be in JPG, TIFF or EPS format. All the tables, pictures and graphs must be placed somewhere in the text and also sent separately.

Since the European Society for History of Law is a non-profit organisation and there is no payment for the papers published in the Journal on European History of Law, the society cannot provide the authors with free prints of the Journal. Nevertheless, each author receives an electronic version (via email) of the issue in which his or her paper was published.

Each work must contain:

1. **Title**. It contains (in this order, always in a new row):
Short and understandable title;
If the Title is in German, please provide us with English translation, too.
The full name and last-name of the author/s including academic titles and working-place;
Address of the author/s, including the code of the country before the postal code (for example CZ). Afterwards write down your email address.
2. **Abstract.** Summarizes the content of the work. Usually up to 10 rows. It should describe clearly the main question of the research, solution, sources and methodology (according to the type of research).
3. **Keywords.** Several terms (not more than 20 words) that characterize the work. Words from the title can be repeated.
4. **Division of the proper text.** For better orientation in the text, it should contain headings. The headings should be numbered (f.e. 1., 1.1, 1.1.1). Please, use footnotes, not endnotes. Footnotes should be placed after punctuation. Each note should have a dot in the end. Do not include bibliography at the end of the paper.

An example of a paper may be found on http://historyoflaw.eu/english/Example_JEHL.pdf.

Quotation from publications in English language – write down in the underlined comments in such a way:
BRAUN, A., *Kirchenrecht.* Wien, 2005, p. 151-152.
BRAUN, A., Zur Entwicklung des Kirchenrechts. In: *Journal on European History of Law,* vol. 6, Nr. 1, 2016, p. 25-34.
BRAUN, A., Zur Entwicklung des Kirchenrechts. In: KLEIN, O. (ed.), *Enzyklopädie der österreichischen Rechtsgeschichte.* Wien, 2016, p. 25-34.

Quotation from publications in German language – write down in the underlined comments in such a way:
BRAUN, A., *Kirchenrecht.* Wien, 2005, S. 151-152.
BRAUN, A., Zur Entwicklung des Kirchenrechts. In: *Journal on European History of Law,* vol. 6, Nr. 1, 2016, S. 25-34.
BRAUN, A., Zur Entwicklung des Kirchenrechts. In: KLEIN, O. (Hrsg.), *Enzyklopädie der österreichischen Rechtsgeschichte.* Wien, 2016, S. 25-34.

If the requirments on the papers are not complied with (mainly the prescribed form of quotation from publications), the paper will not be accepted and presented to reviewers.

Peer review process

- Submitted manuscripts first undergo an in-house review by the Editors who decide on acceptance or rejection for the full review procedure, on the grounds of conformity to the formal and substantive requirements of the journal.
- If accepted, the article is then sent to two reviewers, experts in the given area of research.

Every effort is made to maintain both professional and personal independence between the author and the reviewers; however, we ask the authors to indicate the persons who have read the paper, and/or have cooperated in its completion before its submission. Also, the author may state in a separate letter the reasons why he wishes specific person should not be contacted for reviewing purposes; the Editors however reserve the right of final decision on the reviewers.

Please allow usually six months for the completion of the review process. Based on the verdicts, we will either:

- publish the article as it is or after minor revisions (specified and subsequently reviewed by the Editors), or
- ask the author for a major revision and resubmission, after which another round of external reviewing will take place, or
- decline the text for further consideration.

Although the opponents' reviews are of crucial importance, the final decision on acceptance of the article for publishing, or its rejection, is solely the right and responsibility of the Editorial team and the Editor-in-Chief. In case of contradictory or otherwise conflicting reviews, a third one will be solicited.