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The Canon 8 of Nicea and the Legal Status of the Adulterer. A Review in the Light of the First Conciliar Literature

Javier Belda Iniesta *

Abstract

This study intends to offer a historical-legal overview of the conciliar ecumenical and local texts and of the canonical sources of the ius antiquum Concerning the concubinage and the adultery and the admission of the people in this situation to the sacraments. Through an utroquistic reading of the sources and of the related historical, social and legal context, a historiographic analysis of the topic will be proposed by demonstrating that the admission of the concubinaries or adulterer to the sacraments does not constitute a form of abuse or violation of Tradition; on the contrary, the sources analysed constitute proof of the ability of the Church of the first millennium –whose ambitions are not distant from the one of the Church of today – to include in a harmonious dialogue between Justice and Mercy the problems and the concerns that are present in the society of a specific historical moment, always having the social and the spiritual well-being of the community of the faithful as its aim.

Keywords: *Concubinage; adulterer; admission to the sacraments; δίγαμος.*

1. Introduction

In recent years, perhaps due to changes in the social context, the attention of ecclesiastical scholars has increased with regard to the situation in which separated, divorced and remarried spouses find themselves, as well as the pastoral care to be given to civil unions, cohabitants and de facto families, all of them traditionally grouped in the so-called "irregular situations". However, each of these situations, perhaps due to the huge difference in the circumstances surrounding them, must be addressed in a different way, especially when, from a canonical point of view, it comes to the access to the sacraments [1].

Probably the most complex of them is the case of divorced and civilly remarried persons, both from the theological and pastoral point of view, and from the canonical point of view, being the main object of discussion during the recent XVI Ordinary General Assembly of the Synod of Bishops [2], which was followed by the Post-Synodal Apostolic Exhortation of Pope Francis *Amoris Laetitia* on love in the family, of 19 March 2016. The Holy Father, by referring to these situations, recalls the help that must be offered so that, even in such conditions, it is possible to live in Grace, which necessarily requires the collaboration of the Church [3]. Logically, the life of Grace implies a life of Sacraments, which is why the pontiff has highlighted that "in certain cases, this can include *the help of the sacraments*" [4], mainly the Reconciliation and the Eucharist [5].

However, although it might seem new because of the terms in which it is presented, it is far from being the first time that

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1 See, among the most recent literature, Belardinelli, Sergio, *Diciamoci la verità: non è tutto una favola: il Cristianesimo e le sfide del tempo presente* (Siena, Cantagalli, 2015); Bourges, Béatrice, *Catholique divorcée remariée* (Paris, Artège, 2015); Cereti, Giovanni, *Matrimonio e misecordia: divorzio, nuove nozze e prassi della Chiesa* (Bologna, Edizioni Dehoniane, 2015); Cormier, Philippe, *Les irréguliers de l'amour: une question pour l'Église* (Paris, Cerf, 2015); Dugan, Patricia, Navarro, Luis, *Mercy and law in marriage* (Montréal, Wilson & Lafleur, 2015); Falcone, Francesco Andrea, Ferrari, Enzo, *Dallo scandalo alla carezza: separati, divorziati e Chiesa* (Milano, Edizioni Paoline, 2015); Gentili, Paolo, Cioncolini, Tommaso, Cerioni, Giulia, *Luci di speranze per le famiglie ferite: accanto alle coppie in crisi, ai separati, ai divorziati e ai conviventi* (Cinisello Balsamo, San Paolo, 2015); Granados, José, *Eucaristia e divorzio: cambia la dottrina? Saggio sulla fecondità dell'insegnamento cristiano* (Siena, Cantagalli, 2015); Sánchez Navarro, Luis, *Cosa ne pensa Gesù dei divorziati risposati? Una luce dimenticata per la discussione attuale* (Siena, Cantagalli, 2015); Tettamanzi, Paola, *Ancora famiglia; Genitori sempre: la prima ricerca con le associazioni dei separati* (Cinisello Balsamo, San Paolo, 2015); De Filippis, Bruno, *È caduto il muro tra chiesa e divorziati?* (Pisa, Pacini Editore, 2016); Diriart, Alexandra, *Divorziati risposati e comunione spirituale* (Siena, Cantagalli, 2016); Guglielmoni, Luigi, Negri, Fausto, *Separati, divorziati e risposati nella Chiesa: alla luce della "Amoris laetitia" di papa Francesco* (Torino, Elledici, 2016); Medina Balam, Mario, *Pueden comulgar los divorciados vueltos a casar? Análisis de la norma canónica a la luz de "Amoris laetitia"* (México, Buena Prensa, 2017); Ometto, Matteo, *Divorziati che vivono una nuova unione nella Chiesa cattolica: da Familiaris consortio ad Amoris laetitia* (Padova, 2018).

2 Cfr. *Relazione finale del Sinodo dei Vescovi al Santo Padre Francesco*, del 24 ottobre 2015, nn. 84-86.

3 "Because of *forms of conditioning and mitigating factors, it is possible that in an objective situation of sin – which may not be subjectively culpable, or fully such – a person can be living in God's grace, can love and can also grow in the life of grace and charity, while receiving the Church's help to this end*" (n. 305).

4 Ibid, n. 351.

5 In order to do so, the spouses should demonstrate two fundamental conditions: on the one hand, the desire to change the situation and, on the other hand, the evident impossibility of doing so. Obviously, it is the responsibility of the Church to verify the real coexistence of the two conditions, which implies, from a canonical point of view, an evident difficulty, since the first condition belongs to the internal forum and the second one implies an evaluation of the extent to which it is impossible to implement this internal desire.

a reflection on the matter has been made, both in terms of the pastoral treatment to be given to the persons who find themselves in this situation and in terms of their access to the Sacraments.

Since its foundation, the Church –which has received the Deposit of Faith to announce it to men without changing it– has had to face the delay of the *parusia*, learning to make present at all times the salvific message of Christ, trying to reach everyone, both just or unjust, thus preventing the *Historia Salutis* from leaving out those who could be in the periphery of a nascent Church that was gradually becoming aware of her own identity. In this regard, the conciliar canons, the doctrine of the Fathers of the Church, and the legislation on the conduct of the faithful showed an exceptional sensitivity to the social reality of all times, so that, while maintaining certain scriptural precepts from which it could not be separated, it demonstrated that, when the time came, the sabbath was made for man, not man for the sabbath [6].

In fact, in the canonical sources of the first millennium one can trace how those who were in charge of the government of the communities and of their pastoral care frequently addressed the issue of broken unions and how to deal as a community both with the person who caused the broken union, if any, and with the victims that, unfortunately, are always present, by offering us a string of exceptions and particular actions which, although they are not a general rule, are still relevant, because – with due reservations – they could serve to shed the light on current situations.

From the scientific point of view, as we said, doctrine has returned to this argument with greater frequency in recent years [7], especially from the novelty that the Second Vatican Council constituted [8], with some works that, perhaps going far beyond what historical sources could tell us [9], have endangered some fundamental elements of the sacramental union –such as the indissolubility of marriage–. This stance was contested immediately afterwards as falsely integrative, supported by arguments that are excessively vague and imprecise [10].

However, apart from doctrinal discussions, which without carrying out a direct study of the sources, perhaps mean an attempt to use them to sustain one's own opinion, the truth is that, although the prohibition of remarriage was clear – and the return to the community required *ἐξομολόγησις* or public confession [11] – we conclude it is interesting to examine the actions that have been separated from the common stance and, above all, why and in what way this separation has been carried out. For that reason, we will try to take a look at the legal culture of the canonical sources that include these exceptions in the *ius antiquum*, using the principles of the *utroquistic* school to try to shed some light on the argument.

2. The conciliar doctrine

2.1 The canon 8 of Nicaea and the δίγαμος

In spite of the more or less common opinion with which the fathers of the Eastern and Western Church address the subject of remarriage and the admission of concubinaries to the sacra-

[6] The human fragility, and the possibility of its unions succumbing to the world and to sin, has scourged the human being since the beginning of time, and in spite of having fully known the Revelation in Christ, it has not always been able to be present when giving itself to the other as Christ does with its Church (Cf. Eph. 5:25-30).

[7] Although scientific literature may have increased in this regard, reflection on it has never ceased to be made: The issue of the *porneia* of Matthew, for example, was discussed by Hilary, Augustine or Erasmus (Cf. Pelland, Gilles, *La práctica de la Iglesia antigua relativa a los fieles divorciados y vueltos a casarse, in CDF, Atención pastoral de divorciados vueltos a casar, (Madrid 2003)*, p. 112); remarriage was an usual discussion in the patristics (Cf. Hunter, David, *Did the Early Church absolutely forbid remarriage after divorce*? in Vergentis 6 (2018) 45-64; Bof, Riccardo, and Leyser, Conrad, *Divorce and Remarriage between Late Antiquity and the Early Middle Ages: Canon Law and Conflict Resolution* in Making Early Medieval Societies: Conflict and Belonging in the Latin West, 300-1200. Cooper, K. & Leyser, C. Eds. Cambridge (2016), and it was also discussed during the Council of Trent (Cf. Bressan, Luigi, *II canone tridentino sul divorzio per adulterio e l'interpretazione degli autori*, (Roma, 1973), pp. 35-50). At the same time, several studies were made in the years preceding the last Synod. Luño Rodríguez, Ángel, *L'epicheia nella cura pastorale dei fedeli divorziati e risposati*, in *L'Osservatore Romano*, (Ciudad del Vaticano, 26/11/97); Botero Giraldo, José Sílvio, *Divorciados vueltos a casa. Un problema humano, una tradiciòn ecclesial, una perspectiva de futuro*, (Bogota-San Pablo, 2002); Vidal, Marciano, *Propuestas para una "normalización" eclesial de las parejas católicas "recasadas"*, in *Moralia,* 29 (2006), pp. 83-110; Mazzola, Lia, *L'evoluzione della normativa ecclesiale*, in *Quale comunione? Divorziati risposati e sacramenti*, (Roma, 2009), pp. 28-40; Petrà, Basilio, *Welcoming Divorced and Remarried Persons. A Formal Proposal,* in *INTAMS Review,* 20 (2014), pp. 138-144; Id., *Motives for Marriage. Reflections from an Ethical-Theological Perspective*», in *INTAMS Review,* 13 (2007), pp. 38-40; Id., *The Divorced and Remarried. A New State within the Church?* in *INTAMS Review*, 16 (2010), pp. 194-207, etc.).

[8] The novelty from the pastoral point of view, not concretely referred to the issue of remarriage, although in the Council the discussion arose (Cf. Wenger, Antoine, *Vatican II. Chronique de la quatrième session* (Paris, 1966), pp. 200-246)

[9] The first of these was Pospishil, Victor, *Divorce and Remarriage. Towards a New Catholic Teaching* (Nueva York, 1967), and the second, and perhaps the one that gave rise to most responses, because of how far it goes and because of the interpretation of canon 8 of Nicaea, was the work of Cereti, Giovanni, *Divorzio, nuove nozze e penitenza nella Chiesa primitiva,* (Bologna, 1977-Roma, 2013); Matrimonio e indissolubilità: nuove prospettive (Bologna, 1971); Giudici o Consiglieri? in *Concilium* 86 (1973), pp. 121-135. It is also interesting the stance of MOINGT, Joseph, *Le divorce pour motif d'impudicité*, in *RechSR* 56 (1968) 337-384, who indicates that only Jerome and Augustine oppose the remarriage of the victim of adultery.

[10] This is the description of Adnès (Cf. Adnès, Pierre, *De vinculo matrimonii apud Patres*, *en Vinculum matrimoniale*, Roma 1973, p. 86; *De indissolubilitate matrimonii apud Patres: opiniones et observationes*, *Periodica de re morali canonica liturgica*, 61 (1972), pp. 195-224), soon followed by Noonan, John, Novel 22, in *The Bond of Marriage. An Ecumenical and Interdisciplinary Study* (London 1968), pp. 41-96Pelland, Gilles, Le dossier patristique relatif au divorce, in Science et Esprit 25 (1973) 99-119; Nautin, Pierre, *L'Eglise primitive face au divorce*, Paris 1971, and in its edition of Origen's Homilies (Origène, *Homélies sur Jérémie, Nautin, Pierre. (ed.) Sources Chrétiennes 238, (Paris, 1976),* or Crouzel, Henri, *L'Eglise primitive face au divorce*, (Paris, 1971); *Divorce et remariage dans l'Eglise primitive: quelques reflexions de methodologie historique*, in *Nouvelle Revue Theologique* 98 (1976) pp. 891-917; *Un nouvel essai pour prouver l'acceptation des secondes noces après divorce dans l'Eglise primitive*, in *Augustinianum*, Dec. 1977; *Les "digamoi" visés par le concile de Nicee dans son canon 8*, in *Augustinianum*, Dec. 1978, p. 566).

[11] Cf. Tertullianum, «De paenitentia», in PL 1, pp. 1243-1248.

ments, some exceptions have emerged when the application of their doctrines reached a canonical and universal range in the conciliar meetings, which were extremely sensitive to this situation from the first moment. It is very clear that some of the most relevant contributions were consulted within the councils. However, a preliminary warning should alert us to the way of interpreting the conciliar canons, and that is that they should always be read in their context, given the great difficulty for our contemporary mentality to reach its true meaning, as well as the problem of accessing reliable sources.

Canon 8 of Nicaea envisages the readmission of the so-called *catharoi* (pure) – usually identified with the Novatians– opposed to the readmission of both apostates and adulterers: "*De his qui se catharos, id est puros quandoque nominant, ad catholicam autem et apostolicam ecclesiam accedunt, sanctae magnae sinodo visum est, ut impositis eis manibus sic in clero maneant. Ante omnia autem hoc in scriptis ipsos profiteri convenit, quod adhaerebunt et sequentur catholicae ecclesiae decreta id est quae et cum digamis communicabunt, et cum iis qui in persecutione lapsi sunt, in quibus et tempus constitutum est, et opportunitas praefinita, ut ipsi sequantur in omnibus ecclesiae decreta. Ubi ergo omnes sive in vicis, sive in urbibus ipsi soli inveniuntur ordinati, qui inveniuntur in clero, erunt in eodem ordine. Si autem catholicae ecclesiae episcopo vel presbytero existente accedunt aliqui, clarum est, quod ecclesiae quidem episcopus episcopi degnitatem habebit: qui autem apud eos, qui cathari dicuntur, nominatur episcopus, presbyteri honorem habebit: nisi utique episcopo placeat ipsum nominis honorem impertire. Si autem hoc illi non placeat, vel chorepiscopi, vel presbyteri locum excogitabit, ut esse omnino in clero videatur, ne in civitate duo sint episcopi*" [12].

It is not difficult to know to whom it refers when talking about those who fell during the persecution: the violent attacks against Christians by the end of the 3rd century will make many to apostatise for fear of losing their lives. However, the interpretation of the term *δίγαμος* is much more complicated. The inclusion of both categories in the same canon make it even more difficult to understand: although it obliges the so-called pure to accept both again, some are required to do public penance while nothing is said concerning the remarried ones.

However, the issue does not concern the penalty imposed on remarried persons, but to whom it refers exactly. Some interpret this as meaning the man who has two women or two simultaneous bonds, and others affirm that it should be simply understood as the marriage of widowers, which will also be denied by a great part of the patristics, and which deserved some conciliar reproach, as we will see later. In fact, the Church will take a long time to give full recognition to this latter situation, since it gave it before the consideration of a variety of adultery: Athenagoras, in fact, called it *decorum adulterium* [13]. That consideration was common throughout the ancient conciliar era [14], although the real restrictions on remarriages were directed at clerics or their widows [15] rather than at the rest of the population –except for the king's widow– and there are many forms of such unions [16].

In favour of the term *δίγαμος* referring to remarried widowers, a text by St. Jerome is usually used, in which we read: «*qui de monogamia sacerdos est, quare viduam hortatur ut δίγαμος sit*?» [17]. However, we cannot ignore that the text of St. Jerome is one century subsequent to the conciliar canon in particular, so we would be as close to the text of Athenagoras as to that written by the Western eremite saint.

It is not clear that the reference is necessarily to the marriage of widows, nor that this warning is addressed to those who refused this second union, since in the stricter conciliar legislation, as we will see later, a penalty is imposed on the widow, apparently to condemn her union when it is prior to a stable marriage bond.

Not even the text that has traditionally been used as the most enlightening for the correct interpretation of the term (the fourth paragraph of the *twentieth homily* on Jeremiah) is unquestionable: Pierre Nautin will argue that it is about the remarriage of widows [18], while Luciana Mortari argues that it is about remarried divorced persons, relying on the Eastern tradition of the Church [19].

An important point in the discussion is what rigorists are required to do in relation to the *δίγαμος*. The canon requires that "*cum digamis communicabunt*", that is, that they are admitted to the ecclesial communion (*κοινωονία*), a basic concept in the ecclesiology of the early Church [20], out of which there would not be room for the Eucharistic communion (*εύχαριστία*). Some authors, when they read the Latin term (*communio*), which is abundant in other councils that deal with the same matter, have made no distinction between the two of them, which means, from a canonical point of view, that the exclusion of one or the other entails two completely different penalties, such as the partial excommunication –which was part of the canonical penance [21] – and the total excommunication, which didn't allow the sinner to access to it [22].

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[12] Concilium Niceanum (a. 325), can. 8, in Domenico Mansi, 2, col. 671B-C-D.

[13] Cf. Athenagoras Atheniensis, *Legatio pro Christianis, 33, in P. G. 6, col. 967: "[…] quisque vel ut natus est, maneat, vel unicis in nuptis. Secundae enim decorum adulterium".*

[14] King, Paul, *Derecho y sociedad en el reino visigodo*, (Madrid, 1981), p. 262.

[15] Pardo Fernández, Alejandrina, *La condición de viuda en el mundo visigodo, a través de las actas conciliares,* in *Los visigodos. Historia y civilización. Antigüedad y Cristianismo* 3 (1986), p. 210.

[16] Fernández Alonso, Justo, *La cura pastoral en la España romano-visigoda, (*España-Roma, 1955), p. 420.

[17] Sancti Hieronymi, Ep. LII, 16, in *Corpus Scriptorum Ecclesiasticorum Latinorum (CSEL) 54, p. 439.*

[18] Origène, *Homélies sur Jérémie, Nautin, Pierre, ed., (Paris, 1976), pp. 268-269, notes 1 and 2.*

[19] Cf. Origene, *Omelie su Geremia, Mortari, Luciana (cur.), (Roma, 1995), p. 265, note 43.*

[20] 1 Cor 1, 9; 10, 16-17, etc. (Cf. D'Ercole, Giuseppe., *Penitenza canonica sacramentale dalle origini alla pace costantiniana*, Roma, 1963, pp. 21-66).

[21] The *ἐξομολόγησις*, or public confession (Cf. Tertullianum, *De paenitentia*, in P. L. 1, col. 1243-1248).

[22] This was evidenced, for example, by Chartier (Cf. Chartier Marie-Clement, *La discipline pénitentielle d'après les écrits de saint Cyprien*, in *Antonianum* 14 (1938), p. 18 and more recently Sotomayor, in refutation of some observations made by Vilella concerning the Council of Elvira, to which we will refer later (Cf. Sotomayor Muro, Manuel, *Los cánones 1 y 59 del Concilio de Elvira. A propósito de un artículo de J. VileIla Masana,* in *POLIS. Revista de ideas y formas políticas de la Antigüedad Clásica* 19, 2007 (pp. 141 ff.).

Perhaps the search for the canonical treatment given to similar situations by some councils contemporary to Nicaea could be useful in order to clarify the meaning of this term. Thus, if we were to make a parallel interpretation, for example, of the canon 72 of Elvira, one of the most recent ones and which refers to widows –with the all the exceptions that imply the problem of the unity and the interpolations of the Council of Elvira[23] – one question would arise. This council has traditionally been considered rigorist, given its eminently disciplinary character[24], and it is precisely to them that this Nicene canon is addressed. Elements common to Novatianism can be traced from the first canon, with the prohibitions against non-practising persons[25], the defence of asceticism and virginity (c. 13) or the references to shows (c. 62)[26]. The influence, or at least the common stance, would be, at the very least, evident. As we said, one of the possible interpretations of the term *δίγαμος* is that refers to remarried widowers, who were not admitted by rigorists. However, canon 72 of Elvira, in regulating the marriage of widows, only excludes them from the Eucharistic communion, for the admission of which it foresees the possibility of canonical penance:

Si qua vidua fuerit moechata et eundem postea habuerit maritum, post quinquennii tempus acta legitima poenitentia placuit eam communionem reconciliari. Si alium duxerit relicto illo, nec in fine dandam ei esse communionem, vel si fuerit ille fidelis, quem accepit, communionem non accipiat, nisi post decem annos acta legitima poenitentia, nisi infirmitas coegerit, velocius dare communionem»[27].

Would it then make sense that Nicaea asked the rigorists to admit widows to the ecclesial communion, when they had only been deprived of the Eucharist communion? It would certainly be too risky to say that the fathers of Elvira were Novatianist, but they do share part of the spirit, probably because they suffer the common issue of the *lapsi*, which is very relevant in the neighbouring and influential Carthage, both for the apostates and *libellatici*, for example, of Basilides and Martial[28], and the later problems of Donatus[29], without forgetting that they were not strangers to the issue of adulterers[30]. If they share with them aspects as relevant as those concerning virginity, and sexual disorders are punished so rigorously by the conciliar fathers of Elvira, it would not be possible not to persecute in the same way the remarriages of widows if they were such a reprehensible action as to deserve total excommunication, which, however, is not the case.

The same council also refers to the situation of the double bond, specifically in c. 9, where we can read: *"Item fidelis femina, quae adulterum maritum reliquerit fidelem et alterum ducit, prohibeatur ne ducat. Si autem duxerit, non prius accipiat communionem, quam is, quem relinquit, de saeculo exierit, nisi forte necessitas infirmitatis dare compulerit"*[31]. Here, the innocent spouse who remarried is excluded from Eucharistic communion until the first spouse dies (canon 8, which we will see later, excluded her from the ecclesial communion if there was no cause) but, as far as the penalty imposed is concerned, there is an exception to the general rule: although while the former spouse lives it is not possible to admit to the communion the woman who remarried, there is an occasion – which can be broadly interpreted – in which she can be admitted, which implies that she had been excluded only from the Eucharistic communion, and not from the ecclesial communion[32]. It does

[23] The discussion opened by Meigne (Cf. Meigne, Maurice, *Concile ou collection d'Elvire?*, in *Revue d'Histoire Ecclésiastique,* 70 (1975), pp. 361-387 made some believe that it was a simple collection of canons, perhaps the oldest, but not from a specific council (Cf. Ramos-Lissón, Domingo, *En torno a la autenticidad de algunos cánones del Concilio de Elvira*, in *Scripta Theologica* 11 (1979), pp.181-186; Suberbiola Martínez, Jesús, *Nuevos Concilios Hispano-Romanos de los siglos III y IV. La Colección de Elvira,* (Málaga, 1987), opinion refuted by Sotomayor, Ubiña and Berdugo (Cf. Sotomayor Muro, Manuel, *Cristianismo primitivo y paganismo romano en Hispania*, in *Memorias de Historia Antigua* 5 (1981), p. 178; Fernández Ubiña, José, *Los orígenes del cristianismo hispano: algunas claves sociológicas*, in *Hispania Sacra* 59/2 (2007), p. 434; Berdugo Villena, Teresa, *Fernando de Mendoza "De confirmando concilio iliberritano". Libro 1. Edición, traducción y notas*, (Granada, 2005) These authors advocate the unity of the canons (Cf. Sotomayor Muro, Manuel y Fernández Ubiña, José (coords.), *El concilio de Elvira y su tiempo*, (Granada, 2005), while others advocate the division into three differentiated blocks (Cf. Vilella, Josep and Barreda, Pere Enric, *¿Cánones del Concilio de Elvira o cánones pseudoiliberritanos?,* in *Augustinianum* 46 (2006), pp. 285-373. For the current state of the matter, see Lázaro Sánchez, Miguel, *L'état actuel de la recherche sur le concile d'Elvire,* in *Revue des sciences religieuses*, 82/4 (2008), pp. 517-546.

[24] González Rivas, Severino, *Los castigos penitenciales del Concilio de Elvira*, in *Gregorianum* 22/ 2 (1941), pp. 191-214; Menéndez Pelayo, Marcelino, *Historia de los heterodoxos españoles*, Libro I, (Madrid, 1998), p. 96.

[25] Frazee, Charles, *The Origins of Clerical Celibacy in the Western Church,* in *Church History* 57 Supplement Centennial Issue (1988), pp. 108-126.

[26] Remember in this regard the Novatanist works *De spectaculis* o *De bono pudicitiae* (Cf. Blázquez Martínez, José María, *La Iglesia Hispana. Orígenes en Lusitania. La venida de Pablo. Los orígenes del cristianismo en Lusitania*, in *Cuadernos emeritenses* 4 (2008), pp. 61-100.

[27] Concilium Eliberitanum, a. 305?, Mansi, 2, col. 17. Bazquez and Díaz consider proven not only the African origin of the Hispanic Church, but also its origin as the Mother Church (Cf. Blázquez Martínez, José María, *La carta 67 de Cipriano y el origen africano del cristianismo hispano, in Homenaje a Pedro Sainz Rodríguez, volume III: Estudios históricos, (Madrid, 1986), pp. 93-102; Díaz y Díaz, Manuel, En torno a los orígenes del cristianismo hispano*, in *Las raíces de España*, (Madrid 1967), pp. 423 ss. Sotomayor is more reluctant to such evidence (Cf. Sotomayor Muro, Manuel, *Reflexión histórico-arqueológica sobre el supuesto origen africano del cristianismo hispano*, in *II Reunió d'arqueologia paleocristiana hispánica*, (Barcelona, 1982), pp. 11 ff.

[28] cfr. Concilium Africanum II, *In causa Basilidis et Martialis*, in J.D. Mansi [cur.], *Sacrorum Conciliorum nova et amplissima collectio*, I, [rist.] Graz, 1960, coll. 905-906; Caecilii Cyprianii, *Epistula LXVII*, 1, in *CSEL*, vol. III, pars I, coll. 735 ff.

[29] Cfr. Optatus Milevitanus Ep., *De schismate Donatistarum,* I, 16, in *PL* 11, coll. 916 ff.

[30] Caecilii Cyprianii, *Epistula LV*, 21, in *CSEL*, vol. III, pars I, coll. 638-639: Et quidem apud antecessores nostros quidam de episcopis istic in provincia nostra dandam pacem moechis non putaverunt et in totum poenitentiae locum contra adulteria cluserunt. Non tamen a coepiscoporum suorum collegio recesserunt aut catholicae ecclesiae uniatem vel duritiae vel censurae suae obstinatione ruperunt, ut quia apud alios adulteris pax dabatur, qui non dabat de ecclesia separaretur. Manente concordiae vinculo et perseverante catholicae ecclesiae individuo sacramento, actum suum disponit et dirigit unusquisque episcopus rationem propositi sui Domino redditurus

[31] Cfr. Optatus Milevitanus Ep., *De schismate Donatistarum,* I, 16, in *PL* 11, coll. 916 ff.

[32] García Martínez, when referring to this canon, ignores the second part, referring that *"El Concilio de Elvira del año 305, en los cánones 8 y 9, prescribe que las mujeres que dejan a sus maridos sin causa, o por ser adúlteros, y se unen a otros, nec in fine accipiant communionem, a no ser que el marido abandonado haya muerto"*, but remaining silent as to the exception provided for in the canon. (Cf. García Martínez, Gumersindo, *Indisolubilidad del matrimonio rato y consumado entre dos partes bautizadas*, (Madrid, 1964), p. 507.

not refer to the fact that she will be able to receive communion at the end of her life[33], as it does in many occasions[34], but it uses the term "infirmitas" (as it also does it in the canon referring to the widow who does not remarry afterwards), that is, a lack of strength, physical weakness. This term, referring to women, implied inconstancy, pusillanimity[35], and at the same time it was the consequence of the original sin in the soul of the faithful[36]. In this regard, it is possible that both canons show a certain mercy and, accepting the weakness inherent in the feminine character according to the context of that time, before the asymmetry of the situation of the innocent party (either by victim, or by not having previous bond) avoid abandoning her completely to its fate. This practice, with a strong pastoral –not doctrinal– accent, is by no means an exception in the conciliar reality of the time, as we will see later.

The canon, of course, condemns adultery, but it sees the healthy remedy that communion can be in certain cases, which makes its administration almost obligatory on certain occasions (*dare compulerit). Here, it would be necessary to understand better what the fathers understood by lack of firmness, relevant to the point of forcing the admission of the adulteress to the Eucharistic communion. Furthermore, it does not require the abandonment of the new spouse or the restitution of the previous relationship*[37], which will be done on other similar occasions: when it refers to the woman that lives with a husband which is not hers, for example, if her relationships lasts until death, she may not be admitted to communion unless she abandons him and completes a ten-year penance (c. 64)[38]. The same amendment will be requested in c. 47[39], which prescribes that a person who commits adultery many times shall only be accepted into the community *in fine mortis*, but shall be given communion if he or she promises the amendment (*si se promiserit cessaturum*).

As for the type of validity of that second marriage to which the canon refers (*"si autem duxerit"), we cannot ignore the fact that Elvira legislates for a Roman context, in which repudiation was not strange*[40]. At the same time, the constant difference between the guilty and the not guilty party (and of the condition of faithful or catechumen of the subject) could be interpreted as the lawfulness of a remarriage (only for the innocent party, c. 8), thus punishing the expectation of marriage of the guilty party, which was not strange in the legislation of that time[41]. This new bond, perhaps more concubinary than matrimonial, could be

[33] It is very famous the discussion between Sotomayor and Vilella on how to translate this expression in the council of Elvira, but, of course, we will not take part in it, since, for our purpose, whether *ad literam* translation is used or not, the vital moment to which it is referred is the same, and it has nothing to do with the *infirmitas.* See in this regard Vilella, Josep and Barreda, Pere Enric, *¿Cánones del Concilio de Elvira o cánones pseudoiliberritanos?*, in *Augustinianum* 46 (2006), pp. 285-373 and the subsequent response. Sotomayor Muro, Manuel and Berdugo Villena, Teresa, *Traducción de las Actas del Concilio de Elvira. Una respuesta a J. Vilella y P. E. Barreda,* in *Florentia iliberritana. Revista de estudios de antigüedad clásica* 19 (2008), pp. 383-418, although everything starts from the publication of Sotomayor Muro, Manuel.and Fernández Ubiña, José (coords.), *El concilio de Elvira y su tiempo*, Granada, 2005 criticising the study of Vilella, Josep and Barreda, Pere Enric, *Los cánones de la Hispana atribuidos a un concilio iliberritano: estudio filológico*, in *I concili della cristianita occidentale. Secoli lll-V. XXX. Incontro di studiosi dell'antichita cristiana*, Roma, 3-5 maggio 2001 [*Studia Ephemeridis Augustinianum* 78], (Roma, 2002), pp. 545-579.

[34] c. 17: *[…] placuit nec in finem eis dandam esse communionem*; c. 10: *Placuit in finem huiusmodi dare communionem*; c. 13: *Placuit eas in finem communionem accipere debere*, etc. The expression *nec in finem*, for example, appears 22 times, as Sotomayor indicates (Cf. Sotomayor Muro, Manuel and Berdugo Villena, Teresa, *Traducción de las Actas del Concilio de Elvira. Una respuesta a J. Vilella y P. E. Barreda* in *Florentia iliberritana. Revista de estudios de antigüedad clásica* 19 (2008), p. 387, note 12.

[35] Castelli, Elizabeth, *Virginity and itsmeaning for Women's Sexuality in Early Christianity*, in *Journal of Feminist Studies in Religion* 2 (1986), pp. 61-68; Gardner, Jane, *Women in Roman Law and Society*, (Londres, 1986), pp. 14-22; Pastor De Arozena, Bárbara, *Retórica imperial: el rapto en la legislación de Constantino,* in Faventia 20/1 (1998), p. 77.

[36] . Claes, Martin y Dupont, Anthony, *Augustine's sermons and disability*, in *Disability in antiquity*, Laes, Christian (ed.), p. 335.

[37] The Carthaginian synod of 407, taking up the provisions of Mileve only a few years before, said: "Placuit ut, secundum Evangelium et Apostolicam disciplinam, neque dimissus ab uxore neque dimissa a manto alteri coniungatur sed ita maneant ut sibimet reconcilientur. Quodsi contempserint, ad poenitentiam redigantur. In qua causa legem imperialem petendum est promulgari" (Cf. Concilium Milevitanum II, c. 17, in *Sacrosanta concilia ad regiam editionem exacta Philip. Labbei et Gab. Cossartii*, 2, Paris 1671, col. 1541 (hereinafter, Labbe); Codex Canonum ecclesiae africanae, can. 102, in *Id.,* col. 1117 (also in Registri Ecclesiae Carthaginensis excerta, can. 102, in Munier, Carlo CCL 149, p. 218; Harduinus, *Acta Conciliorum et Epistolae Decretales ac Constitutiones SS. Pontificum*, I, Parisiis, 1715, col. 923, etc.). García Martínez again avoids to refer to the last part of the canon (Cf. García Martínez, Gumersindo, cit. (n.33), p. 507). Logically, reconciliation is first and foremost encouraged, asking both of the parties not to remarry. But, again, we find how the synod fathers foresee the event, probably not strange, that it is impossible to restore the common life which, on other occasion, will even become expressly forbidden.

[38] Concilium Eliberitanum, in Mansi, 2, col. 13.

[39] Ibid.

[40] Tejada Y Ramiro, Juan, *Colección de cánones y de todos los concilios de la iglesia de España y de América (en latín y castellano)*, Madrid 1850, 2, p. 45. It was certainly not unusual for the Jewish context either, but Christianity had abandoned the Hebrew context long time ago, with the rupture between the Christian and Jewish communities after the Jewish-Pharisee Council of Jamnia of the year 70, which formally expelled the Christian communities and excluded them from the synagogues, opening the way to the consolidation of the Pauline ecclesial model (Cf. Duchesse, Louis *Early History of Christian Church. From its Foundations to the End of the Fifth Century* (English version of the original French) 3 vols. 1909-1924, red. 1957-1960.

[41] Tejada Y Ramiro, Juan, cit. (n. 41), p. 44. It is true that in the Council of Granges this possibility is totally rejected: *si qua mulier virum proprium relinquens, decedere voluerit nuptias execrans, anathema sit* (Cf. Concilium Gangrense, can. 14, in *Labbe* 2, col. 422) but the issue of the date makes it difficult to use it to clarify the meaning of the canon under study. Sozomen places it before a council held in Antioch in 341; while Socrates Scholasticus places it after the Council of Constantinople in 360. The doctrine, in turn, is not unanimous either: Hefele prefers the second one, Laniado the 343 and Barnes, the last to study it in depth, proposes the 355 (Cf. von Hefele, Karl Joseph, *Concile de Gangres*, in *Histoire des Conciles* I, pars secunda, Paris 1907, pp. 1029-1041; Laniado, Avshalom, *Note sur la datation conservée en syriaque du Concile de Gangres*, in *Pontificium institutum orientalium studiorum* 61/ 1 (1995), pp. 195-199; Barnes, Timothy, *The date of the council of Gangra*, in *Journal of Theological Studies* 40 (1989), pp. 121-124. Moreover, the fact that it took place in Paphlagonia makes even more evident the division existing between the conciliar opinion of East and West or, at least, in the area of the Gaul.

linked to the c. 17 of the Council of Toledo (year 400), which we will see later, and which allows to choose wife or concubine, according to suitability.

At the same time, canon 10 of the other council closer in time to the Council of Nicaea, that of Arles (year 314), may also be illustrative, perhaps the most similar in context both from the internal and external point of view of the Church. When the absolution of Cecilianus and the condemnation of Donatus were contested, because of the scarce number of judges who participated in his decision[42], Constantine decided to convoke a Council in which more bishops would participate, and the emperor justifies this in his letter to Cresto, bishop of Syracuse[43]: since the Donatists did not intend to accept the sentence of the Roman trial by *voluntaria assensione*, he proposes a new meeting that is almost universal, to which the Pope will send his legates[44]. The Council of Arles shares with the Council of Nicaea the circumstances, the convocation and the issue of the *lapsi.* It would not be surprising, therefore, that, with regard to questions relating to marriage, it also shared its stance.

The aforementioned canon 10 granted the possibility of remarriage in the event that the innocent husband was young. This attitude of understanding is justified by the need to prevent impulses from leading them to sin, although they should be advised not to do so where possible:

«*de his qui conjuges suas in adulterio depraehendunt, et idem sunt adulescentes fideles et prohibentur nubere, placuit ut, quantum possit, consilium eis detur ne alias uxores viventibus uxoribus suis, licet adulteris, accipiant*»[45].

Given the surprising content of the canon, the intention has been to reconstruct the text (by adding particles to it, or even by suggesting that, in reality, the holy fathers could have received a corrupted version of Matthew's famous passage)[46]. Recently, it has been specified that the meaning of the canon does not consist in fixing a doctrinal or a disciplinary principle, but it simply consists in giving pastoral advice hoping that, although the recipients do not comply with the advice, they avoid a life that is completely dedicated to sin[47]. However, the truth is that, in order to avoid the canonical penance (and the definitive expulsion in case of relapse), they are not expelled from the ecclesial communion. We should keep in mind that it is not a simple local council which has little impact, but it is one of those that the fathers will call the first ecumenical council, and that will share the circumstances, the summons and the doctrine with the one of Nicaea. It would make no sense for it to be a pastoral council, given the context in which it was convened[48].

Nevertheless, the more incisive text regarding the canonical interpretation of the word is, without any doubt, canon 19 of the Synod of Ancyra of 314, given the geographic and cultural closeness between this city and Nicaea (less than 300 kilometres) and the reduced temporal separation between the two ecclesial gatherings. Furthermore, the disciplinary nature of the Council, which basically regulates penitential and matrimonial aspects, gives more reliability to the possible use as a key to interpret the canon of Nicaea. The text of the canon of Ancyra states the following:

«*Quotquot virginitatem pollicitam prćvaricati sunt, professione, inter digamos, id est, qui ad secundas nuptias transierunt, haberi debebunt*»[49].

The canon treats those who broke their promise of virginity (made to the Heavenly Spouse, therefore the promise has an indisputable nuptial nature) in the same way it treats the bigamists. Therefore, it would not make much sense to describe them, here, as widowers, because the Spouse can't die; the most rational interpretation would consist in considering them like those who remarried – as explained by the canon itself (*qui ad secundas nuptias transierunt*) – while their first matrimonial bond was still existent.

Given the canonical use of the term, and given that the immediately previous conciliar literature (and directly related with the problem of rigorism) does not expel the widow from the ecclesial community, and it occasionally allows the innocent spouse to remarry, we might even think that *δίγαμος* refers to all those whose unions could be considered as adulterous, whether because they remarried while the previous spouse was still alive or because they were widowers.

In any case, it is clear that this term has been discussed a lot[50]: If *δίγαμος* is applied to the person who remarries, in case of widowhood or adultery, the semantic richness of the word doesn't allow to use it with only one meaning, but rather with the meaning that was attributed to it in each moment. Furthermore, as we have seen, widowhood is also considered adultery in certain eras by certain ecclesiastical voices, so we can't draw any conclusion with absolute certainty. We should not forget that the oriental Church has preserved the practice of allowing, in certain occasions, to remarry, based on the possible interpretation of both Matthew's text and of this conciliar canon[51]. The imperial legislation will have an influence, and it

[42] Optatus Milevitanus Ep., *De schismate Donatistarum,* I, 24, in *PL 11*, col. 932A-933A.

[43] "*[…] prolatae jam sententiae acquiescere nolentes, asserentesque paucos admodum episcopos sententiam tulisse…Idcirco mihi sedulo providendum fuit, ut haec quae post depromptum judicium voluntaria assensione jam finita esse debuerant, nunc tandem multorum interventu finem possint accipere…*" (Cf. Eusebius Cæsariensis Ep., *Historia Ecclesiastica*, X, 5, *Epistola Costanini imperatoris Chresto Syracusorum*, in *P. G. XX*, col. 890A-B).

[44] Two priests 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 Domenico Mansi, 2, col. 476B.

[45] Concilium Arelatense I (a. 314) in Mansi, 2, col. 472. Regardless of the textual problems, with the possibility to insert or not *non before probentur, the truth is that the meaning of the canon is the same (Cf. Pelland, Gilles, cit. (n. 7) pp. 133 ff).*

[46] Ibid.

[47] This is the explanation given by Pelland and Couzel, and that will be shared, among others, by Saint Augustine.

[48] Fernández Ubiña, José, *Osio de Córdoba, el Imperio y la Iglesia del siglo IV*, in *Gerion* 18 (2000), pp. 439-473, p. 451.

[49] Concilium Ancyranum, in Mansi 2, col. 533

[50] As it shows in the existence of two confronted "schools", the one of the mentioned Cereti, (n. 9) and Crouzel and Nautin (n. 10).

[51] Glinka, Luis., *Indisolubilidad y divorcio en las Iglesias Ortodoxas: una contribución al diálogo ecuménico* in *Teología: revista de la Facultad de Teología de la Pontificia Universidad Católica Argentina* 51 (1988), 59-70, p. 61

is also true that the canons of this council were declared as in force by the emperor who convened it.

2.2 The δίγαμος in the conciliar literature of the time

However, the doctrine of the great Ecumenical Councils must be read in the light of the local councils, which will allow us to see how those who were in an irregular situation were treated[52]. Canon 8 of the mentioned *Council of Elvira refers to the excommunication for those women who are divorced for no cause and who unite with another man: Item feminae, quae nulla praecedente causa reliquerint viros suos et alteris se copulaverint, nec in finem accipiant communionem*[53].

Nevertheless, the term used (*copulaverint) is not a minor point: it refers to the union (copula) and not to marriage (ducere) when there is no cause, that is, when she is not the victim (nulla praecedente causa), which could be interpreted as the permission given to the one who is actually innocent. In the following canon, which we have just seen, the term ducere is used.*

Canon 10, when it refers to the abandoned wives of the catechumens, treats again in a different way those who consciously get married with an adulterer and those who ignored that situation: «*Si ea quam catechumenus relinquit duxerit maritum, potest ad fontem lavacri admitir; hoc et crica foeminas catechumenas erit observandum. Quod si fuerit fidelis quae ducitur ab eo qui uxorem inculpatam relinquit, et quum scierit illum habere uxorem, quam sine causa reliquit, placuit in finem hujusmodi dari communionem*»[54].

This new type of union would leave the new spouses in a situation (inside the community), that is, similar to the one contracted by the Christian and the non-Christian party: at first, in order to validly get married, conversion was requested, and they even regulated the temporary separation of the women who contracted that kind of marriage from the communion (c. 11, Synod of Arles)[55]. Nevertheless, in African territory, due to the great quantity of non-Christians, at first, and of people coming from different heresies, later, the Third Council of Carthage only prohibited those unions if they involved the offspring of bishops and presbyters (c. 12)[56], a resolution that was re-affirmed in Chalcedon (c. 14)[57]. In turn, not a long time after, the emperors Valentinian and Valens prohibited the marriage between any non-Christian or foreigner and the women of the province[58]. Although the marriage between a Christian and a non-Christian was perpetually prohibited on various occasions (the above-mentioned canon of Arles, canons 10[59] and 31[60] of Laodicea, canon 14 of the Third Council of Toledo[61], canon 19 of the Second Council of Orléans[62] and canon 24[63] of the Fourth Council of Orléans), in all these instances it is clear that the marriage is illicit and unfair, but it is still valid, probably in line with the classic attitude of Donatist Africa to which we referred before (for the social and religious context of the moment), which even led to the prohibition of the baptism for those who, before the conversion, had repudiated their wives, since the conversion did not dissolve the marriage bond[64].

Canon 72[65] of the Trullan Council gives the possibility to continue the cohabitation of a marriage of non-Christian when the conversion of one of them takes place, if they both want to continue with the union, and c. 16 of Elvira[66], when refer-

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[52] Cf. Rodríguez Díez, José, *Indisolubilidad y divorcio del matrimonio cristiano y canónico: ¿indisolubilidad extrínseca relativa de futuro?, in Anuario jurídico y económico escurialense 39 (2006), pp. 171-214.*

[53] Cf. *Concilios visigóticos e hispano-romanos, Vives, José,* Marín Martínez, Tomás and Martínez Díez, Gonzalo (eds.) (Barcelona-Madrid, 1963), pp. 19-33. In turn, Concilium Eliberitanum, a. 305?, Mansi, 2, col. 7.

[54] Concilium Eliberitanum, a. 305?, Domenico Mansi, 2, col. 7.

[55] "*De puellis fidelibus quae gentilibus junguntur, placuit ut aliquanto tempore a communione separentur*", Concilium arelatense I, c. 11, in Mansi 2, col. 472 D.

[56] "*Item placuit, ut filii vel filiae episcoporum, vel quorumlibet clericorum, gentibus, vel haereticis aut schismaticis matrimonio non jungantur*", Concilium Carthaginense III, c. 12, in Mansi, 3, col. 882.

[57] "*Quoniam in quibusdam provinciis concessum est lectoribus et psalmistis uxores ducere, statuit sancta synodus, non licere cuiquam ex his accipere sectae alterius uxorem…*" Concilium Chalcedonense, c. 14, *Acta conciliorum et epistolae decretales, ac constitutiones summorum pontificum*, Cossart, Gabriel. et al. (curr), (Parisiis, 1714), 2, p. 607.

[58] I. unic. De nuptiis gentil. C. Theod. which is already directly related to the ancient Roman laws that wanted to grant the purity of blood (Ulpiano, fragment., tit. 3, c. 5; Caio, Instit. Tit. 4). Nevertheless, it should be noted that, even if it can be interpreted differently, the norm doesn't directly concern the Christians but the Romans, who hold the *ius connubii*.

[59] "*Non oportere eos qui sunt ecclesiae indiscriminatim suos filios haereticis matrimonio conjungere*", Concilium Laodicenum, sub Silvestro, c. 10, in Mansi, 2, col. 565.

[60] *Quod non oportet cum omni haeretico matrimonium contrahere, vel dare filios aut filias: sed magis accipre, si se Christianos futuros profiteantur*, Concilium Laodicenum, sub Silvestro, c. 21, in Mansi, 2, col. 569.

[61] "*Suggerente concilio, id gloriosissimus dominus noster canonibus inferendum praecipit, ut Judaeis non liceat Christianas habere uxores vel concubinas…*", Concilium toletanum III, c. XIV, in Mansi, 9, col. 996.

[62] "*Placuit ut nullus Christianus Judaeam, neque Judaeus Christianam in matrimonio ducat uxorem, quia inter hujusmodi personas illicita nuptias esse censemus. Qui si comminiti a consortio hoc se separare distulerint, a communionis gratia sunt sine dubio submovendi*", Concilium Aurelianense II, c. XIX, in *Sanctorum Conciliiorum nova et amplissima Collectio*, in Mansi, 8. col. 838.

[63] "*Quaecumque manciapia sub specie conjugii ad ecclesiae septa confugerint, ut per hoc credant posse fieri conjugium, minim eis licentia tribuatur, nec talis conjunctio a clericis defensetur: quia probatum est, ut sine legitima traditione conjuncti, pro religione ordine, statuto tempore ab ecclesiae comminione suspendatur ne in sacris loci turpi concubitu misceantur*", Concilium Aurelianense IV, c. 24, in *Sanctorum Conciliiorum nova et amplissima Collectio*, Domenico Mansi, 9, col. 117.

[64] Tejada Y Ramiro, Juan, cit. (n. 41), p. 45.

[65] "*Non licere virum orthodoxum cum muliere haeretica conjugi, neque vero orthodoxam cum viro haeretico copulari…Si autem aliqui qui adhuc sunt infideles, et in orthodoxorum gregem nondum relati sunt, sunt inter se legitimo matrimono conjuncti: deinde hic quidem eo quod est honestum electo, ad lucem veritatis accurrerit…fideli vero homini placeat cum infideli cohabitare, vel e contra, se invicem separentur…*" Concilium in Trullo Palatii Imperatorii, c. LXXII, in *Acta conciliorum et epistolae decretales, ac constitutiones summorum pontificum*, Cossart, G. et al. (curr), (Parisiis, 1714), 3, p. 1687.

[66] "*Haeretici si se transferre noluerint ad ecclesiam catholicam, nec ipsis catholicas dandas esse puellas. Sed neque Judaeis, neque haeretici, dare placuit…Si contra interdictum fecerint parentes, abstineri per quinquennium placet*", Concilium Eliberitanum, a. 305?, Mansi, 2, col. 8.

ring to the prohibition to marry not with the unfaithful but rather with the heretics, the Jews or the schismatic, punishes the parents who give away their daughter to such marriages. The aforementioned canon of the Trullan Council declares as null the marriages between the unfaithful and the Catholics, but the situation of the heretics is different[67]. The marriage is valid and, as a matter of fact, in these cases the solution given by conciliar fathers is the separation, seen more as an effective dissolution of the marriage than as an interruption of the cohabitation[68], declaring the marriage null from the very outset. This evolution, which ends with the enunciation of the impediment of disparity of cult, is similar to the one that will happen with the second marriage, which in this case will end up being an impediment of ligamen.

We should also notice that we are referring to unions that are somehow voluntary and that are intended to be stable, which are different from simply adulterous relationships, which are more related to sexual offenses which were severely punished, especially if they affected those who belonged to a special state of life, such as the widows or the virgins. This is what happens with c. 47 of Elvira, which commands that those who committed adultery multiple times must be accepted in the community only *in fine mortis*, but communion can be given to them if they promise to correct their situation (*si se promiserit cessaturum*)[69]. This benevolent approach, nevertheless, does not impede the fact of trying to avoid the indifferentism and, in case of recidivism, they are completely deprived of it[70]. The same punishment is applied to the adulteress who conceives when the husband is absent and kills the baby (c. 63)[71]. On the contrary, if she only commits adultery one time, the penance lasts five years, unless some circumstance obliges to move forward the readmission (c. 69)[72]. Also those who give to their wives the permission to commit adultery, whether they are clerics (c. 65)[73] or lay persons (c. 70)[74], will be prosecuted.

This disorder can be related with others that the conciliar fathers contemplate and that, although they do not refer expressively to concubinage, do not exclude this possibility. The young woman who married the man with whom she had had sexual relations before marriage was deprived of the Eucharist for one year (c. 14)[75], which demonstrates the very little consideration given to this crime, since no public penance was required (*post annum sine poenitentia*). If the situation was not redressed by marriage, or if it was not a case of premarital relations but of dissolute life (*vel si alios cognoverint viros*), the penance lasted five years. C. 72 established the same penance for the widow who had had sexual relations with a man after becoming a widow, if she regularised the situation by marrying him. But if she married another man, all the chances to receive human forgiveness disappeared and her spouse was excommunicated for ten years, and the penance could not be diminished, not even at the point of death: «*Si qua vidua fuerit moechata et eundem postea habuerit maritum, post quinquennii tempus acta legitima poenitentia placuit eam communionem reconciliari. Si alium duxerit relicto illo, nec in fine dandam ei esse communionem, vel si fuerit ille fidelis, quem accepit, communionem non accipiat, nisi post decem annos acta legitima poenitentia, nisi infirmitas coegerit, velocius dare communionem*»[76].

We can see again that, despite the harshness applied to the dishonest widow (which is typical of the nature of the council), the new spouse can receive the communion, so we can observe a different treatment based on the past life of each of them. Furthermore, we must differentiate the obligation of the public penance and the fact of receiving the communion to which we referred before.

At the same time, the attitude of attention and vigilance, especially for those who are more likely to succumb to sin, is constantly present. For example, we can see even in Gaul, apart from the mentioned canon 10 of Arles, how they avoided to apply public penances that, as we know, could only be applied once. This was taken into consideration when Avitus of Vienne judges Vincomal, who had problems to be faithful to his wife[77]: "*la jerarquía eclesiástica, por su parte, hizo frecuentemente suya esta actitud prudente ante el recurso a la penitencia canónica. En este sentido, los estudios que Cyrille Vogel dedicó a la disciplina penitencial en las iglesias galas de época antigua y alto medieval advierten al historiador de la necesidad de contemplar las penas de excomunión decretadas en las resoluciones conciliares y la penitencia canónica como dos realidades distintas: en la mayoría de supuestos, el pecador excomulgado no se veía*

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[67] San Isidoro de Sevilla, *De haeresi et schismate, Etimologías VI, 19, 51*. (ed.) Oroz Reta, José and Marcos Casquero, Manuel Antonio, (Madrid, 1993) p. 688.

[68] A proof of this can be found in Ley 15, tit. 2°, part. IV, which states: "*desvaramiento de la ley es la sexta cosa que embarga el casamiento. Ca ningún christiano debe casar con judía, nin con Mora, nin con Hereja, non con otra mujer que no toviesse la ley de christianos, et si cassase, non valdrie el casamiento*".

[69] "*Si quia fidelis habens uxorem, non semel, sed saepe moechatus, in fine mortis est conveniendus. Quod si se promiserit cessaturum, detur ei communio…*", Concilium Eliberitanum, a. 305?, Domenico Mansi, 2, col. 13.

[70] This persecution of indifferentism is not unusual, as we'll see, for example, in the Council of Angers: "*hi quoque qui alienis uxoribus, superstitibus ipsorum maritis nomine conjugii abutuntur, a communione habeantur extranei*" (Cf. Concilium Andegavense, c. 6, in Labbe IV, col. 1021).

[71] "*Si qua mujer per adulterium, absente marito, concepit, idque post facinus occiderit, placuit neque in finem dandam esse communionem, eo quod germinaverit scelus*", Concilium Eliberitanum, a. 305?, Domenico Mansi, 2, col. 16.

[72] "*Si quis forte habens uxorem fuerit lapsus, placuit eum quinquennium agere de ea re poenitentiam, et sic reconciliari; nisi necessitas infirmitatis cogerit ante tempus dare communionem. Hoc et circa foeminas observandus*", Concilium Eliberitanum, a. 305 Domenico Mansi, 2, col. 17.

[73] Ibid, p. 16.

[74] Ibid, p. 17.

[75] Ibid, p. 8.

[76] Concilium Eliberitanum, a. 305?, Domenico Mansi, 2, p. 17.

[77] Wood, Ian, *Letters and Letter-Collections from Antiquity to the Early Middle Ages: The Prose Works of Avitus of Vienne, in The Culture of Christendom, (London, 1993), pp. 29-43; Shanzer, Danuta y Wood, Ian, Avitus of Vienne: Selected Letters and Prose Translated Text for Historians* 38 (Liverpool, 2002), pp. 285-286; Vilella, Josep, *El canon 3 del Concilio de Orange (441), el Ad Ecclesiam de Salviano de Marsella y los debates en torno a la penitencia in extremis en la Galia de mediados del siglo V, in Revue d'etudes augustiniennes et patrsitiques 58 (2012) pp. 287-319.*

obligado a asumir la penitencia canónica para ser restablecido en la comunión" [78].

This attitude of accepting human frailty is not something extraordinary in the case of Avitus: in the *Council of Agde* (506) it became apparent the need to grant canonical penance to the young people, with prudence, in case of having permanently lost any *peccandi occasio* [79].

This explains the tolerance that even Saint Augustine had shown when referring to concubinage [80]:*"[…] De concubina quoque, si professa fuerit nullum se alium cognituram, etiamsi ab illo cui subdita est dimittatur, merito dubitatur utrum ad percipiendum Baptismum non debeat admitti. Quisquis etiam uxorem in adulterio deprehensam dimiserit, et aliam duxerit, non videtur aequandus eis qui excepta causa adulterii dimittunt et ducunt: et in ipsis divinis sententiis ita obscurum est utrum et iste, cui quidem sine dubio adulteram licet dimittere, adulter tamen habeatur si alteram duxerit, ut, quantum existimo, venialiter ibi quisque fallatur. Quamobrem quae manifesta sunt impudicitiae crimina, omni modo a Baplismo prohibehda sunt, nisi mutaticne voluntatis et poenitentia corrigantur; quae autem dubia, omni modo conandum est ne fiant tales conjunctiones. Quid enim opus est in tantum discrimen ambiguitatis caput mittere? Si autem factae fuerint, nescio utrum ii qui fecerint, similiter ad Baptismum non debere videantur admitti."* [81]

The *Council of Toledo* of 400 holds the same stance. It doesn't allow the married man who maintains a concubine to receive the communion, because there must be only one bond: "*Si quis habens uxorem fidelem, si concubinam habeat, non communicet. Ceterum qui non habet uxorem, & pro uxore concubinam habet, a communione non repellatur, tantum ut unius mulieris, aut uxoris, aut concubinae (ut ei placuerit) sit conjunctione contentus; alias vero vivens abjiciatur, donec desinat, & per poenitentiam revertatur."* [82].

The orientation established by the Council of Toledo was preserved throughout years. Saint Isidore of Seville wrote: "*Christiano non dicam plurimas, sed nec duas, simul habere licitum est, nisi unam tantum aut uxorem aut certe loco uxoris concubinam"* [83], a passage that, together with the provisions of the Council of Toledo, was included in Gratian's decree, which furthermore defined who had the status of concubine: "*Concubina autem hic ea intelligitur, quae cessantibus legalibus instrumentis unita est, et coniugali affectu ascistur; hanc coniugem facit affectus, concubinam vero lex nominat"* [84]. This expression could be useful to illustrate the spirit with which the Church interpreted the situation: maybe the laws, or the social and economic circumstances, do not allow her to occupy, in society, the position that she already occupies in her husband's mind.

In case the union had been formalised, there are also attempts to understand the situation in order to, again, and most importantly, try to avoid the sin of the innocent party. This is the case of the *council of Vannes*, of 461, that, in its canon 2, pointed out that the new union was lawful if the adultery of the spouse had been demonstrated ("*Eos quoque, qui relicti uxoribus suis, sicut in evangelio dicitur, excepta causa fornicationis, sine adulterii probatione alias duxerint, statuimus a communione similiter arcendos: ne per indulgentiam nostram praetermissa peccata alios ad licentiam erroris invitent*") [85], and the same thing was done some years after by the *council of Agde* (506), in canon 15: "*Poenitentes, tempore quo poenitentiam petunt, impositionem manuum & cilicium super caput a sacerdote, sicut ubique constitutum est, consequantur. Si autem comas non deposuerint, aut vestimenta non mutaverint, abjiciantur; et nisi digne poenituerint, non recipiantur. Juvenibus etiam poenitentia non facile committenda est ptopter aetatis fragilitatem. Viaticum tamen omnibus in morte positis non negandum."* [86].

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[78] Vilella, Josep., *El canon 3 del Concilio de Orange (441), el Ad Ecclesiam de Salviano de Marsella y los debates en torno a la penitencia in extremis en la Galia de mediados del siglo V, in Revue d'etudes augustiniennes et patrsitiques 58 (2012) pp. 287-319: "Avito optó por esta línea contemporizadora tras percibir en Vincomal cierta proclividad a los pecados de la carne (iuuenis uitiis, senex annis), que amenazaban con condenar definitivamente a su alma si se le obligaba a someterse a la no reiterable penitencia canónica (Epist. 18, p. 49,1. 28.)"*

[79] Cf. Ibid: Conc. Agath. (506), c. 15, ed. Ch. Munier, CCSL 148, Turnhout, 1963, pp. 192-228, p. 201: "iuuenibus etiam paenitentia non facile committenda est propter aetatis fragilitatem"; cf. in this same sense Conc. Avrel. (538), c. 27, ed. C. de Clercq, CCSL 148A, Turnhout, 1963, pp. 114-130, p. 124: "de paenetentum conuersione. Vt ne quis benedictionem paenetentiae iuuenibus persunis credere praesumat; certe coniugatis nisi ex consensu parcium et aetate iam plena eam dare non audeat."

[80] De bono conjugali - C5.5.: "*Solet etiam quaeri, cum masculus et femina, nec ille maritus nec illa uxor alterius, sibimet non filiorum procreandorum, sed propter incontinentiam solius concubitus causa copulantur ea fide media, ut nec ille cum altera nec illa cum altero id faciat, utrum nuptiae sint vocandae. Et potest quidem fortasse non absurde hoc appellari connubium, si usque ad mortem alteriuse eorum id inter eos placuerit et prolis generationem, quamvis non ea causa coniuncti sint, non tamen vitaverint, ut vel nolint sibi nasci filios, vel etiam opere aliquo malo agant, ne nascantur. Ceterum si vel utrumque vel unum horum desit, non invenio, quemadmodum has nuptias appellare possimus. Etenim si aliquam sibivir ad tempus adhibuerit, donec aliam dignam vel honoribus vel facultatibus suis inveniat, quam comparem ducat, ipso animo adulter est, nec cum illa, quam cupit invenire, sed cum ista, cum qua sic cubat, ut cum ea non habeat maritale consortium. Unde et ipsa hoc sciens ac volens impudice utique miscetur ei, cumquo non habet foedus uxorium. Verumtamen si ei tori fidem servet et, cum ille uxorem duxerit, nubere ipsa non cogitet atque a tali prorsus opere continere se praeparet, adulteram quidem fortassis facile appellare non audeam; non peccare tamen quis dixerit, cum eam viro, cuius uxor non est, misceri sciat? Iam vero si ex illo concubitu, quantum ad ipsam attinet, nonnisi filios velit et, quidquid ultra causam procreandi patitur, invita patiatur, multis quidem ista matronis anteponenda est, quae tametsi non sunt adulterae, viros tamen suos plerumque etiam continere cupientes ad reddendum carnale debitum cogunt non desiderio prolis, sed ardore concupiscentiae ipso suo iure intemperanter utentes, in quarum tamen nuptiis bonum est hoc ipsum, quod nuptae sunt. Ad hoc enim nuptae sunt, ut illa concupiscentia redacta ad legitimum vinculum non deformis et dissoluta fluitaret, habens de se ipsa irrefrenabilem carnis infirmitatem, de nuptiis autem indissolubilem fidei societatem, de se ipsa progressum immoderate coeundi, de nuptiis modum caste procreandi. Etsi enim turpe est libidinose uti vellef marito, honestum est tamen nolle misceri nisi marito et non parere nisi de marito."*

[81] S. Aurelii Augustini hipponensis ep., *De fide et operibus, I, c. XIX, n. 34, in PL 40, col. 221.*

[82] Concilium toletanum I (a. 400), c. 17, in Mansi, 3, col. 1001B-C.

[83] Isidorus, De distantia Novi et Veteris Testamenti, Dist. XXXIV, cap. 5; Alphonsi Tostati, Hispani Episcopi Abulensis, Philosophi, Theologi, Ac Pontificii Juris, Caesareique Consultissimi, Necnon Lingua: Graecae, & Hebraicas Peritissimi, Commentaria In Primam Partem, I. Regum, t. 11, Venetiis MDCCXXVIII, cap. VIII, q.CCIX, p. 238.

[84] Decretum Gratiani, II, Distintio XXXIV, c. 3 Pallea, in PL 187, 0188A: "*Concubina autem hic ea intelligitur, quae cessantibus legalibus instrumentis unita est, et coniugali affectu adscitur; hanc coniugem facit affectus, concubinam vero lex nominat. De hac dicitur in concilio Toletano I, c. 17".*

[85] Concilium Veneticum, c.2, in Mansi 7, col. 953C

[86] Concilium Agathense (a. 506), in Mansi, 8, col. 327B-C

This type of canons, far from being considered pro-divorce, must show us the understanding attitude that the conciliar fathers show in certain occasions, aware of the social circumstances that surround these cases. The concept of matrimonial nullity was still developing, and the Church answered to the cases which were submitted to her by applying the principles of justice and mercy[87].

3. The canonical Exceptions of the following epoch (6th-9th century)

3.1 The local Councils

Although the general attitude of the era is contrary to these situations, and to the fact of accepting new unions, what is true is that, as we have seen, the use of the canonical penance, which requested a hard and humiliating conversion and that, furthermore, in case of relapse, definitively closed the doors of the Church for them (and they were likely to relapse if they had formed new families), was progressively reduced by some later councils, by developing a list of causes why the new unions were allowed. We cannot (and should not) refer to them as causes of divorce, but rather as situations that must have been pretty common, and therefore needed a concrete response by the authority in order to grant the peace (the social and the spiritual one) of the community.

The Third Council of Orleáns, in canon 24, followed the same line mentioned before: "*Ut ne quis benedictionem poenitentiae juvenibus personis credere praesumat: certe conjugatis, nisi ex consensu partium & aetate jam plena, eam dare non audeat*"[88].

Theodore of Canterbury[89] will reflect this in canon 10 of the *Council of Hereford* of 673: "*Pro conjugiis, ut nulli liceat nisi legitimum habere connubium. Nulla incestum faciat, nullus conjugem propriam, nisi ut Sanctum evangelium docet, fornicationis causa, relinquat. Quod si quisquam propriam expulerit conjugem legitimo sibi matrimonio conjunctam, si Christianus recte esse voluerit, nulli alteri copuletur; sed ita permaneat, aut propriae reconcilietur conjugi*"[90].

Some of these canons were included in other works, like the *Iudicium Clementis*, ascribed to Willibrord that, for example, in case of captivity of one of the spouses, said: *Si cuius uxorem ostes rapuerint et non potuerint eripere eam, post annum integrum licet ei aliam ducere, et si potea redierit, licet eam alio viro ducere* (c 19)[91].

In the council of Verberie, in 752[92], a new list of reasons for which the new unions were authorised was made: the incest of the husband with his own daughter (*Si quis filiastrum vel filiastram suam ante episcopum tenuerit ad confirmationem, separetur ab uxore sua, & numquam aliam accipiat*, c.2) or of the wife with the son or the stepson (*Si quis cum matre & filiam fornicatus est, ignorante matre de filia, & filia de matre: ille numquam accipit uxorem: illae, vero, si voluerint, accipiant maritos. Si autem hoc scierint ipsae feminae, absque maritis perpetuo maneant, c. 10*) and, lastly, in case the husband had to change his residence because of his job and the wife, since it is possible, refuses it (*Si homo fornicatus fuerit cum muliere, & frater ejus nesciens eadem duxerit uxorem; frater eo quod fratri crimen celaverit, septem annos poeniteat; & post poenitentiam nubat. Muliere autem usque ad mortem poeniteat, et sine spe conjugii maneat*, c. 18)[93].

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[87] We must remember the attitude recommended by Saint Cyril of Alexandria, who in the Christian East evolved in the defence of monogamous marriage, according to the evangelical mandate, but since his interpretation of Mt 19,9 he has taken an attitude of mercy, using the "oiconomia" to grant divorce to those marriages destroyed with guilt or for special reasons (Cf. Glinka, Luis., *Indisolubilidad y divorcio en las Iglesias Ortodoxas, una contribución al diálogo ecuménico, in Teología: revista de la Facultad de Teología de la Pontificia Universidad Católica Argentina 51 (1988), pp. 59-70, p. 61; MAI A., Scriptorum veterum nova collectif), (Roma, 1938), 269 ss; Mansi 2, 997-1010.*

[88] Concilium Aurelianense III (the third one according to Migne's numbering) Conc. Di Orléans (a. 538), c. 24, in Mansi, 9, col. 18C.

[89] Cf. Kelly, William, *Pope Gregory II on divorce and remarriage: a canonical-historical investigation of the letter Desiderabilem mihi, with special reference to the response Quod proposuisti, (Roma, 1976), p. 98*

[90] Concilium Herufordense (Conc. di Hereford, a. 673), c. 10, in Mansi, 11, col. 130B-C

[91] *Judicium Clementis, ei Councils and Ecclesiastical Documents relating to Great Britain and Ireland, Haddan, Arthur West y Stubbs, William. 3, Oxford 1871, p. 226-227.*

[92] Concilium Vermeriense (Conc. di Verberie, a. 752), Canones Concilii Vermeriensibus a Gratiano, aliisque adscipti, in Mansi, 12, p. 566B-C y 567A

[93] Concilium Vermeriense (Conc. di Verberie, a. 752), Canones Concilii Vermeriensibus a Gratiano, aliisque adscipti, in Mansi, 12, p. 566B-C y 567A; Concilium Vermeriense (a. 752), Acta Conciliorum et Epistolae decretales, ac Constitutiones Summorum Pontificum, Hardouin, Jean. (ed.), 3, pp. 1989 ff, can. 2: De eo qui cum uxoris suae filia carnale commercium habuit: "*Si aliquis cum filiastra sua manet, nec matrem, nec filiam ipsius potest habere; nec ille, nec illa aliis se poterunt conjungere ullo umquam tempore. Attamen uxor ejus, si ita voluerit, si se continere non potest, si posteaquam cognovit quod cum filia sua vir ejus fuit in adulterio, carnale commercium cum eo non habet, nisi voluntate abstinet, potest alio nubere." (p. 1990D).*
can. 5: De eo cui mortem uxor cum aliis machinata est: "*Si qua mulier mortem viri sui cum aliis hominibus consiliavit, & ipse vir ipsius homine se defendendo occiderit, & hoc probare potest; ille vir potest ipsam uxorem dimittere, & si voluerit aliam accipiat." (p. 1990E).*
can. 6: De ingenuo qui ancillam duxit pro ingenua, quae servo nupsit pro ingenuo: "*Si quis ingenuus homo ancillam uxorem acceperit pro ingenua, si ipsa femina postea fuerit inservita, si redimi non potest, si ita voluerit, liceat ei aliam accipere. Similiter & mulier ingenua si servum accipiat pro ingenuo, et postea pro qualicumque causa inservitus fuerit, nisi pro inopia fame cogente se vendiderit, & ipsa hoc consenserit, & de pretio viri sui a fame liberata fuerit; si voluerit, potest eum dimittere, &, si se continere non potest, alium ducere. Similiter & de muliere, si se vendiderit, & vir ejus ita consenserit, taliter potest stare, si se separaverint. Poenitentiam tamen amborum necessaria est. Nam qui de pretio paris sui de talis necessitate liberatus fuerit, in tali conjugio debet permanere, & non separari." (1990E-1991A)*
can. 9: De muliere quae virum suum in alio pago sequi non vult: "*Si quis necessitate inevitabili cogente in alium ducatum seu provinciam fugerit, aut seniorem suum cui fidem mentiri non poterat, secutus fuerit; & uxor ejus, cum valet & potest, amore parentum aut rerum suarum, eum sequi noluerit: ipsa omni tempore, quamdiu vir ejus, quem secuta non fuit, vivit, semper innupta permaneat. Nam ille vir ejus, qui necessitate cogente in alium locum fugit, si se abstinere non potest, aliam uxorem cum poenitentia potest accipere." (p. 1991C)*
can. 10: De filio qui cum noverca moechatus est: "*Si filius cum noverca sua uxore patris sui dormierit, nec ille nec illa possunt ad conjugium pervenire. Sed ille vir, si vult, potest aliam uxorem habere: sed melius est abstinere." (p. 1991D)*
can. 11: De eo qui cum privigna vel cum uxoris sorore moechatu: "*Si quis cum filiastra sua dormierit, simili sententia stare potest: & cum sorore uxoris suae, simili modo stare potest." (p. 1991D)*
can. 18: De eo qui cum uxoris suae consobrina moechatur: "*Qui cum consobrina uxoris suae manet, sua careat, & nullam aliam habeat: illa mulier quam habuit, faciat quod vult. Hoc ecclesia non recipit." (p. 1992B)*

Actually, many of these causes might be considered as causes of nullity or even as similar to the process of presumed death, but this would mean to apply current categories to situations that belong to the past. For better or for worse, and in spite of the usual tendency of the councils to separate the adulterers from the communion, the truth is that in some local councils, through the authorisation of the new unions, the access to the sacraments was being authorised as well. The opposite would make no sense.

In fact, soon some causes happened which were impossible to equate to nullity or to presumed death. A sudden illness was also a motive that gave the possibility to remarry[94]: this will happen in the Council of Compičgne, in 757: ""*Si vir leprosus mulierem habeat sanam, si vult ei donare commeatum ut accipiat virum, ipsa foemina, si vult, accipiat. Similiter* & *vir* " (c.16)[95]. In this case, we can't try to associate the possibility to access to marriage (and to communion, for that matter) of the new spouse with a theoretical nullity of marriage, because it is presumed that when the marriage was celebrated, the party was not infected and, therefore, this would not affect the validity of the first marriage. We already know that the illness of leprosy does not affect contemporary society as it did in the past, but this example shows the *exceptional* nature of the cause and the *exceptionalness* with which the Church gave a remedy to those who found themselves in an extremely dramatic situation.

Only a few years later the Roman Council of 825 referred to similar causes[96], although, actually, the disagreement was increasingly strong even in the few councils in which the topic was already discussed, and it was reduced exclusively to the issue of fornication, without even clarifying if in that case the fact of remarrying was allowed. This will happen in canons 41-46 of the council of Tibur (895)[97] or in c. 16 of the Council of Bourges[98].

3.2 Penitential Books

But, in addition to the local and provincial councils (not to discuss again the canon 8 of Nicaea), the Penitential Books also show some exceptions to the general attitude[99]. When religious were sent to the British Isles to evangelise those distant lands, this source arose and, together with secular Law, with a strong Germanic accent, it adopts many of the legal principles of the time, transferring them to a Christian context. Thus, the popular idea of justice in Ireland during this period plays an important role in the formation of a new canonical form, especially in the philosophy of punishment that governs the prescribed penalties for particular sins[100].

And this new source, of course, also shows the attitude we have traced in the conciliar texts. The penitential of Theodore[101], for example, was devoted in detail to the matter of remarriage. If the wife had been unfaithful, the husband could repudiate her and marry another woman, if the unfaithful woman was his first wife. If she did penance for her sins, after five years, the wife could also remarry: "*Si cujus uxor fornicata fuerit, licet dimittere eam et aliam accipere; hoc est, si vir dimiserit uxorem suam propter fornicationem, si prima fuerit, licitum est ut aliam accipiat uxorem, ilia vero, si voluerit penitere peccata sua, post V. annos alium virum accipiat*."

The wife, however, could not repudiate her husband, even if he was an adulterer, unless she intended to embrace the monastic life: "*Mulieri non licet virum dimittere licet sit fornicator, nisi forte pro monasterio. Basilius hoc judicavit*."

The spouses could grant themselves permission to enter the religious life and remarry, if it was their first union –*secundum Grecos*– as long as it had not been a canonical marriage; if, on the contrary, it was their second union, they could not remarry

[94] Lozano, F., *Divorcio y nuevo matrimonio (Estella, 1971), p. 148.*

[95] Concilium Compendiense (Concilio di Compiègne, a. 757), Synopsis Canonum Ecclesiae Latinae: qua Canones Spurii, Epistolae Adulterinae et Decreta Suppositia istius Ecclesiae Conciliorum in Lucem proferuntur, et a Veris ac Genuinis dignoscuntur: quibus accesserunt Annotationibus quaedam Suppletoriae in Synopsin Canonum Ecclesiae Graecae Conciliorum. Nuper editam, Laurence Howell (ed.), (Londini, MDCCX), p. 345: can. 8: "*Siqua uxor cum fratre conjugis sui moechatur, frater vel uxor numquam quo vivunt habeant conjugium. Ille autem, cujus uxor fuit, alteram accipiat." (p. 345)*
can. 10: "*S pater sponsa filii sui oppresserit, & postea filius eam acceperit, pater ejus postea non habeat uxorem, & ipsa foemina non habeat virum, quia non dixit quod pater ejus cum ipsa mansisset: Filius vero ejus qui nesciens fecit, accipiat mulierem legitimam." (p. 345); can. 13: "Siquis conjugem dimiserit, & monasterium aut velari permiserit, vir illius accipiat aliam mulierem legitimam: Similiter & mulier faciat." (p. 345); can. 14: "Si quis cum matre & filia adulterasset, matre nesciente quod cum filia esset, & filia quod cum matre esset; ille vir, si mulierem acceperit, dimittat; & usque in diem mortis uxorem ne habeat. Illa autem mater, & illa filia viros habeant." (p. 345); can. 15: "Qui cum una sorore in adulterio mansit, & alteram in publico accepit usque in diem mortis non habeat mulierem; sed illae duae sorores habeant maritos." (p. 345); Concilium Compendiense, Acta Conciliorum et Epistolae decretales, ac Constitutiones Summorum Pontificum, Hardouin J. (ed.), 3, coll. 2003 ff: can. 8, col. 2005C; can. 10, col. 2005D; can. 13, col. 2005E; can. 14, col. 2006A; can. 15, col. 2006A-B; can. 16, col. 2006B.*

[96] "*Nulli liceat excepta causa fornicationis adhibitam uxorem relinquere, et deinde aliam copulare: alioquin trasgressorem priori convenit sociari conjugio. Sin autem vir et uxor divertere pro sola religiosa inter se consenserint vita, nullatenus sine conscientia episcopi fiat, ut ab eo singulariter praeviso consituantur loco. Nam uxore nolente, aut altero eorum, etiam pro tali re matrimonium non solvatur" Concilium romanum, a. 825, in* Mansi, 14, col. 1009A.

[97] Concilium Triburiense in *Labbe* 9, coll. 461-463.

[98] Concilium Bourgensis, c. 16, in *Labbe* 9, col. 1031: "*Ut qui uxorem fornicationis dimiserit, alteram illa vivente non ducat. Ut illi qui uxores legitimas sine culpa fornicationis dimittunt, alias non accipiant illis viventibus, nec uxores viros, sed sibi sibimet reconcilietur*".

[99] Vogel, Cyrille, *Il peccatore e la penitenza nel Medioevo, (Torino, 1988), p. 155.*

[100] Cfr. Rankin, Travis, *Jurisdiction in the sacrament of penance: a canonical-theological schema*, (Leuven, 2011), pp. 10-11; Belda Iniesta, Javier, *Excommunicamus et Anathematisamus: predicación, confesión e inquisición como respuesta a la herejía medieval* (1184-1233), in *Anuario de derecho canónico* II (2013), p. 120. Thus a particular juridical-sacramental institute is born, the commutation, which will see the light for the cases in which a penitence was impossible whether for reasons of illness, disability, age, etc. The possibility of replacing the expected satisfaction with the payment of an amount of money is foreseen. It was the custom of the place to accept monetary fines instead of sanctions imposed by the secular authorities, and this was received in some of the penitentials as a relaxation of the penance in exchange for the restitution of patrimony, which offers a string of casuistry concerning marriage that deserves to be studied in detail in other work. For the emergence and development, see, among other works, Achille Cesarini, Clara, *Il peccatore e la penitenza nel medievo*, (Leumann, 1988); Vogel, Clara, *Le pécheur et la pénitence au Moyen Age*, (Paris, 1969).

[101] *Poenitentiale Theodori, L. II, c. XII (De Questibus Conjugiorum), in Councils and Ecclesiastical Documents relating to Great Britain and Ireland, Haddan Arthur West-Stubbs, William, III, (Oxford, 1871), pp. 199-201.*

vivente 'viro vel uxore': "Potest tamen alter alteri licentiam dare accedere ad servitutem Dei in monasterium et sibi nubere, si in primo conubio erit, secundum Grecos; et tamen non est canonicum; sin autem in secundo, non licet vivente viro vel uxore. Maritus si se ipsum in furtu aut fornicatione servum facit vel quocunque peccato, mulier si prius non habuit conjugium, habet potestatem post annum alterum accipere virum; digamo non licet.[102]"

If the wife separated from her husband by despising him, and did not want to return to him, after five years, with the consent of the bishop, he could marry another woman: "*Si mulier discesserit a viro suo despiciens eum, nolens revertere et reconciliari viro, post V. annos cum consensu Episcopi aliam accipere licebit uxorem*.[103]"

If the wife had been forcibly taken into captivity, the husband could take another wife after one year, provided that she could not be rescued: "*Si in captivitatem per vim ducta redimi non potest, post annum alteram accipere*." [104]. In the same way, if the woman was reduced to slavery, after 5 years, she could remarry. The same was to be understood in the case of the woman: "*Item si in captivitatem ducta fuerit, vir ejus V. annos expectet; similiter autem et mulier si viro talia contingerint*" [105]. They had to abandon the new spouse when the first spouse was freed: "*Si igitur vir alteram duxerit uxorem, priorem de captivitate reversam recipiat, posteriorem dimittat: similiter autem illa, sicut superius diximus, si viro talia contingerint, faciat* [106]".

If the enemy took the woman, and it was not possible for him to reach her, he could remarry: "*Si cujus uxorem hostis abstulerit, et ipse eam iterum adipisci non potest, licet aliam accipere; melius est sic facere quam fornicationes*" [107]. If the first wife returned again after being remarried, he was not obliged to take her again if he had already taken another one. She herself could take another husband, if she had only had one before: "*Si iterum post haec uxor ilia venerit ad eum, non debet recipi ab eo, si aliam habet; sed illa tollat alium virum sibi, si unum ante habuerat. Eadem sententia stat de servis transmarinis* [108]".

Finally, in case of secret impediments, even if they were already married, if the woman said that her husband could not marry her, and the truth of the accusation was proven, she could marry another man. "*Si vir et mulier conjunxerint se in matrimonio, et postea dixerit mulier de viro, non posse nubere cum ea, si quis poterit probare quod verum sit, accipiat alium.*[109]"

Another one will be the penitential of Burchard of Worms (1008-1012): *"Contigit tibi ut uxor tua te conscio et hortante cum alio viro, illa autem nolente adulterium perpetraret? Si fecisti, XL dies, id est, carinam, in pane et aqua poeniteas et septem annos, unum ex his in pane et aqua poeniteas, et nunquam sis sine poenitentia. Si autem uxor tua hoc probare potuerit, quod tua culpa et tuo jussu, se renuente et reluctante, adulterata sit, si se continere non potest, nubat cui voluerit, tantum in Domino. Tu autem sine uxoria spe in perpetuo permaneas. Illa autem si consentiens fuerat, eadem jejunet quae tibi proposita sunt, et sine spe conjugii permaneat"* [110].

For some scholars, this attitude towards the innocent spouse demonstrates that both cannot be considered in the same way, although the appeal is made to the right conscience when proceeding (*before God*). Once again, we can continue to draw a line in which the Church considers certain victims in a special way, either because of a human attitude (adultery) or because of a sudden harm (leprosy) [111].

In general, many penitentials will show similar attitudes, most of the time returning to the reasons we detailed before [112]. At the same time, we can find similar solutions among the pontiffs of that millennium [113]. Gregory II (715-731) answered a question of the Bishop of Mainz, Saint Boniface, as follows: *«Nam quod posuisti, quodsi mulier infirmitate correpta non valuerit viri, debitum reddere, quid eius faciat iugalis: bonum esset, si sic permaneret, ut abstinentiae vaceret; se, quia hoc maiorum est, ille, qui se non poterit continere, nubat magis. Non tamen subsidii open subtrahat ab illa, cui infirmitas praepedit et non detestabilis culpa excludit»* [114].

Stephen II, shortly after, will maintain a similar stance: "*si quis se in conjugio copulaverint, et ni eorum contigerit ut debitum reddere non possit, non liceat eos separare: nec pro alia infirmate, excepto si demonii infirmitas, aut leprae macula supervenerit. caeterum si ab his duabus infirmitatibus liberi fuerint invicem conjuncti unus alteri servitutum exhibeat*" [115]

However, they are always isolated positions and, little by little, as we said, the most generalised one of the universal councils, which will also be present in the local councils, will

[102] Can. 8.
[103] Can. 19.
[104] Can. 20.
[105] Can. 21.
[106] Can. 22.
[107] Can. 23.
[108] Can. 24.
[109] Can. 32.
[110] *Burchardus Vormatiensis, Decretorum libri viginti, L. XIX, in PL 140, col. 959.*
[111] Cfr. Picasso, Giorgio, *a cura di, A pane e aqua. Peccati e penitenze nel Medioevo. Il Penitenziale di Burcardo di Worms, Europia, (Novara, 1986), 44. Translation by Botero Giraldo, José Silvio.*
[112] Antonio García y García states that most of the penitentials admit absolute divorce and remarriage while the first spouse is still alive, for several reasons (Cf. García y García, Antonio, *La indisolubilidad matrimonial en el primer milenio, con especial referencia a los textos divorcistas, in García Barberena, Tomás, El vínculo matrimonial ¿Divorcio o indisolubilidad?, (Madrid, BAC 1979), 117-164; p. 148.*
[113] Pope Leo had already made a statement in the case of a prisoner of war who had returned after a long time and had found that his wife had remarried. The pope admits that the first husband can voluntary renounce his rights (*Carta 159 a Nicetas de Aquileia, in PL 54, 1136-1137).*
[114] Cf. Mon. Germ. Hist., Epist. III, 276. Gregorius II Pp., *Ep. Ad varias Bonifatii consultationes, in MGH, Epistolarum Tomus III (Merowingicii et Karolini Aevi I), p. 276.*
[115] Kelly, William, *Pope Gregory II on divorce and remarriage: a canonical-historical investigation of the letter Desiderabilem mihi, with special reference to the response Quod proposuisti, (Roma, 1976), p. 72.*

end up being imposed: "*Las de tendencia centrífuga universalizante (colecciones dionisiana, hispana, hadriana, dackeriana…) que afirman el vínculo indisoluble; y las de tendencia centrípeta o particularizante, más ajurídicas (colecciones penitenciales, anglosajonas…), que derivan en posibles disoluciones matrimoniales por las causas romanas y después germánicas de adulterio, abandono, amencia, cautiverio, impotencia, esclavitud, ingreso en religión*" [116].

4. Epilogue

After reviewing the conciliar texts and the canonical sources that contemplate, somehow, the exceptions when admitting the concubinaries to the sacraments, we can conclude that, although the possibility to "remarry", or to receive the acknowledgement for the new unions, or at least to receive no punishment, at first, even in the case of the widowers, was not admitted, it was gradually permitted, and over time a stance of kindness was adopted, and that the starting point consisted in causes such as the adultery, and it gradually included some others: the monastic life, the risk for impending sin facing the impossibility of the incontinence, the age, the gender, etc.

The official stance will continue to be the one of indissolubility, from a theoretical point of view, and with no dogmatic definitions, which will allow to the application of emergency pastoral solutions that will stick to Matthew's text (the famous *porneia* exception) and to the permissive or contrary civil laws. In any case, in spite of the clarity of the doctrine, during the whole first millennium we will see how the Church deals with a current problem of the society of every moment, trying to give an adequate answer to its concerns.

In fact, as we have seen, on many occasions, despite the unity of the dogmatic stance, pastors were aware of the difficulty of complying with it in an unfavourable environment, which has been interpreted by some as a recognition of remarriage as the least worst option, although never advisable [117]. In this respect, although it is true that there are not so many texts in which these exceptions can be found, and many of them are not especially clear, and sharing that the Church cannot base her practice in "*discussed exegetical hypotheses*" [118], it is precisely this lack of clarity that demonstrates the complexity of the subject addressed [119]. From our point of view, regardless of recent interpretations of these texts, and without wanting to fall into an scarcely science-based foundation that would allow, without a reason, the contemporary Church to liberalise her attitude towards remarried divorced persons, we consider that to simply describe such exceptions as abuses would be to make a contextual analysis that makes alterations from the historical point of view: in the same way that it is pointless to talk about divorce mentality in the ancient conciliar era, it also makes no sense to describe as simple traitors to Tradition (or as contaminated to the texts received) those who apply, with more or less fortune, pastoral solutions to the flock entrusted to them. We must realise that, although our current way to deal with the problem responds to the regulation germinated in Lateran and flourished in the logics of Trent (which was convoked for a Christian world, perhaps not Catholic, but always Christian, and which had to defend itself from an enemy that tried to impose its own doctrine), today we find ourselves rather in a pre-Nicene environment, in which the Church coexisted with an Empire that was sometimes indifferent, sometimes hostile, and that she knew she was called to convert, even more, the one that she had to make aware of its need for salvation.

Thus, in the absence of a canonical regulation of marriage, the local councils, which perfectly knew the particular reality and the specific context they were dealing with, use certain situations of exception in order to avoid the abandonment of the faithful that might find themselves in theoretically irregular situations. Some of the exceptions that we have seen, such as the issue of the kidnappings and of leprosy, although they can't be applied to the current reality, demonstrate in which way the Church has been able to apply exceptional measures for the cases in which sin is not the cause of the irregular situation. For this reason, on exceptional occasions, concubinage –seen as a situation in which the legal formalities and the social-legal circumstances are the ones that impede the matrimonial bond– is recognised as an authentic union, as long as it does not derive from the personal rejection of the essential elements of the marriage institution.

[116] Rodríguez Díez, José, *Indisolubilidad y divorcio en la historia del matrimonio cristiano y canónico ¿Indisolubilidad extrínseca relativa de futuro?, in Anuario Jurídico y Económico Escurialense 39 (2006) pp. 171-214. Thus the councils of Friuli (a. 796, c. 10), Paris (a. 829, c. 2), Nantes (a. 895, c. 12), and Tribur (a. 895, c. 46).*

[117] Botero Giraldo, José Silvio*, El cónyuge injustamente abandonado. Una situación que reclama justicia"* in *Teología y Vida 54 (2004), 3 – 17.*

[118] Müller, Gerhard Ludwig, *La forza della grazia. Indissolubilità del matrimonio e dibattito sui divorziati risposati e i sacramenti, in L'Osservatore Romano, (23 ottobre 2013), 4-5, p. 5.*

[119] Taranzano, Adrián, *¿Se disuelve la indisolubilidad matrimonial? Consideraciones acerca del debate en torno al próximo Sínodo, in Teología: revista de la Facultad de Teología de la Pontificia Universidad Católica Argentina, 115 (2014), pp. 185-213; p. 189.*

Natural Law and the Rights of Man in France before the Revolution

*Ivo Cerman**

Abstract

Elaborating on recent works on the merits of the physiocrats, we ask whether the interest in the rights of man could also be traced in the legal sciences and whether French legal scientists applied the secular natural law of the 'school of the north' (Grotius, Pufendorf). There was a French tradition of 'ordre naturel' which drew on Domat and Montesquieu, which instigated the refashioning of Roman law by Bourjon, Pothier and others, who focused on the rights of persons. However, the 'school of the north' made some impact. It was thanks to a reinterpretation of history that French lawyers managed to push through the idea that equality, rather than inequality, should be seen as the normal status of persons. Several reform projects in higher education were continued after 1789 with an effort to use natural law to interpret the Declaration.

Keywords: *Natural law; Jean Domat; Montesquieu; Human rights; serfdom; absolutism.*

Ever since Georg Jellinek challenged the causal connection between the French Enlightenment and the French Declaration of 1789, it has become difficult to explain what the French had been thinking about universal human rights before the Revolution. A satisfactory answer has not been given yet. It is always helpful to reopen this question, just as Dan Edelstein and Anthony Mergey recently did.[1] Yet, we believe that this question should be revisited as an issue of pre-revolutionary legal science. The conclusions of Dan Edelstein's monograph *On the Spirit of Rights* have brought us a great deal nearer the goal, for he proved quite convincingly that physiocrats are the most likely fathers of the French conception of human rights.[2]

Edelstein's argument has been discussed by a group of distinguished French historians, experts in the field of eighteenth-century French legal thought, in the journal *Opera historica*.[3] Even though they did criticize some marginal omissions in Edelstein's narrative, none of them denied the merits of the physiocrats for advancing the political doctrine that '*droits naturels de l'homme*' should be preserved even after the transition from the state of nature to the civil state. This is what Edelstein calls 'the preservation regime'. However, it has been pointed out that the physiocrats did not provide a legal solution showing how to reconcile subjective rights with the supreme power and with the objective legal order.[4] Even though they used terminology similar to that of natural law, they did so within a framework of 'physicist thought', which was different from the school of secular natural law that followed Grotius and Pufendorf. Whereas the 'school of the north'[5], as they were called in France, understood natural law as logical inferences from principles, the physiocrats understood '*droit naturel*' as a complex of physical laws that were supposed to operate on their own. Since the chief physiocrats were not lawyers (except for Le Trosne[6]), the question is what the French legal science was thinking about all these issues. This article will try to prove that this physicist understanding of natural order originated in French legal science, but legal scholars developed a more nuanced conception

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1 EDELSTEIN, D., *On the Spirit of Rights.* Chicago, 2019; MERGEY, A., *L'état des physiocrates: autorité et décentralisation.* Aix-en-Provence, 2010.

2 A similar idea had already been suggested in 1912 in response to Jellinek. See MARCAGGI, V., *Les origines de la Déclaration des droits de l'homme de 1789*. Paris, 1912.

3 CARVALHO, T., The Role of Physiocracy in the Birth of Human Rights. In: *Opera historica*, vol. 21, Nr. 2, 2020, p. 61–71; GRENOUILLEAU, O., On the Spirit of Rights and Abolitionism. In: *Opera historica*, vol. 21, Nr. 2, 2020, p. 81–89; DE CHAMPS, E., How to Do Things with Rights? On Circulation of Ideas between Great Britain and France. In: *Opera historica*, vol. 21, Nr. 2, 2020, p. 72–80. See also EDELSTEIN, D., Spirit of Rights. Response to Comments. In: *Opera historica*, vol. 21, Nr. 2, 2020, p. 108–113.

4 CERMAN, I., On Rights without Natural Law. In: *Opera historica*, vol. 21, Nr. 2, 2020, p. 90–106. In terms of logical inferences, the legal relation between the subject and the sovereign could not include enforceable rights of the subjects. The logical conflict between subjective rights and objective legal order was identified by German and Austrian legal scientists in the nineteenth century and resolved by Georg Jellinek. See JELLINEK, G., *System der subjektiven öffentlichen Rechte.* Freiburg im Breisgau, 1892.

5 The term has been used, for example, by SERVAN, J., M.A., *Discours sur le progrès des connaissances humaines*. [Lyon], 1781, p. 73-74. The French legal historian André-Jean ARNAUD also called it 'Central European natural law', which has already established itself in France. I will use these two labels interchangeably with 'secular natural law' to denote the school of Grotius and Pufendorf.

6 CARVALHO, The Role, p. 61.

of rights than the physiocrats. For this reason, we must ask how this peculiarly French tradition developed and how it developed the notions of inalienable goods and a sphere of acts permitted by natural law.[7] Yet, knowing that the 'school of the north' made some impact in France, we must still ask what was their actual contribution to the French legal science.

1. Parallel beginnings

If we are to understand why France was different, we need to consider the different legal cultures. Whereas other European countries needed secular natural law as a scholarly discipline to prepare a systematization of chaotic and fragmentary laws, France went straight to making domestic French law a new scholarly discipline. In the same decade that Pufendorf published the groundbreaking book *De jure naturae*[8], the King of France issued a series of *ordonnances* that culminated in the Edict of Saint German in 1679[9] which ordered the universities to establish chairs of French law. This became a new university discipline alongside Roman law and canon law. The edict also allowed the teaching of Roman law in Paris and ignited interest in this discipline. Finally, the edict also created the posts of *docteurs agrégés*. From then on, the tensions between them and professors became a permanent feature of faculties of law.

The new edict was imposed on a country whose legal culture was developing along two different tracks. The southern regions capitalized on the sixteenth-century revival of Roman law studies, whereas the east, centre and north of France, with the enclave of Toulouse in the south, progressed towards systematizing their regional *coutumes*.[10] This customary law was being transmitted into written form, but its validity was conditioned by the King's approval. The regions of the first group became known as *pays du droit écrit*, and the regions of the second group developed into *pays de coutume*. The legal status of individuals was determined by these regional legal cultures, for the royal *Ordonnance civile* of 1667 and the *Ordonnance criminelle* of 1670 did not pertain to the fundamentals of law; they merely regulated the procedure.[11]

It was at this juncture that Jean Domat, from an enclave of Roman law within the Auvergne, a province of *coutumes*, intervened with his groundbreaking work *Les lois civiles dans leur ordre naturel* of 1689.[12] It can be perceived as the foundational work of a specific French approach to private law, with a specific method of systematization that competed with the methods of Pufendorf and other German thinkers. It was also based on a natural order, but in a different way.

In the introductory essay *Traité des lois*[13] Domat argued that the convergence of regional *coutumes* and Roman law should continue to attain compliance with the natural order, which contains both immutable laws and arbitrary laws. However, he believed that whereas all of these cultures contain arbitrary laws, only Roman law comprises immutable laws which have to be uncovered.[14] Humans, as beings created as images of God, still have a godlike nature that urges them to attain the highest good ('*souverain bien*') which he defined as 'life and happiness' ('*vie et beatitude/felicité*').[15] To attain this, man should observe two supreme principles, called also 'human laws' ('*lois de l'homme*'), which are 'imprinted in the foundation of our nature'.

The first principle commands man to seek love of the highest good, and the second obligates humans to join and love each other. Humans need to collaborate because they have been created weak, and therefore they need to uphold human society, also called '*société civile*'. This was held together by 'engagements' ('*engagements*') securing present-day relations and property and 'successions' ('*successions*') that secure the survival of social bonds over time. It is for the securing of these engagements and successions that we need laws which Domat divides into 'immutable laws' which pertain to absolute duties and 'arbitrary laws' that deal with questions of detail. Similarly to Pufendorf, he also stresses that all man-made laws are concerned only with the exterior. In Domat's view, the interior convictions motivating people to do good are dealt with in the realm of religion. The exterior aspects of human action are a matter of '*police*', which should be understood here as man-made laws in a broad sense. Yet he weakens this distinction by saying that matters that are essential and related to the first two principles are regulated by '*lois communes à la religion et à la police*'.[16] He also believed that people should be motivated to observing the *engagements* by following eleven *règles générales*[17], which they should observe voluntarily as moral principles. Considering this aspect of his philosophy, we may conclude that law and morality were not yet separated in Domat's conception of law.

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[7] The groundbreaking research by Brian Tierney has shown that the first step in this process was the move to retain a larger sphere of tacit permissions within law which existed side by side with specific rights as entitlements to do something or to have something. See TIERNEY, B., *The Idea of Natural Rights. Studies on Natural Rights, Natural Law, and Church Law 1150–1625.* Grand Rapids, MI, 1997; TIERNEY, B., *Liberty and Law. The Idea of Permissive Natural Law, 1100–1800*. Washington, D.C., 2014.

[8] PUFENDORF, S., *De jure naturae et gentium libri octo.* Lund, 1672.

[9] ISAMBERT, F-A. (ed.), *Récueil général des anciennes lois françaises.* Paris, 1829, vol. 19, p. 195–202 (N° 886).

[10] For the novelty of distinguishing these terms, see CASTALDO, A. – MAUSEN, Y., *Introduction historique au droit.* Paris, 2013[4], p. 390–391.

[11] See OLIVIER-MARTIN, F., *Les lois de roi.* Paris, 1997; BERCÉ, Y.-M., Les monarchies d'âge moderne. In : BERCÉ, Y.-M. (ed.), *Les monarchies.* Paris, 1997, p. 229–324.

[12] DOMAT, J., *Les lois civiles dans leur ordre naturel, suivie du droit public,* 2 vols. Paris, 1695. The book was re-edited in France in 1695, 1697, 1713, 1723, 1745, 1756 and 1777.

[13] DOMAT, 'Traité des lois'. In: idem, *Les lois*, p. I–XXXI. Re-edited by Simone Goyard Fabre as Domat, J. *Traité des lois* Caen, 1989. We will refer to numbers of chapters and sections of this work.

[14] DOMAT, *Traité*, ch. XI, 19.

[15] *Ibidem*, ch. I, 4.

[16] *Ibidem*. *Traité*, ch. XI, 25.

[17] *Ibidem*, ch. V.

Domat also believes that the effectiveness of law is guaranteed by God's interventions. Even though he argues that humans recognize rules of law by using the 'light of their reason',[18] he also believes that God intervenes secretly to secure the survival of society. Even human reason is actually a gift from God. One of the divine guarantees of justice is the authority of the sovereign who has been given '*droit de gouverner les hommes*'.[19] To achieve this, the rulers of monarchies, republics and other states have been given the right to levy taxes, inflict punishments on criminals, etc.

Domat did not proceed to discussing the relation of citizens to the sovereign, for he believed that private law must be systematized before public law. However, Jean Bodin had already provided an answer to that question when he maintained that the King of a 'royal or legitimate monarchy' is never absolute, for he must obey 'laws of nature' ('*lois de nature*').[20] These were, however, just moral rules, which were guaranteed by the King's respect towards God. Jean Domat did not change this rule[21] and limited the sovereign's power by unenforceable duties.[22] However, Bodin also argued that the monarch in a royal monarchy was also obligated to respect the citizens' natural liberty ('*liberté naturelle*') and their property ('*les biens*'), otherwise he would change his empire into a seigneurial monarchy or even a tyranny. This was a predecessor to Domat's conception of life and felicity as two supreme principles. In his own draft of public law, Domat focused on the duties of members of society ('*société*').

Domat elaborated on Bodin's views even in the *Traité des lois*. He did acknowledge that valid laws – *coutumes* and Roman law – should be interpreted on the basis of *lois naturelles* which tell us what is just. It is, for example, natural that the owner of things should use them or that children should have some inheritance from their parents. The source of this knowledge could be Roman law, but in the case of testaments, Domat rejected the Roman preference for liberty of the testator. The law of nature says that children should inherit something, and this rule limits the testator's liberty. He also acknowledged a wide sphere of acts permitted by law because he admitted that '*liberté naturelle*' should be seen as the priority.[23] Domat certainly remained true to the conception that laws may not only command and prohibit, but also permit something.[24] Whereas these were principles for the legislator, the citizens were obliged in his sense to act in good faith (*bonne foi*). This meant that legal actions should not be carried out with the intention of cheating.

If we consider that life and happiness were given the position of the highest aims in Domat's concept, we may see that they played here a role similar to that of inalienable goods in the works of Central European natural law thinkers. Elements of human rights did play a large role in Domat's legal concept. Even though he did not provide a list of rights, he did preserve a wide sphere of freedom by 'natural' interpretative rules, by his respect for natural liberty, and by his restrictive interpretation of law which created a broad sphere of factually permitted acts.

2. Responses to Secular Natural Law

Even though these domestic French developments carried most weight, Central European secular natural law cannot be completely excluded from the French story. It made only a feeble impact, but it did make some impact. Its contribution must be assessed, too.

No chairs of natural law were founded at French universities, but historians of universities such as Jean Portemer and Marie-Antoinette Lemasne-Desjobert[25] or the historian of legal doctrines André-Jean Arnaud[26] have proved that there was some interest in secular natural law among university scholars, and among officials who wished to reform higher education.[27] Yet on closer inspection, these proofs turn out to be problematic. We know that the university of Perpignan had works by Pufendorf and others in their holdings[28], we know that Barbeyrac's French translations of Grotius and Pufendorf went through several editions[29], just like Burlamaqui's books[30], and we know that Chancelier Henri François d'Aguesseau recommended books by Pufendorf and Grotius in his instructions for the legal

[18] *Ibidem*, ch. IX, 4.
[19] *Ibidem*, ch. IX, 7.
[20] BODIN, J., *Les six livres de la république.* Paris, 1576, book II, ch. 2-3.
[21] Domat progressed to public law in the second part of his work, published posthumously. In it, he repeated the same principle. (DOMAT, J., Le droit public, suite des lois civiles dans leur ordre naturel. In: Domat, *Les Lois civiles dans leur ordre naturel; Le droit public et Legum delectus*, 2 vols. Paris, 1695, vol. 1, p. 1–246 [608–853], ch. I, p. 6; ch. II-III.
[22] DOMAT, Le droit public, ch. III.
[23] DOMAT, *Traité*, ch. XII, p. 10.
[24] *Ibidem*, p. 14.
[25] PORTEMER, J., Recherche sur l'enseignement du droit public au 18e siècle. In: *Revue historique du droit français et étranger* vol. 36, 1959, p. 341–397; LEMASNE-DESJOBERT, M.-A., *La faculté de droit de Paris aux 17e et 18e siècles.* Paris, 1966.
[26] ARNAUD, A.-J., *Les origines doctrinales du code civil français.* Paris, 1969, p. 45-48, 53-59, 109-111, 142-149.
[27] Robert Derathé argues that authors writing on '*droit naturel*' between 1680 and 1750 drew mainly on Hobbes. He draws on one work by an anonymous author, one by Louis Desbans (edited by Dreux de Radier), and one by François Richer d'Aube, which will be discussed later. See DERATHÉ, R. *Jean-Jacques Rousseau et la science politique de son temps.* Paris, 1995[4], p. 33.
[28] PORTEMER, J., La politique royale de l'enseignement du droit en France au 18e siècle. *Revue d'histoire des facultés de droit et de la science juridique* vol. 7, 1988, p. 15–43, at 31.
[29] See DERATHÉ, *Rousseau*, p. 32–33. We are interested here in opinions of French authors living within France, and for this reason we do not include the opinions of Jean Barbeyrac and Jean-Jacques Burlamaqui in our discussion. We are, however, interested in responses to their works, since we discuss French responses to all theorists of secular natural law, as long as they can be based on hard evidence (i.e. references to names, works, doctrines, or opinions which can be identified as responses to their theses.).
[30] EDELSTEIN, *On the Spirit*, p. 73.

training of his son.[31] Yet only Grotius was recommended as an authority on law[32], whereas Pufendorf was recommended only half-heartedly as a historian writing on essential principles of law.[33] Domat was certainly the greatest modern authority on law that d'Aguesseau recognized.[34]

In the *Essay on the study of public law* d'Aguesseau did nonetheless express his adherence to natural law ('*droit naturel*'), but without providing any names of scholars representing this trend.[35] He shared Grotius's definition saying that natural law is '*règles que la raison me dicte*'.[36] He understood '*droit naturel et primitif*', common to all humankind, as the foundation of all laws within particular states. In his exposition of its principles, he showed that this '*droit naturel et primitif*' was a blending of Jean Domat and the logical inferences of the '*savants du nord*'.[37] The point of departure was again the conception of man as the image of God, and the goal of natural law was defined as the attainment of happiness ('*bonheur*'). Yet in his elucidation of our '*devoirs envers nos semblables*', d'Aguesseau proposed that they are based on geometrical axioms which are based on common human nature. This was already a significant deviation from Jean Domat. The first of these axioms was the equality of all men, followed by self-imposed rules respecting other people's life, property, happiness and truth in public discourse. All this is actually reminiscent both of Domat and of Pufendorf. Yet d'Aguesseau also adds a more modern reflection on the question of whether these self-imposed rules are a part of law because real laws are only those which include sanctions.[38] D'Aguesseau answers that all laws are effective only through God's intervention which scares people by fear (*crainte*) that they would not attain happiness.[39] This fear manifests itself in three forms: as the pangs of consciousness each man feels, as the fear of punishments imposed by human laws, and as fear of alienation from other people (i.e. social sanctions).[40] All these fears are punishments for violating the '*lois naturelles*'. They remain in force even in case of kings.[41] Thus d'Agguesseau provides a Domatian answer to a Pufendorfian question.

No wonder that Chancelier d'Aguesseau also prompted King Louis XV to intervene in the realm of private law which had been reserved for the regional legal cultures. He prepared three *ordonnances* which pertained to property and successions: the *ordonnance* on donations in 1731, *ordonnance* on testaments in 1735 and *ordonnance* on substitutions in 1747.[42] The prefaces to these measures appeal again to the unity of private law as a system.[43] He also planned a large-scale reform of courts of justice to underpin this process[44], and a unity of private law that would remove 'incapacities of serfs' and restore equality in law.[45]

Domat's legacy was also elaborated by Montesquieu, who is likewise often suspected of writing under the influence of secular natural law.[46] There is a strong conviction that Montesquieu admired the systematic thought of the 'school of the north' in his youth because he was dissatisfied with the low standard of scholarly work at French universities, but abandoned it in his mature years when he wrote *De l'esprit des lois*. The young aristocrat attended the Faculty of Law of the University of Bordeaux from 1705 to 1708, but it was not there that he could become acquainted with secular natural law because it was not taught there. He had several volumes of Grotius and Pufendorf in his library, but we cannot establish when he acquired them.[47] The evidence of his adherence to secular natural law is scanty. The *Cahiers* on *Juridica* have been lost, and so has the youthful *Traité des devoirs* which he read in the Bordeaux Academy in 1725.[48] The apocryphal *Essai touchant les lois naturelles et la distinction du juste et de l' injuste* has also been lost. The surviving fragments and the concise summary of the *Essai* published in *Bibliothèque française* have raised hopes that this might have been the work

[31] D'AGUESSEAU, H.-F., Première instruction. In: *Oeuvres complètes du chancelier d'Aguesseau,* 15 vols. Paris, 1819, vol. 15, p. 1-30, 18; D'AGUESSEAU, Deuxième instruction. *Ibidem*, p. 30–91, 42–44. Arnaud overestimated d'Aguesseau's adherence to the school of the north (Arnaud. *Les origins*, p. 109-111, 147-149); for a more recent comment on d'Aguesseau's attitude to natural law see STOREZ-BRANCOURT, I., *Le chancelier Henri François d'Agueseau (1668–1751).* Paris, 1996, p. 480–539.

[32] D'AGUESSEAU, *Oeuvres*, vol. 15, p. 18, 43, 69, 144.

[33] *Ibidem,* p. 42.

[34] *Ibidem,* p. 18-20.

[35] D'AGUESSEAU, Essai d'une institution du droit public. In: D'AGUESSEAU, *Oeuvres*, vol. 15, p. 164-272.

[36] *Ibidem*, p. 190.

[37] His own term for the school of the north. See D'AGUESSEAU, Deuxième instruction. In: *Ibidem*, p. 42.

[38] A similar survey is repeated in rules of *jus gentium*. *Ibidem,* p. 271-272.

[39] *Ibidem*, p. 201-202.

[40] *Ibidem*, p. 203-236.

[41] *Ibidem*, p. 216-217.

[42] REGNAULT, H. (ed), *Les ordonnances civiles du chancelier Daguesseau. Vol. I Les donations et l'ordonnance de 1731.* Paris, 1929; REGNAULT (ed), *Les testaments et l'ordonnance de 1735*, 2 vols., Paris, 1938 and 196, vols. II.1-II.2. See OLIVIER-MARTIN, F., *Histoire du droit français des origines à la Révolution.* Paris, 1948, p. 355; CASTALDO – MAUSEN, *Introduction*, p. 370; STOREZ-BRANCOURT, *d'Agueseau*, p. 527–535.

[43] STOREZ-BRANCOURT, *d'Agueseau*, p. 529–535.

[44] CAREY, J. R., *Judicial Reform in France before the Revolution of 1789.* Cambridge, MA, 1981, p. 49-59.

[45] BRESSON, T., Le chancelier Daguesseau et le procès de la condition mainmortable : l'article XXXIII de l'enquête sur les incapacités (1738). In : *Revue historique de droit français et étranger* vol. 74, 1996, p. 253–270; BRESSON, *Serfs et mainmortables en France au 18e siècle. La fin d'un archaïsme seigneurial*. Paris, 2007, p. 56–57.

[46] See ARNAUD, *Les origines*, p. 98-99; EHRARD, J., *L'idée de la nature en France dans la première moitié du 18e siècle.* Paris, 1994[2] [1st edition 1963]; EHRARD, *Politique de Montesquieu.* Paris, 1965, p. 10–11; CROCKER, L. G., *Nature and Culture. Ethical Thought of the French Enlightenment.* Baltimore, 1963, p. 26-27; WADDICOR, M. H., *Montesquieu and the Philosophy of Natural Law.* The Hague, 1970, p. 20.

[47] *Ibidem*, p. 15.

[48] *Ibidem*, p. 13.

in which he spelled out his affections for the school of Grotius and Pufendorf, but Robert Shackleton proved convincingly that the essay was not Montesquieu's work.[49] After all these losses and misattributions, the evidence for Montesquieu's support for secular natural law remains scanty. There is one laudatory mention of Grotius and Pufendorf in his *Pensées.*[50] On the other hand, Montesquieu's method, in which he abandoned the social contract and the method of logical inferences from the highest principles, show him as an antagonist of the school of the north.[51]

In *De l'esprit des lois* of 1748, Montesquieu clearly followed the conception of Jean Domat who had spoken about '*esprit des lois*', meaning the sense of the two highest '*lois de l'homme*'. Whereas Domat hinged his laws on the immutable structure of the two supreme laws, Montesquieu envisaged positive laws as being suspended between the nature of the people, determined by the climate and historical and economic factors, and the right type of government. The core of his analysis seems not to match the introductory premise of his book, which said that there are '*rapports d'équité antérieurs à loi positive qui les établit*'[52] and laws connect human beings with the God-given '*raison primitive*'. Yet Montesquieu also believed that humans have abandoned the God-given track because they are erring beings, and this is why he does not propose a concept based on these immutable antecedent laws. It is only his method that shows the way back to the right track because it is based on an examination of humans and the '*nature des choses*'.[53] Laws in his conception were almost physical laws which would guarantee motion of the body politic, if the principle of government matched the nature of the people.

With this strikingly new empirical method, France diverted even further from concepts of law based on universal principles. Yet Montesquieu's method did guarantee a great latitude for human agency and various liberties. Even though he did not provide a list of human rights, he did employ some rights-talk. Yet the label and the contents do not always match in his book. He uses the term '*droits respectifs des hommes*'[54] when he actually means the power of one person over another, and he speaks in several places about inalienable properties and rights without calling them so.[55] He refers to Pufendorf only as a historian[56], but acknowledges his own indebtedness to English, French and German predecessors.[57]

Little known is the ambitious attempt of Montesquieu's contemporary d'Aube, who sought to lay foundations for a specifically French conception of natural law that would correspond to Grotius and Pufendorf. D'Aube was a lawyer who served at the *parlement* of Rouen. His multivolume *Essai sur les principes du droit et de la morale* was published a few years before Montesquieu's masterpiece, but made almost no impact.[58] It scored a greater success in Germany than in France. The introduction to this work provides a succinct account of secular natural law, in which Grotius and Pufendorf are praised as thinkers who found and developed methods that would be helpful in structuring chaotic laws. On the other hand, the ancient philosopher Carneades and Thomas Hobbes are singled out as sceptical evil thinkers who opposed these efforts to restore order, and d'Aube sets it as his goal to combat their destructive work by applying consistent principles. Yet he refuses to follow Grotius and Pufendorf. The result was a system of his own which did not include any natural rights or inalienable goods. It was a set of rules which surpass the will of individual humans because they stem from God's supreme power.

The next important cases were Denis Diderot and Jean-Jacques Rousseau, who diffused the concept of the social contract in France. It has been suggested that their critical views responded to secular natural law, but the evidence that they were studying the writings of the 'school of the north' is again very flimsy. Diderot possessed a copy of Johann Gottlieb Heineccius which he was given in 1748,[59] and he made one reference to Pufendorf in the article '*Citoyen*'.[60] The other 'political articles' he wrote for the *Encyclopédie* do not provide any references to names or particular books. We may, however, believe that Diderot's repetitive references to '*contrat de soumission*' were an echo of Pufendorf's concept of a double social contract. Rousseau was also impressed mainly by this stage of Pufendorf's social contract theory, but also by his conception of the first humans as 'deficient beings' who needed each other's assistance. This thesis affected his own image of the beginnings of human society as depicted in the discourse on inequality. In it, he also maintains that his father would make him read Grotius in his childhood, and his early writings actually do betray familiarity with this type of thought. Did he then engage directly with these authors in his works? He pondered on Grotius, Pufendorf and Burlamaqui in the discourse on inequality, in *Du contrat*

[49] SHACKLETON, R., L'Essai touchant les lois naturelles est-il de Montesquieu? In: *Mélanges offerts à Jean Brethe de la Gressaye.* Bordeaux, 1967, p. 763-775.

[50] DE SECONDAT BARON DE LA BRÈDE ET DE MONTESQUIEU, C.-L., 'Pensée Nr. 1537'. In: MONTESQUIEU, *Oeuvres complètes*, ed. Roger CAILLOIS. Paris, 1965, vol. 2, p. 443.

[51] Arnaud believed that Montesquieu was a supporter of the Central European influence on France, but Arnaud was writing before it was proved that the two essays had been misattributed to Montesquieu. See ARNAUD, *Les origines*, p. 98-99.

[52] MONTESQUIEU, *De l'esprit des lois* (1748), ed. Victor Goldschmidt. Paris, 1979, book I, ch. 1, p. 125.

[53] *Ibidem*, Préface, p. 117.

[54] MONTESQUIEU, *De l'esprit*, book XXV, ch. 13.

[55] *Ibidem*, book I, ch. 2; book X, ch. 2; book XI, ch. 6; book XIX, ch. 27; book XXVI, ch. 1-3.

[56] *Ibidem*, book V, ch. 14.

[57] *Ibidem*, Préface.

[58] RICHER D'AUBE, F., *Essai sur les principes du droit et de la morale.* Paris, 1743. See ARNAUD, *Les origines,* p. 103.

[59] PROUST, J., *Diderot et l'encyclopédie.* Paris, 1967, p. 343.

[60] DIDEROT, D., Citoyen. In: Diderot D. - Le Rond d'Alembert, J. (eds), *Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers, etc.*, 17 vols. Paris, 1753, vol. 3, p. 488–489. Available online at https://encyclopedie.uchicago.edu/ (accessed on 4/9/2020).

social, in his educational tract *Emile* and in *Lettres écrites de la montagne*.[61] Unlike other French scholars, Rousseau was more critical about Grotius than about Pufendorf. He saw Grotius as a partisan of absolutism[62], whereas Pufendorf's double social contract inspired him to reflections about the origins of human society.[63] It is just puzzling that in *Du contrat social* he attributed the idea of a subjection contract to Grotius[64] and did not mention Pufendorf's name at all.

On the other hand, Diderot's collaborator, the lawyer Antoine Boucher d'Argis, provided in his underrated encyclopedia entry on '*Droit naturel*'[65] a fairly informative summary of the teachings of the 'school of the north'. He was also reserved about Pufendorf, but lauded Grotius as the founder of a system of natural law which was based on '*principes de droite raison*' and excluded animals. What is important for the history of human rights is that he attributed to Grotius the idea that certain entitlements we have as humans were grounded in natural law and some of them constituted '*droits communs à tous les hommes*'. These also included the unreserved '*pouvoir des souverains sur leurs sujets et des maîtres sur leurs esclaves*'.[66] The pride of place in his survey was reserved for Jean-Jacques Burlamaqui of Geneva, whose system was considered the most perfect. The Frenchman Boucher d'Argis interpreted the Swiss thinker in terms which made him sympathetic to every French admirer of Jean Domat because he slightly exaggerated the active role of God and underscored the role of happiness as the ultimate goal of natural law. It should be noticed that the anonymous article '*Droit naturel*' in the *Encyclopédie méthodique* of 1784 basically repeats the same narrative.[67] It too eulogizes Burlamaqui as the greatest author of this school.

It should be noted that even Chevalier Jaucourt's entry on '*Loi civile*' drew on natural law.[68] Laws issued by humans, i.e. civil laws, were supposed to be just implementations of natural laws, to which the sovereign would add only the punishments. They further had to regulate the use of rights that each person naturally had to each other.[69]

Surprisingly neither Boucher d'Argis, nor Jaucourt mentions Christian Wolff, the author of the most systematic conception of natural law, who was himself trying to popularize his philosophy through translations. During his lifetime, he had two French translators – the Huguenot preachers Deschamps and Formey – with whom he actively discussed methods of gaining the affections of the French reading public.[70] Based on these reflections Formey published a series called *La belle wolfienne*, because he, Wolff and his sponsor Count Manteuffel believed that the light style might better capture the attention of the impatient French reader.[71] In spite of this effort, which continued even after Wolff's death in 1754,[72] his dry style did not score success in France. However, Dan Edelstein has recently shown that the lawyers who used natural law arguments to defend the *parlements* against Maupeou's revolution of 1771 drew on Christian Wolff.[73]

French thinkers of the high Enlightenment did not show much enthusiasm for the school of the north. Writing in 1769, the physiocrat Dupont de Nemours expressed doubts about the value of Pufendorf's conjectures[74], Linguet in 1767 ridiculed them all,[75] and Joseph-Michel-Antoine Servan in the 1780 s rejected the whole 'school of the north', in which he also included Grotius and Wolff.[76] On the other hand, a detailed analysis of Pothier's treatise on obligations showed that this legal scientist drew on classics of the school of the north in his construction of some legal concepts.[77] Portalis, the main architect of the *Code civil*, left a more balanced view of their doctrines in his memoirs, in which he retrospectively assessed intellectual life during the Ancien Régime.[78]

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[61] See the entries by Simone Goyard-Fabre in TROUSSON R. – EIGELDINGER, F. S. (eds), *Dictionnaire de Jean-Jacques Rousseau.* Paris, 2006, p. 247–249 ('Droit naturel'), p. 393–394 ('Grotius, Hugo'), p. 773-775 ('Pufendorf, Samuel'), p. 120–122 ('Burlamaqui, Jean-Jacques').

[62] ROUSSEAU, J.-J., *Emile ou de l'éducation*. Oeuvres complètes, ed. SPINK J. P. et alii, 4 vols. Paris, 1969, vol. 4, p. 836.

[63] ROUSSEAU, J.-J., *Oeuvres complètes*, 4 vols. Paris, 1964, vol. 3, p. 1443 (Robert Derathé's comment on the double social contract).

[64] ROUSSEAU, *Du contrat social.* In: *Oeuvres* (1964), vol. 3, p. 353 and p. 359. He repeated the same idea in Emile. In: *Oeuvres* (1969), vol. 4, p. 839-843.

[65] BOUCHER D'ARGIS, A., Droit de nature ou droit naturel. In: DIDEROT - D'ALEMBERT (eds), *Encyclopédie* (1755), vol. 5: 131-134. Available online at https://encyclopedie.uchicago.edu/ (accessed on 4/9/2020).

[66] *Ibidem*, p. 132.

[67] (A), Droit de la nature ou droit naturel. In: *Encyclopédie méthodique. Jurisprudence.* Paris, 1784, p. 90–93. The author was most probably André Jean Boucher d'Argis, the son of the previous author.

[68] JAUCOURT, L. de, Loi civile. In: DIDEROT - D'ALEMBERT (eds), *Encyclopédie*, vol. 9, p. 654–656. See ARNAUD, *Les origins*, p. 114–116.

[69] Derathé also believes that Jaucourt was compiling from Pufendorf, Barbeyrac and Burlamaqui in the entries 'Souveraineté' and 'Sociabilité'. See DERATHÉ, *Jean-Jacques Rousseau*, p. 32.

[70] JANSSENS-KNORSCH, U., Jean Deschamps, Wolff-Übersetzer und Alétophile français am Hofe Friedrichs des Grossen. In: SCHNEIDERS, W. (ed.), *Christian Wolff 1679–1754.* Hamburg, 1983, p. 254–265; BRONISCH, J., *Der Mäzen der Aufklärung. Ernst Christoph von Manteuffel und das Netzwerk von Wolffianismus.* Berlin, 2010; FONTIUS, M. - HÄSELER, J., *Die Franzosen in Berlin: Über Religion und Aufklärung in Preußen.* Basel, 2019, p. 205–225.

[71] MIDDELL K. – NEUMANN, H.-P. (eds.), *Der Briefwechsel zwischen Christian Wolff und Ernst Christoph von Manteuffel 1738 bis 1748*, 3 vols, Leipzig, 2013; Open Access Publication, vol. 1, p. 205 (Manteuffel to Wolff, 1 January, 1741; p. 208 (Wolff to Manteuffel, 27 January 1741), p. 211 (Manteuffel to Wolff, 10 February 1741).

[72] [Formey, J. H. S.], *Principes du droit de nature et des gens. Extrait du grand ouvrage latin de Mr. de Wolff par M. Formey.* Amsterdam, 1758.

[73] EDELSTEIN, *On the Spirit*, p. 92-93.

[74] See MERGEY, *L'état*, p. 37.

[75] LINGUET, S.-N. H., *Préliminaire à la théorie des lois civiles ou principes fondamentaux de la société.* London, 1767, p. 135–144. See ARNAUD, *Les origins*, p. 116–117.

[76] See CAREY, J. R., *Judicial Reform*, p. 114.

[77] ARNAUD, *Les origines*, p. 207.

[78] PORTALIS, J.-É.-M., *De l' usage et de l'abus de l' esprit philosophique durant le XVIIIe siècle*, 2 vols. Paris, 1820, vol. 1, p. 1111. See Arnaud, *Les origines*, p. 56–57.

3. Equality, Liberty and the Legal Incapacities of Serfs

The consistency of the French legal theory was put to test in the lawyers' approach to private law. The continuing process of subjecting regional legal cultures to a united logical system raised the question of whether a sphere of individual liberty should be respected and whether legal equality required the abolition of the legal incapacities of serfs and *mainmortables*. However, it seems that the French managed to answer both questions without the help of Central European natural law. Roman law and history were their most useful tools in dealing with these issues.

The editors of *coutumes* continued the process of merging regional cultures into a larger whole. This process reached its climax with the publication of *Nouveau coutumier général* by the advocate Charles-Antoine Bourdot de Richembourg in 1724.[79] In it, he occasionally appealed to '*droit naturel*' when he could not find other reasons to abolish some unusual habits.[80] François Bourjon in his *Le droit commun de la France* of 1747 provided a theoretical underpinning to this achievement.[81] However, the foundations of his reflections were provided by Roman law and Domat's philosophy. Bourjon argued that legal concepts must be restructured on the basis of a 'natural order', but he drew on Domat and not on the school of the north. In the template of legal relations which he proposed, he drew on Gaius's structure of '*personae, res et actiones*'. However, he stressed the significance of persons and proposed a new structure, based on the rights of the free person within the contexts of nature, of private law and of public law. In doing so, he also implied that a space of individual liberty should be preserved even within the coherent national legal order. Even though other commentators on *coutumes* such as Prévôt de la Jannès[82] were also operating with the notion of 'natural order' and blending *coutumes* with principles of Roman law, they were often reluctant to acknowledge equality before the law even for serfs and *mainmortables.*

The remains of *mainmorte* in the central, northern and eastern parts of France became a burning issue of public debate in the 1760 s and 1770 s.[83] Legal scholars took also part in it. It should be noted, however, that *mainmortables* were limited only in their freedom to decide about their heritage, and only the serfs in some regions in the east were really limited in their personal freedom. The unusual term '*mainmorte*' means that the peasant was not free in handling his / her property (i.e. he / she could not reach his / her hand to grasp his / her property). Contemporary authors would often prefer more dramatic terms such as '*servitude*' or '*esclavage*' to create empathy.

The legal campaign against serfdom and *mainmorte* started around 1760. Earlier historians set the beginnings of this revision already in the 16th century,[84] but this seems to be a rather optimistic assessment. *Mainmorte* was surviving mainly in the provinces of *coutumes*[85], and until 1760 the editors of customary law tended to support both *mainmorte* and serfdom. Things changed with the important legal case dealing with the heritage of Pierre Truchot at the *parlement* of Paris in 1760.[86] The prosecuting attorney general (*avocat général)* Louis-Antoine Séguier made a passionate appeal to humanity (*'l'humanité*) and publicly rejected serfdom (*servitude*).[87] Shortly after that, Louis Damours, an advocate of the King's Councils, published a proposal for the complete abolition of '*servitude*' in France.[88] In the same year François-Ignace Dunod, a professor at the University of Besançon in Franche-Comté, published a second edition of his treatise on *mainmorte*, in which he argued that people are born equal and raised doubts whether it was really possible to donate or sell one's liberty.[89] His was a rare case of a university professor intervening in the struggle; most of the lawyers commenting on cases concerning serfs were advocates in *parlements*.

At this juncture, the physiocrats intervened with their economic and physicist arguments in favour of life, property and security for everyone.[90] Since they esteemed agriculture highly, peasants enjoyed their sympathies. Their extravagant philosophy of natural order appears to be derived from the peculiarly French legal tradition, starting with Jean Domat. Their campaign started around 1766/1767[91] and in 1779 it even pro-

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[79] BOURDOT DE RICHEMBOURG, C. A. (ed.), *Nouveau coutumier général ou corps des coutumes générales et particulières de France et des provinces*, 4 vols. Paris, 1724.

[80] *Ibidem*, vol. 2, p. 754.

[81] BOURJON, F., *Le droit commun de la France et la coutume de Paris reduits en principes*, 2 vols. Paris, 1747. See ARNAUD, *Les origines*, p. 104–106, 159–163.

[82] PRÉVÔT DE LA JANNÈS, M., *Les principes de la jurisprudence française, exposés suivant l'ordre de diverses espèces d'actions qui se poursuivent en justice*, 2 vols. Paris, 1750. See ARNAUD, *Les origines*, p. 91–94.

[83] See BRESSAN, T., *Serfs et mainmortables en France au 18e siècle. La fin d'un archaîsme seigneurial.* Paris, 2007.

[84] SCHMALE, W., *Bäuerlicher Widerstand, Gerichte und Rechtsentwicklung in Frankreich.* Frankfurt am Main, 1986, p. 171–186. In terms of legal doctrines, Schmale attributed a landmark importance to Jean Papon's legal decision of 1528 (*ibidem*, p. 24, 146)

[85] Exceptions inside the *pays du droit écrit* were Berry in Central France, regions in the south-west and Bresse in the east. See the map in BRESSAN, *Serfs*, p. 290-291.

[86] BRESSAN, *Serfs*, p. 66–69; BRESSAN, Servage et Lumières : le rejet du droit de suite par le parlement de Paris (1760-1765). In : *Revue historique,* vol. 298, 1997, p. 365–381.

[87] HENRION DE PANSEY, P. P. N., Mainmorte. In: GUYOT, J.-N. (ed.), *Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale*, 17 vols. Paris, 1785, vol. 11, p. 97–128, 98.

[88] DAMOURS, L., *Mémoires pour l'entière abolition de la servitude en France.* Paris, 1765. It is available in the BNF as a legal opinion for the community of Sivry. (Bibliothèque nationale de France, call nr. Fm 30223 'Factum. Sivry-la-Perche. Meuse, 1765'.) See BRESSAN, *Serfs*, p. 94–98; BRESSAN, L'avocat Damours et le Mémoires pour l'entière abolition du servage en France. In: *Dix-huitième siècle* vol. 29, 1997, p. 315–327.

[89] DUNOD, F.-I., *Traité de la mainmorte et des retraits.* Paris, 1760 [1st edition 1733]. Bressan ranks him among defenders of *mainmorte*. See BRESSAN, *Serfs*, p. 59–61.

[90] MERGEY, *L'État*, p. 40, 60–62; Carvalho, Physiocracy, p. 62-64.

[91] BRESSAN, *Serfs*, p. 105–109.

vided some legal arguments in favour of peasants in Le Trosne's *Dissertation sur la féodalité*. In it he argued that there were no legal obstacles to the abolition of feudal ties.[92]

The 1770 s then saw a joint campaign by the advocate of the Besançon *parlement* Charles Christin and Voltaire in support of the *mainmortables* in Mont Jura in the east of France.[93] Their arguments were historical ones; they rarely drew on natural law. The most outspoken enemy of serfdom and *mainmorte* among lawyers was the advocate Henrion de Pansey, whose legal opinions finally carried the day. He had already made himself famous in 1770 by a courageous defence of an African slave, Roc, from the isle of Cayenne who claimed liberty on the grounds of the principle that anyone who set foot on French soil was considered free.[94] Henrion de Pansey drew on the famous Edict of Louis X from 1315 which allegedly promulgated this principle. However, his main argument was that the African should be presumed free because he was a human being (*l'homme*) and the slaveholder should prove his claim, not the other way round. A similar alteration of the premises was decisive even in his polemic against serfdom in France.

However, his journey into the camp of detractors of *mainmorte* was a complicated one. In the famous legal case of François Sinherin's heritage (1777–1779), he was employed by the noble landlady who claimed the inheritance for herself as a part of *mainmorte*.[95] His defeat in this case and the subsequent reflection made him a decisive enemy of *mainmorte* and serfdom.

Nevertheless, he did not draw on any natural law thinkers, rights or naturalistic principles. He drew on history and the premise of human liberty. As a legal thinker he won a good reputation by publishing a French commentary on the famous manual of customary law by Guy de Coquille with supplements from other manuals.[96] This was a good strategy, for serfdom was alive mainly in *pays des coutumes*, and the critique of that practice was also a critique of the old-style *droit coutumier*.

Encouraged by these developments the minister of finance, Turgot, decided to test the public opinion by launching an attack on serfdom and *mainmorte* and seeing what the response would be. He prompted Pierre-François Boncerf to publish in 1776 a book, *Les inconvenients des droits féodaux*, which attacked serfdom on moral, legal and religious grounds and exhorted Louis XVI to abolish serfdom in royal domains. However, even here natural law or rights did not play any important role. Boncerf relied mainly on historical arguments, and referred to '*droit naturel*' only in a quotation from the same edict by Louis X of 1315, in which it was declared that France was the land of the Franks and according to '*droit naturel*' all inhabitants should be free.[97] As a physiocrat he also believed that domains, as a form of property, were no longer protected by law because their nature had changed and therefore laws had to be adjusted to new circumstances. When he needed to find a name for that good which had been violated by feudal lords, he called it '*liberté personelle*' and not human or natural rights.[98] He argued on economic grounds because limitation of liberties damaged commerce and prosperity.[99] Boncerf's pamphlet was publicly rejected by the *parlement* of Paris and burnt in public.

The time was not yet ripe for a major revision, but the growing pressure of physiocratic economic arguments and another victorious trial in the Grand Chambre of the *parlement* of Paris inspired Necker and King Louis XVI to issue the Edict of 8 August 1779 by which *mainmorte* and personal serfdom were prohibited in royal domains.[100] Even though this document did not have any legal force in private domains, it encouraged the lawyers to intensify their polemic against serfdom and *mainmorte*. The historical work of Abbé Claude-Joseph Perreciot provided new arguments because he believed that the original Frankish inhabitants of France were free and that serfdom was imposed on them by feudal lords in the Middle Ages.[101] The origin of the institution was in the status of the late Roman Laeti, from whom it was extended to other ethnic or social groups. The spread of serfdom was interpreted as the result of repressions, blackmail and violence. This work inspired the clergyman Pierre-François Clerget to write his own two tracts against serfdom, in which he drew mainly on history.[102] He only appealed to '*droit à liberté*' in an ironic fictitious document which he inserted in his pamphlet *Cri de la raison* of 1789.[103] Its aim was to show what it would be like if the masters buying freedom said explicitly what the object of the transaction was.

Even though these authors appealed to liberty, other lawyers criticizing serfdom and *mainmorte* in the 1780 s appealed to natural law. This effort went hand in hand with a continuing convergence of regional legal cultures which was now supposed to be based on natural law. Gabriel Olivier, who was writing both about Roman law and *coutumes*, proposed a project of a new legal code based on '*ordre naturel*'.[104] Yet his wording makes it

[92] LE TROSNE, G.-F., Dissertation sur la féodalité. In: LE TROSNE, *De l'administration provinciale et de la réforme de l'impôt.* Bâle, 1779, p. 617-650. See BRESSAN, *Serfs,* p. 163-164.
[93] See BRESSAN, *Serfs,* p. 111-169.
[94] HENRION DE PANSEY, Mémoire pour un nègre qui reclame sa liberté. In: *La Révolution française et l'abolition de l'esclavage. Textes et documents.* Paris, 1968, p. 1-29.
[95] BRESSAN, *Serfs*, p. 170–171. Henrion de Pansey wrote a legal opinion in favour of *mainmorte*. (BNF, call nr. Fm 27692).
[96] HENRION DE PANSEY, *Traités des fiefs de Dumoulin analysé et conferé avec des autres feudistes*. Paris, 1773.
[97] BONCERF, P.-F., *Les inconveniens des droits féodaux.* 'London', 1776, p. 54.
[98] *Ibidem*, p. 21.
[99] *Ibidem*, p. 23.
[100] ISAMBERT (ed.), *Recueil*, 26: 139–142. See BRESSAN, *Serfs*: 170–190.
[101] PERRECIOT, C.-J., *De l'état civil des personnes et de la condition des terres dans les Gaules*. Paris, 1784-1786. See BRESSAN, *Serfs*, p. 232-235.
[102] CLERGET, P.-F., *Coup d'oeil philosophique et politique sur la main-morte.* 'London', 1785; CLERGET, *Le cri de la raison.* Besançon, 1789. See BRESSAN, *Serfs*, p. 238–240.
[103] CLERGET, *Le cri,* p. 70.
[104] OLIVIER, G., *De la réforme des lois civiles.* Paris, 1786; OLIVIER, *De la rédaction des lois dans les monarchies.* Paris, 1789. See ARNAUD, *Les origines*, p. 116–118, 169, 314–315.

clear that he was again referring to the peculiarly French tradition and not to the 'school of the north'. This systemic mode of thinking led Louis Gabriel to the conclusion that every restriction of liberty is against natural law[105], and Jean Baptiste Antoine Auget de Montyon in his treatise on population raised the same claim.[106] The *Catéchisme du citoyen* by Guillaume Joseph Saige of Bordeaux also belongs to this context.[107] In it, he argued that all citizens have '*droits inaliénables de notre espèce*' which were defined as goods necessary for the self-preservation and well-being, as the two justified aims of the civil society. These obligated the state officials to respect the citizens' life, liberty, property and freedom of expression. On the other hand, the *parlement* of Besançon used vague naturalistic terminology to defend serfdom because it claimed in 1780 that it reconciled natural law (*droit naturel*) and economic necessities.[108]

The campaign of Henrion de Pansey reached its climax in the 1780 s as well, but he drew mainly on historical arguments, not on natural law theory. In his article 'Main-Morte' for the *Repertoire universel* of 1785[109] he built on the argument that the Franks were originally all free and that there was no legal ground for depriving an innocent human person of her liberty. This was the main argument. Under this assumption, all feudal obligations were supposed to be unjust and it was the lords who had to prove that they had some legal title to keep the serfs in a lower status.[110] Henrion de Pansey applied the same strategy as in the case of the slave Roc. The similarity of his approaches to both issues can be seen in the article 'Main-morte' in the *Encyclopédie méthodique*, where he used absolutely the same passionate preamble as in his anti-slavery tract.[111] He merely replaced the passage about the status of human beings with a reference to the original historical status of the free Franks. The premise of inherent human liberty was the same in both cases. He used the very same method in his *Dissertations féodales* of 1789.[112] It should be added, however, that he also claimed in his article for *Répertoire* of 1785 that defenders of serfs were '*vengeurs des droits de la nature*', which could be interpreted as their appeal to natural law.[113] The definitive abolition of *mainmorte* and serfdom came about only during the Revolution.

The trials concerning serfs and comments by feudists before 1789 helped to assert the principle of equality and freedom, but they did so without any references to secular natural law of Grotius and Pufendorf. They drew mainly on historical arguments, saying that the first serfs were subjected to servile status by force.[114] This argument did not draw on the Marquis de Boulainvilliers's claim that the origin of an enslaved population lay in the Frankish conquest.[115] Rather, they followed Montesquieu's corrected thesis that the enslavement occurred at a later stage as repressions during '*guerres civiles entre les frères*' of the high Middle Ages.[116] In so doing, the feudists achieved a similar effect as the school of secular natural law in Central Europe. They helped to assert the belief that freedom is the normal status of persons, and any limitation on it must be justified in specific terms.

4. Natural Law at Institutes of Higher Education

Universities also played a part in this process, thanks to the new subject of French law. The lecturers teaching this subject commented mainly on royal *ordonnances* as a new source of law, but they had to consider *coutumes* and Roman law too because *ordonnances* regulated only a very small portion of daily business. These commentators elaborated Bourjon's restructured Roman law, which put forward the person, and applied this model to *coutumes*.[117] In doing so, lecturers in French law would often appeal to '*droit naturel*', but in the sense which was closer to Domat and Montesquieu and not to the Central European framework of logical inferences. Some of them did, however, refer to Grotius in their defence of civic liberty.[118] Some lecturers in French law exploited authors of secular natural law to substantiate various institutions of private law, such as testaments, rules of succession, or obligations, or to explain some rules of international law.[119] In this sense, secular natural law did make a significant contribution to French legal culture.

Secular natural law had already been previously taught at the University of Strasbourg, which had close ties to German legal culture. After Maupeou's revolution of 1771 a chair of natural law was established at the Collège royal in Paris. We will now discuss both cases to see whether natural law as it was taught there really corresponded to the school of Grotius and Pufendorf and whether it included the idea of rights of man or permissions.

The Lutheran university of Strasbourg was different from other French universities because it enjoyed considerable liber-

[105] GABRIEL, L., *Observations detachées sur les coutumes et les usages anciens et modernes du resort de parlement de Metz.* Bouillon, 1787–1788. See BRESSAN, *Serfs*, p. 160. Gabriel died in 1775, so the tract must have been written in the 1770 s.
[106] [AUGET DE MONTYON, J., B.A.], *Recherches et considérations sur la population de la France.* Paris, 1778. See BRESSAN, *Serfs*, p. 164.
[107] SAIGE, G.-J., *Catéchisme du citoyen.* Genève, 1787. See EDELSTEIN, *The Terror of Natural Right*. Chicago, 2009, p. 72-73.
[108] BRESAN, *Serfs*, p. 176.
[109] HENRION DE PANSEY, Mainmorte. In: GUYOT (ed.), *Répertoire universel.* Paris, 1785, vol. 11, p. 97–128. See BRESSAN, *Serfs*, p. 229–232.
[110] SCHMALE, *Bäuerlicher Widerstand*, p. 143–155.
[111] HENRION DE PANSEY, Main-morte. In: *Encyclopédie méthodique. Tome V Jurisprudence*. Paris, 1785, p. 679-699.
[112] HENRION DE PANSEY, *Dissertations féodales*. Paris, 1789.
[113] HENRION DE PANSEY, Mainmorte. In: Guyot (ed.), *Répertoire universel.* Paris, 1785, vol. 11. See BRESSAN, *Serfs*, p. 230.
[114] SCHMALE, *Bäuerlicher Widerstand*, p. 143–155.
[115] See MACKRELL, J. Q. C., *The Attack on Feudalism in Eighteenth-Century France.* Toronto, 1973; THOLOZAN, O., *Henri de Boulainvilliers. L'anti-absolutisme aristocratique légitimé par l'histoire.* Aix-en-Provence, 1999.
[116] MONTESQUIEU, *De l'esprit*, book XXX, ch. 10–11.
[117] ARNAUD, *Les origines,* p. 121–170; CHÊNE, C., *L'enseignement du droit français en pays de droit écrit (1679–1793).* Genève, 1982, p. 287–307.
[118] CHÊNE, *L'enseignement*, p. 278–279.
[119] ARNAUD, *Les origines*, p. 207; CHÊNE, *L'enseignement*, p. 279.

ties even after the imperial city was incorporated into the Kingdom of France.[120] The surrender treaty of 1681 guaranteed that the status of the university would not change[121], which prevented the King from even establishing a chair of French law there as was required after the Edict of 1679. The courses in law that were offered in the faculties of philosophy and law were immensely popular all over Europe from the 1720 s onwards.

The surviving dissertation theses and lecture announcements show convincingly that the content of the law courses remained similar to those in Protestant German universities. For that reason, it is no wonder that secular natural law was taught too. However, the guarantee of liberties made it difficult to establish any new regular chairs, such as the chair of secular natural law.[122] The four chairs which had existed before 1681 had already included one chair of pandect and public law. The holders of this chair, such as Jeremias Eberhard Linck, really engaged with the new secular natural law. In 1780 a regular chair of public law was created.[123] On the other hand, the surviving *programmata inauguralia* do not show a single case of a professor who would discuss natural law in his inauguration address, which implies that none of the chairs specialized in that subject.[124] So secular natural law was a marginal concern of the law professors, who focused mainly on issues of ecclesiastical law. Considering the Lutheran interests of the city and of the Chapter of St. Thomas, the focus on ecclesiastical law was understandable.

In spite of that, secular natural law was integrated into the courses, too, and some scholars discussed it in their academic works.[125] Heineccius's textbook was used in the lessons on Roman law[126] and the lecture announcements include courses based on Grotius, Pufendorf and Heineccius.[127] The large number of exceptionally well-preserved dissertation theses provide a better image of the scope of topics discussed by Strasbourg legal scholars.[128] Among the professors, Johann Heinrich Feltz and Jean Weiger had a lasting interest in questions of legal theory, but they did not focus on natural law. Jeremias Eberhard Linck had already penned a very short outline of natural law in 1723[129], and Johann Philipp Weigel used natural law to discuss guarantees of peace.[130] Linck's works show him as a follower of Pufendorf and Thomasius who had already developed a theory of permissions in law. Many dissertations discussed limitations of torture and attitudes to Church property (*jus circa sacra*).

The reason for the international popularity of Strasbourg was not the work of these legal scholars but the historical erudition of Johann Daniel Schöpflin, who was writing about genealogies of ruling houses and international treaties. He laid the foundation for research into the law of nations, and this was what attracted the students here. Actually, Schöpflin held the chair of eloquence and history, not of natural law.[131] The fame of the school of international law flourished even more under Christoph Wilhelm Koch, who succeeded Schöpflin after his death in 1771. He held the chair of international law and political science[132], and in 1780 he obtained the newly-created chair of public law.[133]

The French universities were making their own way towards a better knowledge of secular natural law and the equal universal rights it entailed. The interest in this topic came rather from individual scholars whereas universities and established professors were effectively blocking these reforms. This was the case in the eastern University of Besançon, where King Louis XV ordered the creation of a chair of '*droit public*' in 1745.[134] The university effectively blocked this plan, even though a certain François Droz persisted in his efforts to make it happen until 1773. The research of Jean Portemer has discovered that there was also a group of scholars who met regularly from 1764 to 1770 in the dwelling of M. Monblind, a councillor of the *parle-*

[120] For the history of the University of Strasbourg see LEFORT, J., *L'enseignement du droit à l'ancienne Université de Strasbourg.* Toulouse, 1872; VOSS, J., *Universität, Geschichtswissenschaft und Diplomatie im Zeitalter der Aufklärung : Johann Daniel Schöpflin (1694–1771).* München, 1979; VOSS, Die französischen Universitäten und die Aufklärung, In: HAMMERSTEIN, N. (ed.), *Universitäten und Aufklärung.* Göttingen, 1995, p. 207–220; LIVET, G. – RAPP, F. (eds.), *Histoire de Strasbourg, 4 vols. Strasbourg, 1981, vol. 3;* THOMANN, M., *Bicentenaire de la Faculté de droit de Strasbourg: 1804-2004. Strasbourg, 2008.*

[121] LEFORT, *L'enseignement*, p. 13; VOSS, *Universität*, p. 112.

[122] VOSS, *Universität*, p. 114; VOGLER, B., L'université de Strasbourg au milieu du 18e siècle. In: VOGLER, B. – VOSS, J. (eds.), *Strasbourg, Schoepflin et l'Europe au 18e siècle.* Bonn, 1996, p. 10–17, 11.

[123] LEFORT, *L'enseignement*, p. 16.

[124] Archives de la ville de Strasbourg, 1 ARST 445, Nr. Inv. 1-60.

[125] See THOMANN, M., Theorie und Praxis der Menschenrechte an der Rechtsfakultät Straßburg im 18. Jahrhundert. In: BAUMGÄRTEL, G. et alii (eds.), *Festschrift für Heinz Hübner zum 70. Geburtstag.* Berlin, 1984, p. 312-324, 318.

[126] THOMANN, Theorie, p. 317.

[127] *Ibidem*, p. 316. The programmes of courses (*programmata lectionum*) are preserved in Archives de la ville de Strasbourg, 1 ARST 450, Nr. Inv. 29.

[128] The law dissertations and dissertation theses from the time before 1790 are preserved in the Bibliothèque nationale et universitaire, Strasbourg. There are about 1340 items in this collection (under the call number F. 13.338), and about 800 of these date from the eighteenth century.

[129] LINCK, J. E., *Principia juris naturae, gentium et civilis.* Strasbourg, 1723; LINCK, *Dissertatio iuridica de historia juris, justitia et jure et statu hominum in genere.* Strasbourg, 1737.

[130] WEIGEL, J. P., *Dissertatio juris naturae de garantia pacis.* Strasbourg, 1762.

[131] VOSS, *Universität*, p. 120. Schöpflin's *programma inauguralium* of 24 March 1721 is preserved in Archives de la ville de Strasbourg, 1 AST 445, Nr. Inv. 40. However, he studied Grotius and Pufendorf with his tutor Johann Georg Scherz. See PORTEMER, Recherches, p. 350.

[132] SPROLL, H., Christoph Wilhelm Koch (1737-1813). Jurist und Historiker an der Straßburger Universität und an dem theologischen Seminar. In: VOGLER - VOSS (eds.), *Strasbourg*, p. 83–109; VOSS, J., Christoph Wilhelm Koch, homme politique et historiographe contemporain de la Révolution. In: *History of European Ideas* vol. 13, Nr. 5, 1991, p. 531–543. Koch's *programma inauguralium* is not extant.

[133] LEFORT, *L'enseignement*, p. 16.

[134] PORTEMER, Recherches, p. 32; PORTEMER, Politique royale de l'enseignement du droit en France au 18e siècle. In: *Revue d'histoire des facultés de droit et de la science juridique,* vol. 7, 1988, p. 351-352.

ment of Paris, to discuss public law. They focused on the study of historical sources, but the minutes of their meetings show that they were also studying natural law after Burlamaqui.[135]

It was again during Maupeou's reform project that leading officials of the state began to support the idea that France should have some chairs of *droit naturel*. In retrospect, Maupeou himself claimed in his *Compte rendu au roi* of 1789 that he wished for a better 'civic education' based on books on natural law put in the right order,[136] but in his memorandum on the reform of faculties of law of 1770, he refused to create any new chairs of that discipline.[137] It was in fact Abbé Jean-Jacques Garnier, inspector of the Collège royal, who in 1772 drafted an outline of a two-year course which also envisaged lectures on the nature of man and the rights and duties of citizens based on Grotius, Pufendorf, Cumberland and Burlamaqui.[138] A chair of law of nature and of nations was supposed to be created, but Maupeou and the Council of State rejected it for fear of the dangerous political implications that lessons in natural law would provoke. Thanks to the King's decision the chair was created in 1773[139] and given to Mathieu-Antoine Bouchaud.[140]

The chair of law of nature and of nations (*juris naturae et gentium*) at the Collège royal was the only one of its kind in France. The lecture announcements[141] confirm that Bouchaud was actually teaching '*institutiones iuris naturae et gentium*' from 1773 to 1774;[142] then '*premissa iuris naturae et gentium historica delineatione*'[143] in 1779 and then again from 1783 to 1784[144]. Apart from that he mainly discussed sovereign power. He did not publish anything that would bear natural law or rights in its title, but he published historical essays and works on Roman law, which show him as an adherent of Montesquieu and a defender of civil liberties. He had already shown his sympathy for Montesquieu in his essays on history which posed as a translation of Lord Kames.[145] In it, Bouchaud lauded the anonymous Scots author and presented his book as a supplement to Montesquieu because it treated of the history of the spirit of laws. His treatise on the philosophy of international commercial treaties of 1772 defends liberty of commerce but draws on historical arguments.[146] His main work is definitely his comment on the law of the Twelve Tables of 1787.[147] This seemingly unworldly subject is actually a discussion on the beginnings of a state and the role of religion and law in the polishing of manners and securing freedom. Rome appears here as a country in a similar situation to France because she is deliberately accommodating ancient foreign (i.e. Greek) law, and at the same time transforming her own older customary law. Bouchaud praises the Romans for their decision to look for advice to Athens because it shows that they wished to preserve their liberty even under law. In his description of the crisis which led the Romans to the decision to provide a written code, Bouchaud explains the merit of law in holding tyrants in check and preventing anarchy among the citizens. In the comments on the tables themselves, Bouchaud emphasizes the significance of individual securities such as property and protection against injuries. This is summed up in the comments on the ninth table, which deals with the right of the Roman citizen to be judged by the community (*populus*) in charges concerning his life, liberty, citizenship and family. Bouchaud never quotes any works on secular natural law. He draws mainly on commentaries on Roman law.

The last chance to introduce (secular) natural law and human rights into the courses of law was the short-lived reform attempt instigated by the Keeper of the Seals, Miromesnil, in 1786 and carried out by his successor Lamoignon.[148] The aim of this reform was to modernize administration and justice, but it also pertained to legal education. In 1786 the President of the *Cour des aides*, Charles Barentin, was ordered to conduct a large-scale survey among the faculties of law, in which they were asked to fill in a unified form concerning the organization and content of legal education.[149] None of the known answers provided by faculties proposed to establish chairs of natural law. Yet, as we will see, Lamoignon's survey did inspire some individuals to advance their own private reform projects.

5. Commenting on the Revolutionary Declaration

It was only in the first years of the Revolution that all these loose ends were tied together and plans to interpret the Declaration of 1789 on the basis of natural law emerged.[150] In this way, systematic legal thinking would extend even to the relation between individual citizens and public power. It was the time when Henrion de Pansey, Christin, the clergyman Clerget and other thinkers who had participated in earlier discussions got

[135] Bibliothèque nationale de France, MS call nr. Fr. 7565. See Portemer, 'Recherches' : 361-363.
[136] Published in FLAMMERMONT, J., *Le chancelier Maupeou et les parlaments.* Paris, 1883, p. 599-646, 602-04.
[137] Bibliothèque nationale de France, MS call nr. fr 6570, MAUPEOU, *Projet contenant règlement pour les facultés de droit*, c.1770.
[138] Copy in Collège de France, Archives, 14 CDF 24-c. See PORTEMER, Recherches, p. 366, 395–396.
[139] ISAMBERT (ed.), *Recueil*, vol. 22, p. 558-560.
[140] For his personal papers see Collège de France, Archives, 15CDF43. On his biography see KAFKER, F. A., Notice sur les dix-sept auteurs des 'discours' de l'encyclopédie. In : *Recherches sur Diderot et sur l'Encyclopédie*, vol. 7, 1989, p. 125–150, at 131.
[141] Collège de France, Archives, 4 AFF 145–163. See Portemer, Recherches, p. 371.
[142] Collège de France, Archives, 4 AFF 145-146, 1773-1774.
[143] Collège de France, Archives, 4 AFF 152. 1779.
[144] Collège de France, Archives, 4 AFF 157. 1783-1784.
[145] [HOME, LORD KAMES, H.], *Essais historiques sur les lois, traduit de l'anglais par M. Bouchaud.* Paris, 1766.
[146] BOUCHAUD, M.-A., *Théorie des traités de commerce entre les nations.* Paris, 1777.
[147] BOUCHAUD, M.-A., *Commentaire sur la loi des douze tables.* Paris, 1787.
[148] See MARION, M., *Le garde des sceaux Lamoignon et la réforme judiciaire de 1788.* Paris, 1905; CURZON, L'enseignement (II), p. 330.
[149] COURZON, A., L' Enseignement du droit dans les universités de France aux 18e et 19e siècles' (I). In: *Nouvelle revue historique de droit français et étranger,* vol. 43, 1919, p. 209–269; (II), p. 305–364, 330–332.
[150] *Ibidem*, p. 312.

involved in the revolutionary turmoil, either as voters, or by entering the National Assembly, or by activities at local level. However, the Universities as corporations were prevented from taking part either in the Estates General or from participating at the drafting of the final *cahier de doléances* of the municipalities, *baillages* or *sénechaussées*.[151] They could express themselves only in the preparatory *cahiers* and circular forms of early 1789. Yet this preparatory material testifies only to the continuing lack of interest in any innovations. The *cahier* submitted by the University of Orléans did not include any proposals to establish chairs of natural law or introduce any other new disciplines.[152] However, the *cahiers de doléances* written by other actors than universities did contain proposals concerning reforms of legal training, and some of them – such as Normandy – asked for the introduction of courses in natural law.[153]

In the meantime, the faculties of law were falling apart, for professors were entering politics and students were losing interest in further studies. It was only the passage of the Declaration of the Rights of Man and of the Citizen in August 1789 that created a new opportunity for the surviving institutions of legal education. They understood that the constitutional monarchy would need qualified forces to teach and interpret the new laws. Since most professors had left the universities or resisted the new order, it was an opportunity for several previously marginalized professors and *docteurs agrégés* to spell out their own wishes.

The preparatory debate on the new Declaration did not appeal to the discipline of natural law, and the Declaration itself did not appeal to it either. The preamble to the final version does not say that the cause of the troubles and corruption had been ignorance of natural law, but ignorance of '*droits de l'hommes*'. This was an interesting detail which the lawyers who submitted the petition of February 1791, which we will discuss later, failed to see. Even though the declaration speaks in Article 2 about '*droits naturels*' and many preliminary proposals denoted 'Nature' as the origin of such rights, none related such terms to secular natural law as its basis. If we run through the preliminary and parallel proposals of the declaration[154], we find that deputies and external authors actually believed that the declaration would provide such a basis, or '*la première pierre de l'edifice*'[155]. The '*legicentrisme*' expressed in Articles 4 to 8 turned the logic of natural rights upside down because it established the principle that human-made laws, which will be promulgated, will determine the boundaries between rights and provide the basis for the edifice of positive laws.

Apparently, the basis to which the framers referred was not the immutable logical references of natural law, but future positive laws. The Declaration itself was given only an educative role because the preamble stated that its aim was to make '*les membres du corps social*' recall their rights and duties. It was only after the passage of the Declaration that some of the commentators found out that a declaration cannot be explained by circular self-references, but needs an exterior referential framework. This was found in natural law.

Some of the remaining universities and institutions of higher education sought to revive their courses by teaching commentaries on the new declaration and Constitution. The university of Angers had already proposed such a course in the academic year 1789/1790, but the details of its contents are not known.[156] A certain Pierre Tastu at the university of Perpignan also sought to offer such a course, but he was prevented from doing so by his colleagues.[157] Strasbourg, too, joined this trend and announced a course in '*Jura et officia hominis et civis*' in 1792.[158] In Caen, Professor Lhonorey Dubuisson is said to have offered a course on the Constitution and the rights of man in 1791, but the details of his project are not known either.[159] We know, however, that only four students enrolled that year.[160] The numbers at other universities were not much better. The faculties of law were dying, and the new course was their last hope.

Fortunately, there are three more projects for such new courses which are extant and which show that their authors were trying to see the broader frame of reference in natural law. What makes them even more interesting for our subject is that they all claim to have resumed activities that had begun in the last months of the Ancien Régime. In chronological order, the first of them is the educational project of Léonard Bourdon, the second is the petition of *docteurs agrégés* of the Faculty of Law in Paris, and the last one is a project on Roman law by Bertrand Cahuac of Douai. All of them were concerned with the benefit of natural law for the explanation of human rights to the general public. All are preserved among the files of the Committee of Public Instruction because the revolutionaries believed that human rights must somehow be inculcated into the minds of French citizens. A truly national education was supposed to guarantee this task. The thinkers who participated in this public discussion were aware that the core of public education should be the explanation of the Constitution, and this is why they even discussed law.

The first of these reformers was Léonard Bourdon de Crosnière, who had already submitted a '*Projet d'institution publique*

[151] *Ibidem*, p. 337–340.
[152] *Ibidem*, p. 333–336.
[153] BRIDREY, E., Les dernières années de l'ancienne faculté des droits de Caen. In : *Revue historique de droit français et étranger,* vol. 9, 1930, p. 230–294, 702–773, at 741.
[154] See FAURÉ, C. (ed.), *Les déclarations des droits de l'homme de 1789.* Paris, 1988; DE BAECQUE, A., SCHMALE, W., VOVELLE, M. (eds.), *L'an 1 des droits des hommes.* Paris, 1988; RIALS, S. (ed.), *La déclaration des droits de l'homme et du citoyen.* Paris, 1988; JAUME, L. (ed.), *Les déclarations des droits de l'homme.* Paris, 1989.
[155] Le projet de déclaration de Sinety. In: RIALS (ed), *La déclaration*, p. 650.
[156] CURZON, L'enseignement, p. 344.
[157] *Ibidem*.
[158] THOMANN, Theorie, p. 318.
[159] BRIDREY, Les dernières années (II), p. 702–773.
[160] *Ibidem*, p. 703.

et nationale' in May 1790, even before the final promulgation of the first Constitution.[161] His main argument was that he possessed the greatest experience in the field because he had established an experimental school on the same educational premises in the last months of the Ancien Régime. As a proof, he supplied *lettres patentes* from October 1788 permitting him to start a Royal Academy (*Société royale d'émulation*) which would be based on equality among pupils and which would teach useful sciences. The '*Prospectus d' un plan d'éducation nationale*' of October 1788 provided details about the contents of the educational courses.[162] What makes his school interesting for us is the fact that the programme also includes the study of '*droit naturel*'. When the deputies did not respond for a long time, Bourdon submitted a second request in November 1791,[163] in which he again stressed that he had begun to teach on the 'eternal basis of human rights and separation of powers'[164] even before the Revolution. He explained the paradox by the unusual self-confidence of despotism, which did not foresee the results of such principles. In the new project for national education, Bourdon insisted on teaching the '*droits de l' homme*' and '*devoirs du citoyen*' on the principles of equality and liberty, but he did not relate them to natural law any more, but to the future '*code civil*', which would provide the basis for a new concept of legal education. Bourdon finally joined the committee and the Jacobin club and subsequently became one of the cruellest radicals, but his educational plans were not realized.[165]

The second project was submitted in February 1791 by a group of *docteurs agrégés* from the Paris Faculty of Law.[166] It was a petition proposing a system of law education for all citizens which would help them to understand the new Constitution. They strictly required the establishment of chairs of '*droit naturel*'. They styled their proposal as a revolutionary attack against the despotism of professors who had been given the monopoly of teaching law by the Edict of Saint Germain in 1679. If they had been given the liberty to give public courses in law, they would have explained the new Constitution on the basis of natural law. In support of their request, they misquoted the Declaration of the Rights of Man and of the Citizen. According to their *Projet d'enseignement,* the preamble of the Declaration determined that the `*ignorance et mépris du droit naturel*' was the main cause of `*malheurs publiques*', while the Declaration was actually speaking about '*mépris des droits de l'homme*' in this phrase.[167] Yet the course in sovereign power and constitution was necessary because if citizens were not taught to love the new order, society would relapse into despotism. The new system would also require a completely new hierarchy of law schools. Natural law and constitutional theory would be taught in the highest institutes, which would be established in Paris, Rennes, Bordeaux and Lyon.

The last of these projects was submitted to Talleyrand in October 1791 by Bértrand Cahuac, professor of Roman law at the University of Douai in the north-east of France.[168] Even he presented himself to the Committee of Public Instruction as a legal thinker who had begun to spread new principles of equality and human rights even before the Revolution. In 1788 and early in 1789, he published two volumes of a French translation of Justinian's *Institutes* on which he commented with an emphasis on the rights of persons.[169] This was a part of a larger plan for a reform of law studies which he had proposed as a reply to the survey conducted by the Keeper of the Seals, Lamoignon. To prove his claim, Cahuac supplied a complete correspondence between the Law Faculty of Douai and Charles Barentin, the president of the *Cour des aides*, who supervised the reform of legal studies. In the good French tradition, Cahuac had suggested that the courses of law be based on principles hidden in the *Institutes*, which actually also permeate other parts of Roman law, *coutumes* and royal ordonnances. The French translation of the *Institutes* was proof of his efforts. Cahuac wished that Roman law should be taught in French, as citizens would then acquire principles which were the basis of the new order.

A part of these efforts to create a link between the declaration and secular natural law is an unusual step taken by the printer Guillaume junior in Paris in 1791. He re-edited Burlamaqui's *Principes du droit naturel,* to which he added the whole Declaration and suggested that Burlamaqui's work provided the background philosophy to the Declaration.[170]

It was after these last-ditch attempts on the part of university scholars that the National Assembly issued the decrees of 14–26 September and 16 October 1791[171] which commanded the remaining universities to have at least one professor who

[161] Archives nationales, carton F17, 1310, folder n° 7, Léonard Bourdon de Crosnière, '*Projet d'institution publique et nationale*'. The folder includes also a printed program, '*Idées sur l'éducation nationale*' (no folio number). The whole collection of documents from 1788 was printed during the Revolution under the title *Plan d'un établissement d'éducation nationale*. Orleans, 1788. (reprinted in Paris by Hachette in 1976).

[162] Archives nationales, carton F17, 1310, folder n° 12.

[163] Archives nationales, carton F17, 1309, no folder number, 'A l'assemblée nationale'.

[164] *Ibidem*, '…analogue à celle qui a depuis régéneré cet empire, fondée comme elle sur les bases éternelles des droits de l'homme et sur la separation des pouvoirs.'

[165] On his later career see SYDENHAM, M. J., *Léonard Bourdon. The Career of a Revolutionary 1754–1804.* Waterloo, 1999.

[166] Archives nationales, Instruction publique, carton F17, 1310, *Projet d'enseignement de droit public et privé dans toute l'eténdue de la France*, paginated. See Lemasne-Desjobert, *La faculté*, p. 118; RIALS, S., Les docteurs agrégés parisiens à la barre de la Constituante. In : *Revue d'histoire des facultés de droit et de la science juridique*, vol. 7, 1988, p. 45–67.

[167] Archives nationales, Instruction publique, carton F17, 1310, *Projet*, p. 6.

[168] Archives nationales, Instruction publique, carton F17, 1310, no folder number. The document includes the address 'renvoyé à M. Talleyrand-Perigord'. For Cahuac see COLLINET, P., *L'ancienne faculté de droit de Douai 1562–1793.* Lille, 1900, p. 33-34, 99-100.

[169] CAHUAC, B., *Premier livre des Instituts de Justinien.* Douai - Paris, 1788. The library catalogues register only one volume of this book; the existence of the second volume has not been proved.

[170] BURLAMAQUI, J.-J., *Principes du droit naturel. Nouvelle édition, revue, corrigée et augmentée par la Déclaration des droits de l'homme.* Paris, 1791.

[171] BRIDREY, Les dernières années, p. 736; LIARD, L., *L'enseignement supérieur en France 1789-1889*, 2 vols. Paris, 1888, vol. I, p. 120-123.

was to teach the new constitution.[172] The universities of Paris, Nancy and Reims actually appointed such professors.[173] The University of Caen presented the Directory of the Department with a plan including the establishment of such a chair, too.[174] Lhonorey Dubuiss assured the Department in 1792 that he had been giving such a course since November 1791.[175]

After all these futile efforts, the decree of 15 September 1793 abolished all *collèges de plein exercises*, faculties of theology, medicine, arts and law. The reform attempts of legal scholars from old universities were terminated, as were their courses, but Bouchaud at the Collège de France continued his course in natural law until 1796.[176] After his chair was abolished, he also produced a reform proposal, and in 1799 presented the Committee of Public Instruction with a tract on *Institutions élémentaires du droit de la nature et des gens*.[177] Without universities, the further commentators of the Declaration of the Rights of Man and of the Citizen understood the interpretation mainly as an educational task, the aim of which was to make people understand and love the new principles.[178]

6. Conclusion

Our article discussed the question of whether we could trace any interest in the rights of man and permissions in the natural law theories of the Ancien Régime and if so, whether these attempts were related to the logical inferences of secular natural law of the 'school of the north'. There are already some classical French interpretations of this issue, such as Arnaud's work on legal doctrines and Stéphane Rials's inquiry in the epistemology of human rights. French law was undergoing a transition to a coherent system, but on the basis of a gradual convergence of regional legal cultures, which were partly based on Roman law and partly on *coutumes*. This process was supported by elevating French law to an academic position in 1679. This move led to establishments of chairs of French law at universities, but it also made chairs of secular natural law unnecessary. The systematization conducted by French legal scientists was based on the idea of a '*ordre naturel*' which developed on the basis of Jean Domat's groundbreaking tract *Lois civiles* of 1689. It drew on the idea of a God-given natural order which could be reconstructed on the basis of Roman law. Later on, in Montesquieu's refashioning, the idea of a natural order was pushed towards a more relativist model, in which particular laws of a given state were supposed to be naturally adjusted to a given set of physical and economic circumstances characterizing the nation.

Domat's model provided also for a large scope of permitted acts and for two main aims, life and felicity, which led to a logical guarantee of property. Under the influence of this thinking, later French legal scholars – such as Bourjon or Pothier – transformed the Roman triangle of '*personae, res, actiones*', into triangles, in which persons were central, and legal action was replaced by property or other objects.

The coherence of the French system was put to test in their approach to the legal incapacities of serfs and *mainmortables*. The lawyers were not blind to this challenge. Drawing on the idea that the subjection of serfs and *mainmortables* had been introduced in the high Middle Ages by force, the lawyers – mainly Henrion de Pansey – asserted the conception that liberty is the original and appropriate status of humans, and limitations to it have to be explained and justified. This reversal of premises was another improvement which the French achieved without the help of secular natural law.

After Maupeou's revolution of 1771, voices calling for establishing secular natural law at institutes of higher education were loud again. Apart from the University of Strasbourg, which was close to German culture, secular natural law was taught at the Collège royal in Paris. The chair holder, Professor Mathieu-Antoine Bouchaud, was actually teaching again on the basis of Roman law, and his concepts were derived from Montesquieu.

Several exceptional projects of educational reform which started under Lamoignon's judicial reform of 1786/87-1789 supposed that natural law (in general terms) should be taught and that it should be used as a referential framework to explain human rights (Léonard Bourdon, Bértrand Cahuac in Douai).

This tendency is also confirmed in the first years of the Revolution, when ancient faculties of law began to weave plans for teaching the principles of the new Declaration of the Rights of Man and of the Citizen and the Constitution. In this way, legal scientists sought to regulate the relationship between individual citizens and public power.

The development of the early years of the Revolution shows that there were domestic French origins of the idea of human rights. Drawing on a specific French conception of '*ordre naturel*' of Domat and Montesquieu and on the scheme of Roman law transformed by Bourjon and others, French legal scholars were able to formulate their own idea of human rights.

[172] CURZON, L'enseignement, p. 343.
[173] *Ibidem*, p. 344.
[174] BRIDREY, Les dernières années, p. 742 and 752.
[175] *Ibidem*, p. 746.
[176] LEFRANC, A., *Histoire du Collège de France depuis les origines jusqu'à la fin du premier empire.* Paris, 1893, p. 269–307, at 293.
[177] Archives nationales, Instruction publique, carton F 17, 1011, BOUCHAUD, M.-A., *Institutions élémentaires du droit de la nature et des gens.* Paris, 1799.
[178] See the bibliography by HARTEN, H.-C., *Les écrits pédagogiques sous la Révolution.* Paris, 1989.

Die Todesurteile und die Propaganda. Die härtesten Urteile des Sondergerichts Kattowitz (1939–1945) und deren Ausnutzung in der lokalen Presse*

(Death Sentences and Propaganda. The Harshest Penalties of the Special Court in Katowice /1939–1945/ and their Use in the Local Press)

*Konrad Graczyk***

Abstract

The article is devoted to the propaganda use of the Special Court's death sentences in Katowice during the Second World War. It outlines the statistics on the use of the death penalty by the special court. The provisions regulating the judiciary's operation of press centers, which were a vital link between the judiciary and the press, were discussed. Then the practice of announcing the execution of death sentences imposed by the Special Court in Katowice was presented, based on archives illustrating the court's activities and a query of the local press during the Second World War. The research covered both the practice of using the characteristic red posters informing about the executions and the use of newspapers for this purpose. The press inquiry results were discussed in detail, taking into account the content and form of press releases. In summary, an attempt was made to answer the question to what extent the discussed Katowice practice differed from the practice of proclaiming death penalties in other regions of the territories incorporated into the Reich, in particular in Poznań and Łódź, and to estimate the impact on the propaganda on the Upper Silesian population.

Keywords: *special court; Upper Silesia; Sondergericht Kattowitz; propaganda; death penalty.*

1. Einführung

Die NS-Justiz bleibt seit längerer Zeit Gegenstand von wissenschaftlichen Untersuchungen. In letzten Jahren sind viele Monographien zu einzelnen Sondergerichten[1] sowie die synthetische Arbeit zur deutschen Justiz in den eingegliederten Ostgebieten von Maximilian Becker erschienen[2]. Es ist ein natürlicher Ablauf, dass Forscher ihre Aufmerksamkeit zunächst auf Fachliteratur und dann auf Archivalien richten. Diese Methodik erlaubt es, die wesentlichsten und grundlegendsten Fragen der Tätigkeit der NS-Sondergerichte zu erörtern, wie Verfassung, Organisation, Kognition, Personal und Praxis der gerichtlichen Entscheidungen. Die in diesem Umfang durchgeführten Untersuchungen sollten die Charakterisierung eines bestimmten Gerichts ermöglichen. Da es sich bei NS-Sondergerichten um Institutionen eines totalitären Staates handelt, der die Nachbarstaaten erobert hatte, treten auch viele andere – politische – Kontexte in Erscheinung. Dazu lohnt es sich auch über die Gerichtsarchivalien als Quellenbasis hinauszugehen. Wie Becker zutreffend feststellte, war die deutsche Justiz in den in das Reich eingegliederten Ostgebieten ein „Mitstreiter in Volkstumskampf". Vor diesem Hintergrund erscheint es naheliegend, nicht nur nach den Tätigkeiten der einzelnen Justizbehörden zu fragen, sondern auch nach der Aufnahme der Rechtsprechung in der Presse und damit nach dem Einsatz von Propaganda.

Es ist zu betonen, dass die NS-Sondergerichte 1933 als politische Gerichte gegründet wurden. Die Einrichtung von Sondergerichten war eine der ersten gesetzgeberischen Tätigkeiten

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[1] U.a.: BOHN, R., DANKER, U. (Hrsg.), *„Standgericht der inneren Front". Das Sondergericht Altona/Kiel 1932-1945*, Hamburg 1998; IRMEN, H., *Das Sondergericht Aachen 1941-1945*, Berlin 2018; VURGUN, O., *Die Staatsanwaltschaft beim Sondergericht Aachen*, Berlin 2017; SCHWARZ, A., *Rechtsprechung durch Sondergerichte. Zur Theorie und Praxis im Nationalsozialismus am Beispiel des Sondergerichts Berlin*, Aachen 1992; NÜCHTERLEIN, J., *Volksschädlinge vor Gericht. Die Volksschädlingsverordnung vor den Sondergerichten Berlins*, Marburg 2015; LUDEWIG, H.-U., KUESSNER, D., *„Es sei also jeder gewarnt". Das Sondergericht Braunschweig 1933-1945*, Braunschweig 2000; KELDUNGS, K.-H., *Das Duisburger Sondergericht 1942-1945*, Baden-Baden 1998; SCHMIDT, H., *„Beabsichtige ich die Todesstrafe zu beantragen". Die nationalsozialistische Sondergerichtsbarkeit im Oberlandesgerichtsbezirk Düsseldorf 1933-1945*, Essen 1998; ROESER, F., *Das Sondergericht Essen 1942-1945*, Baden-Baden 2000; BOZYAKALI, C., *Das Sondergericht am Hanseatischen Oberlandesgericht. Eine Untersuchung der NS-Sondergerichte unter besonderer Berücksichtigung der Anwendung der Verordnung gegen Volksschädlinge*, Frankfurt am Main 2005; OEHLER, C., *Die Rechtsprechung des Sondergerichts Mannheim 1933-1945*, Berlin 1997; BENTZ, C., *Die Rechtsprechungspraxis des Sondergerichts München von 1939-1945*, München 2003; WECKBECKER, G., *Zwischen Freispruch und Todesstrafe. Die Rechtsprechung der nationalsozialistischen Sondergerichte Frankfurt/Main und Bromberg*, Baden-Baden 1998; SCHLÜTER, H., *„…für die Menschlichkeit im Strafmaß bekannt…". Das Sondergericht Litzmannstadt und sein Vorsitzender Richter*, Düsseldorf 2006; HÜTT, G., *Urteile des Sondergerichts Kalisch und der Richter Ferdinand Trümper aus Duderstadt*, Norderstedt 2015.

[2] BECKER, M., *Mitstreiter im Volkstumskampf. Deutsche Justiz in den eingegliederten Ostgebieten 1939-1945*, München 2014.

der neuen nationalsozialistischen Regierung und die erste Änderung im Bereich der Gerichtsverfassung[3]. Die Sondergerichte galten als geschickt und rasch, da sie nur einzelinstanzlich und im verkürzten Verfahren verhandelten. Die offizielle Aufgabe der neuen Justizbehörden bestand darin, bei politischen Hochspannungen schnell und nachdrücklich Strafgewalt auszuüben. Praktisch bedeutete es die Sicherung und Festigung der eroberten Macht, da damals nur politische Delikte zur Rechtsprechung der Sondergerichte gehörten. Dies begann sich 1938 zu ändern und wandelte sich endgültig während des Krieges. Nach der Verordnung über die Erweiterung der Zuständigkeit der Sondergerichte von 1938[4] wurde ein Prozess eingeleitet, der wohl als „Verallgemeinerung" der Sondergerichte bezeichnet werden kann. Dies war die erste Manifestation einer strategischen politischen Entscheidung – die Ausweitung der Rechtsprechung der Sondergerichte auf die allgemeine Kriminalität[5]. Die Wurzeln dieser Entscheidung lassen sich auf die Ansichten der Nationalsozialisten zur Niederlage Deutschlands im Ersten Weltkrieg und Hitlers selbst zur Gesellschaft zurückführen. Nach der sog. Dolchstoß-Legende wurde die Armee des Zweiten Reiches nicht im Felde, sondern von innen heraus von antipatriotischen Kräften[6], d.h. Sozialdemokraten, Pazifisten, Liberalen, einigen Katholiken, Deserteuren und gewöhnlichen Kriminellen heimtückisch bezwungen[7]. Auch Juristen wurden für diesen Zusammenbruch verantwortlich gemacht[8]. Infolgedessen bestand die Aufgabe der deutschen Justiz, vor allem der Sondergerichte und des Volksgerichtshofs, darin, zu verhindern, dass diese Situation im neuen Krieg erneut eintritt[9]. Hitler dagegen sah in der Gesellschaft drei Kategorien von Menschen. Die erste, ganz oben platziert, bestand aus ehrlichen und opferfähigen Personen. Ihr negatives Spiegelbild war die Gruppe der Kriminellen und potenziellen Kriminellen ganz unten. Zwischen diesen beiden Gruppen befand sich eine unbestimmte, indifferente Masse, die dazu neigte, sich der ersten oder der zweiten Kategorie zuzuwenden. In einer solchen Situation sollten das Strafrecht und die Rechtsprechung der Sondergerichte Vertreter der Zwischengruppe abschrecken und die Kriminellen endgültig beseitigen[10].

Der Abschreckungseffekt sollte grundsätzlich durch Erweiterung der Anwendung der Todesstrafe erzielt werden. 1933 gab es im deutschen Strafrecht nur drei Tatbestände, die mit dem Tod bestraft wurden[11]. Für die Nationalsozialisten kam die Abschaffung der Todesstrafe nicht in Frage, ebenso bestand unter ihnen ein Konsens über die Ausweitung ihres Anwendungsbereichs[12]. Noch vor Ausbruch des Zweiten Weltkriegs stieg die Zahl der von der Todesstrafe bedrohten Tatbestände auf fünfundzwanzig[13] und erreichte vor ihrem Ende sechsundvierzig.

Der Abschreckungseffekt in der Bevölkerung sollte durch entsprechende Informationspolitik, d.h. Verkündung von Urteilen durch Straßenanschläge und ihre propagandistische Ausnutzung in der Presse, erzielt werden. Das Ziel der Studie ist es, die Frage der propagandistischen Ausnutzung von besonders harten Urteilen (Todesurteilen) des Sondergerichts Kattowitz zu analysieren. Diese Analyse erfordert zuerst die Erforschung der Theorie – der erlassenen Vorschriften zur Verkündung von Urteilen sowie zur Mitarbeit der Justiz mit der Presse – und dann die Untersuchung der Praxis – wie diese Vorschriften während des Krieges in Oberschlesien angewandt wurden. Zur Erforschung der Praxis wird sowohl auf Archivalien des Sondergerichts Kattowitz als auch auf den Inhalt der oberschlesischen Lokalpresse Bezug genommen.

Das Sondergericht Kattowitz wurde 1939 noch während des Überfalls auf Polen errichtet. Es war also ein Strafgericht, das einzelinstanzlich bei bestimmten, vor allem schweren politischen, wirtschaftlichen und kriminellen Verbrechen verhandelte. Seine örtliche Zuständigkeit umfasste grundsätzlich den neu gegründeten Regierungsbezirk Kattowitz, also die Region, die vorher der Zweiten Polnischen Republik angehörte. Es übte seine Amtstätigkeit im Rahmen des Rechtsregimes der ins Reich eingegliederten Ostgebiete aus. Mit der bis Januar 1945 dauernden Rechtsprechungstätigkeit fing das Sondergericht im September 1939 an[14]. Was die Todesurteile dieses Sondergerichts betrifft, so werden diese nach den Erkenntnissen von A. Konieczny insgesamt gegen 311 Personen gesprochen[15]. Diese Berechnung beruht jedoch nicht nur auf Strafakten, sondern berücksichtigt auch andere Quellen (u.a. die Mordkartei des

[3] RYSZKA, F., *Państwo stanu wyjątkowego. Rzecz o systemie państwa i prawa Trzeciej Rzeszy* [Der Staat des Ausnahmezustands. Zum Staats- und Rechtssystem des Dritten Reiches], Wrocław 1985, S. 200-207, 383; WECKBECKER, *Zwischen Freispruch*, S. 36; BOZYAKALI, *Das Sondergericht*, S. 55; GRUCHMANN, L., *Justiz im Dritten Reich 1933-1940. Anpassung und Unterwerfung in der Ära Gürtner*, München 2001, S. 946.

[4] Verordnung über die Erweiterung der Zuständigkeit der Sondergerichte vom 20. November 1938. RGBl. 1938, S. 1632.

[5] BOZYAKALI, *Das Sondergericht*, S. 93; HERBST, L., *Das nationalsozialistische Deutschland 1933-1945. Die Entfesselung der Gewalt: Rassismus und Krieg*, Frankfurt am Main 1996, S. 269.

[6] VOLLMER, A., *Doppelleben. Heinrich und Gottliebe von Lehndorff im Widerstand gegen Hitler und von Ribbentrop*, Frankfurt am Main 2010, S. 193.

[7] RYSZKA, *Państwo*, S. 489.

[8] ANDERS-BAUDISCH, F., *Aus der „Rechts"-Praxis nationalsozialistischer Sondergerichte im „Reichsgau Sudetenland" 1940-1945.* In: Bohemia, Nr. 40 (1999), S. 335.

[9] KLÜTZ, A., *Volksschädlinge am Pranger*, Berlin 1940, S. 5; HERBST, *Das nationalsozialistische Deutschland, S. 269.*

[10] RYSZKA, *Państwo*, S. 485.

[11] GRUCHMANN, *Justiz*, S. 1130.

[12] RAPPAPORT, E., *Przyszły kodeks karny Trzeciej Rzeszy Niemieckiej* [Das zukünftige Strafgesetzbuch des Dritten Deutschen Reiches]. In: MACIEJEWSKI, M., MARSZAŁ, M. (Hrsg.), *Pod znakiem swastyki. Polscy prawnicy wobec Trzeciej Rzeszy 1933-1939. Wybór pism* [Im Zeichen des Hakenkreuzes. Polnische Juristen gegenüber dem Dritten Reich 1933-1939. Schriftenauswahl], Kraków 2005, S. 350-351.

[13] GRUCHMANN, *Justiz*, S. 1130.

[14] KONIECZNY, A., *Pod rządami wojennego prawa karnego Trzeciej Rzeszy. Górny Śląsk 1939–1945* [Unter der Herrschaft des Kriegsstrafrechts des Dritten Reiches. Oberschlesien 1939–1945], Warszawa–Wrocław 1972, S. 199; GRACZYK, K., *Das Sondergericht Kattowitz 1939-1945, Organisation und Besetzung*. In: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung, Bd. 137 (2020), S. 452-456.

[15] KONIECZNY, *Pod rządami*, S. 211.

Reichsjustizministeriums) und ist daher als endgültig zu betrachten. Auf der Grundlage der erhaltenen Strafakten, die im Staatsarchiv in Kattowitz (Originalakten) sowie im Bundesarchiv in Berlin (Urteilsabschriften) aufbewahrt sind, wurden durch das Kattowitzer Sondergericht in 171 Fällen 247 Menschen zum Tode verurteilt[16]. Die meisten Verurteilungen gingen 1942 hoch, was auf die Zunahme des Einganges, die Einführung der Polenstrafrechtsverordnung und die Konsolidierung des Besatzungsapparats in den eingegliederten Ostgebieten zurückzuführen war. Unter den zum Tode Verurteilten waren Männer im Alter von etwa 35 Jahren und beruflich gesehen vor allem Arbeiter. 50% von ihnen waren Polen, mehr als 40% Deutsche, während die anderen zum Tode verurteilten Juden, Zigeuner und Ukrainer waren. Unter den untersuchten Straftaten, für die die Todesstrafe verhängt wurde, überwogen kriminelle (66%) vor wirtschaftlichen (18%) und politischen (16%) Handlungen.

Die Presserecherche umfasste Ausgaben der „Kattowitzer Zeitung" aus der Zeit des Zweiten Weltkriegs. Diese war ein offizielles Presseorgan der Verwaltungsbehörden[17] sowie der NSDAP und änderte 1942 seinen Namen in die „Oberschlesische Zeitung"[18]. Es gab eigentlich keine legale polnischsprachige Presse in den eingegliederten Ostgebieten[19].

Es ist anzumerken, dass in den bisherigen Arbeiten nur wenig Interesse der gerichtlichen Presseberichterstattung vor den Sondergerichten während des Zweiten Weltkriegs gewidmet wurde. Die Texte von Jan Waszczyński[20], Maximilian Bekker[21] und Ingo Loose[22] zeichnen sich in dieser Hinsicht aus. Waszczyński untersuchte die Presse in Łódź im Zusammenhang mit der Tätigkeit des dortigen Sondergerichts. Er stellte fest, dass die Presse die Verurteilungen gegenüber Polen wegen kriminellen Delikten exponierte. Dies sollte dem Leser das Gefühl geben, dass die Polen eine mit kriminellen Trieben besonders belastete Nation sind. In den Artikeln betonte man die polnische Nationalität der Angeklagten ausdrücklich. Dies war jedoch eine Manipulation der Propaganda, da in Wirklichkeit auch die Deutschen kriminelle Verbrechen begingen[23]. Viele weitere Beispiele für Manipulation seitens der Propaganda fand Becker in seinen Forschungen zu den „Polengreuel"-Prozessen vor dem Sondergericht Posen, nach denen die Presse Behauptungen über die Grausamkeit und Bestialität der Polen in den sog. Septemberdelikten aufstellte, auch wenn sie in dem fraglichen Gerichtsverfahren oder Urteil keine Bestätigung fanden[24]. Loose hingegen gab an, dass die Presse ausführlich über die Sondergerichtsurteile berichtet habe, teilte jedoch nicht mit, dass die Verbrechen auch von den Deutschen begangen wurden. Ein Großteil der Bevölkerung muss alles aus der Presse erfahren haben, da es keine Schauprozesse gab[25].

2. Tätigkeit der Justizpressestellen

Es ist anzunehmen, dass die Koordination der lokalen Propaganda bei den Justizpressestellen lag. Die Tätigkeit der Justizpressestellen wurde im Juni 1938 durch Richtlinien kodifiziert[26]. Sie hatten die Aufgabe, allen Volksgenossen die Tätigkeit der Justiz zu erläutern, die notwendige Haltung im Volk zu wecken und auf ihre Institutionen zu vertrauen. Sie sollten die Justizbehörden über alle sie betreffenden Veröffentlichungen in Presse, Radio, Theater, Film und Literatur informieren. Andererseits bestand die Aufgabe der Justizbehörden darin, die Pressestellen über alle wichtigen Ereignisse im Justizwesen zu informieren. Es gab kein Dienstgeheimnis bezüglich der Justizpressestellen. Sie sollten ebenso schädliche Veröffentlichungen über das Justizwesen verhindern wie auch Presse, Radio, Theater, Film und Literatur in den Dienst der Rechtspflege stellen. Zu den Aufgaben der Pressestellen gehörte es auch, sich mit den im Bezirk erscheinenden Zeitungen vertraut zu machen und persönliche Beziehungen zu den Redakteuren dieser Zeitschriften und anderer Medien zu pflegen. Die Regel war, in jedem Bezirk des Oberlandesgerichts eine Pressestelle einzurichten. Die Justizpressestellen waren alleinige Vermittler zwischen den Justizbehörden und der Presse. Dies bedeutete erstens, dass sich die Journalisten mit ihren Anfragen an die Justizpressestellen wenden mussten. Zweitens sollten Berichte oder Informationen über das Verfahren nur von den Justizpressestellen an die Presse übermittelt werden. Die Pressestellen waren auch für die Auswahl und Zulassung von Personen als Berichterstatter

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[16] Zum statistischen Grundriss der Tätigkeit und Evakuierung des Sondergerichts Kattowitz siehe: GRACZYK, K., *Die (beschleunigte) Evakuierung des Sondergerichts Kattowitz im Jahre 1945*. In: Journal on European History of Law, vol. 11/2020, no. 1, S. 110-113.

[17] SERWAŃSKI, E., *Hitlerowska polityka narodowościowa na Górnym Śląsku* [Hitlerische Nationalitätspolitik in Oberschlesien], Warszawa 1963, S. 41.

[18] KACZMAREK, R., *Górny Śląsk podczas II wojny światowej. Między utopią niemieckiej wspólnoty narodowej a rzeczywistością okupacji na terenach wcielonych do Trzeciej Rzeszy* [Oberschlesien während des 2. Weltkrieges. Zwischen Utopie der deutschen Volksgemeinschaft und der Okkupationswirklichkeit auf den an Drittes Reich annektierten Gebieten], Katowice 2006, S. 303. Die „Kattowitzer Zeitung" erwähnt auch die Urteile der benachbarten Sondergerichte – in Oppeln und in Bielitz.

[19] BÖMELBURG, H.-J., MUSIAL, B., *Die deutsche Besatzungspolitik in Polen 1939-1945*. In: BORODZIEJ, W., ZIEMER, K. (Hrsg.), *Deutsch-polnische Beziehungen 1939 – 1945 – 1949. Eine Einführung*, Osnabrück 2000, S. 68.

[20] WASZCZYŃSKI, J., *Prasa hitlerowska o wyrokach Sondergerichtu (Sądu specjalnego) w Łodzi* [Die hitlerische Presse über die Urteile des Sondergerichts in Łódź]. In: Rocznik Łódzki XVI (XIX) (1972), S. 67-79.

[21] BECKER, M., *Justiz und Propaganda. „Polengreuel"-Prozesse in den eingegliederten Ostgebieten in Presse und Publizistik 1939-1945*. In: Zeitschrift für Ostmitteleuropa-Forschung 64 (2015), H. 1, S. 1-39.

[22] LOOSE, I., *Special Courts in the Annexed Polish Regions (1939-1945): Occupation Period Instruments of Terror and Social History Source*. In: BRECHTKEN, M., BUŁHAK, W., ZARUSKY, J. (Hrsg.), *Political and Transitional Justice in Germany, Poland and the Soviet Union from the 1930 s to the 1950 s*, Göttingen 2019, S. 88-89, 97-98.

[23] WASZCZYŃSKI, *Prasa*, S. 77-78.

[24] BECKER, *Justiz und Propaganda*, S. 38-39.

[25] LOOSE, *Special Courts*, S. 88-89, 97-98.

[26] Richtlinien für die Tätigkeit der Justizpressestellen vom 1. Juni 1938 – Allgemeine Verfügung des Reichsjustizministers, „Deutsche Justiz" 1938, S. 846.

für Gerichtsverhandlungen sowie für die Erleichterung ihrer Arbeit vor Gerichten verantwortlich. Ziel war es, Korrespondenten auszuwählen, die in der Lage waren, in der öffentlichen Meinung das richtige Verständnis für die Arbeit der Gerichte zu wecken und eine verantwortungsvolle, von nationalem und sozialem Geist durchdrungene Zusammenarbeit mit den Justizbehörden zu gewährleisten. Um die Berichterstattung auf den richtigen Weg zu bringen, musste der Berichterstatter in die Angelegenheiten des jeweiligen Prozesses eingeführt werden. Bei der Erstellung von Gerichtsberichten durften in Fällen schwerer Straftaten oder harter Strafen die vollständigen Namen der Täter nicht vermieden werden. Bei leichteren Taten konnte darauf verzichtet werden, es sei denn, es gab besondere Gründe für die Angabe vollständiger Personalien. In den Zeitungsberichten hatte die Berufstätigkeit des Verurteilten insofern zitiert werden müssen, als sie mit der Tat im Zusammenhang stand und das Verständnis der Tat beeinflusst hat, wie z.B. die Veruntreuung durch einen Beamten oder ein Sittlichkeitsverbrechen durch einen Lehrer. In Bezug auf Hinrichtungen beschränkten sich die Richtlinien nur auf Pressemitteilungen, die zuvor vom zuständigen Oberstaatsanwalt vorbereitet werden sollten. Andere Informationen zu diesem Thema wurden ausgeschlossen. Im Falle der Begnadigung einer zum Tode verurteilten Person war die Pressemitteilung vom Oberstaatsanwalt abhängig, obwohl eine frühere Regelung[27] ihre Bekanntmachung erlaubte und den Informationsumfang auf den Bezirk eines Oberlandesgerichts beschränkte.

Der Pressereferent im Reichsjustizministerium wies auf die Notwendigkeit hin, die Hinrichtungsorte zu verbergen. Dies wurde dadurch erreicht, dass die Standorte der jeweiligen Gefängnisse, in denen die Hinrichtungen stattfanden, in den Pressemitteilungen nicht angegeben werden sollten. Es wurde empfohlen, darauf zu achten, dass der Sitz des Gerichts nicht fälschlicherweise als Hinrichtungsort bezeichnet wird[28].

Bereits nach Kriegsausbruch wurden Richtlinien zur Berichterstattung über Sondergerichtsfälle herausgegeben. Sie sollten sicherstellen, dass die Form der Presseveröffentlichungen die mit der Härte der Strafen erstrebte Abschreckungswirkung nicht beeinträchtigt. Zu diesem Zweck wurde empfohlen, statt der derzeitigen Praxis, den Prozess in Teilen zu behandeln, nach dem Urteil eine seriöse, einheitliche und umfassende Veröffentlichung herauszugeben. Dies sollte es dem Leser ermöglichen, sich ein klares Bild von der Tat und der Reaktion der Rechtspflege gegen den Täter zu machen. Für die Zukunft wurde empfohlen, über die Sondergerichtsverfahren nach Verkündung des Urteils zu berichten. Es wurde auch auf die Notwendigkeit hingewiesen, in jedem Einzelfall zu prüfen, ob dieser Sondergerichtsfall zur Veröffentlichung geeignet ist und ob die Verurteilung selbst oder die Höhe der Strafe mit der öffentlichen Meinung nicht im Einklang steht[29]. Ebenso wurde in Bezug auf Verfahren gegen Volksschädlinge vorgeschlagen, die Informationen so zu vermitteln, dass die Strafandrohung und die Notwendigkeit ihrer Anwendung hervorgehoben werden[30]. Ende 1940 wurde auf das Erscheinen von Presseartikeln über Schwarzschlachtung hingewiesen. Dabei ging es nicht um ein Wirtschaftsverbrechen im Sinne der Kriegswirtschaftsverordnung, sondern lediglich um die Nichtzahlung der Schlachtsteuer. Die Anwendung des Begriffes der Schwarzschlachtung auf beide Formen der Straftat konnte nach Meinung des Pressereferenten zur Folge haben, dass der Leser die unterschiedliche Beurteilung nicht versteht und somit keine abschreckende Wirkung erzielt wird. In dem Schreiben wurde empfohlen, den Begriff der Schwarzschlachtung nur im Zusammenhang mit Wirtschaftsverbrechen gemäß der Kriegswirtschaftsverordnung zu verwenden[31].

1942 wurde die Frage der Berichterstattung über Gerichtsprozesse neu geregelt[32]. Es wurde betont, dass das Volk über die Presse zu der Überzeugung kommen sollte, dass es Vertrauen zum Justizwesen haben kann. Die Berichterstattung über Gerichtsprozesse spielte dabei eine besondere Rolle – sie befasste sich nicht nur mit zahlreichen Rechtsfragen des Alltags im Bereich des Zivil- oder Strafrechts, sondern musste vor allem zeigen, wie in einem nationalsozialistischen Staat jeder Verstoß gegen die Gemeinschaft geahndet wird und wie während des Krieges jeder Schieber oder anderer Volksschädling rücksichtlos bestraft wird, wenn nötig – mit der Todesstrafe. In den neuen Richtlinien wurde die Notwendigkeit betont, die beschriebenen Prozesse auszuwählen – andernfalls entstünde häufig ein falsches Bild. Die Wahl sollte in Bezug auf Verfahren erfolgen, in denen der Schutz des Volkes, die Befriedigung des Sühnebedürfnisses, Rechtsbelehrung, Abschreckung und Unterrichtung im Einklang standen. Über Fälle aus dem Bereich des Kriegsstrafrechts sollte von da an nach einem gemeinsam mit dem Propagandaministerium entwickelten Schema berichtet werden. Sie sollten auch einer Vorzensur unterliegen[33].

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[27] BArch Berlin, R 3001/24380, o. Pag., Schreiben des Pressereferenten des Reichsjustizministeriums betr. Veröffentlichung von Begnadigungen zum Tode verurteilter Personen vom 29. April 1937.

[28] BArch Berlin, R 3001/24380, o. Pag., Schreiben des Pressereferenten des Reichsjustizministeriums betr. Meldungen über Hinrichtungen vom 16. Februar 1937.

[29] BArch Berlin, R 3001/24380, o. Pag., Schreiben des Pressereferenten des Reichsjustizministeriums betr. Berichterstattung über Sondergerichtsverfahren vom 2. November 1939.

[30] BArch Berlin, R 3001/24380, o. Pag., Schreiben des Pressereferenten des Reichsjustizministeriums betr. Berichterstattung über Strafverfahren wegen Zuwiderhandlungen gegen die VO. gegen Volksschädlinge vom 6. September 1939 und andere aus Anlaß des Kriegszustandes ergangene Strafgesetze vom 6. Oktober 1939.

[31] BArch Berlin, R 3001/24380, o. Pag., Schreiben des Pressereferenten des Reichsjustizministeriums betr. Schwarzschlachtung von Tieren vor Beginn der Kriegsbewirtschaftung vom 24. Dezember 1940.

[32] BArch Berlin, R 3001/24380, o. Pag., Schreiben des Reichsministers der Justiz an den Leiter der Justizpressestellen betr. Neuregelung der Gerichtsberichterstattung vom 1. April 1942.

[33] Ebenda.

3. Praxis der Verkündung von Todesurteilen des Sondergerichts Kattowitz

Im Bezirk des Oberlandesgerichts Kattowitz wurde im April 1941 im Gebäude des Amtsgerichts in Kattowitz eine Justizpressestelle eingerichtet[34]. Zum ersten Leiter der Stelle wurde der Landgerichtsrat in Beuthen-Kattowitz, Dr. Walter Richter, ernannt. 1942 wurde er an die Deutsche Arbeitsfront abgeordnet. An seine Stelle wurden der Staatsanwalt Gerhard Stephan und zu seinem Stellvertreter Oberlandesgerichtsrat in Kattowitz Herbert Burzlaff berufen[35]. Zur nächsten Änderung in der Leitung der Justizpressestelle kam es im November 1943, da sowohl Stephan als auch Burzlaff einberufen wurden. Der neue Leiter der Stelle wurde Staatsanwalt Dr. Hänsler und sein Stellvertreter – Oberlandesgerichtsrat in Kattowitz Dr. Walter Scheiblich[36].

Zur Ankündigung von Hinrichtungen wurden einseitige rote Plakate in den Formaten 45x23 cm[37] und 59x52 cm[38] verwendet, die mit schwarzer Tinte bedruckt waren. Die Plakate wurden in der Stadtdruckerei in Kattowitz[39] sowie im NS.-Gauverlag Oberschlesien gedruckt und durch „Schlerek" Schlesische Plakatsäulen- u. Reklame-Gesellschaft/Rudolf Weiss & Co[40] aufgehängt. Entgegen der Vermutung Koniecznys[41], war die Anzahl der in der Druckerei bestellten Plakate nicht auf mehrere Dutzend Stück begrenzt. Aufgrund der Archivalien wurde festgestellt, dass die kleinste Anzahl der bestellten Plakate neunzig und die größte – dreihundert Stück betrug. Am häufigsten wurden jedoch einhundert bis einhundertsechzig Plakate gedruckt. Der Inhalt der Bekanntmachung in deutscher Sprache wurde vom Oberstaatsanwalt festgelegt und lautete beispielsweise folgendermaßen:

Bekanntmachung.

Am 19. Dezember 1940 ist der am 6. November 1899 in Mechtal geborene Franz Jelen hingerichtet worden, den das Sondergericht in Kattowitz als Volksschädling zum Tode und dauernden Ehrverlust verurteilt hat.

Jelen, ein bereits vielfach mit langjährigen Zuchthaus- und Gefängnisstrafen vorbestrafter gefährlicher Gewohnheitsverbrecher hat unter Ausnutzung der Kriegsverhältnisse verschiedenen Betrügereien an alleinstehenden Frauen verübt, wobei er sich als Polizeibeamter ausgegeben hat.

Der Oberstaatsanwalt
als Leiter der Anklagebehörde
bei dem Sondergericht[42].

Gemäß den Richtlinien des Reichsjustizministeriums erschienen die Bekanntmachungen am Sitz des Sondergerichts und am Geburts- oder Wohnort des Verurteilten oder an dem Ort, an dem die Straftat begangen wurde. Außerhalb der Stadt wurden Plakate an die zuständige örtliche Polizeibehörde oder an den Gendarmerieposten verschickt, um sie an den Plakatsäulen anzukleben, an denen sich hauptsächlich der Tagesverkehr abspielte[43].

Der Inhalt von Pressemitteilungen, die zuerst an die Justizpressestelle und von dort aus in Publikationen verschiedener Art gelangten, wurde ebenfalls von dem Oberstaatsanwalt festgelegt, so dass der Inhalt manchmal der gleiche war wie in der Bekanntmachung. Zum Beispiel:

Pressevermerk.

Am 19. November 1943 ist der 36 Jahre alte Paul Filipczyk aus Beuthen O/S hingerichtet worden, den das Sondergericht in Kattowitz zum Tode verurteilt hat.

F. hat seine Frau, die Mutter zweier Kinder, die sich von ihm scheiden lassen wollte, ermordet, indem er ihr 12 Stichwunden beibrachte und sie aus dem Fenster der im 2. Stock gelegenen Wohnung warf[44].

Pressevermerk.

Am 11. Juni 1943 ist der 29 Jahre alte in Bukowitz, Kreis Teschen geborene Josef Bury hingerichtet worden, den das Sondergericht in Kattowitz als Gewaltverbrecher zum Tode verurteilt hat.

Bury hat am 1. September 1939 einen gefangenen und verwundeten deutschen Freikorpskämpfer mit dem Gewehrkolben und mit Fußtritten brutal mißhandelt[45].

Wie aus den obigen Beispielen hervorgeht, wurden die Bekanntmachungen und Pressemitteilungen in voller Übereinstimmung mit den Prinzipien der Ressort-Richtlinien ver-

[34] Einrichtung einer Justizpressestelle bei dem Oberlandesgericht in Kattowitz, „Deutsche Justiz" 1941, S. 499.
[35] BArch Berlin, R 3001/53257, Bl. 57, *Schreiben des Reichsministers der Justiz an den Oberlandesgerichtspräsidenten und Generalstaatsanwalt in Kattowitz betr. Besetzung der Justizpressestelle in Kattowitz vom 11. Juni 1942*; *Handbuch der Justizverwaltung*, Berlin 1942, S. 147.
[36] BArch Berlin, R 3001/53257, Bl. 59, *Schreiben des Reichsministers der Justiz an den Oberlandesgerichtspräsidenten und Generalstaatsanwalt in Kattowitz betr. Besetzung der Justizpressestelle in Kattowitz vom 3. November 1943*.
[37] Archiwum Państwowe w Katowicach (Staatsarchiv in Kattowitz, weiter: APK), Sondergericht Kattowitz, Az. 125, Bl. 217, Rechnung vom 31. Dezember 1940.
[38] APK, Sondergericht Kattowitz, Az. 461, Bl. 696, Rechnung vom 19. Januar 1943.
[39] APK, Sondergericht Kattowitz, Az. 125, Bl. 212, Verfügung des Oberstaatsanwalts vom 8. Dezember 1940; Az. 98, Bl. 511, Verfügung des Oberstaatsanwalts vom 20. März 1941.
[40] APK, Sondergericht Kattowitz, Az. 461, Bl. 696, Rechnung vom 19. Januar 1943.
[41] KONIECZNY, *Pod rządami*, S. 258.
[42] APK, Sondergericht Kattowitz, Az. 125, Bl. 212, Verfügung des Oberstaatsanwalts vom 8. Dezember 1940.
[43] APK, Sondergericht Kattowitz, Az. 461, Bl. 670, Verfügung des Oberstaatsanwalts vom 19. Dezember 1942; Az. 982, Bl. 131, Schreiben des Oberstaatsanwalts in Kattowitz an die Polizeiverwaltung in Spytkowitz Kr. Wadowitz vom 19. April 1941.
[44] APK, Sondergericht Kattowitz, Az. 609, Bl. 327, Pressevermerk; Bl. 323-324, Verfügung des Oberstaatsanwalts vom 19. November 1943.
[45] APK, Sondergericht Kattowitz, Az. 482, Bl. 259, Pressevermerk.

fasst. Die Texte waren kurzgefasst aber gehaltvoll und für die Öffentlichkeit verständlich. Sie beschränkten sich darauf, die wichtigsten Fakten anzugeben. Gesetzliche Bestimmungen wurden darin ausgelassen und Fachterminologie im Prinzip nicht verwendet. Sie enthielten lediglich die für das Strafrecht des Dritten Reiches spezifischen Begriffe, z. B. Gewaltverbrecher, Volksschädling oder die Ausnutzung der Kriegsverhältnisse. Die Identität des Verurteilten wurde darin offenbart, während seine Nationalität völlig ignoriert wurde. In den Bekanntmachungen wurde also kein Wert auf die Nationalitätsfrage gelegt.

Mit der Zeit begann man, die Bekanntmachung von Hinrichtungen aufzugeben, sowohl in der Presse als auch durch Plakate. Jedes Mal traf der Reichsjustizminister oder der Generalstaatsanwalt die Entscheidung über den Verzicht auf die Bekanntmachung. Solche Verfügungen[46] enthielten keine Begründung, so dass man über die Motive nur spekulieren kann. Da sich dieses Phänomen in den letzten Kriegsjahren zu verstärken begann, lässt es die Vermutung zu, dass Pressemitteilungen und Plakate alltäglich geworden sind und ihre abschreckende Wirkung auf die Gemeinschaft verloren haben. Vielleicht könnte eine solche Entscheidung auch auf eine schlechte finanzielle Situation zurückgeführt werden. Wichtig ist, dass in jedem der identifizierten Fälle, in denen eine zum Tode verurteilte Person begnadigt wurde, die Entscheidung fiel, von einer Bekanntmachung in der Presse abzusehen. Dies geschah wahrscheinlich aus Angst vor negativen Auswirkungen in der Gemeinschaft, die den Abschreckungseffekt zunichtemachen würden. Nur in einem Fall wurde die Empfehlung des Oberstaatsanwalts gefunden, die Bekanntmachung über die Vollstreckung des Todesurteils nicht zu veröffentlichen, wie es der Bruder des Verurteilten, ein Soldat, beantragt hatte[47]. Die polnische Widerstandsbewegung nahm 1943 den Verzicht auf Bekanntmachung von Todesurteilsvollstreckungen wahr, der es jedoch unmöglich machte, auch nur eine ungefähre Opferzahl festzustellen[48].

Erhaltene Archivalien ermöglichen es auch, an bestimmten Verfahren ein besonderes Interesse festzustellen, das über die Formulierung einer kurzen Pressemitteilung hinausgeht. Wenn der Leiter der Justizpressestelle einen bestimmten Fall interessant und für die Veröffentlichung in der Presse geeignet fand, bat er den zuständigen Oberstaatsanwalt um die Einsichtnahme in die Anklageschrift, die Mitteilung des Datums der Hauptverhandlung und ihre entsprechende Besprechung nach Abschluss des Verfahrens. So konnte eine Grundlage für die Pressberichterstattung geschaffen werden[49].

Inwieweit diese Möglichkeiten genutzt wurden, zeigen die Kriegsausgaben der „Kattowitzer Zeitung". Die Recherche der Ausgaben dieser Zeitung von 1939 bis 1945 hinsichtlich der Ausnutzung der Todesurteile des Sondergerichts Kattowitz lässt folgende Feststellungen zu. Für 1939 konnte nur eine einzige Pressemitteilung zur Verurteilung vom 15. Dezember 1939 wegen Mordes identifiziert werden, die in Form und Inhalt einfach ist[50]. Von diesem Moment an bis zum dritten Quartal 1940 wurde in der Zeitung weder ein Artikel noch eine Notiz über ein vom Sondergericht erlassenes Todesurteil, eine Hinrichtung oder eine Begnadigung gefunden. Aufgrund der Richtlinien des Reichsjustizministeriums ist dieses Schweigen auf die ausdrücklichen Anweisungen des Ministers zurückzuführen, die in Einzelfällen erteilt wurden. Diese Behauptung wird – zumindest in einigen Fällen – durch Archivmaterial bestätigt. In mehreren Fällen sind Dokumente erhalten geblieben, die die Verfügung enthielten, von der Berichterstattung in der Presse abzusehen[51].

Am 28. Juli 1940 erschien in der „Kattowitzer Zeitung" ein Artikel unter dem Titel „Gewaltverbrecher zum Tode verurteilt. Urteile des Sondergerichts in Kattowitz"[52]. Der Text, der zwei Spalten einnahm, bestand aus nur vier Absätzen. Der erste Teil des Textes betraf die Verurteilung des 29-jährigen Gewaltverbrechers Jan Mierny aus Szopienice zur dreifachen Todesstrafe und zum lebenslänglichen Ehrverlust wegen dreimaligen schweren Raubes. Es wurde betont, dass er Mitglied einer Räuberbande war, die in der Gegend von Myslowitz grassierte. Anschließend wurde eine detaillierte Beschreibung der drei Raubüberfälle vorgelegt, an denen der Verurteilte beteiligt war. Die Daten und Orte der begangenen Straftaten wurden ebenso wie die persönlichen Daten der Opfer angegeben. Zitiert wurde ebenfalls eine konkrete Bestimmung der Verordnung gegen Gewaltverbrecher. Die letzten beiden Absätze wurden einer Person gewidmet, die in einem anderen Verfahren zu derselben Strafe verurteilt wurde. Es war der zwanzigjährige Kazimierz Musialik aus Winowno-Łazy bei Warthenau. Aus der weiteren Beschreibung konnte der Leser erfahren, dass auch Musialik als Gewaltverbrecher angesehen wurde. Zusammen mit fünf unbekannten Tätern verübte er in der Nacht vom 6. auf den 7. Dezember 1939 einen Raubüberfall in der Kolonie Przytnica, Gemeinde Pińczyce. Zwei Täter standen Wache, zwei andere kletterten auf das Strohdach, rissen es auseinander, betraten das Haus und öffneten den anderen von innen die geschlossene Tür. Die vier Täter, darunter der Angeklagte, hatten Gewehre bei sich. In

[46] Beispielsweise: APK, Sondergericht Kattowitz, Az. 720, Bl. 220-221, Schreiben des Reichsministers der Justiz vom 4. September 1944; Az. 746, Bl. 38-39, Schreiben des Reichsministers der Justiz vom 19. Oktober 1944; Az. 978, Bl. 626, Schreiben des Generalstaatsanwalts in Kattowitz an den Oberstaatsanwalt in Kattowitz vom 12. Februar 1943.

[47] APK, Sondergericht Kattowitz, Az. 1300, Bl. 10, Gnadenbericht vom 22 Dezember 1942.

[48] MAZUR, Z., PIETROWICZ, A., RUTKOWSKA, M. (Hrsg.), *Raporty z ziem wcielonych do III Rzeszy (1942-1944)* [Berichte aus den eingegliederten Ostgebieten 1942-1944], Poznań 2004, S. 126, 193. Es handelt sich um zwei Berichte: Nr. 5 für den Zeitraum bis 15. Mai 1943 und Nr. 6 für den Zeitraum bis 15. August 1943.

[49] Beispielsweise: APK, Sondergericht Kattowitz, Az. 446, Bl. 298, Schreiben des Leiters der Justizpressestelle in Kattowitz vom 23. Juli 1942.

[50] Mörder zum Tode verurteilt, „Kattowitzer Zeitung", Nr. 347 vom 23. Dezember 1939, S. 3.

[51] APK, Sondergericht Kattowitz, Az. 60, Bl. 158, Begleitschreiben zum Gnadenakt vom 13. Juni 1940; Az. 900, Bl. 281, Begleitschreiben zum Gnadenakt vom 15. Juli 1940.

[52] Gewaltverbrecher zum Tode verurteilt. Urteile des Sondergerichts in Kattowitz, „Kattowitzer Zeitung", Nr. 206 vom 28. Juli 1940, S. 13.

dem Haus griffen sie eine schlafende Familie an: eine Bäuerin Namens Stelmach, ihre Schwester und ihre Eltern. Sie drohten, die Familie zu erschießen und raubten 800 Zloty aus der Kommode im Wohnzimmer, einige Hemden, eine Leinwand, zwei Uhren und zwei Ringe. Die Bäuerin Stelmach und ihre Mutter wurden durch Gewehrschläge verletzt.

1940 wurden die Leser der „Kattowitzer Zeitung" noch sechs Mal über Todesurteile des Sondergerichts informiert. Am 17. Oktober wurde die Verurteilung einer Kindermörderin („Kindesmörderin zum Tode verurteilt")[53] und einen Tag später – zweier polnischer Raubmörder zu sechsfacher Todesstrafe gemeldet („Keine Milde für Verbrechergesindel. Zwei polnische Raubmörder je sechsmal zum Tode verurteilt")[54]. Der letzte Fall wurde dazu ausführlich beschrieben. Der Verfasser des Textes hat die Nationalität der beiden Verurteilten nicht verheimlicht – bereits im Titel verwies er auf ihre polnische Herkunft. Der Fettdruck teilte mit, dass das Sondergericht in Kattowitz die polnischen Gewaltverbrecher Leon Gosek und Edmund Pietras zur sechsfachen Todesstrafe und zum lebenslänglichen Ehrverlust verurteilt hatte. Zusammen mit den Räubern Bekker, Bratkowski und Wierzchowski verübten der erst 22-jährige Gosek und der 27-jährige Pietras zahlreiche Raubüberfälle in Sosnowitz und Umgebung. Sie erschossen zwei Menschen und verletzten viele andere schwer, darunter zwei deutsche Polizisten. Der Haupttext identifiziert beide Verurteilten als Gewaltverbrecher einer besonders gefährlichen Art. Ihre trotz des jungen Alters umfangreiche Kriminalgeschichte wird besprochen und die polnische Nationalität hervorgehoben. Der Jüngere hatte mindestens vierunddreißig Verbrechen auf dem Gewissen, während der Ältere zweimal einen Mordversuch, sechsmal Raub und fünfmal einen Einbruch beging. Die Vernehmung der Angeklagten, die vom Vorsitzenden der Hauptverhandlung, Landgerichtsrat Herrmann, geführt wurde, zeigte – wie es der Verfasser der Veröffentlichung ausdrückte – bei beiden Tätern „eine gewöhnliche polnische kriminelle Karriere". Der erste begann im Alter von siebzehn Jahren zu stehlen, später beteiligte er sich auch an Raubüberfällen, für die ihn polnische Vorkriegsgerichte wiederholt zu schweren Strafen verurteilten. Der zweite Angeklagte lebte eigentlich nur im Gefängnis. Wie im Text angegeben wurde, haben „natürlich die Polen bei Kriegsausbruch beide Banditen freigelassen". Anschließend wurden einzelne Straftaten ausführlich besprochen, wobei man nicht umhinkam, die Namen der Geschädigten zu nennen. In der Zusammenfassung wurde darauf hingewiesen, dass die Angeklagten alle Straftaten vorbehaltlos gestanden haben und der Staatsanwalt für beide die Todesstrafe beantragte. Nach längerer Beratung stimmte das Gericht der Anklagebehörde zu. Der Artikel erklärte auch, warum die anderen am Anfang des Textes erwähnten Verbrecher nicht vor Gericht gestellt wurden: Bratkowski und Wierzchowski starben bei einem Schusswechsel mit der Polizei, während Becker Selbstmord beging.

1940 erschienen auch Berichte über Verfahren bezüglich eines Diebstahls an der Metallspende[55], einer Nichtabgabe der Waffen durch polnische Heckenschützen (was angesichts des Archivmaterials eine Übertreibung war, beide Angeklagten waren einfach nur Unteroffiziere des polnischen Grenzschutzes, und in den Prozessakten wurden ihre besonderen Schießkünste nicht angegeben, wie von der Zeitung behauptet wurde)[56], eines Betruges während des Gefängnisurlaubs[57] und eines unerlaubten Waffenbesitzes[58], auch in der Hoffnung auf einen Aufstand[59] (was jedoch eine Überinterpretation der Zeitung war, da obwohl das Urteil den Angeklagten als fanatischen Polen und Mitglied polnischer Nationalorganisationen bezeichnete, fand darin seine Beteiligung an der nationalen Befreiungsbewegung keine Erwähnung[60]).

Die oben genannten Presseveröffentlichungen waren ausführliche Presseartikel. Sie beschränkten sich nicht auf eine kurze Mitteilung in zwei Sätzen, die über den Urteilsspruch und die zugeschriebene Tat informierte. Die Texte waren umfangreich und enthielten viele Einzelheiten der Straftat. In erster Linie wurden darin persönliche Daten von Verurteilten und Geschädigten enthüllt. Auch die Namen der Richter und die Einzelheiten der Straftat hat man den Lesern nicht vorenthalten. In einigen Fällen wurde die Rechtsgrundlage der Verurteilung angegeben. In den meisten Fällen wurde die Nationalität der Verurteilten nicht angegeben, was sich eher aus dem „natürlichen" Stand der Dinge ergab, der das Deutschtum Oberschlesiens voraussetzte. Die polnische Herkunft der Verurteilten wurde jedoch in einigen Fällen betont, obwohl dies selbst auf der Grundlage der zitierten Veröffentlichungen nicht für jeden Polen galt. Dabei manipulierte der Berichterstatter in zwei Fällen, indem er die von den polnischen Verurteilten ausgehende Gefahr übergroß darstellte. Der Umfang der in den Veröffentlichungen enthaltenen Informationen lässt darauf schließen, dass sich die Berichterstatter nicht so sehr auf Informationen stützten, die von der Justizpressestelle Kattowitz bereitgestellt wurden, sondern lediglich bei Gerichtsverhandlungen anwesend waren. Dies wird durch die Einzelheiten des Beweisverfahrens belegt, die nicht einmal im Protokoll der Verhandlung vor dem Sondergericht festgehalten wurden. Was das Erscheinungsda-

[53] Kindesmörderin zum Tode verurteilt, „Kattowitzer Zeitung", Nr. 287 vom 17. Oktober 1940, S. 3.
[54] Keine Milde für Verbrechergesindel. Zwei polnische Raubmörder je sechsmal zum Tode verurteilt „Kattowitzer Zeitung", Nr. 288 vom 18. Oktober 1940, S. 3.
[55] Wegen Diebstahls an der Metallspende zum Tode verurteilt, „Kattowitzer Zeitung", Nr. 300 vom 30. Oktober 1940, S. 3.
[56] Todesurteile für zwei Heckenschützen. Polen wegen Nichtablieferung von Waffen vor dem Sondergericht, „Kattowitzer Zeitung", Nr. 308 vom 7. November 1940, S. 4.
[57] Zwei Verbrecher zum Tode verurteilt. Gefängnisurlaub wurde zum Verhängnis, „Kattowitzer Zeitung", Nr. 314 vom 13. November 1940, S. 8.
[58] Unerlaubter Waffenbesitz mit dem Tode bestraft. Bei Gefährdung der öffentlichen Sicherheit gibt es keine Milde, „Kattowitzer Zeitung", Nr. 336 vom 5. Dezember 1940, S. 3.
[59] Zwei Verbrecher zum Tode verurteilt. Er hoffte auf einen Aufstand, „Kattowitzer Zeitung", Nr. 314 vom 13. November 1940, S. 8.
[60] APK, Sondergericht Kattowitz, Az. 127a, Bl. 68-75, Urteil in der Strafsache gegen Michael Gluza vom 12. November 1940.

tum der Artikel betrifft, so wurden sie am Tag nach der Urteilsverkündung veröffentlicht.

Die oben genannten Texte waren ausführliche Berichte über das Verfahren vor dem Sondergericht. Ihr charakteristisches Merkmal war ihre Vollständigkeit. Im August 1940 wandte der Gerichtsberichterstatter jedoch eine andere Methode an: In fortlaufenden Ausgaben der Zeitung beschrieb er die Hauptverhandlung, wodurch eine insgesamt vierteilige Reportage entstand.

Im ersten Artikel unter dem Titel „Sieben polnischen Gewaltverbrecher vor dem Sondergericht. Eine gefährliche Räuberbande von der deutschen Polizei unschädlich gemacht – Die Verhandlung dauert an“ [61], informierte der Autor über den Prozessbeginn und beschrieb die Profile der Angeklagten, ihre Vergangenheit und die Straftaten, die ihnen zur Last gelegt wurden. Der Text enthüllte die Namen, Vornamen und Berufe der Angeklagten. Hervorgehoben wurde die Gefahr, die von der aktiven Bande ausging, die nachts bewaffnete Raubüberfälle auf Bauernhöfe in der Umgebung von Pless und Auschwitz verübt hat. Die Verbrecher sollen Angst und panischen Schrecken unter der Landbevölkerung verursacht haben, die erst durch das Eingreifen der deutschen Sicherheitsbehörden beendet werden konnte. Alle Angeklagten wurden wiederholt von polnischen Gerichten bestraft. An der Spitze der Bande stand der zweiunddreißigjährige Metzgergeselle Stefan Jankowski, der, abgesehen von kleineren Taten, zweimal zu sechs Jahren Zuchthaus wegen Raubes verurteilt wurde. Der Journalist beschrieb einzelne Raubüberfälle, die die Angeklagten in der Zeit vom 2. bis 16. April 1940 verübt hatten, und schilderte dann die Polizeirazzia vom 16. April 1940 im Kreis Bielitz, bei der die Verbrecher festgenommen wurden. Das letzte Fragment bezog sich auf den bisherigen Verlauf der von Richter Herrmann geführten Hauptverhandlung, bei der 60 Zeugen angehört werden sollten. Am ersten Tag der Verhandlung wurden die Angeklagten verhört, die die Beteiligung an den Straftaten wie auch jegliche frühere kriminelle Tätigkeit hartnäckig bestritten. Bei der nächsten Sitzung sollten die Angeklagten mit den Opfern des ersten Raubüberfalls konfrontiert werden. Dabei sollten die Täter eine den Raubüberfällen übliche Kleidung tragen.

Der zweite Artikel informierte über die belastenden Aussagen der Zeugen und die Tränen des Bandenführers [62]. Nacheinander wurden die Opfer der einzelnen Raubüberfälle verhört, die Zeugen bezeichneten Jankowski als den Kopf der Bande und erkannten die geraubten Gegenstände. In dem Artikel wurde die Zerschlagung der Solidarität einzelner Angeklagten anhand ihres durch die Sicherheitsbeamten abgehörten und aufgeschriebenen Gesprächs zum Raub besprochen. Während der Gegenüberstellung wurde den Angeklagten befohlen, ihre Mäntel und Hüte zu tragen. Dann verließ das Gericht für einige Minuten den Gerichtssaal, die Angeklagten begannen miteinander zu sprechen und ihre Unschuld zu beteuern, während der Kopf der Bande weinte. Nach der Gegenüberstellung wurden am Nachmittag die Zeugen der Verteidigung befragt, aber die meisten von ihnen waren Angehörige der Angeklagten. Ihre Aussagen waren nach Ansicht des Berichterstatters widersprüchlich oder vorher vereinbart. In den Abendstunden wurde die Befragung der Zeugen beendet. Der Ankündigung zufolge sollten am nächsten Tag der Staatsanwalt und der Verteidiger ihre Reden halten, und am Nachmittag sollte das Urteil verkündet werden.

Im Titel des dritten Teils der Reportage fasste der Autor zusammen, dass der Staatsanwalt sieben Todesurteile forderte [63]. Zuvor gab es jedoch eine überraschende Wendung der Ereignisse – der Kopf der Bande Jankowski legte ein Teilgeständnis ab. Er gestand, einen der Raubüberfälle begangen zu haben, schwor aber, nur fünf Reichsmark entwendet zu haben. Die übrigen Raubüberfälle führte er auf die Aktivitäten einer anderen kriminellen Gruppe zurück, die von der Polizei zerschlagen wurde. Die anderen Angeklagten änderten ihre Aussagen nicht und beteuerten ihre Unschuld. Staatsanwalt Stoetzer forderte für die kriminelle Gruppe, die größtenteils aus polnischen Berufsverbrechern bestand und die Bevölkerung zweier Kreise einschüchterte, die Todesstrafen. Seiner Meinung nach wurden während der drei Tage der Verhandlung zahlreiche Raubdelikte bekannt, die den Antrag ausreichend begründeten. Er beschrieb Jankowskis Geständnis als einen Versuch, seine Bande zu retten, und machte auf das Zeugnis eines ehemaligen polnischen Kriminalpolizisten aufmerksam, wonach alle Angeklagten als Berufsverbrecher bekannt seien. Nur bei zwei Beschuldigten räumte der Staatsanwalt bezüglich eines Überfalls ein, dass es aufgrund der Verkleidung nicht möglich war, ihnen die Tat zu beweisen. Zusätzlich zur Todesstrafe forderte der Staatsanwalt den lebenslänglichen Ehrverlust und die Einziehung der gefundenen Waffen. Die drei Verteidiger beantragten eine milde Bestrafung und in Zweifelsfällen einen Freispruch. Was das letzte Wort der Angeklagten betrifft, so hat neben Jankowskis Geständnis ein anderes Mitglied der Bande – wahrscheinlich unter dem Einfluss der Forderung nach der Todesstrafe – die Schuld auf sich genommen. Die anderen Angeklagten erklärten ihre Unschuld. Nach einer zweistündigen Beratung gab das Gericht bekannt, dass am nächsten Tag sechs Zeugen erneut vernommen werden.

Die letzte in der Reihe von Veröffentlichungen kündigte das Todesurteil gegen fünf Angeklagte und Freispruch aus Mangel an Beweisen für die beiden anderen an [64]. Beschrieben wurden darin die Ergebnisse des wieder aufgenommenen Beweisverfahrens und die erneuten Reden des Anklagevertreters und der Verteidiger. Das Urteil wurde nach anderthalb Stunden bekannt

[61] Sieben polnische Gewaltverbrecher vor dem Sondergericht. Eine gefährliche Räuberbande von der deutschen Polizei unschädlich gemacht – Die Verhandlung dauert an, „Kattowitzer Zeitung“, Nr. 237 vom 28. August 1940, S. 3.

[62] Räuberhauptmann Jankowski brach in Tränen aus. Zeugenaussagen beweisen die Schuld der polnischen Verbrecher - Der. 2. Verhandlungstag vor dem Kattowitzer Sondergericht, „Kattowitzer Zeitung“, Nr. 238 vom 29. August 1940, S. 3.

[63] 7 Todesurteile für die Jankowski-Bande beantragt. Der Räuberhauptmann will den „Nachruhm“ retten - Heute Beendigung des Prozesses vor dem Kattowitzer Sondergericht, „Kattowitzer Zeitung“, Nr. 239 vom 30. August 1940, S. 3.

[64] Fünf Mitglieder der Jankowski-Bande zum Tode verurteilt. Zwei Angeklagte sprach das Sondergericht mangels Beweise frei, „Kattowitzer Zeitung“, Nr. 240 vom 31. August 1940, S. 3.

gegeben. Im Haupttext des Artikels listete der Autor die Namen der einzelnen Angeklagten und die verhängten Strafen auf, außerdem erwähnte er die Rechtsgrundlage für die Verurteilung nach der Verordnung gegen Gewaltverbrecher. Die mündlichen Motive des Urteils wurden ebenfalls zusammengefasst.

1941 berichtete auch die NSDAP-Presse in Kattowitz ausführlich über die vom Sondergericht verhängten Todesurteile. Hierfür wurden einzelne Artikel verwendet, in denen Verurteilungen wegen unerlaubten Waffenbesitzes[65], Raubüberfällen und Mordversuchs[66], Vergewaltigung in Verbindung mit Körperverletzung mit Todesfolge[67], Betrüge[68], Mordversuchs und Körperverletzung[69], wegen Mordes, Mordversuchs und Raubes[70], Brandstiftung, unerlaubten Waffenbesitzes und Mordes[71] sowie wiederholter Taschendiebstähle[72] beschrieben wurden. Diese Veröffentlichungen waren – wie im Vorjahr – detailliert und umfangreich.

Im selben Jahr erschienen in der „Kattowitzer Zeitung" kürzere Informationen über Todesurteile wegen unerlaubten Waffenbesitzes[73], unerlaubten Waffenbesitzes und mehrfachen Diebstahls[74], Raubüberfälle und Einbruchsdiebstähle[75], Betrug, unerlaubten Tragens der SA-Uniform und Amtsanmaßung[76], unerlaubten Waffenbesitzes[77] und Rückfalldiebstähle[78]. In diesen Fällen nahmen die Pressemitteilungen nur ein oder zwei Sätze ein und enthielten die wichtigsten Informationen: die persönlichen Daten der Täter, das Strafmaß und die zugeschriebene Handlung. Sie erschienen in der Spalte „Blick in den Gerichtssaal".

1942 wurde die Form kurzgefasster Pressemitteilungen zu den Todesurteilen des Sondergerichts Kattowitz viel häufiger verwendet. Sie erschienen in der lokalen Spalte „Oberschlesien von Tag zu Tag". Es scheint, dass diese Form die umfangreicheren Gerichtsberichte dauerhaft ersetzt hat – selbst zu großen Verfahren mit mehreren Angeklagten wurde weder eine ausführliche Beschreibung noch eine Reportage in mehreren Teilen gefunden. Auf diese Weise wurden folgende Fälle behandelt: die Verurteilung wegen unerlaubten Waffenbesitzes, Diebstahlsversuches und Begünstigung[79], wegen Diebstahls aus der Wintersachensammlung[80], Einbruchsdiebstahls[81], von Zigeunern wegen Raubüberfälle und Einbrüche[82], wegen unerlaubten Waffenbesitzes durch einen Polen[83], wegen vielmaliger Fahrraddiebstähle[84], von Juden wegen Raubüberfälle[85], wegen vielmaliger Bandendiebstähle[86], eines Kriegswirtschaftsverbrechens[87], unerlaubten Waffenbesitzes und Begünstigung[88], Raubüberfälle[89], Beiseiteschaffung von Rohstoffe und Erzeugnissen sowie polnisch-jüdischen Schleichhandels[90], vielmaliger Betrüge[91], Diebstähle[92], Raube und Nichtanzeige des

[65] Das Erste Todesurteil in Bielitz. Vater, Mutter und Sohn wegen unerlaubten Waffenbesitzes vor dem Sondergericht, „Kattowitzer Zeitung", Nr. 10 vom 11. Januar 1941, S. 3; Wegen Waffenbesitz zum Tode verurteilt. Ein Jagdgewehr und Patronen im Schuppen versteckt, „Kattowitzer Zeitung", Nr. 16 vom 17. Januar 1941, S. 4; Die Waffen eines Räubers versteckt, „Kattowitzer Zeitung", Nr. 38 vom 8. Februar 1941, S. 5; Zwei Todesurteile wegen Waffenbesitz, „Kattowitzer Zeitung", Nr. 59 vom 1. März 1941, S. 4.

[66] Gefährlicher Bandit zum Tode verurteilt. Mit gelähmten Beinen unternahm er am Sonntag einen fast geglückten Fluchtversuch, „Kattowitzer Zeitung", Nr. 49 vom 19. Februar 1941, S. 3.

[67] Eine Greisin zu Tode mißhandelt. Sühne für ein viehisches Verbrechen - Verhandlung des Sondergerichts in Königshütte, „Kattowitzer Zeitung", Nr. 71 vom 13. März 1941, S. 4.

[68] Volksschädling fünfmal zum Tode verurteilt. Frauen und arme Leute waren die Opfer eines Gewohnheitsverbrechers, „Kattowitzer Zeitung", Nr. 87 vom 29. März 1941, S. 4.

[69] Ein Deutscher sollte erschlagen werden. Sühne für eine bestialische Tat aus den ersten Kriegstagen, „Kattowitzer Zeitung", Nr. 118 vom 1. Mai 1941, S. 4.

[70] Das Ende einer Räuberbande. Zwei Gewaltverbrecher zwölfmal zum Tode verurteilt, „Kattowitzer Zeitung", Nr. 153 vom 6. Juni 1941, S. 4.

[71] Urteile des Sondergerichts Kattowitz. Todesstrafe für polnischen Gewaltverbrecher, „Kattowitzer Zeitung", Nr. 257 vom 18. September 1941, S. 4.

[72] Taschendiebe zum Tode verurteilt, „Kattowitzer Zeitung", Nr. 277 vom 8. Oktober 1941, S. 4.

[73] Todesstrafe für unerlaubten Waffenbesitz, „Kattowitzer Zeitung", Nr. 193 vom 16. Juli 1941, S. 4.

[74] Gewohnheitsverbrecher zweimal zum Tode verurteilt, „Kattowitzer Zeitung", Nr. 214 vom 6. August 1941, S. 4.

[75] Mehrfache Todes- und hohe Zuchthausstrafen für eine Räuberbande, „Kattowitzer Zeitung", Nr. 220 vom 12. Oktober 1941, S. 4.

[76] Volksschädling zum Tode verurteilt, „Kattowitzer Zeitung", Nr. 255 vom 16. September 1941, S. 5.

[77] Todesstrafe für unbefugten Waffenbesitz, „Kattowitzer Zeitung", Nr. 258 vom 19. September 1941, S. 6.

[78] Todesstrafe für rückfällige Diebin, „Kattowitzer Zeitung", Nr. 350 vom 20. Dezember 1941, S. 4.

[79] Dem „König der Einbrecher" Unterschlupf gewährt, „Kattowitzer Zeitung", Nr. 29 vom 30. Januar 1942, S. 4.

[80] An der Wintersachensammlung bereichert – zum Tode verurteilt, „Kattowitzer Zeitung", Nr. 40 vom 10. Februar 1942, S. 4; Todesurteil für Wintersachen-Diebstahl, „Kattowitzer Zeitung", Nr. 62 vom 4. März 1941, S. 4; Todesurteile für Diebstähle aus der Wintersachensammlung, „Kattowitzer Zeitung", Nr. 91 vom 2. April 1942, S. 4.

[81] Gewohnheitsverbrecher unschädlich gemacht, „Kattowitzer Zeitung", Nr. 40 vom 10. Februar 1942, S. 4.

[82] 18 köpfige Zigeunerbande vor dem Sondergericht, „Kattowitzer Zeitung", Nr. 56 vom 26. Februar 1942, S. 4.

[83] Todesstrafe für Waffenbesitz, „Kattowitzer Zeitung", Nr. 72 vom 14. März 1942, S. 4.

[84] Fahrrardmarder zum Tode verurteilt, „Kattowitzer Zeitung", Nr. 77 vom 19. März 1942, S. 4; Fahrraddieb zum Tode verurteilt, „Kattowitzer Zeitung", Nr. 138 vom 22. Mai 1942, S.4.

[85] Todesurteil gegen jüdische Räuber, „Kattowitzer Zeitung", Nr. 82 vom 24. März 1942, S. 4.

[86] Vier Schwerverbrecher unschädlich gemacht, „Kattowitzer Zeitung", Nr. 84 vom 26. März 194, S. 4.

[87] Keine Gnade für Kriegswirtschaftsverbrecher, „Kattowitzer Zeitung", Nr. 205 vom 30. Juli 1942, S. 4; Jüdisch-polnische Kriegswirtschaftsverbrecher, „Oberschlesische Zeitung", Nr. 327 vom 29. November 1942, S. 4.

[88] Polnischer Verbrecher unschädlich gemacht, „Kattowitzer Zeitung", Nr. 106 vom 19. April 1942, S. 5.

[89] Die verdiente Strafe erhalten, „Kattowitzer Zeitung", Nr. 104 vom 17. April 1942, S. 5; Berufsverbrecher ausgemerzt, „Kattowitzer Zeitung", Nr. 213 vom 7. August 1942, S. 4.

[90] Mit Juden Hand in Hand gearbeitet. Acht Todesurteile des Sondergerichts, „Kattowitzer Zeitung", Nr. 150 vom 5. Juni 1942, S. 4.

[91] Todesstrafe für unverbesserlichen Betrüger, „Kattowitzer Zeitung", Nr. 168 vom 23. Juni 1942, S. 4.

[92] Er bestahl Soldaten, „Kattowitzer Zeitung", Nr. 179 vom 4. Juli 1942, S. 4.

unerlaubten Waffenbesitzes[93], wegen Mordes[94], unerlaubten Waffenbesitzes[95], Begünstigung und Hehlerei[96], Totschlags[97], Einbruchsdiebstahls, Hehlerei, unerlaubten Waffenbesitzes und Mordes[98].

In dieser Zeit waren Informationen über die Hinrichtung von Personen, die vom Sondergericht Kattowitz verurteilt worden waren, selten[99]. Die kurzen Pressevermerke erinnerten an die von den Verurteilten begangenen Straftaten, verheimlichten jedoch gemäß den Richtlinien des Reichsjustizministeriums den Ort der Hinrichtung. Ihr Inhalt bezog sich direkt auf die Justizpressestelle als Quelle.

1943 gab es einen deutlichen Rückgang der Veröffentlichungen über das Justizwesen im Allgemeinen, insbesondere im Bereich der von dem Sondergericht verhängten Todesurteile. Wenn es überhaupt Texte zu diesem Thema gegeben hat, dann in Form von Pressemitteilungen mit wenigen Sätzen. Dies war höchstwahrscheinlich auf eine Änderung des Formats der Zeitung zurückzuführen, die in der Veröffentlichung von Ausgaben unterschiedlichen Umfangs bestand: von den kürzesten doppelseitigen Ausgaben (nur der Situation auf der Front gewidmet) zu längeren, die bis zu vierzehn Seiten umfassten und auch lokale Nachrichten enthielten.

Der Trend einer abnehmenden Anzahl von Veröffentlichungen zu den strengsten Urteilen des Sondergerichts Kattowitz hielt 1944 an – trotz des konstanten, vierseitigen Umfangs jeder Zeitungsausgabe. Im vorletzten Kriegsjahr wurden nur einige wenige dieser wortkargen Texte identifiziert[100]. Es gab eine Ausnahme von dieser Regel, als eine ausführliche Pressenotiz[101] und ein umfangreicher Artikel[102] über das Verfahren gegen Ingeborg Neumann und Genossen in einer Ausgabe der Zeitung veröffentlicht wurden. Das Beziehen der Tatsache, dass über dieses Verfahren in der lokalen Presse in Einzelheiten berichtet wurde, auf den Inhalt der Richtlinien des Reichsjustizministeriums führt zu der Schlussfolgerung, dass die Zustimmung zur Veröffentlichung des Falles Neumann einerseits auf den Propagandaeffekt in der Zeit der sinkenden Moral der Bevölkerung berechnet war[103] (acht Personen wurden zum Tode verurteilt), andererseits war die Angelegenheit der hiesigen Gemeinschaft bekannt[104].

Die Pressenotiz enthielt eine Besprechung des Urteils. Die Personalien der Verurteilten sowie die gegen sie verhängten Strafen wurden detailliert dargelegt und die Motive des Urteils zusammengefasst. Um dem Leser das Ausmaß des Verbrechens zu veranschaulichen, wurden die Mengen der veruntreuten Lebensmittel angegeben. Der Autor des Artikels konzentrierte sich jedoch auf früheren Umständen, indem er den Prozess und die kriminelle Tätigkeit der Angeklagten beschrieb. Der Text stellt dem Leser im Detail vor, wie die Leiterin eines Kolonialwarenladens in Kattowitz die Angestellte des Wirtschaftsamtes korrumpierte, die finanzielle Abrechnungen fälschten, wodurch sie unrechtmäßige Warenmengen einziehen konnte.

1945 wurden nur zwanzig Ausgaben der „Oberschlesischen Zeitung" veröffentlicht. Die letzte erschien am 23. Januar 1945. Im Januar wurden zwei Pressemitteilungen[105] zur Rechtsprechung des Sondergerichts Kattowitz identifiziert, von denen jedoch keine ein Todesurteil betraf.

4. Fazit

Die Prüfung der Ausgaben der „Kattowitzer Zeitung" (ab 1942 „Oberschlesische Zeitung"), die für die Zeiträume durchgeführt wurde, welche sich aus den vom Sondergericht Kattowitz erlassenen Todesurteilen ergaben, bewies, dass diese Zeitung von den deutschen Behörden dazu verwendet wurde, die Bevölkerung Oberschlesiens über bestimmte von diesem Gericht erlassene Urteile zu informieren. Festgestellt wurden etwas mehr als fünfzig Presseveröffentlichungen über die vom Sondergericht Kattowitz verhängte Todesstrafe. Das Beziehen dieser Anzahl nur auf die Todesurteile, die anhand der erhaltenen Verfahrensakten identifiziert wurden, führt zu dem Schluss, dass weniger als jedes dritte Todesurteil in der Presse veröffentlicht wurde. Die Statistik allein zeigt jedoch die diesbezügliche Informationspolitik nicht auf.

Zunächst ist anzumerken, dass der Großteil dieser Pressetexte bis Ende 1942 erschien. Daher gaben sie den Lesern zwangsläufig nicht die richtige Orientierung bezüglich der strengsten Gerichtsurteile und auch nicht hinsichtlich des Ausmaßes der schwersten Verbrechen in Oberschlesien. Die Praxis der Bearbei-

[93] Bandit bat um sein Leben, „Kattowitzer Zeitung", Nr. 199 vom 24. Juli 1942, S. 4.
[94] Todesurteil für den Mörder von Friedrichswille, „Oberschlesische Zeitung", Nr. 241 vom 4. September 1942, S. 4.
[95] Ein Gewehr versteckt, „Oberschlesische Zeitung", Nr. 238 vom 1. September 1942, S. 4.
[96] Mitschuldige zum Tode verurteilt, „Oberschlesische Zeitung", Nr. 278 vom 11. Oktober 1942, S. 4.
[97] Berufsverbrecher unschädlich gemacht, „Oberschlesische Zeitung", Nr. 259 vom 22. September 1942, S. 4.
[98] Schach dem polnischen Verbrechertum!, „Oberschlesische Zeitung", Nr. 338 vom 10. Dezember 1942, S. 4.
[99] Kriegswirtschaftsverbrecher hingerichtet, „Kattowitzer Zeitung", Nr. 93 vom 4., 5., 6. April 1942, S. 6; Eine Zigeunerbande hingerichtet, „Kattowitzer Zeitung", Nr. 113 vom 26. April 1942, S. 4; Berufsverbrecher hingerichtet, Volkswohl geschädigt – hingerichtet, „Kattowitzer Zeitung", Nr. 204 vom 29. Juli 1942, S. 4; Jüdische Schleichhändler hingerichtet, „Kattowitzer Zeitung", Nr. 213 vom 7. August 1942, S. 4; Gattenmörder hingerichtet, „Oberschlesische Zeitung", Nr. 281 vom 14. Oktober 1942, S. 4; Die gerechte Sühne, „Oberschlesische Zeitung", Nr. 336 vom 8. Dezember 1942, S. 4.
[100] Verbrechen gesühnt. Der Täter bereits hingerichtet, „Oberschlesische Zeitung", Nr. 121 vom 3. Mai 1944, S. 4; Zum Tode verurteilt, „Oberschlesische Zeitung", Nr. 221 vom 12. August 1944, S. 4; Unschädlich gemacht, „Oberschlesische Zeitung", Nr. 254 vom 20. September 1944, S. 3.
[101] Acht Todesurteile im Prozeß Neumann. Volksschädlinge und Schieber der gerechten Strafe zugeführt, „Oberschlesische Zeitung", Nr. 309 vom 23. November 1944, S. 3.
[102] Im Namen des Volkes gerichtet. Der Schieberprozeß Neumann vor dem Sondergericht Kattowitz, „Oberschlesische Zeitung", Nr. 309 vom 23. November 1944, S. 4.
[103] WĘCKI, M., *Fritz Bracht (1899-1945). Nazistowski zarządca Górnego Śląska w latach II wojny światowej* [Fritz Bracht (1899-1945). NS-Verwalter von Oberschlesien während des Zweiten Weltkriegs], Katowice 2014, S. 337.
[104] Ebenda. Die Vollstreckung der Todesstrafe gegen sieben Verurteilte wurde auf charakteristischen roten Plakaten bekanntgegeben. APK, Sondergericht Kattowitz, Az. 1530, o. Pag., Rechnung vom 30. Dezember 1944.
[105] Das Ansehen der Partei schwer geschädigt, „Oberschlesische Zeitung", Nr. 8 vom 10. Januar 1945, S. 4; Zuchthaus für Rundfunkverbrecher, „Oberschlesische Zeitung", Nr. 16 vom 19. Januar 1945, S. 3.

tung von Nachrichten entsprach den Grundsätzen, die sich aus den im Reichsjustizministerium entwickelten Richtlinien ergaben. Es wurden immer die vollständigen persönlichen Daten der verurteilten Person angegeben, manchmal auch ihr Wohn- oder Geburtsort und ihr Alter. In Bezug auf Polen und Juden wurde ihre Nationalität offengelegt, obwohl dies nicht die Regel war. Die überwiegende Mehrheit der Pressemitteilungen wurde in Form von kurzen und einfachen Pressenotizen verfasst, die sich auf eine kurzgefasste Erörterung des Urteilsspruchs beschränkten. Nur in etwa einem Dutzend Ausgaben wurden umfangreiche Presseartikel gefunden, von denen die meisten in den Jahren 1940 und 1941 erschienen, d.h. in der Zeit, in der die Hinrichtungsbekanntmachungen und Todesurteile nicht so häufig waren wie in den folgenden Jahren. Zuallererst sollte man auf den im August 1940 veröffentlichten mehrteiligen Bericht aus dem Gerichtssaal achten, der der Tätigkeit einer Räuberbande gewidmet ist. Diese Art der Berichterstattung wurde in den nächsten Ausgaben der „Kattowitzer Zeitung" nicht wiederholt, vor allem aufgrund der klaren Richtlinienanweisung von 1942, die die Veröffentlichung ganzheitlicher Texte zur besseren Orientierung des Lesers anordnete. Aus praktischer Sicht ist jedoch zu bedenken, dass die fragmentarische Reportage in mehreren Folgeausgaben mehr Platz beanspruchte als ein umfassender Artikel in einer Ausgabe, weshalb die Teilveröffentlichung dazu beitrug, mehr Einzelheiten des Strafverfahrens zu enthüllen. Vielleicht war eines der Motive für die Herausgabe dieser Anweisung sowie für die Medienpolitik im Allgemeinen, die Veröffentlichung von Pressemitteilungen zu Todesurteilen einzuschränken und sie in knapper Form zu veröffentlichen, die Befürchtung, dass sich eine große Masse von Menschen von einer detaillierten Beschreibung krimineller Aktivitäten inspirieren lassen würde, insbesondere während der sich verschlechternden Kriegslage Deutschlands. Die letzte umfangreiche Publikation vom Herbst 1944 sollte jedoch die resignierte hiesige Bevölkerung am Vorabend des Endes der deutschen Herrschaft in Oberschlesien einschüchtern.

Das Beziehen der Informationspolitik aus Oberschlesien auf die in der Literatur beschriebenen Fälle in Łódź oder Posen führt zu dem Schluss, dass es sich um eine andere, weniger grobschlächtige und provokante Propaganda handelte. Die Bekanntmachungen über die Vollstreckung von Todesurteilen ignorierten die Nationalität völlig, während die Presseveröffentlichungen, in denen die polnische Herkunft der Verurteilten angegeben wurde, deutlich seltener waren und nicht der Menge an anderen Informationen über die härtesten Sondergerichtsurteile entsprachen, in denen Nicht-Polen (in der Praxis – die Deutschen) verurteilt wurden. In Oberschlesien versuchte die Propaganda nicht, den Eindruck zu erwecken, dass Polen viel häufiger Verbrechen begehen als Deutsche. Dies entsprach der tatsächlichen Situation, da 1942 unter den Angeklagten des Sondergerichts Kattowitz die Deutschen zu überwiegen begannen. Für diese Zeit wurde auch eine Änderung der Formen von Presseveröffentlichungen beobachtet, die darin bestand, sich auf kurze Notizen zu beschränken. Aufgrund dieser Form ist die Dimension des Propagandaeinflusses der Presse kleiner geworden.

Es ist dagegen schwer, das Ausmaß der Propagandaauswirkungen der härtesten Urteile auf die oberschlesische Bevölkerung einzuschätzen. Berichte der polnischen Widerstandsbewegung enthielten keine Informationen dazu, da sie sich mehr darauf konzentrierten, die Auswirkungen der Informationen über die Situation an den Fronten auf die deutsche Gesellschaft einzuschätzen. Der Generalstaatsanwalt (zuerst in Breslau, dann in Kattowitz) hat mehrfach seine Zufriedenheit über die abschreckende Wirkung zum Ausdruck gebracht, die sich aus dem Rückgang der Fallzahlen aufgrund strenger Rechtsprechung ergeben haben soll[106]. Dies traf jedoch für die Anfangsmonate des Sondergerichts Kattowitz zu, als die Todesstrafe selten war und die Öffentlichkeit noch keine Zeit hatte, sich an die „roten Plakate" zu gewöhnen. Es ist schwer zu sagen, ob Polen und Deutsche in Oberschlesien im Laufe der Zeit Missmut und Kritik gegenüber den drakonischen Urteilen zum Ausdruck brachten, wie im Warthegau[107]. Die Studien zur SD-Berichterstattung in Oberschlesien geben dazu keinen Anlass – die Berichte enthielten keine Bemerkungen zur Aufnahme der Gerichtsurteile in der Bevölkerung[108]. Eine solche Reaktion konnte in einem einzigen Fall beobachtet werden, bei dem ein Reichsdeutscher und NSDAP-Angehöriger einen Diebstahl aus der Sammlung von Wintersachen für die Front begangen hatte. Er nahm Leder aus der Sammlung, aus dem er zwei Einlegesohlen herstellte und deswegen zum Tode verurteilt wurde (die Verordnung[109] sah die Todesstrafe als einzige Strafe vor)[110]. In dieser Strafsache schrieben die Parteigenossen aus Kattowitz von „großer Erbitterung in ganz Oberschlesien" über das so harte Urteil des Sondergerichts an die Reichskanzlei[111].

[106] BArch Berlin, R 3001/23358, Bl. 9-10, Lagebericht des Generalstaatsanwalts in Breslau vom 31. August 1940; Bl. 19-20, Lagebericht des Generalstaatsanwalts in Breslau vom 31. Dezember 1940; BArch Berlin, R 3001/23372, Bl. 23, Lagebericht des Generalstaatsanwalts in Kattowitz vom 6. September 1941.

[107] LOOSE, I., *„Stimmungsmäßig schwierig sind die Ostgebiete überhaupt nicht." Deutsche, Polen und Juden in Kalisch (Reichsgau Wartheland) in Stimmungsberichten des SD 1943*. In: Zeitschrift für Geschichtswissenschaft, Bd. 68 (2020), S. 538.

[108] SIKORA, M., *Służba Bezpieczeństwa SS jako instrument pomiaru opinii publicznej w III Rzeszy. Wstępne ustalenia z perspektywy prowincji górnośląskiej* [Der Sicherheitsdienst des SS als Instrument zur Messung der öffentlichen Meinung im Dritten Reich. Erste Erkenntnisse aus Sicht der Provinz Obrschlesien]. In: GAŁĘZOWSKI, M. u.a. (Hrsg.), *Polska pod okupacją 1939–1945* [Polen unter Besetzung 1939-1945], Bd. 1, Warszawa 2015, S. 225-226; SIKORA, M., *Vox populi. Sondowanie opinii publicznej przez Służbę Bezpieczeństwa Trzeciej Rzeszy. Studium na przykładzie Bytomia i powiatu bytomsko-tarnogórskiego w okresie przesilenia w wojnie (grudzień 1942-wrzesień 1943)* [Vox populi. Meinungsumfrage durch den Sicherheitsdienst des Dritten Reiches. Eine Studie am Beispiel von Beuthen und dem Kreis Beuthen-Tarnowitz während des Wendepunktes im Krieg (Dezember 1942-September 1943)]. In: ROSENBAUM, S. (Hrsg.), *Bytom w cieniu dwóch totalitaryzmów. Szkice z dziejów miasta 1933-1989* [Beuthen im Schatten von zwei Totalitarismen. Studien zur Stadtgeschichte 1933-1989], Katowice 2012, S. 96-114.

[109] Verordnung des Führers zum Schutz der Sammlung von Wintersachen für die Front vom 23. Dezember 1941. RGBl. 1941, S. 797.

[110] APK, Sondergericht Kattowitz, Az. 1122, Bl. 5-7, Schreiben des Oberstaatsanwalts vom 10. Februar 1942; Bl. 176, Urteil in der Strafsache gegen Robert Maniera vom 9. Februar 1942.

[111] APK, Sondergericht Kattowitz, Az. 1122, Bl. 82, Schreiben an den Reichsminister der Justiz vom 14. Februar 1942; BArch Berlin, R 43 Reichskanzlei/4135, Bl. 91, Protest gegen Todesurteil des Sondergerichts in Kattowitz gegen Maniera in einer Bagatellsache.

The Role of the Legal Theses of Polish (non-German) Courts of Appeal in the General Government (1940–1944)*

*Hubert Mielnik***

Abstract

The present article highlights the role of legal theses issued by Polish (non-German) courts of appeal in the General Government. The German occupiers abolished the Supreme Court in the General Government. In the Polish (non-German) judiciary sector, there was no court of the highest instance to ensure the unification of jurisprudence. The competence to ensure the uniformity of jurisprudence and resolve existing doubts and legal issues was transferred to the courts of appeal. The article further indicates the legal nature of the legal theses in the General Government, the role assigned to them and the statistics of their issuance. Archival sources constitute the source basis of the work. We also resorted to the latest subject literature. The work is based mainly on the analysis of archival sources and legal acts, so the scientific methods typical of the history of law were applied.

Keywords: *General Government; Nazi law; Nazi judiciary; The Second World War; Polish (non-German) judiciary.*

1. Introduction

What we experienced in science in recent years is the growing interest in the judiciary in the European countries occupied by the Third Reich[1]. Research is also conducted on the functioning of the supreme courts in the reality of Nazi state[2]. In the case of the General Government (a quasi-state, a colony created by the German occupiers from territories of central Poland; hereinafter referred to as: GG), apart from the works of Andrzej Wrzyszcz, concerning mainly the issues of the German judiciary and the administration of justice, an important research gap remains concerning the issues of Polish (non-German) judiciary system[3]. However, also these issues are slowly beginning to be raised by researchers[4], fitting in the European research stream and supplementing the considerations on the role of law and judiciary in the Nazi state. This example is important due to the specificity of the General Government, which was to be a "reservoir" of cheap labour force resources for the German Reich, in the form of Polish forced labourers, and the place of initial gathering, and then extermination of "undesirable" ethnic groups - Jews (Holocaust), Roma and Sinti (Porajmos)[5].

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1 For instance: BECKER, M., *Mitstreiter im Volkstumskampf. Deutsche Justiz in den eingegliederten Ostgebieten 1939–1945*. München, 2014; GRAVER, H. P., *Der Krieg der Richter: Die Deutsche Besetzung 1940–1945 und der norwegische Rechtsstaat.* Baden-Baden, 2019; KASTNER, K., Die Gerichtsbarkeit des NS-Regimes im Protektorat Böhmen und Mähren. In: Jahrbuch der Juristichen Zeitgeschichte, no. 5, 2003–2004, pp. 231–246. TAUCHEN, J., Národní soud (1939–1942). In: *Právněhistorické studie*, vol. 44, no. 1, 2014, pp. 134–152; VENEMA, D., *Rechters in oorlogstijd: de confrontatie van de Nederlandse rechterlijke macht met nationaal-socialisme en bezetting*. Den Haag, 2007.

2 As an example see: conference "Supreme courts under Nazi occupation" organised at Universität Regensburg, 10-11 July 2017. https://www.hsozkult.de/event/id/event-83472 (access 2. 11. 2019).

3 Some themes related to this issue, and found in the international subject were discussed in: MAJER D., *„Non-Germans" under the Third Reich. The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe, with Special Regard to Occupied Poland*, 1939–1945. USHMM, Texas Tech 2013. On the subject of recent studies on the issues of the judiciary during World War II in the territories of Poland: WRZYSZCZ, A., Sądy na ziemiach polskich w czasie okupacji niemieckiej (1939–1945). Najnowsze opracowania tematu. In: *Studia z Dziejów Państwa i Prawa Polskiego*, vol. 23, 2020, pp. 35-54.

4 MIELNIK, H., *Sądownictwo polskie (nieniemieckie) w dystrykcie lubelskim Generalnego Gubernatorstwa w latach 1939–1944.* Lublin, 2020 (hereafter: MIELNIK); SZULCZYŃSKI, A., *Sądownictwo polskie w Generalnym Gubernatorstwie 1939–1945.* Warszawa, 2020.

5 MŁYNARCZYK, J. A., REIN, L., BOLIANOWSKYJ, A., ROMANKO, O., Europa Wschodnia. Białoruskie formacje pomocnicze, ukraińscy żołnierze Waffen-SS i specjalny przypadek polskiej policji granatowej. In: BÖHLER, J., GERWARTH, R., MŁYNARCZYK J. A. (eds.), *Waffen-SS.* Kraków, 2019, p. 265. In his diary of July 1943 Hans Frank wrote: *The General Government was established by Führer in 1939 as a peculiar, unique administrative structure. It is, so to speak, a latent state of emergency. This is evidenced by, among others the fact that we have retained the ad hoc police courts, that is authorities empowered to execute sentences with immediate effect. By keeping this state of emergency, we have gone so far as to force the local population to make sacrifices that do not have to be made by the population of any other territory.* https://polskieradio24.pl/39/156/Artykul/711450,Generalne-Gubernatorstwo-%E2%80%93-od-dzis-panuja-tu-Niemcy (access 2. 11. 2019).

The General Government created a complex, extensive judicial system, also including various types of special courts[6]. According to Franz Neumann, the functioning of special courts was an example of subordination of law to the objectives of Nazi policy, its strong politicization and the loss of rational character by law in the Nazi state[7]. With regard to the subject matter of the present article, the model of common judiciary introduced in the General Government will be of our interest. The German judiciary was established for people of German nationality and origin. It was a model of judiciary that was separate from the judiciary system operating in the Third Reich. It consisted of two court instances: German courts and higher German courts. It was supplemented by special courts adjudicating in many categories of criminal cases. From 1943 and onwards, these special courts were combined with the German courts[8]. For the remaining categories of the population living in the General Government, a second section of common judiciary was organized - the Polish (non-German) judiciary. It was based on the judicial system functioning in Poland before the outbreak of World War II[9].

The functioning of the Polish (non-German) judiciary sector complemented the application of Polish regulations to the General Government. This means that, in accordance with the intentions of the occupant, its existence was to ensure relative normality in the legal life of the inhabitants of the General Government, and in particular to enable economic relations, which were to remain relatively normal, as for war conditions. The decision to create the Polish division was to be made on the basis of "observation of the rapidly developing economic life with its needs in the legal field, as well as experience resulting from practice"[10].

It is also worth mentioning how did the issue of the division of powers between the two divisions of the common judiciary look like. In civil cases, jurisdiction was rigidly divided by indicating which categories of cases belonged to the German judiciary. All civil cases, which at least indirectly concerned German interests, were brought in front of German courts. In criminal cases, however, the vast majority of legal acts issued by the German authorities in the GG, which introduced criminal provisions, provided for the competence of the German judiciary. In addition, in each criminal case that was to be adjudicated by Polish (non-German) courts, even with regard to crimes regulated by pre-war Polish regulations, the German prosecutor's office had a decisive vote. The entire system was closed by the institution of the law of verification, which allowed for the revision and re-examination of every final judgment of Polish (non-German) court. Therefore, a "colonial" type of judiciary was created, with various forms of supervision over Polish (non-German) courts. This type of system protected the broadly understood German interests[11].

Among the many changes introduced to the pre-war Polish judicial system, one of the most important was the abolishment of the Supreme Court. The Polish (non-German) judiciary was deprived of its court of highest instance. A polycentric system was created with originally four, and from 1942, when the judiciary in the district of Galicia was formed, five courts of appeal. The area of jurisdiction of the respective courts of appeal was adjusted to match the boundaries of individual administrative districts. The courts of lower instance were regional courts and municipal courts[12].

At the end of 1940, Kurt Wille, head of the Justice Department in the Office of the Governor General, decided to delegate the power to issue legal theses to the courts of appeal. The objective of the present article will be to present the reasons behind the introduction of this legal institution in the judicial system in the General Government and indicate the role it played.

2. Legal theses issued by courts of appeal in the General Government

Within the common judiciary system of the Second Polish Republic, the Supreme Court performed the function of a cassation court exercising general judicial supervision over the judicature of common courts[13]. The Supreme Court was equipped with numerous powers, which were to ensure the uniformity of the jurisprudence and clarification of legal provisions that raised doubts or contradictions in adjudication[14]. The most important of these powers was the competence to formulate legal principles. The Codification Committee, while working on the provisions on the judiciary system, adopted the Austrian solution in this respect - providing for binding force only for judgments entered in the relevant book of judgments[15].

With the liquidation of the Supreme Court, the Polish (non-German) judiciary was deprived of its competences. The possibility of submitting a cassation appeal against final judgments of Polish (non-German) courts was therefore excluded. Some of the remaining powers of the Supreme Court were taken over by

[6] More on the German judiciary in the General Government: WRZYSZCZ, A., *Okupacyjne sądownictwo niemieckie w Generalnym Gubernatorstwie 1939–1945. Organizacja i funkcjonowanie.* Lublin, 2008 (hereafter: WRZYSZCZ).
[7] NEUMANN, F., *Behemot. Narodowy socjalizm. Ustrój i funkcjonowanie 1933–1944*. Warszawa, 2016, pp. 524–527.
[8] WRZYSZCZ, pp. 43-59.
[9] MIELNIK, pp. 62-67.
[10] Archiwum Akt Nowych, Ministerstwo Informacji i Dokumentacji Rządu RP (emigracyjnego) w Londynie, sygn. 105, k. 256. Kurta Willy elaboration entitled „Justice System in the General Government".
[11] MIELNIK, pp. 81–95.
[12] Regulation on the Polish judiciary in the General Government of 19 February 1940 (Journal of the Regulations of the General Governor for the occupied Polish territories, part I, no. 13), § 5, p. 65.
[13] Więcej na ten temat: MALEC, D., Sąd Najwyższy w latach 1917–1939. In: KOROBOWICZ, A. (ed.), *Sąd Najwyższy Rzeczypospolitej Polskiej. Historia i współczesność*. Warszawa, 2007, pp. 121–191 (hereafter: MALEC).
[14] JASTRZĘBSKI, R., O stu latach Sądu Najwyższego (1917–2017). In: *Palestra*, no. 4, 2017, pp. 72–73; PIETRZAK M., Sąd Najwyższy w II Rzeczypospolitej. In: *Czasopismo Prawno-Historyczne*, vol. 33, no. 1, 1981, p. 97.
[15] MALEC, p. 172.

the central (Central Justice Department in the Government of the GG) and district justice departments[16]. Initially, the competence to ensure the uniformity of judicial decisions was not exercised at all in the General Government.

It was not until 23 November 1940 that Kurt Wille, head of the Justice Department in the Office of the Governor General (and after the administrative reform of the GG of the General Justice Department of the GG Government), made a decision to enable the courts of appeal to elaborate legal theses on important legal issues, whose role was to unify the judgments of Polish (non-German) courts by settling interpretation uncertainties arising from the application of the law[17].

The actual reason behind the delegation of powers to adopt legal theses to the appellate courts in the General Government was the complicated, unclear, and practically open legal system introduced by the German authorities. This legal system that consisted of non-hierarchical sources of law, issued by a large group of entities, that were superimposed on pre-war Polish law, was the aftermath of totalitarian law, whose program assumptions were legal uncertainty and legal nihilism[18]. In the result, in mid-1940, Polish (non-German) courts of all instances were addressing numerous questions to the German authorities, concerning the interpretation of conflicts and legal loopholes that arose mainly in the process of applying pre-war Polish law under the occupational legal system[19]. German authorities at the central and district level in the General Government suffered from a lack of qualified clerical staff. Despite the operation of units dealing with Polish in justice departments, its real knowledge among German judges and officials was never excessive[20]. Therefore, in the absence of the Supreme Court, it was decided to delegate the competence to resolve at least some legal doubts to appellate courts.

Pursuant to the ordinance issued by Kurt Wille, the heads of district justice departments commissioned the heads of courts of appeal to prepare draft acts that would regulate the issuing of legal theses by these courts. No uniform regulation was introduced for all courts in the General Government, despite the fact that Kazimierz Rudnicki, head of the Court of Appeal in Warsaw, made appropriate efforts to create a single Adjudication Office for the entire General Government[21]. The result was that each of the courts of appeal in GG had a separate and different procedure for issuing these legal theses. In all districts, however, a common goal was to be achieved - clarifying doubts and unifying the jurisprudence of courts.

Unfortunately, despite the conducted query, no appropriate legal basis was found to regulate the elaboration of legal theses by the Court of Appeal in Lviv. We also failed to find any legal theses issued by the Court of Appeal in Lviv and sent to any of the other courts in the General Government. After the creation of the Galicia District in 1941, German authorities extended the area of the judiciary of the four original districts[22]. In addition to the published legal provisions in the area of non-German judiciary in the district of Galicia there were also other solutions adopted, which were regulated by the German authorities in the four original districts by the so-called multiplier law, i.e. various types of ordinances, circulars and others. Just to provide an example, it was also in the district of Galicia that court trainees were trained and the possibility of conducting judicial examinations was introduced[23]. Certainly, the legal theses of the courts of appeal from the original four GG districts were also sent to the Court of Appeal in Lviv[24]. The above-mentioned issues, as well as the fact that such solutions were adopted in all four districts and their introduction by the central government in the General Government, suggest that also in the district of Galicia, legal theses were elaborated on the basis of the judgments and decisions of the Court of Appeal in Lviv. Determining their legal status will require further archival queries.

3. The role of legal theses

The provisions concerning the institution of legal theses of courts of appeal in the General Government were not a direct adoption of solutions concerning the legal principles of the Supreme Court. In the courts of appeal in Lublin and Radom, a legal thesis was elaborated in a procedure isolated from the pending court proceedings in which an important legal issue arose. At the same time, in the solution adopted in the Lublin district, the thesis could have been elaborated on the basis of

[16] WRZYSZCZ, A., Organizacja niemieckiego resortu sprawiedliwości w Generalnym Gubernatorstwie w latach 1939–1945. In: *Annales UMCS. Sec. G, IUS*, vol. 60, no. 1, 2013., pp. 124–125.

[17] MIELNIK, pp. 88–92.

[18] On the characteristics and principles of totalitarian law: TURSKA, A., Prawo państwa totalitarnego. In: *Studia Iuridica,* vol. 22*,* 1992, pp. 21–34; URUSZCZAK, W., Perwersyjne funkcje niemieckiego „prawa" w Generalnym Gubernatorstwie (1939–1945). In: *Z dziejów prawa,* vol. 12, 2019, pp. 681–707

[19] For example, in the Lublin district, the head of the district justice department issued a circular dated 10 May 1940, in which he ordered that all legal questions be referred to the regional courts. The regional courts were to turn to the German authorities only in cases where they were not able to provide an answer to the issue that arose on their own, and in all other cases they were to provide answers themselves. Archiwum Państwowe w Zamościu, Prokuratura Okręgowa w Zamościu, sygn. 1, k. 22.

[20] MIELNIK, pp. 127–138.

[21] Archiwum Państwowe w Radomiu (hereafter: APR), Sąd Apelacyjny w Radomiu 1939-1945, sygn. 4, k. 8. Application of the head of the Court of Appeal in Warsaw of 20 December 1940 regarding the establishment of a case law office at the Court of Appeal in Warsaw.

[22] More on this topic: WRZYSZCZ A., Odrębności ustrojowo-prawne dystryktu Galicja w Generalnym Gubernatorstwie (1941–1944). In: LITYŃSKI A., FIEDORCZYK P. (eds.), *Wielokulturowość polskiego pogranicza. Ludzie – idee – prawo.* Białystok, 2003.

[23] Archiwum Naukowe w Krakowie (hereafter: ANK), Sąd Apelacyjny w Krakowie 1919–1950, sygn. 223, no pagination. Letter from the head of the Court of Appeal in Lviv of 8 December 1942 to the head of the Court of Appeal in Kraków regarding the judicial exams in the Galicia district.

[24] Archiwum Państwowe w Lublinie (hereafter: APL), Sąd Apelacyjny w Lublinie 1918–1939, sygn. 13/5, no pagination. Letter from the head of the Justice Department at the Office of the Governor of the Warsaw District of 30 June 1943 to the heads of the courts of appeal in Kraków, Lublin, Lviv and Radom regarding the collection of decisions of the Court of Appeal in Warsaw.

a specific case, even before the judgment was issued and the judgment became final. In the Court of Appeal in Radom, the thesis was developed on the basis of the judgment of the appellate court, by a separate panel of judges appointed to establish legal theses[25]. The procedure for issuing legal theses in courts of appeal in Kraków and Warsaw was different[26]. In these courts, the legal theses were elaborated on the basis of final judgments of courts in the second instance. Adopting a different procedure had an impact on the legal effects of legal theses in the courts of individual districts. As a rule, the legal theses in the General Government were statements of purely consultative and informative content, professional opinions of the highest court, as intended by the German authorities. Their objective was to resolve interpretation doubts that arose in some cases, causing discrepancies in judicial practice, and to introduce a uniform interpretation of the provisions issued by the authorities of the General Government. Thus, the legal theses were not binding for the courts of lower instance, save for situations allowed in the Lublin and Radom districts, where the legal thesis was issued on the basis of a specific case.

Table I. Statistics of legal theses issued by individual courts of appeal[27]

	Court of Appeal in Lublin		Court of Appeal in Kraków		Court of Appeal in Radom		Court of Appeal in Warsaw	
	Civil law theses	Criminal law theses	Civil law theses	Criminal law theses	Civil law theses	Criminal law theses	Civil law theses	Criminal law theses
1940	---	---	8	1	9	---	18	2
1941	3	5	4	18	5	---	189 (9)	12
1942	1	---	---	7	2	---	114 (19) data for six months	---
1943	---	---	---	4	1	---	291 (21)	---
1944	---	---	---	---	---	---	No data available	
Total:	**4**	**5**	**12**	**30**	**17**	**0**	**612**	**14**
	9		**42**		**17**		**626**	

The different procedures and sizes of judicial districts had an impact on the number of theses issued by the respective courts. In the courts in Lublin and Radom, where the legal theses were adopted in procedures separated from ordinary court proceedings, they were elaborated extremely rarely. Despite the introduction of the possibility of formulating legal theses only from the first quarter of 1941, the courts of appeal also issued theses on the basis of judgments issued in 1940. The Court of Appeal in Kraków was the only one of the four courts subject to our analysis to issue more theses in the field of criminal than those in the field of civil law. The greatest number of legal theses came from the Court of Appeal in Warsaw. We can attribute this to two underlying causes.

Firstly, only the Warsaw Court of Appeal had a separate judicial office dealing with "collecting legal material for jurisprudence", in which judges dealing solely with the preparation of jurisprudence worked[28]. The Adjudication Office in the Warsaw appellate district was to analyze the submitted judgments and keep a record in which both its own theses were entered, containing the resolution of fundamental legal issues, and theses from other courts of appeal[29]. Every quarter, the Adjudication Office at the Court of Appeal in Warsaw issued a collection of court rulings considered important for the unification of jurisprudence and clarification of legal issues provided at the request of the head of the Court of Appeal in Warsaw, entitled "Zbiory tez i opinii opracowanych przez Biuro Orzecznictwa przy Sądzie Apelacyjnym w Warszawie" [Collections of theses and opinions prepared by the Adjudication Office at the Court of Appeal in Warsaw].

Secondly, owing to the activities of the Adjudication Office at the Court of Appeal in Warsaw, the jurisprudence of appeal divisions of regional courts in Siedlce and Warsaw was also analyzed and elaborated in large numbers. In no other district, despite the introduction of such a possibility, were legal theses elaborated on the basis on the decisions of regional courts.

What is particularly noteworthy is the small number of criminal law theses, compared to civil law theses. This is mainly due to the division of jurisdiction in the General Government, as aforementioned. Multi-layered, complicated cases that required legal interpretation were brought in front of the German state-

[25] APR, Sąd Apelacyjny w Radomiu 1939–1945, sygn. 4, k. 1. Order of the head of the Court of Appeal in Radom of 25 July 1941 regarding legal theses.

[26] ANK, Sąd Apelacyjny w Krakowie 1919–1950, sygn. 31, no pagination. Zarządzenie kierownika Sądu Apelacyjnego w Krakowie z 21 stycznia 1941 roku w sprawie zbioru orzeczeń; Archiwum Państwowe w Warszawie (hereafter: APW), Sąd Okręgowy w Warszawie 1917–1944, sygn. 9, no pagination. Letter from the head of the Court of Appeal in Warsaw of 2 March 1941 on the establishment of the Adjudication Office at the Court of Appeal in Warsaw.

[27] Author's elaboration, based on: ANK, Sąd Apelacyjny w Krakowie 1919–1950, sygn. 31; APL, Sąd Apelacyjny w Lublinie, sygn. 13/5; APR, Sąd Apelacyjny w Radomiu 1939–1945, sygn. 5.

[28] APR, Sąd Apelacyjny w Radomiu 1939–1945, sygn. 4, k. 6; 12. Application of the head of the Court of Appeal in Warsaw of 20 December 1940 regarding the establishment of a case law office at the Court of Appeal in Warsaw.

[29] APW, Sąd Okręgowy w Warszawie 1917–1944, sygn. 9, no pagination. Letter from the head of the Court of Appeal in Warsaw of 2 March 1941 on the establishment of the Adjudication Office at the Court of Appeal in Warsaw.

judicial apparatus. Hence, there was no practical need for interpretation of criminal law by Polish (non-German) courts of appeal. The Court of Appeal in Radom did not develop a single thesis in the field of criminal law.

The analysis of the number of legal theses in individual years illustrates the tendencies is cases in the entire Polish (non-German) judiciary in the General Government. Most of the theses were elaborated in the first two years of the judiciary in the General Government. 1941 was the year marked with the largest number of significant, from the point of view of interpreting the law, decisions. The reason for this was the organizational and legal shaping of the GG's legal and judicial system in that period. It was then that the most important acts of law were issued, regulating the organization and functioning of the judiciary and affecting the economic turnover in the General Government. Since 1942, there has been a decline in the number of legal theses issued, and this institution completely disappears at the turn of 1943 and 1944. It is highly likely, only the Court of Appeal in Warsaw managed to elaborate the theses from the first quarter of 1944[30]. This is undoubtedly related to the policy pursued by the German occupiers, as since 1942 the German terror intensified and became widespread, the extermination of the Jewish population begun, and so did the displacement of the Polish population from the Zamość region (Lublin district)[31]. The beginning of 1944 was also marked by the war front approaching the borders of the General Government from the east. These events reduced the number of cases in the courts, as it was dangerous to travel around the General Government area, rendering it almost impossible for some of the population to defend their rights in court proceedings. These factors also influenced the activities of the highest instance courts in the General Government.

What remains most interesting and the most important are, without doubt, the legal theses that were elaborated on the basis of the law issued by the German authorities in the General Government. The analysis of the issued legal theses demonstrates that the most frequently interpreted provisions were the provisions of the regulation on Polish judiciary of 19 February 1940[32], i.e. the legal act regulating the activity of the Polish (non-German) judiciary. This is understandable due to the numerous changes introduced to the organization of the judiciary and the course of proceedings, which influenced the pre-war Polish solutions. Therefore, it was necessary to interpret these changes, especially with regard to the entire legal system of the occupied country. Large number of legal theses was issued on the basis of the regulation on the seizure of private property in the General Government of 24 January 1940[33] and the regulation on real estate in the General Government of 27 March 1940[34]. Both of these regulations constituted the main basis for the looting of property, mainly Jewish, carried out in the General Government by the German occupiers. The provisions of these regulations had a significant impact on the real estate turnover in GG and all related legal issues. The main issues that were interpreted by appellate courts were related to making entries in land registers kept in the General Government by Polish (non-German) courts, and the legal effects of seizures for legal transactions (e.g. expiry of third party claims pertaining to confiscated property).

Despite the existence of a polycentric system in the GG with four, and since 1942, five, court appellate districts, formally separated from each other, legal theses were circulated between these courts. This is undoubtedly the result of the fact, that the very nature of the institution itself, which aims at unification of jurisprudence of courts. The heads of the courts of appeal, if they found that the thesis issued by another court of appeal was of legal significance, ordered that all courts in the district be informed of its content via the regional courts[35].

What was most important, however, was the unification of jurisprudence within the district (court appellate district). In the General Government, a significant problem in the operation of the courts was the general lack of access to sources of law, and both to the journal of regulations published in the General Government and to the texts of pre-war acts of law. The German authorities seized numerous Polish court buildings, placing either the German judicial authorities or other institutions in them. These buildings often housed Polish law libraries, access to which was thus practically excluded. Polish (non-German) courts had to occupy either other buildings, or several courts were gathered in a single building. There was also a shortage of professional books, commentaries and monographs on the market. These reasons influenced the significance of the legal theses which, apart from unifying functions, also performed purely cognitive and professional functions for judges[36].

The analyzed archival material proves that the legal theses were used in the judicial practice of the General Government, and their function was not limited to influencing the decisions of lower court instances. The legal theses of courts of appeal were also frequently used by the parties to proceedings in justification of their court pleadings. This indicates that the legal theses were also widely disseminated between the attorneys. In-

[30] APL, Sąd Apelacyjny w Lublinie 1918–1939, sygn. 13/8, no pagination. Covering letter on the Collection of theses and opinions prepared by the Adjudication Office at the Court of Appeal in Warsaw in the first quarter of 1944.

[31] LIBIONKA, D., Zagłada Żydów w Generalnym Gubernatorstwie. Lublin, 2017; KLUKOWSKI, Z., Zamojszczyzna 1918–1959. Warszawa, 2017.

[32] Regulation on the Polish judiciary in the General Government of 19 February 1940 (Journal of the Regulations of the General Governor for the occupied Polish territories, part I, no. 13, pp. 64–68).

[33] Regulation on the seizure of private property in the General Government (Confiscation Ordinance) of 24 January 1940 (Journal of the Regulations of the General Governor for the occupied Polish territories, part I, no. 6), pp. 23-27.

[34] Regulation on real estate transactions in the General Government of 27 March 1940 (Journal of the Regulations of the General Governor for the occupied Polish territories, part I, no. 23), pp. 115-117.

[35] APL, Sąd Apelacyjny w Lublinie 1918–1939, sygn. 13/5, no pagination. Letter from the head of the Court of Appeal in Lublin regarding the transfer of the content of the thesis of the Court of Appeal in Radom to its subordinate courts.

[36] MIELNIK, pp. 37–49; 246–247.

terestingly, this took place not only in proceedings before Polish (non-German) courts, but also in proceedings for the right of verification pending before higher German courts[37].

In addition to legal theses, the Court of Appeal in Warsaw also issued legal opinions in the form of answers to legal questions. Similar opinions were issued by the Court of Appeal in Lublin, albeit they had an informal form. Legal opinions of the Warsaw court of appeal were also published in the aforementioned collection. Among the published legal opinions, many were the answers to questions posed by the Justice Department in the Office of the Head of the Warsaw District (Governor). They concerned doubts related not only to the interpretation of Polish law, but also to Soviet law[38]. In the issue No. I for the months of April-May 1941 there were written answers to legal questions addressed to the Adjudication Office at the Court of Appeal in Warsaw by the district justice department: "Is the Act of 27 January 1922 on the absent and missing (Dz.U., poz. 87) applicable for the town of Wołkowysk?[39]"; "Does the USSR issue certificates to the effect that there are no legal obstacles for the subjects of the domestic law, wishing to enter a marriage in the USSR?"[40]; "What documents should be submitted, when registering a marriage in the USSR?"[41]. Incidentally, it should be noted that issues related to marriage law in the territories occupied by the USSR were very problematic for the German officials[42]. The subject matter of the questions and the date of their submission allow us to formulate the thesis that the German authorities wanted, by seeking legal opinions from the Polish court, to prepare legally for the situation related to the attack on the USSR and the future occupation of Soviet territories.

4. Conclusion

Despite the lack of consent to the establishment of a central adjudication office in the General Government, the head of the Court of Appeal in Warsaw, judge K. Rudnicki, assessed that with the proper organization of adjudication offices, within the framework set by the Justice Department in the Office of General Governor, their activities could bring useful results. He considered that their most important task was to preserve the legal thought contained in the judgments of courts adjudicating in the second, i.e. the final, GG instance. The activity of adjudication offices was to facilitate the work of judges in resolving complex legal issues by informing them about their current views on the respective legal issue. According to judge K. Rudnicki, it was also possible to contribute to the unification of judicial decisions[43].

So the question is whether the goals assumed by K. Rudnicki were achieved. Certainly, the issued legal theses were widely distributed between the courts in the General Government. The most important in this respect was the activity of the Warsaw court, which took over the pre-war collections of judgments and the library of the Supreme Court, and had the organizational and substantive capacity to elaborate a wide range of jurisprudence. As for the unification of jurisprudence, if this was ever achieved, it was still limited to the level of the respective districts. This was due to the system in which the Polish (non-German) courts were subject to the supervision of their district authorities. Some of the legal interpretations prepared by the German authorities differed between districts, which could also affect the jurisprudence of Polish (non-German) courts. In the remaining matters, and in particular those relating to the unchanged legal institutions, there surely was some influence of court judgments between the districts.

In the General Government there was a polycentric model of the unification of judicial decisions in the Polish (non-German) judiciary system. Each of the courts of appeal itself established the procedure for issuing legal theses, which resulted in significant differences between courts in this respect. The very institution of legal theses was not a completely new legal solution, but it did it constitute directly adopted solutions from the prewar period either. It was modeled on these solutions, but at the same time interpreted quite freely.

The purpose of issuing legal theses was to standardize judicial decisions and thus to solve important legal issues. Legal theses were, in their nature, non-binding juridical statements, they were binding only for the judges in the cases on the basis of which they were elaborated. Although the courts of appeal interpreted the law issued by the German occupiers of the General Government, the described institution did not serve to introduce "political" interpretations of the law. Even the theses concerning the GG law were of a purely technical and professional nature.

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[37] MIELNIK, H., Prawo sprawdzenia prawomocnych orzeczeń sądów polskich (nieniemieckich) w Generalnym Gubernatorstwie w okresie II wojny światowej. Orzecznictwo Wyższego Sądu Niemieckiego w Radomiu. In: *Czasopismo Prawno-Historyczne*, vol. 72, No. 1, 2020, p. 235.

[38] APL, Sąd Apelacyjny w Lublinie 1918–1939, sygn. 13/5, no pagination. Collections of theses and opinions prepared by the Adjudication Office at the Court of Appeal in Warsaw.

[39] During the Second Polish Republic, the city of Wołkowysk belonged to the Białystok Province, but the question asked is justified inasmuch as the binding force of the aforementioned act (Act of 27 January 1922 on amending and supplementing certain provisions in force in the former Kingdom of Poland of the Civil Code of 1825 and the Civil Procedure Act regarding absent and missing persons (Dz.U. No. 11, item 87) was extended to these areas only by the Regulation of the Council of Ministers of 15 May 1922 on the extension of the binding force of the Act of 27 January 1922 on the absent and missing to the provinces: Nowogródek, Polesie and Wołyń and the following poviats: Białowieża, Biała, Białystok, Grodno, Sokółka and Wołkowysk of the Białystok voivodship (Dz.U. s No. 43, item 360). In the years 1939-1941 Wołkowysk was under the Soviet occupation and was the place of detention of Polish prisoners of war from September 1939. APL, Sąd Apelacyjny w Lublinie 1918–1939, sygn. 13/5, no pagination. Collections of theses and opinions prepared by the Adjudication Office at the Court of Appeal in Warsaw.

[40] *Ibidem*.

[41] *Ibidem.*

[42] WRZYSZCZ, p. 371.

[43] APR, Sąd Apelacyjny w Radomiu 1939–1945, sygn. 4, k. 10. Letter from the head of the Court of Appeal in Warsaw regarding the case law office.

The described issues demonstrate the significance of the existence and functioning of the supreme court in a judicial system. Such a court has the task, in addition to purely procedural functions, of additionally unifying judicial decisions by adopting and publishing judgments, which then, under the authority of this court, affect the courts of lower instances. The lack of this type of activity was clearly noticeable in the first months of the existence of the judiciary in the General Government. Hence the necessity to take over these judicial competences by the courts of appeal.

The jurisprudence of Polish (non-German) courts of appeal during the occupation and the General Government is rich in terms of the number of theses issued. Some theses are also of great legal importance, as they indicate how pre-war law was interpreted in the extraordinary conditions of occupation. Judges of the courts of appeal demonstrated their great maturity during the occupation, ensuring the appropriate substantive level of jurisprudence and its uniformity. The formulated theses were primarily to serve subsequent decision-making processes. In this way, the "collective wisdom" of the judiciary was shaped, understood as the exclusion of wrong solutions, the introduction of uniformity of adjudication and strengthening the juridical character of legal dispute resolution [44].

[44] LESZCZYŃSKI, L., Precedens sądowy. In: HOŁÓWKA J., DZIOBKOWSKI B. (eds.), *Filozofia prawa. Normy i Fakty*. Warsaw, 2020, pp. 626–644.

The Impact of the Germanic and Romanesque Model of Combating Unfair Competition on the Legislation in Inter-War Poland (1918 – 1939)

Tomasz Dolata *

Abstract

The first country that decided to regulate the issues of combating unfair competition in a specific statute dedicated to this phenomena (1896) was Germany. The so-called criminal method of regulations was used. Other legislations, including but not limited to, Austrian, Czechoslovakian, Norwegian or Yugoslavian followed the German model. A completely different system was introduced and developed by the French lawyers who relied on the civil concept of combating this phenomenon. A characteristic feature of the French solutions was the lack of a specific statute devoted to the repression of this phenomenon. In addition, by way of skilful application of the provisions of the Napoleon Code the French case law and doctrine have construed a very comprehensive model for combating unfair competition. This model was based on the subjective right, which was the right to clientele. All actions violating the subjective right sanctioned by the Act were unlawful and constituted the basis for initiating a civil complaint, i.e. for instigating claims against the infringer. The French model constitute inspiration for, among others, Belgian, Italian, Spanish and Bulgarian legislation.

The first Polish Act on Combating Unfair Competition of 1926 combining both the French and German model of combating this phenomenon seems interesting. However, an attempt to simply assign the Polish statute to the French or German model must prove unsuccessful because the Polish legislator, while devising the Polish law, reached for legal measures characteristic for both the French and German structures of repression of this phenomenon.

This is the civil method of combating unfair competition based on the relevant subjective right–the ownership right in an enterprise as an intangible asset which is common to the Polish and French model, while the German model has been brought closer to the Polish law due to the concept of regulating this phenomenon by means of a specific statute, casuistic list of unfair competition activities supported by the use of general clauses, a separated criminal-law part in the Act containing a similar catalogue of offenses set out in the Act.

Keywords: *unfair competition phenomenon; combating unfair competition models in 20th-century European legislation; German model of combating unfair competition; Romanesque model of combating unfair competition; Polish Act on Combating Unfair Competition of 1926.*

1. Preliminary remarks

The economic development of the nineteenth-century European countries resulted in the fact that entrepreneurs competing about sale of their goods and services and striving to maximize their profits more often resorted to ethically reprehensible methods. Therefore, there was a need to incorporate competition into a legal framework [1]. In the European legislation of the nineteenth and early twentieth centuries, two completely different systems of combating unfair competition developed, i.e.: a *continental system* in which the juridical solutions that were applied for the first time in Germany (the German model) and in France (the Romanesque model) [2] played a dominant role, and an *Anglo-Saxon system* (the common law model) [3]. The systems have affected the legislation of other European countries.

The purpose of this study is to indicate the characteristic elements of the Germanic (German) and Romanesque (French) model of combating unfair competition, which had the greatest

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1 Internationally, this has been reflected in attempts to unify the protection against unfair competition. As a result, on 20 March 1883, the Convention for the Protection of Industrial Property was signed, also referred to as the Paris Union Convention, which covered the unfair competition as well. This sphere was also influenced by the Madrid Agreement of April 14, 1891, Concerning the International Registration of Marks.

2 German and French models have inspired many European legal systems that either adopted one of these models or, benefiting from the best solutions, sought their own way. The German system, uderstood as a statutory regulation of combating unfair competition, was adopted by inter alia the Austrian, Norwegian, Czechoslovakian and Yugoslavian legislation. French solutions have become been followed *inter alia* by the Belgian, Italian, Spanish and Bulgarian legislation. See further: KURATOW-KURATOWSKI, R., *La nouvelle legislation polonaise sur la repression de la concurrence déloyale.* In: Bulletin Mensuel de la Societe de Legislation compare, Nr 7-9, 1927, p. 343–344.

3 The common law model did not significantly impact either the shape or the development of legal solutions regarding unfair competition within the continental Europe. More on the Anglo-Saxon model: GÓRNICKI, L., *Z dziejów zwalczania nieuczciwej konkurencji.* In: *O prawie i jego dziejach księgi dwie*, Book II, Białystok - Katowice 2010, p. 934-936; MOKRYSZ-OLSZYŃSKA, A., *Zagadnienia prawne nieuczciwej konkurencji*, In: Ruch Prawniczy, Ekonomiczny i Socjologiczny, vol. 3, 1983, p. 123-125. See. also: HOLLAND, R. W., CODE HOLLAND, R. H., *Slater's mercantile law*, London 1933, p. 463-467.

impact on the development of Polish legislation in this area. For the sake of precision, the problem of terminology used in thisstudy on combating unfair competition requires clarification. The issue of terminology concerning the repression of this phenomenon in the context of French and German doctrine is particularly noteworthy. The French doctrine of that time used two terms: "*concurrence deloyale*" (unfair competition) and "*concurrence illicite*" (unlawful competition). A premise of bad and good faith constituted the criterion for the distinction between the two. Unfair competition has always involved the bad faith, while in the case of activities referred to as unlawful competition there was no requirement of the bad faith on the part of the infringing party. This distinction was purely theoretical as both violations were unlawful and gave rise to liability for damages[4]. Unlike in the French doctrine, there was one term commonly used in German doctrine i.e.: "*unlautere Wettbewerb*", which did not raise any interpretational doubts. In Polish literature, however, four terms were mainly used in an interchangeable manner: "unfair rivalry", "disloyal rivalry", "disloyal competition" and finally "unfair competition". It was the latter term that was definitely prevailing in the Polish legal literature. Therefore, we use the term: "unfair competition" herein to describe activities characterized by the pursuit of the same economic goal by using means that are contrary to law or decency.

2. The most important models of combating unfair competition in European legislation of the early 20th century

The cut-off date for analysis of the manifestations of the theoretical model of combating unfair competition in European legislation was marked by the French Revolution of 1789. The Revolution constituted the basis for the emergence of doctrinal principles being in opposition to many economic restrictions resulting from guild regulations and norms of the police state. As a result, the French Revolution laid the foundations for a more flexible and effective method of combating unfair competition. However, the proper origins of modern juridical solutions based on the civil method of regulating this phenomenon appeared only along with the nineteenth-century free-competitive capitalism[5]. The new civil-law concept of repressing unfair competition used the concept of subjective rights. The relevant subjective rights, preferably the right of ownership, were introduced based on the interests that were to be legally protected and secured[6]. European doctrine was not uniform in its views on the legal interest protected by law against unfair competition. In France, the need for repression against unfair competition was justified by the need to protect the rights of the subjective entrepreneur (*achalandage*)[7]. The problem was completely different in Germany, where the differences in views on the issue of legal interests protected by the law on combating unfair competition reached so deeply that representatives of the doctrine were not able to agree on one uniform position. In German literature, up to modern times, the prevailing view is that the protection covers the legal interest of the entrepreneur to personhood, consisting in the freedom of earning or the entrepreneur's freedom of conducting a business. This approach was supported *inter alia* by O. Gierke, J. Kohler, H. Dernburg and R. Reinhardt. The second important trend in German doctrine considers an intangible asset, constituted by an enterprise, as the object of protection. Adherents to this theory included, among others, A. Baumbach, R. Callmann, E. Reimer[8]. There were also views expressed that combating unfair competition is aimed at the protection of professional ethics[9]. These views were reflected in § 13 of the German Act on Combating Unfair Competition of 1909[10], which was granting a right to seek prohibition of unfair competition against any entrepreneur producing or marketing goods or services of a similar kind; as well as against associations supporting industrial or commercial interests, provided they had capacity to be a party in judicial proceedings.

However, apart from disputes regarding the subject of protection against unfair competition, it should be emphasized that Germanic (German) and Romanesque (French) models exerted the greatest influence on the legislation of the states of continental Europe. The Germanic model was based on the criminal method; however, this criminal method of regulation constituted a certain mental shortcut used in the doctrine to establish the tort-based way of determining liability. The tort-based method of determining liability consisted in enumerating all unlawful unfair competition activities in the text of a legal act (usually a statute), both under civil and criminal law. It was often supported by the use of general clauses. The role of the court was to analyse the given facts and, prospectively, to "ascribe" them to the relevant provision of the statute or a general clause thereunder.

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[4] VALLOTTON, J., *La Concurrence déloyale et la concurrence illicite: Etude de jurisprudence*, Lausanne 1895; BLUMENFELD, T., *Klientela jako przedmiot obrotu i ochrony prawnej*, Warsaw 1932, p. 92; similarly DĄBROWSKI, E., *Nieuczciwe współzawodnictwo*, Warsaw 1929, p. 10; NAMITKIEWICZ, J., *Uwagi nad polską ustawą o zwalczaniu nieuczciwej konkurencji*. In: Przegląd Prawa Handlowego, no. 6, 1927, p. 243. It is worth mentioning that the concept of "prohibited competition" also existed in American literature. This term has been derived from the antitrust law and meant "deliberate restriction of competition by market operators" - see further: MOKRYSZ-OLSZYŃSKA, A., *op. cit.*, p. 130 - 131.

[5] Combating the unfair commercial practices has a very long tradition. First documented attempts to eliminate unfair competition from the economic life may be found in the ancient times. Initially, this was done using the penal method of repression. Under the threat of criminal sanctions, certain, detailed and casuistically listed behaviours that violated specific interests of business participants have been prohibited.

[6] ZOLL, F., *Prawa na dobrach niematerialnych*. In: CYBICHOWSKI, Z. (ed), Encyklopedia podręczna prawa publicznego, vol. 2, Warsaw [without a year of publication], p. 693; idem, *Przedsiębiorstwo – przedmiotem własności*. In: Przegląd Prawa i Administracji 1925, p. 428 et seq.

[7] BLUMENFELD, T., *op. cit.*, p. 93.

[8] See. GÓRNICKI, L., *Nieuczciwa konkurencja, w szczególności przez wprowadzające w błąd oznaczenie towarów lub usług, i środki ochrony w prawie polskim*, Wrocław 1997, p. 16-17; see. also SIEBERT, W., *Verwirkung und Unzulässigkeit der Rechtsausübung*, Marburg 1934, p. 160 et seq.; also: EHRLICH, M. J., *Przedsiębiorstwo jako przedmiot umownych stosunków obligacyjnych*, Tarnów 1934, p. 34; GIERKE, J., *Handelsrecht und Schiffahrtsrecht*, Berlin 1938, p. 155; KNYPL, T., *Zwalczanie nieuczciwej konkurencji w Polsce i w Europie*, Sopot 1994, p. 37.

[9] ISAY, R., *Das Recht am Unternehmen*, Berlin 1910, p. 54 *et seq.*

[10] On the juridical foundations of German solutions regarding combating unfair competition - see below.

Germany was the first country that decided to regulate issues related to unfair competition by way of a distinct legal act (of 1896 and of 1909)[11]. In a single legal act - *Gesetz zur Bekämpfung des unlauteren Wettbewerbes* of May 27, 1896[12] - the German legislator collected the most common unfair competition activities and assigned appropriate legal sanctions to each of them. This strictly criminal method of regulation soon proved to be completely insufficient. Practice has shown that a lack of a general clause in the form of even a general definition of unfair competition meant that the statute quickly became outdated. This resulted in a need to introduce a new law on combating unfair competition - *Gesetz gegen den unlauteren Wettbewerb* of June 7, 1909[13]. The framework of the new statute, in addition to the extended catalogue of unfair competition activities, introduced the general clause prohibiting all unfair competition activities[14].

At the other extreme within the continental model, there was France with its civil-law concept of combating unfair competition, introduced and developed by the French doctrine. A characteristic feature of French solutions was a lack of a specific statute devoted to the repression of this phenomenon. By way of skilful application of the provisions of the Napoleon Code on torts (Articles 1382 and 1383), the French case-law and doctrine have construed a very comprehensive model for combating unfair competition. France, which was the first to proclaim the principle of free competition, also began combating its unfair manifestations (although it did not need a specific statute to do so). The postulate of the commercial and industrial freedom contained in the Act of 2 March 1791, under which everything not expressly prohibited was allowed[15], constituted the guiding principle in the French legal system. Applying this reasoning, the French lawyers took a position that each entrepreneur, acting honestly, could acquire the maximum number of recipients who became his/her clientele. Regarding a response to unfair competition manifestations, the premises specific to tort liability, i.e. loss and fault have been reached for. Therefore, starting from the general liability in tort (contained in Article 1382 and Article 1383 of the Napoleon Code), the French case law departed in combating unfair competition from the literal wording of the provisions of the Napoleon Code and established a set of principles that effectively dealt with combating this phenomenon. As the doctrine of that time commented: "a French judge, accustomed to translating the principles of equity over the letter of the Act and being not discouraged by the lack of strict legal directives in such cases where life brings new needs and new concepts, found a basis for combating all modern forms of unfair competition[16] in the general provision of Article 1382 of the Napoleon Code (...)". This model was based on the subjective right, which was the right to clientele - *achalandage*. The notion of *achalandage* was understood as the entirety of lasting relationship between the entrepreneur and its recipients and clients[17]. The French doctrine recognized the sum of these relations as property and established a subjective right based on it and referred to as *droit d'achalandage*[18]. All the activities in contravention of the subjective right contained in the statute were unlawful and constituted the basis for instituting a civil complaint, i.e. for launching a system of claims against the infringer[19].

The third extremely important model, although much less affecting continental solutions of combating unfair competition in the late nineteenth and early twentieth century, was the common law model characterized by recognition of combating unfair competition mainly from the procedural perspective[20]. The court rulings, based on the general principles of liability for damages resulting from torts, have evolved certain types of conduct in relation to specific manifestations of unfair competition. Initially, the protection of the entrepreneur's good name and economic success - livelihood – played a significant role. A breach or even a threat to the livelihood allowed the entrepreneur to take advantage of appropriate legal means[21].

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[11] In contemporary literature the development of unfair competition in Germany presents among others: BEATER, A., *Unlauterer Wettbewerb*, Tübingen 2011, p. 79-139; HARTWICH, M. O., *Wettbewerb, Werbung und Recht. Eine Kritik des Rechts des unlauteren Wettbewerbs aus historischer, rechtsvergleichender und ökonomischer Sicht – zusammengeführt am Beispiel der vergleichenden Werbung*, München 2004, p. 7-86; see also: RABBE, M., SCHUBMEHL, S., *Länderbericht Deutschland.* In: SCHMIDT-KESSEL, M., SCHUBMEHL, S., (ed), *Lauterkeitsrecht in Europa. Eine Sammlung von Länderberichten zum Recht gegen unlauteren Wettbewerb,* München 2011, p. 67-71.

[12] Reichsgesetzblatt 1896, Band 1, no 13, p. 145.

[13] Reichsgesetzblatt 1909, p. 499.

[14] See further: DOLATA, T., *Zwalczanie nieuczciwej konkurencji na ziemiach polskich do 1926 roku*. In: Acta Universitatis Wratislaviensis No. 2758, Prawo CCXCIV, Wroclaw 2005, p. 201-205. The following authors, among others, have written about German solutions in the field of unfair competition: KOHLER, J., *Der unlautere Wettbewerb. Darstellung des Wettbewerbsrecht*, Berlin und Leipzig 1914; NEUBERG, J., *Der unlautere Wettbewerb*, Leipzig 1919; OSTROWSKI, U., *Der unlautere Wettbewerb im Zeitungsgewerbe und seine Bekämpfung durch das Gesetz*, Hamburg 1921; BAUMBACH, A., *Kommentar zum Wettbewerbsrecht*, Berlin 1929; CALLMANN, R., *Der unlautere Wettbewerb. Kommentar zum Gesetz gegen den unlauteren Wettbewerb*, Mannheim 1929. See also the scientific papers of the new German doctrine for example: VON STECHOW, H., *Das Gesetz zur Bekämpfung des unlauteren Wettbewerbs vom 27. Mai 1896. Entstehungsgeschichte und Wirkung*, Berlin 2002, p. 304-315.

[15] *Uzasadnienie ogólne projektu ustawy o zwalczaniu nieuczciwej konkurencji*, Druk Sejmu Ustawodawczego (Print of Legislative Sejm) No. 2448 of 1926, p. 6.

[16] MAYZEL, M., *O zwalczaniu nieuczciwej konkurencji*. In: Przegląd Prawa Handlowego 1926, no 5, p. 196.

[17] ARZT, Z., *Przedsiębiorstwo.* In: *Encyklopedia Podręczna Prawa Prywatnego*, vol. 3, Warsaw [without a year of publication], p. 1867.

[18] MOKRYSZ-OLSZYŃSKA, A., *op. cit.,* p. 116 - 117.

[19] The French solutions in the field of unfair competition have been discussed, among others, by: ALLART, H., *Traité théorique et pratique de la concurrence déloyale*, Paris 1892; DARRAS, A., *Traité théoretique et pratique de la concurrence déloyale*, Paris 1894; BARBIER, R., *De la concurrence déloyale*, Paris 1895; POUILLET, E., *Traité des marques de fabrique et de la concurrence déloyale en tous genres*, Paris 1906; PAPADAT, V.A., *De la concurrence déloyale*, Paris 1907; PICHOT, O., *De la concurrence déloyale et la contrefacon*, Paris 1926.

[20] Neither the legislation nor legal doctrine specified general substantive criteria on the basis of which individual activities were assessed as unfair competition activities. However, the lack of a definition of the unfair competition activities was compensated by judicial decisions.

[21] See further: ZOLL, F., *Nieuczciwa konkurencja i jej pokrewne objawy ze stanowiska prawa prywatnego.* In: Przegląd Prawa i Administracji, vol. XXI, No. 10, 1896, p. 923-924; idem, *Reforma prawa naftowego*, Krakow 1905, p. 7.

However, the most characteristic and most important concept of Anglo-American law in combating unfair competition was the passing-off formula[22], allowing the courts to combat any actions that led or could lead to the false impression that the goods or services represented the goods or services of another merchant or that they were somehow connected with it[23]. Protection against unfair competition under the common law model was perceived in a selective manner (it functioned in so far as there were appropriate formulas provided by the case law). Over time, however, the scope of this protection has been significantly expanded by supplementing it with a number of specific statutes[24].

3. Germanic and Romanesque model and the Polish Act on Combating Unfair Competition of 1926

In the field of combating unfair competition, within the Polish territories upon regaining a state sovereignty[25], there were as many as four different legal systems i.e. German, Austrian, Russian and French[26]. They represented radically different juridical solutions regarding both the formal foundations for protection and theoretical structures. The only common element connecting the legislation of the partitioning states was the fact that all of them, to a greater or lesser extent, constituted some protection against unfair competition[27]. The method of combating unfair competition in the Second Republic of Poland was essentially influenced by German solutions (effective within the former Prussian partition) as well as French solutions(applicable within the former Russian partition, the area of the former Congress Kingdom)[28].

In the former Prussian partition, on regaining independence by Poland (1918), the Act of 7 June 1909 - *Gesetz gegen den unlauteren Wetthewerb*, was in force. This was the second statute on this subject introduced into the German legal system[29]. The structure of this normative act, in addition to the extended catalogue of prohibited activities, differed from its predecessor of 1896 by one extremely important element. This was a general clause set out in § 1 thereof, generally prohibiting all activities of unfair competition[30]. The general clause was of fundamental significance to the entire Act, because it contained a definition of unfair competition. It was to be applied in all instances where individual provisions of the Act proved to be insufficient. According to the legislator's intentions it was to complement all other provisions of the law on combating unfair competition. Consequently, the courts considered individual conduct as manifestations of unfair competition if the facts met the hypothesis of one of the activities contained in the Act or the general clause[31].

To qualify an activity as an unfair competition activity, it was essential for a specific act to meet the following prerequisites:

1) contradiction of decency[32],
2) competitive nature of the act[33].

Particularly noteworthy is the premise of contradiction with the principles of decency. However, the term "decency" has not been defined in the Act. Therefore, these were the case law and doctrine which contributed to the definition of this concept. Initially[34], the jurisprudence of the Supreme Court held that the interpretation of this term should be made from the perspective of all people with "a sense of decency and fairness"[35]. After the adoption of the new Act on combating unfair competition, German jurisprudence applied this "decency formula" in relation to § 1 thereof, but enriched it by guidelines which provided that while "filling" the concept of decency one should apply an average measure[36].

Apart from the contradiction of decency, a decisive element which had an impact on the determination of the conduct as the unfair competition activity was the competitive nature of the activity carried out for the competitive purpose or in the

[22] See further: HOLLAND, R. W., CODE HOLLAND, R. H., *op. cit.*, p. 463-467.

[23] See further: MOKRYSZ-OLSZYŃSKA, A., *Niemieckie prawo o nieuczciwej konkurencji na rozdrożu? Ewolucja niemieckiego prawa o nieuczciwej konkurencji*. In: Kwartalnik Prawa Prywatnego vol. 2, 2001, p. 315-317; eadem, *Zagadnienia prawne…,* p. 123-125. Other Anglo-American law institutions have been also discussed in these studies.

[24] MOKRYSZ-OLSZYŃSKA, A., *Niemieckie prawo…*, p. 317.

[25] Upon regaining independence in 1918, the newly shaped Polish state consisted of the territories of the German, Austrian and Russian partitions. In the Russian partition, French law (in the former Polish Kingdom) and Russian law (in the so-called Eastern Borderlands) were in force.

[26] GŁĘBOCKI, K., *Uwagi z powodu ustawy „O zwalczaniu nieuczciwej konkurencji"*. In: Gazeta Sądowa Warszawska, No. 43, 1926, p. 585 et seq.; KURATOW-KURATOWSKI, R., *op. cit.*, p. 341-342.

[27] See further: DOLATA, T., *op. cit*.; GÓRNICKI, L., *Nieuczciwa konkurencja, w szczególności…,* p. 14-15.

[28] Austrian and Russian legal solutions in the field of unfair competition had no a major impact on the model adopted by the Polish legislator.

[29] This statute replaced the Act of 27. 05. 1896 - *Gesetz zur Bekämpfung des unlauteren Wetthewerbes* - the world's first regulations on unfair competition in a statutory form.

[30] § 1. "Anyone who, in the course of business for competitive purposes, undertakes actions contrary to decency may be forced to abstain from taking the actions and to repair damage caused".

[31] BLUMENFELD, T., *op. cit.,* p. 93; CALLMANN, R., *op. cit.,* p. 35.

[32] However, the Act does not contain a definition of the term ‚decency'. The content of this concept became part of jurisprudence and doctrine - see further: MOKRYSZ-OLSZYŃSKA, A., *Niemeickie prawo…*, p. 318-319; NOWIŃSKA, E., *Zwalczanie nieuczciwej reklamy. Zagadnienia cywilno-prawne,* Krakow 2002, p. 51; KNYPL, T., *op. cit.,* p. 39. The Polish legislator has used a similar solution in the Act on Combating Unfair Competition of 1926.

[33] The competitive nature of the act was carried out for the competitive purpose or in a competitive relation of the given activity. The competitive purpose of the activity was understood as the intention to acquire clientele to the detriment of other competitors- entrepreneurs. On the other hand, a competitive relationship could take place only in the situation of undertaking activities contrary to decency between entrepreneurs offering goods or services of the same or possibly similar type - see further: BLUMENFELD, T., *op. cit.*, p. 111-112.

[34] Even before the entry into force of the 1909 Act, German jurisprudence had dealt with the term "decency" in relation to § 826 BGB.

[35] NOWIŃSKA, E., *op. cit.,* p. 51.

[36] KNYPL, T., *op. cit.*, s. 39.

competitive relationship of the given activity. The competitive purpose of the activity was understood as the intention to acquire clients to the detriment of other competitors, entrepreneurs. On the other hand, a competitive relationship could take place only in the situation where the activities undertaken were contrary to decency between entrepreneurs offering goods or services of the same or possibly similar type[37].

The statute subject to analysis herein protected entrepreneurs[38] wronged by the unfair competition activities granting them a right to make the following civil claims:

- a claim to cease and desist from unlawful activities (§ 1, 3, 6, 8, 10, 11, 12, 14, 16)
- a claim for damages (§ 1, 3, 6, 8, 10, 11, 12, 14, 16, 17, 18).

Both civil claims lapsed after six months of the date on which the entitled learned about the activity and the perpetrator, but not later than three years after committing the unlawful activity (§ 21).

A claim for ceasing and desisting from unfair competition activities was assigned a non-pecuniary nature. The essence of the claim was contained in the demand to stop unlawful activities. A right to make the claim was vested in an entrepreneur affected by the unfair competition activities of the competitors as well as in the associations of entrepreneurs, provided they had a capacity to sue. On the other hand, it was the entrepreneur committing unfair competition activities against the claimant or it was the owner of the business whose employee or representative committed any unfair competition activities contained in the Unfair Competition Act (§ 13 point 1 and 3) who had capacity to be sued.

It could be inferred from the literal wording of § 1 of the German Act on Combating Unfair Competition that the claim for ceasing and desisting from unfair competition activities was only allowed once the activity contrary to the principles of decency had been committed. However, German jurisprudence took the view that a complaint for ceasing and desisting from unfair competition activities was already justified in a situation where there was a reasonable threat that the prohibited activities violating the entrepreneur's interests (causing harm) were at the stage of completed preparation or, even more justified, during the attempt phase[39]. In addition, an action for ceasing and desisting from unfair competition activities was admissible whenever there was a risk of repeating or continuing the activity which was harmful for the entrepreneur[40]. The claim for ceasing and desisting from unfair competition activities was of a preventive nature as the entrepreneur could request refraining from future unfair competition activities[41]. The premise for this claim was not the fault of the person responsible for the violation. Therefore, the claimant did not have to prove the defendant's fault and the defendant could not effectively defend itself by showing that their actions were not committed at their fault.

The claim for damages could only be made by such an entrepreneur who had it available, irrespectively of the fact whether the dishonest competitor had generated some profits as a result of unfair competition activities or not. The Act did not provide any guidance as to how to seek compensation. Therefore, the claim was subject to the general rules governing compensation set out in the BGB. The German Civil Code distinguished between the two compensation regimes i.e.: contractual and tortious. The damage caused to the entrepreneur's assets as a result of the unfair competition activities determined the tort liability of the defendant. Therefore, the provisions on tortious liability[42] constituted the legal basis for damages. The obligation to provide a remedy dependent upon the cumulative satisfaction of the following conditions: a) occurrence of the unfair competition activity, b) damage suffered, c) the causation link between the activity and the damage suffered, d) the fault of the perpetrator of the act for damage suffered[43].

The claim contained a demand for compensation for damage caused by the unfair competition activity. It is worth mentioning that pursuant to a norm contained in § 249 BGB, the guiding principle of the German Civil Code with regard to the obligation to pay compensation was restoration to the original condition (*restitutio in natura*). Only in the event the restoration to the original state proved to be impossible or insufficient it was replaced by a monetary obligation to remedy the damage (compensation) - § 251 BGB. Given the nature of the damage caused to the entrepreneur by the unfair competition activities, the appropriate method to compensate for the damage caused was monetary compensation. German law followed the principle of the full reimbursement of damages (§ 252 BGB). This meant that an obligation to remedy the damage concerned both: the actual loss suffered by the injured entrepreneur (*damnum emergens*) and the loss of profits that it could have expected had the damage not been caused (*lucrum cessans*)[44].

In addition to civil law protection, criminal law protection played a huge and dominant role in the German Act on combating unfair competition. In addition to the general clause of § 1

[37] See further: BLUMENFELD, T., *op. cit.*, p. 111-112.

[38] The legislator's intention was solely the protection of entrepreneurs; hence the Act did not provide for any legal instruments to protect the interests of consumers. However, these interests could be indirectly protected while applying the Act. See: BLUMENFELD, T., *op. cit.*, p. 91.

[39] KRAUS, A., ZOLL, F., *Polska ustawa o zwalczaniu nieuczciwej konkurencji*, Poznan 1929, p. 113.

[40] CALLMANN, R., *op. cit.*, p. 60 et al.; KRAUS, A., ZOLL, F., *op. cit.*, p. 115. This view is shared by ROZMARYN, S., *Uwagi procesowe do art. 4 ustawy o zwalczaniu nieuczciwej konkurencji*. In: Przegląd Prawa Handlowego, No. 2, 1937, p. 71.

[41] See further: Kraus, A., ZOLL, F., *op. cit.*, p. 174-175.

[42] See further: § 823 and *et seq.* BGB.

[43] DERNBURG, H., *Das Bürgerliche Recht des Deutschen Reichs und Preussens*, Bd. 2, Abt. 2, Halle 1915, p. 747 *et seq.*; OERTMANN, P., *Kommentar zum Bürgerlichen Gesetzbuch und seinen Nebengesetzen*, Buch 2, Berlin 1929, p. 1378 *et seq.*; PLANCK, G., *Bürgerliches Gesetzbuch nebst Einführungsgesetz*, Bd. 2, Berlin 1907, p. 970 *et seq.*; STAUDINGER, J., *Kommentar zum Bürgerlichen Gesetzbuch und dem Einführungsgesetz*, Bd. 2, München, Berlin und Leipzig 1929, p. 1770 *et seq.*

[44] OHANOWICZ, A., *Prawo cywilne byłej dzielnicy pruskiej*. In: *Encyklopedia prawa obowiązującego w Polsce*, part III Prawo cywilne, Poznan 1925, p. 164.

and, in principle, the three torts[45], the other unfair competition activities contained in the Act constituted a criminal activity in the form of a crime (more specifically, minor offences) or misdemeanours. A dishonest competitor could therefore be subject to penal sanctions for committing the following acts: fraudulent advertising (§ 4), illegal sale of goods as a result of bankruptcy (§ 6), organizing unfair sales (§ 8 and 10), masking the quantity of goods and its origin (§ 11), bribery (§ 12), disclosure and dishonest use of company secrets (§ 17), dishonest use of other people's designs or technical regulations (§ 18). Committing a criminal offense exposed the dishonest competitor to a specific criminal sanction. In addition, in most cases, the injured party could pursue civil claims as well. This meant that, apart from criminal proceedings, civil proceedings could be conducted independently.

In the territory of the former Congress Kingdom of Poland, protection against unfair competition consisted in applying the provisions of the Napoleon Code of 1804 on torts (Article 1382 and 1383)[46] and in addition the definition of ownership contained therein (Article 544)[47]. In cases concerning the repression of acts that constituted manifestations of unfair competition activities premises, specific to tort liability, i.e. damage and fault were applied. This established the foundation for the introduction of a solid civil law protection platform. Over time, therefore, a set of rules and norms well suited to combating unfair competition have crystallized[48]. The essence and the only criterion for recognizing the activity as an unfair competition activity was the violation of the legally protected interests i.e. the clientele - *achalandage*[49] in the French legal system. The concept of *achalandage* was understood as the entirety of lasting relationships between the entrepreneur and its clients. The French legal doctrine has recognized the sum of such relationships as a property and established a subjective right based on it and referred to as *droit d'achalandage.*

After regaining independence, the Polish legislator was faced with a difficult task, in a situation of a very diverse legal nature (in the area of unfair competition Polish territory was under the regime of four different legal systems), to unify the legal provisions in this respect. This could be done by extending one of the existing legal system of the partitioned territories to the entire territory of the Second Polish Republic[50] or by introducing its own legal order, possibly using the best solutions known and verified by other legal systems. It was the latter method that the Polish legislator decided to choose. As a result, the first Polish law on combating unfair competition was adopted by the parliament on 2 August 1926, promulgated on 25 September 1926, and entered into force on 10 October 1926[51]. The author of the statute was an outstanding Polish academic, professor of the Jagiellonian University - Fryderyk Zoll[52].

4. Similarities of the Polish Act on combating unfair competition to the German juridical solutions

P*rima facie*, the basic feature placing the Polish statute within the sphere of the German model of combating unfair competition was the concept of repression of this phenomenon by means of a law adopted especially for this purpose. This solution clearly demonstrates the fact that the Polish legislator resigned from introducing and developing legal regulations specific to the French legal order - operating in the former Congress Kingdom of Poland- throughout the territory of the Second Republic of Poland.

While analysing the German Act of 1909 and its Polish equivalent of 1926, it is impossible not to notice a similar catalogue of offenses and misdemeanours that the Polish legislator had introduced into the Act of 1926[53]. Moreover, the repression of unfair competition under the 1926 Act involved the use of two levels of protection i.e.: civil and criminal. Violation of the civil law provisions of the Act resulted in a tort against which relevant claims could be made[54]. The provisions of Article 1 clause 1 and Article 3 of the Act were of fundamental importance for such model of combating unfair competition. Contemporary

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45 False advertising (§ 3), defamation of an enterprise (§ 14) and a misleading enterprise designation (§ 16).

46 Article 1382 "Any human activity causing harm to another person shall be remedied by the one who is liable for the harm".
Article 1383 "Everyone is responsible for damage caused, not only by its actions, but also by its negligence or carelessness".

47 Article 544 "Property is a right to use things and dispose of them in the most unrestricted manner, provided that it is not used by statutes or a prohibited device".

48 BAUDOUIN DE COURTENAY, Ś., *Ochrona przedsiębiorstwa*. In: *Polityka gospodarcza*, Warsaw 1928, p. 72. The development of the French case law on unfair competition presented by WADLE, E., *Geistiges Eigentum. Bausteine zur Rechtsgeschichte,* Band II, München 2003, p. 373-374.

49 GÓRNICKI, L., *Rozwój idei ochrony praw własności intelektualnej do II wojny światowej*. In: Zeszyty Naukowe Wyższej Szkoły Informatyki "Copernicus" we Wrocławiu, No. 3/2006, p. 20.

50 II Republic of Poland - a period in the history of the Polish state dated 1918 (regaining independence after the partitions) - 1939 (outbreak of World War II).

51 Dz. U. RP [Legal Journal of the Republic of Poland], No. 96, item 559.

52 Doctrinal constructions by professor F. Zoll have formed the theoretical foundations for all pre-war Polish legislation in the field of intangible property rights.

53 Article 7 of the Polish statute sanctioned the act of selling goods contrary to regulations (equivalent to § 11 of the German Act of 1909); Article 9 sanctioned defamation of an enterprise or entrepreneur (equivalent to § 14 German Act of 1909); Article 10 paragraph 1 and 2 sanctioned the prohibited use of secrets of someone else's enterprise and disclosure of the enterprise secret (equivalent to § 17 German Act of 1909).

54 The Act on Combating Unfair Competition of 1926 provided for the following civil claims:
- prohibitive order;
- claim for the removal of effects that may mislead recipients;
- claim for unjust enrichment;
- claim for damages;
- claim for payment of a lump sum.

doctrine[55] rightly treats these provisions as general clauses, although the author of the statute, i.e. professor Fryderyk Zoll, in his commentary to the Act[56], as well as in his extensive academic achievements, never used such terminology in relation to any of the provisions. Similarly, the inter-war doctrine of unfair competition did not recognize general clauses[57] in the Act, although it stressed a significance of Article 3 and considered the provision similar to such clause[58]. Today, the provisions of Article 1§ 1 and Article 3 of the Act of 1926 are commonly referred to as a small and large general clause, respectively.

The general clause contained in Article 1 clause 1[59] was at the forefront of the Act on Combating Unfair Competition. It started with the phrase "invading the entrepreneur's clientele". This term, unknown to the previous statutory terminology, despite its unspecified character did not cause any interpretation difficulties. It meant appropriating the attractive power of the enterprise[60]. The further part of the provision contained the essential guidelines regarding the phrase "invading the entrepreneur's clientele". There was another term there - "any actions capable of evoking confusion (...)". General interpretative assumptions indicated that the behaviours in question must have been aimed at causing an error or even the possibility of causing an error[61] among recipients as to the origin of goods (products, services) from a particular entrepreneur - the so-called "confusion". These activities most often consisted in introducing by the infringer onto the market its own products with similar trademarks to those of the injured entrepreneur' goods. The imitation of trademarks of the goods could relate to their verbal, pictorial or mixed (verbal-pictorial) marking[62].

The term "invading the clientele of the entrepreneur" was an expression of an evaluative character and it was definitely adversely assessed. The assessment was made from the perspective of the effects that the actions of the competitor produced or could potentially produce. These effects were manifested in the acquisitions of clients and the deprivation of profits to which the entrepreneur was entitled to.

While analysing the structure of the Polish Act on combating unfair competition of 1926, one should pay a special attention to Article 3[63], which was the so-called large general clause.

The general clause contained in Article 3 of the Act consisted of two alternative premises, each of them bore a general clause character i.e.:

a) contrary to law being in force;

b) contrary to decency (commercial honesty)[64].

As far as the contradiction with the law being in force is concerned, the Act did not specify any particular provisions that must not be violated (phrase undefined). The content of this premise, in doctrine and jurisprudence, however, did not cause controversy hence it was not given much attention. It is sufficient to say that any actions violating the statute or a subjective right granted under the statute were considered contrary to the law.

As for the second premise concerned, it should be noted that the criterion of "decency" was also used by the German legislator in the Act on Combating Unfair Competition of 1909. "Contradiction with the principles of decency" contained in the Act on Combating Unfair Competition of 1926, as indefinite term, was subject to judicial interpretation. Due to the fact that the signs of decency cannot be determined *in abstracto*, the legislator gave a clear interpretive guideline using the criterion of commercial integrity. The violation of the concept of decency in a particular case was always decided by a judge who, based on the overall circumstances of the case[65], ruled on the basis of an objective sense of positive values subsisting within the merchant environment. The average moral level characteristic for decent earning and economic life constituted the expression of these positive values. This meant that it was unacceptable to assess the interference with the sphere of decency based on the world-view and ideas of persons with an excessively high sense of merchant integrity, as well as persons tolerating grossly unethical commercial practices[66]. The issue was to determine

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[55] PREUSSNER-ZAMORSKA, J., *Problematyka klauzul generalnych na gruncie ustawy o zwalczaniu nieuczciwej konkurencji*. In: Kwartalnik Prawa Prywatnego, vol. 4, 1998, p. 649; SZWAJA, J., *Die Genese der Generalklausel des neuen polnischen UWG. In:* Gewerblicher Rechtsschutz und Urheberrecht, No. 4, 1996, p. 486.

[56] KRAUS, A., ZOLL, F., *op. cit.*

[57] KURATOW-KURATOWSKI, R., *op. cit.,* p. 347.

[58] BLUMENFELD, T., *op. cit.*, p. 108, 117.

[59] Article 1. 1 "An entrepreneur is entitled to request that another entrepreneur (competitor) not to interfere with its clientele by any activities capable of misleading persons to whom it offers its products, goods or services as to the fact that they originate from the former entrepreneur".

[60] KRAUS, A., ZOLL, F., *op. cit.*, 63-64. As for the meaning of the concept of „attractive power" - see below.

[61] HOWORKA, M., *Ustawa z dnia 2-go sierpnia 1926 r. o zwalczaniu nieuczciwej konkurencji*, Poznan 1926, p. 6. Similar case law: ruling of the Supreme Court of 22 September 1932, Rw 838/32, Przegląd Prawa Handlowego 1932, No. 8 p. 440-442. While assessing the ability to cause confusion, it was not about details but about the overall impression: Supreme Court judgment of 17. 09. 1935, C II 806/35, Przegląd Prawa Handlowego 1936, No. 5, p. 275-277; Supreme Court judgment of 18. 05. 1937, C II 2570/36, Przegląd Prawa Handlowego 1937, No. 9, p. 415-417.

[62] As for the restrictions resulting from such marking of goods - see further: KRAUS, A., ZOLL, F., *op. cit.*, p. 68-81.

[63] Article 3 "Whoever, except for cases set out in Articles 1 and 2, harms the entrepreneur due to activities contrary to applicable regulations or principles of decency (commercial honesty), as by way of providing false information about the enterprise, (...), should refrain from these activities and in the event of the fault compensate the injured party and possibly provide a redress to them. (...)".

[64] This juridical structure could be defined as the so-called large general clause due to the existence of two premises within it.

[65] The judge examined a behaviour in terms of the content, motives and purpose of the action. For example: a person who failed to make timely payments due to financial difficulties, did not act contrary to good merchant practice, however the one who was withholding payments to cause a competitor's insolvency violated good principles of decency.

[66] KRAUS, A., ZOLL, F., *op. cit.*, pp. 170-172. Traditionally, there was a view presented in the Polish doctrine pursuant to which assessment of an activity in terms of violating morality required the use of a universally understood criterion of ethics. There was the assumption underlying that view that merchant ethics as a uniform concept for everyone does not differ from the ethics of any other human being or profession. DĄBROWSKI, E., *op. cit.*, p. 12.

what fair trading actually allowed for and what it did not. It is worth emphasizing that by classifying the activity as contrary to the principles of decency (commercial integrity) the judge did not deal with the question of whether the person was or was not aware of the violation of such principles. The Polish legislator has granted the primacy of an objective criterion for assessing a given activity as violating principles of decency (rules recognized within the merchant environment) disregarding the subjective factor (beliefs of the person committing the unfair competition activity).

It was a belief of the legislator that there is a need to create a very flexible and, as a consequence, an effective model for combating unfair competition that constituted the main motive to introduce the two general clauses into the Act on Combating Unfair Competition (in art. 1 and 3). This was an original solution, although the very idea of including a general clause into the Act indicates references to the German system.

5. Similarities of the Polish Act on combating unfair competition to the French juridical solutions

Polish solutions within the area of combating unfair competition should be attributed to civilian concepts of subjective rights, which brought them closer to the French regulations. The relevant subjective law, in this case the ownership right, was made based on an interest that was legally protected. Under Polish legal doctrine, due to F. Zoll, this subjective right was the ownership right in an enterprise as an intangible asset[67]. This law constituted the theoretical foundation on which the Polish Act on combating unfair competition of 02. 08. 1926 was based.

Devising this model, F. Zoll granted the entrepreneur the subjective right, diversified due to the way it affected the contractors (clientele). This impact occurred in a form of attracting customers by the enterprise understood as a separate property substrate from its creator, being the subject of legal transactions. The entrepreneur had an absolute subjective right[68] with respect to the enterprise, similar to the ownership right. Thus, the subjective right acquired the status of a specific ownership right – the ownership interest in the enterprise as an intangible asset[69].

The enterprise constituted one object of property. Its intangible character was determined by the most important asset that constituted a part of the enterprise. By the latter we mean here: "the attractive power", which involved the possibility of "acquiring and maintaining due to its organization and its features or advertising - the circle of recipients, even though they were constantly changing"[70]. The enterprise presented the asset value in isolation from the material elements contained in it. This value was reflected in the attractive power that the enterprise exerted on the clientele. The larger the clientele, the more valuable the enterprise was[71].

Regarding the most important differences between the Polish legal solutions and the French system, it should be clearly pointed out that there was not a specific statute to combat the unfair competition activities within the French legal system, but the relevant provisions of the Napoleon Code (Articles 1382 and 1383) were applied in this regard. Finally, another object of protection in France deserves attention - *achalandage*, i.e. the right to clientele, while in Poland - the ownership right in an enterprise.

6. Summary

There is no doubt that the system of combating unfair competition introduced by the professor F. Zoll stemmed from the achievements of the continental legal thought. However, it may not be strictly attributed to either the German or the French model of combating unfair competition. It constituted an indirect, original expression of Polish legal thought, partly referring to its German and its French counterpart[72]. The fact that the provisions for combating the unfair competition were contained in the statute and the application of general clauses brought the German system, which was the starting point for the Polish statute, closer to the Polish one. In addition, when analysing the Polish Act of 1926 and its German equivalent of 1909, it is impossible to ignore some similarities in the context of criminal law regulations. Primarily this is a similar catalogue of activities subject to criminal prosecution. On the other hand, it was the civil method of combating unfair competition using the concept of the subjective right that was common both to the Polish and French model[73].

Professor Zoll, using German and French solutions in his concept, drew on the experience of legislations with the longest tradition of unfair competition repression and in which, over the years of application, a number of solutions have proved to work positively. The Act of 1926, using modern legal solutions, gave rise to modern repression of unfair competition in Poland.

It is worth noting that the Polish concept regarding the repression of unfair competition has also aroused interests in France and Germany[74]. A translation of the Polish statute into

[67] Broadly about this juridical construction: GÓRNICKI, L., *Koncepcja prawa na przedsiębiorstwie Fryderyka Zolla.* In*:* LITYŃSKI, A., MIKOŁAJCZYK, M., ADAMCZYK, T., DROGOŃ, A., ORGANIŚCIAK, W., (ed.), *Państwo, prawo, społeczeństwo w dziejach Europy Środkowej*. Księga jubileuszowa dedykowana Profesorowi Józefowi Ciągwie w siedemdziesięciolecie urodzin, Katowice-Kraków 2009.

[68] Effective *erga omnes* containing a ban on violating the protected sphere of the entrepreneur's rights – KRAUS, A., ZOLL, F., *op. cit.*, p. 60.

[69] To emphasize a difference in relation to the „right in the enterprise". Thus, the ownership right to the enterprise constituted a right in rem to the property and not just a contractual right to the property – ZOLL, F., *Przedsiębiorstwo – przedmiotem…,* p. 431-432. There may be also found language considerations on the term "ownership of the enterprise" there; GÓRNICKI, L., *Nieuczciwa konkurencja…*, p. 17.

[70] KRAUS, A., ZOLL, F., *op. cit.,* p. 59.

[71] See further: Ibidem, p. 29.

[72] The same conclusions have been reached by prof. F. Zoll, see further: KRAUS, A., ZOLL, F., *op. cit.* p. 23.

[73] In France, this right was the right to clientele, in Poland - the ownership right in an enterprise as an intangible asset.

[74] The Polish statute on combating unfair competition was considered progressive and modern by the German doctrine, - ELSTER, A., PINNER, A., *Gesetz gegen den unlauteren Wettbewerb*, Berlin 1927, p. 49.

French was published in the Propriété Industrielle of January 1927, and into German in the Zeitschrift für Ostrecht of February 1927[75]. In addition, in the renowned foreign legal and non-legal press, articles by professor Zoll have been published introducing the character and theoretical structure contained in the Polish Act with its further amendments as well as presenting views of the author on this subject[76].

F. Zoll's views on combating unfair competition enjoyed considerable interests and positive reception as far as the international opinion was concerned. Professor Zoll presented the assumptions of his theory on combating unfair competition at the International Congress of Experts in Geneva in May 1924[77] and during the International Congress for the Revision of the Paris Convention in Hague in October 1925, which was very well received by the international opinion[78].Contrary to current custom, Zoll's speech was fully published in the documents devoted to the Hague Conference[79], what constitutes another proof of the recognition given to F. Zoll's theoretical concepts (contained in the Act of 1926) and introduced into the Polish legal order.

Summing up, the Polish Act on combating unfair competition was an original work (although partly referring to the French and German systems), while its legal solutions and theoretical concepts corresponded to the highest international standards of that time. One could even argue that it was the third, intermediate between the French and German, mixed model of combating unfair competition.

[75] KRAUS, A., ZOLL, F., *op. cit.*, p. 46.

[76] ZOLL, F., *A propos de la loi polonaise du 2 aout 1926 concernant la repression de la concurrence deloyale*. In: Propriété Industrielle vol. 4, 1927, p. 64-68; idem, *Das Schöpferische der Unternehmertätigkeit als Immaterialgut*. In: Danziger Wirtschaft Zeitung No. 15, 1927, p. 230; idem, *La „novelle" relative a la loi polonaise du 2 aout 1926 concernant la repression de la concurrence deloyale*. In: Propriété industrielle vol. 1, 1928, p. 19-20; idem, *Novelle zum Gesetze vom 2. August 1926, betreffend die Bekämpfung des unlauteren Wettbewerbes*. In: Zeitschrift für Ostrecht, Erster Jahrgang, 1927, p. 1155 - 1156. idem, *Zur Charakteristik des neuen polnischen Gesetzes vom 2. August 1926 betreffend die unlauteren Wettbewerbes*. In: Ostrecht, vol. 2, 1927, p. 113-126.

[77] Minutes and an abstract of Prof. Zoll's lecture, see: ZOLL, F., *Zwalczanie nieuczciwej konkurencji jako zadanie Ligi Narodów*. In: Gazeta Administracji i Policji Państwowej, no 25, 1924, p. 502-503, and no. 26, p. 522–524.

[78] Cf. "*Sprawozdanie Prezydenta Komisji Kodyfikacyjnej, Rektora Fr. X. Fiericha, wygłoszone na posiedzeniu połączonych Komisji Prawniczych Sejmu i Senatu Rzeczypospolitej 21 marca 1927 r.*". In: *Komisja Kodyfikacyjna Rzeczypospolitej Polskiej. Dział Ogólny*, Tome. 1, no. 10, Warsaw 1927, p. 271.

[79] Union Internationale pour la protection de la propriété industrielle: *Actes de la conférence reunie a la Haye du 8 octobre au 6 novembre 1925*, Berne 1926, p. 473-474.

Das Handelsrecht und seine Entwicklung im Protektorat Böhmen und Mähren (1939–1945)

(Commercial Law and its Developments in the Protectorate of Bohemia and Moravia 1939–1945)

*Jaromír Tauchen**

Abstract

This article focuses on the state interventions in the sphere of commercial law in the Protectorate of Bohemia and Moravia during the years 1939–1945. Protectorate citizens (the Czechs) were mainly governed within the scope of commercial law by the Austrian Commercial Code of 1863, inherited from the Habsburg monarchy, which received only minor alterations. During the war, the Minister of Justice had wide powers to enforce restrictions or waive certain limitations when it came to commercial law, which was mainly justified by public order concerns and the environment of the war economy. The article takes note, among other issues, of the changes in corporation law, obligation law, patent law or securities law. During the existence of the Protectorate of Bohemia and Moravia, an entirely new system of regulation was also introduced for promissory notes and cheques.

Keywords: *Protectorate of Bohemia and Moravia; Third Reich; private law; commercial law; Austrian Commercial Code; corporations; securities law; patent law; promissory note law.*

1. Einführung

Am 15. März 1939 wurden die böhmischen Länder, die vorher der Tschechoslowakischen Republik angehörten, von der deutschen Wehrmacht besetzt und anschließend das Protektorat Böhmen und Mähren proklamiert.[1] Die volksdeutschen Bewohner des Protektorates wurden deutsche Staatsangehörige und unterstanden der im Protektorat neu errichteten deutschen Gerichtsbarkeit. Die übrigen Bewohner von Böhmen und Mähren wurden Staatsangehörige des Protektorates Böhmen und Mähren.[2]

Neben dem bisherigen tschechoslowakischen Recht wurde deutsches Recht (Reichsrecht) auf dem Protektoratsgebiet eingeführt, wobei seine Anwendung in der Regel (jedoch nicht in allen Fällen) von der Staatsangehörigkeit abhing.[3]

Während der deutschen Besetzung erfuhr die Rechtsordnung in den böhmischen Ländern tiefgreifende Eingriffe, die vor allem im Bereich des öffentlichen Rechts zu Tage traten. Im Unterschied dazu blieben die meisten Privatrechtsgebiete verschont.[4] Dieser Beitrag befasst sich mit der Entwicklung des für die Protektoratsangehörigen (d.h. Tschechen) geltenden

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1 Als Rechtsgrundlage diente der Erlass des Führers und Reichskanzlers vom 16. März 1939 über das Protektorat Böhmen und Mähren (RGBl. I, S. 485).

2 Zum Rechtssystem des Protektorats Böhmen und Mähren siehe folgende auf Deutsch oder Englisch erschiene Literatur: SCHELLE, K., TAUCHEN, J., *Recht und Verwaltung im Protektorat Böhmen und Mähren*. München, 2009; TAUCHEN, J., Das Protektorat Böhmen und Mähren und seine Rechtsordnung (1939–1945). In: *Beiträge zur Rechtsgeschichte Österreichs*, Jg. 10, Nr. 2, 2020, S. 260-268; TAUCHEN, J., Law in the Protectorate of Bohemia and Moravia. In: *Plundered, But By Whom? Protectorate of Bohemia and Moravia and Occupied Europe in the Light of the Nazi-Art Looting. Proceedings of an international academic conference held in Prague on 21–22 October, 2015*. Prag, 2015, S. 43-56.
Aus den tschechisch verfassten Standartwerken ist vor allem auf folgende aufmerksam zu machen: MARŠÁLEK, P., *Pod ochranou hákového kříže: nacistický okupační režim v českých zemích 1939–1945*. Prag, 2012; ders., *Protektorát Čechy a Morava: státoprávní a politické aspekty nacistického okupačního režimu v českých zemích 1939-1945*. Prag, 2002; PASÁK, T., *Pod ochranou říše*. Prag, 1998; SOBOTA, E., *Co to byl protektorát*. Prag, 1946; TAUCHEN, J., Protektorát Čechy a Morava (1939–1945). In: SCHELLE, K., TAUCHEN, J. (Hrsg.), *Encyklopedie českých právních dějin, IX. svazek Procesy (od roku 1950) – Pů*. Pilsen, 2017, S. 715-723; TAUCHEN, J., Právo protektorátní. In: SCHELLE, K., TAUCHEN, J. (Hrsg.), *Encyklopedie českých právních dějin, VII. svazek Právo pra – Prob.* Pilsen, 2017, S. 126-131.

3 Dazu ausführlich VEITZKE, G., Das Personalstatut im deutschen interlokalen Privatrecht. In: *Deutsches Recht, Ausgabe A*, Jg. 10, Heft 38, 1940, S. 1539-1543; KRIESER, H., Die Rechtsangleichung im Protektorat. In: *Böhmen und Mähren*, 1942, S. 150.

4 Zur allgemeinen Charakteristik der Privatrechtsentwicklung im Protektorat Böhmen und Mähren siehe TAUCHEN, J., Die Grundcharakteristik des Privatrechts im Protektorat Böhmen und Mähren. In: *Journal on European History of Law*, Jg. 2, Nr. 1, 2011, S. 56-60; VOJÁČEK, L., SCHELLE, K., TAUCHEN, J. (Hrsg.), *Die Entwicklung des tschechischen Privatrechts*. Brünn, 2011; dies. (Hrsg.), *An introduction to history of Czech private law*. Brünn, 2011; dies. (Hrsg.), *Vývoj soukromého práva na území českých zemí* (2 Bände). Brünn, 2012; TAUCHEN, J., Nacistické „soukromé" právo jako vzor pro právo protektorátní (analýza jednotlivých právních odvětví). In: KNOLL, V., BERÁNEK, P. (Hrsg.), *Acta historico-iuridica Pilsnensia 2011*. Pilsen, 2011, S. 262-274; TAUCHEN, J., Základní ideologická východiska nacistického „soukromého" práva jako vzoru pro právo protektorátní. In: *Dny práva – 2010 – Days of Law*. Brünn, 2011, S. 1720-1742.

Handelsrechts in dieser Periode, wobei die reichsdeutschen Vorschriften des Handelsrechts außer Betracht bleiben.[5]

Auf dem Gebiet des Handelsrechts kam dem weitergeltenden Allgemeinen Handelsgesetzbuch (Nr. 1/1863 öRGBl.) eine Schlüsselrolle zu.[6] Während der Zeit des Protektorats wurden in ihm nur unbedeutende Änderungen durchgeführt, bzw. der von ihm geregelte Bereich wurde durch eine Reihe von Regierungs- oder Ministerialverordnungen ergänzt oder abgeändert. Beschrieben und analysiert sind also starke öffentlich-rechtliche Elemente, welche in das Handelsrecht des Protektorats mit dem Ziel eingriffen, die ganze Wirtschaft dem Krieg und seinen Bedürfnissen unterzuordnen. Die Aufmerksamkeit beschränkt sich bloß auf die durchgeführten Eingriffe und die neu eingeführten handelsrechtlichen Institute, sodass das bis 1939 geltende Handelsrecht als Ganzes nicht charakterisiert wird.

Eine ganze Reihe von den zwischen 1939–1945 eingeführten Rechtsvorschriften hatten zwar nicht den „klassischen" handelsrechtlichen Charakter und können auch nur schwer dem Privatrecht untergeordnet werden, die Regelungen schränkten faktisch jedoch die unternehmerischen Tätigkeiten Privater wesentlich ein. Diesen eher öffentlich-rechtlichen Rechtsvorschriften, welche u.a. den freien Markt und die freie Preisgestaltung abschafften, wird einer der nächsten Artikel gewidmet.[7]

2. Vertragshilfe des Richters

Zu einem der Grundpfeiler des Schuldrechts gehört der aus dem Naturrecht stammende und bis ins römische Recht zurückgehende Grundsatz der Vertragstreue, in Latein *„pacta sunt servanda"* oder auf Deutsch *„Verträge sind einzuhalten"*. Es können jedoch solche Situationen vorkommen, in denen der Schuldner die geforderte Leistung infolge der außerordentlichen Umstände nicht erbringen kann. Beispiel dafür sind Kriegsverhältnisse oder Wirtschaftskrisen, welche ohne Zweifel weitreichend in die privatrechtlichen Verhältnisse eingreifen. Aufgrund der durch höhere Gewalt eingetretenen Änderungen konnte es von dem Schuldner gerechterweise nicht verlangt werden, die wirtschaftlichen Konsequenzen für die nicht von ihm, sondern durch die Kriegsverhältnisse verursachte Situation selbst zu tragen. Den ihn verpflichtenden Vertrag schloss er mit der Vorstellung von stabilen Wirtschaftsverhältnissen ab, die sich jedoch infolge der Kriegsereignisse änderten. Die Vertragsparteien gingen also beim Vertragsschluss von einer bestimmten Stabilität der Wirtschaftsverhältnisse und der Währung aus. Die erste Regelung, die durch die Änderung der Verhältnisse eingeführt wurde, stammte aus der Zeit der Zweiten Tschecho-Slowakischen Republik und galt die ersten Monate nach der Errichtung des Protektorats Böhmen und Mähren weiter. Aufgrund der Regierungsverordnung vom 4. November 1938 Nr. 281/1938 Slg., über die Regelung der durch den Staat vereinbarten Verträge konnte der Staat von einem abgeschlossenen Vertrag zurücktreten, sofern er aufgrund der veränderten Verhältnisse kein Interesse mehr an der Fortsetzung des Vertrages hatte. Die veränderten Verhältnisse stellten in diesem Falle die für die Tschecho-Slowakei sehr problematische Situation im Wirtschaftsbereich und in der Lenkung des ganzen Staates nach der Abtretung der sudetendeutschen Gebiete an das Deutsche Reich infolge der Durchführung des Münchner Abkommens im Oktober 1938 dar.[8]

Einen wesentlichen Eingriff in die Vertragsbeziehungen brachte die Regierungsverordnung vom 14. Dezember 1939 Nr. 44/1940 Slg.,[9] welche eine Änderung einiger Bestimmungen des Schuldrechts durchführte. Es sollten Rechte und Verbindlichkeiten der Personen gerechterweise geregelt werden, welche in ihrem Beruf (vor allem in einem Gewerbe oder in der Landwirtschaft) von den Wirkungen des Krieges solchermaßen betroffen wurden, dass sie nicht im Stande waren, ihre vor Kriegsbeginn begründeten Verbindlichkeit nachzukommen.[10] Diese Regierungsverordnung stellte also eine normative Regelung von Ausnahmen aus dem oben erwähnten Grundsatz *„pacta sunt servanda"* dar, welcher zwar in der Rechtsordnung bestehen blieb, es wurden jedoch Bedingungen festgesetzt, zu denen es möglich war, auf diesen Grundsatz zu verzichten. Der Gesetzgeber – in den Verhältnissen des Protektorats Böhmen und Mähren die Protektoratsregierung – erkannte also an, dass es in bestimmten außerordentlichen Verhältnissen nicht möglich ist, die Leistung von dem Schuldner gerechterweise zu verlangen.[11]

Im Reich erging auch eine sehr ähnliche Regelung, die zum Vorbild für die Rechtsvorschriften des Protektorats wurde.[12] Die erste Änderung betraf das Institut der Verjährung, deren Verlauf gehemmt wurde, sofern zu den Beteiligten der Vertragsbeziehung Mitglieder der deutschen Wehrmacht, sowie solche Personen gehörten, die gezwungen waren, ihren Aufenthaltsort

[5] Das zwischen 1939-1945 geltende Handelsrecht gehört zu den Rechtsgebieten, die bisher weit unerforscht geblieben sind. Zur Übersicht der Handelsrechtsentwicklung siehe VOJÁČEK, L., SCHELLE, K., TAUCHEN, J. (Hrsg.), *Vývoj soukromého práva na území českých zemí (2 Band).* Brünn, 2012, S. 704-719.

[6] Zur Entwicklung des Handelsrechts in den böhmischen Ländern vor 1939 siehe die Arbeiten von Ladislav Vojáček: Právo obchodní (do roku 1950). In: SCHELLE, K., TAUCHEN, J. (Hrsg.), *Encyklopedie českých právních dějin, VI. svazek Právní – Právo po*. Pilsen, 2016, S. 753-807; Stručně k rekodifikaci obchodního práva. In: SALÁK, P. (Hrsg.), *Historie osnovy občanského zákoníku z roku 1937*. Brünn, 2017, S. 41-47; Prvek modernizace v počátku přípravy prvorepublikového obchodního zákoníku. In: BUBELOVÁ, K. (Hrsg.), *150 let Všeobecného obchodního zákoníku*. Olmütz, 2012, S. 31-44; Obchodní, směnečné a hospodářské právo (Nástin problematiky). In: TAUCHEN, J. (Hrsg.), *Výzkum vývoje soukromého práva na území České republiky. Sborník z konference*. Ostrava, 2010, S. 127-160.

[7] Zur Übersicht dieser öffentlich-rechtlichen Eingriffe siehe TAUCHEN, J., K některým veřejnoprávním zásahům do hospodářské činnosti podniků v Protektorátu Čechy a Morava. In: BUBELOVÁ, K. (Hrsg.), *150 let Všeobecného obchodního zákoníku*. Olmütz, 2012, S. 85-96.

[8] KUBEŠ, V., *Soudcovská pomoc při smlouvách*. Prag, 1943, S. 18.

[9] Regierungsverordnung vom 14. Dezember 1939 Nr. 44/1940 Slg., womit die Sonderbestimmungen über das Verfahren vor den Gerichten des Protektorats erlassen und einige Bestimmungen des bürgerlichen Rechts geändert werden.

[10] HOFFMANN, J. (Hrsg.), *Nové zákony a nařízení Protektorátu Čechy a Morava. Jahrgang I. (1939).* Prag, 1939, S. 1232.

[11] SRNA, K., Doc. JUDr. Vladimír Kubeš: Soudcovská pomoc při smlouvách. In: *Právní Prakse*, Jg. 8, Nr. 2, 1943- 1944, S. 72-73.

[12] Zur Regelung der Vertragshilfe des Richters im Reich siehe HOMOLKA, J., Výstavba smluvní pomoci soudcovské v Říši. In: *Všehrd*, Jg. 21, Nr. 4-5, 1940, S. 181-184.

als Folge der anberaumten Zwangsräumung der bedrohten Gebiete oder als Folge eines anderen durch den Krieg verursachten unabwendbaren Ereignisses zu verlassen. Die Hemmung der Verjährungsfristen, sowie der Fristen für die Klageerhebung und anderer Fristen für die Geltendmachung der Rechte im Gerichtsverfahren endete mit dem Wegfall des Grundes, aus welchem sie bestand. War der Schuldner aufgrund der Kriegsvorkommnisse verhindert, die nach 25. August 1939 zu erfüllende Verbindlichkeit als Folge des Krieges ohne sein eigenes Verschulden zu erfüllen, konnte der Richter auf Antrag des Schuldners entscheiden, dass die Rechtsfolgen (z. B. Verpflichtung zur Entrichtung der Verzugszinsen oder Recht des Gläubigers den Vertrag zu kündigen oder von ihm zurückzutreten) ganz oder teilweilweise nicht eingetreten seien.[13]

Im Protektorat wurde die Verordnung des Generalbevollmächtigten für die Reichsverwaltung über die Vertragshilfe des Richters aus Anlass des Krieges vom 30. November 1939 (RGBl. I, S. 2329) eingeführt. Nach dieser Verordnung konnte das Kriegsausgleichsverfahren jedoch nur von Personen beantragt werden, die nicht Protektoratsangehörige (d.h. Tschechen) waren. In diesem Falle waren die deutschen Gerichte im Böhmen und Mähren zuständig. Auf die Tschechen bezog sich also diese Rechtsvorschrift nur, wenn es sich um einen Gläubiger handelte.

Die Vertragshilfeverordnung wurde mit folgender Präambel eingeführt, die den Zweck der rechtlichen Regelung verdeutlichte:

> *„Eine wesentliche Voraussetzung für das Durchhalten der deutschen Wirtschaft im Kriege ist, dass jeder seinen Zahlungsverpflichtungen pünktlich nachkommt. Wer sich dieser Pflicht entzieht, gefährdet den Sieg ebenso wie etwa derjenige, der Rohstoffe verschwendet. Wo jedoch einzelne Volksgenossen wegen der besonderen Lage ihrer persönlichen und wirtschaftlichen Verhältnisse von den Kriegsfolgen weit härter betroffen sind, als die Mehrzahl der übrigen, müssen die Gläubiger hierauf bei der Geltendmachung ihrer Ansprüche Rücksicht nehmen. Es wird erwartet, dass zwischen den durch die Kriegsverhältnisse unverschuldet in wirtschaftliche Not geratenen Schuldnern und ihren Gläubigern eine billige und gerechte Abwicklung ihrer Verpflichtungen im Wege gütlicher Vereinbarung herbeigeführt wird. Wo gleichwohl eine solche Einigung nicht zustande kommt, ist es Aufgabe des Staates, ausreichend einzugreifen“*.

Diese Verordnung sollte den Gewerbetreibenden helfen, die infolge der Auswirkungen des Krieges genötigt waren, ihren Betrieb stillzulegen oder deren Leistungsfähigkeit so wesentlich beeinträchtigt wurde, dass eine planmäßige Abwicklung ihrer Verpflichtungen nicht möglich war. Zu den Instrumenten der Vertragshilfe des Richters gehörten z.B. die Regelung der Fälligkeit, die Abwicklung gegenseitiger Verträge oder die Herabsetzung bzw. die Auflösung der Miete oder Pacht bei Geschäftsräumen.[14]

Im Jahre 1943 wurden mehrere Regierungsverordnungen erlassen, aufgrund derer es möglich war, den Betrieb von Unternehmen zum Zwecke der Freimachung der Arbeitskräfte zur Erfüllung kriegswichtiger Aufgaben oder zur Einsparung von Energien und Brennstoffen stillzulegen, umzustellen oder erheblich einzuschränken.[15] Bis zum Kriegsende wurde der Betrieb von Unternehmen unterbrochen, die keine kriegswichtige oder für die Ernährung der Bevölkerung notwendigen Waren herstellten. Den stillgelegten oder erheblich eingeschränkten Betrieben blieben jedoch Verbindlichkeiten und Verpflichtungen aus der Zeit vor der Stilllegung oder Einschränkung ihrer Tätigkeit erhalten. Es stellte sich also die Frage, ob vom Schuldner verlangt werden konnte, die Leistung im vollen Umfang zu erbringen, wenn er als Betriebsinhaber seinen Betrieb einstellte oder andere Arbeiten ausübte und dadurch weniger Geld verdiente.[16]

Zur Lösung dieser Situation sollte die Vertragshilfeverordnung vom März 1943 beitragen,[17] welche fast wörtlich die schon oben angeführte reichsdeutsche Verordnung vom November 1939 wiedergab und welche dem vom Krieg betroffenen Schuldner Erleichterung bringen sollte.

Den durch die Vertragshilfeverordnung eingeräumten Schutz konnten einerseits die Inhaber der auf behördliche Anordnung stillgelegten oder infolge sonstiger Auswirkungen des Krieges eingeschränkten Betriebe und andererseits die Eigentümer der Betriebsgrundstücke in Anspruch nehmen. Unter einem Betriebsinhaber wurde auch der Pächter verstanden. Die Vertragshilfe des Richters bezog sich sowohl auf Industrie-, Gewerbe- oder landwirtschaftliche Unternehmen, als auch auf die Inhaber von Gasthäusern oder Angehörige der freien Berufe.[18] Nur diese Personen konnten Schutz für Vertragsverbindlichkeiten verlangen. Ausgeschlossen wurde also die Deliktsverbindlichkeiten oder Verbindlichkeiten öffentlich-rechtlichen Charakters, wie

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[13] Dazu ausführlich z.B. HRDLIČKA, V., O vlivu válečných událostí na smlouvy soukromé. In: *Právní Prakse*, Jg. 4, Nr. 9-10, 1939–1940, S. 249-257; KUBEŠ, V., Dočasná změna některých ustanovení občanského práva. In: *Všehrd*, Jg. 21, Nr. 3, 1940, S. 81-90, Nr. 4-5, 1940, S. 129-136; ders., Válečná doložka a jiné doložky o odstoupení od smlouvy. In: *Časopis pro právní a státní vědu*, Jg. 24, 1941, S. 191-200; ders., K otázce vlivu válečných událostí na smlouvy soukromé. In: Právní prakse, Jg. 5, Nr. 1, 1940–1941, S. 1-16; HOMOLKA, J., Zvláštní ustanovení o změně některých předpisů procesních a hmotně-právních. In: *Všehrd*, Jg. 21, Nr. 3, 1940, S. 98-101.
Die Frage der Vertragshilfe des Richters rief eine noch nie da gewesene Diskussion über den Einfluss der Kriegsverhältnisse auf Privatverträge auf den Seiten der juristischen Fachzeitschriften des Protektorats hervor. Der Diskussion wurden vor allem Artikel des ehemaligen Dozenten der Brünner Juristischen Fakultät Vladimír Kubeš (*1908–†1988) unterzogen. Dazu s. HRDLIČKA, V., Ke sporu o vliv válečných poměrů na smlouvy soukromé. In: *Právní prakse*, Jg. 5, Nr. 4, 1940–1941, S. 109-111.

[14] Zur Auslegung dieser Verordnung s. näher z.B. VOGELS, W., Ausbau der richterlichen Vertragshilfe. In: *Deutsche Justiz, Ausgabe A*, Jg. 102, 1940, S. 413.

[15] Regierungsverordnung vom 11. Februar 1943 Nr. 44/1943 Slg., zur Freimachung von Arbeitskräften für kriegswichtigen Einsatz. Zur Lenkung der Arbeitskräfte im Protektorat siehe TAUCHEN, J., Die Arbeitsverwaltung im Protektorat Böhmen und Mähren (1939–1945). In: *Journal on European History of Law*, Jg. 10, Nr. 2, 2019, S. 2-14.

[16] ČERNÝ, B., Soudcovská pomoc při smlouvách. In: *Moderní stát*, Jg. 16, 1943, S. 127-131.

[17] Regierungsverordnung vom 17. März 1943 Nr. 71/1943 Slg., über die Vertragshilfe des Richters aus Anlass des Krieges (Vertragshilfeverordnung).

[18] KUBEŠ, V., *Soudcovská pomoc při smlouvách*. Prag, 1943, S. 23-24.

z.B. Entrichtung von Steuern oder Verwaltungsabgaben. Der Richter konnte jedoch die bis 31. August 1939 begründeten Verbindlichkeiten (also bis zum Ausbruch des Zweiten Weltkrieges) oder spätere Verbindlichkeiten abwickeln, sofern der Betriebsinhaber mit den Kriegsauswirkungen, die ihn an der Erfüllung seiner Verpflichtungen hinderten, nicht rechnen konnte. Im Rahmen des Verfahrens hatte der Richter stets die gesamten Erwerbs- und Vermögensverhältnisse des Betriebsinhabers zu berücksichtigen.

In den Erläuterungen zur Vertragshilfeverordnung führte der Justizminister folgendes an:

„…Diese Vorschriften zielen auf eine gerechte Auseinandersetzung der wirtschaftlichen Interessen der Beteiligten ab und eröffnen dem Richter die Möglichkeit, die den Umständen des Falles und den wirtschaftlichen sozialen Verhältnissen der Beteiligten am besten entsprechende Anordnung zu treffen… Der Richter soll nicht zwischen den Parteien Recht sprechen, sondern Recht gestalten, die Verpflichtungen und Berechtigungen nach Gerechtigkeit und Billigkeit verteilen, den Überlasteten entlasten und auf den Minderbelasteten das überwälzen, was er ertragen kann, mit anderen Worten soll der Richter danach trachten, dass unter der Schwere der Kriegsauswirkungen niemand erdrückt wird, sondern dass diese Lasten durch gegenseitiges Nachgeben allen Beteiligten erträglich werden." [19]

Der Richter hatte drei Möglichkeiten zur neuen Abwicklung des Schuldverhältnisses zwischen dem Schuldner und dem Gläubiger: er konnte die Fälligkeit der Zahlungsverpflichtungen neu regeln, Erleichterungen bei der Erfüllung gegenseitiger Verträge einräumen und die Miete oder Pacht bei Geschäftsräumen herabsetzen. Der Richter konnte die Fälligkeit von Zahlungsverpflichtungen des Betriebsinhabers durch Bewilligung von Teilzahlungen oder Stundung entsprechend der Leistungsfähigkeit des Schuldners regeln. Aus der Regelung der Fälligkeit wurden die durch Hypothek an einem inländischen Grundstück gesicherten Verbindlichkeiten, die Verbindlichkeiten für öffentliche Abgaben, Sozialversicherungsbeiträge und Geldstrafen, ferner die Lohn- und Gehaltsansprüche, sowie die Verbindlichkeiten aus einem von der Nationalbank für Böhmen und Mähren im Lombardverkehr gewährten Darlehen ausgenommen.

Der Richter war berechtigt, einen zweiseitigen vom Betriebsinhaber geschlossenen Vertrag ganz oder zum Teil aufzuheben, wenn die Erfüllung oder weitere Erfüllung des Vertrages die Weiterführung oder Abwicklung des Betriebes gefährden und durch die Aufhebung dem Vertragsgegner kein unverhältnismäßiger Schaden verursacht würde.

Hatte der Richter den Vertrag aufgehoben oder geändert, so konnte er dem Betriebsinhaber auf Verlangen der anderen Vertragspartei auftragen, diesen angemessen zu entschädigen, soweit dies unter Berücksichtigung der Verhältnisse beider Vertragsparteien der Billigkeit entsprach, oder bestimmen, in welcher sonstigen Weise ein angemessener Ausgleich der Belange der beiden Vertragsparteien stattfinden sollte.

Auf Antrag des Betriebsinhabers konnte der Richter die Miete oder Pacht der für den Betrieb genutzten Räume und Grundstücke für einen bestimmten Zeitraum um einen angemessenen Betrag, jedoch um nicht mehr als die Hälfte, herabsetzen.

Die Vertragshilfeverordnung ging von dem Grundsatz aus, dass der Schuldner die Vertragshilfe des Richters erst in Anspruch nehmen konnte, nachdem er versucht hatte, sich mit dem Gläubiger außergerichtlich zu einigen. Sollte es zu keiner Vereinbarung kommen, konnte er sich an das Bezirksgericht wenden. Die Vertragshilfeverordnung bezog sich auf die Staatsangehörigen des Protektorats (d.h. Tschechen). Die Juden, sowie Personen, die als Juden galten,[20] konnten jedoch die in dieser Verordnung vorgesehene richterliche Vertragshilfe nicht in Anspruch nehmen. Sollte ein deutscher Staatsangehöriger als Gläubiger am Verfahren beteiligt sein, konnte er innerhalb von 14 Tagen nach Zustellung der ersten gerichtlichen Verfügung die Abgabe des Verfahrens an das deutsche Gericht im Protektorat beantragen. Diesem Antrag hatte das Protektoratsbezirksgericht zu entsprechen.[21]

3. Einschränkungen beim Vertragsabschluss

Während des Zweiten Weltkrieges erfuhr der Vertragsabschlussprozess einige Einschränkungen, zu denen z.B. das Nutzungsverbot einiger bisheriger Arten des Post- und Nachrichtenverkehrs gehörten.[22] Der unmittelbare und mittelbare Nachrichtenverkehr mit den feindlichen Staaten war verboten. Die Folge davon war, dass die Unternehmer keine Verträge mit ihren bisherigen „aus dem feindlichen Ausland" stammenden Geschäftspartnern mehr abschließen konnten.[23] Als Nachrichtenverkehr waren Briefsendungen (Briefe, Drucksachen, Geschäftspapiere, Postanweisungen), Paketsendungen, Fernsprech-, Fernschreib- oder Telegrammverkehr, Güter- und Frachtenverkehr oder Brieftaubenverkehr angesehen. Der Nachrichtenverkehr mit dem „nichtfeindlichen Ausland" war grundsätzlich zulässig. Die Vertragspartner durften jedoch keine Nachrichten über die militärische, wirtschaftliche oder politische Lage übermitteln.

Zugleich konnte der Inlandsnachrichtenverkehr aus Gründen der Kriegsführung durch das Oberkommando der Wehrmacht Beschränkungen oder Auflagen unterworfen werden. Zuwiderhandlungen gegen derartige Beschränkungen wurden mit Geldstrafe oder mit Haft bestraft.

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[19] Erläuterungen des Justizministers zur Regierungsverordnung vom 17. März 1943, verlautbart im *Verordnungsblatt des Justizministeriums*, Jg. 25, Nr. 3, 1943, s. 78-88.

[20] Im Sinne der Regierungsverordnung vom 7. März 1942 Nr. 85/1942 Slg., womit weitere Vorschriften über Juden und jüdische Mischlinge erlassen werden.

[21] Verordnung des Reichsprotektors über die Zuständigkeit der deutschen Gerichte in Angelegenheiten der richterlichen Vertragshilfe vom 18. März 1943 (VBl.RProt. S. 33).

[22] Verordnung des Vorsitzenden des Ministerrats für die Verteidigung und des Beauftragten für den Vierjahresplan über den Nachrichtenverkehr vom 2. April 1940 (RGBl. I, S. 823).

[23] Welche Staaten als „feindliches Ausland" anzusehen waren, regelten die Bekanntmachungen zur Verordnung über den Nachrichtenverkehr vom 28. Mai 1940 (RGBl. I, S. 826), vom 22. Oktober 1940 (RGBl. I, S. 1397) und vom 30. Mai 1942 (RGBl. I, S. 377).

Gemäß der Durchführungsvorschrift zur Verordnung über den Nachrichtenverkehr war der Post- und Fernmeldeverkehr mit dem nichtfeindlichen Ausland auf das Äußerste einzuschränken. Im Postverkehr durften die Unternehmen und ihre Vertragspartner von keinen Geheimtinten, Geheimschriften, Kunstsprachen wie Esperanto, sowie von hebräischen Schriftzeichen Gebrauch machen. Die Briefe mussten deutlich und leicht lesbar und möglichst mit Schreibmaschine geschrieben sein. Die Briefe geschäftlichen Inhalts waren nur in Schreibmaschinen- oder Druckschrift zulässig. Die Postanweisungen und Überweisungen aus einem Postscheckkonto durften auf dem Empfängerabschnitt nur solche kurzen Mitteilungen enthalten, die sich auf den Zahlungsgrund bezogen. Alle Zusendungen ins Ausland hatten auf der Außenseite die vollständige Anschrift des Absenders zu tragen.

Der Vertragsabschluss der Unternehmen wurde auch durch die Einschränkungen, nach welchen der Fernsprech- und Fernschreibverkehr ins Ausland nur den vom Oberkommando der Wehrmacht zugelassenen Firmen gestattet wurde, verkompliziert. Ebenfalls musste die volle Anschrift des Absenders auf den Telegrammen, sowie die Art der Verschlüsselungscodes vermerkt sein.[24]

4. Änderungen im Gesellschaftsrecht

In der Zeit des Protektorats Böhmen und Mähren erfuhren die Vorschriften des Gesellschaftsrechts bloß minimale Änderungen.[25]

Im Jahre 1940 erleichterten die Rechtsvorschriften eine Verlegung des Sitzes der sich auf dem Protektoratsgebiet befindenden Handelsgesellschaft in das sonstige Reichsgebiet und umgekehrt auf eine wesentliche Art und Weise, was bisher nur nach der Durchführung einer Liquidation der Gesellschaft möglich war. Die Verlegung der Sitze der Kommanditgesellschaften auf Aktien, der Aktiengesellschaften, der Gesellschaften mit beschränkter Haftung und der Erwerbs- und Wirtschaftsgenossenschaften aus dem Gebiet des Protektorats Böhmen und Mähren in sonstige Teile des Großdeutschen Reiches wurde nur als eine Änderung ihrer Gesellschaftsverträge über Sitze angesehen. Die Verlegung des Sitzes wurde dem Handelsregister bekannt gemacht, in welchem die Gesellschaft bisher eingetragen war. Das Gericht verzeichnete diese Änderung in das Handelsregister und teilte diese Tatsache dem nach dem neuen Sitz zuständigen Registergericht mit, sofern die Gesellschaft nachwies, alle rückständigen Steuern, Abgaben und Gebühren entrichtet zu haben. Das Gericht schloss zugleich die sich auf den bisherigen Sitz beziehenden Eintragungen und Urkunden an, die sich bei dem bislang zuständigen Gericht befanden. Das Gericht führte eine Löschung im Handelsregister durch, sobald es eine Mitteilung über die Durchführung der Sitzverlegung von dem neu zuständigen Gericht erhielt.[26]

Die neuen staatsrechtlichen Verhältnisse nach 15. März 1939 erforderten eine Änderung des Wortlauts der Firma und Gesellschafts- und Genossenschaftssatzungen, welche auf die ehemalige Tschechoslowakische Republik verwiesen, denn die Besatzungsmacht konnte sich nicht mit der Tatsache abfinden, dass einige der bisherigen Bezeichnungen an das alte Regime erinnerten. Es musste sich jedoch nicht nur um eine Bezeichnung der Firma, sondern auch um die Angabe der ehemaligen tschechoslowakischen Währung oder der ehemaligen tschechoslowakischen Staatsangehörigkeit, die Erwähnung der ehemaligen tschechoslowakischen Republik bei der territorialen Abgrenzung des Wirkungskreises von Gesellschaften und Erwerbs- und Wirtschaftsgenossenschaften und ähnliches handeln.[27]

Es wurde ermöglicht, dass die Satzungs- oder Gesellschaftsvertragsänderung von einem anderen als nach den bisherigen Rechtsvorschriften zuständigen Organ durchgeführt wurde. Im Falle der Kommanditgesellschaft auf Aktien konnte die Änderung von den persönlich haftenden Gesellschaftern, von dem Vorstand bei Aktiengesellschaften, von den Geschäftsführern (dem Vorstand) bei Gesellschaften mit beschränkter Haftung und dem Vorstand bei Erwerbs- und Wirtschaftsgesellschaften vorgenommen werden. Der Beschluss der persönlich haftenden Gesellschafter oder des Vorstandes bedurfte eine absolute Stimmenmehrheit.[28] Sofern die Firmen von Einzelkaufleuten, Handelsgesellschaften oder Erwerbs- und Wirtschaftsgenossenschaften nicht aus bloßen Personennamen oder aus neutralen Bezeichnungen bestanden, durften sie seit 1941 nur in deutscher Sprache oder wenigstens auch in deutscher Sprache in das Handels- oder Genossenschaftsregister eingetragen werden.[29] Die einzelnen Gewerbe und Betriebe selbst hatten auch eine zweisprachige Bezeichnung zu führen.[30]

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[24] Erste Durchführungsverordnung zur Verordnung über den Nachrichtenverkehr vom 13. Mai 1940 (RGBl. I, S. 824).

[25] Zur Übersicht einiger Änderungen des Gesellschaftsrechts s. JANĎOUREK, S., Některé změny při řízení ve věcech akciových společností. In: *České právo*, Jg. 24, 1942, S. 26-27.

[26] Regierungsverordnung vom 6. Juni 1940 Nr. 199/1940 Slg., über die Verlegung des Sitzes von Wirtschaftsunternehmen aus dem Gebiet des Protektorats Böhmen und Mähren in sonstige Teile des Großdeutschen Reiches oder aus diesen Gebieten auf das Gebiet des Protektorates Böhmen und Mähren. Eine ausführliche Analyse dieser Regierungsverordnung bringt z.B. RAUFTL, J., O překládání sídel akciových společností z území Protektorátu Čechy a Morava do jiných částí Velkoněmecké říše nebo z těchto na území Protektorátu Čechy a Morava. In: *Soudcovské listy*, Jg. 22, 1941, S. 47ff.

[27] Erläuterungen zur Regierungsverordnung Nr. 26/1940 Slg., betreffend Erleichterungen bei Beschlussfassung über einige Abänderungen von Gesellschafts-, Genossenschafts- und Vereinsstatuten und betreffend die Bezeichnung einiger Anstalten und Einrichtungen für Geldwesen, verlautbart im *Verordnungsblatt des Justizministeriums*, Jg. 22, Nr. 3, 1940, S. 41.

[28] Regierungsverordnung vom 21. Dezember 1939 Nr. 26/1940 Slg., betreffend Erleichterungen bei Beschlussfassung über einige Abänderungen von Gesellschafts-, Genossenschafts- und Vereinsstatuten und betreffend die Bezeichnung einiger Anstalten und Einrichtungen für Geldwesen.

[29] Regierungsverordnung vom 30. April 1941 Nr. 268/1941 Slg., betreffend die sprachliche Regelung von Firmeneintragungen in das Handels- oder Genossenschaftsregister. Dazu s. folgende umfangreiche Abhandlung GLOS, J., Ještě k vlád. Nařízení čís. 268/41 Sb., zejména k otázce „Neutrálních názvů" a t. zv. „Firemních zkratek". In: *Soudcovské listy*, Jg. 23, Nr. 4, 1942, S. 93-95, Nr. 5, S. 110-114.

[30] Zu den Richtlinien des Zentralverbandes der Industrie, des Handels und des Handwerks hinsichtlich die zweisprachige Bezeichnung von Betrieben im Protektorat Böhmen und Mähren s. ausführlich KREJZA, Z., Označení obchodů po stránce jazykové. In: *Revue živnostenského (průmyslového) vlastnictví. Časopis pro průmysl, obchod a živnosti Protektorátu Čechy a Morava*, Jg. 7, Nr. 6, 1941, S. 37-38.

Seit 1942 griff der Staat nach dem reichsdeutschen Vorbild in die Gewinnausschüttung einiger Kapitalgesellschaften ein. Diese Einschränkungen betrafen jedoch nur die größeren Kapitalgesellschaften; die Aktiengesellschaften und Kommanditgesellschaften auf Aktien mit Aktienkapital über 3 Millionen Kronen und die Gesellschaften mit beschränkter Haftung mit Anlagekapital über 10 Millionen Kronen durften ihren Gewinn nur im festgesetzten Ausmaß und nach festgesetzter Maßgabe ausschütten. Den Sinn und Zweck dieses Eingriffes in die Wirtschaftsfreiheit begründete ein zeitgenössischer Kommentar folgendermaßen:

> *„…Es ist notwendig, die außerordentlichen in der Produktion angelegten Kriegsgewinne aus dem Kapital zu verhindern. Der Gesetzgeber wurde von der Überlegung geführt, dass es nicht zulässig sei, dass das in der Produktion angelegte Kapital unverhältnismäßig viel in der Zeit verdient, wenn alle Schichten unserer Wirtschaft mit Rücksicht auf außerordentliche Verhältnisse erhebliche Opfer tragen müssen“.*[31]

Für die Kapitalgesellschaften setzte die entsprechende Regierungsverordnung eine Obergrenze fest, bis zu der der Gewinn ausgeschüttet werden konnte. Die Kapitalgesellschaften hatten den Teil des ausgeschütteten Gewinns, der den Anteilseignern nicht ausgezahlt wurde, unverzüglich in Anlagepapieren des Reiches oder des Protektorats anzulegen. Diese Anlagepapiere waren treuhänderisch für die Anteilseigner zu verwalten.

Weiters wurde die Erhöhung oder Herabsetzung des Kapitals neu geregelt.[32] Damit der Härtefall nicht eintrat, dass die Gewinne infolge von zu extensiver Reservenbildung und den damit einhergehenden krassen Missverhältnis von scheinbar hohen Gewinnen (durch eben diese langfristige Bindung der Reserven) und niedrigem tatsächlichen Vermögen der Gesellschaft, nicht ausgeschüttet werden, wurde es den Handelsgesellschaften ermöglicht, die Höhe des Grundkapitals zu ändern.[33]

Gewerbliche Unternehmer, die eine außergewöhnliche Steigerung ihres Einkommens aus Unternehmungen erzielt haben, waren verpflichtet, ihre während des Krieges erzielten außergewöhnlichen Gewinne an das Finanzamt abzuführen. Der abgeführte Betrag wurde auf ein Sonderkonto (Gewinnabführungskonto) zugeführt, über dessen Verwendung der Finanzminister nach Beendigung des Krieges bestimmen sollte. Die außergewöhnliche Gewinnsteigerung wurde aufgrund eines Vergleiches des im gegenständlichen Geschäftsjahr erzielten Einkommens mit dem Einkommen für das Jahr 1939, also das Jahr des Kriegsbeginns, festgestellt.[34]

1942 wurde ermöglicht, dass einige geltende Vorschriften des Handelsrechts aufgrund der herrschenden Kriegsverhältnisse nicht konsequent eingehalten werden mussten. Der Justizminister wurde ermächtigt, während des Krieges auf den Gebieten des Handelsrechts und des Gesellschaftsrechts ergänzende oder vom geltenden Recht abweichende Vorschriften zu erlassen, soweit dies aus Gründen der öffentlichen Ordnung geboten war.[35] Die Regelung des Protektorats hinsichtlich die Befreiungen und Erleichterungen für Unternehmen während des Krieges wurde größtenteils aus der entsprechenden Verordnung des Reiches (Verordnung über weitere Maßnahmen auf dem Gebiet des Handelsrechts während des Krieges vom 4. Oktober 1940, RGBl. I, S. 1337) übernommen.

Wenn es aus Gründen der öffentlichen Ordnung oder im Hinblick auf die Kriegsverhältnisse geboten war, konnte der Justizminister für einzelne Aktiengesellschaften, Kommanditgesellschaften auf Aktien und Gesellschaften mit beschränkter Haftung Abweichungen von den gesetzlichen und satzungsmäßigen Bestimmungen über die Bekanntmachung des Jahresabschlusses und über die Bekanntmachung bestimmter Eintragungen in das Handelsregister anordnen. Unter den gleichen Voraussetzungen konnte er einzelne zur Aufstellung und Vorlegung einer Jahresbilanz und einer Gewinn- und Verlustrechnung verpflichtete Kaufleute von dieser Verpflichtung für die Dauer des Krieges oder für einzelne Geschäftsjahre während des Krieges befreien. Sollte es aus Gründen der öffentlichen Ordnung erforderlich sein, war der Justizminister berechtigt, den einzelnen Kaufleuten zu untersagen, für die Dauer des Krieges Gläubigern Berichte zu erstatten, Auskünfte zu erteilen oder Einsichtnahme in die Berichte der Geschäftsführer (des Vorstands, des Aufsichtsrats oder der geschäftsführenden Gesellschafter), in die Bücher und Schriften sowie in die Vermögensgegenstände des Unternehmens zu gestatten.[36]

Seit 1944 hatten die Registergerichte aus Kostengründen einige bestimmte Bekanntmachungen von Eintragungen in das Handelsregister zu unterlassen. Die Einsichtnahme in das Handelsregister und in die zum Handelsregister eingereichten Schriftstücke war nur insoweit zulässig, als dem Registergericht ein besonderes schutzwürdiges Interesse an der Einsichtnahme glaubhaft gemacht werden konnte.[37] Die Gesellschaft mit beschränkter Haftung war seit 1944 nicht mehr gezwungen, ihre alljährliche Pflicht zu erfüllen, im Jänner jeden Jahres eine

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[31] HOFFMANN, J. (Hrsg.), *Nové zákony a nařízení Protektorátu Čechy a Morava. Jahrgang IV. (1942).* Prag, 1942, s. 538.

[32] Regierungsverordnung vom 22. April 1942 Nr. 141/1942 Slg., über die Gewinnausschüttung in gewissen Kapitalgesellschaften und die Abänderung ihres Gesellschaftskapitals; dazu s. z.B. JANĎOUREK, S., Řízení při úpravě společenského kapitálu některých kapitálových společností. In: *České právo*, Jg. 24, 1942, S. 37; STOKLASA, J., Úprava společenského kapitálu u kapitálových společností ve smyslu vlád. nař. č. 141/1942 Sb. In: *Právní prakse*, Jg. 7, Nr. 2-3, 1942–1943, S. 45-50.

[33] Regierungsverordnung vom 1. März 1943 Nr. 78/1943 Slg., zur Ergänzung und Durchführung der Regierungsverordnung vom 22. April 1942, Slg. Nr. 141, über die Gewinnausschüttung in gewissen Kapitalgesellschaften und die Abänderung ihres Gesellschaftskapitals

[34] Regierungsverordnung vom 18. September 1942 Nr. 327/1942 Slg., über die Erfassung außergewöhnlicher Gewinnsteigerungen während des Krieges (Gewinnabführungsverordnung); Regierungsverordnung vom 6. Mai 1944 Nr. 114/1944 Slg., über die Erfassung außergewöhnlicher Gewinnsteigerungen während des Krieges (Zweite Gewinnabführungsverordnung).

[35] Regierungsverordnung vom 2. September 1942 Nr. 312/1942 Slg., über die Befreiung von der Einhaltung handelsrechtlicher Vorschriften.

[36] Ebenda.

[37] Regierungsverordnung vom 27. Dezember 1943 Nr. 317/1943 Slg., über die Einschränkung handelsrechtlicher Bekanntmachungen während des Krieges.

Gesellschafterliste mit der Angabe von der Höhe der Stammeinlage eines jeden Gesellschafters an das Registergericht einzureichen.[38]

1943 wurde die zehnjährige Frist für die Aufbewahrung von Büchern und Schriften der Handelsgesellschaften auf fünf Jahre herabgesetzt. Die Handelsbücher, Inventare und Bilanzen waren zu Beweiszwecken zehn Jahre aufzubewahren. Diese Maßnahme wurde nicht zur Vereinfachung der handelsrechtlichen Vorschriften, sondern aufgrund der Tatsache, dass so das alte Papier als Rohstoff genutzt werden konnte, erlassen.[39]

In den letzten zwei Kriegsjahren gab es eine Reihe von Eingriffen in den funktionellen Ablauf der Handelsgesellschaften. Die Generalversammlungen von Aktiengesellschaften fanden im Jahre 1944 und 1945 nicht mehr statt. Der Grund dafür war, dass viele Aktionäre angesichts des laufenden Krieges unerreichbar waren und es im Hinblick auf die Kriegsverhältnisse für überflüssig gehalten wurde, dass die Aktionäre auf eine Generalversammlung reisen, die bloß einen formellen Charakter aufwies. Zum Zwecke der Vermeidung der mit der Abhaltung der Generalversammlung verbundenen Kosten ordnete der Justizminister ein grundsätzliches Verbot der Abhaltung von Generalversammlungen an. Dieses Verbot galt nicht, wenn ein Beschluss der Generalversammlung über die Abänderung des Gesellschaftsvertrags, über Maßnahmen zur Erhöhung oder Herabsetzung des Aktienkapitals, über die Auflösung oder Vereinigung einer Aktiengesellschaft mit einer anderen Aktiengesellschaft oder über die Umwandlung in eine Gesellschaft mit beschränkter Haftung einzuholen war. Unberührt blieb auch die Bestimmung des § 240 des Handelsgesetzbuches. Ergab sich aus der letzten Bilanz, dass sich das Grundkapital um die Hälfte vermindert hatte, so musste der Vorstand unverzüglich eine Generalversammlung einberufen. Der Justizminister konnte noch weitere Ausnahmen aus den für die Handelsgesellschaften geltenden gesetzlichen Pflichten zulassen.

Weil keine Generalversammlungen stattfanden, war es notwendig, eine Regelung für das planmäßige Auslaufen der Amtsperiode der bestehenden Gesellschaftsorgane zu finden. Die Amtsdauer der von einer Generalversammlung gewählten Organe verlängerte sich, wenn keine Generalversammlung stattfand, bis zum Amtsantritt der in der nächsten Generalversammlung neu gewählten Organe. Wenn die Besetzung des Vorstandes unter die zu seiner Beschlussfassung oder zur Vertretung der Gesellschaft erforderliche Zahl herabgesunken war, so wählte der Vorstand, solange keine Generalversammlung stattfand, die erforderlichen Mitglieder mit Wirkung bis zur nächsten Generalversammlung, in der über die Ergänzung des Vorstandes beschlossen werden sollte. Die gleiche Regel wurde auch im Falle der Reduzierung der Mitglieder des Aufsichtsrates genutzt; die erforderliche Anzahl seiner Mitglieder ergänzte der bisherige Aufsichtsrat.[40]

Die Umwandlung einer Aktiengesellschaft in eine Gesellschaft mit beschränkter Haftung gemäß dem Gesetz über Gesellschaften mit beschränkter Haftung Nr. 58/1906 öRGBl. wurde für unzulässig erklärt. Soweit es sich um gemeinnützige Wohnunternehmen (gemeinnützige Bauvereinigungen) handelte, konnte der Justizminister Ausnahmen zulassen.[41]

Die zwischen 1939 und 1945 durchgeführten bedeutsameren Änderungen betrafen die Genossenschaften, in deren Tätigkeit der Staat relativ oft und erheblich eingriff. In den böhmischen Ländern war das Genossenschaftswesen weit verbreitet und das tschechische Volk wurde auch als „Volk der Genossenschaftlern" und das Genossenschaftswesen als der nationale Stolz bezeichnet.[42]

Die ersten Restriktionen wurden schon drei Wochen nach der Errichtung des Protektorats durchgeführt. War es für das öffentliche Interesse erforderlich, konnte es zum Zusammenschluss von zwei oder mehreren Genossenschaften mit gleichem oder ähnlichem Tätigkeitsgegenstand aufgrund eines amtlichen Bescheides kommen. Der Zusammenschluss von Genossenschaften konnte entweder aufgrund der Auflösung einer Genossenschaft und Übertragung ihrer Rechte und Verbindlichkeiten auf eine der zusammenschließenden Genossenschaften oder aufgrund der Errichtung einer neuer Genossenschaft aus den zusammenschließenden Genossenschaften durchgeführt werden. Bei dem Zusammenschluss wurden auch erteilte Gewerbeberechtigungen übertragen. Die Mitglieder der aufgelösten Genossenschaft wurden automatisch zu Mitgliedern der neu gegründeten Genossenschaft, sofern sie den Beitritt nicht innerhalb einer Frist von 14 Tagen ablehnten.[43] Die Eingriffe in die Organisation und Tätigkeit der Genossenschaften konnten auch vom Reichsprotektor durchgeführt werden; seiner Kompetenz oblag auch der Zusammenschluss oder die Liquidation der Genossenschaften aus staatspolitischen Gründen, sowie die Bestellung neuer Organe.[44]

Eine neue Regelung für Zusammenschlüsse von Genossenschaften wurde im September 1939 erlassen. Ihr Zweck bestand darin, Großgenossenschaften zu ermöglichen, womit die Kosten für diese erheblich gesenkt wurden. Somit konnten die Großgenossenschaften von der Besatzungsmacht leichter beherrscht und für die Kriegswirtschaft ausgenutzt werden. Der Zusammenschluss von Erwerbs- und Wirtschaftsgesellschaften (Genossenschaften) mit gleichem oder ähnlichem Unterneh-

[38] Verordnung des Justizministers vom 7. Oktober 1944 Nr. 228/1944 Slg., über Maßnahmen auf dem Gebiete des Privatrechts (Erste Verordnung zur Durchführung des totalen Kriegseinsatzes auf dem Gebiete des Protektorats Böhmen und Mähren).

[39] Regierungsverordnung vom 5. Mai 1943 Nr. 120/1943 Slg., über die Abkürzung handelsrechtlicher und steuerrechtlicher Aufbewahrungsfristen.

[40] Verordnung des Justizministers vom 23. Mai 1944 Nr. 134/1944 Slg., über die Einschränkung von Generalversammlungen bei Aktiengesellschaften und Kommanditgesellschaften auf Aktien.

[41] Verordnung des Justizministers vom 7. Oktober 1944 Nr. 228/1944 Slg., über Maßnahmen auf dem Gebiete des Privatrechts (Erste Verordnung zur Durchführung des totalen Kriegseinsatzes auf dem Gebiete des Protektorats Böhmen und Mähren).

[42] HŮLKA, A., Český národ a jeho družstevnictví. In: *Brázda*, Jg. 3, Nr. 3, 1940, s. 26-27.

[43] Regierungsverordnung vom 6. April 1939 Nr. 111/1939 Slg., über den Zusammenschluss von Erwerbs- und Wirtschaftsgesellschaften.

[44] Verordnung des Reichsministers des Innern über die Neuordnung und Abwicklung von Organisationen im Protektorat Böhmen und Mähren vom 13. Juni 1939 (RGBl. I, S. 1012).

mensgegenstand bedurfte der Schriftform und musste von den Mitgliederversammlungen beider Genossenschaften mit einer Dreiviertelmehrheit der anwesenden Mitglieder bewilligt werden. Die entsprechende Regierungsverordnung verankerte zum ersten Mal die Möglichkeit der Übertragung des Betriebes, der Zweigstelle, des Ladens oder des Lagers von einer Genossenschaft auf die andere.[45]

Im Interesse der Versorgung der Bevölkerung und zur Lenkung des einheitlichen Einsatzes der Verbrauchergenossenschaften wurde Ende 1942 ein an die Weisungen des Reichsprotektors gebundener Beauftragter für die Verbrauchergenossenschaften in Böhmen und Mähren bestellt. Die nach Gesetz oder Satzung (Gesellschaftsvertrag) den Mitgliedern (Genossen) und den Organen der Verbrauchergenossenschaften zustehenden Befugnisse gingen auf den Beauftragten über, welcher diese Befugnisse wiederum auf Dritte übertragen konnte.[46]

Ähnlich wie bei den Handelsgesellschaften wurde auch im Falle der Genossenschaften die Einberufung von General- und Mitgliederversammlungen eingeschränkt. Auf Antrag des Vorstandes hatten diese nicht stattzufinden.[47] Am Ende des Jahres 1944 wurden noch die Bekanntmachungspflicht von Genossenschaften neu geregelt, die Führung der Register der Genossenschafter vereinfacht, sowie die Frist zur Vorlage der Revisionsberichte verlängert.[48]

5. Die rechtliche Regelung des Wertpapiergeschäftes und seine Einschränkungen

Im Bereich der Wertpapiergeschäfte betraf die erste nach der Errichtung des Protektorats ergriffene Maßnahme die Getreidepfandbriefe und Lagerscheine, deren Rechtsgrundlage aus dem Jahre 1933 stammte.[49] Zur Erhöhung der Kreditwürdigkeit der Landwirte erhielten die öffentlichen Getreidelager eine Berechtigung, Getreidelagerscheine zu erlassen, die sich auf das sich in der Verwahrung befindende Getreide bezogen. Der Eigentümer von mindestens 25 q Getreide heimischer Abstammung war aufgrund der Ausstellung eines Getreidepfandbriefes berechtigt, ein Gelddarlehen über dieses Getreide zu vereinbaren und ein Pfandrecht an diesem Getreide zu Gunsten des Gläubigers zu bestellen. Die 1939 durchgeführte Novellierung reagierte auf einige Mängel der bisherigen Regelung betreffend die Getreidepfandbriefe.[50] Sie erweiterte vor allem den Kreis von Erfordernissen, welche ein Getreidepfandbrief zu erfüllen hatte und ließ die in der Regel schwer zu erfüllende Bedingung aus, dass der Getreidepfandbrief zum 31. Mai des folgenden Jahres fällig war. Neu wurde festgesetzt, dass auf einen Getreidepfand kein weiterer Getreidepfandbrief ausgestellt werden oder kein anderes vertragliches Pfandrecht errichtet werden konnte; ein Zuwiderhandeln war rechtsgültig, der Aussteller konnte jedoch strafrechtlich belangt werden. Zugleich wurde die Möglichkeit für jedermann eingeführt, eine Einsicht in das Register der Abschriften der Getreidepfandbriefe zu nehmen, Auszüge zu machen oder eine Ausstellung der amtlich beglaubigten Kopie zu fordern. Dies räumte nicht nur den Gläubigern, sondern auch den Indossanten ein Kontrollrecht ein. Dem Aussteller des Getreidepfandbriefes wurde auch die Pflicht auferlegt, das gelagerte Getreide mit der Sorgfalt eines ordentlichen Kaufmannes aufzubewahren und den Namen des Gläubigers, die Höhe des geliehenen Betrages, sowie die Menge und Art auf das gepfändete Getreide anzuführen. Der Aussteller war zugleich verpflichtet, dem Inhaber des Getreidepfandbriefes und dem Indossanten zu ermöglichen, sich über die Aufbewahrung des verpfändeten Getreides zu überzeugen. Weiter wurden die Fälle näher präzisiert, in denen der Gläubiger eine vorzeitige Erstattung des Getreidepfandbriefes verlangen konnte.[51]

In der Devisenordnung von 1939 schränkte die Protektoratsregierung den Erwerb, den Verkauf und die Verfügungen mit Wertpapieren ein. Nur mit Einwilligung der Nationalbank war es erlaubt, einheimische und ausländische Wertpapiere ins Ausland auszuführen, in das Eigentum von Ausländern zu übertragen oder zu Gunsten von Ausländern im Inland zu verwahren. Für die Wertpapiere wurden auch Depositenscheine (Empfangsscheine), Zins- und Dividendenscheine, Talons, Einlagebücher, Kassenscheine und Kuxe gehalten. Die Nationalbank konnte anordnen, dass die den Ausländern obliegenden inländischen Wertpapiere und die ausländischen den Inländern obliegenden Wertpapiere in eine Sperrverwahrung bei einer der Devisenbanken hinterlegt werden sollten. Über solche in der Sperrverwahrung hinterlegte Wertpapiere konnte der Inhaber nur mit Einwilligung der Nationalbank verfügen. Die Wertpapierhändler hatten innerhalb einer Woche die aus dem Ausland stammenden Wertpapiere der Nationalbank schriftlich mitzuteilen.[52]

Im Jahre 1940 kam es zu einem erhöhten Interesse für Investitionen in Wertpapiere, was zu außerordentlichen Kursbewegungen der Wertpapiere (vor allem der Aktien) führte. Auf diese Erscheinung reagierte die Protektoratsregierung mit Erlassung einer Regierungsverordnung über die Regeln des Handels mit Wertpapieren.[53] Die im amtlichen Kursblatt der Prager Waren- und Effektenbörse notierten Aktien durften außerbör-

[45] Regierungsverordnung vom 21. September 1939 Nr. 259/1939 Slg., über die Fusion und Übertragung von Betrieben der Erwerbs- und Wirtschaftsgesellschaften (geändert durch die Regierungsverordnung vom 21. November 1940 Nr. 74/1941 Slg.).

[46] Verordnung des Reichsprotektors vom 18. November 1942 über die Bestellung eines Beauftragten für die Verbrauchergenossenschaften in Böhmen und Mähren (VBl.RProt. S. 305).

[47] Verordnung des Justizministers vom 3. März 1944 Nr. 72/1944 Slg., über die Einberufung und Einschränkung von General- und Mitgliederversammlungen der Erwerbs- und Wirtschaftsgenossenschaften.

[48] Verordnung des Justizministers vom 22. Dezember 1944 Nr. 291/1944 Slg., über einige weitere Maßnahmen auf dem Gebiet des Genossenschaftsrechts (Erste Verordnung zur Durchführung des totalen Kriegseinsatzes im Bereiche des Genossenschaftsrechts im Protektorat Böhmen und Mähren).

[49] Gesetz vom 28. Juni 1933 Nr. 107/1933 Slg., über Getreidepfandbriefe und öffentliche Getreidelager.

[50] Regierungsverordnung vom 5. Mai 1939 Slg., über Änderung und Ergänzung des Gesetzes vom 28. Juni 1933 Nr. 107/1933 Slg., über Getreidepfandbriefe und öffentliche Getreidelager.

[51] HOFFMANN, J. (Hrsg.), *Nové zákony a nařízení Protektorátu Čechy a Morava. Jahrgang I. (1939).* Prag, 1939, S. 619.

[52] Regierungsverordnung vom 23. Juni 1939 Nr. 155/1939 Slg., über die Erlassung der Devisenordnung.

[53] Regierungsverordnung vom 27. März 1941 Nr. 137/1941 Slg., über den Handel mit Wertpapieren.

slich zu keinem höheren Preis gehandelt werden als zu dem, der ihrer amtlichen Notierung am Tage des Geschäftsabschlusses entsprach. Der Preis, der auf der Prager Börse nicht notierten Aktien und der festverzinslichen Wertpapiere, wurde durch ihren maßgebenden Marktpreis bestimmt. Es war nicht mehr zulässig, Aktien und festverzinsliche Wertpapiere von jemand anderem als von einer Geldanstalt oder Geldunternehmen entgeltlich zu erwerben. Desgleichen war es verboten, diese an jemand anderen als eine Geldanstalt oder ein Geldunternehmen zu verkaufen. Unter Geldunternehmen wurden Einzelpersonen, offene Handelsgesellschaften und Kommanditgesellschaften verstanden, die eine Gewerbeberechtigung zum Handel mit Wertpapieren besaßen und überdies zum Handel mit ausländischen Zahlungsmitteln befugt waren. Laut dem zeitgenössischen Kommentar bestand

> *„der Zweck der oben angeführten Bestimmungen in der Verhinderung der Bildung der Kurse von Wertpapieren außerhalb ihres ordentlichen Marktes und in der Ausschließung unsolider und unerfahrener Elementen".*[54]

Die Regierungsverordnung legte auch die Sanktionen für jede vorsätzliche oder wissentliche Verletzung oder Umgehung irgendeines der festgesetzten Verbote als schwere Gefällsübertretung fest, über welche die Gefällsgerichten entschieden haben. Im Urteil konnte auch der Verfall der den Gegenstand der strafbaren Handlung bildenden Wertpapiere ausgesprochen werden. Der Finanzminister wurde ermächtigt, weitere Vorschriften zur Regelung des Handels mit Wertpapieren zu erlassen und Ausnahmen von den festgesetzten Beschränkungen und Verboten zu bewilligen.

Mittels einer Verordnung wurde 1941 das Ratengeschäft mit Baulosen verboten, die nach dem Gesetz Nr. 100/1921 Slg., über die Baubewegung erlassen wurden. Verträge, die entgegen diesem Verbot abgeschlossen wurden, wurden für nichtig erklärt.[55] Verboten war auch die Gewährung und die Aufnahme von Krediten zur Anschaffung von Aktien, Kuxen und Kolonialanteilen, die auf einer der Börsen des Deutschen Reiches oder im Protektorat Böhmen und Mähren notiert waren. Bei den Kreditansuchen waren die Geldanstalten und Geldunternehmen verpflichtet, vom Kreditwerber eine Erklärung anzufordern, dass er die gewährten Geldmittel nicht zur Anschaffung von diesen Wertpapieren nutzt.[56]

Die Geldanstalten (Geldunternehmen) hatten sämtliche Anschaffungs- und Verkaufsanweisungen der oben angeführten Arten von Wertpapieren ausschließlich auf der Börse durchzuführen. Es war verboten, solche Anweisungen außerhalb der Börse zu realisieren. Die zur Handelsvermittlung an der Prager Börse bestellten Börsenmakler (Sensale) hatten unmittelbar nach Ende des Handels den Bevollmächtigten den verwirklichten Verkauf von den auf dieser Börse notierten und von ihnen an diesem Tage vermittelten Aktien zu melden.[57]

Zur Kontrolle und Regelung des Börsenmarktes mit Wertpapieren trug auch die Regierungsverordnung von 1942 bei, nach welcher Personen mit Wohnsitz oder ständigem Aufenthalt im Protektorat verpflichtet waren, alle an einer Börse des Großdeutschen Reiches notierten (zum Börsenhandel zugelassenen) Aktien, Kuxe oder Kolonialanteile anzumelden, die sie seit dem 1. September 1939 gekauft hatten.[58]

Spätestens bis Ende 1943 musste ein Austausch von Wertpapieren der Aktiengesellschaften (Kupons und Talons) durchgeführt werden. Sie sollten der neuen Sprachregelung entsprechen, sie mussten also zweisprachig sein. Die Aktiengesellschaft hatte die Änderung selbst vorzunehmen, und zwar mittels eines Austausches der bisherigen Wertpapiere mit neuen. Mindestens war eine Berichtigung durch Streichung oder Aufkleben eines Hinweises vorzunehmen. Der deutsche Text sollte über den tschechischen oder links von ihm untergebracht werden. Entschied sich die Gesellschaft, einen Austausch bisheriger Wertpapiere gegen neue durchzuführen, hatten sie das Ministerium für Wirtschaft und Arbeit um Bewilligung eines neuen Musters zu ersuchen.[59]

Im Jahre 1943 wurde die Verwahrung von Wertpapieren neu geregelt. Der Verwahrer von Wertpapieren oder der Handelsvermittler konnte die Wertpapiere der Nationalbank für Böhmen und Mähren in Prag als Wertpapiersammelbank zur Sammelverwahrung (Kumulativdepot) anvertrauen, ohne dass es einer Ermächtigung des Hinterlegers bedurfte.[60] Im März 1945 wurde noch eine Sammelverwahrung bestimmter Wechsel eingeführt.[61]

Am Rande der Problematik der Wertpapierrechtsregelung ist noch die Entschädigung der Staatsangehörigen des Protektorats durch das Großdeutsche Reich für den Fall zu erwähnen, dass sie Inhaber von Schuldverschreibungen des 1939 erloschenen polnischen Staates waren. Weder das Deutsche Reich noch das Generalgouvernement waren seine Rechtsnachfolger. Zur Abschaffung der unangemessenen Härte entschloss sich die Reichsregierung, den Inhabern von polnischen staatlichen Schuldverschreibungen eine angemessene Entschädigung in der Form von Kassenanweisungen des Deutschen Reiches zu leisten.[62]

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[54] HOFFMANN, J. (Hrsg.), *Nové zákony a nařízení Protektorátu Čechy a Morava. Jahrgang III. (1941).* Prag, 1941, S. 380.

[55] Verordnung des Finanzministers vom 27. Juni 1941 Nr. 276/1941 Slg., über das Verbot der Ratengeschäfte mit Baulosen, ihrer Kontrolle und der Herausgabe von privaten Ziehungslisten.

[56] Verordnung des Finanzministers vom 7. Oktober 1941 Nr. 95.414/II A-3a, über das Verbot des Kredites für die Anschaffung bestimmter Wertpapiere, kundgemacht im *Amtsblatt des Protektorates Böhmen und Mähren* vom 8. Oktober 1941, Nr. 237, S. 8189.

[57] Verordnung des Finanzministers vom 25. Dezember 1941 Nr. 126.500/II A-3a, über die Pflicht von Geldanstalten (Geldunternehmen), die Anweisungen zur Anschaffung und zum Verkauf bestimmter Wertpapiere ausschließlich auf der Börse durchzuführen, kundgemacht im *Amtsblatt des Protektorates Böhmen und Mähren* vom 31. Dezember 1941, Nr. 307, S. 10782.

[58] Regierungsverordnung vom 9. Mai 1942 Nr. 170/1942 Slg., über die Anmeldung bestimmter Wertpapiere.

[59] JANĎOUREK, S., Jazyková úprava cenných papírů akciových společností. In: *České právo*, Jg. 24, Nr. 2, 1942, S. 9-10.

[60] Regierungsverordnung vom 19. Mai 1943 Nr. 136/1943 Slg., über die Sammelverwahrung von Wertpapieren bei der Nationalbank für Böhmen und Mähren in Prag.

[61] Verordnung des Justizministers vom 26. März 1945 Slg., über die Sammelverwahrung von Wechseln.

[62] Verordnung des Reichsministers der Finanzen vom 9. Juli 1943 über die Entschädigung über die deutschen und diesen gleichgestellten Inhaber von Schuldverschreibungen des ehemaligen polnischen Staates, kundgemacht im *Amtsblatt des Protektorates Böhmen und Mähren* vom 27. Juli 1943, Nr. 173.

Für den Zweck der Einsparung von Arbeitskräften wurde die Frist für die Zahlung der Zinsen auf die im Inland ausgestellten und auf die inländische Währung lautenden festverzinslichen Wertpapiere aus einem Halbjahr (Halbjahreszinstermin) auf ein Jahr (Jahreszinstermin) verlängert.[63] Geregelt wurden auch die Fälligkeitstermine der Zinsen auf Anleihen des Protektorates Böhmen und Mähren.[64] Aus Spargründen und zur Vereinfachung der Bekanntmachung von Wertpapieren wurden einige Angaben hinsichtlich der Wertpapiere nicht mehr in verschiedenen Zeitungen, sondern nur in einem Blatt – in dem Anzeiger kraftlos zu erklärender und abhanden gekommener Urkunden – verlautbart.[65]

Neu geregelt wurden im Jahre 1944 auch die bisherigen Vorschriften über die Maklergebühren und über die Provisionen für Aktienkäufe. Bei Aufträgen zur Anschaffung von Aktien, die an einer Börse des Deutschen Reichs, einschließlich des Protektorats Böhmen und Mähren notiert waren, waren die Maklergebühr und die Effektenprovision dem Auftraggeber bereits beim Eingang des Auftrages aufzurechnen. Die Aufrechnung erfolgte zum letzten Börsenkurs. Konnte der Auftrag nicht oder nicht restlos ausgeführt werden, so durften die Maklergebühr und die Effektenprovision nicht erstattet werden. Die Restriktionen hatten Einschränkungen des Handels mit Aktien zur Folge.[66]

6. Neues Wechsel- und Scheckrecht

Am 1. Juni 1941 trat eine neue Wechselordnung in Kraft, welche durch die Regierungsverordnung vom 19. Dezember 1940 Nr. 111/1941 Slg. in die Rechtsordnung des Protektorats eingeführt wurde. An diesem Tag wurde das bisherige Wechselgesetz vom 13. Dezember 1927 Nr. 1/1928 Slg. außer Kraft gesetzt.[67] Mit der neuen Wechselordnung sollte auf diesem Gebiet die Rechtseinheit geschaffen werden, was schon die internationalen, in Den Haag in den Jahren 1910 und 1912 stattgefundenen, Wechselrechtskonferenzen anstrebten. Zur Erreichung dieser Einheit trug erst die wechselrechtliche Konferenz, die zwischen 13. Mai 1930 bis 7. Juni 1930 in Genf stattfand, bei.[68] Das Ergebnis dieser Konferenz bestand insgesamt aus drei Abkommen: Das Abkommen über das Einheitliche Wechselgesetz, das Abkommen über Bestimmungen auf dem Gebiete des internationalen Wechselprivatrechts und das Abkommen über das Verhältnis der Stempelgesetze zum Wechselrecht. Durch die Unterzeichnung der drei Genfer Abkommen übernahm die Tschechoslowakische Republik eine internationale Verpflichtung, das einheitliche Wechselrecht gemäß diesen Abkommen auf ihrem Gebiet einzuführen, wozu es jedoch nicht gekommen ist.

Der Vorteil des einheitlichen Wechselrechts bestand darin, dass der Wechsel die gleichen Erfordernisse hatte und mit ihm die gleichen Rechtsfolgen in allen dem Genfer Abkommen beigetretenen Staaten eintraten. Die Einführung des einheitlichen Wechselrechts bedeutete nicht nur eine bloße inhaltliche Annäherung dieser Regelung, sondern eine direkte Unifikation (Vereinheitlichung), welche eine außerordentliche Bedeutung für die Erleichterung des internationalen Wechselverkehrs hatte.[69] Diese Unifikation wurde in vielen europäischen Staaten schon früher erreicht, z. B. in Deutschland im Jahre 1934 (durch das Gesetz vom 21. Juni 1933 RGBl. I, S. 399).

Die neue Regelung des Wechselrechts im Protektorat brachte eine Reihe von erheblichen Änderungen und Abweichungen im Vergleich zum Wechselgesetz vom 1927, welches größtenteils auf den Entschlüssen der oben angeführten Haager Konferenzen des Wechselrechts gegründet wurde. In der neuen Regelung des Wechselrechts äußerte sich die Bemühung um eine Mäßigung des strengen Formalismus und die damit verbundene Anstrengung um Verhinderung der Entstehung von ungültigen Wechseln wegen ihrer formalen Mängel.[70]

Die Regierungsverordnung Nr. 111/1941 Slg. über die Erlassung der einheitlichen Wechselordnung übernahm jedoch nur die ersten zwei Genfer Abkommen in die Protektoratsrechtsordnung. Das erste Abkommen wurde in Art. 1-78, das andere in Art. 91-98 der einheitlichen Wechselordnung untergebracht. Die Rezeption des dritten Abkommens wurde nicht durchgeführt. Außer der einheitlichen Wechselordnung beinhaltete die oben angeführte Regierungsverordnung zugleich die Bestimmungen über die Änderung und Ergänzung der Vorschriften der Zivilprozessordnung hinsichtlich des Wechselverfahrens, der Wechselamortisation, der Unterbrechung der wechselrechtlichen Verjährung, der gesetzlichen Feiertage und des vor einem Postbeamten vorgenommenen Protestes.

Die einheitliche Wechselordnung bestand aus 98 Artikeln, welche in vier Teile gegliedert wurden: gezogener Wechsel, eigener Wechsel, ergänzende Vorschriften und Geltungsbereich der

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[63] Regierungsverordnung vom 27. Jänner 1944 Nr. 25/1944 Slg., über die Zahlung der Zinsen auf festverzinsliche Wertpapiere.

[64] Kundmachung des Finanzministers vom 11. Februar 1944 Nr. 45/1944 Slg., über die Zahlung der Zinsen auf Anleihen des Protektorates Böhmen und Mähren.

[65] Regierungsverordnung vom 13. November 1944 Nr. 262/1944 Slg., zur Vereinfachung der Bekanntmachungen über Wertpapiere.

[66] Verordnung des Ministers für Wirtschaft und Arbeit und des Justizministers vom 15. Juli 1944 Nr. 159/1944 Slg., über die Maklergebühr und die Provision für Aktienkäufe.

[67] Weil das neue 1941 eingeführte Wechselrecht ein Novum darstellte und wesentliche Änderungen mit sich brachte, gibt es dazu relativ viele Titel der zeitgenössischen Sekundärliteratur, wobei auf folgende hingewiesen werden kann: ŠVAMBERG, G., Naše jednotné směnečné právo: systematický výklad nového směnečného práva vydaného vl. nař. č. 111/41 a 112/41 Sb. za účelem zavedení směnečných úmluv ženevských. Prag, 1941; SMITEK, J., Nové směnečné právo. In: *Obzor národohospodářský*, Jg. 46, Nr. 5, 1941, S. 238; PROCHÁZKA, J., Nové směnečné právo. In: *České právo*, Jg. 23, 1941, S. 75-79; ŠVAMBERG, G., Jednotný šekový řád a změny způsobené jeho vydáním v našem šekovém právu. In: *Právník*, Jg. 80, Heft 5-6, 1941, S. 257-258; FRÖHLICH, J., Úvodní poznámky k novému směnečnému zákonu. In: *Všehrd*, Jg. 22, Nr. 6, 1941, S. 161-167, Nr. 7, S. 192-200; SLEZÁK, J.: Unifikovaná směnka. In: *Právní prakse*, Jg. 5, Nr. 7-8, 1940–1941, S. 194; ŠTĚPINA, J., Nové směnečné právo a jeho odchylky od práva dosud platného. In: *Soudcovské listy*, Jg. 22, 1941, S. 174; HIERSEMANN, W., Zur Einführung des Wechsel- und Scheckrechtes im Protektorat. In: *Deutsches Recht*, Jg. 11, Heft 35, 1941, S. 2509-2510; JANATKA, F., Směnečný protest podle jednotného směnečného řádu. In: *České právo*, Jg. 23, 1941, S. 47-64.

[68] SMITEK, J., Nové směnečné právo. In: *Obzor národohospodářský*, Jg. 46, Nr. 5, 1941, S. 238.

[69] SLEZÁK, J., Unifikovaná směnka. In: *Právní prakse*, Jg. 5, Nr. 7-8, 1940–1941, S. 194.

[70] ŠTĚPINA, J., Nové směnečné právo a jeho odchylky od práva dosud platného. In: *Soudcovské listy*, Jg. 22, 1941, S. 174.

Gesetze. Die Änderungen gegenüber der tschechoslowakischen Rechtsordnung waren auf zwei Arten erkennbar: terminologisch und inhaltlich. Die einheitliche Wechselordnung beinhaltete keine Bestimmungen über die Ungültigkeit von den in hebräischer Sprache verfassten Wechseln und Wechselerklärungen.[71] Von den wichtigsten inhaltlichen Änderungen ist auf folgende aufmerksam zu machen: Ein Wechsel ohne Angabe der Verfallzeit galt als Sichtwechsel (Art. 2 Abs. 2); der Wechsel konnte auf den Aussteller selbst gezogen werden (Art. 3 Abs. 2); in einem Wechsel, der auf Sicht oder auf eine bestimmte Zeit nach Sicht lautete, konnte der Aussteller bestimmen, dass die Wechselsumme zu verzinsen war (Art. 5) oder der Aussteller haftete für die Annahme und die Zahlung des Wechsels (Art. 9).

Wesentliche Änderungen gegenüber der bisherigen Regelung erfuhren auch die Bestimmungen über Indossamente (Art. 11), insbesondere über das Indossament „in Prokura", sowie die Bestimmung über das Rückgriffsrecht (Art. 43). Eine Neuigkeit stellte auch die Einführung des vor einem Postbeamten vorgenommenen Protestes dar, welches dem bisherigen Recht bis dato unbekannt war.[72]

Wie schon oben angeführt wurde, führte die einheitliche Wechselordnung im Art. 79 eine bedeutende Änderung ein, die darin bestand, dass auch die Postbeamten neben Notaren und Gerichtsbeamten zu den die Aufnahme eines Wechselprotestes berechtigten Organen angehörten.[73]

Gleichzeitig mit der Erlassung der einheitlichen Wechselordnung wurde auch das Gesetz über die Wechselgebühr novelliert,[74] welches 1942 durch das Gesetz über die Wechselsteuer ersetzt wurde. Diese wurde aus der Wechselsumme berechnet und betrug ein Promille.[75]

Kurz nach dem Abschluss der Wechselrechtsabkommen im Jahre 1930 folgten ein Jahr später drei Scheckabkommen, welche von der Tschechoslowakei als einem der Signatarstaaten in ihre Rechtsordnung nicht übernommen wurden. Zur Rezeption kam es erst im September 1941 mit der Einführung der einheitlichen Scheckordnung, die aus 66 Artikeln bestand.[76] Die neue Rechtsordnung brachte grundlegende Änderungen gegenüber der bisherigen Regelung, was vor allem die Ausstellung und die Form des Schecks betraf. Eine Neuigkeit stellte z.B. auch die Einführung des gekreuzten Schecks dar.[77]

7. Geistiges Eigentum

Im Bereich der gewerblichen Schutzrechte reagierte die Protektoratsregierung auf die außerordentlichen Kriegsverhältnisse vor allem mit der Verlängerung der Fristen.[78] War jemand durch die Kriegsverhältnisse verhindert, die Frist zur Wiederinkraftsetzung der Schutzmarke einzuhalten, war es möglich, die Wiederinkraftsetzung der Schutzmarke auf Antrag nachträglich durchzuführen. Die Schutzfrist der eingetragenen Schutzmarke betrug damals zehn Jahre seit der Eintragung und diese Frist konnte um weitere zehn Jahre verlängert werden. Der Antrag auf nachträgliche Wiederinkraftsetzung der Schutzmarke war bei der zuständigen Handels- und Gewerbekammer zu stellen, spätestens jedoch innerhalb von zwei Monaten ab dem Tag des Wegfallens des Hindernisses. Der Antrag hatte die konkreten Umstände zu benennen, welche den Inhaber an der Wiederinkraftsetzung der Schutzmarke gehindert hatten. Diejenigen, welche die betreffenden nicht wieder in Kraft gesetzte und aus dem Register nicht gelöschte Schutzmarke im guten Glauben nutzten, konnten wegen Verletzung des Markenrechtes nicht sanktioniert werden, auch wenn die Schutzmarke nachträglich wieder in Kraft gesetzt wurde. Das Recht auf weitere Nutzung nach der Wiederinkraftsetzung der Schutzmarke stand ihnen jedoch nicht mehr zu. Die Änderungen betrafen auch die Zustellung. Sollte die Zustellung aufgrund der außerordentlichen Kriegszustände nicht möglich sein, wurde das Verfahren bis zu dem Zeitpunkt, zu dem Postsendungen wieder zugestellt werden konnten, eingestellt.[79]

Auf dem Gebiet des Schutzes der Gebrauchsmuster wurde die Prioritätsfrist für die Anmeldung eines Gebrauchsmusters verlängert.[80] Eine ähnliche Regelung wurde auch im Bereich des Schutzes von Erfindungen eingeführt.[81]

Erwähnenswert ist auch die im Jahre 1940 durchgeführte Änderung im Bereich des Patentrechts,[82] als eine Erstreckung der Geltung der Reichspatente und Reichsgebrauchsmuster auf das Protektorat vorgenommen wurde. Die nach dem 31. Juli 1940 beim Reichspatentamt angemeldeten Patente und Gebrauchsmuster hatten im Protektorat die gleiche Wirkung wie im übrigen Reichsgebiet, soweit ihnen keine im Protektorat früher angemeldeten Rechte entgegenstanden. Seit Juli 1940 konnten Patente beim Patentamt in Prag nicht mehr angemeldet werden.[83]

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71 ŠVAMBERG, G., Jednotný směnečný řád a změny způsobené jeho vydáním v našem směnečném právu. In: *Právník*, Jg. 80, Heft 5-6, 1941, S. 263.

72 HIERSEMANN, W., Zur Einführung des Wechsel- und Scheckrechtes im Protektorat. In: *Deutsches Recht*, Jg. 11, Heft 35, 1941, S. 2509-2510.

73 Regierungsverordnung vom 6. November 1941 Nr. 410/1941 Slg., zur Durchführung der Bestimmung des Art. VI, Abs. 1 der Regierungsverordnung Nr. 111/1941, Slg., womit die einheitliche Wechselordnung erlassen und eingeführt wird.

74 Regierungsverordnung vom 19. Dezember 1940 Nr. 112/1941 Slg., womit das Gesetz über die Wechselgebühr abgeändert wird.

75 Regierungsverordnung vom 20. November 1942 Nr. 385/1942 Slg., über die Wechselsteuer.

76 Regierungsverordnung vom 18. September 1941 Nr. 372/1941 Slg., womit die einheitliche Scheckordnung erlassen und eingeführt wird.

77 Zum neu eingeführten Scheckrecht s. HIERSEMANN, W., Zur Einführung des Wechsel- und Scheckrechtes im Protektorat. In: *Deutsches Recht*, Jg. 11, Heft 35, 1941, S. 2509-2510; zur ausgewählten Problemen des Scheckrechts s. z.B. JANATKA, F., Protest šeků podle jednotného šekového řádu. In: *České právo*, Jg. 23, 1941, S. 84ff; ŠVAMBERG, G., Jednotný šekový řád a změny způsobené jeho vydáním v našem šekovém právu. In*: Právník*, Jg. 81, Heft 3, 1942, S. 61-71, Heft 4, s. 100-108.

78 Zum Markenrecht siehe SMITEK, J., Das Markenrecht in Böhmen und Mähren. In: *Prager Archiv für Recht, Verwaltung und Wirtschaft*, 1944, S. 175 ff.

79 Regierungsverordnung vom 1. Februar 1940 Nr. 95/1940 Slg., über außerordentliche Maßnahmen im Bereich der Schutzmarken.

80 Regierungsverordnung vom 1. Februar 1940 Nr. 96/1940 Slg., über die Verlängerung von Prioritätsfristen im Bereich des Gebrauchsmusterschutzes.

81 Regierungsverordnung vom 1. Februar 1940 Nr. 97/1940 Slg., über die Änderung des Patentgesetzes und über außerordentliche Maßnahmen im Bereich des Erfindungsschutzes.

82 Dazu vgl. VITÁČEK, F., Das Patentrecht in Böhmen und Mähren. In: *Prager Archiv für Recht, Verwaltung und Wirtschaft*, 1944, S. 72.

83 Verordnung des Reichsministers der Justiz über das Patent- und Gebrauchsmusterrecht im Protektorat Böhmen und Mähren vom 20. Juli 1940 (RGBl. I, S. 1009).

8. Fazit

Wie dieser Beitrag gezeigt hat, erfuhr das Handelsrecht keine solchen tiefgreifenden Eingriffe, wie es bei anderen Rechtsgebieten der Fall war. Die durchgeführten Änderungen sind also bloß als Teiländerungen zu bezeichnen. In der Besatzungszeit war die Wirtschaft u.a. durch den Übergang von der Friedens- zur Kriegsökonomie gekennzeichnet. Schrittweise orientierte sich die gesamte Industrie auf die Herstellung von Kriegsmaterial für die deutsche Wehrmacht. Während des Krieges griff der Staat mehrmals in die Vorschriften des Handels- und Wirtschaftsrechts ein. Der Justizminister besaß weitreichende Kompetenzen und Ermächtigungen; vor allem konnte er zur Aufrechterhaltung der öffentlichen Ordnung oder in Rücksicht auf die Kriegsverhältnisse Befreiungen von den in handelsrechtlichen Vorschriften festgesetzten Pflichten verordnen. Dies betraf auch das Wertpapierrecht.

Grundsätzliche Änderungen erfuhren jedoch das Wirtschaftssystem und der gesamte unternehmerische Bereich, welche durch erhebliche Eingriffe des Staates gekennzeichnet wurde. Er entschied darüber, was und von wem hergestellt und für welchen Preis es verkauft werden sollte und durfte. Hunderte von diesen restriktiven Vorschriften haben so die Autonomie des Willens der Unternehmers oder der Handelsgesellschaft beeinflusst. Gerade die Autonomie des Willens stellte eine der Grundkategorien dar, auf deren nicht nur das Handels- sondern auch das ganze Privatrecht beruhte.

Als positiv kann jedoch die Einführung des neuen Wechsel- und Scheckrechts bezeichnet werden, das eine moderne rechtliche Regelung darstellte.

The Criminal Punishment of Sexual Abuse in the First Czechoslovak Republic and its Effects on the Subsequent Development of the Legal System*

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Abstract

This article reviews the punishment of the sexual abuse of juveniles in the law of the Czechoslovak Republic (1918–1992). It maps and traces the development of the constituent elements relevant to the sexual abuse of juveniles and analyses the reasons for the changes that they underwent. It proceeds in stages from the issues raised by the Austrian Criminal Code of 1852 and the Hungarian Criminal Code of 1878, which were taken over in the territory of the "First Czechoslovak Republic", through the definition of this class of crimes in the Draft Criminal Codes of 1926 and 1937, to the legislation on sexual abuse in socialist criminal law and the relevant provisions of the criminal codes of 1950 and 1961.

Keywords: *sexual abuse; crime; criminal law; Czechoslovakia.*

1. Introduction

The present study tracks the development of legal sanctions against the sexual abuse or defilement (translating the archaic Slovak term "*sprznenie*")[1] of minors in the Czechoslovak Republic from 1918 to 1992. In this context, the authors study the evolution of the relevant legislation from period anachronisms to the modern conception of this crime. This can be used to trace the historical developments leading to the current legal text in Slovakia, which is laid down in Sections 201 to 202 of Act No 300/2005, the Criminal Code, as amended ("the CC of 2005").

To ensure legal continuity in the territory formerly under the rule of the Habsburg monarchy, the Czechoslovak Republic decided receive all of the legislation of Austria-Hungary then in force, into the law of the new country, by means of the Act on the Formation of the Independent Czechoslovak State (Act No 11/1918).[2] Since the Czech Lands belonged to the Cisleithanian, Austrian part of the monarchy, they continued to apply the Austrian Criminal Code, Act No 117/1852 ("the CC of 1852") whereas Slovakia and Subcarpathian Ruthenia applied the Hungarian Criminal Code, Act No V/1878 ("the CC of 1878") as they had been part of Hungary or Transleithania.

This state of legal dualism was unsatisfactory and, together with the wish to create a modern criminal code, it gave rise to the gradual unification and codification process aimed at creating a uniform, modern Criminal Code. The outcome of this process in the early years of the Czechoslovak Republic was the presentation of several draft Criminal Codes.[3] As early as 1919, academics prepared a draft of the General Part of the Criminal Code, which was later incorporated into the "Professors' Draft" of 1926 ("Draft of 1926").[4] When this draft was not accepted, a subsequent "Officials' Draft" of a new combined Czechoslovak Criminal Code was prepared ("Draft of 1937") but its implementation was thwarted by the break-up of Czechoslovakia after the Munich Conference, the creation of the autonomous Slovak Republic and the creation of the Protectorate of Bohemia and Moravia in 1939.

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[1] E. g. "*Schändung*" in German. The term currently employed in Slovak law in the original language is *sexuálne zneužívanie* (sexual abuse). It did not appear in legislation during the existence of Czechoslovakia [on the other hand, the Slovak term that was used, "*pohlavné zneužívanie*", must also be translated into English as "sexual abuse"].

[2] For further information, see: VOJÁČEK, L., *První československý zákon: Pokus o opožděný komentář* [The First Czechoslovak Law: An Attempt at a Delayed Comment]. Prague, 2018. 392 pp.

[3] This is not to say that no recodification work had taken place under Habsburg rule, although it tends to fade into the background for the purposes of current legal theory. A noteworthy example is the Hoegel-Lamasch draft of 1906, which stated that the German Criminal Code of 1871 was outdated and recommended drawing on the Italian Criminal Code of 1889 or the Norwegian Criminal Code of 1902 to reflect the latest developments in the theory of criminal law. See: STORCH, F., Prozatímná osnova zákona trestního z měsíce září 1909 [The Temporary Draft of the Criminal Code of September 1909]. In: *Právník: Časopis věnovaný vědě právní i státní*, vol. 49, No. 9, 1910, pp. 316-317; MILOTA, A., *Trestní právo hmotné: část obecná* [Substantial Criminal Law: General Part]. Bratislava, 1924, p. 20-21.

[4] JABLONICKÝ, T., Pokus o reformu československého trestního práva – Osnova trestního zákona z let 1921, 1926 [The Attempt to Reform the Czechoslovak Criminal Law – the Draft of the Penal Code from the Period of 1921 – 1926]. In: *Právněhistorické studie* 43. [Legal History Studies 43], 2013, p. 93.

When the Communist Party took power in February 1948, they announced a two-year legislative plan. One of its results was the adoption of Act No 86/1950 the Criminal Code ("the CC of 1950"), which implemented a fully uniform criminal code for the territory of Czechoslovakia. After its adoption, the concept of sexual abuse became stabilised in legislation. Later, upon the alleged transition to a socialist society heralded by the adoption of the Constitution of the Czechoslovak Socialist Republic in 1960 (Act No 100/1960), the change had to be reflected in a recodification of several branches of law. The result of these efforts was the adoption of Act No 140/1961 the Criminal Code ("the CC of 1961"). The model of criminalization of certain sexual activities, which has long been established in Czechoslovakia, compared to other cultures, remains the same even after the change in social conditions in connection with building socialism - it can be defended by the overall role of law - to protect the weaker subject.[5] After the fall of the totalitarian regime in 1989, several amendments were made to implement democratic reforms in criminal law. The article sequentially presents to readers the changes in the understanding and punishment of the sexual abuse of minors.

2. Legislation on the sexual abuse of juveniles in the Austrian CC of 1852

Pursuant to Section 128 of the Austrian CC of 1852, the sexual abuse of juveniles was punished under the term "defilement".[6] It related to the sexual abuse of a person under the age of 14 or a person who was defenceless or unconscious. Thus it provided absolute protection for persons under the age of 14 and a degree of protection for persons over the age of 14 who were either defenceless, i.e. they could not express their will[7] or were unable to defend themselves or show resistance[8], or who were unconscious. It was irrelevant whether such defencelessness was caused by the offender's actions[9] as opposed to the situation in the Slovak Republic under current law.[10] The absolute protection of persons under the age of 14 made their consent legally irrelevant,[11] whereas for defenceless or unconscious persons, consent was relevant only if it had been given in advance. The provisions of the Austrian CC of 1852 in question were advanced[12] and later became the basis for further recodifications of substantive criminal law.

The fundamental constituent element of defilement was "*other sexual abuse*". It did not include intercourse itself. The sexual abuse of a person in another way was a relatively imprecise definition of the objective constituent elements of the crime, which had to be interpreted through case law and legal theory. It can be defined as any contact constituting the bodily abuse of a child,[13] regardless of the duration,[14] which is not accidental[15] and which is intended to gratify the perpetrator's "lecherous desires".[16]

This would mainly include other sexual practices such as oral and anal sex, masturbation, the groping of a person's genitals or intimate parts, or even the touching of the thighs, regardless of whether or not it resulted in the perpetrator's sexual gratification.[17] The case law did not require the involvement of the penis in the act, either in the sense of its abuse or use as an instrument.[18] The constituent elements of the crime could include touching through underwear or clothing. Protection was intended not only

[5] See more: HATALA, V., *Kriminologické štúdie. Výber z diela 1973–1985* [Criminological studies. Selection from the work 1973–1985]. Bratislava, 2011, p. 299 et sub.

[6] Section 128 of the CC of 1852: "*Defilement. If a person, for the gratification of their lecherous desires, sexually abuses a boy or girl under the age of 14, or other persons who are defenceless or unconscious, in a way than a way other than within the meaning of Section 127, and if the act is not a crime under Section 129(b), that person shall be guilty of the crime of defilement and shall be punished by severe imprisonment in a penitentiary for one to five years, or if there are very aggravating circumstances or evil consequences within the meaning of Section 126, up to twenty years.*" Compare this with the parallel text in Section 407 of the Military Criminal Code, Act No 19/1855.

[7] Compare R 43/1994-II: "*A woman can be deemed to be defenceless within the meaning of Section 241(1) of the Criminal Code only if her condition is such that, given the circumstances of the crime, she is unable to express her will regarding sexual intercourse with the perpetrator and/or she is unable to resist his actions. This is not the case if the victim is underage but physically or mentally mature enough to understand the perpetrator's actions and, should she not consent to such action, to express this clearly.*"

[8] Judgement 2843 of the Supreme Court of the Czechoslovak Republic of 02 July 1927. Additionally, Judgement 1741 of the Supreme Court of the Czechoslovak Republic of 29 September 1924 defines these circumstances as the absolute inability to resist, not just the victim being in a state of surprise. Judgement 3740 of the Supreme Court of the Czechoslovak Republic of 21 January 1929 emphasises that the offender's intention must also cover the fact that the person was in a state of defencelessness.

[9] Judgement 316 of the Supreme Court of the Czechoslovak Republic of 30 December 1920. The legal requirement of defencelessness was met in this case because the offender held the victim so tightly that they could not move.

[10] Putting a person into a state of defencelessness by means of deception is considered violence as regards the way the crime is committed. Section 122(7) of CC 2005.

[11] Judgement 3669 of the Supreme Court of the Czechoslovak Republic of 16 September 1929.

[12] See also: BENDOVÁ-BEDNÁŘOVÁ, L., Delicts Against Morals Before the Regional Court in Olomouc in the End of the 19th and in the Beginning of the 20th Century. In: *Journal on European History of Law*, vol. 1, No. 2, 2010, pp. 82-88: "*[…] the legislator excellently formulated series of conducts which are punishable up to the present day. In ad- dition in series of provisions he protected children younger than fourteen years and youth from the early intercourse, the abuse, the seducement and the prostitution*."

[13] Judgement 812 of the Supreme Court of the Czechoslovak Republic of 24 April 1922. In the given case, touching the thighs of a child.

[14] Judgement 3417 of the Supreme Court of the Czechoslovak Republic of 15 March 1929. The action need not be directed towards such an end. Stimulation and increasing arousal is sufficient. See also Judgement 4151 of the Supreme Court of the Czechoslovak Republic of 24 April 1931.

[15] Judgement 1622 of the Supreme Court of the Czechoslovak Republic of 03 May 1924.

[16] On this matter see also: KALLAB, J., *Trestní právo hmotné platné v zemi české a moravskoslezské. Část obecná i zvláštní* [Substantial Criminal Law Valid in the Czech and Moravian-Silesians Lands. General and Special Part]. Prague, 1935, p. 184.

[17] Judgement 163 of the Supreme Court of the Czechoslovak Republic of 20 March 1920.

[18] Judgement 1950 of the Supreme Court of the Czechoslovak Republic of 16 April 1925.

to prevent the abuse of a child's genitals but to prevent abuse of the child *per se*, which would include the impairment of the child's moral development resulting from inappropriate touching.

The defining feature of such physical contact was the gratification of the perpetrator's "lecherous desires" in the sense of achieving "sensual pleasure",[19] which could be identified by the fact that the perpetrator was sexually aroused.[20] If such gratification was not the aim of the alleged perpetrator, they would not be held guilty of this crime. For example, this could be the case when patting a girl on the back or thighs or knokking a girl from a bench to the floor, provided that she is not sexually violated.[21] Thus, although patting someone on the back or the thighs could not in itself be considered sexual abuse, this offense could not be defined so narrowly to involve only direct contact between the uncovered bodies of the perpetrator and the victim.[22] For example, the case law did not define the lifting of a skirt as defilement[23] but reaching under a skirt was considered to fulfil the definition.[24]

By referring directly to Section 127 of the CC of 1852, the crime of defilement, in a subsidiarity relationship to the more severe crime of violent fornication, is defined in Sections 125 to 127 of the CC of 1852. The objective constitutive elements of this crime related to extramarital sexual intercourse with a person under the age of 14 or with a defenceless or unconscious person. The act of sexual intercourse constituted the crime but did not include any other sexual abuse of the person.

A perpetrator could be found to have committed the crime of violent fornication if they intended to engage in sexual intercourse even if contact had not taken place or, *a fortiori*, if there had been no sexual gratification.[25] This legal qualification was not affected by the fact that the victim's youth meant that their sexual organs were unsuited to sexual intercourse.[26] The severity of this crime was reflected in the severity of the penalty: whereas the penalty for *defilement* was punishable by one to five years of severe imprisonment in a penitentiary or up to ten years for particularly aggravating circumstances (the serious injury or death of a victim under the age of 12), violent fornication was punishable by five to ten years of severe imprisonment in a penitentiary, or ten to twenty years or life imprisonment in cases of serious injury or death.

From the time of the Habsburg monarchy, the sexual abuse of a person by a person of the same sex was treated as a different crime.[27] Such actions were defined as fornication against nature under Section 129(b) of the CC of 1852.[28] The crime of *defilement* had a subsidiary relationship to this crime which is indicated by a direct reference in Section 128. Therefore, pursuant to the case law in the First Republic[29] a single action could not constitute both of these crimes concurrently.[30] This crime was punishable from one to five years of severe imprisonment in a penitentiary or ten to twenty years or life imprisonment in cases of serious injury or death.

3. Characteristics of the crime of defilement in the Hungarian CC of 1878

The Hungarian CC of 1878, which remained in effect in the territory of Slovakia and Subcarpathian Ruthenia during the First Czechoslovak Republic, represented a different conception of the punishment of sexual abuse. The crime of defilement was defined in Sections 236 to 240 of the CC of 1878.[31] The different conception of defilement was based on the following provisions:

1. the offence could not be committed by every criminally liable person but only by a man;
2. the offence could only be committed against a person of the female sex – a girl who was honourable and younger than fourteen;
3. the crime of defilement applied only to sexual intercourse, meaning that the law did not apply to other forms of sexual abuse covered by the Austrian CC of 1852.

Furthermore, these provisions only protected females between the ages of 12 and 14. Similar actions against a person

[19] Judgement 2443 of the Supreme Court of the Czechoslovak Republic of 20 July 1926. In respect of its subjective constitutive elements, *defilement* was a deliberate crime and every constituent element, including the fact that the perpetrator was seeking to obtain sensual gratification, had to meet this standard of intent.

[20] Judgement 316 of the Supreme Court of the Czechoslovak Republic of 30 December 1920, from the grounds: "*It was evident that the defendant wished to gratify his lust from his overall behaviour, especially from remarks such as 'let's do it for once', 'that the victim should sit on his lap and it would happen' and movements he made against her clearly indicating his sexual arousal. The law's requirement of gratifying lust can be satisfied merely by the arousal or intensification of a sensual urge.*"

[21] See below.

[22] Judgement 1996 of the Supreme Court of the Czechoslovak Republic of 27 May 1925. The grounds refer to Judgement 1116.

[23] Judgement 1622 of the Supreme Court of the Czechoslovak Republic of 03 May 1924.

[24] Judgement 4151 of the Supreme Court of the Czechoslovak Republic of 24 April 1931.

[25] Judgement 863 of the Supreme Court of the Czechoslovak Republic of 27 May 1922.

[26] Judgement 1259 of the Supreme Court of the Czechoslovak Republic of 01 September 1923.

[27] From a criminological point of view, it was considered undoubted, at the start of the 20th century, that homosexuality was not automatically linked to attraction to juveniles: "*There is a widespread perception that homosexuals are a threat to children and from that people conclude that homosexuality is something criminal. Defiling boys is something that old lechers do, and a gross calumny against homosexuals.*" See: SCHÖNENBERGER, F., SIEGERT, W., *Život pohlavní* [Sex Live]. Prague, 1904, p. 133.

[28] JANKA, K., *Das österreichische Strafrecht*. Zweite Auflage. Wien, 1890, p. 321. See also: GREIF, E., A Crime by all means: Female same-sex Sexuality in the First Republic of Austria. In: *Journal on European History of Law*, vol. 4, No. 2, 2013, p. 80.

[29] See Judgement 1163 of the Supreme Court of the Czechoslovak Republic of 17 March 1923. The case involved the perpetrator engaging in mutual masturbation with a nine-year-old boy. The supreme court ruled that the crimes could not be concurrent.

[30] See also Judgement 2094 of the Supreme Court of the Czechoslovak Republic of 18 September 1925.

[31] Section 236 of the CC of 1878: "*A man who has sexual intercourse with an honourable girl under the age of fourteen is guilty the crime of defilement which is punishable by up to five years of imprisonment in a penitentiary.*"

under the age of twelve were prosecuted under Section 232(2) of the CC of 1878 as violent fornication.[32] Crimes were probably classified in this way due to the presumption that girls under the age of twelve were unable, by reason of being a child, to express their will and therefore sexual intercourse with them was always against their will and thus violent fornication.

As a rule, the offence in question was prosecuted through private prosecution[33] i.e., only at the request of the injured party (Section 238) without the application of the principle of legality by the public prosecutor. The provisions of Section 240 of the CC of 1878 subsequently stipulated special grounds for exemption from punishment for *defilement* (as well as violent fornication under Section 232 or violence against chastity under Sections 233 and 234 of the CC of 1878). For example, the perpetrator was not punished if he married the victim before the "criminal judgement" was handed down by the court of first instance. By comparison with this legal situation, the CC of 1852 did not require the private prosecution of this offence or establish grounds for exemption from punishment based on marriage to the victim. This was also reflected in the "extramarital character" of violent fornication and violence against chastity.

The sexual abuse of a boy by another male was covered by the crime of *fornication against nature* under Sections 241 and 242 of the CC of 1878,[34] which criminalised sexual practices between two males or between a male and an animal in general, regardless of age. The minimum age of criminal responsibility was set at 14 by Section 1(1) of Act No 48/1931; therefore, in the event of sexual contact between two males, a male under 14 years of age would not be held responsible.

4. Codification efforts through the lens of the Draft Criminal Code of 1926

There were several specific aspects to the way this crime was defined in the Draft Criminal Code of 1926. The draft was significantly influenced by the draft proposed by the second expert commission on the codification of the Swiss Criminal Code in 1916, with many of its provisions being translated word for word from the German text.[35] The inspiration from other German-speaking countries was also significant.

A fundamental change was to set 16 as the minimum legal age for sex, which was not typical in Czechoslovakia, and other drafts did not adopt this threshold.[36] Raising this age threshold was a response to demands for stricter protection of youth reflecting new trends in the development and education of youth for whom 14 to 16 years of age represented aa critical period of adolescence. It presupposed a parallel change in the civil willingness to establish the same age threshold for marriage.[37]

Under the Draft of 1926, the crime of defilement would lose its protective function in relation to juveniles. It would be limited only to acts of fornication in which the perpetrator abused the defencelessness of the victim.[38] This wording covered both persons made defenceless as a result of a loss of consciousness (usually caused by alcohol or drugs) and people with impaired or under-developed mental functions, who were considered to be defenceless by that very fact.

For the purposes of protection against sexual abuse, juveniles were divided into three categories: those under the age of 16, those under the age of 18 and minors. The protection of persons under the age of 16 was covered by Section 258 of the Draft of 1926.[39] In addition to physical contact between a perpetrator and a person under the age 16 (intercourse and other acts of fornication as understood in First Republic case law),[40] the incitement to fornicate in any way was a crime[41] because juvenile victims were considered to have lower levels of resistance. It was also a crime to force a person under the age of 16 to watch the perpetrator's acts of fornication in a way that did not affect the victim's physical integrity but increased the perpetrator's sexual arousal. However, there were no criminal consequences if a person under the age of 16 accidentally wit-

[32] Section 232(2) of the CC of 1878: "*The crime of violent fornication is committed and punishable by up to ten years imprisonment by a perpetrator who… (1) abuses an unconscious woman or a woman who is in a condition in which she cannot express her will or prevent extramarital sex with him, regardless of whether the perpetrator is responsible for the condition.*"

[33] Regarding the issue of private prosecutions, see e.g. BELEŠ, A., Súkromná trestná žaloba a preskúmanie meritórneho rozhodnutia v prípravnom konaní súdom ako záruky zákonnosti [Private criminal action and review of the substantive decision in the preparatory proceedings by the court as guarantees of legality]. In: *Cofola* 2017 [electronic source]. Brno, 2017, p. 41-56.

[34] Section 241 of the CC of 1878: "*Fornication between men and the fornication with an animal is a misdemeanour of fornication against nature and is punishable by imprisonment for up to one year." Section 242 of the CC of 1878: "Fornication against nature is a crime punishable by imprisonment in penitentiary for up to five years if committed between men by violence or under threat and by life imprisonment where the crime causes the death of the victim."*

[35] Explanatory memorandum on Section 254 of the Draft of 1926. See: *Přípravné osnovy trestního zákona o zločinech a přečinech a zákona přestupkového*. Prague, 1926, p. 138.

[36] Compare word for word the text of Section 168 of the Swiss draft on "*Schändung*" (Defilement) and others. See: *Vorentwurf zu einem Schweizerischen Strafgesetzbuch. Fassung der zweiten Expertenkommission*. Zűrich: Kommissions-Verlag, 1916.

[37] Compare: BONDY, H., K diskusi o otázce chráněné hranice věkové při deliktech proti mravnosti v přípravné osnově k novému trestnímu zákonu [Remarks on the Issue of the Protected Age Limit for Offenses Against Morality in the Draft of the New Criminal Code]. In: *Česká advokacie*, 1926, vol. 12, p. 83-86.

[38] Section 254 of the Draft of 1926: "*Whoever abuses the mental illness, mental deficiency, loss of consciousness or other state of defencelessness of another for an act of fornication shall be punished by imprisonment in a penitentiary for one month to three years*".

[39] Section 258(1) of the Draft of 1926: "*Whoever abuses persons under the age of 16 by performing an act of fornication with them shall be sentenced to six months to three years in penitentiary or three months to three years in jail*". Section 258(2) of the Draft of 1926 said: "*The same punishment shall apply to anyone who abuses persons under the age of 16 by performing an act of fornication in front of them*".

[40] MILOTA, A., *Reforma trestního zákona v Československu* [Reform of the Criminal Code in Czechoslovakia]. Bratislava: Právnická jednota na Slovensku a Podkarpatskej Rusi, 1934, p. 195.

[41] The Draft of 1926 uses the term "*act of fornication*" (*smilné jednání*) throughout. It is expressly defined in the Draft as "*extramarital sexual intercourse and all other immodest behaviour of a person with another person of the same sex to gratify or increase sexual urges*".

nessed sexual intercourse between adults, for example, as a result of inadequate housing conditions.[42]

In July 1927, the Ministry for the Unification of Laws and Organizations of Political Administration sent comments on the Draft Criminal Code to the Ministry of Justice. According to the comments[43], an increase in the age limit is possible only if prosecution would be allowed on the proposal of a person who may have been harmed by a person to represent such a person authorized by law. The increase in the protection of persons from 14 to 16 years is not justified, the ministry recalled. It is necessary to take into account especially the conditions in the countryside, where women are fully grown long before the age of 16. It is also important to take into account the very frequent cases of marriage to a person who has been abused. For such cases, the regulation of § 258 would be very strict, the perpetrator would not marry the person if he knew that he was threatened with punishment. After all, even requests for forgiveness of the marital obstacle of lack of age are often justified by the pregnancy of a girl.[44] These arguments presented by the Ministry are probably among the reasons why the increase in the limit until 16 years later was not implemented.

Protection of persons under the age of 18 applied to acts of fornication between persons of the same sex. Incitement to engage in such activity was also a crime (Section 261).[45] This crime was subsidiary to the constituent elements of abuse of a person under the age of 16. The Draft of 1926 generally ruled out the criminalisation of homosexuality on the grounds that criminal law is not called upon to penalise all immorality. The explanatory memorandum expressly referred to acts of self-gratification that were undoubtedly vices but not penalised in the criminal code.[46] Nevertheless, the authors of the Draft considered persons under the age of 18 to be a vulnerable group that could have a lower degree of resistance to such inclinations. The inclusion of a crime of this type was justified by the special interest in preventing homosexuality from spreading amongst young people, in which the authors of the Draft drew inspiration from its Norwegian counterpart.[47]

Besides these two groups of persons, there was special protection for two cases involving wardship. The first related to the protection of minors (under 21 years of age)[48] against the persons in charge of their upbringing, education or provision of care, i.e. in cases where the perpetrator was *in loco parentis* (Section 260).[49] This rule responded to a potential perpetrator's authority and power over a young person under their wardship, which could make them more benevolent towards acts of fornication.[50] The second case concerned the protection of persons under the age of 18 against acts of fornication by the staff of children's homes, reform schools, hospitals, prisons and other social institutions for young people.

5. Sexual abuse of minors in the context of the Draft Criminal Code of 1937

The Draft Criminal Code of 1937 moderated the radical reforms proposed in this area by its predecessor. Even so, it proposed several changes from the law then in force. It generalised the subject of the crime so that the object of attack was not differentiated by sex; it penalised sexual intercourse and other sexual practices under a single definition, and even retained the multi-level protection of children and adolescents against sexual acts proposed in the Draft of 1926.

It used different age ranges however: firstly, persons under the age of 14, then persons under the age of 16 and finally all minors, i.e. persons under the age of 24.

The Draft defined the crime of defilement under Sections 324 and 325 and the crime of abuse of a person under the age of 16 in Sections 330 and 331. The crime of defilement covered anyone who abused, by means of an *act of fornication*, a person under the age of 14 (Section 325) or a defenceless person or a person who was unable to recognise the meaning of

[42] Explanatory memorandum on Section 258 of the Draft of 1926. See: *Přípravné osnovy trestního zákona o zločinech a přečinech a zákona přestupkového*. Prague: Ministry of Justice, 1926, p. 140.

[43] National Archives of the Czech Republic, collection: Ministry of Unifications, title: Consultations of the Commission of Slovak Lawyers for the Field of Criminal Law, box 121, inv. 986, sign. 3-137-2-2-8.

[44] The ministry's opinion was preceded by a wide-ranging discussion, which also included other arguments: it is impossible to protect against sexual activities persons who have reached the age at which they can work in factories or agriculture; in southern countries the limit of 14 years is common, etc. Record of meetings of the commission of Slovak lawyers for the field of criminal law held in Bratislava, on 9-11. December 1926 in the meeting hall of the Slovak Legal Union. In: National Archives of the Czech Republic, collection: Ministry of Unifications, title: Consultations of the Commission of Slovak Lawyers for the Field of Criminal Law, box 121.

[45] Section 261(1) of the Draft of 1926: "*Whoever performs an act of fornication with a person under the age of 18 of the same sex or incites such a person to fornicate with them shall be sentenced, from one month to three years in a penitentiary or from fourteen days to three years in jail if it is not a crime under Section 258*".

[46] The treatment of this issue in the Draft mainly reflected a resolution adopted by the criminal law section at the Second Congress of Czechoslovak Lawyers in 1925, which declared that medical science had shown that homosexuality could not be considered to be explicitly unnatural, but that "propaganda for homosexual acts" should remain a crime because it was contrary to public morality and health. See: COLLECTIVE. Druhý sjezd československých právníků v Brně v 1925 [The Second Congress of Czechoslovakian Lawyers in Brno in 1925]. *Právník: Časopis věnovaný vědě právní i státní*, vol. 64, no. 11, 1925, pp. 389-390.

[47] Explanatory memorandum on Section 261 of the Draft of 1926. See: *Přípravné osnovy trestního zákona o zločinech a přečinech a zákona přestupkového*. Prague: Ministry of Justice, 1926, p. 142.

[48] For further information see: SEDLÁČEK, J., *Občanské právo československé: Všeobecné nauky*. Brno, 1931, p. 154.

[49] Section 260(1) of the Draft of 1926 said: "*Whoever commits an act of fornication with their stepchild or adopted child, with a child that is under their curatorship or wardship, with a minor that is their pupil or apprentice or another minor entrusted to their upbringing, education or care, shall be sentenced to one month to three years in a penitentiary or from fourteen days to three years in jail.*"

[50] Explanatory memorandum on Section 260 of the Draft of 1926. See: *Přípravné osnovy trestního zákona o zločinech a přečinech a zákona přestupkového*. Prague,1926, p. 141.

such action or to act on their own due to mental illness, mental incapacity or loss of consciousness (Section 324).

Compared to the CC of 1852, the Draft of 1937 abandoned the different legal qualifications for sexual intercourse and other sexual practices and compared to the CC of 1878, it abandoned the different legal qualifications based on the age of the abused person below 14 years of age (the periods from 0 to 12 years and from 12 to 14 years) and on sex.

The punishment proposed for the crime was imprisonment for up to ten years, though in the case of acts of fornication other than sexual intercourse with a person under the age of 14, the sentence was reduced to one to five years. Where the constituent elements included severe harm to the body or health, miscarriage or the risk of infection by a sexually transmitted disease, the sentence range was increased to five to fifteen years and where death was caused, ten to twenty years.

A discussion of the criminal law proposals of the 1930 s cannot overlook a proposal that would seem quite radical from today's point of view - Prof. Milota's suggestion that careful consideration should be given to whether the criminal code should permit a sentence of sterilisation (even some form of castration) for crimes of violent fornication, the defilement of children, sexually motivated murder or for notorious alcoholics with a criminal past "who have children who are physically and mentally inferior". To support his arguments he cited the laws of several American states (California, Nebraska, Washington, Indiana) and even the new laws of Hitler's Germany.[51] As Herrnitt explains, the German law was primarily concerned with the forced sterilisation of the mentally ill, which Herrnritt considered to be contrary to Czechoslovakia's democratic traditions. Even so, he argued for incorporating castration as a punishment for criminals with morbid sexual impulses characterised by extreme perversity and sadism because many of them repeated their offences immediately after their release.[52]

From the viewpoint of the law in our time, the proposed definition of this crime combined sexual abuse with rape or sexual assault because it also covered sexual intercourse and other sexual practices with defenceless persons, which is part of the crime of sexual abuse as such.

The Draft of 1937 set an age limit of 14 years for absolute protection against sexual abuse, which was in line with the legislation then in force while differing from the later legislation and the minimum age for sex now in force in the Slovak Republic. Based on the explanatory memorandum to the Draft of 1937, there were four potential arguments for the age limit of fourteen:[53]

1. young people in European conditions mature sexually at this age; *a contrario*, under the age of 14, it is possible to assume physical and mental immaturity for sexual acts, as was emphasised in First Republic case law;[54]
2. the age of 14 years marks the end of compulsory school attendance;
3. a perpetrator is more likely to know the age of the victim because if the perpetrator knows that their victim attends school, it proves they must be aware that it is a person with whom the criminal law prohibits sexual intercourse or other sexual practices;
4. setting a higher age limit would impose too broad a scope of criminalisation and, in view of the high level of penalties, would be unfairly strict: especially reprehensible acts would be mixed with less serious offences.

From the point of view of the current legislation, it should be noted that the compulsory education argument cannot be invoked, since compulsory education lasts ten years and starts after the age of 6 is reached, the age limit would rise disproportionately. A relevant reference point would be the age of completion of nine-year elementary school. The fourth argument can also be ruled out in view of the high level of penalties and pro-punitive sentencing prevalent in the Slovak Republic.[55]

The crime of abuse of a person under the age of 16 (Sections 330 and 331 of the Draft of 1937) comprised two sets of constituent elements. The first case related to perpetrators who urged – persuaded – a person under the age of 16 of the opposite sex to perform an *act of fornication* with the perpetrator or to tolerate the perpetrator's performance of an *act of fornication* against them. The use of the term "urge – persuade" in the legislation was intended to show that the initiative for the action should come from the perpetrator and not the victim.[56] If the activity was directed against a person of the same sex, the crime would be classified as *fornication with a person of the same sex* under Section 335 of the Draft of 1937,[57] for which more severe punishments were laid down.

In the second case, a person who urged – persuaded a person under the age of 16 of the same or opposite sex to perform "sexual intercourse, fornication or immodest behaviour" (in other

[51] MILOTA, A., *Reforma trestního zákona v Československu* [Reform of the Criminal Code in Czechoslovakia]. Bratislava: Právnická jednota na Slovensku a Podkarpatskej Rusi, 1934, 141 -142.

[52] HERRNRITT, V., Několik poznámek k otázce sterilisace [A Few Remarks on the Issue of Sterilisation]. In: *Pocta k sedmdesátym narozeninám univ. prof. Augusta Miřičky* [August Miřička a Seventieth Birthday Tribute]. Prague: Czechoslovak Criminal Law Society, 1933, pp. 126–127.

[53] Ibid.

[54] See Judgement 1230 of the Supreme Court of the Czechoslovak Republic of 09 June 1923. From the grounds: "*The gravity of the crime of defilement comes not from the severity of the lecherous assault but from the object of fornication and the nature of the person; in the case of children under the age of 14, whose moral principles have not stabilised, acts of fornication against their body or making use of their body may cause them to stray from the path and their moral development can be serious threatened or disturbed by immodest, lecherous activity.*"

[55] For a more detailed discussion of this issue see: BELEŠ, A., Hypertrofia trestných sadzieb v podmienkach Slovenskej republiky [Hypertrophy of criminal rates in the conditions of the Slovak Republic]. In: *Justičná revue*, vol. 70, no. 10, 2018, pp. 1029-1042.

[56] Explanatory memorandum to the Draft of 1937, p. 380.

[57] It is interesting to note that the Draft of 1937 returned to the criminalisation of homosexuality on the grounds that "*this vice is already very widespread, and its decriminalisation would undoubtedly cause it to increase further*". *See:* Explanatory memorandum to the Draft of 1937, p. 383.

words anything, e.g. even sex with an animal) in front of the perpetrator was guilty of the crime of abuse of a person under the age of 16.[58] The law would also punish incitement to such an act and could apply in reverse (if the perpetrator performed such actions in front of a person under the age of 16). The punishment in this case was one month to one year of severe imprisonment. The draft thus covered both cases in which the perpetrator watched sexual intercourse or other sexual practices of the victim and cases in which the victim watched sexual intercourse or other sexual practices of the perpetrator. In this regard it clearly shows the takeover and modification of material from the Draft of 1926.

6. The Criminal Codes of 1950 and 1961

Act No 86/1950, the Criminal Code, laid down a fundamentally new conception of legislation on sexual abuse that differed from the CC of 1852, the CC of 1878 and even the Draft of 1937. In both codifications of the criminal law there was a trend towards "narrowing the range of prosecuted sexual deviations", and many of the sexual acts that the CC of 1852 had deemed dangerous were no longer prosecuted by later laws. Socialist legal theory recognised that society was gradually developing in a way that caused it to shed prejudices and to begin to tolerate behaviour that had previously been thought morally unacceptable; furthermore, there was an overall trend towards the social adaptation of perpetrators.[59]

The term *defilement* (*sprznenie*) was replaced by the term sexual abuse (*pohlavné zneužitie*). Compared to the Draft of 1937, the legislative provisions on sexual abuse under Sections 239 and 240 of the CC of 1950[60] defined the crime in question in much simpler and more general terms. The following provisions of Section 241 of the CC of 1950 defined the crime of sexual intercourse with a person of the same sex, i.e. the criminalisation of homosexual intercourse, which was based on First Republic legislation and the Draft of 1937. Unlike the older legislation and the Draft of 1937, concurrency was possible in the case of the crimes of sexual abuse and sexual intercourse with a person of the same sex.

The definition of the crime included a general subject meaning that the perpetrator could be any criminally liable person, not just a male, as had been the case in Slovakia under the CC of 1878. Absolute protection was provided to every person under the age of 15, not only females as in the previously mentioned legislation.

The age limit for absolute protection was raised from 14 to 15, which was different from all the above legislation. The reasons for this significant change are not specified in the explanatory memorandum.[61] However, since the explanatory memorandum to the Draft of 1937 had indicated a link between the age limit for absolute protection and compulsory school attendance, there are reasons to believe that the age of 15 was chosen because of the nine years of compulsory attendance of the first and second stages of elementary school which began after reaching the age of 6 in accordance with Section 13(1) of Act No 95/1948 on the basic organisation of uniform education (the Schools Act), as amended.

The same age limit of 15 years was also introduced in Sweden, where the issue had been one of the key questions in criminal law at that time. Swedish lawyers had noted the paradox that although young people became sexually mature much earlier than in previous generations, their educational upbringing was extended. Although it was often the case that minors had their first sexual experience with other minors of the same age, they took the view that young people should not begin to indulge in a sexual way of life too early, for example during their basic education.[62]

As regards the actions of the perpetrator, the provisions in question penalised both sexual intercourse and other forms of sexual abuse. This concept was adopted with reference to the legal text in the CC of 1852 and thus covered any invasion of the intimate sphere of a person under the age of 15. The imprecise nature of the concept was a continuing problem. Since the definition of the constituent elements in Section 239 of the CC of 1950 paralleled the wording in Section 128 of the CC of 1852, it was possible to apply the related case law with the difference that the constituent elements of the crime no longer included the gratification of *lecherous desires*.[63] Other forms of sexual abuse thus included oral sex, anal sex, masturbation, groping of the genitals, breasts, thighs etc. if such contact could be considered sexual abuse rather than an accidental touch or contact for the purposes of medical or hygienic treatment.

Another recodification of material criminal law was implemented in Act No 140/1961 the Criminal Code ("the CC of 1961"). The name of the crime in question in Slovak was changed from "*pohlavné zneužitie*" to "*sexuálne zneužívanie*", both of which can be translated as "sexual abuse". However, the systematic treatment remained unchanged; the crime had

[58] Ibid., p. 380 and 381.

[59] BOČEK, O., Zkoumání příčetnosti u trestných činů spáchaných sexuálními devianty [Assessment of Sanity for the Purpose of Offences Committed by Sexual Deviants]. In: *Socialistická zákonnost: časopis pro právní praxi*, vol. 15, no. 10, 1967, p. 584.

[60] Section 239 of the CC of 1950: "*(1) Whoever engages in sexual intercourse with a person under the age of 15 or sexually abuses such a person in another way shall be punished by imprisonment for one to ten years. (2) A perpetrator shall be punished by imprisonment for ten to twenty years (a) if an act under (1) results in serious injury or (b) if there are other especially aggravating circumstances. (3) A perpetrator shall be punished by life imprisonment if an act under (1) results in death.*"

[61] Explanatory memorandum to the 1950 press release, available at: https://www.nrsr.sk/dl/Browser/Document?documentId=72076 [downloaded on 15/11/2018].

[62] NELSON, A., Trestnoprávna úprava sexuálnych deliktov vo Švédsku [Criminal Legal Regulation of Sexual Delicts in Sweden]. Translated by G. Nikšová. In: *Právny obzor: teoretický časopis pre otázky štátu a práva*, vol. 53, no. 6, 1970, pp. 540-541.

[63] See R 34/1957 (Judgement of the Supreme Court, ref. 1 Tz 3/57 of 21 February 1957): "*Pursuant to the second clause of Section 239(1) of the Criminal Code, touching a person under 15 years of age for sexual arousal (to achieve orgasm or other gratification) is the abuse of such a person even if sexual arousal ultimately does not occur.*"

two sets of constituent elements under Sections 242 and 243 of the CC of 1961.[64] Both sets of constituent elements were the same in terms of the obligatory elements. Absolute protection was provided to persons under 15 years of age regardless of their sexual maturity or sexual experience ("moral impairment") and regardless of the abused person's consent, which only affected the assessment of the seriousness of the offence.[65]

The scope of criminal repression against homosexuality under Section 244 of the CC of 1961[66] was narrowed at the recommendation of experts so that it prohibited only intercourse with a person under 18 years of age where the perpetrator was already over 18.[67] This provision was designed to provide a degree of protection for young people because according to the theory of criminal law, the primary objective of defining this crime was the moral development of young people.[68]

The case law and literature on the CC of 1950 (and, where relevant, as stated above, on earlier legislation) concerning the constituent elements of this crime thus remained applicable alongside subsequent case law,[69] as did the possible lack of clarity around the concept of other forms of sexual abuse. The drafting of the legislation indicated that sanctions should apply only in serious cases.[70] These more serious cases could be characterised by the greater invasion of the sexual sphere of the victims (groping of breasts, genitals, kissing of genitals),[71] not fleeting touches through clothing that take place only once.[72] In less serious cases, the courts called for an investigation of the fulfilment of the material elements in the definition of the crime.[73]

In practice, there was a much greater emphasis on sexual abuse in the form of intercourse while the other forms were considered much less serious, which led many lawyers to argue for the creation of two sets of constituent elements of sexual abuse so as to clearly distinguish sexual intercourse from other practices, for which a lighter penalty would be set.[74]

An important issue that was frequently raised was the fact that adolescents often engaged in certain sexual practices with each other such as fondling and kissing. It was not impossible (or even rare) that amongst young people a protected person might have more sexual experience than the perpetrator and the invasion of their physical integrity resulted from curiosity or mutual attraction.[75] An alarming example of the unsuitability of the legislation of the day was the judgement of the Prague Municipal Court in 2 To 261/72 (R 18/72), under which a 16-year-old juvenile offender was given a suspended sentence of one year in prison for having sex several times with a 14-year-old girl in the course of a relationship. In its judgement, the Municipal Court declared that the moral and physical impairment of youth under Section 242 of the Criminal Code cannot be considered an act that is less dangerous to society. On the contrary, higher social importance should be given to the rela-

[64] Section 242 of the CC of 1961: "*(1) Whoever engages in sexual intercourse with a person under the age of 15 or sexually abuses such a person in another way shall be punished by imprisonment for one to eight years. (2) A perpetrator shall be punished by imprisonment for two to ten years if they commit a crime under (1) against a person entrusted to their supervision, abusing their dependence. (3) A perpetrator shall be punished by imprisonment for five to twelve years if they cause severe damage to health as a result of a crime under (1). (4) A perpetrator shall be punished by imprisonment for ten to fifteen years if they cause death as a result of a crime under (1).*" Section 243 of the CC of 1961: "*Whoever abuses the dependence of a person under 18 years of age or a person entrusted to their supervision to persuade them to engage in extramarital sexual intercourse or sexually abuses such a person in another way by abusing their dependence shall be punished by imprisonment for up to two years.*"

[65] See KRUPAUER, J., § 242. In: BREIER, Š., BURDA, A. (ed.). *Trestný zákon: Komentár* [Criminal Code: Commentary]. Bratislava, 1964, p. 830.

[66] Section 244 of the CC of 1961: "*(1) A person having reached the age of 18 years who has sexual intercourse with a person of the same sex under the age of 18 years, or who has sexual intercourse with a person of the same sex abusing their dependence shall be punished by imprisonment for one to five years.*
(2) The same punishment shall apply to whoever (a) accepts or provides payment for sexual intercourse with a person of the same sex, or (b) causes public outrage by engaging in sexual intercourse with a person of the same sex."

[67] The Explanatory Memorandum to the CC of 1961 states: "*Numerous objections have been raised regarding the criminalisation of sexual intercourse with a person of the same sex, especially from medical circles whose authority cannot be denied. Therefore the provisions of Section 244 criminalise only sex between persons of the same sex where a perpetrator over the age of 18 has sexual intercourse with a person of the same sex under the age of 18, or where a perpetrator who has sexual intercourse with a person of the same sex abuses their dependence, or where a perpetrator receives or provides payment for sexual intercourse with a person of the same sex or causes public outrage as a result of such sexual intercourse.*"

[68] DOLENSKÝ, A. et al., *Československé trestné právo. Zväzok II: Osobitná časť* [Czechoslovak Criminal Law. II. Volume: Special Part]. Bratislava, 1964, p. 224.

[69] R 31/1964 (Judgement of the Supreme Court, ref. 5 Tz 8/64 of 27 March 1964): "*The fulfilment of the determining criteria of the crime of sexual abuse under Section 242 of the Criminal Code does not require that the perpetrator achieve sexual gratification during the sexual abuse of a person under the age of 15; it is enough that the perpetrator acted in sexual arousal in an effort to satisfy their arousal in some way, but it is not decisive whether and to which extent such gratification was achieved.*" or R 8/1965 (Judgement of the Supreme Court, ref. 8 Tz 108/61 of 27 November 1964) or R 28/1985 (decision of the Supreme Court of the Slovak Socialist Republic ref. 2 To 22/84 of 25 April 1984) or R 29/1985 (decision of the Supreme Court of the Slovak Socialist Republic ref. 4 Tz 49/83 of 8 September 1983) on the issue of a person entrusted under supervision.

[70] From the Explanatory Memorandum to the CC of 1961: "*The crime of sexual abuse under Section 242 includes sexual intercourse with a person under 15 years of age, as well as other serious sexual abuse of such a person.*" Available at: https://www.nrsr.sk/dl/Browser/Document?documentId=54626 [downloaded 15/11/2018].

[71] JELÍNEK, J., SOVÁK, Z., *Trestní zákon a trestní řád* [Criminal Code and Code of Criminal Procedure]. Prague, 1990, p. 219.

[72] General material of the Supreme Court of the Czechoslovak Socialist Republic of 19 January 1982, No Tpjf 158/80, published as R 17/1982, p. 125.

[73] Ibid., pp. 125-126.

[74] HLADIL, V., Ze zasedání legislativní sekce pro trestní parvo [From the Meeting of the Legislative Section for Criminal Law]. In: *Socialistická zákonnost: časopis pro právní praxi*, vol. 23, no. 5, 1975, p. 294.

[75] JANDA, V., K postihu trestného činu pohlavního zneužívaní [Towards Penalties for the Sexual Abuse Offence]. In: *Socialistická zákonnost: časopis pro právní praxi*, vol. 23, no. 2, 1975, p. 94.

tively widespread cases where the victim was between 8 and 12 years of age.[76]

In the matter of the differentiation between intercourse and other forms of sexual gratification, the People's Republic of Bulgaria was seen as an example to be followed because it separately punished any satisfaction by harassment of a sexual nature against a protected person and harassment involving the use of violence or threats, and reserved the highest penalties for sexual abuse involving intercourse (See Sections 149–151 of the Bulgarian Criminal Code of 1968). It is interesting to note that the law contained a similar provision to the Hungarian law that had applied in Slovakia under which the sexual abuse was decriminalised if the man and women got married before a judgement was handed down.[77]

There were no changes in the punishment of sexual abuse from the fall of the totalitarian regime in 1989 to the dissolution of Czechoslovakia in December 1992. However, the amendment of the CC of 1961 by Act No 175/1990 deleted the protection of persons under the age of 18 against homosexual intercourse under Section 244 of the CC of 1961. This change was in accordance with the overall aim of decriminalisation and depenalisation[78] in the large amendment of 1990 reflecting the new social conditions. The development of criminal law in the 1990s was characterised by a tightening of criminal repression, in particular an acceleration in raising the levels of punishment[79] unlike anything that had occurred during the existence of Czechoslovakia. The crime of sexual abuse was affected by this trend in 2005 when criminal law was recodified in the Slovak Republic.

7. Conclusion

The treatment of sexual abuse in Czechoslovak criminal law based on the received criminal codes (the CC of 1852 and the CC of 1878) was marked by the differences between these laws concerning the subject of the crime, the object of the abuse in terms of sex and age, the fragmentation of protection within the system of the crime and the absence of protection for boys against abuse by criminally liable women. The extensive case law on the crime of defilement in the CC of 1852 was mainly concerned with the interpretation of other forms of sexual abuse, which was made difficult by the law's lack of clarity. The concept was interpreted so broadly that it included any contact between the perpetrator and the victim's body, touching of the thighs, the genitals, including touching through clothing if it caused or increased sexual arousal. The concept did not cover pats on the back or the lifting of a skirt without further action. Subsequent case law followed this interpretation and extended it.

The age limit for absolute protection against sexual acts was set at 14 years in the received acts, reflecting both the age at which young people mature sexually and the duration of compulsory school attendance, which ended at this age. This fact made it easier to prove a perpetrator's guilt regarding the victim's age.

Efforts were made to recodify substantive criminal law during the existence of the First Czechoslovak Republic to standardise it throughout the territory of the republic and to create a modern criminal law. This resulted in the Draft of 1926 and the Draft of 1937. The treatment of sexual abuse in the Draft of 1926 had several distinctive features; it raised the minimum age for sex to 16, created three categories of protected persons – those under 16, those aged 16 to 18 and minors, provided protection under the crime of defilement only to defenceless persons and decriminalised homosexuality. Raising the minimum age for sex to 16 was justified on the grounds that persons below this age were in a critical stage of adolescence and the draft presupposed that the minimum age for marriage would be increased accordingly. The Ministry for the Unification of Laws rejected the increase of the age: the women are fully grown long before the age of 16 (especially in the countryside) and there are very frequent cases of marriage to a person who has been abused.

The Draft of 1937 envisaged keeping the age limit for absolute protection at 14 years and introducing a crime providing partial protection for persons under the age of 16.

Since 1950, the legislation has been characterised by a simplified system, fewer sets of constituent elements of crimes that are easier to interpret, and stability. Continuity (and discontinuity) can be observed in the legislation and in case law. There is continuity in the possibility to refer to the case law of the First Republic on the interpretation of other forms of sexual abuse or the supervision of a protected person, with the difference that the upper age limit of protection was set at 18. However, after the adoption of the CC of 1961 on the protection of persons under the age of 18, there was also continuity in the penalisation of homosexual relations.

Discontinuity can observed in the raising of the age of absolute protection to 15, the equivalent qualification of intercourse and other sexual practices, the equal protection of both females and males, the stricter penalties, which the CC of 1961 then corrected, and so on. The higher age limit was probably related to the introduction of compulsory nine-year school attendance in elementary school, although the 15-year age limit has remained a characteristic feature of Slovak and Czech law to the present day.[80] It must be noted that the linking of the age limit

[76] Research in the 1960 s found that the victims of offences against human dignity in general included 60 persons aged 8 to 12 and 110 persons aged 13 to 17 years. See ROZMARIČ, A., MACKERLE, S., Trestné činy proti lidské důstojnosti páchané na dětech a s dětmi [Crimes against Human Dignity Committed against Children and with Children]. In: *Právny obzor: Teoretický časopis pre otázky štátu a práva*, vol. 49, no. 2, 1966, pp. 177-181.

[77] JANDA, V., K postihu trestného činu pohlavního zneužívaní [Towards Penalties for the Sexual Abuse Offence]. *Socialistická zákonnost: časopis pro právní praxi*, 1975, vol. 23, no. 2, pp. 89-90.

[78] For further information see TERYNGEL, J., K novele trestního zákona [Towards Amendment to the Criminal Code]. *Právo a zákonnost*, vol. 38, no. 9, 1990, pp. 515 – 524.

[79] BELEŠ, A., GREGOR, M., Vývoj sprísňovania trestnej politiky na Slovensku z historického hľadiska [The Development of Tightening of Criminal Policy in Slovakia from a historical Point of View]. In: Sankcie [The Sanctions]. First edition. Bratislava, 2018, pp. 7-35.

[80] For a comparison of current legislation, see: BELEŠ, A., Sexuálne zneužívanie z komparatívneho pohľadu [Sexual abuse from a comparative point of view]. In: *Trestní právo*, vol. 23, no. 2, 2019, pp. 9-17.

for absolute protection to school attendance does not make it easier to prove guilt.

Although socialist legal theorists identified several requirements – the creation of two separate sets of constituent elements of sexual abuse to penalise sexual intercourse separately from other relatively serious sexually-motivated conduct and to allow the consideration of whether the perpetrator of the crime was a juvenile – their ideas were not incorporated into legislation.

Great Moravian Statehood as Viewed by the History of State and Law*

*Róbert Jáger***

Abstract

The article describes the issue of viewing Great Moravia as a state. The first part of the article describes when and how the term "state" was used for Great Moravia for the first time in legal-historical literature, as well as how other authors view Great Moravia and what defining features of the state the authors used. The article further points out that currently the basic features of the state are considered (in a simplified form) state territory, population, power and law, and seeks to find these defining features in the conditions of Great Moravia. He points to the fact that the use of the term state for medieval power structures is a neologism, unknown to the language and the thinking of the people at the time (including lawyers). At the same time, the author poses a question about the meaning of applying modern legal definitions to medieval formations. At the end of the article, the author points out how the understanding of the history of Great Moravian statehood could be changed or supplemented. The author proposes to mitigate the exactness of determination of the "beginning" and "end" of the Great Moravian statehood by 833 and 907, and also points to the problem of integrity of the territory of Great Moravia (with reference to the impossibility of merging the hereditary domain of the ruling Moymirid dynasty, with controlled or more freely affiliated territories).

Keywords: *Great Moravia; State; Statehood; Hereditary Features of State; Public Administration.*

The history of Great Moravia represents – both now and in the past – a period in which many monographic works or textbooks are devoted to the description of the history of the state and law. Although we have quite a lot of preserved information [1] about this period of our history, only a small part of it is relevant from the point of view of state history and law. Despite the fact that only part of the preserved information about the history of Great Moravia is directly or indirectly connected with its law, especially in the twentieth century, great attention was paid to whether Great Moravia had (or did not have) the character of a state, whether Great Moravia was or was not a state. In recent decades, this debate has taken on a broader dimension in the context of legal historians. The originally prevailing tendency stating that Great Moravia was a state,[2] was placed in opposition to a new tendency stating that Great Moravia did not meet the characteristics of the definition of the state and was therefore not a state.[3] In addition to these two border positions, another tendency was created, stating that Great Moravia was somewhere in the middle, that it was already fulfilling some features of the state and some not yet, or that it was on its way to becoming a state, but due to the shortness of its existence, it did not manage to develop into the form that the state should take.[4]

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[1] The number of preserved information from the Great Moravian period is significantly higher than the number of information preserved from the first century of the existence of the Hungarian state.

[2] MOSNÝ, P. – LACLAVIKOVÁ, M., *Dejiny štátu a práva na území Slovenska I. od najstarších čias do roku 1848*. Šamorín, 2010, p. 15: "The state territory (of Great Moravia) was considered the patrimony of the monarch. The highest official of state power was the monarch - prince". Also in MOSNÝ, P. – LACLAVIKOVÁ, M., *History of state and law on the territory of Slovakia I. From ancient times till 1848*. Plzeň, 2009, p. 14; MOSNÝ, P. – HUBENÁK, L., Dejiny štátu a práva na Slovensku. Košice, 2005, p. 17.: "Great Moravia was a state organized on the principles of feudal production relations"; ŠVECOVÁ, A. – GÁBRIŠ, T., *Dejiny štátu, správy a súdnictva na Slovensku*. Plzeň, 2009, p. 25: "The states of Great Moravia and early medieval Uhorska Hungary reflect the same state law foundations". Similarly in TREŠTÍK, D., Pád Velké Moravy. In: *Typologie raně feudálních slovanských států*. Praha, 1987, pp. 27-76: "Today, no one doubts the state character of Great Moravia". Compare with VOJÁČEK, L. – SCHELLE, K. – TAUCHEN, J. (eds.), *Nástin právních dějin. (Czech Legal History)*, Brno, 2011; VOJÁČEK, L. – SCHELLE, K. – TAUCHEN, J. (eds.), *An Introduction to History of Czech Private Law*, Brno, 2011; SCHELLE, K. – TAUCHEN, J., *Vývoj konstitucionalismu v českých zemích (The Development of Constitutionalism in the Czech Lands)*. Praha, 2013.

[3] LYSÝ, M., *Moravania, Mojmírovci a Franská ríša. Štúdie k etnogenéze, politickým inštitúciám a ústavnému zriadeniu na území Slovenska vo včasnom stredoveku*. Bratislava, 2014, p. 107; LYSÝ, M., „Veľkomoravský štát". In: *Quid leges sine moribus? Medzinárodná online vedecká konferencia venovaná životnému jubileu prof. JUDr. Dr. h.c. Petra Mosného, CS*c. Trnava, 2014, p. 267. Compare with STEINHÜBEL, J., *Nitrianske kniežatstvo. Počiatky stredovekého Slovenska. Rozprávanie o dejinách nášho územia a okolitých krajín od sťahovania národov do začiatku 12. storočia*. Bratislava, 2004.

[4] GÁBRIŠ, T. – JÁGER, R., Veľká Morava medzi kmeňom a štátom: historickoprávna a historicko-lingvistická analýza. In: *Acta Facultatis Iuridicae Universitatis Comenianae*. 35, No. 1, 2016, p. 29-80.

Works of the 19th century describing the history of Great Moravia did not yet often use the term state. Pavol Jozef Šafárik used the term Moravian Empire in his *Slovak antiquities* (*Slovenské starožitnosti*), Záborský used the term Moravian possession (*država moravská)* in his work *History of the Kingdom of Hungary from the beginning to the time of Sigismund (Dejiny kráľovstva uhorského od počiatku do časov Žigmundových)*, and Sasinek used the term empire in the work *History of the Earlier Nations in the territory of present-day Hungary (Dejiny drievych národov na území terajšieho Uhorska)*. In his work *History of the Czech Nation (Dejiny národu českého)*, Palacký moved one step forward when he used the expression "system of state", not only referring to the term Great Moravia itself, but to its previous period since the arrival of the Slavs from the homeland. The primary concept of the study of these works, however, was not the concept of the state (in its modern sense), but the empire, possession, the country or the principality.[5]

The works of legal historians in particular have contributed to the wider use of the term state in historical literature. By the term state, Jireček identified Czechia (Bohemia) and Moravia into one whole, similarly also Moymirid Moravia – without distinguishing between the Moravian Principality and the Nitra Principality.[6] In his work *Legal History of the Czech Crown Lands (Právních dějin zemí koruny české)*, Karpas considered the state to be the product of stronger organizations, while he also called Samo's Empire a state. In the *History of Public Law in Central Europe (Dějiny veřejného práva ve střední Evropy)*, Kadlec was one of the first not to confine himself to sternly stating whether Great Moravia was a state or not, but he also gave his insight into the defining features of the state. In his thinking, the state was to be characterized by three features: state territory, population and power[7] (such a definition of the conceptual features of the state was often used in later works of legal historians).

For the first works of legal historians, describing Great Moravia as a state, it was characteristic that the origin of the state was carried out in their opinion by merging tribes into higher units (supra-tribal structures) and merging these higher units into a state unit. This idea was neither new nor specific to the history of the Slavs in legal history. An analogous procedure of uniting families into gentes, gentes into tribes, tribes into higher territorial units, higher territorial units into pre-state units and by their merging a state was formed, was used to describe the origin of almost all the oldest states. It was assumed already in ancient Egypt, and was also assumed in ancient Rome, China or in the Germanic states of the Middle Ages. It can therefore be assumed that legal historians have taken this procedure as a kind of "equation" of state origin generally theoretically applicable to any society, and automatically applied this to the origin of the Great Moravian state, without taking into account the possible specifics of the development of society existing on the territory of later Great Moravia.

Even in recent times, in legal history works devoted to the oldest Slovak history, there is remaining in the positions of perception of Great Moravian statehood established in 833, referring to the fact that Great Moravia fulfilled (or exceptionally failed to fulfil, or only partially fulfilled) basic features of the state: state territory, state power, state population. As textbooks of legal history in Slovakia are primarily focused on the development of the state and law in recent development periods, attention to the oldest history is rather marginal, and there is not enough space to pay more attention to the fulfilment or non-fulfilment of individual features of the state. From the point of view of the latest knowledge of the history of Great Moravia, it would be appropriate to add a few remarks that may slightly modify the original view of the character of the state of Great Moravia from the point of view of legal historians.

The population is currently considered to be one of the features of the state. Using a great simplification we could say that Great Moravia "had the population", so this feature of statehood is fulfilled. However, also other territorial units had population (for example, Samo's Empire), and today this unit is not assumed to be a state. Likewise, a very serious question (which we will not deal with in more detail here) is whether the population of Great Moravia was even aware of their affiliation to Great Moravia as a whole, or whether their affiliation to a tribe or gens was relevant to them.

If we consider its territory to be a feature of a state, it is necessary to separate the current understanding of the state territory (within which the state has firmly defined borders, the border line is precisely and easily identifiable) from the medieval one. Although from some maps pointing to the territory of Great Moravia it may seem that it had fixed and exactly defined boundaries[8] (as we are used to defining borders since about the 20th century), such demarcation is not suitable for early-medieval formations: not only for Great Moravia, or for other contemporary countries (Frankish Empire or Hungary). At the same time, such an exact demarcation of borders neglects the division of the country's territory into what was the hereditary domain of the Moymirid dynasty, which was only an associated territory and what were territories that were only a loosely connected part, where we do not assume effective exercise of a public power (we assume the effective exercise of public power rather in the power centers of Moravia belonging to the hereditary domain of the Moymirid dynasty). The population of the associated territories had to pay the tribute primarily – more or less – for peacekeeping.

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5 LYSÝ, M., *Moravania, Mojmírovci a Franská ríša. Štúdie k etnogenéze, politickým inštitúciám a ústavnému zriadeniu na území Slovenska vo včasnom stredoveku*. Cf. p. 112.

6 JIREČEK, H., *Slovenské právo v Čechách a na Moravě. Doba nejstarší: od prvních zpráv do konce X. století*. Praha, 1863, p. 16.

7 KADLEC, K., *Dějiny veřejného práva ve střední Evropě*. Praha, 1928, pp.1-2.

8 The depiction of the Great Moravian territory of the state in textbooks or other works of legal historians is extremely unique. The depiction of the Great Moravian territory is carried out in the form of maps more often in the works of historians. However, it often happens that the map of the territory of Great Moravia is defined by a relatively exact "boundary line" (which is not entirely suitable for the Middle Ages) and at the same time the representation of the territory usually does not allow distinguishing the above-mentioned dominion of the ruling family and dependent or associated territories.

The third feature of the state is state power. If we argued in favour of the state character of Great Moravia, we would point out that the country was headed by a monarch, who held in his hands all the legislative, executive, and judicial powers (as most legal history writings state).[9] However, for state power to be effective, it is essential that there is an effective law in the country. We have several legal texts preserved from the Great Moravian period, which are generally considered to be Great Moravian law: Judicial Code for the People, Admonitions to the Rulers, Nomocanon, Provisions of the Holy Fathers (hereinafter referred to as "normative legal texts"). As these texts date back to the period after 863, there is a period formed from 833 to 863, when, according to legal historians, the Great Moravian state already existed, but what we call Great Moravian law did not yet exist. However, legal history presupposes that in the given period there was an earlier customary law, which had its basis already in the pre-state period. (However, this law has not been preserved in writing, but we can try to reconstruct its form.[10]) At the same time, a legitimate question arises as to how Great Moravian normative legal texts have been applied in practice.

In the past, there were discussions about the practical significance of the Nomocanon in Great Moravia, and whether it was used in practice at all. In assessing its significance, Kizlink denied Vašica's claim that the Nomocanon was "a strong interference in the legal conditions of Great Moravia."[11] According to him, this work was probably not used in legal practice.[12] As in the Provisions of the Holy Fathers, a substantial part of the Nomocanon was the regulation of ecclesiastical affairs. It is therefore not possible to rule out its application (or at least efforts to apply it) at the ecclesiastical level. The proof that could indicate the application of the Nomocanon in church practice are the so-called St. Emmeram's glosses in the canon, which is related to the dispute over the scope of Methodius' episcopal powers.[13] It is possible to assume that the text of the Nomocanon was really used in resolving Methodius' dispute[14] - specifically for the translation of the Latin text of the relevant canon: the glosses marked in the canon contain a Slavic text very similar to the preserved transcription of the Nomocanon. At the level of secular norms, however, it is probable that the Nomocanon did not play much importance in the form of valid law enforced by the state. However, this was probably not even supposed to be its primary purpose.

Similar doubts may arise in the practical application of other Great Moravian normative legal texts. In the event that the trial was primarily performed by the monarch, or other by him authorised „zhupans" (district administrators) or other representatives of local government units, or heads of families, they are unlikely to be literate. If the normative texts of the Great Moravian period were to be applied in judicial practice, it would require judges to memorize these normative texts. Since the primary role of the country's high dignitaries in the Middle Ages was mainly military service, the idea of a military dignitary memorizing legal texts that he does not fully understand (given that they are written in Old Church Slavonic, i.e. for the population of Great Moravia in a foreign / albeit partially understandable / language)[15] is too idealistic. More realistic is the hypothesis that the content and interpretation of these texts were learnt by the students of Constantine and Methodius in the school for the preparation of the clergy, which they founded. The disciples at the school studied both the script in which these normative texts were written and they mastered Old Church Slavonic language, which may not have been completely understandable to the general population.[16] We can therefore state that priests (probably the only literate members of contemporary society) could play an important role in the trial, either as those who made decisions directly on the basis of norms contained in normative texts, or at least as those who helped (read or explained) the content and meaning of normative texts.

So did Great Moravia have law or not? Certainly yes. However, we dare to assume that the contemporary society was, in practical terms, governed rather by the older customary law, and the so-called normative texts were a "novelty" that came into practice only slowly, as evidenced by the fact that Methodius repeatedly asked for compliance with the Judicial Code for

[9] MOSNÝ, P. – LACLAVIKOVÁ, M., *Dejiny štátu a práva na území Slovenska I. od najstarších čias do roku 1848*. Cf., Similarly in MOSNÝ, P. – LACLAVIKOVÁ, M., *History of state and law on the territory of Slovakia I. From ancient times till 1848.* Cf.; MOSNÝ, P. – HUBENÁK, L., *Dejiny štátu a práva na Slovensku*. Cf.; ŠVECOVÁ, A. – GÁBRIŠ, T., *Dejiny štátu, správy a súdnictva na Slovensku*. Cf., p. 25; TREŠTÍK, D., Pád Velké Moravy. In: *Typologie raně feudálních slovanských států*. Cf., pp. 27-76.

[10] GÁBRIŠ, T. – JÁGER, R., Dispute resolution in Great Moravia and the role of Posluch. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, 135 (1), p. 325-343; GÁBRIŠ, T. – JÁGER. R., Back to Slavic Legal History? On the Use of Historical Linguistic in History of Slavic Law. In: *Frühmittelalterliche Studien*, 53, 2019, pp. 39-66.

[11] VAŠICA, J., *Literární památky epochy velkomoravské*. Praha,1966, p. 63.

[12] KIZLINK, K., Právo Veľkej Moravy. In: *Právnické štúdie*, XVII, 1969, 3, p. 437.

[13] JÁGER, R., Legal and Social Status of the Church in Great Moravia. In: *Journal on European History of Law*, vol. 10, Nr. 2, 2019, pp.115-120.

[14] BARTOŇKOVÁ, D. – HAVLÍK, L. – MASAŘÍK, Z. – VEČERKA, R., *Magnae Moraviae Fontes Historici. IV. Prameny k dějinám Velké Moravy*. Praha, Brno, 1971, p. 235.

[15] At this point it is necessary to point out the fact that the so-called Normative texts of the Great Moravian period were written in Old Church Slavonic language. This was created by mixing elements of the language used by Constantine and Methodius (who had a South Slavic origin) with the language of the native population of Great Moravia, which had a West Slavic origin. Thus, Old Church Slavonic was not the language of the ordinary population of Great Moravia, but it was the language of a narrow circle of people living in the circle of Constantine and Methodius. The general population may have had difficulty understanding the text of normative legal norms, not only because of the erudition of the text containing elements of advanced Roman law, but also because of the language in which they were written.

[16] We deal with the issue of education in Great Moravia in the work of JÁGER, R., Metod - zakladateľ (právnického) vzdelávania na Veľkej Morave? (Niekoľko úvah o vzdelávaní na Veľkej Morave). In: GÁBRIŠ, T. – HORÁK, O. –TAUCHEN, J. (eds.) *Školy, osobnosti, polemiky. Pocta Ladislavovi Vojáčkovi k 65. narozeninám*. Brno: The European Society for History of Law, 2017, p. 206-219.

the People. If this was followed, Methodius would not have to call for compliance. At the same time, Great Moravian normative texts can be considered as a certain ideal, to which the contemporary society was to approach in its further development.

For the history of the state, we thus dare to make a recommendation that Great Moravian law should not be used exclusively to refer to normative legal texts dating from the period after 863, and when mentioning them, it should be stated at least briefly that there were reasonable doubts about their practical application in practice. At the same time, we dare to point out the fact that if we consider the above-mentioned normative legal texts as the primary Great Moravian law, it is appropriate to state that these were probably not used after Methodius's death in 885. When Method's disciples were expelled from Great Moravia as disciples of "undesirable person" and "heretic", it is unlikely that Methodius's work in the form of normative legal texts would be preserved in Great Moravia and continued to be used.

At the end of this article, let us return to the original question that we addressed in this paper. Was or was not Great Moravia a state? The answer to this question depends on what definition we choose with which features of statehood. Accordingly, we can argue in favour of or against Great Moravian statehood. The author of the article does not oppose the use of the term statehood of Great Moravia, but suggests that the moment of the union of the Nitra and Moravia Principalities should not be considered the beginning of Great Moravian statehood. From the point of view of the current understanding of legal history, we can rightly ask the question of what changes took place in the administration of public affairs in 833 (but immediately after that year), if we consider this year to be the formation of the state. We assume that in this area, directly in the year 833 or immediately after it, there were no such significant changes in the area of public administration that we should consider this year to be the formation of the state. At the same time, however, the author must admit that he cannot determine the exact year from which he would consider it appropriate to designate Great Moravia as a state. However, given the slowness and sequence of changes in medieval society, this is not even necessary. However, if he were to concretize his idea of when contemporary society acquired a more state character against the period around 833, he would propose to use the government of Rastislav and Svätopluk as the beginnings of a period that can be discussed as a state.

The author of the article also has a reservation as far as the date of 4 July 907 is concerned as the moment of the end of Great Moravia (or Great Moravian statehood), and would suggest to connect with this moment the end of princely power, or the end of the central state administration (associated with the person of the monarch). If the phrase "end of Great Moravia" (or of Great Moravian statehood) is used, this may give the false impression to lay people that all aspects of public administration disappeared (for example, local government existed in many parts of the country even after 907, as well as we can also assume the existence of elements of ecclesiastical affairs administration). And it was precisely the elements of local government, or the administration of ecclesiastical affairs, which continued to function even after 907, that became the basis on which the Hungarian principality, later the Kingdom of Hungary, was built.

At the end of the debate on the question of the state character of Great Moravia, we would like to draw attention to a serious fact: the discussion of these problems in our circles does not go unanswered by the public. Unlike those of us who do not doubt the existence of Great Moravia, questioning the early feudal, patrimonial and state character can cause doubts about the very existence of Great Moravia in the general population without a deeper historical and legal education. Although the historical legacy of Great Moravia is currently relativized with justification of the discontinuity of law and statehood with the law and statehood of later Hungary, the historical legacy of Great Moravia is alive and a continuity in it can be seen at least in the elements of local government in Great Moravia and Hungary as well as in part of the legal terminology. Rarely can we meet even with the denial of the existence of Great Moravia. At this point, however, it is necessary to point out that it is from the Great Moravian period that we have more data preserved as compared with for example the period of early feudal Hungarian state, the existence of which is not questioned. At the same time, it should be noted that the ratio of the quantity of preserved resources to the amount of developed scientific literature in our history from the Great Moravian period is the highest one.

Conclusion

At the beginning of this article, we asked ourselves the question: "Was Great Moravia a state?" In order to answer this question, it is necessary to characterize what definition of "state" we choose with its features of statehood. Accordingly, we can argue in favour of or against Great Moravian statehood. The author of the article is not against the use of the term statehood of Great Moravia, but suggests that the moment of the union of the Principality of Nitra and the Moravian Principality should not be considered as the beginning of Great Moravian statehood. From the current point of view of legal history, we can rightly ask what changes took place in the administration of public affairs in 833 (or immediately after that year), if this year is considered to be the year of statehood formation. We assume that in this area directly in the year 833 (or immediately after it) there were no significant changes in the area of public administration, which should be considered the formation of the state in that year. At the same time, the author must admit that he cannot determine the exact year from which he would consider it appropriate to designate Great Moravia as a state. However, given the slowness and graduality of change in medieval society, this is not even necessary. However, if he were to concretize his idea of when the current society became more state-related than around 833, the author would suggest that the period of rule of Rastislav or Svätopluk be used as the beginning of a period that can be discussed as a state. The author of the article also has reservations about the use of the year 907 as a year marking the end of Great Moravia, of Great Moravian statehood. In particular, the phrase "the end of Great Moravia" may indicate that any form of social life and culture has disap-

peared from the territory, and there have been no elements of public affair administration. This was not the case: even after 907, we assume the existence of public affair administration at least at the level of higher or lower units of local government. In 907, only the central "state power", represented in the person of the prince, ceased to exist (or did not "survive"). Elements of local government existed continuously, and the Hungarian state was later built on their basis. The author of the article does not consider it appropriate to point out in one book publication that Great Moravia did not meet the defining features of statehood, and at the same time it was uncritically presented that early-feudal Hungary had the character of a state since 1000. Therefore, if we point out that Great Moravia did not meet the defining features of the state in many ways, it is appropriate to point out that at least in the first decades of its existence, even Hungary did not meet many of these features.

Codex Civilis pro Galicia Orientali 1797: Creation and General Characteristic

Anton Guzhva *

Abstract

The article considers the history of creation, structure, language and style features of the Civil Code of Eastern Galicia 1797 – one of the first codifications of private law in Europe, which served as the basis for the creation of the Austrian General Civil Code (ABGB) of 1811 later. The idea that the Code is a product of Roman law reception, without losing certain features of feudal law. To characterize the language and style of the Code, the author of the article used the Latin edition of the text. Based on the general nature of codification processes at the time of the creation of the Code, as well as on the role of the Latin language of the Age of Enlightenment, the article attempts to substantiate the emergence of the Latin version of the Code.

Keywords: *Civil Code for Eastern Galicia; codification of civil law; Civil Code of Austrian Empire; reception of Roman law; the history of civil law of Europe; Habsburg Monarchy; age of Enlightenment.*

1. Introductory remarks

This year (2020), the third edition of the translation from Latin into Ukrainian of the Civil Code for Eastern Galicia 1797 have been published in Ukraine [1]. This demonstrates an intense interest in this source of private law in Europe. Nevertheless, there aren't currently many researches on the history of creation and the features of this codified act. This served as the basis for addressing to this topic in order to draw the attention of both civilians and legal historians to one of the first codifications of private law.

Codex civilis pro Galicia Orientali 1797 (The Civil Code for the Eastern Galicia, hereinafter – the Code) is the result of codification process in the Habsburg Monarchy that started in the time of the empress Maria Theresa. In scientific literature the researches on the Austrian Empire civil legislature codification primarily focus on Austrian General Civil Code 1811 analysis – ABGB. But the first result of codification work in the Habsburg Monarchy was exactly Civil Code for the Eastern Galicia enforced in 1797 that is 15 years earlier than ABGB. According to W. Brauneder even Franz von Zeiller, one of the "fathers" of the ABGB, named its predecessor, the 1797 Civil code for the province of Galicia, the "Verfassung" (constitution) for that territory [2].

Whilst the predecessors of the ABGB – the unfinished 1786 ABGB and the 1797 civil code for Galicia – regulated the enactment of amendments, the 1812 ABGB dropped such provisions [3].

On the one hand, this Code is a sample of Roman law reception, on the other hand, it's a certain period that reflects the change from feudal to capitalist relations of the Austrian Empire of that time and one of the first civil codifications in Europe. Thus the process of the civil legislature codification in the Austrian Empire resulted in civil law codification creation that was implemented in the province of the Habsburg Monarchy – Galicia. But this process of codification lasted for almost half a century and the Code was implemented in different historical conditions than at the time when the work on codification had been initiated. The society was simultaneously changing with the education and science. Civil code was eventually implemented in the Eastern and Western Galicia that were annexed to the Austrian Empire only after the codification resulted in projects of Civil Code.

2. Historico-cultural background of the Code creation

To understand this Code creation features (framework, language, style, legal technique), first of all it is necessary to define the historical conditions of the Code creation, for whom this Code is intended, i.e. the representatives of that time: judges, lawyers, public officials. After the first partition of Poland 1772 Galicia was a part of the Austrian Empire. The Austrian Empire government consolidated Ukrainian and Polish territories in

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1 The Civil Code for Eastern Galicia 1797: the text, the translation, the scientific commentary. Kyiv, 2020, 576 p.

2 BRAUNEDER, W., The "First" European Codification of Private Law: The ABGB. In: Zbornik Pravnog fakulteta u Zagrebu, vol.63, Nr.5-6, 2013, p. 1020.

3 Ibid., p. 1022.

one administrative region, having established official names for the Eastern and Western Galicia[4]. At that time, in the second half of the XVIII century intense codification processes in the field of civil, criminal and procedural law took place in the Austrian Empire. As E. Kharitonov states, it took place when Maria Theresa implemented the reform of Austrian government, the goal of which was the consolidation of all hereditary ownership territories in a modern state[5].

Joseph II after his mother's death decided to carry her program to a logical completion and make his empire a centralized egalitarian state. Joseph II thought that the empire must be a German state.

He said, "I am the emperor of the German Reich that is why all the states I own are its provinces"[6].

After Joseph's death in 1790 Leopold II took his place on the throne and early died in 1792. At that time the ideas of the French revolution were being spread. There was a struggle for the old government preservation of monarchic Europe therefore conservative elements gained strength[7]. After Leopold's death his son inherited the empire Franz II, the last emperor of the Holy Roman Empire and the first emperor of Austria. In 1804 Franz II, the last emperor of the Holy Roman Empire, seeing the threat for his title in Napoleon's ambition he found for himself the title of " the emperor of Austria"[8]. In 1806 when Napoleon became the world emperor made Franz abolish the Holy Roman Empire[9].

Work on law codification was actively conducted in the last quarter of the XVIII century. The code of law of exchange was confirmed, the validity of which covered Galicia. The code of civil procedure that was applied in Galicia since 1784 was enforced in 1871. In the course of time the code of civil procedure was redone and enforced in the Western Galicia in 1796 and in the Eastern Galicia in 1807. A patent for family law regulation was granted in 1783 and a patent for legal succession was granted in 1786[10]. Just then in the late XVIII and in the early XIX Galicia plays an important part in ABGB 1812 adoption.

Civil law codification work started at the time of the empress Maria Theresa. Maria Theresa designated the commission for exact and unvaried law for all her estates in 1753.The draft of civil code in 8 volumes was ready in the late 1766. But this draft was made from Roman law commentaries and was written in a complicated style and as a consequence it wasn't adopted. The draft was difficult to understand and was like a textbook. In 1772 Maria Theresa charged Horten with composing an extract from this draft in order to eliminate defects especially state the provisions of this draft in brief, eliminate everything concerning the field of teaching instead of law, base on the provisions of natural justice and not on Roman legislature etc. The extract from the first part of the draft was represented to the emperor Joseph II in 1785. The code was enacted in this form in the German provinces in 1786 (in Galicia in 1787), i.e. only the first part -"the rights of persons"[11].

After Joseph's death Leopold organized the commission headed by a famous teacher of natural law - Karl Anton von Martini. This commission was charged with making a new draft. The result of codification work was developing the draft of civil code. Martini's draft was issued and submitted to the universities and individual commissions in every province and after that it was enacted[12].

The code was signed on September 8, 1797 and it was enacted in the Eastern Galicia entitled "*Codex Civilis pro Galicia Orientali*" on January 1, 1798 - "Civil Code for the Eastern Galicia". As it was written in the code's preamble – it was to replace Polish statutes that had been in force in the Eastern Galicia. It was logical continuation of the Polish legislature to Austrian one change process that started in 1772[13]. The codification mentioned was a part of common codification processes that took place in Europe at that time.

Thus R. Zimmermann considers the codification to be a phenomenon originated from XVIII and has been lasting hitherto. Codification is a specific historical phenomenon that originated in late seventeenth – and eighteenth - century legal science[14]. R. Zimmermann states that the idea of codification in XVIII became intimately linked to the emergence of modern nation-states that must exclusively exercise control of the legislative process[15].

According to R. Zimmermann history of Austrian codification goes back to 1753 and lasted for almost 58 years. This process managed to promote Martini who succeeded in bringing up the generation of studying Roman law having disguised as natural law[16].

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[4] KHUDOBA, N., Codification of Austrian law and features of its application in Galicia (1772-1918). In: Scientific notes of the V.I. Vernadsky Tauride National University. Legal Sciences Series, vol. 20 (59), Nr. 2, 2007, p. 295.

[5] KHARITONOV, E., Adoption of the new Civil Code of Ukraine and the experience of codification of the civil legislation of Austria. In: Journal of civil law science, Nr. 10/2011, p. 83.

[6] TEILOR, A. J., Habsburg monarchy 1809-1918: History of the Austrian Empire and Austria-Hungary. Kyiv, 2002, p. 19.

[7] TSOLNER, E., The history of Austria. Lviv, 2001, p. 319, 320.

[8] TEILOR, A. J.: op. cit. p. 11.

[9] Ibid., p. 22.

[10] KULCHITSKI, V., State system and law in Galicia (in the second half of the XIX - early XX centuries.). Lviv, 1966, p. 56-58.

[11] PAKHMAN, S., The history of the codification of civil law. St. Petersburg, 1876, p. 92.

[12] Ibid., p. 92.

[13] KHUDOBA, N.: op. cit., p. 295.

[14] ZIMMERMANN, R., The civil law in European code. In: Regional private laws and codification in Europe. Cambridge, 2003, p. 18.

[15] Ibid., p. 19.

[16] ZIMMERMANN, R., Codification – The Civilian Experience Reconsidered on the Eve of a Common European Sales Law (August 5, 2012). In: European Review of Contract Law (ERCL), Vol. 8, Nr. 4, pp. 367-399, 2012; Max Planck Private Law Research Paper No. 12/30. Available at SSRN: https://ssrn.com/abstract=2166765

Wilhelm Brauneder considers the civil code to be the first private law codification even though Prussian earthen code is older (1794) but Civil Code for the Eastern Galicia is the first pure private law codification when Prussian earthen code more or less regulated law and order on the whole[17].

But the ABGB is, so to say, a second edition, namely of the 1797 "Civil Code" for the Austrian province of Galicia in Poland, and it did also replace another predecessor, the (unfinished) "General Civil Code" (Allgemeines Bürgerliches Gesetzbuch), enacted by the emperor Joseph II in 1786[18]. The Galician code was younger than the ALR, but it was the first pure codification of private law, whereas the ALR also regulated more or less the entire legal order[19].

The code was made up in the spirit of the Age of Enlightenment and natural law. And it was accomplished during the wars with France when Austria experienced the heaviest times. When acquainting with the text of Civil Code for the Eastern Galicia one can state for sure that the ideas of natural law were embodied in it. Thus in the first paragraph it is claimed that "no matter what good or justice is, law creates good and justice and also spreads good."

At the same time the code differentiates natural law and positive law, "rights and duties are in human nature and are natural and inborn or exist in human society and are called positive rights and duties, i.e. those ones that are caused by the society itself. We consider such a conception of the code to have been met the ideals of the Age of Enlightenment.

Natural law principles are given to a human exclusively by his or her natural mind. According to Zakhvatayev this may explain the fact that despite quite significant differences among a lot of norms of civil codes that were elaborated in XVIII-XIX certain amount of provisions directly influenced by natural law were very close as with their aim as with essence[20].

The structure of "*Codex Civilis pro Galicia Orientali*" is logical and reasonable enough and that is fully justified taking into consideration that the draft of the code underwent several editions during several decades of elaboration. The structure of the Code is institutional. The preamble precedes the main part of the code which informs what lands are subjected to the scope of the Code, when it enters into force and that it is signed by the emperor of the Holy Roman Empire Joseph II with the enumeration of all his titles.

The text of the Code consists of three parts: the first part includes general provisions about law and act and chapters dealing with personal rights. The second part includes the provisions about things and proprietary interest and also inheritance law. The third part covers law of obligation legal norms, acquisitive prescription and extinctive prescription and also a separate section about restitution.

Let us briefly consider the Code contents.

3. Personal rights

After the first introductory chapter "About Law and Statute" the provisions concerning subjects of law and personal rights are set forth. Thus, in § 29, ch. II CC " About Rights of Persons" the so-called innate rights (innata) are enumerated: the right to preserve life, acquire necessary things for life, to improve body and soul opportunities, protect oneself, be anxious about reputation and public opinion, use own things on the discretion. Further in § 31 these rights are called natural human rights (*jura hominum naturalia*) that cannot be changed by civil society. In other words, in the Codification the rights are divided in their origins into natural rights and statutory rights (*jus lege aut natura datum*). Besides personal rights benefits established by law for a particular class and privileges granted by a legislator for one person or a group of them are also emphasized in the Code (§ 49 ch. II p. I CC). Chapter III is devoted to legal regime of marriage, rights and obligations of spouses, divorce. It should be noted that mixed Christians-not Christians marriages are considered to be null and void. Also the same can be said about marriages between relatives. Cases of divorce are strictly regulated by law. Divorce procedure is regulated in detail and can involve a priest or court.

Chapter IV of the Code sets out legal relationship between parents and children, in particular, their mutual rights and obligations, limits of paternal authority. Thus, as a general rule, paternal authority lasts up to the age of twenty-four (persons under the age of twenty-four are considered to be minors). At the same time, those who do not keep or bring up children can be deprived of paternal authority. (§ 156 ch. IV p. I CC). The provisions about adoption are also set out in the chapter.

In the next chapter V the questions of guardianship and trusteeship are regulated in detail. Chapter VI contains regulation of masters and domestic servants legal relationship. Legal norms regulating persons` admission to homes as servants, characteristics of formalizing arrangements with masters, procedure for domestic servants` payment for work (leaving a deposit), their rights and obligations while serving, grounds for dismissal and so on are set out. Nevertheless it is indicated that kinds of service, period, remuneration are determined by the agreement between masters and servants (§ 275 ch.VI p. I CC). It seemed that indicated relationship regulation in the Code is the consequence of serfdom abolition and a logical continuation of previously adopted patents devoted to the rights and obligations of peasants.

In 1781 after a year of his accession to the throne, Joseph issued his first peasant law – the so called patent for citizens "Untertapatent". According to this patent in Czechia, Moravia, Silesia and Galicia and a little bit later in Hungary, Carinthia, Krajina and Styria serfdom was abolished and replaced by the so called "citizenship." It meant that the land continued to be

[17] BRAUNEDER, W., The Civil Code of Galicia is the first codification of private law in Europe. In: Civil Code of Eastern Galicia 1797 = Codex civilis pro Galicia Orientali MDCCXCVII», Odesa, 2013, p. 9.

[18] One may draw a parallel with Prussian codification initiated by Wilhelm the Great who demanded the chancellor at first to test the result of legislative reforms in Pomerania that he called „terra litigosa"(the land rich for disputes) because the residents of the province were inclined to"litigiousness."

[19] BRAUNEDER, W., The "First" European Codification of Private Law: The ABGB. In: Zbornik Pravnog fakulteta u Zagrebu, vol.63, Nr. 5-6, 2013, p. 1020.

[20] ZAKHVATAYEV, V., Napoleonic Code: a monograph. Kyiv, 2016, p. 31.

in the possession of a landowner and a peasant is obliged to pay tribute for using it. Personal peasant dependence was abolished. A person was able to go wherever he or she wanted, get married, be engaged in craftsmanship, buy and sell property. But a peasant didn't have his own land. Patent for citizens` punishment that abolished nobles` right for trial, after that there was a resolution that forbade to drive peasants from land and also the decree according to which peasants were not allowed to inherit estate. Finally, in 1789 the urbanial patent that established the tax rate was adopted: they were obliged to pay money at the rate of 17% of a peasant's income[21]. Serfdom was abolished. Landowners` land tenure from which peasants couldn't be chased away and which peasants were able to inherit was limited to the right for income tax at the rate of 17%[22].

4. Possession and real rights

Possession is presented in the Code as an actual state and not as right that fully corresponds the conception of possession. According to the provisions of the Code a person can possess as tangible property as immaterial rights which is realized by the way of using the latter. As in Rome, keeps a thing with the intention to possess for oneself (*cum animo sibi habendi*) (§ 30 ch. II p. II Galician Code).

The Code also distinguishes legal and illegal possession, conscientious possession and unconscientious possession, vicious and pure possession. The criterion taken as the basis for differentiation of conscientious possession and unconscientious possession – ignorance of the fact that another person possesses the thing. An unconscientious possessor is obliged to return the possessor benefit got from the thing and also repair a damage. A conscientious possessor is entitled to recover the money spent for keeping the thing or the money that was paid for getting constant income from the thing[23].

Borrowed from Roman law to the Code conditions for thing acquisition as a consequence of possession according to acquisitive prescription: legal cause, conscientiousness, continuity during the whole term established by law (*juste, bona fide, per totum tempus a lege definitum*) (§ 593 ch. XVIII p. III Galician Code).

Not only the institutions of acquisitive prescription were transferred to CC but also motives for its establishment: Galician Code provision that "in order to have obstacles and limitations for trials…" (§ 592 ch. XVIII p. III Galician Code) almost repeats Roman lawyer Neratius's words[24].

Real and faultless possession according to the Code – possession of a person who took possession not by force, nor stealth, nor the licence of the owner (*nec vi, nec clam, nec precario*) (§ 65 ch. II p. II Galician Code). In other words, as in Roman law (fr. 1 pr. D. 43. 17, Gai. IV. 160), only such kind of possession is subjected to protection.

Taken by the Code also the provision of Roman law about the statement concerning the prohibition of a new construction (*operis novi nuntiatio*): if a person who starts a new construction promises a plaintiff in case of its prohibition by final judicial decision to return everything to its original state and guarantees the reparation of possible damages, he or she can continue construction till the decision of the court (§ 60 ch. II p. II Galician Code)[25].

Law of property protection according to the Code provides replevin and negatory action. Burden of evidence in case of judicial vindication of a thing is placed on a plaintiff. In order to find out whether the defendant possess the thing that is a subject-matter of vindication as in Roman law there is a suit of presentation (*actio ad exhibendum*) (§ 89 ch. III p. II Galician Code). Roman rule for giving preference to the possessor of a thing in case of doubt concerning belonging to law of property also taken by the Code (§ 91 ch. III p. II Galician Code) that fully corresponds to Roman rule which we can often meet in the Digest of Justinian, "*in pari causa melior est conditio possidentis*"- "under the equal circumstances the position of a possessor is better" (D.6.2.9.4., D.50.17.128).

Roman means of law of property acquisition are also reflected in p. II, ch. III, IV, V Galician Code: *occupation (*acquisition of a thing that belongs to nobody), *accessio* (joining, i.e. increase in movable property or estate), *traditio* (passing from the possessor to the receiving party).

The provisions about rights for things belonging to other people are also explicit enough: servitudes, their division into rural and urban servitudes and personal (usufruct, usus, habitation and also emphyteusis and superficies. Roman rules concerning servitudes were preserved: servitude is indivisible[26], it must be carried out by the least harmful way, the possessor of the thing that serves mustn't take active steps, servitude is stopped in case of combination of dominant thing and serving thing belonging to one person[27].

The Roman interpretation of usufruct also taken to the Code as the right of free use of the things belonging to other people and getting benefit from them provided preservation of substances of the things (§ 296 ch. II p. II Galician Code). As in Roman law, the change of purpose of the thing is prohibited (e.g. to turn a pond into a meadow), the obligation to bear the costs of repair, reconstruction of a thing (§ 301 ch. II p. II Galician Code). The Roman differentiation between *usus* and *usufruct* is

[21] PRISTER, E., A brief history of Austria. Moscow, 1952, p. 281.

[22] Ibid., p. 282.

[23] GUZHVA, A., Reception of Roman law in the Civil Code of Eastern Galicia 1797. In: Comparative-analytical law - electronic scientific professional publication of the Faculty of Law of Uzhhorod National University, Nr. 5, 2014, p. 73.

[24] Compare.: D. 41,10,5 pr. (Neratius *5 membr.*): Usucapio rerum, etiam ex aliis causis concessa interim, propter ea, quae nostra existimantes possideremus, constituta est, ut aliquis litium finis esset.

[25] Compare.: D. 39,1,1 pr. (Ulp. *52 ad ed*): Hoc edicto promittitur, ut, sive iure sive iniuria opus fieret, per nuntiationem inhiberetur, deinde remitteretur prohibitio hactenus, quatenus prohibendi ius is qui nuntiasset non haberet.

[26] Compare.: D. 8,4,6 (Ulp. 28 *ad Sab.*): 1. Si quis partem aedium tradet vel partem fundi, non potest servitutem imponere, quia per partes servitus imponi non potest, sed nec adquiri…

[27] Compare.: D. 8,6,1 (Gaius 7 *ad ed. provinc.*): Servitutes praediorum confunduntur, si idem utriusque praedii dominus esse coeperit.

also reflected: the holder (who has the *usus*) can use a thing only in the context of his needs preserving the substance of the thing (§ 292 ch. I p. III Galician Code). Habitation, as in Roman law, is interpreted as the right to dwell in living space or entirely or partially entitle others (§ 308 ch. II p. II Galician Code).

However, in a lot of aspects the Code was feudal relationship oriented. Thus, it includes legal constructions of feudal era law such as feud, colonat, succession rule of primogeniture (right of primogeniture, seniority) etc. A separate section– VII book II is dedicated to divided property. In § 187 ch. VII p. II of the Code the duality of the law of property is stated, "the right for substance of the thing differs from the right to use it and the right to get fruits concerning land". Depending on differentiation of the indicated rules for direct possessor or indirect possessor in the Code the following kinds of divided property are enumerated: census real estate, feuds, right for perpetual and inheritance lease, right for emphyteusis.

Thus, the subjects of the law of property are direct possessor (*dominus directus*) and indirect one (*dominus utilis*). The first has the right for the substance of the thing, the second one – the right to use the thing and get fruits from it.

Hence, there are two kinds of divided property: direct property and («*dominium directum*») and indirect property or dependent one («*dominium utile*»).

As A. Venediktov explains this terminology was elaborated by glossators who as a consequence of definitions and norms search in Roman law that could be used for feudatory relationship that was unknown in Roman law. Thus, glossators according to Roman method, "from the suit to substantive right " looked for the suits that could ground the acknowledgement of substantive rights corresponding these suits in Roman sources[28]. To this purpose glossators used analogous to replevin (*rei vindicatio utilis)* that was given by analogy with (*utiliter*) the possessor to a person whom Roman lawyers didn't plead the possessor according to strict law (*stricto jure*), but who, by rights, could be put in a position of the possessor or only recognize that person's right for a thing that belongs to another person, so extensional that it approximated to law of property (e.g. according to emphyteuta and superficiary)[29]. These cases glossators combined into *rei vindicatio utilis* and created doctrine of *dominium utile* as about relevance to the thing at the hands of a person who has right of suit in reference to it - *rei vindicatio utilis*. Such a right of suit they recognized not only for emphyteuta and superficiary but also for a vassal (*feudatarius*) that were denoted "*domini utile."*[30] However, direct possessors were denoted as "*domini directi.*" They include possesors who were burdened with emphyteusis and superficies and also land owners that were transferred to benefice or chivalry. Hence, the doctrine of divided property (*dominium divisum*) originated.

Depending on the grounds for real property rights (benefice or feud, or, or emphyteusis) landowners are called direct possessors or individual owners, land users, feudatories, perpetual colons and emphyteuta's or colons (§ 188 ch. VII p. II Galician Code).

The rights and duties of direct and indirect possessors are also divided in detail. Thus, it is stated in the Code that the rights of direct and indirect possession are coordinated in such a way that everyone can use his right on the discretion and preserving the right of every possessor (§ 196 ch. VII p. II Galician Code).

A direct possessor has the right to forbid an indirect possessor to reduce or change the thing if it excludes or hinders from realization of his or her own right (§ 198 ch. VII p. II Galician Code).

The main right of a direct possessor is priority right to get canon or annual payment for perpetual and inheritance lease or emphyteusis and demand to pay debts that according to the right can't be increased and be retrieved in the form of chose that doesn't cover land or in the form of any other movable property, things personal (§ 200 ch. VII p. II Galician Code).

If perpetual colons don't pay rent for one year, a direct possessor is entitled to demand in the court to use land and get fruits or put up for auction (§ 205 ch. VII p. II Galician Code).

Among the duties of direct possessor are the following: provide a guarantee against eviction, reimburse created improvements to indirect possessor and also to his legal successor as well as to possessor in good faith (§ 211 ch. VII p. II Galician Code).

Emphyteuta is entitled to dispossession without a possessor's consent or is entitled to impawn or give up a thing (§ 207 ch. VII p. II The Code). Superficiary is also entitled to use and get fruits from what is on the land surface, e.g. from trees, plants, buildings and also from his part of the treasure found on the land surface. But dug out treasure or any benefit from bowels of the land belong to the direct possessor (§ 214 ch. VII p. II Galician Code).

Indirect possessor is imposed all usual and special burdens connected with the land, including payment of taxes, tithe and other payments for estate provided by real estate registers (§ 216 ch. VII p. II Galician Code).

The code defines the dominant feature of divided property – indirect possession must be separated from the substance of a thing itself or annual payment doesn't mean divided property presence (§ 216 ch. VII p. II Galician Code).

5. Succession law

Taken by the Code Roman constructions of inheritance were taken by the Code. The provisions about legacies, substitution, hereditary contract, legal portion. The Roman construction of hereditary transmission was borrowed: heir is presumed to be a person who had died before testator and couldn't transfer a right to his heirs not accepted succession right (§ 329 ch. X p. II Galician Code)

The Roman construction of succession law "*substitutio*", i.e. substitution was implemented into the Code: after appointment by the testator the first heir the other heirs can be added

[28] VENEDIKTOV, A., Selected works on civil law. Vol. II. Moscow, 2004, Available: http://library.brstu.ru/static/bd/klassika_ros_civilizac/Elib/1662.html
[29] Ibid.
[30] Ibid.

that can inherit instead of the first heir's death in a particular case (§ 393 ch. XII p. II Galician Code)[31].

A separate chapter of the Code is dedicated to provisions about legacies (p. II ch. XIII). Testamentary prescriptions that included legacy preserved in the Code its Roman title "codicillus". According to included legacy individually leave property (a wedding dress, a house, land) and also a thing of some kind (one hundred sheep, one hundred wine amphoras, one hundred pounds of silk). The latter heir must give legatee taking into account average cost of a thing. Legacy is invalid if the thing at the moment of legacy assignment is owned by legatee.

But if legatee bought things that were the objects of legacy after assignment their cost must be reimbursed. The Roman constructions of heir appointment under certain condition, making of hereditary contract and also the right for legal portion are provided by the Code.

6. The law of obligations

The Roman classification of contracts in the field of law of obligation was preserved by the Code. But as in its original variant of codification (*Codex Theresianus* 1753-1766), the general concept "agreement " - "*pactum*" is primarily put forward that was divided into pacts in the narrow sense and contracts. It corresponded to the conception suggested by Ch. Wolff, according to this conception pacts in the narrow sense corresponded to innominate contracts[32].

However, contractual obligations classification of pacts in a general sense of agreements, contracts (denominated contracts) and pacts in the narrow sense (as innominate contracts) explanation exclusion from the draft, and also corresponding definitions of contracts and pacts exclusion didn't influence the general conception of the agreement in the Code.

The text of codification address shows that Viennese lawyers reflected Roman constructions of contracts and rules concerning them.

Thus, a special kind of storage – sequester is provided according to which the third party is turned in for storage the thing that is subject of the dispute[33]. Borrowed from Roman law such a judicial construction as "precarium", i.e. transfer of the thing without defining the term, limits and way of using the thing according to which the possessor can demand to return the thing at any time in contrast to commodate (§ 84 ch. II p. III Galician Code).

As regards the sale contract (*pacta adjecta*) additional agreements (*pactum de retrovendendo*, *pactum de retroemendo*, *pactum experientiae, in diem addicto etc.).* Also *aestimatum* (*contractus aestimatorius*) according to which a person who takes the thing for a price is obliged to pay the seller a certain amount of money or return the thing is provided. Defence of a buyer and lessee from eviction and things defects received under the contract of sale or contract of lease is stipulated. Prohibition of loans at interest for underaged (senatus consultum Macedonianum in Roman law): loans for underaged are considered invalid and null without parents` consent on condition that loaned money is repaid after the antecessor (§ 261 ch. VIII p. III CC).

Although Galicia has never had an outlet to the sea, the provisions of Roman a loan for the purposes of a voyage, (*faenus nauticum*) were recepted to the Code: if money for voyage is loaned with high interest and if a ship gets into trouble, the creditor is also lost (§ 273 ch. VIII p. III CC). It means that the risk according to such a contract is on the creditor[34]. Also despite the absence of an outlet to the sea in the Habsburg Monarchy of that time, Roman provisions of Rhodian sea law (*Lex Rhodia de jactu*) about thrown out into the sea found its reflection in the Code according to which damages from the loss of thing that were thrown out into the sea during the storm are distributed among all the persons who had goods on board the ship (§ 392 ch. XII p. III Galician Code). In the Code these provisions were even expanded: damages are proportionally distributed among all the passengers and a ship owner even when the ship is raided by pirates and then is bought for a price (§ 391 ch. XII p. III Galician Code).

Roman *quasi ex contractu* obligations – looking after another man's affairs (*negotiorum gestio*) and unjust enrichment (*condictio*) – are called presumed contracts in the Code (ch. XII p. III CC). The Code took Roman provisions about obligations as if from delicts (*obligationes quasi ex delicto*) (§ 476, 478 ch. XIV p. III Galician Code). As in Roman law, responsibility of innkeepers, sailors and ferrymen for their services effect if these actions damage travellers. Residents of the houses responsibility for poured out and thrown out from a window is also provided in the Code[35]. But responsibility in case some sign boards that were hung or put can cause damage is excluded from the Code and this fact is pointed out in § 479 ch. XIV p. III. Such a direct warning can be explained by the fact that the text of the Code was addressed to a person knowledgeable in Roman law who allegedly expects to have such a kind of Roman obligation in the Code.

Here, it should be noted that reception of Roman law and use of Latin terminology is a common tendency of that epoch. Thus, Maximilian Civil Code with the Latin title "Maximilianeus Bavaricus Civilis" that was composed according to pandect system in German contained a great amount of Latin terms[36]. One could say the same thing about Prussian codification that got the title of the code project of Frederick the Great with the Latin title Corpus Juris Fridericianum. In the preamble to the final provisions the codifiers noted that they had to preserve most of the Latin terms in the Frederick Code that was primarily explained by the fact that Prussian lawyers and judges got used to

[31] Compare: D. 26.6; Gai II. 174-184.

[32] POLDNIKOV, D., Doctrines of contract law in Western Europe XI-XVIII. Moscow, 2012, c. 352.

[33] Compare: D.50,16,110 (Modest. *6 pandect*.): «Sequester» dicitur, apud quem plures eandem rem, de qua controversia est, deposuerunt: dictus ab eo, quod occurrenti aut quasi sequenti eos qui contendunt committitur.

[34] Compare: D. 22,2,3 (Modest. *4. regul.*): In nautica pecunia ex eo die periculum spectat creditorem, ex quo navem navigare conveniat.

[35] Compare: D. 9,3,1 pr. (Ulp.23 *ad ed*.): Praetor ait de his, qui deiecerint vel effuderint: "Unde in eum locum, quo volgo iter fiet vel in quo consistetur, deiectum vel effusum quid erit, quantum ex ea re damnum datum factumve erit, in eum, qui ibi habitaverit, in duplum iudicium dabo".

[36] ZAKHVATAYEV, V.: op. cit., p. 27.

these terms and, secondly, these terms were difficult and here and there impossible to briefly convey by means of German [37].

7. Language and style of the Code

The style of presentation of legal norms and definitions is compressed enough but the wording of legal constructions and legal concepts focus on a person with substantial knowledge of Roman law. Certain wordings of the Code borrowed from the text of the Digest. One could claim that even separate definitions of the Code reproduce the text of the Corpus juris civilis provisions. W. Brauneder indicated that according to the principles of codification elaborated of Maria Theresa's Code, the Galician Code as a logical construction was to be created. Roman law was to be the material of making laws only in case provincial or local law turns out to be non-effective [38]. The scientist considers the Code to have originated as "logical construct without the intention to take specific local law" [39]. Also Ch. Neschwara pointed out that "the Code wasn't attached to some provincial law and didn't reckon on to customary law inherited from the past and also didn't contain the traditions of *ius commune*. The Code levelled out all this legal bulk, modified its contents and attached to new constructions on the basis of available projects to the homogeneous text of the law." [40] Such a character of the Civil Code for the Eastern Galicia represents this act of legislation as a result of rational, abstract-logical structure created for the action outside space and time. It is believed that exactly like this variant the Code could become in consequence of direct reception of Roman private law provisions. Mentioned above features of the Civil Code for the Eastern Galicia correspond to German tradition of law: as R. Cabrillak stated, the difference between German tradition and French tradition is that the Code is perceived as legal technical creation [41].

The language of one of the Code editions is the language of Roman law sources – Latin, i.e. the language that is not addressed to a person of a particular nationality and in general to a well-educated person of Europe of that time.

It can be explained as follows. Outlook and professional level of Austrian lawyers of that time were being formed under the influence of classical education that prevailed in European space of that time. Austria belonged to the countries with strong tradition of Roman and canon law where high expert juridical culture crystallized out and professional role of public legal experts and lawyers socially took hold. Thus, career of a lawyer provided high level of education: eight years of grammar school after that judicial studies that result in Doctor's degree [42].Therefore education based on learning classical languages primarily Latin. At the university founded by Joseph II in Lviv in 1784 (instead of liquidated together with order of the Jesuits Jesuit collegium) Latin was the language of teaching [43]. But the emperor Joseph II looked at grammar school and higher education in a pragmatic way. Educated absolutism considered grammar schools and higher schools not only to be the center of general education but first of all to be the institutions for training of conscientious civil servants, doctors and priests.

Joseph II for good and all established the German language of teaching that changed Latin. Further reforms that took place during the rule of Leopold II and Franz II (at the time of instituting the Code) were greatly under the influence of neohumanism of that time. Neohumanism established the type of grammar school where special attention was paid not only to learning classical languages but also classical philosophy [44]. Such educational processes took place at the time of the Code creation. Thus, the Code was meant for a person who got classical education, was good at classical languages, understood the values of the ancient world, explored the sources of Roman law in the original language.

Creation of Latin text of the Code also corresponds to the process of education and science in the Austrian Empire on the whole and scientific and legislative activities of the Code creator– Martini, in particular, and the overwhelming majority of his works were created in Latin. A famous Roman law textbook of that time "*Ordo historiae juris civilis*", that was printed in several editions, Martini wrote in the Latin language [45]. At the same time Martini was a famous professor of natural law, the sub-faculty of which he headed at the University of Vienna just as the creator of mentioned above *Corpus Juris Fridericianu*m – Samuel von Cocceji also was the author of a famous work about created system of natural and Roman law "Novum systema jurisprudentiae et romanae" published in 1740) [46]. It is indicated in the preamble of the Code that it is to be translated into German and Polish. German version of the Code became widespread and after a while formed the basis of the ABGB project.

8. Conclusion

Thus, one may conclude that the Civil Code for the Eastern Galicia is a legal monument that characterizes codification processes in the Habsburg Monarchy on the whole. The Code itself is a completed result of codification work in the Austrian Empire in the second part of the XVIII century and can be interesting to explore considering the combination of Roman law reception, some institutions of feudal legal relationship, realization of natural law ideas. The present article doesn't claim to be a complete analysis of the Code but only an attempt at designation of a possible field of research.

[37] Ibid., p. 39.
[38] BRAUNEDER, W., The Civil Code of Galicia is the first codification of private law in Europe, In: Civil Code of Eastern Galicia 1797 = Codex civilis pro Galicia Orientali MDCCXCVII. Odesa, 2013, p. 20.
[39] Ibid., c. 21.
[40] NESCHWARA, Ch., Preface. In: Civil Code of Galicia. Ivano-Frankivsk, 2017, p. 26.
[41] CABRILLAC, R., The Codifications. Moscow, 2007, p. 340.
[42] PAKHOLKIV, S., The Ukrainian intellectuals in Habsburg Galicia: educated strata and emancipation of the nation. Lviv, 2014, p. 56.
[43] Ibid., p. 66.
[44] Ibid., p. p. 85, 86.
[45] VOLPI, A., Sulla vita e sulle opere del barone Carlo Antonio Martini. Discurso pronunziato nella grand'aula dell'imperiale regia Universitŕ di Pavia del solenne aprimento del anno scolastico MDCCCXXX-MDCCCXXXI. Milano, 1833, p. 57.
[46] ZAKHVATAYEV, V.: op. cit., c. 33.

Prosecutor in Criminal Cassation Proceedings of the Russian Empire

*Vasil Gorbachov**

Abstract

The article deals with the normative regulation and practice of participation of the Prosecutor's office in cassation proceedings in the Russian Empire after the judicial and military-judicial reforms of 1864 and 1867. The author analyzes the Prosecutor's office's right to appeal against court sentences in cassation and its restriction in the military department. The article considers the practice of making cassation protests by the Prosecutor's office, their effectiveness, as well as the existing shortcomings in this activity. The author also analyzed the issues of the participation of ober-prosecutors in the consideration of cassation protests and complaints in the Governing Senate. The article uses historical-legal, formal-legal, comparative-legal, statistical and other special research methods.

Keywords: *judicial reform of 1864; military-judicial reform of 1867; prosecutor's office; cassation protest; ober-prosecutor; conclusion; cassation proceedings; Governing Senate.*

1. Introduction

In 1864 and 1867, judicial and military-judicial reforms were carried out in the Russian Empire, which radically changed the entire judicial system. The new legal institution was the cassation review of court decisions, which replaced the revision procedure. This subject has not been covered properly in the modern scientific literature. In this regard, the purpose of the article is to analyze the normative regulation and practice of participation of the Prosecutor's office in cassation proceedings in the Russian Empire after the judicial and military-judicial reform.

In the pre-reform period, the checking of judicial decisions was carried out in the revision and appeal procedure. The revision procedure meant that certain categories of criminal cases on the most serious crimes, in accordance with the requirement of the law, had to be sent for revision to the provincial chamber of the criminal court and the Governing Senate without complaints or protests. In such cases, complaints against the final decisions of the criminal chambers were not allowed. In practice, about 40% of cases were sent to the criminal chamber for revision.[1] The rest of the cases, which were not subject to revision, were checked only based on complaints of the defendants and protests of prosecutors.[2]

In the military department, in contrast to the civilian department, all sentences of military courts were subject to revision. Cases were audited by military commanders in the order of subordination within the limits of the authority given to them, and for a certain category of cases – by the General auditor of the war Ministry.[3]

The prosecutor's office did not take part in the revision of sentences; however, it checked the decisions of the chambers of the criminal court, made by them as a result of the checking of cases, and had the right to make protests against them.

The revision court (as well as the appeal court) checked the case on its merits and, if canceling the sentence, had the right to issue a new sentence itself. As a result of the judicial reform of 1864 and the military-judicial reform of 1867, the revision procedure for reviewing judicial decisions was canceled both in the civilian and military departments. Instead, a new cassation procedure was established, which was borrowed from French law.[4] Unlike the revision, the cassation check of court decisions was carried out only based on complaints and protests; the cassation court did not check the merits of the case, and when the

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1 MIRONOV, B. N., *Sotsial'naya istoriya Rossii perioda imperii (XVIII–nachalo XX v.); v 2 t. [Social history of Russia during the Empire period of the empire (XVIII – early XX century) (Vols 1–2)]*, 2nd ed. Vol. 2. Saint Petersburg, 2000, p. 53.

2 *Svod zakonov Rossiyskoy imperii :* v 15 t. [*Code of laws of the Russian Empire* (Vols 1–15)]. Saint Petersburg, 1857, vol. 1, part 2, book 3, art. 38, 92, 93, 364, pp. 9, 16, 62; vol. 2, part 1, art. 2392, pp. 477–478; vol. 15, book 2, art. 364, 365, 462, 471, pp. 67, 87, 88.

3 PLOSHINSKY, A., *Russkoye voyenno-ugolovnoye sudoustroystvo i sudoproizvodstvo dlya prakticheskogo primeneniya [Russian military-criminal court system and legal proceedings for practical application]*. Saint Petersburg, 1854, pp. 126-128, 142.

4 SHIRKOV, V., *Ocherk obshchikh osnovaniy nashego ugolovnogo protsessa po sravneniyu s inostrannymi zakonodatel'stvami.* V: *Sudebnyye ustavy 20 noyabrya 1864 g. za pyat'desyat let: v 3 t. [Essay on the general foundations of our criminal process in comparison with foreign legislation.* In: *Judicial statutes of November 20, 1864 for fifty years (Vols 1–3)],* vol. 1. Petrograd, 1914, pp. 676–677; BUTSKOVSKY, N. A., *Ocherki sudebnykh poryadkov po ustavam 20 noyabrya 1864 goda [Essays on judicial orders according to the statutes of November 20, 1864].* Saint Petersburg, 1874, p. 11; ERLIKH, Ye. Yu., O kassatsii opravdatel'nykh prigovorov [On the cassation of acquittals]. In: *Pravo [Law],* Nr. 21, 1914, column 1665.

sentence was canceled, it could only direct the case for a new trial.[5]

The merits of the case (that is, the factual circumstances that served as the basis for the court's conclusion about the guilt of the defendant) were not subject to review and discussion in cassation procedure.[6] The cassation instance checked only the legal side of the case, compliance of the law and the procedural order of consideration of the case.[7] The cassation court did not check the correctness of the jury's decision, it did not have the right to consider the question of the guilt or innocence of the defendant; therefore, it could not acquit or convict him, but had to resolve only the question of compliance of the forms and rites of legal proceedings or the correctness of the application and interpretation of the law.[8,9]

The cassation instance for final sentences of justices of the peace for minor crimes was the Congress of justices of the peace, and in some areas – the district court, which served as the Congress of justices of the peace. The cassation instance for the sentences of the Congresses of justices of the peace and General courts was the Governing Senate, which acted as the Supreme court of cassation. However, in some judicial districts for cases of world jurisdiction the cassation instance instead of the Senate was the judicial chamber.

In the military and naval departments, the court of cassation was the Main military court and the Main naval court. However, in places far from these courts, in particularly important cases regarding violation of military discipline that required urgent punishment of the perpetrators, a special presence could be established at the location of the military district court or the permanent residence of the chief commander of the port to consider possible protests of prosecutors and complaints of defendants. It was vested with the same authority that belonged to the Main Military (Naval) court. The special presence initially included the prosecutor. However, in the early 1880 s, the law excluded the prosecutor from this presence. This was motivated by the fact that the Prosecutor often directly participated in the consideration of the case on the merits; therefore, when considering the same case in a special presence, he, being part of it, was "a judge in his own case".[10]

2. The right to appeal against court decisions in cassation and its restriction

Protests and appeals in cassation procedure could only be filed against the final sentences of justices of the peace, their congresses, district courts and judicial chambers, which could not be appealed on appeal. At the same time, it was determined that anyone who did not appeal or protest against the non-final judgment of the district court, did not have the right to petition for the cancellation of the final judgment of the judicial chamber in the same case, which confirmed the judgment of the first instance court. The drafters of judicial statutes proceeded from the fact that those who did not use the right of appeal, thereby acknowledged that the sentence was correct and had no right to refute it after approval by the judicial chamber. If the judicial chamber changed the sentence of the district court, then all the parties involved in the case, including those who had not previously filed an appeal, could ask for the cancellation of its decision.[11]

The reasons for the cancellation of final sentences in cassation were: 1) obvious violation of the direct meaning of the law and its incorrect interpretation in determining the crime or type of punishment; 2) violation of essential rites and forms of legal proceedings; 3) violation of the limits of jurisdiction or authority granted by law to judicial discretion (Statute of criminal proceedings, article 912).[12] In this regard, the Prosecutor's office did not have the right to make cassation protests against the court's decisions on the merits of the case[13] and the right to protest against the part of the sentence that was decided on the internal conviction of the judges. If there were such protests, the Senate and the Chief military court left them without satisfaction.[14]

In the civilian department the right of the Prosecutor's office to make cassation complaints against the final sentences of the magistrates' and general courts were not limited. However, in the military department, legislation provided for the possibility of such a restriction. In wartime, in emergency circumstances that necessitated the immediate execution of punishment, the commander-in-chief was granted the right not to give the case directions in cassation. In practice, this right was realized in

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[5] SHIRKOV, 1914, p. 677.

[6] FON-REZON, A. K., O granitsakh kassatsionnogo rassmotreniya v ugolovnom sudoproizvodstve [On the boundaries of cassation consideration in criminal proceedings]. In: *Zhurnal ministerstva yustitsii [Journal of the Ministry of Justice],* 1902, Nr. 1, p. 109; Nr. 2, p. 47.

[7] STAMATOV, P., Otmena okonchatel'nykh protsessual'nykh opredeleniy v poryadke nadzora [Cancellation of final procedural determinations in the order of supervision]. In: *Zhurnal grazhdanskogo i ugolovnogo prava [Journal of civil and criminal law]*, book 6, 1893, p. 71.

[8] BUTSKOVSKY, 1874, p. 30; *Ob"yasnitel'naya zapiska k proyektu Ustava ugolovnogo sudoproizvodstva [Explanatory note to the draft Statute of Criminal Proceedings].* [Saint Petersburg, 1863], pp. 451, 453.

[9] Gosudarstvennyy arkhiv Rossiyskoy Federatsii (GARF) [State archive of the Russian Federation (SARF)], fund 564, inventory 1, case 541, sheet 7-reverse side.

[10] *Ustav voyenno-sudebnyy, raz"yasnennyy i dopolnennyy motivami, posluzhivshimi yego osnovaniyem / sost. N. Martynov. [The Military-Judicial Statute, clarified and supplemented by the motives that served as its basis]*. Comp. by N. MARTYNOV. 6th ed. Saint Petersburg, 1894, p. 20.

[11] *Ob"yasnitel'naya zapiska [Explanatory note],* [1863], p. 442.

[12] Ustav ugolovnogo sudoproizvodstva (Vysochayshe utverzhden 20 noyabrya 1864 goda) [The Statute of Criminal Proceedings (Highest approved on November 20, 1864)]. In: *Polnoye sobraniye zakonov Rossiyskoy imperii (PSZRI)) [The Complete collection of laws of the Russian Empire (CCLRE)].* Collection 2nd. Vol. 39, part 2. Saint Petersburg, 1867, Nr. 41476, p. 278.

[13] *Voyennyy sbornik [Military collection],* Nr. 10, section 2, 1869, p. 175; Nr. 7, section 2, 1870, pp. 65-66.

[14] *Resheniya ugolovnogo kassatsionnogo departamenta Pravitel'stvuyushchego Senata za 1867 god [Decisions of the Criminal cassation department of the Governing Senate for 1867].* Saint Petersburg, [1868], pp. 21, 278; *Resheniya ugolovnogo kassatsionnogo departamenta Pravitel'stvuyushchego Senata za 1873 god. Vtoroye polugodiye [Decisions of the Criminal cassation department of the Governing Senate for 1873. Second half-year]*. Saint Petersburg, [1873], pp. 1050, 1299; *Voyennyy sbornik [Military collection],* Nr. 8, section 2, 1870, p. 204; Nr. 11, section 2, 1871, p. 76; Nr. 4, section 2, 1873, pp. 141-142.

1876 in one particular case and in 1878, when in the Balkan Peninsula, the commander-in-chief ordered the chiefs of some detachments to withdraw all cases from the cassation procedure and deprived the Prosecutor's office and the defendants of the right to appeal.[15] In the future, the possibility of limiting the cassation complaints against military court sentences was expanded. The law of April 8, 1879 gave the Governor-General the right to reject the Prosecutor's protest and finally confirm the sentence of the military court in cases in which persons of the civilian department were put on this court.[16] The same right of Governors-General not to allow the cassation of a sentence against civilians in cases sent to a military court for consideration under the laws of wartime was provided for by the "Regulations on measures for the protection of state order and public peace" of 14 August 1881 and the law of 18 June 1892 "About the areas declared to be in martial law".[17]

In order to speed up the proceedings in cases in the early 1880 s, the press suggested that the right not to skip protests and complaints should be granted directly to the courts, which could not send to the Main military court complaints on the merits of the case and protests for minor violations of the forms and rites of legal proceedings.[18]

In 1885, a new edition of the Military-judicial statute expanded the possibility for canceling the cassation review of court decisions. The commander-in-chief was given the right to cancel the filing of cassation complaints and protests against the sentences of the corps courts and the army rear court not only in specific individual cases, but in general in certain categories of cases.[19] However, the law of November 11, 1899[20] retained only the right not to give motion to complaints and protests already filed in specific cases.[21] In 1905, the right not to pass the cassation complaints and protests was extended to cases under the jurisdiction of the naval courts.[22]

The right to cancel cassation proceedings was a convenient tool for fighting the revolutionary movement, and it was used mainly in relation to the complaints of convicts. Even the chief military Prosecutor V. P. Pavlov[23] was in favor of using this right. Justifying this practice, he declared in the first State Duma that the existing laws did not give the Military Ministry the authority to invade the right of governors-general to eliminate cassation proceedings.[24]

The right to cancel cassation proceedings significantly limited the ability of the Prosecutor's office to respond to illegal sentences of military courts. A former assistant military prosecutor of the Vilna military-district court, R. R. von Raupach, recalled one "invulnerable" military judge whose wrongful sentences were difficult to protest, since the Governor-General used his right and did not allow cassation complaints and protests to the Main military court. In this regard, in one of the cases, there were attempts to achieve, even with the help of members of the imperial house, that the Governor-General skip the cassation appeal and the prosecutor's protest filed in the case.[25]

At the same time, as explained in 1910 by the Main military court, the cassation proceedings could not be canceled on acquittals[26]; and it was in the interests of the prosecution.

3. The practice of the cassation protests, its effectiveness and disadvantages

Initially, cassation protests against court sentences were relatively rare. For example, according to information from the Ministry of Justice of November 5, 1889, over the past 5 years, prosecutors lodged 695 protests, that is, an average of 139 protests per year. At the same time, in many courts only one protest was lodged in a year, in some courts 1–3 protests were lodged in all 5 years, and there were no protests at all in one court in 5 years.[27] However, in the future, the number of protests increased significantly. For example, in 1888-1892, the Governing Senate considered 1220 protests, that is, an average of 244 protests per year[28], and in 1907-1910 – 1233 protests,

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15 SHENDZIKOVSKY, I., *O voyennom sude v voyennoye vremya (polevom voyennom sude) [About the military court in wartime (field military court)].* Saint Petersburg, 1892, pp. 49-50, 104.

16 *PSZRI [CCLRE].* Coll. 2nd. Vol. 54, part 1. Saint Petersburg, 1881, Nr. 59491, p. 304.

17 *PSZRI [CCLRE].* Coll. 3rd. Vol. 1. Saint Petersburg, 1885, Nr. 350, art. 19, pp. 263-264; Vol. 12. 1895, Nr. 8757, art. 19, point 10, p. 482.

18 ***, Zametka o nashem voyennom sudoproizvodstve [A note on our military legal proceedings]. In: *Voyennyy sbornik [Military collection],* Nr. 10, 1882, p. 286.

19 Otchet Glavnogo voyenno-sudnogo upravleniya za 1885 god [Report of the Main Military Judicial Directorate for 1885]. In: *Vsepoddanneyshiy otchet voyennogo ministerstva za 1885 god [The report of the war Ministry for 1885].* Saint Petersburg, 1887, p. 26.

20 *PSZRI [CCLRE].* Coll. 3rd. Vol. 19, part 1. Saint Petersburg, 1902, Nr. 17718, p. 1132.

21 Otchet Glavnogo voyenno-sudnogo upravleniya za 1899 god [Report of the Main Military Judicial Directorate for 1899]. In: *Vsepoddanneyshiy otchet o deystviyakh voyennogo ministerstva za 1899 god [The report on the actions of the war Ministry for 1899].* Saint Petersburg, 1901, p. 35.

22 POLYANSKY, N. N., *Tsarskiye voyennyye sudy v bor'be s revolyutsiyey 1905–1907 g.g. [Tsarist military courts in the fight against the revolution of 1905–1907].* Moscow, 1958, pp. 25-26.

23 GERNET, M. N., *Istoriya tsarskoy tyur'my : v 4 t. [History of the Tsar's prison (Vols 1–4)],* vol. 4. Moscow, 1954, p. 88.

24 VARSHAVSKY, S., *Zhizn' i trudy pervoy Gosudarstvennoy Dumy [Life and works of the first State Duma].* Moscow, 1907, p. 123.

25 FON RAUPACH, R. R., *Facies Hippocratica (Lik umirayushchego) : Vospominaniya chlena Chrezvychaynoy Sledstvennoy Komissii 1917 goda / red. i komment. S. A. MAN'KOVA [Facies Hippocratica (The face of the dying): Memoirs of a member of the Extraordinary Commission of Inquiry in 1917. Ed. and a comment by S. A. MANKOV].* Saint Petersburg, 2007, pp. 51, 56.

26 SHVEIKOVSKY, P. A., *Ustav voyenno-sudebnyy (Sv. voyen. post. 1869 g., kn. XXIV, izd. 4) [The Military-Judicial Statute (Code of military regulations of 1869, book XXIV, ed. 4)]. Saint Petersburg, 1914, p. 1224.*

27 *Sbornik tsirkulyarov i instruktsiy ministerstva yustitsii (s 1877 po 1914 g.). Sekretnyye [Collection of circulars and instructions of the Ministry of Justice (from 1877 to 1914). Secret.].* Petrograd, 1914, p. 68.

28 *Vsepoddanneyshiy otchet ministra yustitsii za 1888–1889 gody [The report of the Minister of Justice for the years 1888–1889].* Saint Petersburg, 1891, p. 96; *Vsepoddanneyshiy otchet ministra yustitsii za 1890–1891 gody [The report of the Minister of Justice for the years 1890–1891].* Saint Petersburg, 1893, pp. 110-111; *Vsepoddanneyshiy otchet ministra yustitsii za 1892 god [The report of the Minister of Justice for 1892].* Saint Petersburg, 1893, p. 93.

that is, an average of 308 protests per year.[29] At the same time, the protests of the prosecutor's office among all cases submitted for consideration to the Criminal cassation department of the Senate accounted for a small percentage; for example, in 1888-1889 – only 2,6%.[30]

On cassation, the prosecutor's office appealed mainly against decisions of district courts with the participation of jurors. The sentences of the trial chambers were protested relatively rarely. In the period from 1878 to 1905, 391 cassation protests were submitted to the judgments of the judicial chambers as the first instance,[31] the largest number was in 1895 – 40;[32] later, the number of protests increased: in 1909, 56 were submitted and in 1910 – 114.[33] The number of protests against the judgments of the judicial chambers as an appellate instance was even less, and in 1878-1879 there were none at all.[34] During 1878-1905, 347 such protests were made,[35] and the largest number was in 1897 – 48.[36]

The Senate satisfied about half of the cassation protests of prosecutors, which was significantly more than the proportion of satisfied complaints of convicts. For example, in 1888-1892, 48.8% of the Prosecutor's office's protests and only 20.0% of the convicts' complaints were satisfied,[37] and in 1907-1910, 55.2% of the prosecutors' protests and only 13.6% of the convicts' complaints were satisfied.[38] In some cases, the Senate satisfied the Prosecutor's protests not reasonably enough[39] and often supported the Prosecutor's office, which protested acquittals.[40]

In the military department the cassation protests were more effective. During 1871-1912 the Main military court granted 5168 protests, which amounted to 70%.[41] And in some years, from 59.7% of protests in 1910 to 82.5% in 1903 were satisfied.[42] At the same time, the complaints of convicts and their defenders were mostly refused (in 1871-1885, only 13.6% of complaints were satisfied[43]). At the same time, in some cases, the Main military court, finding violations, left them without consequences, especially if it was in favor of the Prosecutor.[44]

In 1886, the Ober-Prosecutor of the Governing Senate A. F. Kony analyzed the reasons for the Senate's rejection of cassation protests of prosecutors for almost 5 years.[45] This analysis showed that there were numerous shortcomings in the cassation activities of the Prosecutor's office. The Senate dismissed almost half of the cassation protests against the sentences of the general courts; of these, about 90% of the protests were left without consequences, and about 10% were left without consideration.[46] The protests were left without consequences due to: 1) lack of grounds for cancellation of protested sentences – 65% of all protests that were left without satisfaction; this was due to the fact that the arguments presented in the protests did not correspond to the exact meaning of the law, the general principles of criminal law and proceeding, as well as the expla-

[29] *Sbornik statisticheskikh svedeniy Ministerstva yustitsii [The collection of statistical information of the Ministry of Justice].* Issue 23, part 1. Saint Petersburg, 1909, p. 57; Issue 24, part 1. Saint Petersburg, 1910, p. 57; Issue 25. Saint Petersburg, 1911, pp. 60-61; Issue 26. Saint Petersburg, 1912, pp. 64-65.

[30] *Vsepoddanneyshiy otchet ministra yustitsii za 1888–1889 gody [The report of the Minister of Justice for the years 1888–1889],* p. 96.

[31] Summarized information (without 1898 and 1902): 1) *Itogi russkoy ugolovnoy statistiki za 20 let (1874–1894 gg.).* Sostavleno v Statisticheskom otdelenii Ministerstva Justitsii pri blizhayshem uchastii E.N. Tarnovskogo *[Results of Russian criminal statistics for 20 years (1874–1894).* Compiled by the Statistical Department of the Ministry of Justice with the close participation of E.N. TARNOVSKY]. Saint Petersburg, 1899, pp. 244–245; 2) *Svod statisticheskikh svedeniy po delam ugolovnym, proizvodivshimsya v [1895–1905] godu v sudebnykh uchrezhdeniyakh, deystvuyushchikh na osnovanii ustavov Imperatora Aleksandra II [A set of statistical data on criminal cases conducted in [1895–1905] in judicial institutions operating on the basis of the statutes of Emperor Alexander II].* In 3 parts. Part 1. Saint Petersburg, [1899–1908].

[32] *Svod statisticheskikh svedeniy po delam ugolovnym, proizvodivshimsya v 1895 godu [A set of statistical data on criminal cases conducted in 1895].* In 3 parts. Saint Petersburg, 1899. Part 1, p. 43.

[33] *Sbornik statisticheskikh svedeniy Ministerstva yustitsii [The collection of statistical information of the Ministry of Justice].* Issue 25, p. 93; Issue 26, p. 95.

[34] *Itogi russkoy ugolovnoy statistiki za 20 let [Results of Russian criminal statistics for 20 years],* p. 249.

[35] The calculation is based on the sources indicated in footnote 31.

[36] *Svod statisticheskikh svedeniy po delam ugolovnym, proizvodivshimsya v 1897 godu [A set of statistical data on criminal cases conducted in 1897].* In 3 parts. Saint Petersburg, 1901. Part 1, p. 53.

[37] *Vsepoddanneyshiy otchet ministra yustitsii za 1888–1889 gody [The report of the Minister of Justice for the years 1888–1889],* p. 96; *Vsepoddanneyshiy otchet ministra yustitsii za 1890–1891 gody [The report of the Minister of Justice for the years 1890–1891],* pp. 110-111; *Vsepoddanneyshiy otchet ministra yustitsii za 1892 god [The report of the Minister of Justice for 1892],* p. 93.

[38] *Sbornik statisticheskikh svedeniy Ministerstva yustitsii [The collection of statistical information of the Ministry of Justice].* Issue 23, part 1, p. 57; Issue 24, part 1, p. 57; Issue 25, pp. 60–61; Issue 26, pp. 64-65.

[39] KONY, A. F., *Sobraniye sochineniy: v 8 t. [Collected works (Vols 1–8)],* vol. 2. Moscow, 1966, pp. 272, 276.

[40] NOVIKOV, V., Protsessual'nyye voprosy v praktike Senata za 1911 god [Procedural issues in the practice of the Senate for 1911]. In: *Zhurnal ugolovnogo prava i protsessa [Journal of criminal law and process]*, Nr. 1, 1912, pp. 239-240.

[41] Summarized information: 1) ILLYUSTROV, I., *Voyennyye sudy v russkoy armii za 25-letiye. 1861–1885 g.: Obzor statisticheskikh svedeniy po Vsepoddanneyshim otchetam voyennogo ministerstva [Illustrov I. Military courts in the Russian army for 25 years. 1861–1885: Survey of statistical data on the reports of the war Ministry].* Moscow, 1890, p. 136; 2) *"Perechnevyye vedomosti o dvizhenii del v Glavnom voyennom sude"*, prilozhennyye k otchetam Glavnogo voyenno-sudnogo upravleniya za 1886–1912 gody, kotoryye vklyucheny vo Vsepoddanneyshiye otchety voyennogo ministerstva za ukazannyye gody ["Sheets on the movement of cases in the Main Military Court" attached to the reports of the Main Military Judicial Directorate for 1886–1912, which are included in the reports of the war Ministry for these years].

[42] Otchet Glavnogo voyenno-sudnogo upravleniya za 1903 god [Report of the Main Military Judicial Directorate for 1903]. In: *Vsepoddanneyshiy otchet voyennogo ministerstva za 1903 god [The report of the war Ministry for 1903].* Saint Petersburg, 1905, p. 61.

[43] ILLYUSTROV, I., 1890, p. 139.

[44] SOBOLEVSKY, V. A., *Pravosudiye i pravovoy poryadok v voyskakh [Justice and legal order in the troops].* Saint Petersburg, 1882, pp. 358-359.

[45] GARF [SARF], f. 564, inv. 1, case 540, sheets 1-25.

[46] Ibidem, sheet 2-reverse side.

nations of the Criminal cassation Department of the Senate; 2) the insignificance of the violations specified in the protest (according to the law only significant violations of the judicial procedure resulted in the cancellation of sentences), – 5%; this was the result of a different assessment by the Senate and the Prosecutor's office of the value of the violations indicated in the protest; 3) the lack of evidence of violations indicated in the protests – 15% and 4) protesting against the verdict on its merits – 5%.[47] The protests were left without consideration due to the lack of the Prosecutor's office's right to protest in specific cases or the loss of this right.[48]

The actual lack of evidence of the protests was explained by the fact that the circumstances indicated as a reason for the cancellation of sentences were not reflected in the protocols of court sessions,[49] which were a procedural document confirming violations. And employees of the Prosecutor's office in many cases during the court session did not demand timely entry in the protocol of violations of their rights, which were later protested. For the first time, they belatedly pointed out these violations either in remarks on the protocol of the court session, or in a cassation protest. However, in such cases, the Senate did not take into account the violations indicated by the Prosecutor's office, since they were not certified by the protocol and could not be considered committed.[50] The Senate explained in 1882 that if the Prosecutor at the hearing did not declare the violation of his rights by the court and in a timely manner did not ask the court to restore them, then he had no right to point out in the protest the violation of these rights as the basis for canceling the court sentence.[51]

The refusal to satisfy the cassation protests due to the appeal against the merits of the sentence was considered as a mistake in the work of the Prosecutor's office, since article 5 Establishment of judicial institutions explicitly stated that the Senate did not decide the case on the merits. Mistakes in the work were also protests that the Senate left without consideration because the Prosecutor's office did not have the right to protest (for example, in cases of private prosecution, etc.) or because of the loss of such a right (for example, protests about such violations of the court that were allowed without the objections from the Prosecutor[52]). Such protests accounted for 15% of all protests that were dismissed, and showed that the Prosecutor's office employees did not understand the difference between appeal and cassation proceedings, as well as that they did not know their rights to protest sentences in cassation.[53]

The results of the analysis conducted by A. F. Kony formed the basis of a secret circular of the Minister of justice dated November 5, 1889, which was sent to the prosecutors. In this document, the Minister drew special attention of prosecutors to the importance of cassation appeal as a means of ensuring the correctness of court sentences, and to the consequent obligation of the Prosecutor's office not to leave sentences without proper appeal in cases specified in the law. In order to do this, they were asked to protect their rights "as vigilantly as possible" during the trial and not leave without formalization traces of violations that could and should have served as a reason for the cancellation of the sentence. In addition, it was suggested "to be especially careful about the correct presentation of the reasons for the cancellation of the sentence in them", when drafting protests, not to go beyond the cassation appeal and to be limited to indicating only such arguments that, according to the law, could be accepted by the cassation court as the basis for sending the case to a new trial.[54]

However, in practice, the Prosecutor's office in the future, in some cases, prepared manifestly unfounded protests, including when it did not have the right to protest, for example, when the sentence corresponded to the conclusion of the deputy Prosecutor.[55]

4. The role of the Prosecutor's office in considering cassation protests

Consideration of cassation protests and complaints was carried out with the mandatory participation of the Prosecutor's office, which gave its conclusions. In congresses of justices of the peace, protests and complaints were considered with the participation of deputy district court prosecutors, in district courts and judicial chambers (when they acted as a cassation instance) – with the participation of representatives of the relevant Prosecutor's office, and in the Criminal Cassation Department of the Governing Senate – with the participation of the Ober-Prosecutor or his deputy.

After the report of the case made by one of the senators, the Ober-Prosecutor presented his conclusion about the basis for canceling the sentence indicated in the complaint or protest. After that, if the persons involved in the case were present at the meeting, they could present their explanations at their wish. In practice, these explanations were often reduced to refuting the opinion of the Ober-Prosecutor, but he did not have the right to respond to them[56]; in cassation proceedings, debates

[47] *Sbornik tsirkulyarov [Collection of circulars].* 1914, pp. 66-67.
[48] GARF [SARF], f. 564, inv. 1, case 540, sheets 2-3, 21-22.
[49] Ibidem, sheets 5, 12-13.
[50] GARF [SARF], f. 564, inv. 1, case 540, sheet 13-reverse side.
[51] *Alfavitnyj sbornik tezisov Ugolovnogo kassatsionnogo i Obshchego sobraniya kassatsionnykh departamentov Pravitel'stvuyushchego senata 1874–1886 [Alphabetical collection of theses of the Criminal Cassation and General Meeting of the Cassation Departments of the Governing Senate 1874-1886].* Comp. by A. A. ORLOV. Samara, 1888, p. 220.
[52] GARF [SARF], f. 564, inv. 1, case 540, sheet 21-reverse side.
[53] *Sbornik tsirkulyarov [Collection of circulars],* 1914, p. 67; GARF [SARF], f. 564, inv. 1, case 540, sheets 2-reverse side, 19-19reverse side.
[54] *Sbornik tsirkulyarov [Collection of circulars],* 1914, pp. 66-68.
[55] Gosudarstvennyy arkhiv Rostovskoy oblasti [State archive of the Rostov region], f. 835, inv. 1, case 571, sheet 52.
[56] GARF [SARF], f. 564, inv. 1, case 541, sheet 5-reverse side.

on the merits of the case, i.e. adversarial objections and refutations, were not allowed.[57] This procedure was consistent with the point of view of the majority of the drafters of Judicial Statutes on the Ober-Prosecutor, as a representative of the prosecuting authority, who participated in the case only as one of the parties,[58,59] and not as an "interpreter of laws";[60] they believed that the assigning the "mentors, as interpreters of laws" for the Senate would not correspond to its dignity.[61] Following the point of view that the Ober-Prosecutor is a side of the prosecution, he would have to be one-sided,[62] always support the protests of prosecutors and seek to leave cassation complaints without consequences.[63] However, A. F. Kony noted, in reality, the Prosecutor, who presented the conclusion in cassation, did not pursue the purpose of the prosecution and often suggested leaving the protests of the local Prosecutor's office without consequences.[64]

In the Civil Cassation Department of the Senate and in the congresses of justices of the peace in criminal cases the Prosecutor did not participate as an accusing party and presented his conclusion after the end of the contest of the parties. However, the opposite procedure was adopted for cassation consideration of criminal cases in the Senate. As a result, the Ober-Prosecutor was assigned the position of a representative of the accusatory authority and "his activity on the execution of his main task - to be an interpreter of the application of the law, was paralyzed".[65]

In this regard, the Ober-Prosecutor of the Criminal Cassation Department of the Senate A. F. Kony in August 1886 initiated a petition to change this procedure.[66] As a result, on February 16, 1887, the Statute of criminal proceedings was amended and it was established that the Ober-Prosecutor gave his conclusion not after the Senator's report of the case, but after the explanations of the persons involved in the case.[67] Assessing these changes, A. F. Kony noted that they corrected the wrong point of view of the drafters of Judicial statutes about the position and tasks of the Ober-Prosecutor of the Criminal Cassation Department, accurately delineating the activities of the Prosecutor as a accuser and the Prosecutor as a legal adviser and interpreter of the law in the Congress of justices of the peace and in the court of cassation.[68]

The law mentioned very briefly about the participation of the Ober-Prosecutor's office in the proceedings in the Senate. However, in practice, such methods of activity that significantly increased the actual value of the Prosecutor's office were developed. According to the law, the Ober-prosecutors gave their conclusions verbally. However, practice has shown the expediency of preliminary drafting of written conclusions, which were sent to senators.[69] At the same time, some senators asked to send them cases without the opinions of the Ober-Prosecutor's office, considering them as an attempt to inspire them with a certain point of view for the case. In cases that were considered in the judicial sessions of the Department, not its divisions, the conclusions were previously discussed by the Ober-Prosecutor together with his deputies, printed in a typographic way and sent to the senators.[70] These conclusions set out the content of the appealed judgment, appeal or protest, included extracts from laws, previous decisions of the Senate, various circulars, extracts from the materials of the criminal case, and other background information.[71] The preparation of such conclusions required a lot of time (for example, there were conclusions of more than 50 printed pages[72]) and, according to the testimony of the Ober-Prosecutor N. M. Reinke, greatly facilitated the work of senators.[73]

If the senators agreed with the conclusion of the Ober-Prosecutor, it was a draft decision of the Senate. If the senator-rapporteur did not agree with the conclusion of the Ober-Prosecutor, he drew up his own draft decision.[74]

In the military and naval departments, two types of conclusions of the Prosecutor's office (preliminary and final) were provided for at the legislative level. The Chief Military (Naval) Prosecutor gave a preliminary written conclusion, which, together with the case, was passed on to one of the members of the Main Military (Naval) Court for report. After the report of the case by a member of the court, the Prosecutor submitted a final conclusion on the grounds for the cancellation of the sentence given in the complaint or protest. Then the persons involved in the case had the opportunity to give their explanations. However, after the above-mentioned change in this order in the Statute of criminal proceedings, a similar change was made in the Military-judicial Statute. As a result, the Chief Mil-

[57] BUTSKOVSKY, N. A., 1874, pp. 172-173.
[58] GARF [SARF], f. 564, inv. 1, case 541, sheet 5-reverse side.
[59] *Ob"yasnitel'naya zapiska [Explanatory note],* [1863], p. 453.
[60] Ibidem, pp. 451, 453.
[61] Ibidem, p. 454.
[62] GARF [SARF], f. 564, inv. 1, case 541, sheet 8-reverse side; *Ob"yasnitel'naya zapiska [Explanatory note],* [1863], p. 452.
[63] GARF [SARF], f. 564, inv. 1, case 541, sheet 5-reverse side.
[64] Ibidem, sheet 3.
[65] *Otchet po Gosudarstvennomu Sovetu za 1887 god [Report on the State Council for 1887].* Saint Petersburg, 1888, pp. 692-693.
[66] GARF [SARF], f. 564, inv. 1, case 541, sheets 1-11.
[67] *PSZRI [CCLRE].* Coll. 3rd. Vol. 7. Saint Petersburg, 1889, Nr. 4232, p. 81.
[68] KONY, A. F., *Vvedeniye k Sistematicheskomu kommentariyu U. U. S. [Introduction to the Systematic Commentary of S. C. P.].* Moscow, 1913, p. 22.
[69] REINKE, N., *Kassatsionnaya instantsiya. V: Sudebnyye ustavy 20 noyabrya 1864 g. za pyat'desyat let: v 3 t. [The Cassation Instance. In: Judicial statutes of November 20, 1864 for fifty years (Vols 1-3)],* vol. 2. Petrograd, 1914, pp. 319-320, 323-324.
[70] Ibidem, p. 324.
[71] GARF [SARF], f. 564, inv. 1, case 582, sheets 1–160.
[72] Ibidem, sheets 44-69.
[73] REINKE, N., 1914, pp. 321, 324.
[74] Ibidem, N., p. 321.

itary Prosecutor began to give his final conclusion after the submission of explanations by the persons involved in the case.

The specified procedure for giving a written and verbal conclusions of the military prosecutor was established not accidentally. When checking the case, the cassation instance assessed only the issue of compliance with the law. And most of the members of the Main Military Court were military and did not have the legal experience that the senators of the civil department possessed, who were able to quickly assess the arguments of the verbal conclusion of the Ober-Prosecutor. Therefore, in order to clarify all issues concerning the legal side of the case, it was decided at the Chief Military Prosecutor to place the duty to make preliminary written conclusions, which would help the members of the court to clarify the circumstances of the case in advance more thoroughly, and not just before the decision on the verbal conclusion of the Prosecutor.[75]

5. Some issues of personnel support of the Ober-Prosecutor's office

The staff of the Ober-Prosecutor's office of the Criminal Cassation Department of the Governing Senate was small. The temporary state of 1865 provided for the Ober-Prosecutor and 2 of his deputies.[76] In the future, the staff of the Ober-Prosecutor's deputies increased or decreased depending on the number of cases received, and in 1913 their staff was increased to 13.[77]

With such a small staff, the burden on the Ober-prosecutors and their deputies in preparing the conclusions was large. For example, in 1901, there were 162 judicial sessions of the Department and its divisions, in which 6593 cases were considered, that is, an average of 41 cases in one session.[78]

The activity of the Ober-Prosecutor's office was fruitful. In the first post-reform years, the Ober-Prosecutors in their conclusions developed almost all the main issues of the new judicial proceedings.[79] In the mid-1880s, contemporaries noted that the composition of the Ober-Prosecutor's supervision in the Senate was brilliant. All lawyers knew the names of N. A. Neklyudov, A. F. Kony, K. N. Antsiferov, V. K. Sluchevsky, I. Ya. Foynitsky and some other scientifically educated and experienced lawyers.[80]

Until the early 1890s, the Ober-Prosecutors asserted their independence when giving conclusions. A. F. Kony recalled that in the Senate he had to fight a difficult battle and achieve a just and humane result only through great efforts. He also claimed that before N. V. Muravyov became the Minister of justice, there was no servility of the Senate to the Ministry of justice.[81] This was evidenced, for example, by one case of a religious crime, in which the St. Petersburg Judicial Chamber changed the sentence of the district court, softening the qualification of the actions of the convicted person. The Prosecutor of this Judicial Chamber Kuzminsky informed the Ober-Prosecutor A. F. Kony "for guidance" that the issue of protesting the sentence of the Judicial Chamber has been agreed with the Minister of Justice N. A. Manasein. To this A. F. Kony, who had a different point of view about the case, replied that he gives a conclusion before the Senate, guided solely by his own conviction and the meaning of the law; therefore, the view of the Minister of Justice is not mandatory for him. He recommended Kuzminsky not to send a protest and warned that in the Senate he would give a conclusion on leaving the protest without satisfaction. However, the protest still went to the Senate. By this time, the case and the protest had been reported to the Emperor Alexander III, and it was suggested that the Senate would satisfy it. However, A. F. Kony informed the Minister that he could only give a conclusion on leaving the protest without consequences. This position of A. F. Kony was reported to the Emperor, who agreed with his arguments. As a result, the Senate supported the conclusion of A. F. Kony and left the protest without satisfaction.[82]

However, since the mid-1890s and especially at the beginning of the 20th century, the situation in the Senate has changed significantly. S. Yu. Witte noted in his memoirs that during the Stolypin regime, the Senate became largely an instrument of the administration, especially the Minister of Justice and the Chairman of the Council of Ministers.[83] Former Minister of Justice I. G. Shcheglovitov during his interrogation in 1917 in the Extraordinary Investigative Commission of the Provisional Government confirmed that when selecting personnel for the Criminal Cassation Department of the Senate, he proceeded from the requirements of firmness and commitment to monarchical ideas. He also carried out the same policy in the selection of personnel for the Ober-Prosecutor's office.[84]

In such circumstances, the independent legal position of the Prosecutor's office employees influenced their further official activities. For example, after Ober-Prosecutor's deputy S. M.

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[75] *Sbornik zakonodatel'nykh rabot po sostavleniyu Voyenno-sudebnogo ustava [Collection of legislative works on the preparation of the Military-judicial Statute].* Saint Petersburg, 1867, pp. 874-876.

[76] *PSZRI [CCLRE].* Coll. 2nd. Vol. 40, part 2. Saint Petersburg, 1867, Nr. 42587, p. 385.

[77] *PSZ RI [CCL RE].* Coll. 3rd. Vol. 33, part 1. Petrograd, 1916, Nr. 39600, p. 676.

[78] *Otchet po kassatsionnym departamentam Pravitel'stvuyushchego Senata za 1901 god [Report on the Cassation Departments of the Governing Senate for 1901]*. Saint Petersburg, 1902, p. 18.

[79] KONY, A. F., *Ocherki i vospominaniya : (Publichnyye chteniya, rechi, stat'i i zametki) [Essays and memoirs: (Public readings, speeches, articles and notes)]*. Saint Petersburg, 1906, p. 708.

[80] Z., Za mesyats (Yuridicheskaya khronika) [For a month (Legal chronicle)]. In: *Zhurnal grazhdanskogo i ugolovnogo prava [Journal of Civil and Criminal Law]*, book 5, 1885, p. 134.

[81] KONY, A. F., 1966, pp. 268, 273.

[82] Ibidem, pp. 290-295.

[83] VITTE, S. Yu., *Vospominaniya: v 3 t. [Memories (Vols 1–3)],* 2nd ed. Vol. 1. Leningrad, 1924, p. 291.

[84] *Padeniye tsarskogo rezhima: Stenograficheskiye otchety doprosov i pokazaniy, dannykh v 1917 g. v Chrezvychaynoy sledstvennoy komissii Vremennogo pravitel'stva: v 7 t. [The fall of the tsarist regime: Verbatim reports of interrogations and testimony given in 1917 to the Extraordinary investigation commission of the Provisional government (Vols 1-7].* Vol. 2 (ed. by P. E. SHCHEGOLEV). Leningrad, 1925, pp. 374-375.

Zarudny in one of the political cases concluded that it should be terminated due to the absence of corpus delicti, he was transferred to another Department, which did not consider political cases.[85] However, not all the Ober-Prosecutor's deputies were like that. For example, A. F. Kony recalled one of them who showed "absolutely servile and unscrupulous zeal".[86]

Ober-Prosecutor N. M. Reinke, assessing the importance of the Ober-Prosecutor's office in 1914, noted that it was one of the most successful institutions of judicial reform, although least regulated by law. The Ober-Prosecutor's office was directly subordinated to the Minister of Justice as the Prosecutor-General and was the link connecting the Governing Senate with the central administration of the judicial part, and facilitated to the comprehensive consideration of issues solved by the Senate.[87]

6. Conclusion

As a result of the judicial reform, the Prosecutor's office received the right to protest court decisions in cassation. However, in the military and naval departments, legislation provided for the possibility of restricting this right in wartime, which significantly limited the ability of the Prosecutor's office to respond to illegal sentences. The activity of the Prosecutor's office in the cassation protests against court decisions gradually increased. However, many protests were submitted unreasonably, and some were clearly illegal, in the absence of the right to initiate them. As a result, the Senate left almost half of the cassation protests unsatisfied. The cassation protests of the military Prosecutor's office were more effective than the protests of the Prosecutor's office of the civilian department.

Initially, the legislator considered the Ober-Prosecutor and the Main military Prosecutor in the cassation proceedings as a representative of the prosecution. However, in the future, at the initiative of the Ober-Prosecutor A. F. Kony, his legal status was changed to the role of "interpreter of the law".

The law very briefly regulated the activities of Ober-Prosecutors in the Senate, and practice has developed rules that significantly increased the actual value of the Prosecutor's office. The Ober-Prosecutor's office defended its independence when giving conclusions in the Senate and played an important role in developing the main issues of criminal proceedings. However, since the end of the 19th century, its activities began to be politicized.

[85] Ibidem, p. 375.
[86] KONY, A. F., 1966, p. 326.
[87] REINKE, N., 1914, p. 326.

Teilnichtigkeit in der deutschen Privatrechtsgesetzgebung der Neuzeit vor dem BGB

(Partial Invalidity in German Private Law Legislation in the Late Modern Period before BGB)

Lénárd Darázs *

Abstract

As a general rule, Article 139 of BGB, which entered into force in 1900, declares the entire contract invalid if the cause of invalidity affects a specific part of the contract. Although this is a consistent solution by the Code that follows the liberal ideal, it cannot be supported by the development of legislation before BGB. In reality, the solution offered by BGB means a steep break from partial German codifications which can be regarded as its forerunner. The partial regulation of contacts was specifically present in all late modern German legislative endeavours. In these, a broad recognition of partial invalidity and the rescue of the entire contract are manifested as a trend in legal development. Thus, organic German legal development would have required maintaining the entire contract and restricting the withdrawal of legal effect to the invalid part of the contract only. Therefore, Article 139 of BGB is more of a strong reflection of the idea of private autonomy, and less of an organic consequence of German private law codification in the modern era.

Keywords: *Partial invalidity; Private law legislation bevor BGB; History of invalidity of contracts; Consideration of partial invalidity in late modern period; Codex Maximilianeus Bavaricus Civilis; Preußisches Allgemeines Landrecht; Badisches Landrecht; Sächsisches BGB; Dresdener Entwurf.*

1. Einführung

Mit dem Inkrafttreten des BGB im Jahre 1900 hatte sich eine konzeptionelle Wende in der Behandlung der Teilnichtigkeitsproblematik im deutschen Recht vollzogen. Der § 139 BGB verankert die Gesamtnichtigkeit vom Rechtsgeschäft als Hauptregel auch dann, wenn vom Nichtigkeitsgrund bloß ein Teil des Rechtsgeschäftes erfasst wird. Die Teilnichtigkeit lässt die Gesetzesvorschrift als Ausnahme zu, insofern anzunehmen ist, dass das Rechtsgeschäft ohne den nichtigen Teil vorgenommen sein würde. Die zitierte Regelung des BGB gilt offensichtlich als ein starrer Abbruch mit dem gemeinrechtlichen Verständnis der Teilnichtigkeit. Im gemeinen Recht herrschte nämlich bis zum Erlassen des BGB hin die in der nachantiken Zeit generalisierte Maxime von *„utile per inutile non vitiatur“*,[1] nach der die Total-, bzw. Teilnichtigkeit gleichberechtigt sind, und im Falle der Beschränkung des Nichtigkeitsgrundes auf einen Teil des Rechtsgeschäfts der restliche Teil des Geschäftes aufrechtzuerhalten ist. Die konträre Regelung des § 139 BGB steht weder mit den früheren Landesgesetzgebungen noch mit der Jurisprudenz und Rechtsprechung der deutschen neueren Privatrechtsgeschichte im Einklang. Die das BGB grundsätzlich geprägte Pandektenwissenschaft rechtfertigt ebenso wenig die Teilnichtigkeitslösung des BGB. In der folgenden Untersuchung wird das Ziel gesetzt und darauf beschränkt, das Erscheinen der Teilnichtigkeitsproblematik in der deutschen Gesetzgebung vor dem BGB im Jahre 1896 (in Kraft getreten im Januar 1900) darzustellen.

2. Entwicklung der deutschen Privatrechtsgesetzgebung vor dem BGB

Im Laufe der deutschen Privatrechtgeschichte der Neuzeit entstanden seit der Frühen Neuzeit[2] bis zum Erlassen des BGB im Jahre 1896 hin in mehreren deutschen Ländern Gesetzeswerke und Gesetzesinitiativen, die eine (ganze oder teilweise) Kodifikation des Privatrechts zum Gegenstand hatten.[3] Zwar sind die Ergebnisse dieser Bemühungen als partikulare (territoriale) Gesetzgebungsakte zu bezeichnen, dennoch haben sie wichtige

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1 „Das Gültige wird durch Ungültiges nicht in Mitleidenschaft gezogen“. Die Übersetzung stammt von LIEBS, D., *Lateinische Rechtsregeln und Rechtssprichwörter*. München, 1998, S. 235. Diese, erst in nachantiker Zeit generalisierte Maxime ist auf eine Äußerung von *ULPIAN* zurückzuführen. Ulp. D. 45, 1, 1, 5, (…) *duae sunt quadammodo stipulationes, una utilis, alia inutilis, neque vitiatur utilis per hanc inutilem*“. Die Teilnichtigkeit wird von *ULPIAN* mit *„neque vitiatur per hanc inutilem*“ beschrieben, also mit der fehlenden Einwirkung des unwirksamen rechtlichen Tatbestandes auf den wirksamen. Siehe dazu STAFFHORST, A., *Die Teilnichtigkeit von Rechtsgeschäften im klassischen römischen Recht*. Berlin, 2006, S. 28.

2 Ausführlich zu den Anfängen der Kodifikationen während der Frühen Neuzeit siehe DÖLEMEYER, B. / KLIPPEL, D. (Hrsg.), *Gesetz und Gesetzgebung im Europa der Frühen Neuzeit.* Berlin, 1998.

3 MOLITOR, E., *Grundzüge der Neueren Privatrechtsgeschichte, Karlsruhe*, 1949, S. 38 ff., 65 ff.; WESENBER, G. / WESENER, G., *Neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Rechtsentwicklung*. Wien-Köln-Graz, 1985, S. 87 ff., 158 ff., 206 ff.; WIACKER, F., *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*. Göttingen, 1952, S. 197 ff.

Schritte und Impulse auf dem Wege der durch das BGB erreichten deutschen Privatrechtseinheit geleistet. In den erwähnten Gesetzgebungen der Neuzeit erscheint nicht nur die Teilnichtigkeitsproblematik, sondern die Teilnichtigkeit von Rechtsgeschäften wird einer ausdrücklichen und ausführlichen gesetzlichen Regelung unterzogen. Die Etablierung der Teilnichtigkeit in diesen Gesetzen war anfangs gewiss auf die Kodifizierung der gemeinrechtlichen Maxime von *„utile per inutile non vitiatur“* beschränkt. Später wurde aber dieser einfache Grundsatz durch die Gesetzgebung wesentlich weiterentwickelt. Aus der Untersuchung der deutschen privatrechtlichen Gesetzgebungen vor dem BGB lässt sich eine eindeutige allgemeine Orientierung auf die Teilnichtigkeit gegenüber der Gesamtnichtigkeit von Rechtsgeschäften feststellen.

2.1 Codex Maximilianeus Bavaricus Civilis von 1756

Die älteste umfassende Privatrechtskodifikation war auf deutschem Territorium der bayerische Codex Maximilianeus Bavaricus Civilis von 1756.[4] Nach der vorangegangenen Kodifikation des Straf- und Prozessrechts bildete er den letzten Teil des von *Kreittmayr* geschaffenen dreiteiligen Gesetzeswerkes des „Codex Maximilianeus“.[5] Diese erste deutsche Privatrechtskodifikation war vom Naturrecht derzeit weniger beeinflusst, hielt noch an der Subsidiarität des gemeinen Rechts fest, und galt als eine weiterentwickelte Zusammenstellung des römisch-gemeinen Rechts in der modernisierten Form des *usus modernum pandektarum*.[6] Die Geltung des Codex Maximilianeus Bavaricus Civilis von 1756 dauerte dennoch mit Novellierungen als „Bayerisches Landrecht“ bis zum Inkrafttreten des BGB fort.[7] Zum Verstehen und zur Behandlung des durch den Codex kodifizierten bayerischen Privatrechts sind die von *Kreittmayr* 1758 veröffentlichten „Anmerkungen“ besonders hervorzuheben.[8] In diesem fünfbändigen Werk hatte er nicht nur die dogmatischen Grundlagen und Erläuterungen des Gesetzestextes zu Grunde gelegt, sondern die „Anmerkungen“ tragen die eigentliche Bedeutung des Codex Maximilianeus Bavaricus Civilis. Mit ihrer Hilfe konnten die notwendigen Rückgriffe auf die Quellengrundlage des gemeinen Rechts vereinfacht vorgenommen werden. Kraft höchstrichterlicher Judikate besaßen die „Anmerkungen“ deswegen gesetzesgleiche Autorität.[9] Die „Anmerkungen“ sind auch für die Suche nach den Spuren der Teilnichtigkeit im Codex Maximilianeus Bavaricus Civilis von besonderer Relevanz.

Im Codex Maximilianeus Bavaricus Civilis selbst ist weder ein in sich geschlossenes System der Unwirksamkeit gebildet noch sind einheitliche und abstrakte Begriffe der Unwirksamkeit verwendet worden. Der Text versucht eher einzelne Unwirksamkeitsgründe, wie Irrtum, Zwang usw. kasuistisch umzuschreiben. Es fehlt ebenso eine ausdrückliche Regelung der Teilnichtigkeit im Codex selbst. Werden aber die gesetzesgleichen „Anmerkungen“ hervorgenommen, überrascht uns das Ergebnis. Aus der Sicht der vorliegenden Arbeit besitzt insbesondere die „Anmerkung“ zu § 24 des „Part.IV.Cap.I“ große Bedeutung:

„Die Convention oder daraus fließende Obligation ist entweder gleich anfänglich ungültig, oder wird erst hernach aufgehoben… wohl aber das axioma, utile per inutile non vitiatur, Platz hat.“ [10]

Ähnliche Hinweise auf die gemeinrechtliche Maxime von *„utile per inutile non vitiatur“* erschienen in den Anmerkungen zu den erbrechtlichen Vorschriften des Codex Maximilianeus Bavaricus Civilis.[11]

Aufgrund der „Anmerkungen“ zum Codex Maximilianeus Bavaricus Civilis von 1756 lässt sich festhalten, dass eine unmittelbare gesetzgeberische Etablierung der Teilnichtigkeit bereits in der ersten deutschen Privatrechtskodifikation erfolgte. Zwar wurde die Teilnichtigkeit nicht erwähnt und detailliert geregelt, sie erlebte dennoch eine gesetzliche Prägung durch die gesetzesgleiche Verankerung der gemeinrechtlichen Maxime von *„utile per inutile non vitiatur“*, die eine breite und allgemeine Anwendung der Teilnichtigkeit von Rechtsgeschäften vorsah.

2.2 Preußisches Allgemeines Landrecht von 1794

Das Preußische Allgemeine Landrecht (ALR) von 1794 [12] gilt als bedeutendes Stück der naturrechtlichen Kodifikationen des

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[4] *Codex Maximilianeus Bavaricus Civilis* oder Neu verbessert – und ergänzt – chur – bayrisches Landrecht von 1756.

[5] Zur Entstehungsgeschichte und Bedeutung des Codex siehe KREITTMAYR, W., *Compendium Codicis Bavarici Civilis, Judiciarii, Criminalis et Annotationum. Oder Grundriß der gemein- und bayrischen Privat- und Rechtsgelehrsamkeit, den Anfängern zur Einleitung, den übrigen zur Recollection*. München, 1769, Reprint Ausgabe, BAUER, R. / SCHLOSSER, H. (Hrsg.). München, 1990.; SCHLOSSER, H., *Grundzüge der Neueren Privatrechtsgeschichte*. Heidelberg, 2001, S. 112 ff.; ZIMMERMANN, K. P., *Die Monita zum Entwurf des Codex Maximilianeus Bavaricus Civilis*. Baden-Baden, 2008.

[6] MOLITOR, E., *Grundzüge der Neueren Privatrechtsgeschichte*. Karlsruhe, 1949, S. 39; WESENBER, G. / WESENER, G., *Neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Rechtsentwicklung*. Wien-Köln-Graz, 1985, S. 159.

[7] DANZER, M., *Das Bayerisches Landrecht (Codex Maximilianeus Bavaricus civilis) vom Jahre 1756 in seiner heutigen Geltung*. München, 1894.

[8] *„Anmerkungen über den Codicem Maximilianeum Bavaricum Civilem von Wiguläus Xaver Aloys Freiherr von KREITTMAYR“*. 5 Bände. München, 1758. In verkürzter Form siehe KREITTMAYR, W., *Compendium Codicis Bavarici Civilis, Judiciarii, Criminalis et Annotationum. Oder Grundriß der gemein- und bayrischen Privat- und Rechtsgelehrsamkeit, den Anfängern zur Einleitung, den übrigen zur Recollection*. München, 1769. Reprint Ausgabe, BAUER, R. / SCHLOSSER, H. (Hrsg.). München, 1990.

[9] SCHLOSSER, H., *Grundzüge der Neueren Privatrechtsgeschichte*. Heidelberg, 2001, S. 115.

[10] KREITTMAYR, W., *Compendium Codicis Bavarici Civilis, Judiciarii, Criminalis et Annotationum. Oder Grundriß der gemein- und bayrischen Privat- und Rechtsgelehrsamkeit, den Anfängern zur Einleitung, den übrigen zur Recollection*. München, 1769. Reprint Ausgabe, BAUER, R. / SCHLOSSER, H. (Hrsg.). München, 1990, S. 202.

[11] So zum § 7 „Part.III.Cap.II“ und zum § 8 „Part.III.Cap.VIII.“ (an beiden Stellen fehlerhafter Wille bei letztwilliger Verfügung), zum § 5 „Part.III.Cap. XI.“ (Erbschaftsverzicht). Hinweise bei DANZER, M., *Das Bayerisches Landrecht (Codex Maximilianeus Bavaricus civilis) vom Jahre 1756 in seiner heutigen Geltung*. München, 1894, S. 367.

[12] Zum Text des ALR siehe *Allgemeines Landrecht für die Preußischen Staaten von 1794.* Textausgabe mit einer Einführung von HATTENHAUER, H. und einer Bibliographie von BERNERT, G., Berlin, 1996. Der Text des ALR wird im Folgenden nach dieser Ausgabe zitiert.

18. und 19. Jahrhunderts.[13] Es ist nicht lediglich ein Zivilgesetzbuch, sondern ein monumentales Gesetzeswerk mit 19.194 Paragraphen, das neben dem bürgerlichen Recht die wesentlichen Züge des Handels-, Wechsel-, See- und Versicherungsrechts sowie Staats-, Kirchen-, Straf-, Stände- und Lehenrechts umfasst. *Hattenhauer* bezeichnet das stark kasuistische ALR als noch „Gesetzbuch der Kompromisse", in dem versucht wurde, zwei widersprüchliche Erwartungen des Zeitalters der Kodifikation in Einklang zu bringen. Das ALR sollte nämlich nach dem Willen seiner Verfasser ein „Grundgesetz der Freiheit" sein, während es die Autorität der absolutistischen Monarchie in Rechtsbeziehungen noch nicht völlig ausschalten durfte.[14]

Das ALR stellte weder allgemeine Regeln über die Unwirksamkeit von Rechtsgeschäften noch ein konsequentes System der Unwirksamkeit auf. Es mangelte sogar noch an einem festen Sprachgebrauch für die verschiedenartigen Erscheinungsformen der Unwirksamkeit.[15] Dies gilt auch für die Teilnichtigkeit insoweit, dass im ALR weder der Begriff noch eine ausdrückliche Regelung der Teilnichtigkeit zu finden ist. Eine aus dieser formalistischen Annäherung zur Teilnichtigkeitsproblematik herangezogene Konsequenz der mangelnden Teilnichtigkeit im ALR wäre aber dennoch sehr irreführend und unwahr.[16] Das ALR beinhaltet nämlich zahlreiche Vorschriften, die sachlich als gesetzliche Erscheinungsformen von Teilnichtigkeit zu betrachten sind. Diese teilnichtigkeitsbezogenen Regelungen beschränken sich jedoch auf die Frage der Unwirksamkeit von Bedingungen in Haupt- und Nebenverträgen. Dass sich die teilnichtigkeitsrelevanten Regelungen des ALR nur auf die Bedingung von Haupt- bzw. Nebenverträgen beziehen, sowie sie an solchen vertraglichen und testamentarischen Fällen geknüpft waren, lassen sich auf den starken Einfluss des römischen Rechts zurückführen. Aus dem römischen Recht sind nämlich mehrere Quellen überliefert worden, in denen die Frage der unsittlichen oder unmöglichen Bedingungen in Haupt- bzw. Nebenverträgen behandelt wurden.[17] Zwar besaß diese Betrachtungsweise der Teilnichtigkeit durch die Pandektenwissenschaft bedeutende Relevanz für die Ausarbeitung des § 139 BGB, an dieser Stelle wird jedoch über die teilnichtigkeitsbezogenen Vorschriften des ALR nur ein Überblick geschaffen.

Das ALR enthält ausführliche und ziemlich kasuistische Regelungen über die Frage der „Bedingungen". Deren Begriff ist sogar in I. 4. § 99 zu finden: „*So weit jemand über eine Sache verfügen kann, so weit kann er auch seiner Willenserklärung darüber Bedingungen beyfügen.*" Sollte eine Bedingung unerlaubt sein, kann sie laut des ALR zur Gesamt- oder Teilnichtigkeit nach den betroffenen Gesetzen führen.

„§. 136. Was selbst kein Gegenstand einer Willenserklärung seyn kann (§. 6-14), das kann auch niemanden als eine Bedingung aufgelegt werden.

§. 137. Ob dergleichen Bedingungen die Erklärung entkräften, oder für nicht beygefügt zu achten sind, ist nach den verschiedenen Arten der Willenserklärungen in den Gesetzen besonders bestimmt. (Tit. V. §. 227. sqq. Tit. XII. § 63)."

Das ALR regelt in I. 5. § 226 ff. die „Nebenbestimmungen bey Verträgen". Nach § 226 können die Vertragsparteien ihre im Vertrag eingeräumten Verpflichtungen durch Bedingungen im Hauptvertrag oder in einem Nebenvertrag erweitern oder einschränken. Die nachfolgenden Paragraphen bauen das folgende System von Gesamt- bzw. Teilnichtigkeit bezüglich der gesetzlich nicht erlaubten Bedingungen auf:

„§. 227. Unerlaubte Bedingungen, welche nach den Gesetzen bey Willenserklärungen überhaupt nicht statt finden, entkräften einen jeden Vertrag, welchem sie beygefügt worden. (Tit. IV. §. 137.).

§. 228. Ist nicht der Hauptvertrag selbst, sondern nur eine gewisse Nebenbestimmung oder Abrede an eine solche unerlaubte Bedingung gebunden, so wird auch nur diese dadurch entkräftet."

Bei der Regelung der letztwilligen Verfügungen beinhaltet das ALR in I. 12. die folgende Regelung, woraus eindeutig eine auf die rechtswidrige Bedingung beschränkte Teilnichtigkeit von Verfügung des Erblassers gefolgert werden kann.

„§. 63. Was nach den Gesetzen einer Willenserklärung als gültige Bedingung nicht beygefügt werden darf; das wird, wenn es in letztwilligen Verordnungen einem Erben oder Legatario gleichwohl auferlegt worden, für nicht beygefügt angesehen. (Tit. IV. 6-13. § 136. sqq.)."

Obwohl sich die ausdrücklichen Regelungen des ALR auf die Teilnichtigkeit von Bedingungen in Haupt- bzw. Nebenverträgen sowie in Testamenten beschränken, war die Teilnichtigkeit in der Praxis des preußischen Privatrechts dennoch viel breiter gewesen. *Fischer* weist darauf hin, dass es bei Rechtsgeschäften immer von Fall zu Fall zu entscheiden war, welche Bedeutung der durch das ALR festgelegte Unwirksamkeit beizumessen war.[18] Im Schrifttum ist zugleich für das ganze preußische Privatrecht der Grundsatz formuliert worden, nach dem die Nichtigkeit ein ganzes Geschäft oder nur einen Teil dessen ergreifen

[13] Zur Entstehung, der historischen und dogmatischen Bedeutung des ALR siehe SCHLOSSER, H., *Grundzüge der Neueren Privatrechtsgeschichte*, Heidelberg, 2001, S. 116-125; WESENBERG, G. / WESENER, G., *Neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Rechtsentwicklung*. Wien-Köln-Graz, 1985, S. 158-160; WIACKER, F., *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*. Göttingen, 1952, S. 197, 201-207.

[14] *Allgemeines Landrecht für die Preußischen Staaten von 1794*, Textausgabe mit einer Einführung von HATTENHAUER, H. und einer Bibliographie von BERNERT, G. Berlin, 1996, S. 17-20. Siehe noch dazu SENN, M., *Rechtsgeschichte. Ein kulturhistorischer Grundriss*. Genf, 2007, S. 311.

[15] Das ALR verwendet Begriffe wie „Nichtigkeit", „unverbindlich", „ungültig", „entkräftet" oder „unkräftig", ohne dass ein geschlossenes System der Begriffe gebildet zu haben. Vgl. BECKMANN, R. M., *Nichtigkeit und Personenschutz. Parteibezogene Einschränkung der Nichtigkeit von Rechtsgeschäften*. Tübingen, 1998, S. 49.

[16] Insofern kann die Ansicht von LANG nicht gerechtfertigt werden, nach der die Teilnichtigkeit bloß im damaligen Schrifttum, nicht aber im ALR selbst erschiene. Vgl. LANG, E., *Teilweise Nichtigkeit der Rechtsgeschäfte § 139*. Berlin, 1926, S. 6.

[17] KRIECHBAUM, M., Teilnichtigkeit und Gesamtnichtigkeit: Die Rechtsprechung des Reichsgerichts vor und nach Erlass des BGB. In: FALK, U. / MOHNHAUPT, H. (Hrsg.), *Das Bürgerliche Gesetzbuch und seine Richter. Zur Reaktion der Rechtsprechung auf die Kodifikation des deutschen Privatrechts (1896-1914)*. Frankfurt am Main, 2000, S. 43.

[18] FISCHER, O., *Lehrbuch des preußischen Privatrechts*, Berlin und Leipzig, 1887, S. 84.

kann.[19] Die Teilnichtigkeit war nach preußischem Privatrecht in zwei Fallkomplexen allgemein anerkannt und angewandt gewesen. Zum einen, wenn der nichtige Teil nicht wesentlich für die Existenz des ganzen Rechtsgeschäfts war. Zum zweiten blieb das Geschäft innerhalb des zulässigen Maßes wirksam, wenn sich die Nichtigkeit aus der Überschreitung eines quantitativen Maßes ergab.[20] Damit folgte die Praxis des preußischen Privatrechts dem gemeinrechtlichen Prinzip von *„utile per inutile non vitiatur"*, das durch das ALR im Bereich der Teilnichtigkeit von unerlaubten Bedingungen in Nebenverträgen und Testamenten gesetzlich bestätigt wurde.

2.3 Badisches Landrecht von 1809

Die Stärke des Aufrechterhaltungsgedankens von teilnichtigen Rechtsgeschäften im deutschen Recht zeigt besonders das Badische Landrecht. Nachdem die deutschen linksrheinischen Gebiete im Jahre 1801 an Frankreich abgetreten worden waren, trat der französische *Code Civil* 1804 dort automatisch in Kraft. Nach der Gründung des unabhängigen Rheinbundes 1805 führte das Großherzogtum Baden 1809 den *Code Civil* in einer amtlichen Übersetzung als „Badisches Landrecht" ein. Die Rechtsbesonderheiten des Landes sowie die gemeinrechtlichen Rechtskultur konnten durch die rund 500 dem gemeinen und älteren badischen Landesrecht entlehnten Zusätze gerettet werden. Diese von der französischen Vorlage häufig abweichenden Zusätze sowie das Subsidiaritätsgebot garantierten dem gemeinen Recht neben dem *Code Civil* eine Fortgeltung.[21] Das durch den *Code Civil* geprägte Badische Landrecht hatte seine Geltung bis zum Inkrafttreten des BGB im Jahre 1900 bewahrt.[22]

Da der *Code Civil* keine ausdrückliche Bestimmung für die Teilnichtigkeit enthält, wurde das gemeinrechtliche Prinzip der Aufrechterhaltung teilnichtiger Rechtsgeschäfte durch zwei Zusätze zu Satz 6 im Badischen Landrecht gefestigt.

„Satz 6 m. Die Nichtigkeit aus der Uebertretung eines solchen Gesetzes, welches eine Verbindlichkeitsübernahme auf gewisse Summen beschränkt, trifft nur das Ueberschießende.

Satz 6 n. Die Nichtigkeit aus der Uebertretung eines Gesetzes, welche nur einen Theil eines vorliegenden Geschäfts trifft, schadet den übrigen Theilen nichts, wenn das Geschäft theilbar ist, und theilweise bestehen kann." [23]

Aus den Zitaten geht eindeutig hervor, dass das Badische Landrecht nicht bloß eine partielle oder quantitative Teilnichtigkeit kodifizierte, sondern es etablierte im Landeszivilrecht eine allgemeine Regelung für die Teilnichtigkeit von Rechtsgeschäften, ohne dass es die Gesamtnichtigkeit auf irgendeiner Weise bevorzugt gehabt hätte. Die Teilnichtigkeit wurde an objektive Merkmale des Rechtsgeschäftes angeknüpft, wobei subjektive oder relative Elemente, wie der Parteienwille oder Absicht der Parteien, keine Rolle spielten. Das Badische Landrecht legt somit eine allgemeine Teilnichtigkeit von Rechtsgeschäften fest, wenn das Geschäft (objektiv) teilbar ist, und es ohne den vom Nichtigkeitsgrund erfassten Teil (objektiv) bestehen kann.

2.4 Sächsisches Bürgerliches Gesetzbuch von 1863/65

Eine gelungene partikulare Privatrechtskodifikation auf höchstem Niveau erfolgte in Sachsen, als das Bürgerliche Gesetzbuch für das Königreich Sachsen[24] im Jahre 1863 erlassen und 1865 in Kraft gesetzt worden war.[25] Das Sächsische BGB orientierte sich stark an der pandektistischen Zivilrechtsdogmatik, deswegen wird es im Schrifttum als „fast ein in Paragraphen umgegossenes Pandektenlehrbuch" gelobt und bezeichnet.[26] Die sächsische Kodifikation hatte sich in der Praxis bewährt und gewann größte Bedeutung als Vorbild bei der Redaktion des BGB, dessen Inkrafttreten im Jahre 1900 das Sächsische BGB erlöste.[27] Grundlage der sächsischen Kodifikation war das Recht, welches sich in Sachsen seit mehreren Jahrhunderten durch die Gesetzgebung und Praxis gebildet hatte. Dieses sog. Sachsenrecht hatte sich mit dem gemeinen Recht zu einer gewissen Einheit entwickelt,[28] die durch die Pandektenwissenschaft stark durchdrungen war. Das Sächsische BGB umfasst 2620 Paragraphen und folgt dem Pandektensystem auch mit seiner Fünfteilung (Allgemeiner Teil, Sachenrecht, Recht der Forderungen, Familien- und Vormundschaftsrecht, Erbrecht). Im ersten Teil des Gesetzes wird das Rechtsgeschäft (§ 88-115) behandelt und sind die Vorschriften von „Folgen der Nichtigkeit und der Anfechtbarkeit" (§ 103-115) zu finden.

Im Sächsischen BGB erscheint die Teilnichtigkeit ausdrücklich an mehreren Stellen, die nicht nur aus mannigfachen Aspekten geregelt wird, sondern ihre gesetzliche Etablierung hat neue Dimensionen für diese Problematik eröffnet.

Das sächsische Zivilrecht regelt die Teilnichtigkeit bereits im „Hauptparagraph" der Unwirksamkeit, in dem der Begriff der Nichtigkeit selbst bestimmt wird.

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[19] FÖRSTER, F / ECCIUS, M. E., *Preußisches Privatrecht, Band I*, Berlin, 1896, S. 199; kurz ebenso FISCHER, O., *Lehrbuch des preußischen Privatrechts*. Berlin und Leipzig, 1887, S. 84.

[20] FÖRSTER, F / ECCIUS, M. E., *Preußisches Privatrecht, Band I*, Berlin, 1896, S. 199.

[21] SCHLOSSER, H., *Grundzüge der Neueren Privatrechtsgeschichte.* Heidelberg, 2001, S. 133.

[22] Das Badische Landrecht konnte sogar bei der Vorbereitung des BGB in bestimmten Punkten gewisse Unterstützung leisten. Siehe dazu MUSCHELER, K., *Die Rolle Badens in der Entstehungsgeschichte des Bürgerlichen Gesetzbuchs*. Berlin, 1993. Zum späteren, seit dem BGB geltenden badischen Landeszivilrecht siehe BRUGIER, G. / SCHWERIN, Cl. Frh. v. (Hrsg.), *Badisches Landeszivilrecht*. Mannheim-Berlin-Leipzig, 1927.

[23] Hinweis und Zitat bei LANG, E., *Teilweise Nichtigkeit der Rechtsgeschäfte § 139*. Berlin, 1926, S. 7.

[24] *Das Bürgerliche Gesetzbuch für das Königreich Sachsen nebst Publikationsverordnung vom 2. Januar 1863*, Leipzig, 1863. Das Sächsische BGB wird nach dieser Ausgabe zitiert. Siehe noch SIEBENHAAR, E., *Commentar zu dem bürgerlichen Gesetzbuche für das Königreich Sachsen, Erster Band bearbeitet von Eduard Siebenhaar und Georg Siegmann, Zweiter Band bearbeitet von Karl Magnus Pöschmann, Dritter Band bearbeitet von Eduard Siebenhaar*. Leipzig, 1869.

[25] Ausführlich zur Entstehungsgeschichte siehe AHCIN, Ch., *Zur Entstehung des bürgerlichen Gesetzbuchs für das Königreich Sachsen von 1863/65*. Frankfurt am Main, 1996.

[26] KOSCHAKER, P., *Europa und das römische Recht*. München und Berlin, 1947, S. 258.

[27] SCHLOSSER, H., *Grundzüge der Neueren Privatrechtsgeschichte*. Heidelberg, 2001, S. 181.

[28] WESENBERG, G. / WESENER, G., *Neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Rechtsentwicklung*. Wien-Köln-Graz, 1985, S. 208.

„§ 103. Nichtige Rechtsgeschäfte werden in ihren Haupt- und Nebenbestimmungen so angesehen, als wären sie nicht errichtet. Was von dem Inhalte des nichtigen Rechtsgeschäfts als besonderes Rechtsgeschäft bestehen kann, bleibt gültig; insbesondere bleibt, wenn die Nichtigkeit darauf beruht, daß der Gegenstand eines Rechtsgeschäfts eine gewisse Größe übersteigt, dasselbe bis zu dem erlaubten Betrage gültig."

Der erste Halbsatz des zweiten Satzes der zitierten Vorschrift begründet eine ganz allgemeine, ziemlich breit gefasste Teilnichtigkeit. Nach dieser Regelung bleibt derjenige Teil des nichtigen Rechtsgeschäftes wirksam, der als „besonderes Rechtsgeschäft" bestehen bleiben kann. Wichtig ist also nur, das Rechtgeschäft auch ohne den nichtigen Teil als „Rechtsgeschäft" betrachten zu können. Diese Regelung setzt für die Teilnichtigkeit anders formuliert voraus, dass das Rechtsgeschäft teilbar sein muss. Sollte der Nichtigkeitsgrund einen Teil eines teilbaren Rechtsgeschäfts betreffen, bleibt das Rechtsgeschäft ohne den nichtigen Teil in der Regel als wirksam bestehen. Diese generelle und abgesehen von der Teilbarkeit bedingungslose Regel der Teilnichtigkeit wird auch in der Begründung des Sächsischen BGB nicht eingeschränkt. Die Motive legen dieser Vorschrift die gemeinrechtliche Maxime von *„utile per inutile non vitiatur"* zugrunde, und bestätigen den Hauptregelcharakter der Teilnichtigkeit. Nur als Beispiele werden für die Anwendung der Teilnichtigkeit erwägt, dass durch die allgemeine Teilnichtigkeitsregelung insbesondere die Fälle gedeckt werden sollen, in welchen sich die Nichtigkeit auf selbständige Nebenrechtsgeschäfte oder bloße „außerwesentliche Dinge" bezieht, deren Wegfall auf das Geschäft selbst keinen Einfluss hat.[29] Die generelle (vorbehaltlose) Geltung von Teilnichtigkeit wird bezüglich der quantitativen Teilnichtigkeit im zweiten Halbsatz des zweiten Satzes noch bekräftigt. Die Teilnichtigkeit ist immer anzuwenden, wenn der Nichtigkeitsgrund bloß die Quantität der Leistung (z. B. Summe, Zinsfuss) betrifft.[30]

An einer anderen Gesetzesstelle führt die teilweise Unmöglichkeit zur Teilnichtigkeit dem klassischen römischen Recht entsprechend auch nach dem Sächsischen BGB.

„§ 797. Theilweise Unmöglichkeit der Leistung macht den Vertrag nichtig, wenn sie einen solchen Theil betrifft, von welchem anzunehmen ist, dass er für den Vertrag wesentlich ist."

Zwar sieht diese Regelung scheinbar eine Vollnichtigkeit im Falle von teilweiser Unmöglichkeit vor, die aber dennoch insoweit anzuwenden ist, wenn die teilweise Unmöglichkeit gewiss einen wesentlichen Teil des Vertrages ergreift. Mit dieser Vorschrift hatte das Sächsische BGB die Anwendung der Teilnichtigkeit, obschon auf die teilweise Unmöglichkeit beschränkt, an zwei Anknüpfungspunkte geknüpft. Zum einen hat die teilweise Unmöglichkeit einen *wesentlichen* Teil des Vertrages zu berühren, damit Gesamtnichtigkeit eintritt. Zum anderen kommt offensichtlich eine *Parteienabsicht* bei der Feststellung der Wesentlichkeit des Vertragsteiles in Betracht, da von dem Vertragsteil anzunehmen sei, dass er wesentlich ist. Damit kommt es in einer gesetzlichen Regelung zum ersten Mal zum Ausdruck, dass die Vollnichtigkeit dazu gebunden ist, dass der Nichtigkeitsgrund einen wesentlichen Teil des Vertrages betrifft, bei dessen Beurteilung der Parteienwille entscheidende Rolle spielt. Wichtig ist aber, dass diese zwei neuen Merkmale der Teilnichtigkeit bloß bei der teilweisen Unmöglichkeit vorgeschrieben waren, denn als allgemeine Regel für die Teilnichtigkeit galt der § 103.

Eine weitere Teilnichtigkeitsregelung formuliert § 1058 des Sächsischen BGB für die Schenkungsverträge.

„§ 1058. Schenkungen, bei welchen die vorgeschriebene Form nicht beobachtet worden ist, sind nur bis zu dem Betrage von eintausend Thalern oder fünfzig Thalern jährlich gültig."

Mit dieser Vorschrift wird die allgemeine Teilnichtigkeitsregelung des § 103 für die formgebundenen Schenkungsverträge konkretisiert. Der § 1058 gilt nach den Motiven ohne Unterschied, ob der Schenkungsvertrag eine *quantitas* (Leistung nach Menge) oder eine *species* (Leistung nach Gestalt) zum Gegenstand hat.[31]

Das Sächsische BGB etabliert die Teilnichtigkeit als Hauptregel auch im Erbrecht, und bekräftigt sie an zwei Stellen.

„§ 2082 Hat der Erblasser eine Bedingung, welche er beifügen wollte, nicht beigefügt, so ist der letzte Wille nichtig. Hat er eine Bedingung beigefügt, welche er nicht beifügen wollte, so ist die Bedingung als nicht beigefügt zu betrachten.

§ 2083. Bezieht sich der Grund der Nichtigkeit blos auf einzelne Verfügungen, so sind blos diese nichtig."

2.5 Dresdener Entwurf von 1866

Auf dem Wege der deutschen Privatrechtseinheit war ein bedeutender Schritt gewesen, als im Jahre 1862 auf Veranlassung von mehreren deutschen Staaten[32] durch den Deutschen Bund beschlossen wurde, eine Kodifikationskommission mit Sitz in Dresden zu errichten. Deren Aufgabe bestand darin, den Entwurf für eine gesamtdeutsche Kodifikation des allgemeinen Obligationenrechts auszuarbeiten, um die Vereinheitlichung des für die Wirtschaftsbeziehungen vordringlichen Rechts der Schuldverhältnisse voranzutreiben. Der Kodifikationsausschuss hatte 1866 der Bundesversammlung seinen „Entwurf eines allgemeinen deutschen Gesetzes über Schuldverhältnisse", den sog. „Dresdener Entwurf" vorgelegt.[33] Eine Beratung fand doch nicht statt, das Erlassen des Gesetzes scheiterte an dem politischen Widerstand von Preußen und an der Auflösung des Deut-

[29] Motive zu § 103, in: SIEBENHAAR, E. / SIEGMANN, G., *Commentar zu dem bürgerlichen Gesetzbuche für das Königreich Sachsen. Erster Band*. Leipzig, 1869, S. 140. Siehe noch HOFFMANN, S. (Hrsg.), *Das Bürgerliche Gesetzbuch für das Königreich Sachsen. Mit Erläuterungen aus der Rechtsprechung und unter Berücksichtigung der neueren Gesetzgebung. Erster Band*. Leipzig, 1889, S. 64.

[30] Motive zu § 103, in: SIEBENHAAR, E. / SIEGMANN, G., *Commentar zu dem bürgerlichen Gesetzbuche für das Königreich Sachsen. Erster Band*. Leipzig, 1869, S. 141.

[31] Motive zu § 1058, in: SIEBENHAAR, E. / PÖSCHMANN, K. M., *Commentar zu dem bürgerlichen Gesetzbuche für das Königreich Sachsen. Zweiter Band*. Leipzig, 1869, S. 218.

[32] U. a. Bayern, Württemberg, Österreich, Sachsen, Kurhessen, Nassau, Hannover, Mecklenburg.

[33] Den Text siehe: *Dresdener Entwurf eines allgemeinen deutschen Gesetzes über Schuldverhältnisse von 1866*, Dresden, 1866. Nachgedruckt, Aalen, 1973.

schen Bundes.[34] Die spätere Wirkung des Dresdener Entwurfs ist jedoch beachtlich. Er hat nicht nur den Allgemeinen Teil (vor allem die Regeln der Willenserklärung und Stellvertretung) und das Schuldrecht des in einigen Jahren später erlassenen BGB entscheidend beeinflusst[35], sondern er war vorbildlich auch für die Kodifikation des Schweizerischen Obligationenrechts von 1881.[36]

In dem Dresdener Entwurf war eine ausdrückliche Regelung der Teilnichtigkeit von Rechtsgeschäften vorgesehen. Die geplante Vorschrift war offensichtlich nicht bloß eine einfache Wiederholung des bekannten gemeinrechtlichen Grundsatzes von *„utile per inutile non vitiatur"*. Es war geplant, die Teilnichtigkeit im Verhältnis zu den früheren gesetzlichen Etablierungen dogmatisch wesentlich weiterentwickelt zu regeln. Bevor der Regelungsvorschlag des Dresdener Entwurfs ausführlicher dargestellt wird, muss noch darauf wiederholt hingewiesen werden, dass durch den Dresdener Entwurf keine partikulare, sondern eine gesamtdeutsche Kodifikation beabsichtigt war, und dessen Text als fachlicher Kompromiss von den beteiligten Staaten galt. Dies bedeutet auch für die vorgeschlagene Teilnichtigkeitsregelung, dass sich in diesen Vorschriften ein sachgerechter Konsens mehrerer deutscher Staaten, sowie ihrer Jurisprudenz und Praxis widerspiegeln werden soll.

Die Teilnichtigkeit wird in Art. 137 unter den Bestimmungen von „Nichtigkeit und Anfechtbarkeit der Verträge" wie folgt geregelt:

„Art. 137. Die Nichtigkeit einer einzelnen Vertragsbestimmung zieht die Nichtigkeit des ganzen Vertrages nur dann nach sich, wenn die übrigen Bestimmungen ohne die nichtige nicht bestehen können oder nach der Absicht der Vertragsschließenden nicht bestehen sollen.

Beruht die Nichtigkeit lediglich darauf, daß der Gegenstand der versprochenen Leistung eine gewisse Größe übersteigt, so bleibt der Vertrag bis zum erlaubten Betrage giltig."

Mit dieser Vorschrift baut der Dresdener Entwurf ein überschaubares System der Teilnichtigkeitsproblematik auf. Der begriffliche Ausgangspunkt ist es daher, dass sich der Nichtigkeitsgrund auf einen Teil des Vertrages, auf „eine einzelne Vertragsbestimmung" beziehen soll. Sollte dieser Fall vorliegen, dann wird eine auf den vom Nichtigkeitsgrund erfassten Vertragsteil beschränkte Teilnichtigkeit als Hauptregel aufgestellt. Die Vollnichtigkeit des ganzen Vertrages erscheint als Ausnahme, die an zwei alternative Voraussetzungen geknüpft wird. Entweder muss ein objektives, d. h. vom Parteienwillen unabhängiges Merkmal des Vertrages vorliegen, nach dem die übrigen (wirksamen) Bestimmungen des Vertrages ohne den nichtigen Vertragsteil als Rechtsgeschäft nicht bestehen bleiben können. Oder hängt die Gesamtnichtigkeit vom Parteienwillen ab, soweit es auf Grund der Prüfung der Parteienabsicht anzunehmen ist, dass der übrige Teil des Vertrages ohne den nichtigen Teil nicht bestehen soll. Diese zweite Erscheinungsform der Gesamtnichtigkeit gilt übrigens als ein gesetzliches Kuriosum, da eine subjektive, an den Parteienwillen gerichtete Gesamt- bzw. Teilnichtigkeit in der Gesetzgebung bisher nicht erschienen ist. Als Sonderfall ist die quantitative Teilnichtigkeit unter die allgemeine Teilnichtigkeitsgeltung subsumiert worden. Liegt der Nichtigkeitsgrund darin, dass die versprochene Leistung eine gewisse erlaubte Größe übersteigt, bleibt der Vertrag bis zum erlaubten Betrag gültig, wobei die Parteienabsicht keine Rolle spielt. Dass die quantitative Teilnichtigkeit bloß auf das objektive Kriterium abgestellt wurde, heißt, dass der Nichtigkeitsgrund die nicht erlaubte Größe der Leistung erfasst.

Der Dresdener Entwurf folgt der römisch- und gemeinrechtlichen Tradition, nach der die teilweise unmöglichen Rechtsgeschäfte in das System der Unwirksamkeit eingeordnet werden. Eine dem § 797 des Sächsischen BGB inhaltlich ähnliche Vorschrift enthält der Dresdener Entwurf in Art. 30, die wie folgt lautet:

„Art. 30. „Ist die Leistung, auf welche ein Vertrag gerichtet ist, zum Theil unmöglich, so ist der Vertrag nichtig, wenn anzunehmen ist, daß ohne die Voraussetzung der Möglichkeit der Leistung dieses Theiles der Vertrag nicht geschlossen worden wäre."

Diese Formulierung scheint auf den ersten Blick dem späteren § 139 BGB vielleicht ähnlich zu sein, sie weist aber einen grundsätzlichen Unterschied auf. Nach Art. 30 des Dresdener Entwurfs führt nämlich der Nichtigkeitsgrund (die teilweise Unmöglichkeit) nur dann zur Gesamtnichtigkeit, wenn der Vertrag ohne den unmöglichen Teil laut der Parteienabsicht nicht abgeschlossen worden wäre. Kann der mangelnde Parteienwille beim Vertragsabschluss nicht angenommen werden, zieht eine teilweise Unmöglichkeit nur eine Teilnichtigkeit nach sich. Im Dresdener Entwurf blieb also auch nach Art. 30 die Teilnichtigkeit als Hauptregel bestehen. Auf Grund des zitierten Textes lässt sich außerdem feststellen, dass die Gesamt-, bzw. Teilnichtigkeit von teilunmöglichen Rechtsgeschäften allein aus dem Ergebnis der Auslegung von Parteienwillen herzuleiten ist. Die objektive Erscheinungsvariante der Teilnichtigkeit des Art. 130 ist bei Teilunmöglichkeit nicht anerkannt, sondern nur eine parteienwillenbezogene Teilnichtigkeit wird hier vorgesehen.

3. Fazit

In sämtlichen deutschen Privatrechtsgesetzgebungen der Neuzeit hat die Teilnichtigkeit von Rechtsgeschäften vor dem Erlassen des BGB eine ausdrückliche gesetzliche Regelung erfahren. Sowohl inhaltlich als auch aus zeitlicher Hinsicht zeichnet sich eine immer zunehmende Anerkennung und Anwendung der Teilnichtigkeit ab. In der Tendenz lässt sich beobachten, dass die gesetzliche Etablierung der Teilnichtigkeit nicht zur Einschränkung, sondern im Gegenteil, zur umfangreicheren Geltung der teilweisen Nichtigkeit führte. Im Codex Maximilianeus Bavaricus Civilis von 1756 erschöpfte sich die Gesetzgebung noch in einer

[34] Zur Geschichte des Dresdener Entwurfes von 1866 siehe insbesondere HEDEMANN, J. W., *Der Dresdner Entwurf von 1866. Ein Schritt auf dem Wege der deutschen Rechtseinheit.* Berlin, 1935, S. 1-32; SCHLOSSER, H., *Grundzüge der Neueren Privatrechtsgeschichte*. Heidelberg, 2001, S. 182.

[35] HEDEMANN, J. W., *Der Dresdner Entwurf von 1866. Ein Schritt auf dem Wege der deutschen Rechtseinheit.* Berlin, 1935, S. 40 ff.; SCHLOSSER, H., *Grundzüge der Neueren Privatrechtsgeschichte*. Heidelberg, 2001, S. 182.

[36] BENÖHR, H-P., Der Dresdner Entwurf von 1866 und das Schweizerische Obligationenrecht von 1881. Motivationen der Redaktoren und Lösungen in der Kodifikation. In: PETER, H. / STARK, E. / TERCIER, P. (Hrsg.), *Hundert Jahre Schweizerisches Obligationenrecht, Jubiläumsschrift*, Freiburg (Schweiz), 1982, S. 57-89.; HEDEMANN, J. W., *Der Dresdner Entwurf von 1866. Ein Schritt auf dem Wege der deutschen Rechtseinheit*, Berlin, 1935, S. 33 ff.

gesetzlichen Verankerung der gemeinrechtlichen Maxime von „*utile per inutile non vitiatur*“. Das ALR von 1794 enthält kasuistische (in diesem Sinne ausführliche) Regelung der Teilnichtigkeit, folgt aber immer noch der Lösung des römisch-gemeinen Rechts insoweit, dass sich die teilnichtigkeitsrelevanten Regelungen nur auf die Bedingung von Haupt- bzw. Nebenverträgen beziehen, sowie sie an solche vertragliche und testamentarische Fälle geknüpft worden sind. Von seinem Mutterrecht (dem *Code Civil*) in der Teilnichtigkeitsfrage abweichendes Badisches Landrecht von 1809 formulierte zum ersten Mal die allgemeine Geltung der Teilnichtigkeit, wenn das objektive Kriterium der Möglichkeit des Weiterbestehens vom Rechtsgeschäft vorliegt. Seit dem Badischen Landrecht ist die Regel der quantitativen Teilnichtigkeit fester Gegenstand der späteren Gesetzgebung geworden. Das Sächsische BGB von 1863/65 legt ebenso als Hauptregel eine allgemeine Teilnichtigkeit zugrunde. Bei der Teilnichtigkeit wegen teilweiser Unmöglichkeit erscheint die Voraussetzung erstmals hier gesetzlich, dass der Nichtigkeitsgrund zur Gesamtnichtigkeit führt, wenn der von Unmöglichkeit betroffene Vertragsteil „wesentlich“ ist. Der als einen unmittelbaren Vorgänger des BGB betrachtete Dresdener Entwurf von 1866 ging auch von der allgemeinen Geltung der Teilnichtigkeit aus. Gesamtnichtigkeit ergibt sich daraus, wenn das Rechtsgeschäft entweder nach dem objektiven Merkmal der Unmöglichkeit des Weiterbestehens oder nach dem subjektiven Parteienwillen nicht mehr aufrechtzuerhalten ist. Im Dresdener Entwurf kommt zum ersten Mal zum Ausdruck, dass die Gesamt- bzw. Teilnichtigkeit von der Parteienabsicht abhängig gemacht werden soll, wobei aber gesetzlich die Vermutung der Teilnichtigkeit verankert wurde.

Abschließend kann festgehalten werden, dass alle Gesetzgebungen von der allgemeinen Geltung und der Vermutung der Teilnichtigkeit ausgingen. Die Regelung des § 139 BGB kann somit mit der Entwicklung der vorangehenden teilnichtigkeitsbezogenen Gesetzgebung nicht untermauert werden.

Remarks about the History of Foundations

*István Sándor**

Abstract

The aim of this study is to show what changes have been made to the original causes and functions of the foundations. Accordingly, we briefly review the roots and history of foundations and the latest trends, the emergence of the private foundation. The legal construction of the foundation has undergone significant change in legal history and one of the primary benefits was the formation of private foundations. Private foundations in many cases can pursue economic and commercial purposes, even carrying out asset management activities and they are specifically suited to asset separation, making them important legal tools for asset protection. In addition, the study analyzes in detail how the foundation emerged in continental European private law gained ground in some Anglo-Saxon countries.

Keywords: *foundation; foundation company; pia causa; private foundation; Salmann; wakf.*

1. Emergence of the foundation

In connection with the emergence and history of the foundation, scholars usually go back to the Egyptian cult of the dead and the mass of property assigned to the gracious purpose *(pia causa)* emerged in Roman law; furthermore in the Middle Ages the management of ecclesiastical property can be mentioned.[1] In addition, in terms of its impact, it should be emphasized that offerings to the Roman gods were frequent from the beginning, the role of which was taken over by the Christian Church from the transformation of Christianity into a state religion.[2]

1.1 Gracious offering in Roman law

In the Roman Empire, it became customary in the Christian age for people to leave their property to the church for the event of their death in order to use it for some gracious purpose *(pia causa)*. In the Roman Empire in 321, the legality of the acquisition of property by Christian communities was recognized, thus giving them the opportunity to bequeath for their benefit. Previously, this was not allowed because they were not counted as persons and could not be disposed in favor of a person that did not exist *(incerta persona)*.[3] It should also be emphasized that the Christian teachings explicitly urged people to distribute their wealth to the poor.[4]

Such property was in the possession of the bishop on behalf of the church. These special-purpose assets *(piae causae, pia corpora)* were not initially separate legal entities, but from the 5th century onwards, these properties began to be treated as individuals and had independent legal capacity. No state permit was required for the establishment, it was sufficient to order the property, to establish an appropriate management organization and to define some kind of public good goal.[5] The foundation was established by a charter or will. The targets were mainly hospitals *(nosocomy)*, orphanages *(orphanotrophia)*, educational institutions *(brephotrophia)*, poor homes, etc. to be maintained. The founder defined the governing body *(administratores, gubernatores)* and its organizational and operational rules *(gubernatio)*,[6] thus, the bishop had only the right to supervise the use of the wealth.[7] The termination of pia causa resulted in the depletion of property, the attainment or failure of the purpose, or the abolition of it by the State. The assets of the ceased foundation were considered to be passed to the public body under whose supervision the foundation was. During this period, a modification in the purpose of the foundation has not yet been recog-

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1 For details on the emergence of foundations, see CSEHI, Z., *A magánjogi alapítvány. Történeti és dogmatikai alapok* [The private law foundation. Historical and dogmatic principles]. Budapest, 2006, p. 39-52. CSEHI, Z., *A meghagyástól a jogi személyig: Szent Ágostontól Savigny-ig – töredékek az alapítványok kultúrtörténetéhez* [From modus to legal person: From St. Augustine to Savigny – fragments to the cultural history of the foundations]. In: KISFALUDI, A. (ed.), *Liber amicorum. Studia E. Weiss dedicata*. Budapest, 2002, p. 13-44.

2 CSORBA, F., *Alapítvány jogi fogalma* [Legal concept of foundation]. Budapest, 1901, p. 7-14.

3 CSEHI, *op. cit. (A meghagyástól)*, 19.

4 Matthew 19,21.

5 VÉCSEY T., *A római jog külső története és institúciói* [External history and institutes of Roman law]. Budapest, 1893³, p. 199-201.

6 Nov. 120. 6. 1.

7 C.1. 3. 41.11-20.

nized.[8] This legal structure can be considered the predecessor of the modern foundation.[9] At that time, only the terminology of the gracious purpose *(pia causa)* was applied to it, that is, no special designation was formed for the foundation.

1.2 The New Persian private foundation

A private foundation existing in the Sassanid (New Persian) Empire should also be mentioned as an institution closely related to the origins of the foundations. The Sassanid Law Book (*Matakdan I hazar datastan*; Book of a Thousand Court Decisions) devotes an entire chapter to this subject.[10] The book written by Farraxvmart, the son of Vahrān in 620, starts from the theory of Zoroastrian philosophy that earthly life is only a transitional station and real life begins with death.[11] Salvation depends on religious rites. The most important ceremonies are to be presented in the first four days after death, then every month in the first year on the anniversary of death, and annually thereafter on the day of death. In order to present the ceremonies, the wealthier created a private foundation for the soul *(pat ruvan)*, for merciful purposes *(pat abradat)*, and for the sacred fire. The foundations were managed by the deceased's eldest son and therefore received remuneration from the foundation's assets. The proceeds of the foundation's property had to be distributed among the family members of the deceased.[12] No one, not even the priest, was entitled to dispose of the foundation's property. This private foundation showed similarities in some elements to the *pia causa* formed in Roman law and the *waqf* in Islamic law.

Three types of Sassanid private foundations could be distinguished, so where the property was transferred to a close family for management, the second case was the transfer to persons outside the family, and the third case was when two persons belonging to different families became the owners and managers of the property.[13] Anahin Perikhanain therefore makes the remark that there is no doubt that the Muslim wakf is of Iranian origin. This also shows a significant resemblance to the waqf. The difference, on the other hand, is that in the case of the *waqf* the family is the primary beneficiary, while in the case of the Sassanid private foundation the family members of the deceased receive the proceeds of the property only to the extent that it is indispensable for religious rites. Another important difference is that in the case of the Sassanid private foundation, the legal structure was based on the transfer "from A to B", but "in favor of C" is missing. Overall, however, the literature at least does not deny that the Islamic waqf can be traced back to the Iranian private foundation.[14]

1.3 The Islamic waqf

The institution of *waqf* has long been known in Islamic law.[15] The Arabic word *waqf* literally means something held back, stopped, arrested.[16] According to Islam, the waqf represents the care of Allah, forcing the rich to make offerings to him from their wealth.[17] The waqf is the most characteristic institution of Islamic private law, which cannot be traced back to the customs of pre-Islamic Arabia.[18] The founder *(wāqif)* transfers ownership to God and appoints a trustee *(mutawwalī, mutawilli)* who manages the property for the benefit of the beneficiary *(al-mawqūf alayh)*. In the Ottoman Empire, 3/4 of urban real estate was placed in such a construction.[19] The waqf is basically a legal structure similar to a charitable trust *(wakf khayri)*, but its type created for a private purpose *(wakf ahli)* is usually distinguished in the literature.[20] Verbit emphasizes that waqf should ultimately always be a charitable goal.[21] The waqf mixed elements of public and private law.

Under Islamic law, the testator could only dispose of 1/3 of his property, the remaining 2/3 being inherited according to the rules of intestate inheritance. The answer to this restriction was the gifting among the living through the waqf.[22] It should also be noted that no time limit has been set for waqf.[23]

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[8] VÉCSEY, *op. cit.,* p. 198.

[9] FÖLDI, A. – HAMZA, G., *A római jog története és institúció* [History and institutes of Roman law]. Budapest, 2020[24], p. 235-236.

[10] The title of the chapter is „religious services and special appropriations to the treasuries of Fire (temples) and endowments instituted and declared (as foundations) for the soul". VERBIT, G. P., *The Origins of The Trust.* USA, 2002, p. 252-254.

[11] The first translation into Russian was made in 1973: PERIXANJAN, A., *Sasanidskij sudebnik „Kniga tysja, I sudebnyxrešenij"*, then the English translation was prepared in 1997: PERIXANJAN, A., *The Book of a Thousand Judgements [A Sasanian Law-Book]* 1997. See VERBIT, *op. cit.,* p. 253.

[12] VERBIT, *op. cit.,* p. 255.

[13] VERBIT, *op. cit.,* p. 255.

[14] VERBIT, *op. cit.,* p. 257-259.

[15] VERBIT, *op. cit.,* p. 114.

[16] JANY, J., *Klasszikus iszlám jog. Egy jogi kultúra természetrajza* [Classical Islamic law. The natural history of a legal culture]. Budapest, 2006. 400. SALAMON, A. – MUNIF, A. F., *Saría, Allah törvénye. Az iszlám jog különös világa* [Sariah, the law of Allah. The peculiar world of Islamic law]. Budapest, 2003, p. 90.

[17] SALAMON – MUNIF, *op. cit.,* p. 90.

[18] JANY, *op. cit.,* 399.

[19] PLUCKNETT, T. F. T., *A Concise History of the Common Law*. London, 1956[5], p. 575. Besides law schools (*madrasa*) were financed by wakf. HALLAQ, W. B., *An Introduction to Islamic Law*. Cambridge, New York, Melbourne et al., 2009, p. 38-40.

[20] EÖRSI, GY., *Összehasonlító polgári jog. Jogtípusok, jogcsoportok és a jogfejlődés útjai* [Comparative civil law. Types of law, groups of law and ways of legal development]. Budapest, 1975, p. 418. SALAMON – MUNIF, *op. cit.* p. 91. See also CHARLES, R., *Le droit musulman*. Paris, 1965, p. 80. ff. GLENN, H. P., *The Historical Origins of the Trust*. In: RABELLO, A. M. (ed.), *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions*. Jerusalem, 1997, p. 54. HOFRI-WINOGRADOW, A., *Express trusts in Israel/Palestine*. In: SMITH, L. (ed.), *Re-imagining the trusts: trusts in civil law*. Cambridge et al., 2012, p. 85.

[21] At least, the benefits of the transferred assets had to be donated to charity. VERBIT, *op. cit.,* p. 127.

[22] VERBIT, *op. cit.,* p. 124.

[23] FALUS, O., *Az iszlám alapítvány – a „waqf"* [The Islamic foundation – the „waqf"], In: Jogtörténeti szemle, Nr, 3, 2014, p. 5.

Jany points out that waqf is a legal institution that is very close to the trust, yet different from some of its detailed rules.[24] The trustee *(mutawilli)* was appointed by the trustee. A trustee could be any Muslim who is suitable and available for this position, primarily from the family of the trustee.[25] If there was a suitable person in the family for this position, a stranger could not be appointed. If the trustee did not appoint a trustee by the time of his death, this power passed to the executor of the will and, in his absence, ultimately to the judge.[26] Mutawilli was responsible for defining beneficiaries, especially when it came to the poor. Mutawilli could also exercise discretion in the distribution of wealth.

It is disputed whether the waqf is created by the founder's declaration alone or whether the transfer of property is also a necessity for its validity.[27] The property transferred *(mawqūf)* must be a lasting and profitable thing. Opinions are also divided on whether the trustee will also acquire ownership of the transferred property.[28] The founder of a waqf can only be an adult person with legal capacity with an appropriate financial background who is not in bankruptcy.[29]

During the existence of the wakf, the property could not be alienated or sold, and it could be rented for a maximum of one year.[30] At the same time, if the founder allowed this, the property could be exchanged or changed. Mutawilli was only entitled to encumber the managed assets with the judge's permission if the founder had not given his express consent in advance. It should be noted that the usual activity of the judge was also the interpretation of wakf.[31] Jany summarizes mutawilli's activities in six areas, mutawilli is authorized to build, preserve, rent, plant, collect and distribute property income, and provide legal representation for property.[32] The founder could also have provided that mutawilli was entitled to appoint a successor to the trust. Mutawilli was liable for any intentional damage and use of the property for a purpose other than that stated by the founder.[33] The trustee was entitled to replace the mutawilli in case of fault, or even if the mutawilli e.g. he was a drunkard or committed another moral sin. It is worth to remark that violation of waqf rules was considered a fundamental sin.[34]

2. The spread of the foundation in the Middle Ages

Here we would like to point out that in the literature the foundation is distinguished from the pseudo-foundation.[35] In the case of the latter, we can speak of a property assigned to a specific purpose *(donatio sub modo)*, which, however, does not have an independent legal personality, it is the property of the management body, which is only liable for its intended use on a contractual basis.[36] In the case of pseudo-foundations, someone transfers property to another person (individual, city, association) with the order that it should be used for a specific, usually sacred or public interest purpose.[37] Such was, in fact, the case of the Sassanid private foundation, the Islamic waqf, and initially the pia causa, furthermore in the Middle Ages, e.g. in case of the mass foundation, or a foundation set up to erect a perpetual lamp or a memorial.[38] In comparison, the real foundation "lives a busy life and is not rigid in a single legal relationship".[39] The real foundation is a legal entity with separate property and management body.

In the Middle Ages, a significant part of the foundations were divided into ecclesiastical organizations, but from the 13th century, secular donations developed in the urban life, which came under the supervision of the city. It was then that the custom emerged that some of the foundations were aimed at supporting family members, which pointed to the formation of family foundations.[40]

In the Middle Ages, the establishment and operation of the foundation was basically closely connected with the Christian Church and the last will and testament. The Church advocated foundation offerings, which they then managed with the opportunities provided by their organizational framework, primarily

[24] JANY, *op. cit.,* p. 398.
[25] VERBIT, *op. cit.* p. 133. JANY, *op. cit.,* p. 401.
[26] HOFRI-WINOGRADOW, *op. cit.,* p. 86.
[27] JANY, *op. cit.,* p. 401.
[28] The different points of view see JANY, *op. cit.,* p. 403.
[29] FALUS, *op. cit.,* p. 3.
[30] A lease longer than this would have given the impression that the tenant was the owner. VERBIT, *op. cit.* p. 135. FALUS, *op. cit.,* p. 5.
[31] VERBIT, *op. cit.,* p. 137.
[32] JANY, *op. cit.,* p. 404.
[33] JANY, *op. cit.,* p. 403-405.
[34] VERBIT, *op. cit.,* p. 135.
[35] In other words, it is an independent or non-real foundation. MARTON, G., *A római magánjog elemeinek tankönyve. Institúciók* [A textbook of elements of Roman private law. Institutions]. Debrecen, 1947[6], p. 74. BENEDEK, F. – PÓKECZ KOVÁCS, A., *Római jog* [Roman law]. Budapest–Pécs, 2105[3], p. 127.
[36] FÖLDI – HAMZA, *op. cit.,* p. 235.
[37] The so-called alimentatio foundations established during the time of Emperor Nerva and Trajan for social policy reasons are also listed here. Similar were the loans granted to landowners by imperial mortgages, part of the interest of which had to be spent on the care and upbringing of poor children *(pueri alimentarii, puellae alimentariae)*. CHYLARZ, K., *A római jog institúciói* [Institutes of the Roman law]. Budapest, 1914, p. 83. BENEDEK – PÓKECZ KOVÁCS, *op. cit.,* p. 127.
[38] KOLOSVÁRY, B., *Magánjog. Vezérfonal a magyar magánjogból tartott egyetemi előadásokhoz* [Private law. A guideline for university lectures on Hungarian private law]. Budapest, 1927[2], p. 67.
[39] KOLOSVÁRY, *op. cit.,* p. 67.
[40] CSEHI, *From modus (op. cit.)*, p. 29.

through the bishop and later through the trustees they appointed.[41] While ecclesiastical foundations were largely integrated into the organization of the church, in the case of urban foundations, a testamentary executor was appointed primarily for this purpose, over whom the city exercised supervision. One form of urban foundation was a foundation to support family members, which provided the roots for the regulation of the family foundation.[42]

As a result of the Reformation, foundations became independent and secularized in German territories, while in France, due to the concentration of royal power, the legal autonomy of foundations was pushed into the background.

Due to the ideas of the Enlightenment, the care of the state came to the fore on the basis of the principles of natural law, as a result of which the aims of the foundations were replaced by the laity instead of the church.[43]

The problem of the legal personality of the foundation is also closely related to the issue of legal personality in general. According to various theories, some considered the will of the founder, others the needs of the beneficiaries, others also pointed out the purpose of the foundation as a legal entity, and so on. According to another view, the governing body of a foundation is a legal entity and has ownership of the foundation's assets, i.e. the foundation itself is not a legal entity.[44]

3. Codification of the law of the foundation

The school of natural law opposed feudal institutions because through them the absolutist states sought to control all civic activities, thus restricting the rules for founding associations and foundations. As a result, even the French Code Civil did not initially recognize legal personality. In German law, the influence of the radical idea of natural law was less pronounced, and the old German law theory even facilitated the adaptation of the institution of legal personality. As a result, the concept of legal personality developed and spread as a result of Kant's philosophy, primarily as a result of the work of Friedrich Carl von Savigny.[45]

It is the achievement of German jurisprudence, and in particular Arnold Heise, that the modern concept of the foundation was created because Heise regarded it as an independent legal entity.[46] It should be mentioned here that the legal personality of the foundation was seen by Ludwig Ennecerus in the personification of the target, i.e. he considered the foundation as a purpose organization.[47] 19th-century German jurisprudence thoroughly examined the legal construction of the foundation, which resulted in the regulation of the German BGB.[48]

As a result of the Reformation, supervision of foundations was transferred to the state in several countries. As a result of the natural law thinking intensified with the Enlightenment, church purposes were gradually replaced by secular goals, under state supervision.[49] As a result, the institution of the foundation was already included in the first modern codifications, so the Prussian ALR of 1794 already contained some detailed rules for it, e.g. qualified as a legal entity.[50] The French Code Civil, the Dutch Civil Code of 1838 and the Italian Codice civile of 1865 is not at all,[51] while the Austrian ABGB mentioned the foundation only in one section.[52] In France, e.g. due to the possibility of long-term concentration of assets acting as a feudal trust or fideicommissum, the regulation of the foundation was not included in the civil code at all. The Zurich PGB already contained rules on the establishment and state supervision of the foundation, and the Spanish Código civil, the German BGB and the Swiss ZGB also had provisions in relation to it. In some Continental European countries, the foundation's legal regulations have been incorporated into certain private law codes, and in other countries its rules can be found in separate laws.[53]

In Anglo-Saxon law, medieval church property, primarily real estate, was managed through *use* (the antecedent of a trust).[54] The fact that even the property of the ruler and his country could not be separated, contributed significantly to this.[55] The usage of the term foundation is often misleading, especially in English legal language. There are a number of legal structures called foundations that do not actually correspond to the concept of a civil law foundation.[56]

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41 CSEHI, *From modus (op. cit.)*, p. 47.
42 CSEHI, *From modus (op. cit.)*, p. 53.
43 CSEHI, *From modus (op. cit.)*, p. 58, ff.
44 CSORBA, *op. cit.,* p. 15.
45 HORVÁTH, A. (ed.), *Magyar Állam- és jogtörténet* [History of Hungarian state and law]. Budapest, 2014, p. 423.
46 HEISE, A., *Grundriss eines System des gemeinen Civilrechts zum Behuf vond Pandecten-Vorlesungen*. Heidelberg, 1819^3, p. 106-108.
47 ENNECCERUS, L., *Lehrbuch des bürgerlichen Rechts. Allgemeiner Teil.* Marburg, 1913^6, p. 283.
48 KECSKÉS, L., *Az alapítványi jog fejlődéséről* [On the development of foundation law]. In: Magyar jog, Nr. 2, 1998, p. 107.
49 For example the support of education and the economy, See Franke Stiftung (Halle) in 1692, Senckenberg Stiftung (Frankfurt) in 1763. CSEHI, *From modus (op. cit.)*, p. 35.
50 ALR II, 4, 2 § 21-22 and 27-133 regulated the family foundation *(Familienstiftung)* beside the fideicommissum and the so-called *milde Stiftung* (ALR II, 11, 19, 6.).
51 The Italian Civil Code of 1942 already contains general rules for foundations, but in addition, separate legislation has been enacted for certain areas of use (family, agricultural, university maintenance, religious, etc.). BANCONE, V., *Italy: charitable trusts and private foundations*. In: *Trust* & *Trustees*, vol. 15, Nr. 5, 2009, p. 355-357.
52 ABGB § 646. §.
53 CSEHI, *From modus (op. cit.)*, p. 40-42.
54 See GOLDSWORTH, J., *Private Foundations: Law* & *Practice*. Essex, 2011, p. 16.
55 „It should be remembered that in our fully developed common law, the King or Crown is the only corporation sole of a lay kind". POLLOCK, Sir F. – MAITLAND, Sir F. W., *The History of English Law. Before the Time of Edward I*. Cambridge, 1923^2,Vol. 1, p. 53.
56 See for example Rockefeller, Carnegie and Ford Foundation, which are in fact companies. For other structures, the use of the term foundation is also misleading, for example Fondazione Monte dei Paschi di Siena, Robert Bosch Stiftung, etc. GOLDSWORTH, *op. cit.* p. 7. In Canada, the Income Tax Act [1985, R.S.C., (5th Supp.) C. 1. Section 149 (1)] names the foundation.

4. Spread of legal regulation of private foundations

The first decisive legal regulation of a private foundation can be attributed to Liechtenstein, where in 1926 the PGR contained provisions to this effect *(Privatstiftung)* in nineteen paragraphs.[57] It should be noted that in Monaco in 1922 it was already possible for property to be assigned to a foundation for private purposes, but this had less of an international impact. In Austria, a private foundation was also introduced in 1993, modeled on Liechtenstein regulations.[58] Over time, the institution has gained ground in French private law, with similar rules introduced in Belgium in 2002 *(fondations privées)* and in Luxembourg in 2013 *(fondations patrimoniales)*. In the Netherlands, the new civil code includes regulation of the foundation, which also covers private foundations.[59] In mixed jurisdiction Malta, the rules on private foundations were incorporated into the Civil Code in 2007.[60] In America, Panama also played a pioneering role in this field, where in 1995 a legal background was established for the private foundation.[61] The Panamanian legislature relied heavily on the rules of private foundation elaborated in Liechtenstein.[62]

The situation was interesting in the Netherlands Antilles, which was part of the Kingdom of the Netherlands under the Convention signed on 28 October 1954, but with considerable autonomy. In the Netherlands Antilles, private law was based on French law based on Dutch roots, making it a civil law country.[63] Its Civil Code, which entered into force in 2001, relied heavily on the Dutch Civil Code, similar to the Civil Code, which entered into force in Aruba in 2002. In the Netherlands Antilles, Book 2 of the Civil Code entered into force in 2004 and it regulated legal persons, replacing the Commercial Code in force since 1928 (which was otherwise based on the Dutch Commercial Code of 1928). The rules established for the private foundation *(Stichting Particulier Fonds)* in 1998 have also been incorporated into the Civil Code.[64] The Netherlands Antilles disbanded on 10 October 2010, Curaçao and Sint Maarten became an associated state of the Kingdom of the Netherlands, but Curaçao continued to maintain the regulation of the private foundation.

San Marino is also in a special situation, where no civil code has been enacted. The norms of private law here are based on a statute from 1600 *(Leges Statutae Reipublicae Sancti Marini)*. The primary sources of law are the laws of the parliament *(ius proprium)* and this is complemented by common law *(ius commune)* and customary law *(laudabiles consuetudines)*.[65] The law of foundations is contained in the Company Law Act.[66]

It is also worth mentioning Switzerland, where the ZGB contains provisions for the foundation. It is possible to establish a private foundation, but a family foundation is only allowed to be established for limited purposes. Such goals may include education, nurturing talent, helping family members, and the like. However, no foundation can be established to support family members. As a result, it is quite common for such needs to be met by setting up a foundation under foreign jurisdiction.[67]

The foundation has a similar function in legal systems based on Roman law traditions as a charitable trust in the Anglo-Saxon territories. The most significant difference between the two legal institutions can be found in the fact that the foundation is a separate legal entity, while the trust is not. There is also a significant discrepancy in that a trust is primarily a legal construct applied for the benefit of individuals, while a foundation is assigned assets for a purpose. However, similarities can also be discovered between the rules of each subtype of the two legal institutions. During the application of the trust, we also come across an exceptionally private version, and in some jurisdictions, the foundation is also allowed to be established specifically to serve a private interest.

In English law, there were similar reasons for the formation of the foundation in the background as in the case of companies. The acquisition of independent legal personality by charter, by legislative legislation of parliament, could only take place until the middle of the 18th century. As a result, it was not possible to endow a separate mass of assets with a separate legal entity, which was replaced by the legal construction of the trust for the

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[57] See SEEGER, N., *The Liechtenstein Foundation, a Living Will*. In: *Trust & Trustees*, vol. 1, Nr. 6, 1995, p. 21. This act has been modified recently in 2008 (Stiftungsgesetz, Gesetz vom 26. Juni 2008 über die Abänderung des Personen- und Gesellschaftsrechts; Liechtenstein Law Gazette 2008/220.), and the rules were placed into the PGR. See PANICO, P., *Private Foundations. Law and Practice*. Oxford, 2014, p. 5-8. GOLDSWORTH: *op. cit.* p. 51-54. One of the major achievements of the amendment is that it clearly distinguishes between private and public foundations, while allowing the family foundation to serve public purposes at the same time. See ZWIEFELHOFER, T., *Liechtenstein: the reform of foundation law*. In: *Trust & Trustees,* vol. 15, Nr. 5, 2009, p. 373-375.

[58] Bundesgesetz über Privatstiftungen (Privatstiftungsgesetz–PSG) (BGBl. No. 532/1993).

[59] See VAN DEN TOORN, G. P. J. G. – VINK, D. R., *The Netherlands: Johann Cruyff (foundation) play in parliament!* In: *Trust & Trustees,* vol. 15, Nr. 5, 2009, p. 385-388.

[60] Civil Code of Malta (Act XIII of 2007) Second Annex, in effect from 1 April 2008.

[61] Ley No 25 de 12 de Junio de 1995 por la cual se gerulan las Fundaciones de Interés Privado, LFIP.

[62] JERJEN, E.: *Panama: reasons for the popularity of private interest foundations*. In: *Trust & Trustees,* vol. 15, Nr. 5, 2009, p. 399. The regulation was modified in 2006 and 2007 as well.

[63] See HAMZA, G., *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján* [Development of European private law. The development of modern private law systems based on Roman legal traditions]. Budapest, 2002, p. 137.

[64] See GERBRANDA, A., *The Netherlands Antilles: the end of the Private Foundation and the beginning of the Curaçao private foundation*. In: *Trust & Trustees*, vol. 15, Nr. 5, 2009, p. 390.

[65] See PANICO, P., *San Marino: private foundations – a hidden secret?* In: *Trust & Trustees*, vol. 15, Nr. 5, 2009, p. 404.

[66] Law of 23 February 2006, No. 47. „Company law", which replaced the previous regulation (Law of 13 June 1990, No. 68 'Company Law'), excluding foundations and associations.

[67] SCHMUTZ, P. – PALTZER, E. H., *Switzerland: estate planning with foreign family foundations – an assessment of the conflict of law and tax issues arising*. In: *Trust & Trustees*, vol. 15, Nr. 5, 2009, p. 412-414.

use of charitable assets, while the simple company *(partnership)* in other economic areas.[68]

Based on the application of company forms developed in English company law, it is also possible to establish a hybrid company in the Isle of Man and Gibraltar. On the Isle of Man, the regulations are modeled on the *Anstalt* and *Privatstiftung* in Liechtenstein.[69] This is actually accomplished through a company limited by guarantee. The members of the company undertake a guarantee to the creditors of the company up to a maximum of GBP 10 per person. The founding assets are transferred to the foundation and from then on it is managed by the board. Founding rights are non-transferable, terminate upon the death of a member, and founding directors are entitled to appoint new members.[70] There are two types of director status, founding directors and general directors. The former is filled by the founders and their associates (e.g. family members) and they are entitled to appoint additional such directors. They exercise oversight of the operation of the hybrid company acting as the foundation. The general directors are elected by the members on the basis of the nomination of the founding directors and they carry out the everyday operation of the foundation. The legal structure allows the foundation to operate under the control of the founders and their descendants, i.e. to perform the functions of a family foundation. The rule against perpetuities is not applied, so it can function as a dynastic foundation. There are no restrictions on its activity, i.e. it can also engage in commercial activity.

In the case of a guarantee company in Gibraltar, the members undertake to settle with the company's creditors with certain assets (usually one or five British pounds) in the event of the company's insolvency.[71] Consequently, in the case of a hybrid company, it is not necessary to issue shares. If this were to happen, the shareholders would only have to pay the financial contribution to their shares in the event of liquidation of the company. The company may have shareholders who are obliged to pay up the capital attached to their shares and may be guarantor members who owe assets commensurate with their commitment. The operation of such a hybrid company as a foundation requires that the company's articles of association regulate the shareholders as professional management who have voting rights and operational rights, while non-shareholders are beneficiaries who can share the income and capital. In addition, a share class can be created that is accompanied by protector rights. This company, which operates under such a member guarantee, performs the function of a foundation.[72] Its advantage is that it can also engage in commercial activity and the rule against perpetuity does not apply to it. It should be mentioned that the members and shareholders of the company may also sue third parties if they acquire free of charge or in bad faith from the company's assets *(tracing)*, but contrary to the trust, the company acting as a foundation can be sued as an independent legal entity and not by its directors.

In the Cayman Islands, as in the Isle of Man and Gibraltar, the legislature has based its legal structure on the company, but with significant differences in its detailed rules, making this legal solution much closer to that of a Continental European foundation. The *"foundation company"* was launched on March 27, 2017 in the Cayman Islands.[73] The foundation company is a legal entity with independent assets and legal capacity and with limited membership. The defining feature of a foundation company is that it is not a legal entity seeking to make a profit for its members and shareholders.[74] A foundation company can be established by a new foundation and by classifying an existing company as such if it meets the legal requirements. The foundation company obtains this qualification by registering in the Registrar of Companies. This requires that it shall be a company limited by shares or a company limited by guarantee, with or without share capital. It must adopt its articles of association and the name of the foundation company. It must specify its purpose or beneficiaries and, in the event of termination, provide for its remaining assets. It is also necessary to appoint a qualified person as secretary. The foundation company is prohibited from providing dividends or other benefits to its shareholders or members. A foundation company is a hybrid legal construct that combines the benefits of a company and a foundation. It can be operated with or without owners, for specific purposes or for the benefit of specific beneficiaries. The scope of application of a foundation company can be very wide, from a special purpose vehicle, through asset planning and asset protection, it can perform functions known in both company law and trust law. All this without having an owner and, as the beneficiaries do not have rights and legal legitimacy, they also provide full protection against their creditors.

With regard to countries with a common law system, Saint Kitts was one of the first to introduce special regulations for

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68 Partnership Amendment Act 1844, Limited Liability Act 1855.

69 CAIN, C. A., *A Foundation – an alternative to Trusts?* In: *Trust* & *Trustees*, vol. 1, Nr. 10, 1995, p. 9.

70 RIMMER, J., *Isle of man: foundations*. In: *Trust* & *Trustees* vol. 15, Nr. 5, 2009, p. 346.

71 BRIQUET, C. – WHITE, C., *Gibraltar: foundations – a company limited by guarantee*. In: *Trust* & *Trustees* vol. 15, Nr. 5, 2009, p. 339 and 341.

72 GOLDSWORTH, *op. cit.,* p. 121.

73 The Foundation Company Law, 2017 (Law 29 of 2017).

74 „For a company to be a foundation company, the requirements (the "foundation company requirements") are that -
(a) it is limited by shares or by guarantee, with or without share capital;
(b) it has a memorandum that -
(i) states the company is a foundation company;
(ii) generally or specifically describes its objects (which may, but need not, be beneficial to other persons);
(iii) provides, directly or by reference to its articles, for the disposal of any surplus assets the company may have on winding-up; and
(iv) prohibits dividends or other distributions of profits or assets to its members or proposed members as such; and
(c) it has adopted articles; and
(d) its secretary is a qualified person".
The Foundation Company Law, 2017, Art. 4. (1).

private foundations in 2003.[75] Prior to that, a law was passed in Liberia in 2002,[76] however, this had a significantly smaller effect. As a result of the law enacted in Saint Kitts, a number of offshore centers, which also regulate international trusts, enacted their own legislation.[77] Some countries have done this specifically for the development of the financial services industry and for foreign investors, even with a legislative package. A typical example of this is Qatar, where in 2016 the financial center created separate regulations for foundations, although waqf already performs a similar function in its legal system.[78] Similar regulations were enacted in Dubai in 2018.[79]

In the United States, similarly to the British countries, the foundation was not known for a very long time, its place was replaced by the business company and mostly by the trust.[80] The term "foundation" is used as a tax category.[81] It is noteworthy that in the United States, a subcategory of tax exemption under the Internal Revenue Code is the private foundation in addition to public charities that collect donations from the community. Within foundations, a distinction is also made between a foundation providing services for the public interest *(operational foundation)*, which is not a private foundation, but a public charity for tax purposes.

In the United States, New Hampshire first introduced a continental European legal foundation in 2017, and then Wyoming was the second state to regulate private foundations.[82] In Wyoming, the law combines the results of case law on corporations, trusts, and foreign foundations. The law includes the term "statutory foundation" in order to distinguish it from the term "foundation" used in federal tax law.[83]

5. The main reasons for the spread of the private foundation in Anglo-Saxon law

The main obstacle to the foundation's spread in Anglo-Saxon law was the different legal thinking. English lawyers improve the law on a case-by-case basis, while civil lawyers often create completely new legal regimes with a new law. As taking over the legal institution of the trust is a particularly difficult task in a civil law environment, thus, the adaptation of the foundation's institution poses similar challenges in common law countries. The principles of equity are applied to the case law of each common law country, but this does not mean that the general principles of a trust apply to a foundation across borders.[84]

A private foundation is also capable of performing asset protection functions, much like a trust. The mechanism of establishment and operation of the two legal institutions is developing in almost the same way, of which the following should be highlighted. The establishment of a foundation is also based on the founder's free, unilateral legal transaction, which is also a common feature of a trust. However, this also requires some explanation in part. It is true that in the case of a foundation, the foundation is established by a unilateral declaration of the founder, however, a declaration of acceptance from the members of the management body is required, similarly to a trust, where no legal relationship is established without a trustee. The assets of the foundation form a separate property from the assets of the founder, the members of the governing body (board of directors or trustees) of the foundation and the beneficiaries. The same is true in the case of a trust, where the segregation of assets is also resolved in a similar way, except that the beneficiary's assets may, as well as an expectation, include a benefit imposed on him from the assets under management. In the case of both legal institutions, it is possible to establish a supervisory body (protector, supervisory board, etc.), the members of which may, as a general rule, be appointed by the founder or the settlor. The transfer of the assets of the foundation may be made in accordance with the conditions specified in the memorandum of association, similarly to a trust. An interesting issue may be that in the case of a trust, there is the possibility of fully discretionary asset management, while in the case of a foundation, this may raise validity concerns.[85] The members of the

[75] Foundations Act of 2003.

[76] Private Foundation Law of Liberia of 2002.

[77] The followings are the most important ones: Foundations Act 2004 (Bahamas), International Foundations Act 2007 (Antigua and Barbuda), Foundations Act 2008 (Anguilla), Foundations (Jersey) Law 2009 (Jersey), Foundation Act 2009 (Vanuatu), Foundations Act 2009 (Seychelles), Foundation Act 2010 (Labuan), International Foundations Act 2010 (Belize), Foundations Act 2011 (Isle of Man), Foundations Act 2012 (Mauritius), Foundations Act 2012 (Cook Islands), Foundations (Guernsey) Law 2012 (Guernsey). Private Foundations Act 2017 (Gibraltar). See in details PANICO, *Private Foundations (op. cit.),* p. 8.

[78] Quatar Financial Centre Regulation No. 18 of 2016, QFC Foundation Regulations. See JOLK, Christophe – RUSSEL, D., *Quatar Financial Centre Foundation*. In: *Trust & Trustees*, vol. 25, Nr. 6, 2019, p. 611-612.

[79] Dubai International Financial Centre Law No. 3 of 2018, Foundations Law. See a comparative analysis of waqf and trust: MARWAH, H. – BOLZ, A. K., *Waqfs and trusts: a comparative study*. In: *Trusts & Trustees* vol. 15, Nr. 5, 2009, p. 811, ff.

[80] See VIEGAS-HAWS, A., *The Foundation as a trust substitute under US federal tax law.* In: *Trust & Trustees* vol. 15, Nr. 5, 2009, p. 281.

[81] „Every organization that qualifies for tax-exempt status under section 501(c)(3) of the Code is further classified as either a public charitiy or a private foundation. Under section 508, every organization is automatically classified as a private foundation unless is meets one of the exceptions listed in section 509(a). Private foundations typically have a single major source of funding (usuqally gifts from one family or corporation rather than funding from many sources) and most have as their primary activity the making of grants to other charitable organizations and to individuals, rather than the direct operation of charitable programs". Inland Revenue Service: Compliance Guide for 501(c)(3) Private Foundations. www.irs.gov. 4. The cited act is the Internal Revenue Code.

[82] Wyoming Statutory Foundation Act, 2019 Wyo Sess Laws Ch 190 (H.B. 236), in effect from 1 July 2019.

[83] CHANDLER, J. S. – CONE, G. – PANICO, P. – STAEHR, A., *Foundations in the wild west: the Wyoming Statutory Foundation Act*. In: *Trust & Trustees*. Vol. 25, Nr. 6, 2019, p. 617.

[84] GOLDSWORTH, *op. cit,* p. 23.

[85] Imagine a foundation whose purpose is to distribute wealth to the benefit of anyone to the extent decided by the board of trustees.

management body of the foundation also hold office and similarly to the board of directors, their change does not affect or terminate the existence of the foundation or the trust relationship. The founder usually has only limited rights in relation to the operation of the foundation, which is also true to the legal position of the trustee.

Significant differences between the foundation and the trust are as follows. A foundation is a separate legal entity, while a trust is not. There is no doubt that the trust property will in fact be in a legal position as if it were a separate legal entity, but it would not qualify as a legal entity. A foundation can be set up for an indefinite period of time, while in the case of a trust, the legislature usually sets a time limit. The establishment of a foundation is usually subject to registration, while in the case of a trust it is not mandatory in all states, and where it is, registration is not necessarily constitutive (e.g. Hungary). It is generally true that the establishment, dissolution of a foundation and the amendment of its memorandum of association can usually take place with the assistance of a court or authority because of the obligation to register. In comparison, setting up, terminating a trust and modifying the legal relationship is much simpler and less formal, implementing it is faster and more efficient.

In general, private foundations typically perform a property protection function similar to a trust and, in some circumstances, even more effectively than trusts.[86] In the case of the founder's creditors, this is limited by the provisions on foreclosure and legitimate portion, compulsory share. Some states have amended either the general civil law rules on forfeiture (e.g. Cayman Islands, Bahamas) or a separate law on private foundations (e.g. Cook Islands, Belize) to meet the need to set up a private foundation specifically for the protection of property, provided a more favorable legal position for the founders than the general rules.[87] We get a diverse picture of the beneficiaries from the point of view of property protection. In civil law systems, e.g. under Liechtenstein law, it is possible for the founder to exclude the beneficiaries' creditors from claiming assets from the foundation.[88] By contrast, the Austrian law on private foundations does not provide this possibility and, according to case law, a clause intended to provide such protection against the beneficiary's creditors is invalid.[89] Among mixed-jurisdiction countries, Malta has the option of applying a spendthrift clause to protect the beneficiary's creditors.[90] In countries with a common law system, where a private foundation can be established for asset protection purposes, it is possible to stipulate a prohibition on the right of alienation to protect the beneficiary, similar to the legislation on asset protection trusts; such a country e.g. Saint Kitts and Nevis and the Bahamas.[91]

In these countries, however, the founder and the donors to the foundation cannot benefit from this protection if they are also beneficiaries,[92] in contrast to the rules known for self-settled asset protection trusts.

6. Final remarks

Historically, the first significant step in the evolution of foundations was the appearance of foundations with independent legal personality, which replaced the pseudo-foundation according to our current concepts. The next major achievement was the securitization of foundations and the placing of their operations under state supervision. During the modern codifications of civil law, the regulation of foundations has been included in several private law codes and has become a living institution in civil law countries. The next significant change in the legal nature of foundations was to give place not only to serve public interests, but also first family and then specifically private interests as well.

In Anglo-Saxon law, the role of the foundation is performed by the institution of the trust. Compared to this, however, by the end of the 20th century, a number of common law countries worked out and introduced separate regulations for foundations, primarily to serve the needs of foreign investors. Today, the foundation has undergone a major transformation, allowing it to be introduced in some common law countries, an excellent example of which is for example the legislation of New Hampshire and Wyoming and several business centres. The new approach to the regulation of foundations also allows functions similar to trusts, such as asset protection, which also lead to a novel concept of foundations.

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[86] „Private foundations are typically asset protection vehicles in the same way as trusts, and in some circumstances perhaps even more effectively than trusts by virtue of their incorporated nature as 'legal persons' owning assets in their own right". PANICO, *Private foundations (op. cit.)*, p. 309.

[87] See in details: PANICO, *Private foundations (op. cit.)*, p. 317, ff.

[88] „Bei Familienstiftungen kann der Stifter bestimmen, dass die Gläubiger von Begünstigten diesen ihre unentgeltlich erlangte Begünstigungsberechtigung oder Anwartschaftsberechtigung, bzw. einzelne Ansprüche daraus, auf dem Wege des Sicherungsverfahrens, der Zwangsvollstreckung oder des Konkurses nicht entziehen dürfen. Bei gemischten Familienstiftungen kann eine solche Anordnung nur insoweit getroffen werden, als die jeweilige Berechtigung den Zwecken der Familienstiftung dient." PGR Art. 552. § 36(1).

[89] PANICO, *Private foundations (op. cit.)*, p. 339, ff.

[90] Civil Code of Malta (Act XIII of 2007) Second Schedule, in effect from 1 April 2008, Art. 33(10)–(11).

[91] Saint Kitts and Nevis Foundations Act, 2003, Art. 25(1) – (4). Almost the same is the wording with the Bahamas Foundations Act 2004, Art. 67(1)–(4).

[92] „Neither the founder nor any other person transferring property to a foundation may benefit from the provisions of this section." Saint Kitts and Nevis Foundations Act, 2003, Art. 25(5). Vö. „Neither the founder nor any other person donating property to a foundation may benefit from the provisions of this section." Bahamas Foundations Act 2004, Art. 67(5).

The Evolution of the Hungarian Csemegi Code from the Aspect of Early Criminal Policy (1908 – 1948)

*József Pallo**

Abstract

The Hungarian Csemegi Code, which was the first act – in a modern sense – that – obviously besides being a substantive law – had provisions that addressed questions related to the execution of its contents, was a milestone in the development of Hungarian criminal law. The vivid development (emanating from the urging will to reduce the gap between Hungary and the more developed countries, the progressively strengthening economy and the escalation of relevant correctional academic literature) apparent during the three decades that followed 1880 also resulted in a more lucrative period for the field of corrections as well. While towards the end of the 19th century, the classical school of correctional science mostly revolved around the questions of security, discipline, infrastructure and technical issues while being less focused on actual legal questions, the effects of the positivist school – by the 20th century – have seeped into its framework, resulting in the introduction of the so-called personality-influenced individualization, aimed at reducing the chances of recidivism and thus avoiding committing repeated offences. This process is symbolized by the several amendments made to the original Csemegi Code. Present study will address this historical and legal development arc in a more detailed manner.

Keywords: *Csemegi Code; Hungarian legal development; criminal law codification; criminology and criminal law; correctional (penal) law; general experiences.*

1. Introduction

When we analyze the historical nature of Hungarian criminal justice, the Csemegi Code (Act no. V. of 1878), drafted 140 years ago, can be very well considered a sure-fire milestone of the evolution of the field. This regulation has certain values which undoubtedly render it worthy of occupying the peaks of the turn-of-the-century criminal law, and it also provides feedback for several earlier codification attempts. This creates a practical and dogmatic synthesis which overshadows all the previous attempts. The significance of the Csemegi Code cannot be underestimated, since it had the profound effect of eliminating archaic policing structures containing feudal elements, paving the way for further decades in the development of applied criminal law in Hungary. This was the first legal device that contained separate provisions for the execution of sanctions and the first one to create a unique system by elevating these provisions to the top of the legal hierarchy. Several of the provisions contained in the Code were in effect until 1962 – a lengthy period that eventually led to several amendments in order to better mirror the changing landscape of criminal policy efforts. In this essay, I will address the focal points of the changes through several characteristic and representative quotes from early academic literature.

2. The First Amendment to the Csemegi Code (1908): Juveniles in the Spotlight

During the turn of the century, the direction of the reform initiatives grounded in the drastically changing domestic criminal environment was targeted towards the system of sanctions [1], namely the revision of certain provisions pertaining to juvenile people, which received great emphasis. The leading principles of the reform initiatives preparing the new type of criminal policy relied heavily on determinism and pragmatism, coupled with a special-preventive approach and a perpetrator-centered aspect. Certain changes pertaining to the tools dedicated to the protection of the community can also be noted. In the era, the accomplishments and results of revolutionary fields of science like anthropology, psychology and sociology received more and more recognition, which was an effective way on its own right since these endeavors managed to insert a new, deterministic approach (facts and hard science) into the place "vacated by" theological-philosophical indeterminism. As a direct and long-lasting result, the paradigms related to the goals and tools of punishment as an institution changed completely, meaning that sanctions were no longer considered as methods to address the damage caused in the fragile framework of legal balance, but as a tool to protect society in a more effective way by introducing

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[1] Besides this, the introduction of conditional sentences, the reform of fines and indeterminate sentences as security measures were also on the agenda.

an individualistic approach to prevention. The philosophy of this new paradigm also meant that dangerous delinquents can – through the tools delivered by science – be filtered, identified and – through capital punishment or incarceration – removed from society. Following the principles of determinism, the will to act was approached from three, dimensions enjoying a crucial role (namely that of biosphere, sociosphere and psychosphere).[2] Since the path to crime could be identified this way, new possibilities emerged to address these three dimensions using goal-oriented and individualized targeting, coupled with specified correctional measures. In practice, this meant that criminals had to be treated and educated, striving to establish grounds on which one can safely assume that they would refrain from committing further crimes. The Csemegi Code was fairly moderate regarding the sanctioning of juveniles, and designated juvenile correctional centers for the treatment of this sub-category of delinquents. The regulation only stated that those perpetrators who were aged 12 to 16 and lacked the required recognition to become aware of the dangerous nature of their acts would be committed to a juvenile correctional institution[3] until the age of 20.[4] The first comprehensive amendment to the Csemegi Code took place among these circumstances, via Act no. 36 of 1908 (hereinafter: 1st am.).[5] Upon coming into effect, the 1st am. caused quite a stir in the field of criminal justice and corrections of juveniles.[6] While the Csemegi Code can be regarded as a code of law in the typical sense, the amendment shows signs of influence from the positivistic school of criminal justice. An important terminological novelty in the era was the introduction of a new category, namely that of a person who is dangerous to society, which resulted in a gap between someone being dangerous to the public and someone who is guilty of a crime. This made it possible to not only focus on the severity of the crime and facilitated the expansion of individualization as well. In practice, one's threat level was evaluated through an analysis of significant, pertaining personal characteristics which led to the fact that the sanctions imposed as a result were often milder or as a matter of fact more severe than they would have been in case of a strictly crime-based and focused evaluation. Based on the regulation, people aged between 12 and 18 were considered juveniles, who had new measures to face while reduced severity sanctions, fines and incarcerations slowly faded out. However, disciplinary reprimands and probation appeared as moral punishment, and the notion of correctional education was strengthened. Light or enhanced light regime was available to use as a last resort (as an *ultima ratio*).[7] It has to be noted however, that this was the first legal device that strived for the establishment of a penal system based on pedagogy and sought to facilitate a positive change in one's personality. The 1st am. had a separate decree aimed at its execution which perfected the so-called „family system", building on Anglo-Saxon[8] experiences. Ministry of Justice decree no. 27300/1909 contains particularly important rules related to the execution of light and enhanced light regime and the post-charge non-criminal detention of juveniles.[9] The regulation established a quite strictly differentiated and progressive system, in which juveniles were classified based on the nature of the crime committed and the background of the perpetrator. The chief elements of the structure adopted a simplified and less severe method of the progressive penal system. The admitted inmate was first put into complete solitary confinement dedicated to the surveillance of the prisoner, which lasted for a maximum of two weeks. Following this, the prisoner was relocated to a differentiated (for those of unstable state of mind, or alcohol abusers) regime of one-time offenders, recidivists or habitual („career") criminals. This professionally justifiable differentiation had the goal of ensuring that *„in order to avoid further delinquent actions and overlaps between certain threatened groups, prisoners are provided accommodation with fellow inmates whose education, moral principles and social background are more or less similar to those in question".*[10]

The prisoners allocated to these groups worked together during daytime but spent the nights in separate living compartments. The legal environment also made it possible that those prisoners whose behavior and conduct allowed enjoy the privilege of a parole under the supervision of probation officers, during which they had to conform to special rules. According to rule that had been in effect ever since, based on a special directive of the court, juvenile prisoners could stay in juvenile correctional centers until the age of 21. The obvious goal of this directive was to protect those who *„could be saved"* against the perils and detrimental effects of adult prisons.

As a significant organizational measure, 1st am. introduced a special agency dedicated to the supervision of juvenile delinquents, which was composed of representatives of state-owned organizations and civilian corporations. When we talk about the importance of the 1st am., it has to be emphasized that *„the conservative forms of penal sanctions – namely those whose aim is pun-*

[2] LŐRINCZ, J., A javítástól a reintegrációig. A korrekcionalista ideológia metamorfózisa a hazai börtönügyben. (From Repair to Reintegration. The Metamorphosis of Correctionalist Ideology in Hungarian Prisons), In: GÖNCZÖL, K. (ed.), Gályapadból *laboratóriumot. Tanulmányok Finszter Géza professzor tiszteletére.* Budapest, 2015, p. 451.

[3] The establishment of these institutions was a meticulous and slow task, with the first one being completed in 1885, in Aszód (near Budapest). We also have to add that the judges opposed this new type of measure very much.

[4] The first institution dedicated to juveniles was completed late, in 1905 (Kassa, now Kosice)

[5] Among the executive provisions of the relevant legislation, Ministry of Justice decree no. 27200/1909 regulated the system and operation of correctional education.

[6] LŐRINCZ, J., *A fiatalkorúak büntetés-végrehajtása. (Juvenile Prison Law),* Budapest, 1998, p. 21.

[7] We must mention that the complexity of these provisions emanated from Act no.VII of 1913 on juvenile courts.

[8] Particularly Reformatories and those English versions (Borstal systems) are the ones we have experiences with.

[9] The different adjudication of this matter is underlined by the fact that if the last-case scenario of incarceration had to be used, then juveniles were usually put into light regime prisons. The minimum length of stay was 15 days, the maximum length was 15 years.

[10] LŐRINCZ, J., *A fiatalkorúak büntetés-végrehajtása. (Juvenile Prison Law),* Budapest, 1998, p. 30.

ishment – have been substituted by sanctions grounded in criminal policy, which are capable of influencing the future behavior of the perpetrators."[11] The culmination of the measures aimed at modernization was the establishment of the juvenile court of justice with Act no. VII of 1931, which unequivocally demonstrates that the notion of prevention had surpassed the notion of severity-based sanctioning and criminal repercussion[12]. We managed to settle an almost four decade-old debt Finkey described as:*„… partly their pragmatism, and partly their love for children has led the Americans to a conclusion we required long theoretical analysis and scientific debate to reach: the most effective tool against crime is the protection of children and the re-shaping of those juveniles who are still young enough to be saved."*[13] Along with the 1st am. came into effect of another legal device emblematic of the era, Act no. XXI of 1913 on loitering to avoid work, which we would like to describe in a few sentences. The draft of the act was submitted to the legislation on 6 May 1913: *„(…) the complete personality, the inherent dangers and their threat to society shall be analyzed and an indeterminate, preferably long security sanction shall be used to provide satisfying protection of the rule of law and public security."*[14] The new criminal policy brought forward notions that encouraged the use of alternative sanctions against certain groups of perpetrators. Following the philosophy of positivist criminal law, it introduced security regulations for those who were dangerous to the public and provided a definition as well: *„Those who possess traits that urge them to resort to measures that are harmful to society at the slightest stimuli, even in normal conditions, are dangerous to the public.*[15] This opened the way for the expansion of the dogmatic and practical array of tools with a new security measure. Besides the conservative sanctioning approach to loitering to avoid work (light regime incarceration or fine), the legal solution applied in Hungary used workhouse placement as an alternative measure. The legal minds of the era showed signs of modesty since they strictly determined that putting the „dangerous" label on this – sanctionable – type of activity is not something that is recommended. Despite this, it became universally accepted that the two constant components of someone who is „dangerous to the public" are a tendency to perpetrate a crime and "loitering to avoid work". These circumstances paved the way for the introduction of workhouses, the establishment of which was a quite controversial topic in Hungarian criminal justice. Finkey formulated his doubts as follows: *„Since only the court can sentence someone to workhouse stays, it is doubtful whether there is a need for the establishment of a new type of institution largely similar to the various regimes of prisons and detention".*[16] The Csemegi Code stated that those who were capable to work but did not do so and instead lived a life of loitering and vagrancy were to be admitted into a workhouse. The same sanction was used in the case of those who had been sentenced to prison or detained for specific crimes, upon their release, if the court determined that the crime committed was linked to their vagrant lifestyle. Due to the nature of this type of sanction, it was used as a security measure since loitering was considered as the unlawful passive behavior of someone who broke their social duties, thus making them antisocial. Punishment was not considered the chief goal in this case, but rather the limitation of one's freedom in a way that would be sufficient for facilitating their familiarization with work and thus removing the threat factor they had posed before.[17]

Szöllőssy makes a remark on the unfavorable international experiences when he states that *„the lack of independently functioning workhouses is one of the reasons for the courts' refusal to use this type of security measure. As a matter of fact, they believe that if a person sentenced to a workhouse and is later admitted into a light regime prison, then in the end there is no point treating the two institutions as two different, separate entities."*[18] Finkey tries to solve this quite serious issue by arguing that the emergence of the workhouses was in itself a result of the differentiation and – as it is – it signifies the further practical development of tools dedicated to the protection of society. He adds that the need to treat work-avoiding loiterers in a special way requires institutions like these, particularly when we consider the principle of individualization. He provides a concise argument by saying that *„The mentality and personality of an urbanized, lazy vagabond, robber or sexual murderer is completely different from a young peasant who in a drunken stupor becomes involved in a bar brawl and may shed some blood during it."*[19] He supports the idea of constructing workhouses and stands by his opinion, arguing that this would be *„the peak of our penal system".*[20] The law came into effect on 1 January 1916, encompassed by rudimentary material conditions further worsened by the fact that no workhouses have been constructed in the future either. This rendered the whole question „empty", despite the fact that the will to reduce vagrancy and to control recidivism certainly deserved some support.[21] After this short briefing, the following assumptions can be made related to the significance of the 1st am.: due to the effects of criminology, which by then had become a social science in its own right, a paradigm shift occurred, which was based on the fact that

[11] LŐRINCZ, J., *A fiatalkorúak büntetés-végrehajtása. (Juvenile Prison Law),* Budapest, 1998, p. 45. p.
[12] LŐRINCZ, J. - MEZEY, B., *A magyar börtönügy története. (History of Hungarian Prison Law)* Budapest, 2019, p. 124.
[13] FINKEY, F., *Szemelvények kisebb szakdolgozataiból. (Selections of shorter articles 1890-1940)*, Budapest, p. 74. p.
[14] Indokolás a közveszélyes munkakerülőkről szóló törvényjavaslathoz, (Explanation on the Law) In*: Képviselőházi irományok, 1910. XXVI. kötet, 711. szám,* Budapest, p. 240-289.
[15] Indokolás a közveszélyes munkakerülőkről szóló törvényjavaslathoz, (Explanation on the Law) In: *Képviselőházi irományok, 1910. XXVI. kötet, 711. szám,* Budapest, p. 268.
[16] FINKEY, F., *A társadalmi védekezés és büntetőjog. (Social defense and Criminal Law*.) Miskolci Jogászélet, Miskolc. 1925, p. 41.
[17] The actual measure started operating among quite harsh infrastructural conditions, since in 1916, only two light regime institutions had separate workhouses. In the case of male offenders, the location was Jászberény, while women were sent to the Kalocsa workhouse.
[18] SZÖLLŐSY, O., *Magyar Börtönügy. (The Hungarian Corrections.)* Budapest, 1935, p. 226.
[19] FINKEY. F., *A társadalmi védekezés és büntetőjog. (Social defense and Criminal Law.)* Miskolci Jogászélet, Miskolc. 1925, p. 40.
[20] FINKEY. F., *A társadalmi védekezés és büntetőjog. (Social defense and Criminal Law.)* Miskolci Jogászélet, Miskolc, 1925, p. 44.
[21] Workhouses were finally made obsolete by Law Decree no. 39 of 1950.

instead of punishing its subjects, the system had to make up for the education they had not deceived before to ensure that they eventually become law-abiding citizens. This was the first step in 20th century Hungarian criminal justice towards using the core values and accomplishments of criminology.[22] However, there is a significant contradiction between the Csemegi Code and the 1st am since while the former serves repression, then the latter follows the principle of prevention. Fortunately, out of the two, the latter managed to gain the upper hand – even if it was just for a while.[23]

3. The Second Amendment to the Csemegi Code (1928): multiple recidivists

Following the defeat suffered after WWII, negative tendencies started appearing in Hungarian society, with a gradual increase in the crime rate and the structure of the delinquencies committed. By the 1920 s, the argument claiming that „within the category of multiple recidivists, there are hard-core criminals whose life is a life of crime and who are susceptible to habitual offending" once again gained support. The lawyers of the era labeled this category of criminals as people who possess an inherently never-ending urge to commit offences, although the unified use of this designation remained an endeavor that was difficult to pull off. The official argument was that these habitual criminals – who posed constant danger to public security and society – had become so depraved that treatments aimed at special-prevention were no longer considered effective in their case. Consequently, the need emerged for a more effective measure, which in its principle would last for an indefinite period, during which these delinquents would be pacified as long as they are considered a threat to public security. This goal was only manageable through legislation, and as a result Act no. 10 of 1928 was born (hereinafter: 2nd am.),[24] which further amended the Csemegi Code. The regulation contained 52 sections and addressed two larger fields of criminal justice: it reformed financial penalties and it introduced the increased severity workhouse (quasi „preventive arrest") as a novel device dedicated to habitual criminals.[25] The regulation was targeted towards those recidivists who committed crimes against life, sexual freedom or assets on three separate, individual occasions, the last two during the last five years, and did so customarily; or showing signs of living a life based on crime.[26] This new act also settled a debt since it filled the suggestions from 1913 with content and created a complex legal environment for dealing with dangerous perpetrators. Contrary to the rules on workhouses, there was no professional debate at all. As a matter of fact, the initiative gained widespread support. To quote Finkey's words: *„The criminal-judicial talks of the last decades all agreed on the fact that in the case of the so-called „career criminals", who have become accustomed to a life of crime, regular prison or workhouses sentences simply do not seem sufficient since these highly dangerous people can no longer be deterred (or their personalities repaired) by these alternatives. These delinquents require specialized treatment in dedicated institutions:"*[27] As for their legal nature, enhanced severity workhouses are basically a mix of strict regime prisons and regular workhouses. They use the „indefinite placement" used by workhouses as the most effective tool for protecting society but put strong emphasis on several elements otherwise associated with strict regime prisons (e.g. the strict obligation to work, high order and discipline). The increased severity is also apparent in the time to be spent inside: in the case of regular workhouses, this was 5 years at most, while in the case of enhanced workhouses this upper limit was erased, effectively offering the opportunity for life sentences, should parole be denied. The rules of execution were also similar to those used within strict regime prisons, effectively creating a non-typical form of a life sentence. More so, we can only provide marginal excuses that would support their difference: one of these is that in the case of enhanced severity workhouses, several steps used within the prison systems (e.g. solitary confinement upon admission, progressive rules etc.) were skipped. With the intention of protecting the dogmatic foundations of this rather unique system, Finkey argues that *„Our enhanced security workhouses indeed conform to their title, since the 2nd am. created an upgraded version of them by unifying the advantages of strict regime prisons and regular workhouses and omitting elements that would not belong due to being inadequate or ineffective in the case of the highly dangerous criminals anyway."*[28] However, we cannot avoid providing a direct comparison between the fundamental aspects of regular and enhanced severity workhouses. There is a difference between the rules of execution, since while regular workhouses could be compared to light regime prisons, enhanced severity workhouses were more like strict regime prisons. We must also make a remark on the fact that these contained differences resulting from the differing nature of the measures. Regarding the manner of execution used within the two types, we can safely assume that both of them were based on the daytime labor and night-time separation of pre-set groups. The formal goal to be achieved was to ensure the subjects' reliance on work and increase their work-related diligence, within a pseudo-progressive system. The importance of group classifications is underlined by the fact that multiple recidivists visited separate workshops, but they were further differentiated by age, intelligence and education as well. Those who denied work or posed a threat to their peers had to be separated as well.

[22] MEZEY, B., *Magyar jogtörténet. (The History of the Hungarian Constituztion),* Budapest, 1998, p. 304.
[23] In the later years, regulations pertaining to juveniles slowly eroded, the process of which is complex enough to be worthy of a dedicated analysis.
[24] The full title of the law: Act no. 10 of 1928 on several questions of criminal justice.
[25] Enhanced regime workhouses had to be used instead of a sanction, with only its minimum length being designated, and lasted at least 3 years. Following these three years, the incarcerated could ask his or her release from the Minister of Justice, which the Minister decided on following receiving the opinion of the supervisory organ operating next to the workhouse. Thus, this type of measure could last for a life, in which case its severity was equal to strict regime prisons.
[26] MEZEY, B., *Magyar jogtörténet. (The History of the Hungarian Constituztion),* Budapest, 1998, p. 317.
[27] FINKEY, F., *A társadalmi védekezés és büntetőjog. (Social defense and Criminal Law.)* Miskolci Jogászélet, Miskolc. 1925, p. 43.
[28] FINKEY, F., *Büntetés és nevelés. (Punishment and Education.),* Magyar Tudományos Akadémia, Budapest, 1925, p. 23.

It is apparent that those subjected to workhouses had to spend at least a year inside, with the maximum allowed timeframe being 5 years. The date of their release was determined according to their behavior and diligence during their first year inside, essentially giving them an opportunity to influence their fate. In the case of enhanced severity workhouses, the minimum length was 3 years, but the stay could last indefinitely. A strongly enforced compulsion to work was apparent in each of these institutions. Those admitted could not pick a preference, and exceptions were granted only on medical or psychological grounds. In these cases, however, the admitted person had to be transferred to a different location to better suit his or her medical needs. The question of employment was a crucial factor for workhouses from the aspect of agricultural work, due to certain sources that doubted the suitability of this type of labor, arguing that most admitted delinquents had had urbanized lifestyles before, and it would be dangerous anyway to employ them in large open areas. Finkey had a firm opinion on this matter as well, as he argues that *„those important principles that support the (mostly agricultural) open-air labor of prisoners remain just as important in the case of workhouses as they are in prisons. Economical and humane reasons alike call for the introduction of open-air labor options in workhouses and enhanced regime workhouses, albeit not exclusively, but after taking into account factors such as the personality of the convicts and the environmental conditions on the premises."*[29] Even from a dogmatic point of view, enhanced security workhouses were the sources of many other issues, of which I will briefly describe the most outstanding ones. The first was the introduction of the term *„constantly present proclivity to perform criminal offences".* Several futile attempts had been made to create a compact and duly abstract content for this term, but in vain, resulting in the lack of a uniform interpretation. Due to its lack of pre-requisites, this category was inherently utilizable against basically anyone. Its inconsistent and antinomic nature was also apparent in the fact that it was available to use in the case of severe and mild crimes (or even financial crimes) alike. However, white-collar criminals did not belong under this category, so those who committed fraud, forgery or similar offences had no reason to be afraid of being put into an enhanced severity workhouse. The disproportioned nature was also discernible by the fact that while according to the regulation, the minimum length of custody was 3 years, if a perpetrator on parole breached a pre-described behavioral rule, the next parole could only take place after 5 years, despite the fact that no actual crime had been committed. In practice, this meant that when discussing parole (as in conditional release), committing a crime and breaching a behavioral rule absurdly fell under the same category. This, however, did not change the official interpretation as set by the justice sector, as follows: *„sending a person to an enhanced severity workhouse is a security measure, taking into account the guidelines of the London international penitentiary congress in 1920. The use of sanctions that are in proportion with the crime committed and the delinquencies of the perpetrator is wrong and it would be better if it was tied to a workhouse stay, because according to some findings, using definite sentences does not seem to provide the required benefits in certain cases. Hence, a new suggestion uses indefinite sentences and regulates their application to ensure that no parole can take place until the convict becomes capable of living a law-abiding life within society.*[30] The normative foundations of the 2nd am. were grounded in the perpetrator-focused approach, which means that the sanctions were not proportional to the severity of the crime committed, but to the danger the subject poses, resulting in the use of indefinite sentence lengths. In this system, criminal tendencies and the actual crime committed were symptoms of the delinquents' threat to society.We can find a viable and adequate conclusion to this legal measure in the following statement:

„The enhanced severity workhouses could have been a useful tool to increase the safety and security of society if they had provided some sort of education within their walls. Without this, society was only protected from these delinquents as long as they remained inside. From this aspect, the indefinite nature of the sentences to be spent inside did not in the end result in the increased protection of society."[31] Considering all these, it is completely understandable that the regulations of the 2nd am. dealing with the enhanced security workhouses remained futile and ultimately non-realistic notions of Hungarian penal history.[32] This phase of legislation (and the resulting experiences) practically concluded the codification process of the interwar period. We must note, however, that the codification of criminal law had been called for before the war as well. With the words of Pál ANGYAL: *„…the continuous postponement of the Criminal Code reform equals to sacrificing the Hungarian criminal law."*[33] In the last peaceful year before the brink of WWII, the deprivation of one's liberty could be exercised in one of the following ways: strict regime prison, medium regime prison, light regime prison, enhanced light regime prison, workhouse, enhanced severity workhouse. Sentences could be served in one of the six national penitentiaries, 23 higher court and 90 county court jails (light regime) and two workhouses. By this time, however, history has caught up with Hungary which – coupled with the dramatic change of the political-legal landscape – foreshadowed the twilight of the hegemony of the Csemegi Code.

4. The Third Amendment to the Csemegi Code (1948): Detention of the Mentally Insane

After the end of WWII, there was a political will to pave the way for the criminal responsibility of those responsible for war crimes, and to ensure the legal background of this endeavour. This was precluded by a decree of the prime minister that introduced the people's tribunals, which was later elevated to the top of the legal hierarchy through Act no. VII of 1945. In the case

[29] FINKEY, F., *Büntetés és nevelés. (Punishment and Education.),* Magyar Tudományos Akadémia, Budapest, 1925, p. 55.
[30] *Magyarország igazságügye az 1927. évben. (The justice of Hungary in 1927.),* Budapest, p. 49.
[31] MEZEY, B., *Magyar jogtörténet. (The History of the Hungarian Constituztion),* Budapest, 1998, p. 317.
[32] We have to add, however, that this approach did not disappear completely, since albeit modified it appeared once again as a measure called enhanced severity detention in Law Decree no. 9 of 1974.
[33] ANGYAL, P., A joghézag problematikája a büntetőjogban. (The Problem of Loopholes in Criminal Law) In: *Értekezések a philosophiai és társadalmi tudományok köréből,* Budapest, 1942, p. 45.

of the people's tribunals, death sentence, forced labor and strict and medium regime prisons were all valid sanctions. The rules of execution were set by a ministry of justice decree.[34] Another characteristic attribute of the era was that people's tribunals and regular courts operated side by side. The latter used the measures aimed at the deprivation of liberty as per the Csemegi Code (strict, medium and light regime prisons, workhouses and enhanced severity workhouses). Practically, prisons within the system were either light regime court jails, national penitentiaries and workhouses. The regulations were based on a justifiable social need and contained several elements that suggested that the national legal structure had become a *„grotesque tool directly controlled by the monolithic state politics".*[35] It is difficult to talk about bright-minded, complex legal approaches in this era, but several conformist ideas criticizing the Csemegi Code appeared quite early. This criticism was quite indirect, as it was used to slowly erode the status quo of criminal law through several of its key elements. In the words of Miklós KÁDÁR:*„… we provide an illustrative list of several legal measures that are – from the aspect of the democratic Hungary – quite controversial and cause confusion not only among the public, but also among law experts."*[36] With the politics shifting to the left, the Csemegi Code started to lose its grounding, which led to a slow degradation of its fundamentals and ideas. It was constantly compared to the Soviet regulations with the intention of proving that the foreign approach is far superior to it. It is also obvious that the reigning power could not (and did not want to) comprehend and utilize the extremely concise and refined structure of the Csemegi Code. In order to achieve certain political and economic goals, the system required a dramatically new form of criminal code that régime could shape and alter according to its own needs and interests.

The preparation of the 3rd am. began in this political climate, with the intention of ceasing and supplementing certain shortcomings of criminal law. It was not meant to be long-lasting, which fact is underlined by Miklós KÁDÁR as he argues that *„the new criminal code, built on strictly principled and dogmatic fundamentals, can only last as long as it suits our vision and thus remains a far cry from our earlier patchwork regulations containing inadequate rules."*[37]

The draft had a rich array of amendment suggestions, but this was not in proportion to what actually came to fruition. As far as correctional issues go, we have to emphasize that the suggestion would have terminated death sentences in the case of civic courts in favor of life sentences. Incarceration itself was present in two different grades (strict and light regime prisons), which were linked to the actual length of the deprivation of liberty contained in the sentence. Medical detention was suggested in the case of delinquents posing a danger to the public, but this was supplemented by optional parole. The reception of this regulation was not overwhelmingly positive. Several opinions[38] arose that the risk of recidivism (as in repeated offences) was not a pre-requisite for the use of this measure, which in turn was considered a security measure rather than a medical one. In order to understand the prelude to this, there might be a need for a brief retrospection. According to the Csemegi Code: *„those who commit offences unwillingly (e. g. in the state of being senseless) or under a state of mental confusion and thus lack the required the free will, resolution and determination, shall not be held accountable for them".*[39] Thus, Csemegi Code made a difference between mental derangement (psychosis) and a state of senselessness, which, however, do not limit each other. He further adds the general formula of the *„lack of intellectual talent" but* does not provide a taxative list of its types.[40] Moreover, he excluded the culpability of those under 12.[41] This regulation did not provide directions from the aspect of execution-therapy, but it contributed to the future development of the field by establishing the definition of insanity and inserting it into the structure of criminal law. This system lived on with virtually no changes to its content until 1948, when the 3rd am. sought to put the accomplishments of the perpetrator-focused approach to good use. In light of this endeavor, it tried to introduce progressive steps to regulate the treatment of people with reduced sanity. The 3rd am. devotes a dedicated chapter to the *secure detention*[42] of mentally insane persons to be used in the case of persons over the age of 18 whose insanity limits their capacity to act in a responsible manner. This detention can last up to a year, with a court revision 3 years before the planned release date, the results of which can influence the stay by adding an extra year certain conditions related to the recovery of a given person. Security detention faced harsh criticism. For example, István Schäfer claimed that mimicking the symptoms of mental insanity might have been an easy way for those looking to avoid punishment for their offences to do so.[43] Béla HORÁNYI used medical arguments to state that a lengthy institutional stay that

[34] As a significant change, enhanced light regime prisons were abolished in 1946.

[35] LŐRINCZ, J., A sztálini büntetőpolitika és konzekvenciái a hazai büntető igazságszolgáltatásban. (Consequences of Stalin's penal policy and justice.) *In: Börtönügyi Szemle.* vol. Nr. 2, 2007, p. 73.

[36] KÁDÁR, M., Gondolatok a büntetőjog reformja köréből. (Thoughts on the scope of criminal law reform.) In: *Jogtudományi Közlöny.* vol. Nr.1, 1946, p. 75.

[37] KÁDÁR M., Gondolatok a büntetőjog reformja köréből. (Thoughts on the scope of criminal law reform.) *In: Jogtudományi Közlöny.* vol. Nr.1, 1946, p. 76.

[38] SCHÃFER, I., Biztonság vagy gyógyítás? (Safety or Medicine) *Jogtudományi Közlöny.* vol. Nr. 6, 1949, p. 219.

[39] Csemegi Code 76.§

[40] The regulation also addressed the questions of responsibility in the case of deaf delinquents or those between 12 and 16 years of age.

[41] Csemegi Code 89.§

[42] The professional environment was quite vivid during the codification, during which the Lawyer Trade Unionm headed by Miklós KÁDÁR *(1904-1971)* drafted a complex suggestion which contained a so-called "rehabilitative detention", which defined certain treatment options and made conditional release a possibility. It also addressed the question of those of reduced responsibility. The ultimately good-willed and high-standard suggestion was only partly adopted by the 3rd am., however.

[43] SCHÃFER, I., Biztonság vagy gyógyítás? (Safety or Medicine). *In: Jogtudományi Közlöny*. vol. Nr. 6, 1949, p. 219.

followed a short-term recovery period might have actually been harmful.[44] While the introduction of security detention had been a supported initiative from the reform movements of the 19th century, Hungarian criminal law did not have a separate category for mental insanity even in 1948. It is certain that by drafting the 3rd am., the legislators wanted to address the shortcomings of the Csemegi Code,[45] with a degree of success. When we talk about shortcomings, we cannot avoid the fact that the legislators in this case – beyond addressing the goals of pacification – did not go the extra mile. Although the 3rd am. was drafted among a dynamically changing environment [46], it echoed the ideas of an obsolete era, which meant that it was undesirable in the long term. While this became possible with the beginning of the communist regime in 1949, the whole penal and criminal system in Hungary required comprehensive simplification, since its array of tools included was aimed at depriving one from his or her liberty, coupled with post-charge non-criminal detention. The rule of the Csemegi Code was nearing its end. Barna MEZEY provides a concise depiction by noting that *„the majority of penal and criminal law had become political affairs, and several provisions of Soviet pattern conflicted with the conventional, normative text of the Csemegi Code."* [47] By this time, the intention to create a new criminal code had already appeared, but – interestingly – the lawyers (contrary to the drafting of the 3rd am.) did not provide feedback, and *„remained ignorant of the fact that new legislation crucially important to the nation had been in the making for the last two years."* [48] The silent protest of the experts is underlined by István RIES, who addressed a heated complaint to the participants of the conference of the Hungarian Association of Lawyers in 1948: *„Justified or not, it is without a doubt that criminal and penal legislation enjoys the most widespread public attention. We wanted them to come up with a whole arsenal of academic debate, demanding the implementation of the most recent scientific accomplishments. I would like to let you know that only those who had worked will have to right to criticize!"* [49] The reasons behind this silent resistance is not certain. I believe that the Hungarian lawyers had grown up reading the Csemegi Code and thus instinctively sensed certain negative tendencies that foreshadowed the dark future. Their worries became justified with the new, Soviet-style constitution coming into effect in 1949. This silence and indifference were basically a resigned farewell to an era on the brink of extinction. History was not kind to the lawyers: from the peaceful and comfortable confines represented by the framework offered by the Csemegi Code, they were relocated into the cold, harsh and rudimentary system of Soviet law, opening the way for the continuous deformation of legal thinking and opening all doors for the Stalinist criminal policy. After the political turmoil in 1949, left-wing parties emerged victorious and gained the power they wanted after the infamous „blue ballot" elections. This also meant that criminal justice theory and criminal policy started to move in the same direction, covering for the aggressive expansion of Stalinist criminal policy. The following, characteristic quote provides a vivid description of the era's ideas: *„From the aspect of our criminal law and criminal policy, I believe it is of utmost importance that our lawyers learn that criminal justice has a bourgeoise way and has a socialist way. There are no compromises between these two, since there is no third alternative in criminal law either."* [50]

5. Closing Remarks

When analyzing the reception of the Csemegi Code, it must be noted that its fate was quite hectic. It even received serious criticism from the opposition during the preparatory debates of the draft. Béla KOMJÁTHY, chief speaker for the opposition noted that the bill was largely different from the original draft of 1843, which means that it did not contain the division of offences, introduced capital punishment and determined a minimum sanction.[51] Csemegi received several personal attacks as well, with many of his critics saying that he had completely ignored the contents of the bill of 1843, further worsened by his supposed abuse of the opportunity to satisfy his legislative needs. The gist of this criticism can be unraveled through the words of Barna MEZEY, who claims that *„the Hungarian lawyers' almost nostalgic longing for the bill of 1843 is only partly the result of nationalistic emotions, even if we take into account the fact that a bill from 1843 could not simply become law 'as is' in 1878. We know – particularly about Fayer – that he consistently fought for humanist ideas and that he had great affection for ideas rooted in the reform period and which eventually made it into the bill. This was the issue he emphasized and the spiritual heritage that he wanted to protect."* [52]

There was a practical hiatus in the overly complicated, often overlapping rules of the penal system, coupled with the even more lax less logical framework of sanctions and auxiliary measures. The provisions about juveniles were sketchy, and the regulation's reaction to recividism (which by then had become apparent) was also grounds for debate. Besides the exaggerated influence of the dogmatic approach, the unrealistic nature of the rules was also mentioned as a problem, which basically stigmatized foundations of the Csemegi Code as *„something that was already obsolete when it was published".* [53] Despite all the criticism

[44] HORÁNYI, B., Az új büntetőnovella elmeorvosi szempontból. (The new criminal code from a psychiatric point of view.) In: *Jogtudományi Közlöny*. vol. Nr. 23, 1948, p. 452.

[45] Based on the 3rd am., committing a crime while drunk was a sui generis offense. The amendment also brought novelties by introducing several new types of offences (e. g. illegal crossing of borders, drunkenness etc.).

[46] This is also apparent by the fact that the 3rd am. issued more severe sanctions in the case of offences against life or those that involve bodily harm; and offences against the state or against assets.

[47] MEZEY, B., *Magyar jogtörténet. (The History of the Hungarian Constituztion),* Budapest, 1998, p. 333.

[48] SCHULTHEISZ, E., A Btk reformjára vonatkozó elgondolások. (Ideas for penal code reform). In: *Jogtudományi Közlöny.* vol. Nr. 9-10, 1949, p. 192.

[49] SCHULTHEISZ, E., A Btk reformjára vonatkozó elgondolások. (Ideas for penal code reform). In: *Jogtudományi Közlöny.* vol. Nr. 9-10, 1949, p. 193.

[50] TIMÁR, I., Az 1950. évi II. törvény egyes kérdései. (Certain issues of Act 2 of 1950.) In: *Jogtudományi Közlöny*, vol. Nr. 11-14., 1950, p. 382.

[51] MEZEY, B., *Magyar jogtörténet. (The History of the Hungarian Constituztion),* Budapest, 1998, p. 288.

[52] MEZEY, B., *Magyar jogtörténet. (The History of the Hungarian Constituztion),* Budapest, 1998, p. 289.

[53] GYÖRGYI, K., *Büntetések és intézkedések. (Penalties and Measures.).* Budapest, 1984, p. 15.

it received due to its several flaws and shortcomings, it is undoubtable that the Csemegi Code was a well-thought-out regulation, and the attached legal explanations were nothing short of legal masterpieces. After the criticism faded (particularly with the 1st am. coming into effect), the act was very much capable of fulfilling the task it was intended to. The attitude towards its provisions was positive even during the coalition period. A good example to this would be the remark of István RIES, minister of justice, who claimed that *„it is the culmination of ideas vying for ensuring individual freedom and the concise and clear description of the matter of fact."*[54] György AUER considered the act as *„one of the most significant achievements of Hungarian legislation".*[55] The communist legal literature found the focal point for its criticism in the apparent presence of social classes and the material's obviously inconsistent nature, stressing the obsolescence of the practicist approach. Several writings and opinions published to commemorate the centenary of the material used detailed and profound social, historical and legal analyses to elaborate on the virtues of the Csemegi Code, creating an awkward atmosphere within the thrill of joy that followed the recently finished criminal justice codification.[56] HORVATH gets straight to the point by noting that *„all in all, the criminal code of 1879 contained provisions that served the era well, and its historic significance lies in the fact that with it, a uniform and codified criminal justice regulation has become established."*[57] Imre MARKÓJA, the former minister of justice also acclaimed the Csemegi Code, which according to him *„realized liberal legal principles and put an end to the feudal criminal justice system."*[58] As a conclusion, it can be stated that the Criminal Code of 1878 broke the pattern of the earlier principles grounded in feudalist criminal justice and narrowed the gap between national policies and the bourgeois system of Western Europe. It fell in line with the requirements of its age and fit seamlessly into the array of contemporary great European legislative works focusing on rule of law, equality and humane punishments. Its liberal point of view is largely similar to the original reform efforts from 1843, with some of its differences can be explained by the changing political-social-historical environment of post-Compromise Hungary. Nevertheless, the dogmatic regulation of the penal system, the blindness towards the psychical characteristics of delinquents and the rigid sanctioning mechanism were huge fetters on the regulation itself, so much so that several resulting contradictions were never addressed by the later amendments either.[59] The Csemegi Code considers crime a legal phenomenon, disregarding the social nature of crime at all. It considers repercussion as its main task, paying no attention to prevention whatsoever. The Csemegi Code remains a work of permanent value within the field of classical Hungarian criminal justice, particularly dogmatically. This regulation governed judicial practice not only during the period of its establishment, but decades later as well. Its significance cannot be doubted, since this was the first legislative effort that contained separate executional clauses and a unique system.[60] Its complex and expansive framework observed almost all the elements, values and principles of contemporary European criminal legislation, making it capable of providing adequate answers to the various challenges of the era in Hungary, and it also showcased and served the notion of penology. Finally, by examining results gained through an elaborate analysis of the general experiences we can state that trying to find these within the provisions of certain regulations would be a futile effort. Rather, they shine a light on the ever-present rule that – regardless of the era – seeks to preserve the delicate balance between legal policies and professionalism, declaring that: the values and tools that are employed by penal law shall by no means govern or rule over society or the individual, since their tasks is to serve these very elements.

[54] MEZEY, B., Ma*gyar jogtörténet. (The History of the Hungarian Constituztion),* Budapest, 1998, p. 289.

[55] AUER, GY., *A büntetőtörvények egyes fogyatékosságainak megszüntetéséről és pótlásáról szóló 1948.évi XLVIII. törvénycikk magyarázata*. (Act XLVIII of 1948 on the Elimination and Replacement of Certain Disabilities of Criminal Laws), Budapest, 1949.

[56] Law decree no. 11 of 1979 entered into effect on 1 July 1979.

[57] HORVÁTH, T., Az első magyar büntető kódex száz év távlatából. (At the centenary of the first Hungarian Penal.) Code. In: *Jogtudományi Közlöny.* vol. Nr. 4, 1978, p. 201.

[58] MARKÓJA, I., *A magyar büntető törvényhozás 100 éve*. (100 years of Hungarian criminal legislation.) In: *Magyar Jog,* vol. Nr. 3, 1979,p. 140.

[59] HORVÁTH, T., Gondolatok a büntetésvégrehajtási jog kodifikációjához. (Thoughts on the codification of the prison law.) In: *Jogtudományi Közlöny,* vol. Nr. 6, 1978, p. 297.

[60] It has to be noted that the original idea was that then-minister of justice Boldizsár HORVÁT wanted an independent act for execution, but these eventually made it into the Csemegi Code.

The Death Penalty in Hungary during the Enlightenment and the Reform Era

*Zoltán J. Tóth**

Abstract

The present paper reviews the history of capital punishment in Hungary from the second half of the 18th century until the middle of the 19th century. This is an important period on the road to the abolition of capital punishment in Hungary (as well as in the enlightened countries of Europe) during which the death penalty would not be abolished, but its use would become exceptional for ordinary crimes. For extraordinary crimes, mainly in martial law regulations, however, it remains applicable, and, in these cases, it is even used in an extended manner. This can be observed in Hungary especially in the months of the revolution and war for independence of 1848-1849, and in the years of retaliation that followed it.

Keywords: *Hungary; capital punishment/death penalty; Hungarian absolutism; abolitionism; Enlightenment; Hungarian revolution and war for independence of 1848-1849; martial law.*

1. Introduction

Provisions relating to death penalty, at least regarding the so-called common crimes, existed basically at the level of customary law in Hungary until the end of the eighteenth century.[1] However, there were also crimes prohibited by statutes (contemporary name: *decreta*) and punishable by death penalty pursuant thereto, these crimes represented a rather small proportion of all criminal offences and mainly included the delicts against the ruler and the state, and also the violence among noblemen.

Criminal offences defined by statute can be divided into three categories:[2] offences of treachery punishable by death and forfeiture of property (*nota infidelitatis*), cases of violence (*potentia*, *actus potentiae*) and „major cases of violence" (*potentia maior*, *actus maioris potentiae*) threatened by death or forfeiture of property, and, finally, the plain or public criminal offences (*casus criminales*) sanctioned by „plain" death penalty. Since the statutes mainly addressed the conducts which had or might have had nationwide effects, it is no coincidence that most *decreta* imposing death penalty covered criminal acts of treachery or cases of violence, and, thus, the perpetrators of public crimes were left to be threatened and punished with death penalty based on the norms of the local customary law.

2. Death penalty in the age of enlightened absolutism

The customary law prevailed even in the eighteenth (and partly in the nineteenth) century, but, from the second half of the eighteenth century, the death penalty was applied less often. Maria Theresa (1740-1780) and Joseph II (1780-1790), the monarchs of the enlightened absolutism,[3] played the most important role in such process, since their decrees contributed

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1 State-made law became dominant in criminal law from the second half of the 19th century; at the end of the 19th century and throughout the 20th century, the death penalty was already regulated by statutory law in Hungary. (See, e.g.: TÓTH J., Z., Statutory Regulation of Capital Punishment in Hungary during the Horthy Era and World War II. In: *Journal on European History of Law*, vol. 6, Nr. 2, 2015, p. 23-28; TÓTH J., Z., The Last Three Decades of Capital Punishment in Hungary: The Process of Abolition between 1961–1990. In: *Journal on European History of Law*, vol. 10, Nr. 1, 2019, p. 134-148.

2 This classification, of course, is as arbitrary as any other, thus, the categorization of offences can be developed on the basis of other aspects as well. Regarding the description and the possibilities of alternative classification of criminal behaviour of feudalism, see in particular: TRÓCSÁNYI, Zs., *Törvényalkotás az Erdélyi Fejedelemségben*. [Legislation in the Principality of Transylvania.] Budapest, 2005, p. 240-246; BÉLI, G., *Magyar jogtörténet: a tradicionális jog*. [Legal history of Hungary: the traditional law.] Budapest–Pécs, 1999, p. 154-155 and 179-220; KIRÁLY, J., *Magyar alkotmány- és jogtörténet, különös tekintettel a nyugat-európai jogfejlődésre*. [Constitutional and law history in Hungary particularly the law development in Western Europe.] Budapest, 1908, p. 273-281; CSIZMADIA, A., KOVÁCS, K., ASZTALOS L., *Magyar állam- és jogtörténet*. [History of state and law in Hungary] Budapest, 1995, p. 243-244 and 246-251; TIMON, Á., *Magyar alkotmány- és jogtörténet, tekintettel a nyugati államok jogfejlődésére*. [Constitutional and legal history of Hungary regarding the law development in western states.] Budapest, 1903, p. 415-436; SZEMERE, B., *A büntetésről s különösebben a halálbüntetésről*. [On punishments and particularly on death penalty.] Budapest, 1990, p. 175-178; MEZEY, B. (ed.), *Magyar jogtörténet*. [Legal history of Hungary.] Budapest, 1999, p. 247-251; ECKHART, F., *Magyar alkotmány- és jogtörténet*. [Constitutional and law history in Hungary.] Budapest, 1946, p. 380-385.

3 Enlightenment in criminal law at that time was marked by Beccaria's work 'On Crimes and Punishments' and the atmosphere surrounded in Milan. For this, see: BIANCHI, B., The Courage of Beccaria: The Disruption of "On Crimes and Punishments" in the Climate of the "Son-of-Fear's Law" in Bellum Exulum. In: *Journal on European History of Law*, vol. 10, Nr. 1, 2019, p. 22-33.

greatly to the humanizing of the Hungarian criminal case-law. After the legal reform of Charles III in 1723, patents became the main sources of criminal law (beside the customary law), since that was the only manner to enforce the results of the Enlightenment against the conservative noblemen who persistently insisted on their traditions and privileges. The change regarding the assessment of witchcraft can be considered as the first step on the way out of the „dark Middle Ages" and the maybe even „darker" Early Modern Period. Firstly, Maria Theresa ordered in 1756 that the ones being suspected of witchcraft could be sentenced only with due caution and careful assessment, and such sentences had to be presented to the Chancellery in order to examine whether they were rendered correctly.[4] Two years later, in 1758, Maria Theresa ordered also that the monarch had to be informed of such cases even before the commencement of the judicial proceedings. Finally, in 1768, the procedures against witches were generally forbidden, except the cases with doubtless suspicion of such delicts, but, even in such cases, criminal lawsuit on the basis of witchcraft charges was allowed only if any other crime also was suspected.[5] The *Constitutio Criminalis Theresiana,* the Austrian code regulating felonies and punishments in a comprehensive manner, was completed in 1768 and came into effect in January 1770. Even though the scope of the code did not cover the territory of Hungary, partially, it applied also here through customary law (such as the *Constitutio Criminalis Carolina* in some towns and the *Praxis Criminalis* in the jurisdictions of the northern and western municipalities). The code restricted the use of torture and prescribed precisely how to carry out death penalty, thereby eliminating any possible arbitrary procedure of law appliers; but its provisions were cruel enough in themselves,[6] thus, it added only a slight contribution to the humanizing of criminal law. Maria Theresa's patent issued on 22 March 1776 was much more important, since it fully forbade the use of torture in Hungary and this provision was repeated by Joseph II in his decree of 1783. However, these provisions were violated time and again by the counties, towns and manors holding *ius gladii*, since those did not accept regulation by decrees as lawful regulatory instruments. Therefore, the use of torture was completely and definitively forbidden only in 1791, after the death of Joseph II,[7] when Leopold II declared the elimination thereof in a statute.[8]

The justice reform of Joseph II, which, in the spirit of absolutism, endeavoured to centralise criminal justice, was also introduced by decree. For this purpose, the ruler deprived the manorial courts from the *ius gladii* on 12 December 1785,[9] and later, on 30 November 1786, withdrew the right of the county courts and the town *magistrates* to adjudicate criminal cases. The same decree established permanent courts under central control (*Judicium Subalternum*) which commenced operation on 1 September 1787, the date from which *sedrias* [county courts] and *magistrates* were not entitled, inter alia, to impose death penalty. However, the reform's utmost, most important and still memorable novelty related to substantive law: the criminal code of 1787 prepared for Austria, commonly called *„Josephina"*, which entered into force in Hungary by the patent of the monarch,[10] ceased the application of death penalty in case of common crimes [11] and introduced instead the towage on

[4] The reason behind this decision was that Maria Theresa became informed of the case of four women who were sentenced and executed by burning at the stake under „doubtful circumstances" in Borosjenő, Arad county. (Besides, that was the last burning alive in Hungary).

[5] However, ruler's resolution regarding witchcraft was issued even before the reign of Maria Theresa, when, due to the regrettable experiences of the witch trial in Szeged, Charles III ordered in 1728 that if such suspicion occurred, the courts had to conduct the procedure with greater caution than exercised in the case in Szeged.

[6] The *Constitutio Criminalis Theresiana* (in German: *Theresianische Halsgerichtsordnung*) recognised the legitimacy of aggravated executions and regulated several particularly cruel means thereof (even though defining the scope of their application), while prescribing death penalty for more crimes than the *Carolina*.

[7] A further important procedural-law safeguard was codified at the said time, since Act XLIII of 1790/91 entitled also commons to appeal against the convicting first instance judgement in serious criminal cases.

[8] „Since not providing any applicable and appropriate means for seeking the truth but can be rather considered as a punishment, torture shall be prohibited unless other measures regarding criminal procedure are taken by the national assembly." (Act XLII of 1790/91 on torture).

[9] *Ius gladii*, and generally the jurisdiction of landlords, was terminated in the territory of the Kingdom of Hungary with definitive effect by Article 4 in Act IX of 1848. The new regulation on competence, applying thereafter, was introduced by Act XI of 1848.

[10] According to the ruler's resolution of 14 January 1787, the *Sanctio Criminalis Josephina*, which should not be confused with the *Constitutio Criminalis Josephina* issued by Joseph I in 1707, had to be translated from German to Latin in order to be applied in Hungary and that task was delegated to the Chancellery by the monarch. The mentality and the rules of the code, partly, differed from the Hungarian practice, and the requirements of application could not have been fulfilled (e.g. imprisonment was the primal penalty in the code but in Hungary it was applied relatively less, so the Hungarian prison system was not ready for radical increase of number of imprisoned persons). That is why Chancellery tried to play for time and asked for clarification regarding the actual purpose of the instruction (i.e. whether the task was actually to adapt the code or not). But the king's reply was quick and unambiguous, so measures had to be taken to prepare the entering into force, firstly the translation into Latin. But the king did not want to take any chances: he had the code translated and not only for Hungary but also for Transylvania, Galicia and the Italian regions. Despite the objection of the Table of Seven that each country is different regarding its development, conditions, historical progress and legal traditions, Joseph II insisted that the courts should conduct procedures and judges should render decisions on the basis of a uniform law in the integrated empire. Thus, he issued a patent on 22 March 1787 which put the *Josephina* into effect and abolished, even if only for a short time thereupon, the use of Hungarian statutes and customary law. (Cf. HAJDU, L., II. József büntetőtörvénykönyve Magyarországon. [Criminal Code of Joseph II in Hungary.] In: *Jogtudományi Közlöny*, vol. 1-2, 1974, p. 48-55).

[11] „Henceforth, the penalty by death shall not take place, except in case of misdeeds which, pursuant to law, have to be adjudicated by the so-called standing judgements (Judicium statarium). If a standing judgement is to be rendered, execution by trace shall be the only form of death penalty. The villain condemned shall be hanged, suffocated and any proper funeral shall be banned. After being displayed for 12 hours for the public as a deterrent, the villain's corpse shall be buried without any pomp or accompaniment, next to the gallows where possible." (Article 20 of the *Josephina*) (Source of quotation: MEZEY, B. (ed.), *A magyar jogtörténet forrásai. Szemelvénygyűjtemény*. [Sources of Hungarian law history. Collection of excerptions.] Budapest, 2001, p. 243.)

the river Danube for life.[12] Neither this nor his other decrees lasted long, since Joseph II revoked all of them before his death in 1790, which situation was sanctified by Act XL of 1790-91 of Leopold II (1790-1792). Thereafter, the opposition of the noblemen increased, and the monarchs [Leopold II, Francis I (1792-1835)] were too busy with the new challenges of foreign policy (French Revolution, Napoleon, Holy League). Thus, in the following decades, the rulers neither had the time nor were in the mood to interfere with Hungarian criminal case-law, to control the lawfulness of *sedrias*' practice,[13] which led to the increased number of death penalties again, however, the manner of the executions became more humane. Aggravated death penalties were less common due to internal humane considerations and the ruler's resolution (*benigna resolutio*) issued on 15 May 1814 which forbade the application of death penalty with torture or exceptional suffering, and recognised only two means of execution: hanging and beheading. Nevertheless, for instance, an execution by wheel was carried out even in 1827.

3. The criminal law proposal of 1795

A separate criminal code regulating, mandatorily for the entire country, the conditions of criminal liability, the punishable behaviours, the sanctions and the circumstances to be taken into consideration when imposing punishment, would have been an important condition for the mitigation of arbitrary jurisprudence[14] and, thereby, for humanizing criminal law. However, such code was only adopted almost one hundred years after the first attempts in such regard. The first initiative[15] took place in 1791 when, in the diet of 1790-91, a committee[16] was set up in order to draft the first Hungarian criminal code.[17] The bill, titled „*Codex de delictis eorumque poenis*", was prepared by 1795[18] but the diet never discussed it. Besides, this code was considerably enlightened compared to the circumstances of Hungary in the concerned era. Beyond deterrence, it also considered repair as an important priority of criminal law policy, formulating a demand to pursue it whenever possible. Pursuant to the draft code, death penalty or life imprisonment was only imposable if, according to the judge's assessment, the purpose of repair and general prevention was not achievable by other punishments.[19] As the opening provisions, i.e. the Principles (*Principia*)[20] explained, the state, for the purpose of protecting itself, was entitled even to take away the life of the perpetrator if the use of other sanctions could not guarantee the safety of the society. According to the opening provisions, there was no reason to deprive the community of the people from the right of self-defence if it was ensured for individuals.[21]

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[12] Naturally, beyond all humane considerations, practical aims (endeavours to use the labour forces of the convicted ones) also played a significant role in the process.

[13] Even if some attempts were made in such regard, not many results were achieved. For example, due to the regulation of the *Consilium Regium Locumtenentiale Hungaricum* [Governor's Council] dated 21 February 1794, death penalty was applicable only in the event of the most serious crimes, but the Hungarian courts did not comply with that provision.

[14] During the late eighteenth and early nineteenth century, the possibility of the arbitrariness increased due to the fact that the counties could declare martial law with the authorization of the king or the palatine if the increase of offences remarkably jeopardized public security (e.g. in case of vandalizing of robber bands). As a result, summarily conducted adjudication was possible in most municipalities, however, that was often only formal, since actual martial law proceedings were rarely conducted (in some places hardly never) in the first half of the nineteenth century.

[15] In fact, there was an attempt to make such code as early as in 1712, initiated by Mihály Bencsik, law professor in Nagyszombat. But, after all, that scheme became only one subject to discuss by the committee (*Systematica Commissio*) established to reorganize the law entirely, and later it shared the fate of the pertaining legislation in general: since the latter was cancelled, the draft criminal code was not adopted as a statute either (but some elements thereof were used in the reform of Charles III).

[16] This committee was named *Deputatio Juridica* and its chairman was count Károly Zichy then judge royal.

[17] Act LXVII of 1790/91.

[18] Beside the general Criminal Code on common crimes, a separated proposal was drafted to regulate martial law proceedings. It would have not brought much novelty even in case of its adoption because practically it would have contained the written form of the prior law practice regulated by customs and the orders of the Locotenential Council. According to the proposal, the summarily rendering of judgements would have become possible after obtaining the king's authorization and declaring martial law, in case of increased number of riots, rebellions, robberies or rubbery-murders. The court would have had six members and should have rendered the judgements unanimously, following the oral procedure of taking evidence and within 24 hours from the commencement of the trial (otherwise the case should have been tried by ordinary court). As convicting judgement, only death penalty by hanging could have been imposed, enforced within 3 hours and without the right to appeal or plead for pardon. (As mentioned above, all these rules were applied in practice, so they actually prevailed despite the failure of the entry into force of the said separate proposal. See also the delineation of the executive act of 1849 in the present essay).

[19] „Regarding the perpetrator, the purpose of each punishment shall be to reach his correction or, if it is not possible, to deprive him from the ability to cause harm in the future. And, regarding the community, the purpose shall be the providing of example, namely the fear of punishment would deter people from committing crimes. Hence, revenge shall never be the purpose thereof, since it would be dishonourable to the sanctity of the law." (Principles VIII) „Death penalty may not be imposed unless the perpetrator's intention reaches an extent where neither the security of society nor of certain individuals, nor the general purpose of all forms of punishments (i.e. leading by example) can be achieved by other means but capital punishment. To further ensure such achievement, the execution, if possible, shall be carried out always at the place of the offence, or at least nearby." (Principle XV) (Source of the quotations from the proposal: HAJDU, L., *Az első (1795-ös) magyar büntetőkódex-tervezet*. [The first Hungarian draft criminal code from 1795.] Budapest, 1971).

[20] The proposal consisted of the opening provisions titled „Principles" and two more parts; the first prescribed provisions on procedural, and the second on substantial law.

[21] „In case there is no other means to protect the public security, any detriments can be imposed, even the deprivation of life. When, in case of self-defence, a citizen is entitled to legally use any means to safe his own life, it definitely cannot be criticised if the state does the same to protect its security. And what means and what examples are needed to that protection and to achieve the purposes of punishment shall be evaluated on the bases of the people's morality and on other circumstances of the case." (Principles XII).

The proposal also prescribed that death penalty should be applied as rarely as possible and it forbade *expressis verbis* the aggravated executions (but some exceptions still remained).[22] As a further safeguard, it also prescribed to perform the execution as fast and as painless as possible, and in a uniform manner by great sword in the case of all concerned persons, regardless their legal status.[23] (The last principle may be considered as the expression of equal recognition before the law, and the proposal endeavoured to omit the evaluation of distinctions in legal status in other aspects as well.) In the proposal, the minimum age of criminality was 16 years,[24] moreover, it prescribed that, against juveniles between the ages of 16 and 24, capital punishment was imposable only exceptionally („if their incorrigible temper and huge evilness exceed their age").[25] It also recognised limitation: the period of *praescriptio* was, in general, 10 years and, according to the proposal, the prosecution would have been barred upon the lapse of 20 years even in case of crimes punishable with death penalty.[26] It is also interesting that the proposal generally determined the criminality of abettors, coactors, covert offenders and harbouring actors (the aider's criminality was regulated only in case of certain criminal acts in the special part). It also prescribed that the penalty applicable as regards the perpetrator should be applied to all of the aforesaid, except the abettor because „who, as the author of the crime (*author delicti*), stands out from the others or induces anyone with his prestige or otherwise to commit a crime, has to be sanctioned more seriously than others".[27] Furthermore, the proposal ensured the right to lodge an appeal, and, for the ones sentenced to death, the right to the two-level appeal[28] (but not to revision),[29] regulated the manner of executions,[30] emancipated the person of executioner[31] and prescribed the manner of issuing pardons.[32]

Regarding the application of death penalty, the *Codex de delictis eorumque poenis* was more reticent than former statutes or customary law, however, death penalty would have remained imposable in a vast range of criminal offences: the draft allowed for the sentencing of the offender to death in respect of nineteen crimes within three categories. Accordingly, death penalty was imposable in case of treachery (Section I in Part two[33]),[34]

[22] „But regarding the death penalty, it has to be taken into account that, since, death is the ultimate among all bad things, the aggravating thereof goes against the purpose of the penalty and mainly the humane consideration, so it may never be applied on alive convicted, moreover… even death penalty may be only applied very rarely. But, sometimes, under extreme circumstances, the display of the corpse at the place of the dishonour, the cutting of the corpse into four pieces, the burning thereof or the announcement of the execution may be ordered." (Principles XII).

[23] „The manner of enforcing this punishment shall be uniform, and the great sword suitable for the purpose shall be applied in a way that the punishment upon the condemned is carried out as quickly and effectively as possible on each occasion." (Principles XV).

[24] Article 7 of Section XII in Part one.

[25] Article 9 of Section XII in Part one.

[26] „…in case of crimes punishable with death penalty, the living of a decent life for more than 20 years… shall abolish the punishment…" (Article 19 of Section XII in Part one).

[27] Principles VI.

[28] „Everyone sentenced to death has the right to appeal to the board of appeal, namely the district court of appeal, and if the decision of the second instance was also conviction or the first instance court was the royal table, he would have the right to appeal to the supreme body of appeal, the Table of Seven. No sentence for death shall be enforced until the case is reviewed by the supreme body of appeal." (Article 2 of Section XV in Part one).

[29] Instead of revision, the proposal would have merely guaranteed for the descendants and inheritors of the condemned and executed person the right to file a suit on the grounds of a new evidence in order to rehabilitate the innocently executed, and, by proving the innocence of their relative, to restore his honour in such lawsuit. (Section XVI in Part one).

[30] According to Section XVII in Part one of the proposal: the death sentence shall be promulgated before the defendant, following its endorsement by the Table of Seven, and enforced on the third day thereafter during the morning hours. During the three days in between, the convicted shall be prepared for the execution (e.g. a priest shall be provided so that the convicted can make a confession and find some solace) and, on the day of the public execution, the sentence shall be read again before the gathered people. After the beheading, the body shall be displayed for the public for a short time and then the executed shall be given a proper funeral just as anybody. In certain cases, the execution may be interrupted or postponed, e.g. if the innocence of the convicted turns out on the basis of new evidence emerged meanwhile; if the king granted pardon for the accused; if the review of the sentence was required by a higher dicastery, or the convicted became pregnant, mentally unstable or gravely ill, until such condition are ongoing.

[31] „… since, it also goes against the principles of the society that the executioners are considered by the mock public opinion to be dishonest… it is, hereby, proclaimed that they enjoy equal rights with any other member of the society in general. That is why none should blame them for their way of life or reproach them for that." (Article 13 of Section XVII in Part one).

[32] The proposal declared that the ruler was entitled to issue pardon, theoretically without limit (i.e. to remit or reduce any punishment imposed by the decision of a judge), and enjoyed that right exclusively; however, the proposal indicated also that the ruler should practice this right modestly, if possible, namely „in case of special circumstances or if required by the interest of society," in order to guarantee the efficiency of laws. (Section XVIII in Part one).

[33] Particular crimes were regulated in the second (if you like: special) part, so, in the further part of the present study, only the section's number will be referred to.

[34] In the proposal, three forms of treachery were differentiated: treachery against external security of the state [conspiracy with the enemy, collaboration, any aid to the enemy (e.g. supply weapons or food), espionage, giving up or betrayal of fortresses, intentional causing of casus belli, etc.)]; treachery against internal security of the state (acts jeopardizing the ruler's authority or intending to hinder the legitimate functioning of legislative and executive power); and the high treason. The latter covered any intentional conduct against the ruler's physical integrity, personal freedom or life, no matter if this act was completed, only attempted or merely a conspiracy was formed to commit it. While, in case of the first two forms of treachery, only the crimes committed with the third degree of intent (premeditated, evil intent) might be punished by death penalty [and, in addition, by forfeiture of property (so the punishment of this delict was the classical death and forfeiture of property)] although, in case of high treason "the degree of intent might not be taken into consideration" but death penalty should be imposed without any discretion [moreover the aggravating of punishment (see Principles XII) was also appropriate].

riot and rebellion (Section III),[35] harbouring offenders (Section IX),[36] „false denunciation" (defamation - Section XV) and perjury (treason - Section XVI)[37] among offences against public security; while in case of manslaughter (Section XIX),[38] murder of parents or other relatives (Section XX),[39] infanticide (Section XXI),[40] leaving an infant (Section XXIII),[41] murder for hire (Section XXIV),[42] „feeding" (poisoning[43] - Section XXV) and robbery-murder (Section XXVII)[44] among offences against life and personal integrity. Finally, out of the perpetrators of „offences against the goods, assets and freedom of citizens", the ones committing banditry („roguery") or robbery (Section XXXIV),[45] rape (Section XXXVII),[46] theft (Section XXXVIII),[47] „supporting theft" (Section XXXIX),[48] deceit or fraud (Section XL),[49] forgery of documents or seal (Section XLI)[50] or arson (Section

[35] Pursuant to Article 1 of Section III, „riot is the violent or armed up-rising in association with others against the legitimate power. It is called rebellion in case it starts suddenly or it is settled soon or it is managed to still in its early stage." At the third degree of intent, the execution may be aggravated, similarly to treachery.

[36] This delict actually corresponded with the present-day crime of harbouring a criminal, and the punishment of the harbouring actor was adjusted to the seriousness of the crime committed by the perpetrator whose escape, runaway or hiding from the authorities was supported by the harbouring actor (being aware of the nature of the crime). On the basis thereof, if the criminal committed a crime which was punishable or had to be punished by death, the act of hiding such criminal or supporting his runaway was also punishable or had to be punished the same way.

[37] Defamation was the „accusation of committing a criminal offence of a person who proved to be innocent" (Article 1 of Section XV), while perjury was the giving of a false oath against a person who was suspected with crime by an authority if the oath was given in such person's criminal lawsuit. Similarly to the act of hiding criminals, the punishment, in case of both delicts, depended on the crime of which the perpetrator accused someone else innocently, thus, if the accused was punishable by death, then (according to the principle of reflecting penalties) the defamator or the perjurer was also punishable by death in case he was aware that his statement was untrue.

[38] The „plain manslaughter" was punishable by a minimum of 12 years in prison up to a maximum of life imprisonment, but the aggravated cases were to be punished by death (in certain cases by aggravated death). Pursuant to Article 2 of Section XIX, the manslaughter qualified as aggravated if it was committed against „more than one person, a pregnant woman, a benefactor or a person holding a special rank in civic society, or was committed by exceptional means and exceptional evil intent". Article 4 listed further aggravated cases, more of which were regulated as *sui generis* delicts in the special part („homicide committed against one's parents, children, spouse, first degree brothers or sisters, poisoning of wells which actually led to death, repeated murder of hire, robbery-murder").

[39] Including all blood-related relatives in the direct descending and ascending line, spouse, adoptive parents, adopted child, step-parents (it is interesting that the step-child was not included), guardian and the child under guardianship.

[40] Infanticide was homicide committed against a new-born by the mother, and the punishment thereof corresponded with the sanction of homicide.

[41] The act of leaving an infant had to be considered as infanticide if the left baby died before being found and, naturally, the sanction of homicide had to be applied.

[42] The concept of murder for hire covered not only the cases when somebody tried to persuade someone else to kill a third person for financial reward but also the manslaughters committed or attempted due to any promises or threats, etc. But, curiously, the act of the abettor was considered to be less serious by the proposal than the act of the perpetrator (contrary to the proposal's own Principles).

[43] In the wording of the proposal, „feeding" was not a simple poison-mixing or poisoning but „a murder committed with poison" (Article 1 of Section XXV), i.e. a special, extremely dangerous (hardly revealable) method of murder.

[44] According to the proposal, robbery-murder was nothing but a „homicide committed for the purpose of financial gain" (Article 1 of Section XXVII) but gain could be anything and the actual realization thereof was not a criterion. This aggravated case of homicide was even more serious „if committed by blocking a road… committed repeatedly or carried out in association with others as a profession and, finally, if indicated by the *modus operandi* that the perpetrator was acting with special brutality" (Article 3 of Section XXVII). However, according to Article 4 of Section XIX, the robbery-murder was punishable exclusively by death, thus, the aggravating circumstances could entail, at most, the increase of the severity of the execution.

[45] „The violence caused to any person for the purpose of gain (but without the death of that person) qualifies as roguery, but the crime is a robbery in case the attacker actually takes something away." (Article 1 of Section XXXIV) "In case of repeated robberies, when there is no hope for the improvement of the perpetrator, death penalty may be imposed." (Article 7 of Section XXXIV).

[46] "In case the perpetrator had more associates during committing a rape and the act disturbed also public peace insomuch that it can be considered as an aggravated case of robbery, then the sanctions prescribed for robbery may apply also in respect of such crime." (Article 8 of Section XXXVII) I.e. death penalty was imposable if a rape was committed collectively and regularly, almost as if it was a routine, or causing extreme fears and destroying the faith in public security.

[47] Pursuant to Article 8 of Section XXXVIII, the concept of theft covered the modern concept of embezzlement and the "theft of the use of a thing" (*furtum usus*) from Roman law, deeming both, inter alia, as aggravated theft. Article 11 of the same section declares that "death penalty may be imposed if the thief has already been severely punished often and offers no hope to improve so he is still dangerous to society".

[48] The proposal meant that "supporting theft" included abetting to theft, aiding to theft and receiving the stolen goods. As a general rule, the punishment of this delict corresponded with the sanction imposable for theft. "Who provides, intentionally, actual assistance to the act of theft, shall deserve the same penalty as the penalty imposable for the thief according to the provision of the statute." (Article 4 of Section XXXIX) Furthermore: "…the punishment of this delict shall be the same that was prescribed in the section just above the present one for the primary theft." (Article 8 of Section XXXIX).

[49] Pursuant to Article 1 of Section XL, deceit was „the alteration or the cover-up of truth in order to cheat or harm others with disingenuous slyness". This section enumerated several specific cases of deceit: e.g. the so-called dissimulation [„disingenuously taking on another personality in order to harm someone" (Article 2) such as making a legal declaration under assumed name], the abetting to commit perjury, the forgery of promissory note, the forgery of measure and weigh, the plagiarism, the deceptive bankruptcy, the switching of babies, etc. The punishment of fraud, similarly to the crime of supporting theft, corresponded with the penalty of theft, thus, in case of multiple recidivism and impenitent and incorrigible criminal lifestyle, death penalty was also applicable.

[50] The punishment of theft was also applicable for this crime, adding that „the conduct of someone who seeks to take another's life with this crime shall be deemed more serious than the one's who intrigues against the goods relating to someone else but not against his honour or life". (Article 3 of Section XLI).

XLIII)[51] were punishable by death. However, the fact that the proposal did not prescribe death penalty or even severe imprisonment for either moral or religious offences can be assessed as a significant progress.

Possibly due to its overly progressive nature, this draft had never been discussed by the national assembly, even though there were two more attempts thereto subsequently (in 1802 and 1807). Primarily, the task of the committee delegated by Act VIII of 1827 was to review and comment the draft of 1795 once again,[52] but the proposal that was prepared by the committee by 1829, and submitted to the national assembly in 1830, rather considered the Austrian criminal code, which entered into force on 3 September 1803, as a model. Accordingly, that proposal was quite retrograde, since it regulated the death penalty as an „ordinary" punishment applied widely, and took the distinctions arisen from feudal system into account both in defining criminal offences and the imposing and enforcing of punishments. The only feature that can be considered as forward-thinking was that it forbade the aggravated death penalty. But the spirit of the Reform Era had already passed beyond that level by the time, so that explains why the proposal of 1830 could not become a statute.

4. The need for a new regulation on death penalty in the Reform Era

At this time (contrary to the 1790s), a demand for a regulation was formulated among the nobility, which can be explained by the monarch's increasing involvement in the internal affairs. The Chancellery endeavoured to hinder the dissemination of enlightened thoughts and the opposition against the monarch by administrative and criminal-law measures, and, in order to break down such actions, it initiated prosecution against several persons and even imprisoned some (on the grounds of committing different misdemeanours against the state, or charging them with political or press offences). This is what happened e.g. to baron Miklós Wesselényi, Lajos Kossuth, and several members of so-called „youth of the national assembly". Under such circumstances, it is easy to understand why the Hungarian noblemen altered, in about a brief decade, their standpoint and why they insisted more and more on a new, coherent criminal code which would warrant the legal certainty (and thereby, of course, the interests of the noblemen). The first opportunity arose in the diet of 1839-40, when a national committee was established by Act V of 1840 with the duties to reform the prison system (actually to create a system of prisons instead of the system of dungeons) and to „improve" the substantive and procedural criminal law proposal of 1830.[53] On 2 December 1841, the national committee decided to work in three subcommittees to determine the modern provisions of the substantive, procedural and enforcement law, in accordance with the principles of humanism. Simultaneously, a delegation[54] was appointed to coordinate the work of the three committees and to determine the principles to be followed. On 10 December, the delegation laid down for the subcommittee of substantive law a position of principle, among others, that the death penalty had to be abolished from the range of sanctions of common crimes.[55] Although count Ferenc Tihanyi became the leader of the subcommittee of substantive law, the proposal bore the hallmarks of Ferenc Deák, since, the latter was who coordinated the work of the subcommittee and dictated the final wording to Ferenc Pulszky, the secretary thereof.[56]

The most important feature of the proposal was that it did not include the death penalty as a sanction[57] and Article 8, which stipulated the forms of punishments, abolished the cor-

[51] Under the concept of arson, the proposal actually meant all conducts, covered by the modern concept of public endangerment, which constituted a danger to the community (e.g. causing flooding by destroying a dam). And as for the punishment: „the death penalty may be imposed against the perpetrator if, due to his intent, someone died and major damage to property also occurred." (Article 11 of Section XLIII).

[52] „Since holding great importance and having important consequences, the discussion of works elaborated on the basis of Act LXVII of 1790/1 calls for a longer consultation, the ranks and estates (*status et ordines*), with the gracious approval of His Majesty the King, decided to delegate a committee of several members. It is split into subcommittees in order to judge the mentioned works, to discuss it in accordance with the principles of the abovementioned Act and to submit its opinion regarding both the works of the committees and the draft of the acts, including also the reasoning, to the following session of the national assembly." (Act VIII of 1827).

[53] About the preparation, creation process and the characteristics of the proposal finally created by 1843, see in particular: SÁNDORFY, K, *Törvényalkotásunk hőskora. Az 1825-1848. évi reformkorszak törvényeinek története*. [Historical years of our legislation. The history of the statutes in the Reform Era between 1825 and 1848] Budapest, 2001; MEZEY, B. (ed.), *Magyar jogtörténet*. [Hungarian law history.] Budapest, 1999, p. 275-278 and 280-281; MEZEY, B. (ed.), *A magyar jogtörténet forrásai. Szemelvénygyűjtemény*. [Sources of Hungarian law history. Collection of excerptions.] Budapest, 2001, p. 503-504; BÉLI, G., *Magyar jogtörténet: a tradicionális jog*. [Legal history of Hungary: the traditional law.] Budapest–Pécs, 1999, p. 329-332; CSIZMADIA, A.; KOVÁCS, K.; ASZTALOS, L., *Magyar állam- és jogtörténet*. [History of state and law in Hungary.] Budapest, 1995, p. 257.

[54] The leader of the delegation was count József Teleki and the members were Ferenc Deák, count Aurél Dessewffy, baron József Eötvös, Gábor Klauzál, Ferenc Pulszky and János Zarka.

[55] Further requirements were specified for the subcommittees to guarantee the equal recognition before law (namely that no distinguish would be made between nobles and non-nobles or laymen and churchmen); the oral and public nature of criminal procedures; the limitation of prosecution and enforceability of punishments; the abolition of corporal penalties; the foundation of criminal proceedings on accusatorial forms; and the adjudication of the issues of facts and of law by the same panel.

[56] For many people, the proposal is tied to László Szalay, although he was not a member of the committee of substantive law (yet, he doubtlessly helped the work from time to time) but provided the secretarial tasks of the subcommittee of procedural law. The misunderstanding was due to the fact that he presented the proposal to the general public in a pamphlet, so, in the public awareness, the proposal became linked to Szalay's name, Although, for the drafting and wording thereof Ferenc Deák and (in a minor part) Ferenc Pulszky could take the credit. (Cf.: SÁNDORFY, K., *Törvényalkotásunk hőskora. Az 1825-1848. évi reformkorszak törvényeinek története*. [Historic years of our legislation. The history of the statutes in the Reform Era between 1825 and 1848.] Budapest, 2001, p. 150).

[57] A further relevant feature was that the proposal did not recognize a minimum of punishment, hence, it (would have) guaranteed the possibility of limitless reduction for judges.

poral and the degrading punishments as well.[58] The most severe punishment would have been „bondage for life"[59] even in case of crimes like murder,[60] high treason[61] or treachery.[62] Finally, the proposal failed because of the rejection by the House of Magnates, even though it had been accepted by the lower house first at the district session of August 1843 (with the affirmative vote of 30 counties to 12 against)[63] and later at the national session in September[64] (with 27 affirmative votes to 16 against).[65] Due to the victory of the revolution and the fact that Ferenc Deák became the minister of justice, the theoretical possibility to create a statute from the humanistic concepts emerged again in 1848. But in the course of initiating the April laws, the national assembly of 1847-48 which was the last estate diet, was occupied with elementary questions of state structure and constitutional law (the measures necessary to the transition from feudalism to the era of civic society), while the subsequent, elected legislative body aimed to protect the achievements of the revolution and to repress conspiracies. In this situation, the reform of criminal law could not become a core issue, in fact, an intense process towards a more stringent regulation appeared instead of humanizing.

5. Rules of martial law proceedings in the concerned era

In Hungary, martial law (summarily conducted) proceedings (*processus judicii statarii*, *processus summarissimus*) were not unprecedented. The institute of „cruising" existed as early as the seventeenth century; when the public order and the public security weakened (e.g. at the time of bandits' looting or during war years), the *vicecomes* (deputy county head), together with a few *iudices nobilium* and jurors (and sometimes on his own, choosing associate judges from the local noblemen), under the case-by-case authorization of the county's general assembly, walked the countrysides, where the quick and efficient elimination of crimes was sorely needed, and, as an extraordinary court, rendered judgements in the cases of arrested villains from village to village. The punishment imposed by the cruising court was usually prompt hanging, practically in all cases in which the *congregatio parochialis* entitled it to act. On many occasions, these were minor offences, as in 1656, when Nyitra county ordered to impose death penalty for all thefts until the recovery of the public order; promptly executable death penalty was also the punishment for any village judge who culpably failed to meet his law-enforcement-related obligations against the felons.[66]

In the second half of the eighteenth century, the martial law proceeding, which was „at its peak" in the nineteenth century (at least regarding the age of feudalism), developed from such cruising. These proceedings were regulated by the orders of the Locotenential Council; the first of these was the ruler's resolution issued under number 4783. HI. on 29 January 1813, and published on 23 February in the same year. It declared that a county might order martial law in case it received permission from the palatine or (typically) from the leader of the royal Locotenential Council and if it promulgated that permission within 14 days of its delivery. The counties had to inform the Locotenential Council on crime situation every three months, on the basis of which the latter reviewed the necessity of the permit and could revoke it (if the public security had been restored), but the state of emergency expired after one year anyway, unless the county expressly requested a new permit (i.e. requested the extension thereof). The declaration of the state of emergency could be requested only in order to fight against certain offences, such as robbery (*praedocinium*), robbery-murder (*latrocinium*), looting with banditry (*obsessio viarum cum spoliatione juncta*) and intentional arson (*incendium malitiosum*). Pursuant to the orders of the Locotenential Council, the martial law proceedings were legitimate in case of the perpetrators of the above crimes only if they were caught in the act (including the ones arrested during an uninterrupted chase after committing the concerned delict) or in case of armed resistance to arrest. But few strictly defined exceptions still existed (e.g. the ones under the age of 20 years having no previous criminal records; the ones against whom the evidence was incomplete and obtaining further evidence would have taken a longer time; and the perpetrators who robbed for food but caused the death of nobody, could not be impeached by „court standing on feet").

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[58] The provision of Article 17 confirmed it by declaring that "the forms of punishments not mentioned in Article 8 shall, hereafter, not apply in cases other than private prosecution". The source of the quotations from the proposal: MEZEY, B. (ed.), *A magyar jogtörténet forrásai. Szemelvénygyűjtemény*. [Sources of Hungarian law history. Collection of excerptions.] Budapest, 2001, p. 468-474).

[59] Beyond the aforesaid, the proposal recognised the following punishments: fixed-term bondage, durance, removal from public function, financial penalty and rebuke of judge.

[60] "Bondage until death shall be the maximum penalty for a murder…" (Article 110).

[61] "The maximum penalty for high treason shall be bondage until death." (Article 421).

[62] "The maximum penalty of treachery may exceed to bondage until death." (Article 430).

[63] Seven counties did not vote and the representatives of one were not present.

[64] The House of Representatives (lower house) had a process of two phases to adopt a statute. Firstly, the district session took place where the envoys elaborated the draft version of the statute to put to final vote, trying to word a text which could obtain the majority votes at the national session. Since no minutes were recorded on the debate of the district session, no official documents remained on what occurred there, except, of course, the result of the voting on the wording of the proposal (being a result of a compromise). The "official" (documented) debate was left to the so-called "national session" where the text could not be modified, so, the stake merely was the adoption of the proposal's final version. As, the proposal had already obtained majority at the district session, it happened rarely that the lower house did not adopt the proposal finally. However, it had no effect on the intensity of the debate since the envoys representing a minority opinion could prove with the minutes on the debate that they followed the instructions of their counties.

[65] The same happened to the proposal for procedural law (mainly due to the plan to introduce a jury system), and only the proposal on prison system were adopted by both houses of the national assembly. However in accordance with the opinion of the advisors, the ruler did not sanctify it, saying that without the two other codes, it would have been unreasonable to legislate only the enforcement law, and the necessary alterations regarding the latter could be carried out administratively, so there was no need for statutory level provisions in order to reform prison conditions.

[66] Cf.: MEZNERICS, I., *A megyei büntető igazságszolgáltatás a 16–19. században*. [The criminal jurisdiction of counties from the 16th to the 19th centuries.] Budapest, 1933, p. 24.

The procedure itself had to be commenced within 3 days from the arrest and finished within 24 hours; otherwise the case had to be transferred to the ordinary court. The martial law court consisted of five members and was entitled to render two types of judgements: death penalty (unanimity was required) or release. In case of lack of unanimity, the ordinary court took over the case. After imposing the death sentence, the execution had to be enforced within 3 hours, the corpse had to be displayed on the gallows for „deterrence", theoretically for the entire duration of the effect of martial law but in practice for 3 days, and after that it had to be buried next to the gallows.

This law was confirmed on 19 May 1846 (number HI. 27822) but only some minor completions and amendments were regulated therein. Thereby, the criterion of being caught in the act (still including the uninterrupted chasing) and of resistance to arrest were regulated as cumulative, instead of alternative conditions; the court carrying out martial law proceedings had 3 days instead of 24 hours to render a judgement; it became an official provision to bury the corpse after the three-day hanging on public display; furthermore, insane persons along with ones who had never been charged for a crime before became exemptions from such proceedings.

6. Death penalty during the Hungarian revolution and war for independence of 1848-1849

As mentioned above, the regulation on criminal law became more and more stringent from 1848; due to the internal conspiracies, resistance movements of minorities and, especially, the rebellion of the Délvidék broken out by Serbian insurgents. In order to suppress that rebellion, Bertalan Szemere, the interior minister of the Batthyány government, proclaimed the state of siege in the concerned southern counties on 19 July, which, regarding the offences against the state, implied the introduction of martial law. Ferenc Deák, on the basis of a motion from the lower house, drew up a proposal by 22 July which ordered the setting up of extraordinary criminal courts (the so-called executive courts).

During the war for independence of 1848-49, a *de facto* dual legal system prevailed. In the regions remaining under Hungarian control, new martial law rules were formulated, as mentioned above. In the territories falling under the actual control of Austria, the civil summarily conducted proceedings of 1846 remained (with slight amendment), while courts-martial (*Kriegsgerichten*) were also set up. These courts-martial had the right (and the obligation) not only to carry out court-martial procedures but also summarily conducted proceedings against both military persons and civilians in respect of certain offences. As for the rulings of Szemere and Deák: Bertalan Szemere interior minister (together with palatine István) declared martial law with effect covering the whole territory of Hungary as early as on 12 June 1848 (the legal basis of such measure was also the abovementioned order of the Locotenential Council of 1846), and, on 19 July, proclaimed the state of siege in certain counties, mainly in the Délvidék. At the same time, they set up summarily adjudicating courts-martial with competence extended to civil perpetrators, which courts adjudicated, following the same rules existing in Austria, in a panel of 14 judges in cases of military officers and of 8 judges in cases of privates and civilians. These courts were also entitled to impose only death penalty if the accused was found guilty unanimously and the sentence had to be enforced within 3 hours. Failing unanimity, the case had to be transferred to the ordinary court.[67] Simultaneously, the need arose to crush the armed resistance of the movements of nationalities and peasants by legislation, i.e. by martial law proceedings. For this purpose, Ferenc Deák prepared a bill by 31 July, pursuant to which the government became entitled to proclaim the state of siege and appoint an omnipotent „royal" (actually government) commissioner anywhere in the country, who could order the application of summarily conducted proceedings (the conditions and the process of which the bill regulated thoroughly). The act was finally adopted in February 1849 in an extremely intensified internal situation, and, apart from some tiny differences, the law basically contained Deák's concept regarding the summarily conducted proceedings. By 8 February, the Defence Committee prepared the reviewed version of the proposal made half a year earlier and the act was adopted by the national assembly seated in Debrecen on 13 February.[68]

Under Act I of 1849 (the so-called executive act)[69], the criminal conducts covered by the offences of treason, aid and comfort to the enemy, cooperation with the enemy, weakening of the Hungarian defence forces etc., were to be punished by death penalty within the frames of martial law proceedings, except if these crimes were committed by persons under the age of 18, insane persons or pregnant women.[70] The Defence

[67] Naturally, release was also a possible decision, requiring unanimity as well.

[68] Regarding the changes of the rules of summarily conducted proceedings between June 1848 and February 1849, see in detail: TÓTH, Á., A statárium és az ostromállapot szabályozása 1848-tól a kiegyezésig. [The rules of martial law and state of siege between 1848 and the compromise.] In: *Acta Juridica et Politica*, vol. 29, Nr. 5, Szeged, 1982.

[69] The full and precise title of the statute was: „Act I of 1849 on the setting up, the structure and the procedural rules of joint military and civil summarily adjudicating courts and on defining the cases to be adjudicated thereby".

[70] Pursuant to Article 5 of the statute: „If a citizen or resident of Hungary (whether civilian, clerical or military person), with the exception of persons under the age of 18, insane persons and pregnant women, a) takes up arms against the Hungarian homeland, its constitution, its independence and territorial integrity, or encourages others to act in such way; b) conspires with enemies and, voluntarily without being physically forced, provides any services (serves as a spy, provides food, weapons or money, recruits mercenaries, shows a way or a path, supports any oral or written instructions; c) accepts and disseminates the orders, measures and invitations of the enemy without irresistible coercion; d) gives the soldier or any citizen of Hungary and also any weapons, gunpowder or else military device to the hands of the enemy; e) without irresistible coercion, accepts any position or engagement from the enemy and acts in the interest thereof; f) intentionally misleads the army or an army division of Hungary, or any officer, commissioner or courier thereof, or hinders the operations thereof actively or arrests any person belonging thereto during his travelling; g) actively and intentionally obstructs to provide the army of Hungary with food, payment and accommodation or to transport it; h) actively contravenes the national assembly or its decisions, orders or measures, or actively and emphatically encourages others to act in such way; i) is hiding enemy soldiers or spies, being aware of his status, that person shall fall under the jurisdiction of the summarily adjudicating court, regardless of status or gender."

Committee determined the territories where these provisions had to be applied, and appointed the members of the executive courts.[71] In case of being caught in the act, the perpetrator of a crime could be captured by anyone and had to be taken before court within 24 hours. The court had maximum three times 24 hours to make a decision. The summarily conducted procedures were entirely verbal[72] and, in principle, open but the public could be excluded due to „important reasons in favour of the state". In case the executive court unanimously found the accused person guilty, it could sentence him solely to death[73] by „gunpowder and bullet" which sentence had to be enforced within three hours from the prompt delivery of the judgement and there was no place for legal redress or for request for pardon. Between March and June of 1849, 18 extraordinary courts were set up which were eliminated in June and, a central national executive court was established instead. The latter had only two cases but delivered no sentences and ceased its operation upon Görgey's initiative at around 20 July.

7. Afterword

After the suppression of the revolution and war for independence of 1848-1849, the autonomous Hungarian legislation and application of criminal law ceased to exist. Subsequently, the majority of the death sentences were imposed in the course of martial law proceedings, rendered, on the one hand, by the specific courts-martial (*Kriegsgerichten*) set up on 2 July 1849 (in order to impeach the ones participating in the revolution and the war for independence) and, on the other hand, on the basis of the Austrian criminal code of 1803 (*Strafgesetz*) replaced by the new Austrian criminal code adopted on 17 May 1852 (*Strafgesetzbuch*). The restitution of the application of Hungarian law became possible only in 1861 when the Ideiglenes Törvénykezési Szabályok (ITSZ) [Temporary Rules on Legislation] were adopted by the Országbírói Értekezlet [Conference of the Judge Royal] which, regarding the substantive and procedure criminal law, decided to return[74] to the conditions existing before 1848.[75]

[71] The executive courts consisted of five members, two of whom were military persons, two more members were civilians and the leader could be either military or civil person.

[72] Nevertheless, strict rules existed in order to record in the minutes what was said. E.g. the words of the accused and the witnesses had to be written down literally, and, after the hearing, the recorded text had to be read aloud immediately and signed by all members of the court.

[73] When the accused was found innocent unanimously by the extraordinary court, he had to be released of course, but, in case the votes were split, the case had to be transferred to the ordinary court (regardless the majority opinion).

[74] „The Hungarian statutes and statutory practice shall be restored with reflecting the changed relations." (Preamble of Part II in ITSZ) Furthermore: „Being less stringent than Austrian criminal law, the Hungarian criminal statutes and statutory practice shall apply to judgement of crimes and misdemeanours committed prior to the restitution of the Hungarian law." (Article 9 of Part II in ITSZ).

[75] The possibility of enacting the revised version of Deák's proposal seriously arose but, finally, it did not happen because Deák insisted on regulating the criminal liability of ministers.

Antikes, mittelalterliches und gegenwärtiges im Privatrecht. Römische ‚eigentumsrechtliche' Kasuistik hinter dem in *Azos Brocardica aurea* erschienenen und im geltenden ungarischen BGB als allgemeines privatrechtliches Verbot neu kodifizierten Adagium von *„venire contra factum proprium nulli conceditur"*

(Ancient, Medieval and Present Issues in Private Law. On the Example of the Casuistics of Ancient Roman 'Property Law' Standing Behind a Medieval Adage in Azo Portius' Brocardica Aurea called "venire contra factum proprium nulli conceditur" codified in the New Hungarian Civil Code as a General Prohibition of Private Law)

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Abstract

This contribution investigates how the great achievements of the Roman Antiquity in the field of private law survived in the oeuvre of the Middle Ages' Legists and then how they were preserved these days' modern codifications. The example and nonetheless the temporal middle point, through which the paper examines the continuity of legal thoughts was the 13th century Brocardica aurea elaborated by the meaningful Bolognese glossator, Azo Portius. The opus contains an adagium, according to which „venire contra factum proprium nulli conceditur", i.e. „no one shall act contrary to his or her previous conduct". The proverb was established on many cases mainly located in Emperor Justinian's Digest and Codex. The paper classifies many of these cases into the genera of modern legal notions, and analyses detailed some of them belonging to the contemporary private law category of property law. These cases showed that the ancient Roman requirement of bona fides had as strongly dominated even some basic rules of Roman Law as clearly determined the Art 1:3 § 2 of the new Hungarian Civil Code in effect that: „The requirements of good faith and fair dealing shall be considered breached where a party's exercise of rights is contradictory to his previous actions which the other party had reason to rely on."

Keywords: *bona fides; venire contra factum proprium; Brocardica aurea; Azo Portius; good faith and fair dealing; General Principles of Hungarian private law; survival of Roman law institutions.*

1. Erläuterung des allgemeinen privatrechtlichen Verbots von *venire contra factum proprium* im geltenden ungarischen Recht

Eine neu kodifizierte Regel des ungarischen Privatrechts (ungBGB[1] § 1:3 Abs. 2) sagt: „Das Gebot von Treu und Glauben verletzt auch, wessen Rechtsausübung im Gegensatz zu seinem früheren Verhalten steht, in das die andere Partei begründet vertrauen konnte."[2] (ebenso auch das ungAGB[3]). Man kann überrascht feststellen, dass weder die Motive des neuen ungBGB, noch die Gerichtspraxis und die ersten ungBGB-Kommentare über Anwendungsbereich und Inhalt des Prinzips schweigen.[4] Der überzeugende Nachweis, dass das Prinzip von rechtsvergleichender Methode her rezipiert wurde, liegt darin, dass die ansonsten schweigsame Allgemeine Begründung des ungBGB ausgedrückt nur darauf hinweist, dass dieses Prinzip ein „alter, in zahlreichen heutigen Privatrechten angenommener" Grundsatz ist. Laut dessen wurde das Prinzip nicht aus dem Ergebnis einer induktiven Prüfung des lebenden Rechts, welches z. B. in der Gerichtspraxis spiegelt, kodifiziert. Daraus folgt aber, dass der mögliche Anwendungsbereich des Grundsatzes nicht selbstverständlich ist, sondern etwa aufgedeckt werden soll. Vorher müssen aber das Wesen und die Natur des Prinzips hinsichtlich des ungarischen Privatrechtssystems zusammengefasst werden.

Ohne eine ausdrückliche Kodifikation des Grundsatzes anerkannte schon auch die Gerichtspraxis des vorherigen ungBGB aus 1959[5], dass das Verhalten der einen Partei das Gebot von Treu und Glauben verletzt, welches im Gegensatz zu einem früheren Verhalten dieser Partei steht, worin die andere Partei begründet vertrauen konnte[6]. Der *venire*-Grundsatz ist ein sog. konkreter Tatbestand von allgemeiner Bedeutung, der zur Verletzung des Grundprinzips von Treu und Glauben (ungBGB § 1:3 Abs. 1) ein besonderes Tatbestandsbeispiel bietet. Seine Begriffselemente sind wie folgt:

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1 Gesetz Nr. V von 2013 über das Bürgerliche Gesetzbuch.

2 Siehe § 1:3 Abs. 2.

3 Siehe Gesetz Nr. I von 2012 über das Arbeitsgesetzbuch § 6 Abs. 2.

4 Chronologischer Reihe nach siehe VÉKÁS, Lajos (Hrsg.), *A Polgári Törvénykönyv magyarázatokkal* [=Das Bürgerliche Gesetzbuch mit Erläuterungen] Budapest 2013, S. 30-32; WELLMANN, György (Hrsg.), *Az új Ptk. magyarázata* [=Die Erläuterung des neuen BGB] Budapest 2013, Bd. I, S. 52-54; CSEHI, Zoltán (Hrsg.), *Az új Polgári Törvénykönyv magyarázata* [=Die Erläuterung des neuen Bürgerlichen Gesetzbuchs] Budapest 2014, S. 36-39; OSZTOVITS, András (Hrsg.), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja* [= Großkommentar des Gesetzes No. V von 2013 über das Bürgerliche Gesetzbuch und der zugehörigen Rechtsnormen] Budapest 2014, Bd. I, S. 89; VÉKÁS, Lajos - GÁRDOS, Péter (Hrsg.), *Kommentár a Polgári Törvénykönyvhöz* [=Kommentar zum Bürgerlichen Gesetzbuch] Budapest 2014, Bd. I, S. 49f.

5 Nämlich das Gesetz Nr. IV von 1959 über das Bürgerliche Gesetzbuch.

6 Letzthin siehe z. B. das rechtskräftige Endurteil vom Regionalen Berufungsgericht zur Hauptstadt, Budapest No. Gf.40.072/2015/7.

Die eine Partei leitet sowohl das Vor- oder Erstverhalten als auch das Nachverhalten, welches ausschließlich eine Rechtsausübung zu sein vermag. In vernünftig begründeter Weise vertraut aber die andere Partei, dass die Rechtsausübung ihres Partners mit seinem Erstverhalten harmonisieren werde. Jedoch ist es nicht notwendig, dass die Parteien schon miteinander im Rechtsverhältnis stehen. Weder das Vorverhalten noch das Nachverhalten darf rechtsmissbräuchlich, rechtswidrig oder vorwerfbar sein. Es fallen solche Fälle aus dem Anwendungsbereich des Prinzips aus, in denen das Nachverhalten nicht eine Rechtsausübung sondern eine schlicht rechtmäßige oder nicht widerrechtliche Handlung ist; oder das Nachverhalten eine besondere missbräuchliche Rechtsausübung ist, wenn z. B. die Partei eine durch eine Rechtsnorm geforderte Erklärung missbräuchlich verweigert[7]; oder aber das Erstverhalten rechtswidrig oder sogar schuldhaft[8] war, weil auf solches Verhalten kein Recht begründet werden kann[9]. Es ist nicht unerlässlich, dass das unter diesen Umständen ausgeübte Recht, aus einem mit der anderen Partei faktisch zusammenhängenden Rechtsgrund stammt. Eine Voraussetzung ist es, dass die Partei, welche ihr Recht durch das Nachverhalten ausübt, ein Erst- oder Vorverhalten leitet, welches von der anderen Partei aus irgendwelchem Grund oder Sachverhalt schon bekannt sein soll. Auch vorausgesetzt ist es, dass die andere Partei in der ähnlichen Weiterführung oder Wiederholung des Erstverhaltens vernünftigerweise vertraut. Sinngemäßes Kriterium ist es auch, dass das Erstverhalten, welches nicht unbedingt eine Rechtsausübung sein kann, auch nicht gesetzwidrig sein darf. Keine Voraussetzung bildet jedoch, dass das Vorverhalten im Zusammenhang mit der anderen Partei geleitet wurde.

Ein Spezialfall des allgemeinen Verbots von *venire contra factum proprium* wurde im ungBGB (§ 6:63 Abs. 5) auch kodifiziert: „Zum Inhalt des Vertrags werden alle Gewohnheiten, deren Anwendung die Parteien in ihren früheren Geschäftsbeziehungen vereinbart hatten, und alle Praktiken, die zwischen ihnen ausgestaltet worden sind. Zum Inhalt des Vertrags werden auch alle im gegebenen Geschäftszweig den Subjekten ähnlicher Verträge allgemein bekannten und von diesen regelmäßig angewandten Gewohnheiten, außer, wenn deren Anwendung zwischen den Parteien – angesichts ihrer früheren Beziehung – unbegründet wäre." Es gibt jedoch zahlreiche Sachverhalte, die die Tatbestandsmerkmale des Prinzips hinsichtlich des begründeten Vertrauens in der Wiederholung des Erstverhaltens wohl verwirklichen, fällt jedoch die Anwendbarkeit des Prinzips weg, da die weiteren Sachverhaltselemente des konkreten Falles, wie z. B. ein vertragsverletzendes oder schädigendes Verhalten, die speziellen Elemente eines besonderen Tatbestandes im Vertragsrecht oder Schadensersatzrecht erfüllen.

Eine weitere richtige Frage wäre, was für eine Sanktion in einem reinen Fall von *venire contra factum proprium* zu verwenden ist, wenn das Gesetz ausdrücklich keine Sanktion festlegt. Als ein sog. ‚konkreter Tatbestand von allgemeiner Bedeutung' bildet dieses allgemeine privatrechtliche Verbot einen Teil des Grundprinzips von *Treu und Glauben*. Daraus folgt, dass auf die Verwirklichung von einem solchen Tatbestand, im Gegensatz zu einem Verhalten, welches nur den Titelsatz eines Grundprinzips verletzt, ein gerichtlich durchsetzbarer Anspruch begründet werden kann, und ohne eine ausdrücklich kodifizierte Sanktion kann nur diejenige Rechtsfolge angewendet werden, welche aus der Rechtsnatur des Grundprinzips folgt, wozu der vorliegende konkrete Tatbestand von allgemeiner Bedeutung gehört. Daraus folgt, dass ein Verhalten, welches dem *venire*-Verbot entgegensteht, gleichzeitig auch das Grundprinzip von Treu und Glauben verletzt. Danach fällt die verwendende Sanktion eines *venire contra factum proprium* mit der Rechtsfolge der das Gebot von Treu und Glauben verletzenden Handlung zusammen. Wenn also die Rechtsausübung einer Partei im Gegensatz zu seinem früheren Verhalten steht, in das die andere Partei begründet vertrauen konnte, kann diese Partei keinen Erfolg haben: Die begehrte, durch dieses Verhalten zu erreichende Änderung kann weder in seiner eigenen Rechtsstellung noch in der Rechtsposition von einem anderen realisiert werden. In einem Zivilprozess kann ein solches Verhalten des Klägers oder des Beklagten nie erfolgreich sein: das Gericht lässt solche Berufungen, Hinweise oder Beweismittel jeder Partei außer Acht.

Ein dem Verbot von *venire contra factum proprium* entgegenstehendes Verhalten, welches keine speziellere Norm gleichzeitig verletzt, in der Gerichtspraxis kaum vorkommt, da gesellschaftliche und wirtschaftliche Beziehungen durch die besonderen Regeln des neuen ungBGB im Allgemeinen in angemessener Weise abgedeckt wurden. Die Foren[10] beschlossen in den wenigen ungarischen Fallbeispielen generell, dass das angestrebte oder gezielte Ergebnis nicht erfolgen und der unerwünschte oder zu vermeiden gewollte Ausgang eintreten soll. Die jüngsten – beinahe ausschließlichen – gerichtlichen Beispiele sind wie folgt. Ein im April 2018 ergangenen Endurteil[11] der Revisionskammer des Obersten Gerichts (*Kúria*) für Arbeitssachen aussagte, dass wenn die Parteien gemäß ihrem Benehmen bei und nach der Übergabe der über die Kündigung des Arbeitgebers ausgestellten Urkunde davon ausgingen, dass das Abnahmeverfahren der Kündigung nicht gelang, aber danach im Gegensatz zu seinem Vorverhalten sich der Arbeitnehmer auf die Wirksamkeit der Kündigungsmitteilung bezog, verletzt dieses Nachverhalten als ein *venire contra factum proprium* das Gebot von Treu und Glauben, deshalb kann das Gericht die Wirksamkeit der Übermittlung der Kündigung nicht feststellen. Das im

[7] In diesem verbotenen Falle des Rechtsmissbrauchs, wenn auch die anderen Voraussetzungen (vgl. ungBGB § 1:5 Abs. 2) verwirklicht wurden, ersetzt das Gericht die verweigerte Erklärung durch sein Urteil.

[8] Dessen Verhalten ist schuldhaft, wer in einem Zivilrechtsverhältnis nicht so vorgeht, wie das in der gegebenen Situation im Allgemeinen zu erwarten ist (ungBGB § 1:4 Abs. 1).

[9] Wegen z. B. des Prinzips von *„nemo auditur suam turpitudinem allegans"* (ungBGB § 1:4 Abs. 2).

[10] Nicht nur vor den Gerichten, sondern z. B. auch vor dem Verfassungsgericht. Siehe dazu den Unterpunkt E der Begründung des Beschlusses 64/1991. (XII. 17.) AB. Siehe VINCZE, Attila: *Az Alkotmány rendelkezéseinek érvényre juttatása a polgári jogviszonyokban [=Die Durchsetzung der Verfassungsbestimmungen in zivilrechtlichen Verhältnissen]*, in Polgári Jogi Kodifikáció [=Privatrechtliche Kodifikation] 6/3 (2004) 7.

[11] Fallnummer: Mfv.I.10.323/2017/8.

Mai 2017 erlassene Urteil[12] des Regionalen Berufungsgerichts (*ítélőtábla*) zu *Pécs* erklärte, wenn das während des Prozesses geleitete Nachverhalten der Prozesspartei im Gegensatz zu seinem solchen Vorverhalten steht, worin die andere Partei begründet vertrauen konnte, verletzt dieses Nachverhalten das Gebot von Treu und Glauben, deshalb verwirklicht das auf dieses Nachverhalten begründete Prozessverhalten (Hinweis, Bezugnahme, Beweisantrag) einen gesetzlich verbotenen Rechtsmissbrauch, deswegen lässt das Gericht dieses rechtsmissbräuchliche Prozessverhalten bei der Beurteilung des Rechtsstreits außer Acht.

2. Ursprung und Herkunft des Adagiums

Die maßgeblichen Forscher des Themas, wie z. B. Riezler[13], Liebs[14], Astone[15] und jüngstens Isola[16], sind darin einig, dass die legistische *Brocardica aurea* von Azo Portius aus der Wende vom 12. zum 13. Jahrhundert – die Ära der Wiederentdeckung des antiken Wissens und der sog. *„Wiedergeburt der Rechtskultur"*[17] (*rinascimento giuridico*) – vermutlich als der erste Nachweis des Prinzips gilt. In diesem Zeitalter war das heute ‚Privatrecht' genannte Rechtsgebiet weitgehend ungeregelt und durch allumfassenden Partikularismus zergliedert. Die mittelalterliche Jurisprudenz benötigte generelle Prinzipien nicht um die Unterstützung einer neuen, deduktiven Methode juristischer Fallbearbeitung, sondern um allgemeine Phänomene des Rechts zu erkennen: Die Rolle eines rechtlichen Sprichworts war ganz anders als heutzutage. Die Rolle und Zweck der *Brocardica* sind umstritten: Savigny[18] hielt es für richtig, dass sie einen Regelcharakter hatte, aber anderen[19] erachten, dass das Werk lieber eine Argumentsammlung sei. Im modernen juristischen Schrifttum tauchen mehrere Varianten des Wortgebrauchs des Prinzips auf. Er kommt sowohl als *‚venire contra factum proprium nulli conceditur / non valet / nemini licet'*, als auch als *‚factum proprium nemo impugnare potest'* oder schlicht als *‚venire contra factum proprium'*, oder aber als *„neminem debere venire contra factum suum et si non valeat quod fecit"*[20] vor. Bereits im 16. Jahrhundert entstanden mehrere diverse Druckausgaben, die sich auch auf verschiedene Handschriften stützten. Der *Brocardica*-Titel lautete im Originaltext der Ausgabe von Basel 1567 und Neapel 1568 als: *„venire contra factum proprium nulli conceditur"*[21].

Die angewandte Methode Azos *Brocardica* ist die möglichst viele Parallelstellen von Kasus sowohl aus der Kompilation von Justinian (zumeist selbstverständlich aus der Digesten und dem Codex) als auch aus den Quellen der Kanonistik (wie z. B. das *Decretum Gratiani*) zu sammeln, und danach sie zu zwei kasuistischen Hauptgruppen von *Pro* und *Contra* zu gliedern. Für den Beweis der Aufrichtigkeit des *venire*-Verbots (*pro*), wenn also die Partei ihr Erstverhalten folgen soll, benutzt das Werk insgesamt 27 Zitate (u.a. 13 Digesten- und 10 Codex-Stellen), dagegen (*„contra"* oder *„contrarium"*) aber, wenn nämlich das Verbot nicht gilt, und damit das „widersprüchliches" Verhalten der Partei nicht unerlaubt ist, 26 Quellenstellen (14 aus der Digesten und 10 aus dem Codex, etc.). Das Werk beinhaltet auch einen dritten, als *„solutio"* betitelten Teil, worin Azo Portius solche Fälle aufzählte, die seine Konklusion unterstützen, wonach es zwei Arten des Erstverhaltens nach dem Kriterium dessen Rechtmäßigkeit gibt: Es kann entweder rechtmäßig oder widerrechtlich sein. Im Falle eines legitimen Erstverhaltens ist man an sich daran gebunden, im Falle jedoch von einem unrechtmäßigen soll man lieber dagegenhandeln.

3. Die klassifizierte Kasuistik des azonischen Adagiums

Ich fasse die justinianische[22] Kasuistik im Kreis meistens von den *Pro*-Fällen nach dem Buch von Isola[23] möglichst kurz zusammen, wobei ich diese Einzelfälle in neuen thematischen Gruppen klassifiziere, um sie leicht übersehen zu können.

a) Einige *prozessrechtliche Fälle* sind wie folgt. *aa)* Der urkundliche, als *pactum* betrachtende und somit vom *iudex* berücksichtigende Verzicht auf eine privilegierte *praescriptio fori* wegen besonderen Gerichtsstandes (Erstverhalten) bindet den Erklärenden.[24] *ab)* Erscheint jemand zur Zeugenaussage vor einem Richter und macht eine Falschaussage, so kann der Zeuge ein ihm ansonsten zustehendes *privilegium fori* nicht geltend machen, um sich dem Verfahren vor diesem Richter zu entziehen.[25] Als legitimes Vorverhalten ist hier nur die Zeugung betrachtet zu werden. *ac)* Wenn ein Prokonsul die Gerichtsbarkeit an *legati* wirksam überträgt, ist deren Entziehung nur nach Befragung des Kaisers erlaubt.[26] *ad)* Ohne ein Angebot ein anderes Be-

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12 Fallnummer: Gf.40.008/2017/4.

13 RIEZLER, Erwin, *Venire contra factum proprium*, Leipzig 1912, S. 44.

14 LIEBS, Detlef, *Lateinische Rechtsregeln und Rechtssprichwörter*, 7. vollst. überarb. u. verb. Aufl. München 2007, S. 241.

15 ASTONE, Francesco, *Venire contra factum proprium*, Neapel 2006, S. 75[65].

16 ISOLA, Lisa, *Venire contra factum proprium. Herkunft und Grundlagen eines sprichwörtlichen Rechtsprinzip*, Frankfurt am Main 2017, S. 6, 13.

17 Dieser Phrase folgt das Werk von ENGELMANN, Woldemar, *Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre*, Leipzig 1938. *passim*.

18 SAVIGNY, Friedrich Carl von, *Geschichte des römischen Rechts im Mittelalter*, 2. Aufl. Bd. 3. Heidelberg 1834, S. 568.

19 WEIMAR, Peter, *Argumenta Brocardica*, in: DERS.: *Zur Renaissance der Rechtswissenschaft im Mittelalter*, Goldbach 1997, S. 45-80. Siehe auch bei ISOLA, A.A.O., S. 30.

20 SCHWAIBOLD, Matthias, *Brocardica - dolum per subsequentia purgari. Eine englische Sammlung von Argumenten des römischen Rechts aus dem 12. Jahrhundert*, in Ius commune Sonderhefte 25 (1985) 43.

21 Siehe ISOLA, A.A.O., S. 31-33.

22 Aus Umfangsgründen lasse ich die im Zusammenhang mit Sklaverei stehenden Fälle aus. Diese stammen aus den folgenden Digestenstellen: D. 7,1,25 *pr*. und D. 17,1,26,7.

23 Für *Pro*-Gruppe von Quellen mit detaillierten Argumentationen siehe ISOLA, a.a.O., S. 41-220 (resümiert: S. 381-384); für die *Contra*-Gruppe ausführlich siehe S. 220-365 (zusammenfassend: S. 384-386).

24 Siehe C. 2, 3, 29 *pr*. *Imp. Iustinianus A. Iohanni pp.* [a. 531].

25 Siehe C. 4, 20, 14 *Imp. Zeno A. Arcadio pp.* [a. 486].

26 Siehe D. 1, 16, 6, 1 *Ulpianus libro 1 de officio proconsulis.*

weismittel zu erbringen kann ein im Prozess schon angebotener Eid nicht mehr zurückgenommen werden.[27] *ae)* Wenn ein einen Prozess beendender Vergleich als Erstverhalten legitim und daher verbindlich ist, müssen dessen Parteien sich daran halten, womit sie eine neue Klage über denselben Gegenstand nicht einbringen dürfen.[28] *af)* Wenn ein Gericht ein rechtskräftiges Urteil erlässt, ist sein Verhalten als legitimes und bindendes Erstverhalten auszulegen, womit es dieses Organ nicht mehr abändern kann.[29] *ag)* Wird man in einem Verfahren verurteilt, kann man sich nicht mehr auf vorteilhafte Umstände berufen, die im Vorverfahren geklärt werden müssten.[30]

b) Rechtsgültige Geschäfte und *vertragsgemäße Leistungen* sind als verbindliche Erstverhalten auszulegen, wovon die Parteien nicht mehr einseitig abgehen können. *ba)* Kann man von rechtsgültig abgeschlossenen Verträgen nicht mehr einseitig abgehen.[31] Weder mit der Zustimmung von dem Minderjährige noch mit der Genehmigung seines Vormundes kann das dem Minderjährige gültig geschenktes Grundstück wieder entzogen werden, um es auf einen anderen zu übertragen, weil die empfangene Schenkung hier als legitimes Erstverhalten betrachtet werden muss.[32] *bb)* Falls ein *promissor* den Rechtsgrund einer Geldbezahlung in einer Urkunde bestimmt, kann er sich nicht mehr auf die Ungültigkeit dieser *causa* berufen, und vom *stipulator* Beweise für diesen Rechtsgrund zu fordern.[33] *bc)* Da Kaufverträge generell – auch für den Fiskus – verbindlich sind, ist ihre einseitige Auflösung nicht möglich, auch wenn der Verkäufer dem Käufer anbietet, den schon vertragsmäßig geleisteten Kaufpreis zurückzugeben.[34] Der Fiskus ist also an seinen gültigen Kaufvertrag gebunden, und er kann die Ware auch dann nicht vom Käufer zurückverlangen und damit als Verkäufer den Eviktionsfall selbst herbeiführen, wenn er als verwertender Pfandgläubiger nicht für Eviktion haftet.[35] Wenn außerdem ein Fiskalbeamter eine Sache verkauft, kann diese ein anderer Beamter des Fiskus überhaupt nicht zurückverlangen, selbst wenn dieser einem anderen örtlichen Amt zugehörig ist.[36] *bd)* Ein Pfandgläubiger, der das Pfand verwertet, kann die Sache bei seinem Partner nicht mehr verlangen, selbst wenn er ein aus anderem Grund daran bestehendes Recht geltend machen will.[37] *be)* Wenn die Tilgung eines Darlehens in einem entfernten Ort in Stipulation vereinbart wird, kann der Schuldner einseitig nicht festsetzen, sie an einem näheren Ort zu leisten, auch wenn er frühere und mehrere Leistung bietet.[38]

c) Die Rolle *unrechtmäßiger Rechtsgeschäfte* als Beispiele zum Prinzip *‚nemo auditur suam turpitudinem allegans'*[39] oder anderen Grundsätzen. *ca)* Emanzipierte ein Vater seine Tochter auf formlose Weise, so kann er sich nach ihrem Tod jedoch keinesfalls auf die mangelnde Entlassung berufen, wenn die virtuelle Emanzipierte wie eine wahre Gewaltfreie lebte (und testierte).[40] *cb)* Da eine Vereinbarung über ein Servitutsrecht in einer *res extra commercium* durchaus unrechtmäßig ist, müssen sich jedoch die Beteiligten an die Vereinbarung um ein solches Servitutsrecht zu unterlassen halten.[41] *cc)* Der Erbe ist auch an ein formloses Fideikommiss gebunden, wenn er nur vom dahingehenden Willen des Erblassers Kenntnis hat.[42] *cd)* Bei einem mit *lex commissoria* geschlossenen Kaufvertrag kann der Käufer das schon übergegebene Geld mit dem Argument nicht zurückfordern, dass er selbst nicht vertragsgemäß leistete, womit der Verkäufer vom Vertrag zurücktreten könne und daher dieses Geld herausgeben müsse.[43] *ce)* Falls ein Miteigentümer Servitut einräumt, kann er seinem Vertragspartner dessen Ausübung nicht verbieten, selbst wenn das Servitut mangels Mitwirkung der übrigen Miteigentümer nicht wirksam entstanden ist.[44]

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[27] Siehe C. 4, 1, 11 *Imp. Iustinianus A. Demostheni pp.* [a. 529].
[28] Vgl. u.a. D. 9, 2, 46; 9, 4, 20; 12, 6, 23, 1; 48, 5, 4, 2; 48, 6, 5, 2.
[29] Siehe zum Beispiel: C. 7, 45, 1-2; D. 1, 18, 6, 9; D. 4, 8, 19 *pr.*
[30] Siehe C. 8, 8, 1 *Imp. Antoninus A. Iustino* [a. 212].
[31] Siehe C. 4, 10, 5 *Impp. Diocletianus et Maximianus AA. et CC. Camerino et Marciano* [a. 293].
[32] Siehe C. 2, 29, 2 *pr. Impp. Diocletianus et Maximianus AA. et CC. Midae* [a. 293].
[33] Siehe C. 4, 30, 13 *Imp. Iustinus A. Theodoto pu.*
[34] Siehe C. 4, 44, 7 *Impp. Diocletianus et Maximianus AA. et CC. Mucatraulo militi* [a. 293].
[35] Siehe C. 8, 45, 1 *Imp. Alexander A. Publicio* [a. 223].
[36] Siehe C. 10, 5, 1 *Pars epistulae Imp. Alexandri A. ad rationales* [a. 451].
[37] Siehe D. 20, 5, 10 *Paulus libro 6 responsorum.*
[38] D. 45, 1, 122 *pr. Scaevola libro 28 digestorum: Qui Romae mutuam pecuniam acceperat solvendam in longinqua provincia per menses tres eamque ibi dari stipulanti spopondisset, post paucos dies Romae testato creditori dixit paratum se esse Romae eam numerare detracta ea summa, quam creditori suo usurarum nomine dederat. quaesitum est, cum in integrum summam, qua stipulatione obligatus est, optulerit, an eo loco, in quo solvenda promissa est, sua die integra peti posset. respondit posse stipulatorem sua die ibi, ubi solvendam stipulatus est, petere.* Siehe dazu JAKAB, Éva, *Geld und Sport. Rezeption griechischer Topoi in der römischen Jurisprudenz?* in Revue Internationale des droits de l'Antiquité (hinfort: RIDA) 59 (2012) 119.
[39] Siehe die Glosse von *Accursius* zum C. 7, 8, 5: *„non audiri quem allegantem turpitudinem suam"*. Zur Rolle der ungarischen *peregrinatio academica* (*Damasus Hungarus, Paulus Hungarus* usw.) siehe ausführlicher GALLAI, Gergely, *Some Observations on Paulus Hungarus and His Notabilia*, in: BELLOMO, Manlio -CONDORELLI, Orazio (ed.), *Proceedings of the Eleventh International Congress of Medieval Canon Law, Catania, 30 July - 6 August 2000* [=MIC Series C: Subsidia, Vol. 12] Cittŕ del Vaticano 2006, Fn. 236-237[8]; siehe dazu BÓNIS, Péter, *A joghatás hibái miatti érvénytelenség az európai ius commune rendszerében* [=*Die Unwirksamkeit wegen Rechtswirkungsmängel im System des europäischen ius commune*], in Jogtörténeti Szemle [=Rechtshistorische Rundschau] 15/2 (2013) S. 3.
[40] D. 1, 7, 25 *pr. Ulpianus libro 5 opinionum: Post mortem filiae suae, quae ut mater familias quasi iure emancipata vixerat et testamento scriptis heredibus decessit, adversus factum suum, quasi non iure eam nec praesentibus testibus emancipasset, pater movere controversiam prohibetur.*
[41] Siehe D. 8, 4, 13 *pr.* In detaillierter Weise siehe Kapitel IV.3 unten.
[42] Siehe Inst. 2, 23, 12.
[43] D. 18, 3, 6 *pr. Scaevola libro 2 responsorum.*
[44] D. 8, 3, 11 *Celsus libro 27 digestorum.*

d) Die *Konvaleszenzfälle*: *da)* Falls der bei der Übertragung noch nicht aber später ja berechtigte Veräußerer die Sache vom Erwerber Bezug nehmend auf diesen Rechtsmangel gerichtlich herausverlangt, kann er durch die Einrede des Erwerbers zurückgewiesen werden.[45] *db)* Wenn die Parteien ein schlecht ausgeführtes Geschäft nachträglich genehmigen, können sie diesen Fakt nicht mehr als Klagegrund heranziehen.[46] *dc)* Die Einrede des Erwerbers ist auch wirksam, wenn ein Grundstück entgegen der *lex Iulia de fundo dotali* veräußert wird, aber der Verbotsgrund nachträglich wegfällt, da die Ehefrau verstirbt und damit der Ehemann die *dos* endgültig behalten kann.[47]

4. Beispiele aus der ‚eigentumsrechtlichen' Kasuistik der *Brocardica* oder die volle und unbedingte Herrschaft des *bona fides*-Gebots

4.1 Einige Vorfragen der Methodenlehre

Falls man die *„eigentumsrechtliche"* Kasuistik der *Brocardica* analysiert, die im Mittelalter auf zumeist altertümlichen Quellen ausgebaut wurde, taucht die Frage sogleich auf, inwieweit man hier über ‚Eigentumsrecht' im heutigen Sinne überhaupt sprechen kann. Schon nur die *azonische* Kasuistik wirft nämlich mehrere Auslegungen auf. Ein Kasus römischer Antiquität kann entweder aus *materiellem* oder aus *subjektivem* Aspekt oder aus dem Gesichtspunkt der *Rechtsquellenlehre* mit ‚eigentumsrechtlicher' Rechtsstreitigkeit laut unserer Begriffe zusammengebracht werden.

a) Wenn in einem Rechtsfall, der hinter einer antiken Quelle der *Digesten* oder des *Codex* steht, das *Eigentumsverhältnis* hinsichtlich einer bestimmten Sache streitig ist, ist dieser Kasus aus *materieller* Hinsicht eigentumsrechtlich, weil die Debatte mit der Teilnahme des Eigentumsgegenstandes im Verkehr zusammenhängt, obwohl diese Streitigkeiten hinsichtlich der Verträge zur Eigentumsübertragung ebenfalls mit dem Obligationenrecht im Zusammenhang gebracht werden könnten.

b) Gegen den *subjektiven* Aspekt, worin die rechtliche Auseinandersetzung an die *Rechte des Eigentümers* anknüpfend ist, könnte man erbringen, dass die Ausübung zum Beispiel des *ius disponendi* auch eine mit dem Obligationenrecht oder Erbrecht verwandte Frage sein vermag.

c) Der Betrachtungsweise der *Rechtsquellenlehre* nach könnte ein Kasus an das Eigentumsrecht auf der Weise angeheftet werden, dass die antike Quelle unter einem Titel der Digesten oder des Codex liegt, der wohl *eigentumsrechtliche* Verhältnisse regelt. Dagegen könnte es sich die Frage stellen, ob einige Grundprobleme des im heutigen Sinne nehmenden *Vertragsrechts* nicht gerade unter den Digestentiteln über *rei vindicatio* (D. 6, 1) oder *publiciana in rem actio* (D. 6, 2) kompiliert wurden.

Nach diesen Streitpunkten scheint die Aufgabe nicht leicht, aus der Kasuistik der *Brocardica aurea* von *Azo* solche Quellen auszuwählen, die unbestreitbar zur Kasuistik des im modernen Sinne gefassten Eigentumsrechts eingeordnet werden können.

4.2 Veräußerung fremder Sachen: wirkliche Konvaleszenz?

Es gibt ein in der *Brocardica* auch aufgenommener Falltyp, worin sowohl der *materielle* Aspekt als auch der Gesichtspunkt der *Quellenlehre* gut legiert werden können. Der Quellenbasis dieses Typen der Fälle ist in der Digesten vereinzelt: Fragmente tauchen unter den Titeln sowohl über den Kauf[48] als auch über *rei vindicatio*[49], *evictio*[50], *exceptio rei venditae et traditae*[51] und die *doli exceptio*[52] auf. Im Hintergrund dieser Sporadizität steht der heterogene Begriff des römischen Eigentums, und daraus folgend das komplizierte System des römischen Eigentumsschutzes. In seiner *Brocardica* zog Azo von den Texten zur Konvaleszenz beim Erwerb von Landgütern (*res mancipi*) zwei heran, um die Regel zu stützen, dass widersprüchliches Verhalten unzulässig sei. Die Texte sind mehrfach überliefert: Ulp. D. 6, 1, 72; Pomp. D. 21, 3, 2 und Ulp. D. 44, 4, 4, 32. Die hier angeführten drei Quellen sind mehr oder weniger einig (Sachverhalt mit Kursivschrift, Entscheidung ohne sie hervorgehoben; textliche Unterschiede wurden unterstrichen):

D. 6, 1, 72 *Ulpianus libro 16 ad edictum*
Si a Titio fundum emeris Sempronii et tibi traditus sit pretio soluto, deinde Titius Sempronio heres extiterit et eundem alii vendiderit et tradiderit, aequius est, ut tu potior sis. nam et si ipse venditor eam rem a te peteret, exceptione eum summoveres. sed et si ipse possideret et tu peteres, adversus exceptionem dominii replicatione utereris.

D. 21, 3, 2 *Pomponius libro 2 ex Plautio*
Si a Titio fundum emeris qui Sempronii erat isque tibi traditus fuerit, pretio autem soluto Titius Sempronio heres exstiterit et eundem fundum Maevio vendiderit et tradiderit: Iulianus ait aequius esse priorem te tueri, quia et si ipse Titius fundum a te peteret, exceptione summoveretur et si ipse Titius eum possideret, Publiciana peteres.

D. 44, 4, 4, 32 *Ulpianus libro 72 ad edictum*
Si a Titio fundum emeris qui Sempronii erat isque tibi traditus fuerit pretio soluto, deinde Titius Sempronio heres extiterit et eundem fundum Maevio vendiderit et tradiderit: Iulianus ait aequius esse praetorem te tueri, quia et, si ipse Titius fundum a te peteret, exceptione in factum comparata vel doli mali summoveretur et, si ipse eum possideret et Publiciana peteres, adversus

[45] Vgl. D. 6, 1, 72; D. 21, 3, 1 *pr.*; D. 21, 2, 17 (siehe ausführlicher im Kapitel IV.2).
[46] Siehe D. 3, 5, 8. Die kurze Auslegung des zu langen Textes: Falls die schlechte Führung eines fremden Geschäfts nachträglich genehmigt wird, stellt es sich die Frage, ob eine *negotiorum gestorum actio* zusteht: *Pomponius* neigt, *Scaevola* aber insofern bejaht, dass wenn trotz schlechter Geschäftsführung eine Zustimmung erteilt wurde, ist an diese der Geschäftsherr nun ja gebunden; aber wenn *dolus malus* dem Geschäftsführer vorwerfbar ist, soll seine Haftung durchsetzbar sein, und keine Einwendung kann gegen die Genehmigung erhoben werden. Vgl. ISOLA, a.a.O., S. 142f.
[47] D. 23, 5, 17 *Marcianus* oder *Marcellus* [?] *libro 7 digestorum.*
[48] Siehe Ulp. D. 18, 1, 28 und Paul. D. 18, 1, 34, 3.
[49] Siehe Ulp. D. 6, 1, 72.
[50] Siehe Ulp. D. 21, 2, 17.
[51] Siehe Ulp. D. 21, 3, 1 *pr*.
[52] Siehe Ulp. D. 44, 4, 4, 3.

excipientem „si non suus esset“ replicatione utereris, ac per hoc intellegeretur eum fundum rursum vendidisse, quem in bonis non haberet.

Die deutsche Übersetzung der drei Texte wurde in einem *einheitlichen Schema* eingesetzt. Sie lautet wie folgt (Textunterschiede in *eckige Klammern* gesetzt): [53]

„Wenn du von *Titius* ein Grundstück des *Sempronius* gekauft hast und es dir nach Kaufpreiszahlung übergeben worden ist, dann *Titius* der Erbe des *Sempronius* geworden ist und er dasselbe einem anderen [*Maevio*] verkauft und übergeben hat, ist es [nach *Julian*] gerechter, dass du stärker bist. Denn auch wenn der Verkäufer [*Titius*] selbst diese Sache [das Grundstück] von dir forderte, könntest du ihn mittels *exceptio* [*in factum/doli*] abwehren. Aber auch wenn er [*Titius*] selbst besäße und du [mit einer *actio Publiciana*] klagen würdest, könntest du gegen die *exceptio* [*iusti*] *dominii* [*‚si non suus esset‘*] eine *replicatio* anwenden[, da es selbstverständlich ist, dass das wiederverkaufte Grundstück nicht zum Verkäufer gehörte [54]].“

Die *responsa* der Juristen ist darin einig, dass das Recht des ersten Käufers, dem das Grundstück nach der Kaufpreisbezahlung übergegeben wurde, stärker ist, weswegen er im Formularprozess obsiegt, soll er als sog. bonitarischer Eigentümer von dem quiritischen Eigentümer (Verkäufer) verklagt werden, oder umgekehrt. Im ersten Falle, wenn also der Verkäufer den ersten Käufer klagte, kann der beklagte Käufer den Verkäufer mittels *exceptio in factum* oder *doli* abwehren (zur Möglichkeit einer *exceptio rei venditae et traditae* siehe Thielmann [55]). Im zweiten Falle jedoch, worin der Bonitareigentümer (Käufer) den Zivileigentümer (Verkäufer) durch *Publiciana actio* verklagt, kann die *iusti dominii exceptio* des Beklagten (Verkäufer) mittels der *replicatio (doli)* des Klägers (Käufer) ja abgelehnt werden.

Gemäß des ersten Falltypen hatte die erstmalige Veräußerung des *fundus* dann stattgefunden, wenn der Verkäufer das Eigentum an der verkauften Sache noch nicht erworben hatte, aber nachträglich z. B. beerbte der Verkäufer das Eigentum, und danach er wünschte den schon verkauften Vermögensgegenstand entweder zurückzufordern oder ihn einem Dritten wiederholt zu verkaufen. Die Hauptfrage der elementaren Rechtsstreitigkeit besteht darin: Wem gehört die bei ihrer Veräußerung für den Verkäufer noch fremde Sache? Ein weiteres Problem ist: Wer kann den Vermögensgegenstand erwerben, wenn er nach dem Eigentumsübergang mehrfach veräußert wurde?

Wacke [56] meinte, dass das Erwerbsgeschäft durch den nachträglichen Zusammenfall von Verfügendem und Rechtsinhaber in einer Person „geheilt“ werde, und dies könne mit der Vorstellung der *juristischen Sekunde* erklärt werden, wenn das Recht nach dem Durchgangserwerb des Verfügenden sofort an den Erwerber übergehe.

Siklósi meint, dass die bonitarische Rechtslage des Käufers auch dadurch verstärkt werde, dass der Verkäufer erbmäßig zum quiritischen Eigentümer geworden sei, da er gegen den ersten Käufer im Prozess obsiege.[57] Meines Erachtens werde jedoch die Position des Käufers nicht wegen des theoretisch zum zivilrechtlichen Eigentum leitenden Erbfalles verfestigt, sondern vielmehr deshalb, weil der Käufer – als gutgläubiger Erwerber, der entgeltlich erworben habe – die beiden positiven Bedingungen einer erfolgreichen *actio Publiciana* gemäß des Sachverhalts beweisen könne: sowohl die *iusta causa* des Erwerbs als auch die Besitznahme (und nichtsdestoweniger die Kaufpreisbezahlung). Daraus folgt, dass seine prozessrechtliche Position in diesem Verfahren ohne Rücksicht auf den zwischenzeitlichen Erbfall stärker ist. Der (erste) Käufer könnte den Prozess gegen den Verkäufer nur dann verlieren, wenn dieser den Besitz des *fundus* noch nicht übergeben hätte. Der Verkäufer verkaufte und übergab das Grundstück nach dem Erbfall auch einem anderen (dem *Maevius*). Folglich das Grundstück ist im Besitz eines Beklagten (des zweiten Käufers), der – theoretisch – *ex iure Quiritium* erwarb, somit sollte dieser „*alius*“ (*Maevius*) die *Publiciana actio* obsiegen, falls das Verfahren zwischen den Käufern anhängig wäre. Auch in diesem Falle wäre der erstere Käufer die unterlegene Prozesspartei, dieses Mal aber gegen den späteren Käufer.

Iulianus, *Pomponius* und *Ulpianus* nach solle der erstere Käufer gegen den Verkäufer oder den späteren Käufer in irgendwelcher Position des Prozesses durchaus obsiegen. Obgleich handeln sich die Quellen um einen Prozess zwischen den Käufern nicht, zeigt die Begründung der Entscheidung in D. 44, 4, 4, 32 auch den Ausgang dieses Verfahrens in indirekter Weise: „*ac per hoc intellegeretur eum fundum rursum vendidisse, quem in bonis non haberet*“, d.h. „da es selbstverständlich ist, dass das wiederverkaufte Grundstück nicht zum Verkäufer gehörte“. Meines Erachtens steht jedoch im Hintergrund dieser billigen („*aequius est/esse*“) Entscheidung nicht die anakronistische Gedanken

[53] Die Übersetzung wurde nach dem Werk von ISOLA, a.a.O., S. 144-147. und 164 ausgearbeitet.

[54] Der Ausdruck „nicht zum Verkäufer gehörte“ ist in technischer Weise so zu übersetzen, dass (das Grundstück) nicht zu seinem *prätorischen* (*bonitarischen*) Vermögen (Eigentum) gehört. Ansonsten kann man auch den Originalausdruck von „*in bonis non haberet*“ ohne Übersetzung benutzen.

[55] Aus der Formulierung des Titels von D. 23, 1 („*de exceptione rei venditae et traditae*“) folgt, dass eine Quelle überliefert wurde, worin dasselbe Problem durch eine *exceptio rei venditae et traditae* gelöst wird. Ulpian zitiert nämlich im 76. Buch *ad edictum* auch Marcellus in der Stelle D. 21, 3, 1 *pr.*: „*Marcellus scribit, si alienum fundum vendideris et tuum postea factum petas, hac exceptione recte repellendum*.“ Thielmann nach sei die *exceptio rei venditae et traditae* ursprünglich in das Edikt aufgenommen worden, aber außer Übung geraten. Somit sei diese *exceptio* in der späten Republik bzw. frühen Hochklassik zu einer „Kategorie der Wissenschaft und Praxis“ geworden, die spezielle Tatbestände bezeichne, die auch von der *doli* und der *in factum exceptio* abgedeckt worden wären. Thielmann meinte, dass die Benennung sich in der Spätklassik wieder verfestigt habe, somit sei sie in die Digesten aufgenommen worden. THIELMANN, Georg, *Nochmal: Doppelveräußerung durch Nichtberechtigte - D. 19, 1, 31, 2 und D. 6, 2, 9, 4.*, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (von jetzt an: ZRG) Romanistische Abteilung (hinfort: RA) 111 (1994) S. 225. Siehe auch bei ISOLA, a.a.O., S. 164.

[56] WACKE, Andreas, *Die Konvaleszenz der Verfügung eines Nichtberechtigten*, in ZRG RA 114 (1997) S. 198 und *passim*. Siehe auch bei ISOLA, a.a.O., S. 145.

[57] SIKLÓSI, Iván: *Az érvénytelen jogügylet érvényessé válásának római jogi kérdésköréhez az Ulp. D. 44, 4, 4, 32 fényében [=Zur Konvaleszenz im römischen Recht im Licht Ulp. D. 44, 4, 4, 32]*, in *Jogi tanulmányok* [=Aufsätze im Recht] 3 (2010) S. 24f.

der Konvaleszenz, sondern vielmehr die unbedingte und völlige Herrschaft des Gebots von *bona fides* (siehe diese auch im nächsten Unterpunkt). Eine Konvaleszenz könnte mit der *bona fides*-Gedanken begründet werden. Der Verkäufer *in bonis non habet* das Grundstück, welches nach dem Erbfall des Verkäufers von ihm wiederverkauft wurde: Diese Entscheidung sollte nicht mit der Rückwirkung des Erbfalls und dadurch mit der Konvaleszenz der ursprünglich nichtigen Veräußerung begründet werden, sondern deshalb, weil der Schutz des ersteren Käufers in diesem Falle sowohl gegen den Verkäufer als auch gegen den späteren Käufer *ex fide bona* einen Vorrang genießt.

Die Fälle sowohl der *Zurückforderung* als auch des *Doppel-* oder *mehrfachen Verkaufs* sind bedeutsam hinsichtlich der Auslegung des Verbots von *venire contra factum proprium*. Der Verkäufer, der beim Verkauf zurzeit Nichteigentümer war, ist nämlich an seines Erst- oder Vorverhalten, das *fundus* zu verkaufen, gebunden. Nach dem Eigentumserwerb des Verkäufers soll demnach das verkaufte Grundstück weder zurückgefordert noch wiederholt verkauft werden: *ex fide bona*.

4.3 Unrechtmäßiges Rechtsgeschäft als bindendes Erstverhalten: Vorrang des *bona fides*-Gebots vor Naturrecht

Manchmal *unrechtmäßige Rechtsgeschäfte* als Ausnahmen vom Prinzip des ‚*nemo auditur suam turpitudinem allegans*' oder von anderen Prinzipien im Ausbau des azonischen Adagiums eine Rolle spielten, somit sind sie als bindende Erstverhalten berücksichtigt zu werden. Man soll aber bei der Auslegung des folgenden Textes nicht außer Acht lassen, dass der Kasus sich zuallermeist nicht um einige Probleme des Servitutsrechts, sondern vielmehr um die Herrschaft des *bona fides*-Prinzips über die Grundregel handelt, dass die Meeresufer als unter dem öffentlichen Recht stehenden staatlichen Vermögensgegenstände *res communes omnium* und *extra commercium* sind, deren Ausübung für jedermann erlaubt und durch sowohl ein *interdictum* (*ne quid in loco publico fiat*) als auch eine *actio iniuriarum* geschützt ist. Meines Erachtens kann die ersichtliche Lückenhaftigkeit des Sachverhalts im Text auch durch dieses besondere Hauptziel des Textes dargelegt werden. Das Fragment zeigt auch, dass die ‚eigentumsrechtliche' Lage der Kasuistik auch dann wohl zweifelhaft ist, wenn der Fall, der sich um einen Rechtsstreit zwischen Grundstückseigentümer hinsichtlich der *iura in re aliena* handelt, sowohl durch die *Subjekte* des Kasus als auch durch dessen *Objekt* unter die Kategorie von eigentumsrechtlicher Kasuistik gezogen werden kann.

D. 8, 4, 13 *pr. Ulpianus libro 6 opinionum*
Venditor fundi Geroniani fundo Botriano, quem retinebat, legem dederat, ne contra eum piscatio thynnaria exerceatur. quamvis mari, quod natura omnibus patet, servitus imponi privata lege non potest, quia tamen bona fides contractus legem servari venditionis exposcit, personae possidentium aut in ius eorum succedentium per stipulationis vel venditionis legem obligantur.

Die deutsche Übersetzung[58] des sowohl in seiner Echtheit als auch in seiner Auslegung umstrittenen Textes lautet:

„Der Verkäufer des *Geronianischen* Grundstücks hat für das *Botrianische*, das er zurückbehalten hat, angeordnet, dass ihm gegenüber kein Thunfischfang ausgeübt wird. Obwohl dem Meer, das von Natur aus allen offen steht, eine private Bestimmung keine Servitut auferlegen kann, wird dennoch aufgrund der *bona fides* die Vertragsbestimmung des Verkaufs eingehalten werden müssen und sie verlangt, dass die Person des Besitzers oder seines Rechtsnachfolgers durch die in einer Stipulation oder beim Verkauf festgesetzte Vertragsbestimmung verpflichtet wird."

Das Dasein einer römischen Vertragspraxis, bei Grundstücksverkäufen ein Servitut (wie der *aquaeductus*[59]) für den Verkäufer durch *lex venditionis* zurückzubehalten, wurde schon im 16. Jahrhundert, z. B. vom französischen Humanisten, Barnabé Brisson[60] klargestellt. Kaser[61] meinte, dass die erst nur später anerkannte Servitutsbestellung durch *vendere* in diesem Text einen „klassischen Ausgangspunkt" habe. Seiner Meinung nach werde die Klassizität des Textes dadurch unterstützt, dass es im nachklassischen Recht keinen Beleg dafür gegeben habe, dass die römischen Juristen die Stipulation zulasten (zugunsten) Dritter anerkannt haben.[62] Liebs[63] meinte jedoch, dass der Text aus der konstantinischen Zeit gestammt habe.

Die Nebenbestimmung von „*ne contra eum piscatio thynnaria exerceatur*", d.h. „ihm gegenüber kein Thunfischfang ausgeübt wird", ist auch umstritten. Bezog sich nämlich diese Bestimmung auf das verkaufte (*Geronianus*) oder das beibehaltene (*Botrianus*) Grundstück? Wie ist die Wendung „*contra eum*" in dieser *lex venditionis* ausgelegt zu werden? Falls man über den Text hinaus vorstellt (wie z. B. Wacke[64]), dass der Verkäufer seinen vom verkauften Grundstück aus geübten Fischereibetrieb veräußert und dann auf dem einbehaltenen benachbarten Grundstück in Ruhestand zu treten vorgehabt habe, kann in der Nebenbestimmung eine Konkurrenzverbotsklausel sehen (siehe neben Wacke Bormann[65] und Wieling[66]). In diesem Fall soll die bestimmte

[58] Angeführt aus ISOLA, a.a.O., S. 369.
[59] D. 8, 3, 29 *(Paulus libro 2 epitomarum Alfeni digestorum)*; D. 8, 6, 19 *pr. (Pomponius libro 32 ad Sabinum).*
[60] JAKAB, Éva, *Humanizmus és jogtudomány: Brissonius szerződési formulái I. [=Humanismus und Jurisprudenz. Die Vertragsformeln von Brissonius I]* Szeged 2013, S. 62f, 132.
[61] KASER, Max, *Der Privatrechtsakt in der römischen Rechtsquellenlehre*, in BEHRENDS, Okko - LIEBS, Detlef *et al.* (Hrsg.), *Festschrift für Franz Wieacker zum 70. Geburtstag*, Göttingen 1978, S. 100; siehe auch bei ISOLA, a.a.O., S. 370f.
[62] KASER, a.a.O., S. 102[83].
[63] LIEBS, Detlef, *Ulpiani Opinionum libri VI*, in Tijdschrift voor Rechtsgeschiedenis 41 (1973) S. 279ff. Siehe dessen überarbeitete Version in Sonderdrukken aus der Albert-Ludwigs-Universität Freiburg. Vgl. https://freidok.uni-freiburg.de/fedora/objects/freidok:5085/datastreams/FILE1/content
[64] WACKE, Andreas, *Wettbewerbsfreiheit und Konkurrenzverbotsklauseln im antiken und modernen Recht*, in ZRG RA S. 99 (1982) S. 213. Siehe ISOLA, a.a.O., S. 370f.
[65] BORMANN, Jens, *Wettbewerbsbeschränkungen durch Grundstücksrechte*, Heidelberg 2003; siehe ISOLA, a.a.O., S. 370f.
[66] Siehe die Rez. von WIELING, Hans Josef, *Bormann, Wettbewerbsbeschränkungen durch Grundstücksrechte*, in ZRG Germanistische Abteilung 123 (2006) S. 837; siehe ISOLA, a.a.O., S. 370f.

Nebenpflicht, das Servitut weiter nicht auszuüben, sich ja auf das zurückbehaltene Botrianische Grundstück richten.

Einer konträren Ansicht[67] nach bezog die Unterlassungspflicht der Ausübung des Servituts auf den verkauften *fundus Geronianus*. Meines Erachtens ist jedoch dieser Standpunkt aus grammatischen Gründen kaum abstützbar, da sich das ‚*is*' Pronomen in „*contra eum*" offenbar auf das nächste Substantiv richtet, welches klar der *fundus Botrianus* ist (so auch Wieling[68]). Zusätzlich in dieser Auslegung ist ein wirkliches wirtschaftliches Interesse ebenfalls kaum zu imaginieren: Wie könnte der Verkäufer *ohne dazugegebene Sachverhaltselemente* (wie die Fischereibetriebsführung oder die direkte Nachbarschaft der *fundi*) darin interessiert sein, dass der Käufer *gegenüber seinem eigenen gekauften fundus Geronianus* keine Thunfischfang *am Meer* ausübt. Obgleich die „*piscatio thynnaria*" im Text klar „*servitus*" genannt wurde, stellt es sich jedoch die Frage, ob man hier überhaupt einem Servitut gegenübersteht (vgl. Franciosi[69]). Man kann ohne Zweifel lediglich anerkennen, dass die Rede über die Ausübung eines *ius in re aliena* ist, welches hier als „*piscatio thynnaria*" erwähnt wurde. Dieser Standpunkt wurde dadurch verstärkt, dass eine sich gegen den verkauften *fundus Geronianus* richtende *lex venditionis* sobald überflüssig würde, da Dienstbarkeiten an eigenen Sachen nach einem *Paulustext* als etwas Selbstverständliches nicht zugelassen wurden: *nulli enim res sua servit*.[70] Diese Auslegung wird also widersprüchlich.

Aufgrund ‚öffentlicher Ordnung' (*ordre public*), wonach Dienstbarkeiten, und damit deren Unterlassungspflichten, auf *res communes omnium* oder *extra commercium* wie Meeresufer nicht begründet werden können, wäre der Ausschluss weiterer Ausübung der *piscatio thynnaria* fehlgeschlagen. Der Käufer als Eigentümer kann dagegen die *piscatio*, beruhe sie auf die widersinnige Dienstbarkeit auf eigene Sache oder auf eine ‚naturrechtliche' Freiheit, nicht mehr ausgeübt werden, weil die Erhaltung des *bona fides*-Gebots ein noch höheres Ziel war. Im Falle eines ‚legitimen' Erstverhaltens ist man an sich daran gebunden, im Falle jedoch von einem ‚illegitimen' soll man lieber dagegenhandeln. Nach Azo Portius kann dieser Grundgedanken des Verbots von *venire contra factum proprium* wegfallen, wenn das ‚widerrechtliche' Erstverhalten dem höchsten Ziel des Rechts besser entspricht.

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[67] Siehe die Zusammenfassung der Ansichten bei ISOLA, a.a.O., S. 370f.

[68] WIELING, a.a.O., S. 837. Siehe auch bei ISOLA, a.a.O., S. 370f.

[69] Franciosi, Gennaro, *Il divieto della piscatio tinnaria: un'altra servitù prediale?* in RIDA 49 (2002) S. 101ff.

[70] D. 8, 2, 26 *Paulus libro 15 ad Sabinum: In re communi nemo dominorum iure servitutis neque facere quicquam invito altero potest neque prohibere, quo minus alter faciat (nulli enim res sua servit): itaque propter immensas contentiones plerumque res ad divisionem pervenit. Sed per communi dividundo actionem consequitur socius, quo minus opus fiat aut ut id opus quod fecit tollat, si modo toti societati prodest opus tolli.*

The Use and Abuse of Legal History. On the Nature of the Censorial Regimen Morum

Gergely Deli *

Abstract

The paper analyses the nature of enforcement within the censorial regimen morum (CRM) in Ancient Rome by taking into consideration various Latin legal and literary sources. It comes to the conclusion that CRM could be seen as a transitional institution in a system which evolved from a formerly domaninant collective or decentralized to a more centralized enforcement. It also enriches the debate on the concept of law through historical insights by claiming that a social order can meaningfully called a legal order only if centralized production and enforcement of norms had been already added to the consensus of some commonly shared values.

Keywords: *collective punishment; decentralized; enforcement; centralized enforcement; regimen morum; legal order.*

1. Introduction

Hadfield and Weingast attempted to explain the phenomenon of legal order by building their rational choice model in an environment that relies exclusively on decentralized enforcement.[1] They also claimed that historical experiences in many human societies correspond to their rational model, that is legal order is apparently achieved without the existence of a centralized coercive enforcement body. The examples include medieval Iceland,[2] Gold Rush California,[3] medieval Europe [4] under the Law Merchant and merchant guilds,[5] and modern international trading and collaboration regimes.[6] Their theoretically informed approach illuminated important questions about the emergence, stability, and function of law in supporting economic and democratic growth.

The model of Hadfield and Weingast leaves open the challenging task of fully distinguishing legal order from other forms of deliberate social order. In this paper, I initiate the project of filling this gap by discussing the development of social order in ancient Rom from the limited aspect of how individual behavior has been controlled by a very special institution, the censorial regimen morum (CRM).[7]

The article is organized as follows. Section 2 briefly summarizes the model of Hadfield and Weingast in an informal manner and section 3 demonstrates that the ancient regimen morum displays all the important attributes associated with that model. However, the censorial activity as such has not been conceived by the Romans as supporting a specifically *legal* order. Section 4 provides a few concluding observations.

2. The model of Hadfield and Weingast

Hadfield and Weingast claim that the identification of legal order with the characteristics of modern western democracies, that is, with the existence of the centralized production of legal rules by legislatures and courts combined with centralized coercive enforcement of those rules by duly constituted governments, offers us only a fragmented understanding of legal orders.

As opposed to the mainstream literature, they demonstrate in formal terms that there is an equilibrium in which wrongful

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1 HADFIELD, G. K., and WEINGAST, B. R., What is Law? A Coordination Account of the Characteristics of Legal Order. In: *The Journal of Legal Analysis*, vol. 4, 2012, pp. 471-514.

2 MILLER, W. I., Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland. Chicago, 1990, 221ff.

3 CLAY, K., and WRIGHT, G., Order without Law? Property Rights during the California Gold Rush. In: *Explorations in Economic History,* vol. 42, pp.155–183, at 161ff; MCDOWELL, A. G., From Commons to Claims: Property Rights in the California Gold Rush. In: *Yale Journal of Law and Humanities*, 2002, vol. 14, pp. 1–72, at 31ff.

4 WEDEMEYER, M., E., *The Fairs of Medieval England: An Introductory Study*. Toronto, 1985, p. 331.

5 NORTH, M., P., D., C., and WEINGAST, B., R., The Role of Institutions in the Revival of Trade: The Medieval Law Merchant, Private Judges, and the Champagne Fairs. In*: Economics and Politics*, vol. 2, 1990, pp. 1–23, at 9-10.

6 HADFIELD, G., K., and WEINGAST, B., R., *Law without Coercion: Examining the Role of Law in Coordinating Collective Punishment,* 2011, pp. 1-52, at 19-44. at: http://works.bepress.com/ghadfield.

7 MOMMSEN, TH., *Römisches Staatsrecht. II*, Leipzig, 1887[3], pp. 375f.; SCHMÄHLING, E., *Die Sittenaufsicht der Censoren. Ein Beitrag zur Sittengeschichte der römischen Republik*. Stuttgart, 1938, p. 1; LEUZE, O., *Zur Geschichte der römischen Censur*. Halle, 1912, pp. 95ff.

behavior is effectively deterred by exclusively decentralized enforcement, which means that the imposition of penalties results from individual and independent decision making, and neither from official legal actors (such as police or judges), nor from express covenants for collective actions.[8]

Decentralized enforcement includes both voluntary compliance and collective punishment or (with a simple word) boycott. Consequently, the challenge of sustaining decentralized collective punishment is to coordinate individual decisions to participate in costly punishments.[9] The coordinating function is fulfilled by the so called common logic which classifies a behavior as wrongful or not. This common knowledge classification of conduct can be provided by a third-party institution that supplies a system of public and impersonal reasoning and by doing so exercises authoritative stewardship.

Hadfield and Weingast do not presume that coordination alone is sufficient to support an equilibrium. They have to clarify why individuals participate in a system that relies on collective punishment, i.e. why they are willing to incur costs to inflict penalties on those who behaved wrongfully without any immediate material benefit. To solve this puzzle, they link the incentive problem of the individual to the characteristics of the legal order. According to this approach, an individual punishes in order to signal to other agents that the preservation of the given legal order based on the values expressed by the common logic in effect is still in his private interest. By contrast, if an individual do not carry through on punishment any more, other agents may infer that collective punishment is no longer sustainable. Such an inference may also diminish their incentive to punish which in turn may lead to a lower level of deterrence of wrongful conduct.

They argue that the individuals for being able to define their incentives in the preservation of a certain legal order, the normative classifications (common logic) underlying this legal order should be general, stable, open, and impersonal. In addition, they claim that several features ordinarily associated with legal order – such as generality, impersonality, open process, and stability – can be best explained by the incentive and coordination problems facing collective punishments. They best qualify their equilibrium from other forms of social order as being a legal order.

To sum up briefly, Hadfield and Weingast defined legal order followingly: a social order is a legal order, if an individual A will surely (if and only if) boycott an other individual B, if their community's common knowledge of behavior (common logic) sufficiently often identical (in equilibrium) with A's own personal judgment (idiosyncratic logic) about the wrongfulness of B's action. In such an equilibrium A' costs of incuring the punishment (boycott) will be paid off by the benefit of the existence of the community by given common values.

Based on the formal considerations by Hadfield and Weingast, such a social system should have the following characteristics:[10] 1. individual behaviors systematically follow a designated pattern (e.g. that is an order), 2. the pattern is based on normative classifications (the members of the community collectively prefer the given pattern over its opposite), and 3. the content of this classification system is capable of being deliberately articulated by a third-party institution. These are also the attributes that make an order legal as opposed to a more general deliberate social order.

3. Shared attributes of the common logic and the censorship

Following the described criteria, Hadfield and Weingest have demonstrated in a formal manner that the common logic of their model possesses several of the features that are commonly emphasized as definitive of "law".[11] They identified several characteristics of their common logic that correspond to the above requirements and are identical that legal philosophers see as definitive of legal rules or rule of law.[12] These are: generality, stability, prospectivity, congruence; universality; clarity, noncontradiction, uniqueness; impersonal, neutral, and independent reasoning; public reasoning and open process.[13]

In this chapter I demonstrate that the censorial[14] *regimen morum* (CRM) possesses all the above mentioned key characteristics the framework of Hadfield and Weingast associates with law and that CRM could be usefully interpreted as a legal order in Hadfield-Weingastian sense.

3.1 Generality, stability, prospectivity, and congruence

A rule is general if it is articulated in terms of categories or principles that can be applied to specific factual circumstances not fully described by the rule itself. The *mores* (Latin for 'traditional standards of conduct')[15] more precisely the public information about *mores* has been general enough to provide a basis for the members of the elite to reach a relatively high level of confidence about the likely convergence between their idiosyncratic logic and the CRM as common logic. *Mores* have

[8] For a historical analysis see Benson, B. L., Enforcement of Private Property Rights in Primitive Societies: Law without Government. In: *Journal of Libertarian Studies*, vol. 9, 1989, pp. 1–26.

[9] There are some empirical evidences here, see BOYD, ROBERT, GINTIS, H., and BOWLES, S., Coordinated Punishment of Defectors Sustains Cooperation and Can Proliferate When Rare. In: *Science* vol. 328, 2010, pp. 617–620.

[10] HADFIELD, G. K., and WEINGAST, B. R., Law without the State Legal Attributes and the Coordination of Decentralized Collective Punishment, In: *Journal of Law and Courts,* vol. 1, 1 March 2013, pp. 3-34.

[11] HADFIELD, G. K., The Problem of Social Order: What Should We Count as Law?, In: *Law & Social Inquiry,* vol. 42, Nr. 0101, December 2018, pp. 16–27.

[12] RAZ, J., The Rule of Law and its Virtue. In: RAZ, J., *The authority of law: Essays on law and morality.* 1979, pp. 223-224, at 211.

[13] Similarly FULLER, L., *Morality of Law*, rev. ed., New Haven, 1969, p. 39; MURPHY, C., FULLER, L., and the Moral Value of the Rule of Law. In: *Law and Philosophy*, vol. 24, 2005, pp. 239-262, at 240.

[14] On the censors see JAAKO, S., *The Roman Censor. A Study on Social Structure*. Helsinki, 1973, p. 6; CANCELLI, F., *Studi sui censores e sull'arbitratus della lex contractus*. Milano, 1960[2]; CRAM, R. V., *The Roman Censors. Studies in Classical Philology*. Harvard, 1940, pp. 71–110.

[15] RECH, H., *Mos maiorum. Wesen und Wirkung der Tradition in Rom.* Marburg, 1936, p. 19.

predicted with sufficient accuracy the classification of a significant number of performances without obtaining a specific declaration from the classificatory entity, the censor.[16]

The generality of the norms of *mores* is clearly shown by the fact that the censors offen based their judgments exclusively on the general notion of *mores* and did not seek to allude to any other, more specific authority. For instance, the only explanation offered for the condemnation of some rethoricians pointed to the old customs and the morals of the forefathers *(consuetudo ac mores maiorum)* in general: *"Our forefathers determined what they wished their children to learn and what schools they desired them to attend. These innovations in the customs and principles of our forefathers do not please us nor seem proper.* […]*"*[17]

The censors were not acting on the basis of some statutory code[18] or list of prohibited actions, and *mores* or *mores maiorum* were not consisted of clear-cut, well-defined principles, they did provided, however, relatively precise general criteria for the classification of newly emerged special circumstances.[19]

Mores were also relatively stable in the sense that the classifications they offered in a given period could be expected to apply also in the future. Consequently, citizens could conclude that it is sufficiently convergent with their own idiosyncratic logic as required in the Hadfieldian equilibrium. Scipio Aemilianus used for instance two much older examples in an admonitory speech early in his censorship in 142 BC, presumably as a warning that disrespectful conduct might meet with a like response.[20] The whole institution of censorship was the product of a slow and therefore stable evolutionary process[21] rather than an act of legal creation.[22]

Further evidences suggest that the standard of *mores* has been quite stable and predictable enough to enable the qualification of individual activities and that there was a strong public pressure on censors who in their judgments strikingly diverged from the socially accepted standards: *"*[…] *his colleague, overwhelmed with shame by reason of the infamous and unworthy choice made of senators, had abdicated his office."*[23]

Another occasion shows that the censors could not effectively overwrite well-established and stable customs or the consensus of the Roman elite embodied in the Senate.[24]

Additionally, *mores* displayed a reasonable congruence between the norms as publicly perceived an as applied by the censors. The public opinion has been a good predictor for its actual content and equilibrium deterrence of wrongful conduct could be supported.

We read by Gellius about a censor who spoke *"on a subject which was a matter of everyday knowledge and formed a part of the common and habitual experience of life."*[25]

The congruence is also demonstrated by the absence of many attempts to impose control on an unfettered censorial discretion.[26] These instances show that without the collective participation of the citizens in the CRM, censors alone were relatively incapable to enforce their classification judgments.

3.2 Universality

A logic is universal for Hadfield and Weingast if it addresses the rights and obligations of all individuals.

In the field of *mores*, all Roman citizens were subject to the authority of the censors[27] and liable to penalties corresponding to their status: a senator was expelled from the senate, an *eques* was deprived of his public horce, a plebeian (a member of the lower orders) was transferred to the list of *Caerites* and made an *aerarius*.[28]

The potentially all-embracing personal scope of the CRM is spectacularly confirmed by the action of M. Livius Salinator, censor of 204 BC, who proposed to register as *aerarii* the entire membership[29] of thirty-four of the thirty-five tribes.[30] There is further confirmation in two, more sober episodes which Livy records under 214 BC and 209 Bc.[31] There is also evidence that on occasion actors (persons of low social esteem) were moved to an inferior tribe.[32]

3.3 Clarity, non-contradiction, and uniqueness

Mores were assumed to produce clear and non-contradictory classifications. We find exactly these conditions in a speech of the censor Metellus urging fellow citizens to marry.[33]

There must be a unique "right" answer to the question of whether a particular performance is wrongful or not. Achieving this common knowledge classification necessitates that there be

16 BEHEIRI, N. E., Die römische Zensur – Ein entwicklungsgeschichtlicher Abriss. In: *Acta Antiqua Academiae Scientiarum Hungaricae*, 2004, 48ff.
17 Suet. rhet. 1; Gell. 15, 11, 2.
18 There are some exceptions. In the later Republic some censors issued edicts, but the known instances are few, and very limited in scope. They entailed restrictrions upon actors in 115 BC (Cassiod., Chron.), expelled teachers of Latin rhetoric in 92 (Cic. De Orat. 3, 93-4), or prohibited the sale of exotic ointments and prescribed maximum price for Greek and some high quality Italian wine (Pliny, NH 13, 24; 14, 95).
19 ZIMMERMANN, R., *The Law of Obligations, Roman Foundations of the Civilian Tradition*. Oxford, 1996, p. 711.
20 Gell. 4, 20, 1-2; Cic. De Orat. 2, 260.
21 BRÓSZ, R., Die Rolle der Gewohnheit (des Gewohnheitsrechts). In: *Studia in honorem Velimirii Pólay septuagenarii*. Szeged, 1985, 141ff.
22 MOMMSEN, TH., *Römisches Staatsrecht. II*, Leipzig, 1887^3, 375ff.
23 Livy, 23, 29.
24 Livy, 23, 30. For further examples see Livy 23, 23, 2.
25 Gell. 1, 6, 3.
26 Livy 23, 34.
27 KÜBLER, B., *Geschichte des römischen Rechts, ein Lehrbuch*. Leipzig, 1925, 88ff.
28 Livy 29, 37, 13-15.
29 The source is unreliable according to SIBER, H., Zur Kollegialität der römischen Zensoren. In: *Festschrift Fritz Schulz.* Weimar, 1951, 473ff.
30 Livy 29. 37. 13-15.
31 Livy 24. 18. 7-8; 27. I I. 15
32 Cic. De Rep. 4, 10; Livy 7, 2, 12; For the universality of CRM see Cic. De Orat. 2, 272; Pro Cluent. 1, 62; Livy 24, 18, 7.
33 Gell. 1, 6, 3.

an authorative steward of the classifications. In Rom this role has been played by the censors who were the exclusive arbiters to resolve complexities and gaps.[34] The *regimen morum* has been so much attached to office of the censors that even a *dictator* would not have questioned it, as we have already seen.[35]

3.4 Impersonal, neutral, and independent reasoning

The model also would require impersonal, neutral, and independent reasoning. By impersonality Hadfield and Wengast mean that the operation of the *mores* on a set of facts regarding a performance produces a classification that is invariant to the identity of the censors engaged in the operation. Cato for instance when having promised that with Valerius in 184 BC he would *„cut and sear the hydra-like luxury and softness"*[36] gave the *mores* their full vigor, he did not change the norms or made them less predictable or dependent from his own interpretations. In contrast, he just put more emphasis on the existing consens of common values.[37]

According to the requirements censors should have also been neutral. They must had no interest in the classifications they delivered. We can firmly assume that this condition is also met. For instance, in 174 BC, the censors did expel the brother of one of them from the Senate.[38]

There are very few accusations that censors did act from biased or partisan motives with the exception of the conduct of one of the censors in 204, when he proposed to register almost the entire population as *aerarii*, due to a personal a quarrel between himself and his colleague, C. Claudius Nero.[39]

3.5 Public reasoning and open process

I also argue that the *mores* has been publicly accessible as it assumed of the common logic by Hadfield and Weingast. They suggest that a robust common logic is likely to come in the form of public reasoning in an open process to which an interested party might introduce their private information and reasoning. Hadfield and Weingast have predicted that a classification institution (CRM) that is open to hearing from individuals and sufficiently public is likely to give them greater confidence that the *mores* will, in practice, converge sufficiently with their idiosyncratic logics. According to their model the censors must had provided a set of norms that is capable of integrating, coherently, the information and reasoning (short the idiosyncratic reasoning) from individual members of the Roman society. The *mores* should have been sufficiently convergent with each individual's (*ex ante* inaccessible) idiosyncratic logic in order to attract his participation in the coordination equilibrium.

Astin suggests that it was common and perhaps usual for a censor to indicate briefly the objectionable conduct which had led him to take action.[40] Censors questioned some of those involved and may frequently have given them an opportunity to rebut the accusations.[41] From 58 to 52 BC some extra formality was imposed by the Lex Clodia, which apparently required a formal hearing of complaints against a senator, conducted in judicial form in the presence of both censors.[42]

It may have been common practice that the censors publicly announced their exhortations on aspects of *mores* in their speeches,[43] or issued publicly accessible edicts as already mentioned before.

Cicero reports that the investigation of M. Aemilius Lepidus Porcina by the censors of 92[44] BC seems to have led on to a conviction in an open trial before the *populus*.[45]

3.6 An interim summary

The above examples indicate that the CRM worked similarily to the so-called 'common logic' in the model of Hadfield and Weingast. In preclassical Rom there has been an identifiable entity (the censor) that served as authoritative steward of a unique, clear, and noncontradictory normative classification scheme (*mores*) that was also prospective and reasonably stable. The scheme was public and common knowledge. It enabled the Roman citizens to predict reasonably well the classifications that the censors will reach through the use of impersonal, neutral, and independent reasoning to extend generalizable classifications to specific and novel circumstances. The CRM was open enough to provide a mechanism whereby idiosyncratic knowledge and reasoning could be integrated into generalised reasoning and improved the potential for the general classifications to capture interests of idiosyncratically informed citizens. It seems also that the equilibrium classification employed by the CRM made the Roman citizens who participated in enforcing its judgments better off under the system as a whole. The classifications made by the censors were sufficiently universal in the sense of attending to the needs and interests of the elite of Rom that played an important role in decentralized enforcement. In addition, the most important penalty imposed by the censors was the expulsion of the condemned person from his so-

[34] KUNKEL, W., Bericht über neuere Arbeiten zur römischen Verfassungsgeschichte. Kleine Schriften. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 1955, 442ff.
[35] Livy 23, 23.
[36] Pliny, NH 18, 32; Crassus: Aelian, Hist. Anim. 8, 4; Macrob. Sat. 3, 15; Plut. Cato mai. 16, 7.
[37] ASTIN A., *Cato the censor*. Oxford, 1978, p. 78.
[38] Livy 41, 27, 2.
[39] Livy 29, 37, 13-15.
[40] Ascon. 84C may reproduce the actual *subscriptio* written by the censors of 70 B.C. concerning Antonius Hybrida.
[41] Gell. 4, 20, 11.
[42] Ascon. 8C; Dio. 38, 12, 2, cf. 40, 57, 1-3. For another example see Cicero, Pro Cluentia 134; Val. Max. 4, 1, 10; Plut., Apophth.S cip. Min. I2; Quint. Inst. 5, 11, 13.
[43] Cato, ORF4 frs9 3 and 94; Astin, Cato the Censor, 83; Scipio Aemilianus, ORF4 frs 13-15; Metellus Mace-donicus, ORF4, frs4 -7.
[44] Vell. 1, 10, 6.
[45] Val. Max. 8, 1, d, 7; Livy 4, 8, 4; Varro, Ling.L at. 6, 87; Val. Max. 4, 1, 10; Cic. De Orat. 2. 283.

cial class.[46] In matters of *mores* virtually the only sanction open to them was to depose a person from a higher to a lower order or classification.[47] Fines were imposed by the censors occasionally, but either it was done not by direct fines but by adjustment of census assessments,[48] or in the case of direct imposts, they only sanctioned persons who had flouted their authority.[49] Otherwise *„[t]he censor's decision inflicts almost nothing except a blush on the person he has condemned. Therefore, as that whole judgement bears only upon a man's good name (versaturt antumm odo in nomine), that punishment is called ignominy (ignominia)."*[50]

The removal from the Senate or the transfer to the *Caerites* was a slightly more sophisticated form of boycott and its enforcement was mainly built on collective action of the citizens.[51] When their participation in the realisation of this form of punishment began to abate in the late Republic, the CRM practically disappeared.[52]

4. The CRM was not a legal order

As we have seen, CRM corresponded with the criteria of legal order prescribed by Hadfield and Weingast. My concern is that the Romans themselves did not regard CRM as law or even a part of their legal order in the late Republic. On the contrary, they clearly differentiated CRM from the *ius* made by the assemblies and the praetors. In their view, CRM belonged to the 'moral' and not to the legal subsystem of the regulation of social behavior.

Cicero describes,[53] for instance, how the competences of the censors and the preators should differ in an ideal state.[54] According to him, censors have to guard the 'morals' *(mores populi regunto)* of the people, while praetors should be entrusted with deciding private quarrels *(privata iudicet iudicarive iubeat)* and guarded the law *(ius civile)*.[55]

Gaius begins his *Institutiones* with the statement that „[a]*ll peoples who are ruled by statutes (legibus) and customs (moribus) partly make use of their own ius, and partly have recourse to the ius which are common to all men* […]."[56] The law *(ius)* seems here to cover both the statutes *(leges)* and customs *(mores)*. Interestingly enough, Gaius did not enlist *mores* as a source of *ius* in a later passage of the same work: *„The law (iura) of the Roman people consists of laws, plebiscites, decrees of the Senate, constitutions of the princeps, the edicts of those who have the right to promulgate them, and the opinions of jurists."*[57] This apparent contradiction might be explained by assuming that at the early phases of the development (from the Twelve Tables till the end of Republic) *leges* and *mores* (which probably are both of religious origin) were distinct set of norms. Back than *ius* denoted exclusively the norms (especially *leges*) set by centralized or formal entitities and its meaning only gradually expanded to cover some part of *mores* as well. Ulpian seems to reveal this original distinction by saying that *„the marriage consists of our morals (moribus) et costums (legibus)."*[58] The convergence of the different sort of norms culminated in the late classical period when *mores* became a stable part of law *(ius)*[59] in the form of the good morals *'boni mores'*.

The Roman historical evidence does not necessarily refute the thesis of Hadfield and Weingast that an order is a legal order if it includes an institution that is capable of supplying deliberately choosen normative classification of conduct and in which the incentive for actors to choose behavior that the classification designates as preferred is to avoid incurring a boycott. The powerful insights delivered by their novel approach remain still valid. It is also acceptable to denominate a social phenomen according to its 'objective' properties from an external point of view, even if the people directly affected by the institution label it differently from their internal point of view. However, an artificial qualification on formal mathematical considerations is severely challenged by the empirical fact, that the Romans as the founders of the law as we know it today did not think of CRM as law.

The different nature and effectivity of *mores* and and *leges* can be seen clearest in those fields where both system of norms were concerned with the same issue. Luxury and extravagance,[60] for instance, were targeted not only by the actions of the censors

[46] On the penalties see WLOSOK, A., Nihil nisi ruborem. Über die Rolle der Scham in der römischen Rechtskultur. In: WLOSOK, A., *Res humanae – res divinae. Kleine Schriften*, Heidelberg, 1990, p. 86.
[47] Astin, AE., Regimen Morum. In: *The Journal of Roman Studies*, vol. 78, 1988, p. 15.
[48] Plut. Cato Mai. 18, 2-3; Livy 39, 44, 1-3; Nepos, Cato 2, 3.
[49] Livy 43, 16, 3-5; Cato, ORF4 frs 99-105.
[50] Cic. De Rep. 4. 6.
[51] Confirmed by BALTRUSH, E., *Regimen morum. Die Reglementierung des Privatlebens der Senatoren und Ritter in der römischen Republik und frühen Kaiserzeit*, München, 1989, p. 7.
[52] BALTRUSH, E., *Regimen morum: die Reglementierung des Privatlebens der Senatoren und Ritter in der römischen Republik und frühen Kaiserzeit*, München, 1989, p. 30.
[53] Cicero, De legibus 3, 8.
[54] On Cicero's the ideal state see HAMZA, G., L'«optimus status civitatis» di Cicerone e la sua tradizione nel pensiero politico. In: *Tradizione romanistica e Costituzione. Cinquanta anni della Corte Costituzionale della Repubblica Italiana*. vol. II, Napoli, 2006, pp. 1455-1468.
[55] On the importance of legal knowledge, see HAMZA, G., Das Vorbild des Rechtsgelehrten bei Cicero. In: *Annales Univ. Scient. Budap. de Rol. Eötvös nom. Sectio Juridica*, vol. 24, 1982, pp. 57-69, at 64.
[56] Gai. 1, 1.
[57] Gai. 1, 2.
[58] Ulp. D. 24, 1, 3, 1.
[59] MARTINO, D. F., Motivi economici nelle lotte dei populares. In: HARDER M. und THIELMANN G., (Hrsg): *De iustitia et iure: Festgabe für Ulrich von Lübtow zum 80. Geburtstag*, Berlin, 1980, p. 79.
[60] On these see CSERNE, P. and DELI, G., Contracts and Morals: Towards an Economic Analysis of Immoral Contracts in Ancient Rome. In: *TILEC Discussion Paper No. DP 2009-037*. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480685, at 7.

but by a series of sumptuary statutes introduced during the 2nd and 1st centuries Bc.[61] Gellius talks about an old decree of the Senate, passed during the consulship of Gaius Fannius and Marcus Valerius Messala, which provided that *„the leading citizens* […] *should take oath before the consuls in set terms, that they would not spend on each dinner more than one hundred and twenty asses in addition to vegetables, bread and wine; that they would not serve foreign, but only native, wine, nor use at table more than one hundred pounds' weight of silverware."*[62] An effective deterrence containing such detailed and special norms is illusory only with the help of a collactive punishment system. To add to the complexities, the relevant norms were expanded very shortly thereafter by the law of Fannius which allowed *„the expenditure of one hundred asses a day at the Roman and the plebeian games, at the Saturnalia, and on certain other days; of thirty asses on ten additional days each month; but on all other days of only ten."*[63]

Ananother difference was that *mores* were based on a consens about public values and *„formed a part of the common and habitual experience of life"*,[64] while the very idea of *ius* lied originally in solving the conflicts between private interests. One of the oldest proof in this regard is the formula of the *legis actio sacramento in rem* whose words are reproduced by Gaius as follows: *"Hunc ego hominem ex iure Quiritium meum esse aio* […]",[65] that is *„I declare this slave to belong to me […] in accordance with quiritarian right (ius)."* Beyond doubt, *ius* here meant right. i.e. a capacity of a given individual whose interests had been harmed by another. Ancient *ius* also meant the place where the praetor exercised his jurisdictional power: *„When a real action was instituted, the movable property, and that which could move itself and be brought into court (in ius) was demanded as follows."*[66] The nature of *ius* was consequently something punctual both in time and space in contrast to well-spread and stable mores.

Accordingly, the most important difference between *mores* and *ius* is that the former was duty-oriented and regarded primarily the interest of the State (which, in a strict sense, is not equal to the public interest),[67] while the latter was right-oriented and upheld private interests. *Mores* made men liable of, *ius* made men capable to something.

If we look closer at the diverse fields of application of *mores* we see that they all are linked to the well-being of the state. That indeed, though imprecise and elastic, is one broad principle which was embodied in the censors' oath that all their deliberations and decisions were taken in the interests of the *res publica*.[68]

Mores were mostly associated with the interest of the state while *ius* focused primarily on private (or better individual) interests. In the final chapter I expound what consequences it may have on the validity of the thesis of Hadfield and Weingast and more generally, on the concept of law.

5. Conclusion

Undoubtedly, the law does involve in many cases collective enforcement without centralised coercion. It is only a part of the whole picture. One can denominate a certain kind of social control as he wishes. However, on the strength of the Roman historical development I argue that the identification of a decentralized enforcement system with legal order is misleading. In its proper use the term 'legal order' covers much more than coordination of punishment decisions and incitement of incurring personal costs associated with punishment that benefits the larger group.

The strict separation of the two enforcement systems and their exclusive use for describing the phenomen of law is seriously one-sided. Hadfield and Weingast is right in arguing that there is a lacuna in the mainstraim presumption of law as defined by the existence of the institutions that characterize modern western democracies; namely, centralized production of legal rules by legislatures and courts combined with centralized coercive enforcement of those rules by duly constituted governments. It is equally maladjusted, however, to understand legal order as a collective punishment system with the above listed characteristics of the rule of law.[69] In its true understanding, law is the combination of these two enforcement systems.

Law is based both on the consens about certain common values and on values arbitrarily prescribed by a powerful, central entity. Law should partly evolve slowly and spontenaously but, on the other hand, should be capable to answer sudden changes and challenges. Law can only be partly created by formal acts. It should be (perhaps even to a greater extent) rest on informal pacts among people. Law should take into account not only the subjective, personal interests of individuals (their idiosyncronic logic) and the correspondance of those with the socially shared values (common logic) but also the duties centrally prescribed by a separate institution, independently from the individuals' personal accord. Law has the double face of Ianus: it is oriented to right and focused on duty at the same time. It should regard both private and public interest. Law empowers us with the faculty of doing and constrains our doings at the same time. Generally, law might strive to (or ideally should) be clear, universal, and open, but it is still law if it is (within limits) obscure, particular, and hermetic. It is law if its knowledge surpasses the limits of human recognition, or even if those who make it do not

[61] ASTIN A. E., *Cato the Censor*. Oxford, 2000, p. 93.
[62] Gell. 2, 24, 1 ff.
[63] Gell. 2, 24, 3.
[64] Gell. 1, 6.
[65] Gai. 1, 119.
[66] Gai. 4, 16.
[67] FUHRMANN, M., Das Revolutionszeitalter und die Literaturgeschichte. Bemerkungen zum Übergang von der Republik zur Monarchie in Rom. In: SPIELVOGEL, J. (Hrsg.): *Res publica reperta: Zur Verfassung und Gesellschaft der römischen Republik und des frühen Prinzipats Festschrift für Jochen Bleicken zum 75. Geburtstag.* Stuttgart, 2002, p. 209.
[68] ASTIN A. E., Regimen Morum, In: *The Journal of Roman Studies.* 1988, vol. 78, pp. 14–34, at 19.
[69] WALDRON, J., The Concept and the Rule of Law. In: *Georgia Law Review,* 2008, vol. 43, pp. 1–61, at 59.

understand what they are currently making. Law is law even if the individuals cannot decide whether to prefer it or not either because it is too ambigous or its costs are too much deferred making meaningful calculations of personal benefits illusory.

The use of the term 'legal order' or 'law' should be restricted to a more complex social phenomenon. Legal order first emerges when the classification of behavior had reached a higher level of ambiguity where this complexity is already disruptive of the equilibrium of Hadfield and Weingast. In their model the tolerance for ambigity is rather low. This is not to say that their system could not tolerate some ambiguity, and a more general model that allowed for noise in a classification system would not help to determine how much is too much. I just think law begins exactly there where much is too much. Legal order is there where collective punishment alone is not enough anymore. A social order is legal when centralized production and enforcement of norms has been already added to decentralized punishment.

Historical Development of the Hungarian Regulation on Special Legal Order

*Endre Domaniczky**

Abstract

In the context of the 2020 pandemic, the regulation and content of the special legal order has come to the forefront of attention around the world. A similar thing happened in Hungary, but while new rules and legal concepts were developed to deal with the pandemic, there was a need to explore and present the historical background of the national regulation. This article presents the changes in the Hungarian regulations concerning the special legal order from the beginning to the communist takeover after the World War II.

Keywords: *Special Legal Order; Emergency Powers; Pandemic; Hungary; Austria-Hungary; Interwar Period; WWI; WWII; communist takeover.*

1. Hungarian regulation from the beginning until 1949

1.1 Early regulation in the Hungarian legal system and in legal systems of Europe

1.1.1 Conceptual framework of emergency power and special legal order

Emergency power and special legal order are not new in Hungarian public law. Emergency power is an excessive power granted to the executive by suspending the constitutional order. Special legal order is a legal order introduced for the duration of declaring emergency power, where the term "special" refers to an order derogating from the ordinary.[1]

The substantial elements of the concept of emergency power are: (a) constitutional order; (b) suspension; and (c) excessive power. Constitutional power implies a stable, multi-actor state system which was generally developed in the modern era in European countries. By referring to constitutional order, we usually mean the existence of a written constitution, even though such phenomenon has begun to spread only as of the end of the eighteenth century. But constitutional order may exist also in the absence of a written constitution, which fact is actually verified by early Hungarian examples related to emergency power (point 1.1.3.). The term "suspension" refers to the provisional and restricted nature of the cessation of constitutional order. Thus, emergency power may only be exercised in order to reach certain purposes, and to achieve them, special powers are vested in the executive branch– by applying rules acceptable under ordinary constitutional circumstances – along with introducing impediments to all other actors of the ordinary constitutional order. The term "excessive power" explains the content of special powers. Normally, the measures taken by the executive branch is controlled by other branches of power, while excessive power enables the executive to apply certain measures and procedures justified by the exceptional, extraordinary nature of the purposes to be achieved.

Although the definition of the priority public or social purpose at stake was not included among the substantial elements of the concept of emergency power, it is nonetheless worthy of mention. The need for a comprehensive regulatory framework of emergency power appeared after the full development of the modern civil state, i.e. in the second half of the nineteenth century. Many elements, prerequisites of today's rule of law have existed already by that time in public law.[2] The possibility of the provisional restriction, cessation of those elements led to the development of the meaning of emergency power and special legal order as we understand them today. Only priority public or social interests, a sort of public emergency may justify the suspension of the safeguards fortifying the rule of law.[3] Such interests may be the protection of, in today's terms, public order, national security, public health or national economy, which concepts crystallized and were incorporated – as a standard – within the criteria of rule of law in the second half of the twentieth century, mostly as a response to the events of the century which hindered states and communities. All in all, emergency power is a restricted measure, since in a state

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1 The term "special" is used to mark a legal regime derogating from the general rules i.e. the legal regulations applicable under ordinary circumstances.

2 Such as the principle of the separation of powers, a part of civil liberties or the theory of parliamentary sovereignty.

3 See also: *Jogtudományi Közlöny*, Nr. 9, 1916, p. 86-87. (The lecture of Ödön Polner given at the Magyar Jogászegylet [Association of Hungarian Jurists]).

governed by the rule of law "*not even public authority is considered as unlimited*." [4]

Summarizing the conceptual elements, it is apparent that the concept of emergency power and special legal order gained today's content gradually, along the development of the civil states. Naturally, that does not mean the absence of antecedents in earlier legal history. In the following, the present paper will trace such preceding regulations, primarily in Hungary, but providing also an outlook to certain European states.

1.1.2 The appearance of emergency power in the law of some European countries

In the framework of estate societies, emergency power emerged primarily with respect to criminal law or to military issues.[5] The unification of the regulation of emergency power and its parallel development with the rule of law was promoted by the constitutional-law processes arising from the American and French Revolution at the end of the eighteenth century.

The Constitution of the United States (1787) – in a limited scope – ensured the possibility of emergency power to be vested in the President,[6] which became the reference base in the course of the later constitutional process as regards the separation of power. On the other hand, the Declaration of the Rights of Man and of the Citizen (1789) listed the rights which, slowly becoming universal human rights, ensured "*the foundation of individual freedom and the fortification thereof with safeguards*." [7]

It is no coincidence, that the cases when the rules allowed for the suspension of the constitution were determined relatively early in France,[8] i.e. in the Constitution of 1799, since that largely facilitated the (co)operation of the branches of power. The special legal order was also addressed by Napoleon's constitutional act of 1815, prescribing that the state of siege may only be introduced in case of being attacked by an external power or of internal upheaval.[9] Throughout most of the nineteenth century, the issue was regulated on a statutory level, on the basis of constitutional enablement.[10]

In Germany, an early regulation of emergency power appeared in the 1851 Constitution of the Prussian Kingdom which, after listing the civil rights, also allows for their suspension in the event of war or internal riots.[11] The issue was elaborated by a separate act in 1851 on the basis of enablement granted by the Constitution, which is noteworthy due to the fact that the regulation of emergency power in the Constitution of the German Empire of 1871 was based on it.[12] A similar solution was applied in the Bavarian act of 1912.[13]

In Russia, where "*the completeness of the power of the tsar was not restricted in a legal sense by any formal norm or institution up until the beginning of the twentieth century*",[14] the Constitution of 1906 mentioned the state of war and the state of exception as categories falling into the scope of special legal order, while rendering the determination of the scope of application of such order as the ruler's competence.[15] That constitution also prescribed that the detailed rules should be regulated on a statutory level which, however, was not completed until the outbreak of the First World War, and the said constitution itself was repealed by the end of 1917.[16] As a curiosity of legal history, in is noteworthy that the Soviet state was featured by the predominance

[4] See: Decision 11/1992 AB of the Constitutional Court of Hungary. In: *Alkotmányos elvek és esetek*. [Principles and cases of constitutional law.] Budapest, 1996, p. 538.

[5] See in detail: A kivételes hatalom jogi természete [The legal nature of emergency power] In: *Jogtörténeti Szemle*, Nr. 4, 2015, p. 25-32.

[6] Cf. US Constitution Art. II., Sec. 3., Cl. 3 – which is in effect also today. See: JÁNOSI, F., Alkotmányok gyűjteménye [Collection of constitutions.] Pest, 1867, vol II, p. 60-61.

[7] POLNER, Ö., A háború esetére szóló kivételes hatalom alkotmányjogi jelentősége. [The constitutional significance of emergency power in the event of war.] In: *Jogállam*, Nr. 1-2, 1917, p. 25.

[8] See: article 92. https://en.wikisource.org/wiki/Constitution_of_the_Year_VIII (10. 06. 2020)

[9] See: point 66. https://www.napoleon-series.org/research/government/legislation/c_additional.html (10. 06. 2020)

[10] Cf. POLNER, Ö., A háború esetére szóló kivételes hatalom alkotmányjogi jelentősége. [The constitutional significance of emergency power in the event of war.] In: *Jogállam*, Nr. 1-2, 1917, p. 29-34. For the development of the French regulation in constitutional history, see also: SÁGVÁRI, Á., Különleges jogrend a francia jogban. [Special legal order in French law.] In: *Iustum Auquum, Salutare*, Nr. 4, 2017, p. 179-188.

[11] See: Article 36. https://en.wikisource.org/wiki/Constitution_of_the_Kingdom_of_Prussia (10. 06. 2020).

[12] See: Article 66, and https://en.wikisource.org/wiki/Constitution_of_the_German_Empire (10. 06. 2020). See also: TÓTH, Á., A kivételes állapot intézményének alakulása néhány burzsoá állam jogrendszerében [The development of the state of exception in certain bourgeois states.] In: Acta Universitatis Szegediensis de Attila József Nominatae. Acta Iuridica et Politica, vol. 14, Nr. 8, 1967. http://acta.bibl.u-szeged.hu/6351/1/juridpol_014_fasc_008_003-019.pdf (06. 06. 2020).

[13] Cf. BUZA, L., Az államjogi kivételes állapot. [State of exception in constitutional law.] In: *Jogtudományi Közlöny*, vol 13, Nr. 4, p. 179-188., and POLNER, Ö., A háború esetére szóló kivételes hatalom alkotmányjogi jelentősége. [The constitutional significance of emergency power in the event of war.] In: *Jogállam*, Nr. 1-2, 1917, p. 33-34. See also for the subsequent German regulation: SZABÓ, I., Különleges jogrend a weimari alkotmányban. [Special legal order in the Weimar Constitution.] In: *Iustum, Aequum, Salutare*, Nr. 4, 2017, p. 127-141.

[14] SZ. BÍRÓ, Z., *Az elmaradt alkotmányozás*. [The postponed constitutional process.] Budapest, 2017, p. 137. For the basic features of the Russian constitutional development see: SZ. BÍRÓ, Z, op. cit. 135-180.

[15] See points 15 and 83. https://ru.wikisource.org/wiki/%D0%9E%D1%81%D0%BD%D0%BE%D0%B2%D0%BD%D1%8B%D0%B5_%D0%97%D0%B0%D0%BA%D0%BE%D0%BD%D1%8B_%D0%A0%D0%BE%D1%81%D1%81%D0%B8%D0%B9%D1%81%D0%BA%D0%BE%D0%B9_%D0%98%D0%BC%D0%BF%D0%B5%D1%80%D0%B8%D0%B8 (05. 06. 2020).

[16] In Russia, a statute adopted in 1881 defined the state of enhanced defence and the state of extraordinary defence, and entitled the governors to restrict certain civil rights. Moreover, in 1892, the state of war also appeared, allowing for any measures to be taken by the governors in order to restore internal order. In the absence of the separate act referred to in the Constitution of 1906, the statute of 1881 was applied in practice. For further details see: TÓTH, Á., A kivételes állapot intézményének alakulása néhány burzsoá állam jogrendszerében [The development of the state of exception in certain bourgeois states.] In: Acta Universitatis Szegediensis de Attila József Nominatae. Acta Iuridica et Politica, vol. 14, Nr. 8, 1967, p. 10-11., BÚZA, L., Az államjogi kivételes állapot. [State of exception in public law.] In: *Jogtudományi Közlöny*, vol 50, 1915, p. 3.

of the executive, regardless of the state system prescribed in the different constitutions.

Finally, we should briefly mention also the characteristics of the British regulation. As regards special legal order, Great Britain (the United Kingdom since 1801) has followed a path somewhat derogating from that of other countries. The fundamental document itself also differs from those in continental countries. The English Constitution is an unwritten (historical) constitution,[17] since, instead of being codified in a single document, it is an organic construction developed over centuries, the content of which has been determined by continuous interpretation.[18] The British regulation of emergency power is rooted in the medieval and early modern era[19] (while, as we have seen in the above examples, such origins reach back to the modern era in continental countries). It is also a major difference that the laws allowing for emergency power have been adopted as early as the second half of the eighteenth century in England, i.e. decades ahead the similar solutions of other countries.[20]

As regards Hungary, it formed part of the Austrian Empire, and later of the Austro-Hungarian Monarchy in the nineteenth century. Thus, the early Austrian regulation of emergency power will be presented under the next point, in connection with the codification attempts in Hungary.

1.1.3 The appearance of exceptional power in the Hungarian legal system

Although a general regulation on emergency power was prepared as late as at the beginning of the twentieth century, certain laws allowed for handling particular cases under an exceptional process much earlier.[21] The laws listed most often[22] in such category were adopted back in the eighteenth century, the earliest of which was Act VIII of 1715 on obligatory military service and taxation of nobles, which concerned basic legislating competences by granting and regulating certain enablement to the ruler as regards the subject matters of the act in the event of unexpected war conditions.

The issue of the regulation of emergency power has become a focal point during the Hungarian Revolution and War for Independence of 1848-1849, when a state of exception was declared both in the territories under Austrian and Hungarian governance. As regards Hungary, the first legislative proposals on emergency power (one initiated by a member of the National Assembly, and one as a draft submitted by the Ministry of Justice led by Ferenc Deák) was also prepared then. Both proposals, submitted in July 1848, aimed at a comprehensive regulation of emergency power (contemporary name: state of siege). However, instead of a general regulation, only an act in the field of jurisdiction, i.e. on summarily adjudicating courts was adopted at the beginning of 1849.[23] Even though the statutory regulation of the issue was postponed, government commissioners[24] were engaged in practice to handle the exceptional situations.

1.1.4 Outlook: the application of the Austrian special legal order in Hungary (1848-1865)

In October 1848, as the tensions became even more acute between the Austrian Empire and Hungary: the ruler dissolved the Hungarian National Assembly, appointed a plenipotentiary royal commissioner with competence over the full territory of Hungary and declared that "*Hungary shall be subject to martial law*".[25] Following the expulsion of the royal commissioner (baron Jelačić), Alfred I, Prince of Windisch-Grätz received full

[17] „Since in England, the constitution was not created by one act or cardinal act, but is a reflection of all parliamentary documents adopted over centuries and of the public customs of centuries, the right reflection of which is hard to achieve due to the fact the operation of certain main institutions, of which the constitution consists, also appears as a temporary direction instead of sharply drawn boundaries." CONCHA, Gy., Újkori alkotmányok. [Constitutions of the modern era], vol 2, Budapest, 1888, p. 177.

[18] English law is also reluctant to provide a comprehensive list of fundamental rights, since the primary source thereof is common law, even though certain legal acts (Magna Charta, Petition of Rights, Bill of Rights, Habeas Corpus Act) also had great influence on them. Such different origin might be the utmost reason of the divergence between the „catalogue of fundamental rights" applied in the UK and in the continental countries (e.g. as regards the issues of privacy of letters, freedom of education, freedom of religion and freedom of press). See also CONCHA, Gy., op. cit., p. 14-172.

[19] Perhaps the most important difference in such regard, compared to the continental countries, is that equality before the law, which was one of the main objectives of the social transformation embracing human and civil rights in the continent, has been recognised as early as the Middle Ages in England: „*… English society has been based on the principle of equality before the law for centuries. Since the adoption of the Magna Charta, the bastions of English individual liberty protect both the poor and the rich, both the mighty lord and the common peasant; equality before the law is a basic feature of the constitution.*" CONCHA, Gy., op. cit., p. 172-172)

[20] Coercion Acts, www.oxfordreference.com/view/10.1093/oi/authority.20110803095621949 (10. 06. 2020.) Based on English legal thought, the prerequisite of exercising emergency power was the suspension of the Habeas Corpus Act. As regards the institution, see in detail CONCHA, Gy., op. cit., p. 172-174.

[21] See in summary: TÓTH, Á., A statárium és az ostromállapot szabályozása 1848-tól a kiegyezésig. [The regulation of martial law and of the state of siege from 1848 up until the Austro-Hungarian Compromise.] In: *Acta Universitatis Szegediensis: acta juridica et politica*, vol 29, Nr. 5, 1982, p. 1-37. (http://acta.bibl.u-szeged.hu/6486/1/juridpol_029_fasc_005_001-037.pdf, 05. 06. 2020).

[22] The opinion of the nineteenth-century jurists was divided on which laws could be listed here, on their content and on the existence of emergency power itself. The monograph of law professor Kálmán Molnár titled Kormányrendeletek [Government decrees] (1911) is also worth noting here, since it addresses the issue at hand as well.

[23] See Act I of 1849 on the establishment, structure and procedure of and on the determination of cases to be ruled by the summarily adjudicating military and civil mixed courts. See also: MEZEY, B. (Ed.), *Magyar alkotmánytörténet*. [Hungarian constitutional history.] Budapest, 2003.

[24] Commissioners – who were referred to as government commissioners, presumably following the example of the name royal commissioner – were often appointed by the bodies of the executive and by the legislative branch, primarily in order to promote the coordination between different bodies or handle extraordinary situations. The first such commissioners were appointed as early as in March 1848. For the regulation on and activities of government commissioners in 1848-1849, see the works of CSIZMADIA, A. and HERMANN R.

[25] Cited by TÓTH, Á., A statárium és az ostromállapot szabályozása 1848-tól a kiegyezésig. In: *Acta Universitatis Szegediensis: acta juridica et politica*, vol 29, Nr. 5, 1982, p. 17. (http://acta.bibl.u-szeged.hu/6486/1/juridpol_029_fasc_005_001-037.pdf, 05. 06. 2020).

power which was confirmed also by the new ruler, Francis Joseph. As of December 1848, Windisch-Grätz appointed royal commissioners in order to organise public administration submitted to military administration. An authorization at constitutional level was ensured only by the Stadion Constitution in the spring of 1849,[26] enabling the emperor to establish provisional rules in the event the Reichstag was prevented from acting. Even though the Stadion Constitution was repealed in 1851,[27] the state of siege (military administration) was terminated in Hungary only at the beginning of 1856. However, following the negative response to the attempts for the restoration of constitutional order in Hungary in 1860-1861, the ruler decided to introduce special legal order once again. Although the so-called "Schmerling-Provisorium", which lasted from October 1861 to June 1865, introduced a less strict regulation than the preceding state of siege, it should nonetheless be considered as a case of special legal order.[28]

1.1.5 Emergency power in the dualist era

Following the Austro-Hungarian Compromise, the need for regulating emergency power emerged in both parts of the Austro-Hungarian Monarchy.[29] In Hungary, however, emergency power was allowed for only on ad-hoc basis, in connection with particular acts for quite a long period, since "*[…] the whole spirit of our legislation demonstrates that, legally speaking, any emergency decrees may have a rather limited room only*."[30] But the exceptions, even though considered as those of limited room in theory, fell under the scope of national defence and public administration,[31] thus, would have allowed for intervention to a significant extent if applied in practice.[32]

1.2 The first comprehensive regulation of emergency power in Hungary: Act LXIII on emergency power

1.2.1 The background of the act

At the turn of the century, along with growing tensions between major powers of the world, the matter of emergency power came to the fore once again, primarily as a military issue.[33] Pursuant to the Compromise Act, this matter qualified as a so-called common affair,[34] thus, the requests received from the common Ministry of War had an impact which led to the preparation of a separate Hungarian legislative proposal.[35] One of the most important elements of the government's concept was that the civil, not the military authorities should be mandated to exercise emergency power in Hungary.[36]

Act LXIII of 1912 on the exceptional measures in the event of war (hereinafter: Kit.) was originally adopted by the Hungarian National Assembly in order to, as shown also by the name of the act, establish emergency measures to be taken in the event of war or during the period of preparations for war.[37] The material scope of the act, compared with the regulation that was in force at the Austrian part of the Monarchy, was quite narrow, i.e. confined to the conditions (state of war and preparations for war) under which such measures were deemed as strictly necessary.[38] However, within such scope it indeed established an exceptional, even if strictly limited, competence: that is the emergency power.

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[26] Cf. Article 87 of the Stadion Constitution, www.verfassungen.at/at-18/verfassung49-i.htm (05. 06. 2020)

[27] Repealed on 31 December 1851 (As regards Hungary: *Törvény és Kormánylap* vol 1, Nr. 1, 1852)

[28] See in detail: TÓTH, Á., A statárium és az ostromállapot szabályozása 1848-tól a kiegyezésig. In: *Acta Universitatis Szegediensis: acta juridica et politica*, vol 29, Nr. 5, 1982, p. 33-34. (http://acta.bibl.u-szeged.hu/6486/1/juridpol_029_fasc_005_001-037.pdf, 05. 06. 2020).

[29] As for the Austrian regulation, see below. In Hungary, a proposal on the right to association and assembly was prepared in 1868 (hereinafter: Proposal), regulating also the suspension of such rights. The Proposal – in the event of war, internal upheavals or the misuse of the right to association and assembly – would have entitled the Minister to act with the obligation to inform the National Assembly. For the Proposal, see in detail DOMANICZKY, E., Az első magyar egyesülési törvényjavaslat. Az egyesülési jogról szóló 1989:II. megalkotásának 20. évfordulójára. [The first Hungarian proposal on the right of assembly. For the 20th anniversary of the adoption of Act II of 1989 on the right of assembly.] In: *Közjogi Szemle*, vol 2., 2010, p. 26-34.

[30] See KISS, I., *Magyar államjog*. [Hungarian public law.] Eger, 1886, p. 20.

[31] As regards national defence, the use of the defence forces and of the conscription-based forces (contemporary Hungarian term: *népfölkelés*) abroad, and as regards public administration, the enforcement of government orders were the priority goals serving as grounds for ensuring emergency power. Cf. Act XLI of 1868, Act XX of 1886, as well as Act XLII of 1870 and Act XXI of 1886, and KISS I., *Magyar államjog* [Hungarian public law] Eger, 1886, p. 20. and MOSKOVITZ, I., A kormánybiztos. [The government commissioner.] In: *Jog*, Nr 1, 1906, p. 25-27.

[32] For example, during the crisis of 1905-1906 when the government proposed the *„declaration of a state of exception* […]. KATUS, L., *A modern Magyarország születése*. [The birth of modern Hungary.] Pécs, 2012, p. 562.

[33] See in detail: MEZEY, B., Az első világháború jogi törvényhozói előkészítése: a kivételes hatalomról szóló 1912. évi 63. törvénycikk. [Legislative preparation to the First World War: Act 63 of 1912 on emergency power.] In: KÓNYA, P. (Ed.), *Első világháború a Kárpátokban*. Eperjes, 2016, p. 11-18.

[34] See: Act XII of 1867 on the affairs of common interest between the countries under the Hungarian Crown and other countries subject to the rule of His Majesty, and on the manner of handling them

[35] Thus, the act adopted in 1912 was not a result of an organic development, but can be construed as a response given to a particular public-law issue. The timeliness of the regulation was beyond dispute, however, the preparation of a separate proposal demonstrated Hungarian sovereignty. For the stages of the conciliation and the development of the Hungarian stance, see GALÁNTAI, J., A háborús állam. A "kivételes hatalom" kodifikálása és alkalmazása 1914-1916-ban. [The war state. Codifying and applying "emergency power".] In: PÖLÖSKEI, F.-RÁNKI, Gy. (Ed.), *A magyarországi polgári államrendszerek*. Budapest, 1981, p. 195-222.

[36] See in detail: GALÁNTAI, op. cit., p. 196-197.

[37] Paragraph (1) of article 1 in the Kit.

[38] „Act 63 of 1912 is an act of ours drafted with clear intentions, which can be appreciated primarily due to the fact that it illustrates the way the free hand, the flexible potestas, that is of eminent need under war conditions can, be given to the government even between the strong walls of fortress built by safeguards." FELSZEGHY, B., A belső igazgatást érdeklő kivételes intézkedések. [The exceptional measures concerning internal governance.] In: *Közigazgatási Szemle*, Nr 1, 1914, p. 474., and PÖLNER, Ö., A háború okából tett kivételes intézkedések. [Exceptional measures taken due to war.] In: *Jogállam*, Nr. 7-8, 1914, p. 489-512.

1.2.2 The limits of emergency power

Pursuant to the Kit., emergency power was applicable (a) during a war or preparations for war;[39] (b) following a government decision; (c) on the basis of the Kit; (d) to the extent necessary. The emergency power was limited in time: it terminated upon the end of the war at the latest. In line with the Kit., the measures taken on the basis of the act also lost their effect at the said time, i.e. ordinary legal order was restored even in the case of ongoing matters.[40] The temporal scope of the measures taken on the basis of emergency power was limited and conditional: provided the war did not break, they could only remain in effect for a period of 4 months, unless they were approved[41] by the National Assembly.[42]

The subject matter, scope and the effective date of the measures taken on the basis of emergency power was established by the government, however, such measures was to be communicated, as widely as possible: (a) to the citizens, on the one hand, by displaying the measures in the official gazette, as well as to each concerned community, in the locally accustomed manner; (b) and, on the other hand, to the National Assembly subsequently, where "*the application of emergency power, and the territories covered by the measures taken on the basis of the emergency power […] shall be announced at the following session*."[43]

1.2.3 Competence of the government commissioners

The fact that the institute of government commissioners, which had fulfilled expectations already in 1848-1849, was incorporated in the Kit. demonstrates that the submitter of the proposal sought to prepare a bill in accordance also with Hungarian legal traditions. In the proposal, precise functions and competences were set out as regards government commissioners and, at the same time, their omnipotence was restricted in several ways by the legislator, such as by ensuring a right to remedy against their decisions.

Based on the entitlement given by the Kit., the government in Hungary, and the governor (the "Ban") in the Kingdom of Croatia-Slavonia, was entitled to appoint government commissioners[44] in order to implement the tasks of public administration.[45] Only "*Hungarian resident civil individuals*" could be appointed as government commissioners.[46] Their operation was directly submitted to the government, and their territory of competence was also established by the government: in the case of permanent headquarters, it extended to one or more municipalities, while in the case of government commissioners assigned to a military commander, it could extend to the full territory of operation of such commander.[47]

In general, their task was to "*ensure the maintenance of public order and public safety whenever necessary, and to take the measures of ordinary public administration required to achieve the success of warfare*."[48] To this end, they were entitled to give direct orders to the employees of the given municipalities, the personnel of state forestry, the members of law enforcement forces (gendarmerie and the police), as well as to the members of the financial police and border guards, who were obliged to fulfil the tasks received from the government commissioners on the basis of the Kit. out of turn. Based on the approval of the minister of competence, the listed personnel could also be instructed with tasks falling out of their own respective competence.[49] The instructions of the government commissioners were to be implemented promptly, however, a right to seek remedy against the received orders, to be submitted to the minister of competence, was ensured by the Kit. Thus, an appeal lied from the decision of the government commissioners, which was to be submitted within 15 days of the rendering of the contested decision.[50]

1.2.4 The branches and pieces of law concerned by the emergency power

With today's term, the substantive part of the Kit. allowed for the restrictions of fundamental rights (articles 5-12), the sanctioning of certain acts or omissions, or the increase of the penalties generally applicable to such acts or omissions (articles 15, 18-33).[51]

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[39] Pursuant to the reasoning of the proposal to the Kit., preparations for was means the period „[…] when the seriousness of the situation can be ascertained generally and indisputably." (The detailed reasoning to article 1.)

[40] See paragraph (3) of article 1 in the Kit.

[41] See paragraph (3) of article 1 in the Kit.

[42] In such regard, the government was entitled to request the National Assembly to dispense with the dispute (i.e. the acceleration of the decision-making), with reference to state interest. See paragraph (4) of article 4 in the Kit.

[43] See article 2 of the Kit., and detailed reasoning to article 2. Even though the Kit. prescribed the obligation of communication that bounded the government only towards citizens, the intention of the legislator to ensure the widest possibly publicity „*if the measures are extended, restricted or repealed*" can be deduced from the reasoning provided tot he said article and to the proposal.

[44] The institute of government commissioners had strong traditions in Hungarian history and public law. For their operation during the Revolution of 1848-1849, see the study of HERMANN, R., http://mek.niif.hu/02000/02097/html/hermann.htm (14. 04. 2020) and HERMANN, R., A kormánybiztosi rendszer 1848-1849-ben [The system of government commissioners in 1848-1849.] In: *Hadtörténeti Közlemények*, Nr. 1, 1998, p. 28-77.

[45] See paragraphs (1) and (12) of article 4 in the Kit.

[46] I.e. the citizens of Hungary who were not members of the army.

[47] Paragraphs (3)-(4) of article 4 in the Kit.

[48] Cf. paragraph (2) of article 4 in the Kit.

[49] The member of the said personnel who delayed with his task or disobeyed could be suspended or substituted by the government commissioner, and the person deemed to be incompetent to fulfil the given task could be placed in a non-active status. The temporal scope of such measures extended to the termination of the state of emergency, but disciplinary proceedings were to be initiated against the member of the personnel suspended due to wrongful conduct (by the person competent thereto otherwise). Cf. paragraphs (5)-(10) of article 4 in the Kit.

[50] Cf. paragraph (11) of article 4 in the Kit. and detailed reasoning to article 4. As a consequence of the comparison of the two texts, the concerned person could submit an appeal.

[51] The act ensured the space for financial manoeuvre necessary to handle the state of emergency (advancing the costs necessary for warfare) by the government, until such costs were determined by the National Assembly. See article 17 in the Kit.

The restrictions of fundamental rights allowed for by the Kit. are summarized in the following table:

Restriction of fundamental rights allowed for by the Kit	
Right to local governance	(a) The government may temporarily repeal, by decree, the provisions of policing nature included in local government ordinances, and may replace such provisions by decrees adopted by the Interior Minister or by a government commissioner; (b) the Interior Minister may repeal ex officio all orders rendered by the commission of municipalities or by representative body of townships (towns with regular councils) that violates any warfare interests, and "if any measures are required as regards the above, he may take such measures within his own competence" (paragraphs (2)-(3) of article 5 in the Kit.)
Right to remedy	No remedy shall lie from provisions rendered and measures taken as regards the deprivation of the legislative rights of local governments (paragraph (3) of article 5 in the Kit.)
Right to travelling abroad	The government may take the matter of issuing passports out of the hands of the authorities acting on the basis of law in the whole territory of the country, and may refer it to the competence of the Interior Minister in Hungary, and the ban in the Kingdom of Croatia-Slovenia (paragraph (1) of article 6 in the Kit.)
Right to free movement and free choice of place of residence	(a) the obligation to report the accommodation of foreign citizens within 24 hours and the review of such reports were prescribed by law previously. The said obligation shall bound also the host, and the omission in such regard or the report of false data shall be punishable as misdemeanour; (b) based on the Kit., the government may exceed the said general reporting and registering obligation to domestic (Hungarian) citizens seeking accommodation in Hungary, "*whose right to chose their place of residence, more so, right to movement ensured by law is indeed limited by this provision, yet, such restriction is a matter of public interest and is indeed justified by the maintenance of public order and public safety*" (paragraph (2) of article 6 in the Kit. and the reasoning to the proposal); (c) the obligation to report may be prescribed also to reports due 3 months prior to the adoption of the concerned decree (paragraph (3) of article 6 in the Kit.); (d) non-permanent residents may be banned from the given settlement if their residency raises concerns for public interest, public order or public safety (paragraph (4) of article 6 in the Kit.); (e) stay at a given settlement may be ordered as regards permanent residents with a view to public interest, public order or public safety (paragraph (5) of article 6 in the Kit.); (f) the government may order that, for the purpose of warfare, "*the part of the population whose presence has a detrimental effect as regards warfare may be removed from the fortified locations that accepted military equipment or placed in military status*" (paragraph (7) of article 6 in the Kit.)
Right to property	The government may limit or prohibit the possession or use of objects which qualify as usable to jeopardize the interests of warfare, public order or public safety (weapons, ammunition, gunpowder, explosives, etc.) and may order the surrender of such objects (paragraph (1) of article 7 in the Kit.)
Right to entrepreneurship	If it is to be feared that the price of certain consumer goods may increase unproportionally and unreasonably due to the mobilization or withdrawal of the army, or dur to the war, the government may introduce official price (paragraph (4)-(5) of article 7 in the Kit.)
Right to personal liberty	(a) If it is suspected that a person possesses unlawfully any object suitable to jeopardize the interests of warfare, public order or public safety (weapons, ammunition, gunpowder, explosives, etc.), personal search and a search of premises may be carried out as regards such person in order to investigate the aforesaid. The objects possessed unlawfully shall be confiscated (paragraph (2)-(3) of article 7 in the Kit.)
Right to privacy	The government, within the restrictions provided by international treaties, may take all measures necessary to control the post, telegraph and telephony traffic and communication in order to protect the interests of warfare (paragraph (1) of article 8 in the Kit.)
Right to freedom of expression	(a) The government may order that the legal deposit of periodicals and other press products, which is to be submitted to the public prosecutor with competence regarding press pursuant to press law, shall be submitted to the nearest public prosecutor's office or police department before distribution, and that the distribution, unless allowed for earlier, may only commence after three hours of the service of the press law legal deposit as regards periodicals, and after one week of the day of service as regards other press products; (b) If the competent prosecutor's office or police department finds that a criminal offence concerning warfare interests is committed in any press product, it may ban the distribution of such press product, but shall also inform the producer of the press product of the (criminal-law) consequences of the failure to comply with the ban as prescribed in article 25; (c) The government may ban the publishing and distribution of certain domestic periodicals if the releases in it would jeopardize the interests of warfare; (d) The government may control press products arriving from abroad before their arrival to their place of destination, and, if their content jeopardizes the interests of warfare, may confiscate them; (e) A full ban may be rendered as regards the importation and distribution of foreign periodicals (paragraphs (1)-(5) of article 11 in the Kit.)
Right to association	If "*it is necessary as regards public safety*": (a) the establishment of new associations or branches of associations may be banned; (b) the assembly of existing associations or branches of associations may be controlled, their operation may be restricted or suspended; (c) commercial companies or other associations or funds may be subject to police control if it is suspected that their operation violates the law or their articles of association, or takes a direction against the state. If such suspicion is confirmed, their assemblies may be banned, dissolved, or the implementation of their unlawful resolution may be fully forbidden (paragraph (1) of article 9 in the Kit.)
Right to assembly	if necessary for public safety, the government may ban the holding of popular assemblies, marches, processions – with the exception of the assemblies of public administration authorities – and may render the holding of other assemblies as subject to official approval, regardless of whether or not the holding of such assemblies would be subject to report obligation under ordinary circumstances or not (paragraph (1) of article 1I in the Kit.)
Civil procedure safeguards	As regards the enforcement of civil-law claims – including claims arising from bills of exchange –, as well as regards civil-law court and non-contentious proceedings and civil-law jurisdiction in general, as well as the operation of the Central Bank, the government may take extraordinary measures and may establish provisions derogating from existing laws (article 16 in the Kit.)
Criminal procedure safeguards	On the basis of the Kit.: (a) certain criminal procedural provisions may be established also by government or ministerial decree; (b) certain criminal offences may be adjudicated also pursuant to rules derogating from the criminal procedure code (Bp.); (c) "civil criminal courts may act also is having no competence pursuant to Bp." (points 1-4 of article 14 of the Kit., article 31 of the Kit. and Detailed reasoning to articles 12 and 31)

Source: Kit.

Basically, the sanctions introduced by the Kit. reflect a three-pronged approach: (a) making the constitutional elements of misdemeanours (minor offences) stricter and extending them; (b) increasing criminal liability by complementing the constitutional elements of existing criminal offences and creating new ones; (c) placing ordinary procedures under martial law.

Part of the amendment of misdemeanours belong to the restriction of fundamental rights (articles 6-7, 9-11) but the Kit. contains also a general clause in order to make the measures taken by government commissioners more efficient (paragraph (1) of article 15). The purpose of increasing criminal liability was the "*efficient criminal-law protection*" [52] of public interests during wartime, to which end the law amended and introduced corrections to the Criminal Code (Act V of 1878) and Act XL of 1879 on misdemeanours. As regards placing ordinary procedures under martial law, the Kit. allows for the government to derogate both from the substantial and formal regulations, by enabling the application of the procedure of summarily adjudicating courts to certain criminal offences,[53] and, on the other hand, unlike under normal circumstances, the establishment of such regulations also by decree.[54]

1.2.5 The act in practice: the application and extension of emergency power (1914-1918)

With the escalation of the crisis after the Sarajevo assassination, the Austro-Hungarian Monarchy entered the stage of preparations for war (cf. point 1.2.2). Based on the legal sources, the Kit. was applied for the first time in relation to the package of decrees of 26 July 1914.[55] The effect of certain elements of such package was then extended on 1 August 1914,[56] thus, the issuance of the decrees rendered on the basis of the Kit. commenced. As the war became persistent, the Kit and the "cross-cutting decrees" issued thereupon proliferated throughout more and more spheres of life.[57] The act was an almost permanent reference basis,[58] thus, its text was amended several times on the basis of practical experience and in order to handle the emerging new situations during the war.[59]

1.2.6 Outlook: regulation of special legal order in the other half of the Austro-Hungarian Monarchy

While in Hungary, a comprehensive regulation of emergency power was prepared only in the last decade of the dualism, and, even then, was restricted to national defence interests, in Austria, the fundamental laws issued after the Compromise included also general rules regarding special legal order.[60] The act on the fundamental rights of citizens,[61] which has been in effect to date, prescribed that the detailed rules on the restriction of certain rights should be regulated in a separate act which was prepared in 1869.[62]

That act was in effect until the end of the First World War,[63] and the Austrian part of the Monarchy was governed on the basis of it from May 1914 up until the beginning of 1917.[64]

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52 See: Detailed reasoning to chapter II of the Kit.

53 See: point 4 of article 12 in the Kit. and Detailed reasoning to article 12 of the Kit.

54 See point 4 of article 31 in the Kit and Detailed reasoning to article 31, as well as Decree 5491/1914 ME of the Prime Minister on the submission of individuals subject to civil criminal court procedures under court procedure of the defence forces (Repository of Decrees (hereinafter: RT) 1914. 1990), Decree 12002/1914 IM of the Minister of Justice on the rules of accelerated criminal procedure (RT 1914. 1967-1989) and Decree 5488/1914 ME of the Prime Minister on putting into effect of accelerated criminal procedure (RT 1914. 1434-1437).

55 See RT 1914. 1410-1413.

56 See RT 1914. 1448-1450.

57 Cf. e.g. Decree 647/1915 ME of the Prime Minister on exceptional measures as regards marriage (RT 1915. 70-72.) or Decree 647/1915 ME of the Prime Minister on the establishment of the Yeast Industry Committee (RT 1918. 3-6.)

58 See e.g. the definition of war in Act XIX of 1915.

59 Cf. Act L of 1914, Act XIII of 1915, Act IV of 1916 and Act VII of 1917.

60 See: RT 1914. 1410-1413.

61 See its contemporary translation in: Pesti Napló 1867. 12. 29. 99. , and by Ágnes Deák (translation and foreword): Austrian acts of 1867 on the common affairs and the manner of handling thereof (http://acta.bibl.u-szeged.hu/41026/1/aetas_2001_003_004_238-243.pdf; 07. 06. 2020).

62 That was the act adopted on 5 May 1869, for its original text see: RGBL 1869/31.303-306., for its summary in Hungarian see: POLNER, Ö., A háború esetére szóló kivételes hatalom alkotmányjogi jelentősége. [The constitutional significance of emergency power in the event of war.] In: *Jogállam*, Nr. 1-2, 1917, p. 38-40, and TÓTH, Á., A kivételes állapot intézményének alakulása néhány burzsoá állam jogrendszerében [The development of the state of exception in certain bourgeois states.] In: *Acta Universitatis Szegediensis de Attila József Nominatae. Acta Iuridica et Politica*, vol. 14, Nr. 8, 1967. (http://acta.bibl.u-szeged.hu/6351/1/juridpol_014_fasc_008_003-019.pdf, 07. 06. 2020).

63 Thus, the sample for regulation was available to the Hungarian party quite early, the application of which, however, would have required also the statutory regulation of fundamental rights but the Hungarian legislation failed to fulfil such need throughout the whole concerned period. For the illustration of the difference between the Hungarian and Austrian ideas on the regulation of fundamental rights – which would have been a prerequisite also to the regulation on emergency power, see: NAGY, O., Ausztria nemzetiségi politikája [Austrian policy as regards nationalities.] In: *Magyar Társadalomtudományi Szemle*, vol. 3, Nr. 6, 1910, p. 465-489 (http://mtda.hu/ADATTAR/cikktar/e_cikk/eottevenyi_nagy_oliver_ausztria_nemzetisegi_politikaja.pdf, 06. 07. 2020.) For the rights of assembly and association, see also: DOMANICZKY, E., Az első magyar egyesülési törvényjavaslat. Az egyesülési jogról szóló 1989:II. megalkotásának 20. évfordulójára. [The first Hungarian proposal on the right of assembly. For the 20th anniversary of the adoption of Act II of 1989 on the right of assembly.] In: *Közjogi Szemle*, vol 2., 2010, p. 26-34. and DOMANICZKY, E., Adalékok a magyar egyesülési jog szabályozásához a dualizmus korában [Contributions to the regulation of the right of assembly in the period of Austro-Hungarian Dualism For the 20th anniversary of the adoption of Act II of 1989 on the right of assembly.] In: *Jogtörténeti Szemle*, Nr. 3-4, p. 1-17.

64 See in detail: SZINAI, M., A parlamenten kívüli kormányzás Ausztriában és Magyarországon az első világháború után. [Governance outside of the Parliament in Austria and Hungary after the First World War.] In: *Századok*, Nr. 4, 1986, 802-805, and MULNER, I., Az osztrák és magyar válságkezelés 1918-1920. Hasonlóságok és különbségek a közös birodalom összeomlását követően. [Crisis management in Austria and in Hungary 1918-1920. Similarities and differences after the collapse of the common empire.] In: *Századok*, Nr. 6, 2018, 1293-1320.

1.3 The persistence of the special legal order between the two World Wars

1.3.1 Anchor in the sea of crisis (1918-1922)

By the end of the war, in accordance with the so-called people's resolution rendered on 16 November 1918, the government of Mihály Károlyi applied the Kit. in two different ways. On the one hand, the government commenced the lifting of the restrictions introduced regarding rights and freedoms (e.g. the rights of association and assembly, the freedom of press),[65] and, on the other hand, it continued to apply the enablement provided by the Kit. in order to maintain existing regulations.[66] The restrictions concerning the freedoms and rights were reset by the government of István Friedrich.[67]

As intended, the Kit. and the related laws would have remained in effect only until the end of the war, however, towards the time of the conclusion of the peace treaty, its temporal scope was extended. Act VI of 1920[68] prescribed that the term of extension was 1 year of the "*confirmation of the peace treaty*", which could be further extended by 3 months.[69] The peace treaty was enacted by act XXXIII of 1921, which took effect on 26 June 1921,[70] thus, the Kit. and the related laws could have remained in effect by the end of June 1922, at the latest.

It is important to note that ensuring the seamless transition to peace provides only partial explanation to the maintenance of the effect of the Kit. and the related laws. Rather, the special legal order facilitated the reorganization of Hungary as a country struggling with many difficulties. This was reflected also by Act VI of 1920, as it determined that the interests serving as the basis of the maintenance of emergency power were internal order, public safety and foreign policy interests.[71] A significant change in viewpoint is also marked by the legislator's realization that certain legal relationships changed so significantly during the war (or after the war), that the restoration of previous conditions (i.e. the repeal of all laws related to Kit.) was no longer possible.[72]

1.3.2 Persistence of the emergency power (1923-1939)

Act VI of 1920 also shows that the government of István Bethlen needed emergency power even after the expiry of the period prescribed in the act, thus, the government eventually enabled the maintenance of the special legal order by incorporating it in the budget act.[73] Act XVII of 1922, taking effect in August 1922, which regulated the public fees, charges, and public expenses for the first six months of the fiscal year of 1922-1923, prescribed concurrently, determining a tight deadline, the deregulation of certain laws related to the Kit.[74] on the one hand, and, on the other hand, the government's right to adopt decrees, without limitation in time, yet built upon the Kit. "*for the purpose of implementing the peace treaty or settling the situation arising from the provisions thereof*".[75]

After that, the first deregulation of the laws related to the Kit. was carried out in 1923,[76] followed by a next waive of deregulation by the end of the concerned period, in connection with the coming into effect of the act adopted in 1939 on national defence (Hvt.); eventually, the government maintained the effect of several (almost one hundred) decrees adopted on the basis of the Kit.[77] As regards the remaining decrees, the Hvt. allowed for any amendment or supplement by the government at its own discretion.[78]

It should be noted that in 1931, the government, in order to manage the Great Depression – i.e. to "*protect the order of economic and credit operations*" –, was also granted with an enablement narrower than that provided by the Kit.[79]

1.3.3 Novel regulation of the special legal order. Act II of 1939 on national defence

The act on national defence was adopted on the threshold of another crisis in 1939. Finally, that act repealed the Kit. and all acts amending it and maintaining its effect.[80] However, the Hvt. allowed for further maintenance of the laws adopted on the basis of the Kit., for example, the deregulation decree of the

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[65] Cf. Decree 4802/1918 ME of the Prime Minister (RT 1918. 2198-2199), Decree 4969/1918 ME of the Prime Minister (RT 1918. 2199-2200), and Decree 4970/1918 ME of the Prime Minister (RT 1918. 2200).

[66] Cf. Decree 4878/1918 ME of the Prime Minister on the ban regarding the use of potato, corn and barley for alcohol production, or Decree 5034/1918 ME of the Prime Minister on the amendment of certain measures of Decrees 1851/1917 ME and 2.086/1917 ME of the Prime Minister on the reporting and registry, as well as the use and marketing of the timber and charcoal stocks (RT. 1918.2197, 2201.)

[67] Cf. Decree 5499/1919. ME of the Prime Minister (RT 1919. 874-875.), Decree 5084/1919. ME of the Prime Minister (RT 1919. 729-730.)

[68] Effective date: 13 May 1920.

[69] See: article 1 of Act VI of 1920 on the extension of emergency power in the event of war

[70] See: Decree 7200/1921 ME of the Prime Minister on putting into effect of the Trianon Peace Treaty

[71] See: paragraph (2) of article 1 in Act VI of 1920.

[72] Cf. article 2 of Act VI of 1920. The repeal or maintaining the effect of war laws was problematic in all belligerent countries. Some, like Hungary, decided to maintain their effect, others decided to replace them with peacetime regulations.

[73] See also: TAKÁCS, Gy., A sajtó és a kivételes hatalom. [The press and the emergency power.] In: *Jogtudományi Közlöny*, Nr. 7-8, 1973, p. 407-411.

[74] See: paragraphs (1)-(2) of article 1 in Act XVII of 1922.

[75] See: paragraph (3) of article 1 in Act XVII of 1922.

[76] See: Decree 960/1923 ME of the Prime Minister on the repeal of certain decrees issued by the virtue of emergency power (RT 1923. 29-28.) Upon the deregulation of 1939, the legislator referred to that there was an error in the list of laws at the preparation of Decree 6976/1922 ME of the Prime Minister, and the attempt is 1939 was to correct the mistake made (cf. RT 1939. 282 articles 2-3).

[77] See: Decree 8270/1939 ME of the Prime Minister on the publication of acts adopted for the event of war, as well as of decrees issued or maintained on the basis of the provisions of acts on the prolongation and extension of emergency power (RT 1939. 1281-1355).

[78] See: paragraph (3) of article 232 in the Hvt.

[79] See: Act XXVI of 1931 on ensuring the balance of the order of economic and credit system which was prolonged from time to time up until 31 December 1944 (by Act IV of 1944 for the last time).

[80] See: paragraph (2) of article 231 in the Hvt.

government of Pál Teleki was also prepared on the basis of such enablement (cf. point 1.3.2.).[81]

At the same time, the Hvt. re-codified the institute of emergency power.[82] Incorporating emergency power in the act on national defence created an extended tradition regardless of regimes.[83] Building on the experiences gained during the period of over two decades of applying the Kit.,[84] the Hvt. established a scope of emergency power much broader than the previous regulation.

In principle, pursuant to the Hvt., the government was enabled to emergency power: (a) in the event of war or an imminent danger of war threatening the country; (b) until further provisions adopted by the legislation; (c) to the extent necessary, but (d) by virtue of the provisions prescribed in the Hvt.[85] As an exception, "*in the event of danger lying in belated acting*", the Hvt. granted a broader enablement to the government: (a) for the purpose of national defence; (b) as regards taking other measures falling within the scope of public administration, civil law, procedural law or legislation.[86] Such broader enablement was restricted by the Hvt. both with respect to its material scope[87] and the applicable procedure.[88] As a general restriction to emergency power, the Hvt. prescribed that such power may be declared for the period of four months which may be extended only with the approval of the National assembly for four further months.[89] Also based on the lessons learned from the Kit. and the cross-cutting laws built upon it, the Hvt. ensured statutory enablement for the government in order to take the measures necessary in the provisional situation following the war.[90] Furthermore, the Hvt. maintained a demand for criminal-law regulation in connection with the emergency power, however, unlike in the Kit., that does not form a separate part within the act.[91] But the most significant innovation of the Hvt. as regards the system of sanctions was vesting powers in the government commissioner in relation to misdemeanours.[92]

For reasons of brevity, we review the fields that the Hvt. allowed to be covered by emergency power in a table below.

Fields that may be covered by emergency power pursuant to the Hvt.				
Competences related to public administration	**Competences related to policing**	**Competences related to finances**	**Competences related to jurisdiction**	**Further competences**
amendment of the public administration system (article 142 of the Hvt.)	functions related to passports (article 146 of the Hvt.)	credit operations related to public finances (article 156 of the Hvt.	civil-law jurisdiction (article 159 of the Hvt.)	eliminating or mitigating the legal consequences arising from the failure to mee deadlines or belatedness (article 162 in the Hvt.)
annulment of public administration decisions, competence to act (article 143 in the Hvt.)	restriction of the right of association (article 148 in the Hvt.)	regulation and restriction of cash flow (article 156 in the Hvt.)	complementing and amending criminal procedural provisions, restriction of criminal procedural safeguards (the right to a lawful judge) (article 160. in the Hvt.)	measures related to public health (article 163 in the Hvt.)
right of government commissioner to instruct and of disposal (article 144 in the Hvt.)	restriction of the right to assembly (article 149 in the Hvt.)	competences related to public utilities (article 145 157 in the Hvt.)	transfer of judges in the absence of their consent (article 161 in the Hvt.)	measures related to cemeteries (article 164 in the Hvt.)
competence of government commissioner related to misdemeanours (article 145 in the Hvt.)	evacuation (article 147 of the Hvt.)	competences related to the operation of national credit institutions (article 158 in the Hvt.)		measures related to obligatory insurances (article 165 in the Hvt.)
	banning, custody, detention (article 150 in the Hvt.)			competences related to advocacy groups (article 166 in the Hvt.)

[81] Article 232 in the Hvt. and Decree 8270/1939 ME of the Prime Minister (RT 1939. 1282-1355).
[82] Articles 141-171 in the Hvt., see also: the table above.
[83] Cf. Act IV of 1960, Act I of 1976, Act CX of 1993, Act CV of 2004 and Act CXIII of 2011 of national defence.
[84] The incorporation of such experiences – many times along with referring even to the particular law – was highlighted also by the reasoning prepared to the Hvt. See in detail: Detailed reasoning to the proposal of the Hvt. (to articles 141-170)
[85] Paragraph (1) of article 141 of the Hvt.
[86] Paragraph (2) of article 141 of the Hvt.
[87] Pursuant to paragraph (3) of article 141 in the Hvt., nor provisions concerning the organization and operation of state supremacy neither ones amending or dissolving the system of municipality or local government systems may be issued, moreover, no substantial criminal provisions, beyond those allowed for by the statutory enablement existing otherwise, may be established.
[88] Pursuant to paragraph (3) of article 141 in the Hvt., the decrees issued on the basis of paragraph (2) shall be presented to the national committee consisting of members from both houses of the Parliament, in line with the provisions written below, who shall be convened by its chairpersons within eight days.
[89] Paragraph (8) of article 142 of the Hvt.
[90] Paragraph (2) of article 142 of the Hvt.
[91] As regards the system of sanctions, it should be noted that several other acts were adopted beside the Kit. as of the 1920 s, and presenting the interrelation of such laws is not possible in the present paper. In detail cf. detailed reasoning prepared for the proposal of the Hvt.
[92] Article 14 of the Hvt.

	press control (article 151 in the Hvt.)			competences related to trade companies and traders (article 167 in the Hvt.)
	control of the post, communication via telegraph or telephony, and of the radio (article 152 in the Hvt.)			competence related to education and examination order of educational institutions, and to qualifying examinations (article 168 in the Hvt.)
	restrictions as regards weapons, ammunition, explosives and other dangerous objects (article 153 in the Hvt.)			competences related to allowing for derogations from the conditions required to exercise industrial and economic professions (article 169 in the Hvt.)
	restrictions on serving alcoholic drinks (article 154 in the Hvt.)			competences related to securing assets (article 170 in the Hvt.)

Source: Hvt.

1.4 Emergency power during the Second World War (1939-1941)

During the Second World War, decrees were issued continuously with reference to the provisions of the Hvt. on emergency power. One part of such decrees was adopted to facilitate the application of emergency power in general,[93] while others on the basis of particular enablement provisions (articles 142-170). In 1945, even the Provisional National Government referred to certain provisions of the Hvt. on emergency power,[94] but such references were soon omitted. Nonetheless, the Hvt. was repealed as late as in 1960 by the Act on national defence.[95] The Hvt. was eventually repealed by the act on national defence adopted in 1960.[96]

1.5 Emergency power in the early-Rákosi regime[97] (1945-1949)

The Provisional National Assembly (hereinafter: PNA) operated as the supreme body of sovereignty from 21 December 1944 until 29 November 1945,[98] i.e. until the constitutive sitting of the National Assembly created on the basis of the elections of 1945, and exercised restricted powers only.[99] Although the new state power, under the extraordinary circumstances, would have desperately needed emergency power, the legislation in such regard was conducted only in 1946. Since the new state power was not born on the basis of legal continuance, referring to the Hvt. would not have provided a solution either. Seemingly, the only possible solution was to establish a *sui generis* practise; eventually, such practise was codified by the acts adopted between 1946 and 1949.[100]

At first, exercising emergency power was based on the fact that "*the Provisional National Assembly enabled the Provisional National Government to govern the matters of the country. Such enablement served as the basis of the government's activity to adopt and issue decrees up until September 1945 […] In September 1945, the government received another enablement with a further addition – which, however, had been exercised in practice also before the new enablement –, i.e. that the government was obliged to present draft decrees to the Political Commission of the PNA for prior approval*." [101]

[93] Cf. Decree 15/1945 ME of the Prime Minister on the certification of public servants (MK 1945/1. 3), and Decree 800/1945 ME of the Prime Minister on the remuneration of civil servants and other officials, and on allowances of pensioners, widows and orphans (MK 1945/22. 1.).

[94] As of 21 December 1944, the sole custodian of the national sovereignty – and, thus, the body entitled to regulate emergency power – was the Provisional National Assembly (MK 1945/1. 1.) Yet, the issue of legal continuance emerged not only in1945, but also as early as in 1918-1920. On account of the length of the present paper, we only refer to the works of Kálmán Molnár, as well to as his recently published biography (see: SCHWEITZER, G., *„A tisztességes jogtanár" – Molnár Kálmán pályaképe*. [„An honourable law professor" – the career of Kálmán Molnár.], Budapest, 2018.), and to a study of Ödön Polner (POLNER, Ö., Jogfolytonosság és ideiglenes alkotmány. [Legal continuance and provisional constitution.] In: *Jogállam*, Nr. 3-4, 1931, p. 144-151.)

[95] Article 127 of Act IV of 1960.

[96] Article 127 in Act IV of 1960.

[97] For periodization see: GYARMATI, Gy., *A Rákosi-korszak*. [The Rákosi regime.] Budapest, 2011; and PALASIK, M., *A jogállamiság megteremtése és kudarca Magyarországon 1944-1949*. [The creation and failure of the state governed by the rule of law in Hungary, 1944-1949.] Budapest, 2000; and most recently: and PALASIK, M., *Parlamentarizmustól a diktatúráig (1944-1949*) [From parliamenarism to dictatorship (1944-1949).] Budapest, 2017.

[98] Such change was codified by Act XI of 1945 taking effect on 16 December 1945. (Paragraph (1) of article 1)

[99] For example, it did not adopt any laws. As Gizella Föglein put it: *„the Provisional National Assembly – due to the war conditions, by restricting itself – had not adopted laws of the highest level of legislation, i.e. acts, only resolutions; since, without the MPs of Budapest and Transdanubia, it was 'incomplete'. Thus, as a matter of fact, it was not entitled to adopt any acts or, more precisely, it did not entitle itself to it*." (FÖGLEIN, G., Az államfői jogkör ideiglenes szabályozása és gyakorlása Magyarországon 1944-1946 között. [The provisional regulation and exercise of the powers of the head of state in Hungary between 1944 and 1946.] In: *Jogtörténeti Szemle*, Nr. 2, 1992, p. 5) For further details on the PNA see: FEITL, I. (Ed.), *Az Ideiglenes Nemzetgyűlés és az Ideiglenes Nemzeti Kormány 1944-1945* [The Provisional National Assembly and the Provisional National Government 1944-1945.] Budapest, 1995.

[100] See: footnote nr. 105.

[101] PALASIK, M., *A jogállamiság megteremtése és kudarca Magyarországon 1944-1949*. [The creation and failure of the state governed by the rule of law in Hungary, 1944-1949.] Budapest, 2000, p. 47-48.

The regulation on emergency power was adopted (more so, the existing practice was codified) – in order to ensure the economic, financial and public administration order of the state – by Act VI of 1946 (hereinafter: Kht.). By comparing the Kht. with the regulations adopted in 1912 and in 1939, in can be ascertained that in 1946, a provisional enablement was created that allowed for pursuing state and national economic interests.

The temporal and material scope prescribed in the act is only seemingly narrow, since emergency power was allowed to be exercised for over 5 months and only subsequent approval of the National Assembly (in practice, the PNA at first, and later the Political Commission of the National Assembly) was required for the decrees issued.[102]

As regards the material scope, the government was enabled to adopt regulation on the basis of emergency power (a) for the purpose of restoring the balance of public finance; (b) derogating from any civil-law, criminal-law, public administration or other provision falling within the competence of legislation, with the exception of acts adopted by the National Assembly; and (c) not affecting the provisions of public law.[103]

The emergency power allowed for by the Kht. proved to be useful in practice, thus, another act was adopted after its expiry,[104] the temporal effect of which was extended several times – up until 31 December 1949 on the last occasion.[105]

Following that, the next comprehensive regulation on emergency power was adopted only in connection with the act on national defence of 1960.

1.6 Summary

1.6.1 The constitution-poor country

The early regulation on emergency power was, partially, connected to the constitutions. For example, the French regulation, which was exemplary in several respects, appeared in more French constitutions. One of the characteristics of the constitutional history of Hungary is that, despite the preparation of several drafts, a permanent written constitution was eventually adopted only by the middle of the twentieth century.[106]

Thus, the rules on emergency power appeared at first as part of the regulation integrated in the historical constitution,[107] and the first attempt for its codification, as well as its application in practice, occurred in pursuit of military interests in the middle of the nineteenth century. The first detailed regulation was adopted relatively late,[108] as an act, also due to military interests. The Kit., which was firmly fortified by safeguards in 1912, rapidly became a general reference basis during the First World War. Following the collapse, it turned out that the enablement provided by it, as well as the application of the "cross-cutting laws" adopted on the basis of it are essential for the reorganization of the state system and the national economy, thus, the temporal effect of the Kit. was extended over and over again.

1.6.2 The cross-cutting laws of emergency power

Shortly, it also became apparent that the myriad of decrees issued on the basis of the enablement granted by the Kit. was brought to an independent life, and cross-cutting decrees, modified several times, began winding through the legal system from almost each sentence of the Kit. Attempts of deregulation were made in the 1920s, as well as in the 1930s, however, it occurred time and again even in the Rákosi regime that certain decrees issued on the basis of the Kit. had to be repealed separately.[109]

In the 1930 s, in order to ensure the hierarchy of legal norms, the rules on the provisional period and on the faith of laws issued on the basis of emergency power was separately incorporated into the Hvt., i.e. the successor of the Kit.[110]

It is true that a significant amount of laws was issued also on the basis of the Hvt. during the Second World War, however, the repeal of those was eventually solved by history, instead of the legislator. The National Assembly formed in 1945 addressed the issue of emergency power relatively early,[111] but the Kht. was most probably adopted as a temporary piece of law in the first place.

1.6.3 When an exceptional legal framework becomes the general rule

Upon the adoption of the Kit., the government and most of the MPs were preparing to a state of war, with the concept that as the war ends, the period of emergency power ends with it. Unfortunately, they had to realize as early as in the first months of the war that the emergency power and the tools ensured by it might be needed – for public interest – for a much longer

[102] Paragraphs (2)-(3) of article 1 in the Kht., and article 2 of Act XXVI of 1947. Such controlling power changed several times in the second half of the 1940 s. Palasik writes about prior approval of the government's draft decrees between December 1944 and September 1945 (see: footnote nr. 101). The Kht. prescribed subsequent approval quarterly. However, Act XVI of 1947 prescribed a time limit of 15 days – of the adoption of the concerned decree – for the government to request the approval.

[103] Paragraph (1) of article 1 in the Kht.

[104] See: Act XVI of 1946.

[105] However, as regards the content of regulation in relation to the Kht. (Act VI of 1946), the political fights that became more and more severe left their mark. Cf. Act XVI of 1946, Act XXVIII of 1946, Act VIII of 1947, Act XXVI of 1947, Act XXIV of 1948, Act LVI of 1948, Act XVIII of 1949.

[106] See also: DOMANICZKY, E., *A jogállam és a civil szektor Magyarosrszágon, különös tekintettel a helyi önkormányzatokra.* [The rule of law and the civic sphere in Hungary, with particular attention paid to local governments.] Budapest, 2009.

[107] Cf. VIROZSIL, A., *Magyarország nyilván- vagy közjoga mint az alkotmánya eredetétől 1847/8-ig fennállott*. [The public law of Hungary as a constitution, from the beginning of 1847-1848.] Buda, 1861, 132-133.

[108] Cf. international models in point 1. 1. 2.

[109] Cf. e.g. article 16 of Law decree 18 of 1955.

[110] See: paragraph (9) of article 141 in the Hvt.

[111] Act VI of 1946.

time, and that realization appears in the 1914 amendment of the Kit.

By the end of the war, the decisionmakers faced more and more – unforeseen – extraordinary events: war occupation, rapid changes in the territory and borders of the state, civil wars, economic crisis. The handling of such situations lasted for years, and each demanded unprecedented approaches derogating from routine solutions, fast reactions and a new set of tools. The act on emergency power and a part of the lower-ranking norms based on it soon became outdated by themselves,[112] but others maintained their effect even after the war, perpetuating the state of exception in a longer term.

1.6.4 A cross-regime subject matter

The emergency power and the special legal order established on the basis of the enablement granted by the Kit. – as seen above – remained permanent also in the twentieth-century history of Hungary burdened by continuous changes of regime. Even though the appearance of the legal institutions, i.e. the legal source, changed from time to time, but it was applied almost constantly in the period between 1912 and 1949. Moreover, as an essential tool of governance, it was under continuous development.

The scope of the basic act adopted in 1912 was extended several times between 1914 and 1918. The government of Mihály Károlyi excluded a part of the fundamental rights from its scope, which – if the restriction had been regulated as a *lex specialis*, as, for example, in the Austrian act adopted in 1867 in such regard – might have turned into a new direction of legal development, had it not been put aside within a few months' time.

In the 1920s, the competences established during the war were exercised, and the practice of two decades was structured and re-codified in the Hvt. In the second half of the 1940s – following primarily the model of economic emergency power introduced in the 1930s –, a provisional regulation was developed and codified.

The constitution of 1949 omitted the issue,[113] thus, the matter of emergency power was regulated in the act on national defence adopted in 1960, where, even though reflecting the structure of the Hvt. adopted in 1939, a significant regression can be seen in the regulation compared to the concept of the Hvt. Such negative legal development may reflect primarily the depreciation of emergency power: in the seeming legal order of the party-state system, the issue lost its significance. There was no need to regulate the emergency power, since the separation of power existed only on paper, and no need emerged to restrict its exercise, since the party possessed unlimited power in each body and institution.[114]

1.6.5 Dynamic period of regulation as regards emergency power

In the present paper, we followed the history of the regulation of emergency power, from the beginning until 1949. It can be seen that in Hungary – even though several international models (such as the Austrian regulation as of 1867) were available –, the matter was regulated relatively late and as an issue of national defence. It was approached from the perspective of state interest all along, and – unlike in Austria in 1867 – was not connected with human rights (apart from a shorter period; it eventually occurred after 1989).

Even though the concept of the regulation of emergency power was continuously changing between 1912 and 1939, while becoming more and more detailed, the principal of submitting the emergency power under civil governance (government) perpetuated. The purpose of the adoption of an act in such regard was, at first, to facilitate the operation of the state; however, during the Second World War, it gradually became a tool of total control over the state system. The provisional regulation of emergency power between 1946 and 1949 also served the purpose of acquiring state power. Although the legal institution was re-codified during the Kádár regime, the issue could not regain its original relevance in the second half of the twentieth century.

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[112] As it was put in the reasoning to the proposal of Act VI of 1920: "*Such measures are mostly of a nature which would have lost its relevance by the end of the war, and might have been deemed as repealed already or repealable without any difficulties; however, there are several of them which, under the coercive effect of the state of exception created by war, regulated relations that emerged as new due to the war or demanded new regulation due to the significantly changed circumstances, with respect to which relations the rules adopted on the basis of emergency power cannot be repealed simply and promptly without causing disturbances and difficulties*." Cf. paragraph (3) of article 1 in Act VI of 1920.

[113] More precisely, the regulation of the Kht. might have served as a model at the determination of the powers of the Presidential Council. Cf. paragraphs (4)-(5) of article 20 in Act XX of 1949.

[114] See in detail: BIHARI, M., *Magyar politika 1944-2004. Politikai és hatalmi viszonyok*. [Hungarian politics 1944-2004. Relations of politics and power.] Budapest, 2005.

The History of The Reformed Law Academy of Kecskemét (1875–1949)

*Árpád Olivér Homicskó**

Abstract

In my study I would like to present The History of The Reformed Law Academy of Kecskemét. For centuries, the Reformed Church in Hungary operated a law academy under the wings of its ancient college. So, the question rightly arises: Why was it considered important by our church? Since Calvin, in the hearts of Reformed people there has always been an attachment to law, what is more, respect for law and legislation. We do not know how long Calvin had been pondering his career choices and what motivated him eventually to choose the legal profession. However, one thing is certain: he could not have given us his main work, Institutio – the system of Christian religion – without the knowledge of the precise and regulated system of law. "Steely new order, victorious teaching!" – writes Lajos Áprily about the Institutio in his poem Kálvin. The poet praises not the jurisconsult but the Genevan preacher… Do we need a more worthy foundation for the Reformed law academies?

Keywords: *History; Reformed Church; Reformed Law Academy; education; Hungary.*

Introduction

The Reformed denomination in Kecskemét provided a high level of education for its parishioners already in the 16th century, since – following the practice of other Protestant schools – its educational institute embraced a fairly extensive scientific training. Although the number of classes in the educational institute varied, in the first half of the 19th century systematic legal education took place in a collegiate organization, in which those subjects could already be studied in two years from 1831. The inhabitants of the city and the vicinity also created decent conditions, so the institute received a new building already that year. It was then that the first year of the college department was opened, and then in the following years further college years respectively, so that the entire college department, consisting of humanities, law, and theology, was completed between 1831 and 1836. In 1835, the king promoted the Kecskemét institute to the rank of lyceum contrary to its rival Nagykőrös. Recognition within the church was also achieved, as in 1840 the Universal Convention declared the educational institute to stand on an equal footing with the colleges of Debrecen, Patak and Pápa.[1]

From 1849 to 1860, as in the other denominational law colleges (főiskola), teaching was suspended by imperial decree, but in the academic year of 1860/1861, organized training resumed, in a hopeful atmosphere of the constitutional monarchy. More and more lawyers were needed in all sectors of the civil society which evolved gradually. Considering the need for clerks in the neo-absolutist period, from 1855 three-year state law academies were developed, but strictly "scientific subjects" such as Roman law, legal history, or economics were taught exclusively by universities, following the Austrian model. Certificates in denominational studies were accepted only if they met the standards of state educational institutes, i.e. they were licensed to take judicial services state exams, had at least six departments, and had their own legal courses separate from humanities studies. After the reorganizations had taken place, a number of denominational law schools resumed operation. In 1863, the required 3rd year was started in Kecskemét. What made it possible even then was the city's municipal board providing the financial contribution needed for the proper transformation of the Law Academy.[2] The law school of Kecskemét was already in a particular situation at that time, since as an institution jointly maintained by the Dunamellék Reformed Diocese, the

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1 The memorial speech of the dean of the later law academy calls for caution on establishing the beginning of the legal training in Kecskemét. "The year 1830, which can be read on the façade of the second floor of the Old College, marks the year the foundation stone was laid for the building erected for the Reformed College in Kecskemét. However, in the middle of the legend on the old seals of the law academy year 1836 is visible, which is either the year of its foundation or the year of its opening, but neither of them explains why we are celebrating the centenary of the college now, this year." Joó, Gy., *The centennial ceremony of the Law Academy.* Yearbook 1932. 8-9, p. 11.; Horváth, Ö., Law academies and legal examinations. In: *Encyclopedia of Hungarian Law* (Ed.: Dezső Márkus) Nr. IV, Budapest, 1903, p. 447.

2 Halmai, I., The Kecskemét Reformed Law Academy in the system of the colleges of the civil era. 1975-1944. *Acta Academiae Paedagogicae Agriensis*. (Scientific Publications of the Károly Eszterházy Teacher Training College). Eger, 1995, p. 138; Horváth, Ö., p. 447; Pető, E., *Law academies in the 20th century.* PhD dissertation, Debrecen, 2003 (Manuscript), p. 15-16.

Kecskemét Reformed Parish and the city with a Catholic-majority, it introduced an open-minded and cooperative educational practice. According to an 1863 agreement reached between the town and the parish, despite its Reformed character, they were allowed to employ, as they did, Catholic teachers, such as the famous professor of procedural law, Géza Magyary, who later moved to Budapest.

1. Law academy a Hungarian specialty

The law academies were special institutions in Hungarian legal education. In a general approach, we mean a higher education institute established in the period of dualism, which, similarly to the faculties of law and political science of universities, was designed to teach law and political science, but they did not have the right of organizing final comprehensive "jogtudor" examinations (promotion) and to confer the qualification for private lecturers (habilitation).[3]

The organization, the educational and supervisory order of the Hungarian law academies in the era of dualism was established due to state measures, on the basis of the 1874 Decree of the Minister of Culture, Ágoston Trefort. The provisions underpinning the reform of higher education and legal training, reminiscent in many respects of the Austrian period, remained essentially in force and were enacted according to their original content throughout the operation period of law academies until 1949. The organizational and operational order of state-run law academies prevailed in ecclesiastical and mixed-maintenance institutions, including the Kecskemét Reformed Law Academy.

The Decree of 1874 and the normative ministerial regulations issued for its implementation, imposed conditions which were difficult to fulfill for the maintenance of sites operating previously. The government's intention was to transform lyceums with a heterogeneous organization and radically different standards into full law and political science faculties with four-year courses. It was a clear intention of the government to unify this form of educational institute and – as stated in the basic regulation – to lay it on an educational-organizational basis "in which to correspond preferably not only to the task of a vocational school but also the higher purpose of the college, according to which in addition to the requirements of practical life, they ought to be cultivators and disseminators of science at the same time". After reviewing the history of the Kecskemét Law Academy, it seems strange that through the reform the Minister wanted them to "compete more equally with the two Hungarian universities in the more thorough training of Hungarian youth, and that the principle of academic freedom – one of the cornerstones of university curriculum – should be applied in these legal education institutes, within the limits set by their specific purpose."[4]

This decision did not question the right of domestic churches to maintain schools, but created an extremely difficult situation for former denominational maintainers and municipal donators. Providing funds for four years of training was not an easy task for schools that previously had a two-to-three-year training scheme, as they had to provide for an adequate number of academic staff and infrastructure within a short period of time. Although the reform did not practically benefit universities, colleges, which are largely tuition-funded, were at a substantial disadvantage compared to state-funded universities. It is characteristic that when Act XXVI of 1889 ordered that law students having completed one year of voluntary military service before or during their studies could receive a final (pre-degree) certificate after seven semesters, law academies, including Kecskemét College, raised objection to their loss of tuition fees.

Although the Decree of the Minister of Culture of 1875 emphasized the intention to flourish law academies and ensure level playing field in the competition with universities, other provisions brought a significant disadvantage to institutes having a long history of transforming their organizations with great difficulty. The most important of these is the provision of Section 5 of Act XXXIV of 1874 under which it was required, as one of the conditions for admission to the bar examination (and for employment too), to take the final comprehensive "jogtudor" examinations (promotion) at the faculties of law and political science of the universities. Already in the first year, there was a strong will on the part of law academies to change the discriminatory rule drawn up by the contemporary ministry of justice. In 1874, the Royal Law Academy of Nagyvárad (today: Oradea) prepared a memorandum in a well-reasoned form, which was also supported by the maintainers and faculty members of the College of Kecskemét. In this document the Ministry of Religion and Public Education was asked to extend the right of organizing final comprehensive "jogtudor" examinations (promotion) to law academies which were expanded into fully-fledged law and political science faculties. The diverse law academies separated by their interests and often competing with each other, formed a united front on this issue, and in their annual conferences and faculty meetings under the 1874 regulations, they filed several petitions thereto concerning the disadvantages of their institutes in relation to universities.[5]

2. Four year training (from high school ["főtanoda"] to college faculty of law and political science) in Kecskemét

The reform provisions transforming the contemporary system of legal higher education undoubtedly resulted in a significant change in quality. As the law academies were to be brought closer to the universities, the number of years was raised to four and, accordingly, the state examination passed here entitled students to take the examination for doctorate. The subjects were standardized and structured in the same way, thus allowing the transition to university, of course by passing the appropriate graduate equivalency exams. Final (pre-degree) certificates differing by school type were abolished, furthermore in law academies the opportunity was provided to establish open student

[3] HORVÁTH, Ö., 1903, p. 436.
[4] Ibidem p. 443.
[5] HORVÁTH, Ö., p. 443.

societies ("egylet"). It was an important change that college tuition fees became essentially the same as university tuition fees and an attempt was also made to bring the salaries of teachers at state-run law academies closer to the university level. However, these institutes were not allowed to set comprehensive examinations, they could not award a doctorate, and they did not have the right to award habilitation to private lecturers. Law academy qualifications did not allow for entering the legal profession, since according to Act XXXIV of 1874 only those having a law degree can take the bar examination, i.e. it was only after the final university examinations that it was possible to obtain the essential qualification of the legal profession even in that era.[6]

The former maintainers of the Kecskemét Law Training School (as the 1874 yearbook called it: Kecskemét Reformed High School) thus arrived at a crossroads. Given that only full-time, four-year law and political science faculties could remain in existence and provide legal qualifications, they had to decide on either reorganization or dissolution. In the case of organizational restructuring and expansion, it was possible for the former institution to be transformed into Kecskemét Law Academy and according to Decree No. 12.917 of the Ministry of Religion and Public Education issued on 19 May 1874, from the academic year of 1874/1875, to develop into a four-year-course Law Academy classified as a full faculty of law and political science in accordance with the regulations of law academies controlled directly by the state.

The General Assembly of the City of Kecskemét stated in a resolution that in the public interest it is considered necessary to maintain the school and also offered its financial contribution. The reorganization proposals were compiled by a tripartite committee formed from the representatives of the Dunamellék Reformed Diocese, the Kecskemét Reformed Parish and the city of Kecskemét. Based on the proposal, the city of Kecskemét committed itself to setting up three departments, i.e. providing the salaries of three teachers, the Kecskemét Reformed Parish to maintain the institute and providing the salaries of five teachers (one at the expense of the diocese) at the expense of 90% of the tuition fees received. It was the maintainers' right to select the teachers. The city therefore selected three teachers; however, their decision had to be submitted for approval directly to the Minister of Religion and Public Education.[7]

The final agreement included in the treaty of 17 July 1874 was essentially the same as the proposal submitted. According to the detailed agreement ensuring the status of the law academy for the long term, Kecskemét will provide the institute with three regular teacher salaries, each worth 1,200 gulden per year. However, due to the bitter experience of neo-absolutism, the city stipulated that support would be provided only "as long as the sciences were taught in Hungarian at this institute and as long as the institute was administered by the Hungarian constitutional government under Hungarian law, and the city of Kecskemét is free to exercise its constitutional municipal law and influence under the Hungarian constitutional law, in accordance with the present statements". The congregation of the Kecskemét Reformed Parish undertook to finance five regular teaching positions, on condition that "the current character of the educational institution would be preserved" and the possibility of constitutional operation would be provided. In addition, the parish also agreed to providing the school with rooms for libraries and classes and also to their maintenance, lighting, heating, repair work and providing them with servants. According to the agreement within the church, one of the five regular teaching positions was maintained by the Dunamellék Diocese.

The internal organizational order and the decision-making powers were determined by the nature of the institution and the method of financing. Accordingly, for the departments funded by the maintainers, regular teachers were selected by them. Considering the five departments, confirmation of personal decisions – "until the further policy of lawmaking" – took place according current practice, namely depended solely on church discretion. Confirmation of the three teaching posts maintained by the city came under the powers of the ministry. The agreement laid down that the Faculty of Law and Political Science would form a self-governing body (*teachers' board*) headed by the Director, which would handle all matters delegated to it by the Academic Council in addition to the tasks provided for in the regulations of the Law Academy.

3. New organizational and operational statute in 1878

The Ministerial Decree of 19 May 1874 and the decision in principle No. 53 taken at the meeting (held on 26 May 1875) of the Dunamellék Diocesan General Assembly, allowed that the Kecskemét Law Academy reached the same standards as the reorganized faculties of law and political science falling under the direct control of the Government, and obtained an operating license. The regulations set the framework conditions for further educational activity and state legitimacy. The rules of the local agreement – which were hovelled quickly – contained detailed measures aimed at implementing the indicated principles, but not such as to ensure reaching that goal on all sides due to gaps, shortcomings and remaining doubts. The detailed internal regulations were drawn up four years later. Practical experience has brought to light the regulatory shortcomings of the powers of the directors, the controversies in the decision-making procedure of the academic staff, and the shortcomings of administration. According to the governing and maintenance bodies, "filling these gaps and deficiencies, dispelling these doubts made it undeniably necessary to make a proposal concerning the rules of procedure attached here, the development of which was based on the following guiding principles. The rules proposed should be based on the organizational rules as a basis; in this respect, it should not contain a change-in-principle, rather in all respects, serve to put into practice the principles contained therein. The

[6] Bálintné Mikes, K., *Yearbooks of the Kecskemét Reformed Law Academy Repertorium*. From the past of Bács-Kiskun county VIII (Published by) Bács-Kiskun County Archives, Kecskemét, 1983, p. 8.

[7] Ibidem p. 46. Csillery, B., *Data on the history of our law academy*. Yearbook 1875, p. 33-40. The new curriculum. Agreement between the city of Kecskemét and the church. In: Kovács, E., (Series ed.) *Our sources about the Reformation*. Documents from the MNL Bács-Kiskun County Archives. Hungarian National Archives. Budapest, 2018, p. 172.

detailed measures of the organizational regulations that do not correspond to the specific conditions of the institute should be amended in accordance with those, or supplemented with new measures if necessary. In order for the proposed regulations to be in line with the intention to reorganize the academy, the "Tuition and Exam Fees regulations" of the Hungarian Royal University (M. K. Tud. Egyetem) were used as a source, as well as the experience gained while applying the organizational rules so far, was not lost sight of either.[8]

The detailed regulations covered the order of education and examination, as well as the order of organization and operation of the Law Academy. In the following there are the rules governing the standing orders of the academic staff, the powers of the director and office administration. The academic staff decided on matters within its competence at meetings to be convened and chaired by the director. In addition to the regular teachers, non-regular, and assistant teachers and private lecturers had to be invited to their meetings, who were there not only in a consultative, but also a voting capacity. Taking valid decisions required the presence of at least four regular teachers apart from the director. Decisions were taken by a general majority of the votes, in the event of a tie, the director was entitled to have the casting vote.

Submissions to the Director and the Faculty, higher decrees, official inquiries and communications were entered in the register by the clerk of the Faculty, the sections of which include: in addition to the registrar number resuming each academic year, the date of submission, settlement and communication, and the archival number. In addition to the provisions of the regulations, the faculty yearbooks also contained the subject matter of the most important files received. Minutes had to be kept of the faculty meetings, with a serial number resuming each academic year, which included the time of the meeting, the names of the members present, the subject matter of the cases settled and the decisions taken. More importantly, in particular with regard to disciplinary matters, the proportion of votes had to be laid down and the explanatory notes had to be fully preserved. The separate opinion of the minority, if recorded in written form, had to be enclosed to the minutes. The minutes had to be verified at the same or the next meeting; before that, decisions could not be issued. All the minutes taken during the academic year had to be bound and filed at the end of the academic year.

3.1 Organizational reform ideas, struggle for survival

The activities of the Law Academy were hampered by a number of circumstances even after striking a local compromise that allowed for organizational stabilization and survival. Although the regional position and accessibility of Kecskemét by train was favorable, the number of students decreased year by year. Universities were slow to realize their potential benefits and the advantage they had gained from the government in conferring academic degrees and performing legal professions. In this situation, the faculty of the Law Academy was seriously affected by the fact that on July 21, 1880, the Minister of Religion and Public Education in its circular No. 921, called upon the maintainers of law academies: either to dissolve them or, in combination with other law academies, to develop their institutes into universities.[9] The professed aim of the call was that the maintainers dissolve the law academies, and at the same time forsaw that it would do the same with the educational institutions directly under the control of the ministry. However, the call was not effective, as most of the maintenance bodies "sent enthusiastic representations and memorandums to the ministry to explain the aspects that make the survival and prosperity of these educational institutions such a necessity". It was only the Nagyszeben (today: Sibiu) State Law Academy left without supporters which was dissolved in 1886 under government pressure.

The Reformed Church in Kecskemét, referring to its large constructions, could no longer assume or increase its obligations and turned to the co-maintainers for help. The General Assembly of the City of Kecskemét, on the other hand, decided to maintain the Academy of Law "as one of the main factors in the progress of the city" and to undertake the salary of one teacher of a fourth department. However, the parish continued to persevere with the dissolution and turned to the diocese. The final decision, according to the 1875 agreement, required all of the three maintainers' unanimous opinion. The city of Kecskemét insisted on maintaining the institute again.

As with other denominational and private law academies, the government's disclosed intention was leading to great losses. In Kecskemét, moreover, two departments became vacant at the same time in 1883, which provided a favorable opportunity for supporters of the dissolution of the institute. The local political opposition of the Academy of Law came from the Independence Party, led by teachers from the Reformed Grammar School and some members of the Church Council. This situation was offset by the fact that the ruling party had the majority in the city municipal board, so the existence of the school became the subject of a balanced political struggle. The general assembly of the city sought a compromise: Béla Bagi who was a young lawyer from the independence party, i.e. the opposing party, but had great family connections, was elected, as the teacher for the department falling within the city's powers. At the Reformed Church Council Pál Kovács, the editor of the Independence Party paper *Kecskemét* was successfully elected as a teacher, thus ensuring the functioning of the institute in the future. The favorable decision also had a positive effect on the number of students, but following a small fluctuation, the decline continued. As Pál Kovács stated, the 13 law academies of the country had 1866 students in 1871 and only 661 students

[8] Rules of Procedure of the Kecskemét Reformed Law Academy. Kecskemét, 1878. In: Kovács, E., 2018, p. 188.

[9] Horváth, Ö., 1903, p. 443. The churches referring to their right of school maintainer, rejected the proposal. They also argued that that training means decentralization i.e. saving expenses, furthermore the state does not require a law degree for many professions which law academies train for. In the counties such qualifications were required for only three positions (county chief clerk, orphan's court president, and financial controller). Pető E., p. 20.

in 1885, i.e. the number of students decreased to almost one third over the period of years. Due to Act XXXIV of 1874, those seeking legal qualifications, enrolled in the law faculties of the two existing universities making them overcrowded. Although, in some respects, the Academy of Law provided more in-depth training because the term-time was longer, the teachers knew very well how students performed during the academic year, and while in Pest only students with tuition fee exemption had to take exams, in law academies every student was obliged to take exams at the end of every term. In his opinion, establishing a third university would not solve the problems either because denominational law academies do not burden the state budget and especially suitable for organizing administrative courses. However, no substantive response was received to that or any of their other proposals, and the law hindering their development remained in force.[10]

The organization of the legal vocational training made an unjustified distinction between universities and law academies regarding examinations. At universities the obligation to take examinations applied only to students with tuition fee exemption; however, in law academies every student had to take examinations, otherwise they did not get signatures in their grade books. According to the rules valid at that time, the university also had an advantage regarding mid-year transitions, because while the transition from law academy to university was possible, vica versa it could only take place with the permission of the minister, duly substantiated "so that law students did not escape university rigor". The memorandum referred to the fact that, due to the huge number of students, it was not possible to maintain study discipline at the university the same way as at law academies.

3.2 Years of organizational consolidation, new organizational regulations

The board of directors of the Law Academy was re-elected in 1893. One of the guarantees of organizational consolidation was the compilation of the new regulations of the Law Academy. Hereunder, the organizational and governmental norms are reviewed. The two decades that had passed since the establishment of the law academies had not brought about any significant changes in the organization and government system of the Kecskemét College. However, no doubt that its maintainers, despite all the difficulties, ensured its operation and provided financially for its further activities.

The fate of law academies was therefore significantly influenced by the position taken by the maintainer in this period too. Kecskemét was in a fortunate position, as mentioned above, because the city provided the salaries for five out of the eight teachers to be employed mandatorily. The fact that it also provided for other teachers at least with the wage level of grammar school teachers, including allowances, also contributed to organizational stability. Thus, to some extent, the faculty was stabilized. In 1904, the former status quo was firmly established by the 1904 institutional regulations, according to which the city of Kecskemét maintained 5 departments, the local parish 2, and the Dunamellék Diocese 1 respectively. The internal balance of power within the supervisory authority developed accordingly. In the board of directors controlling the life of the institute, the ecclesiastical hierarchy was represented only in proportion to the tasks of maintenance, the bishop essentially conducting relations only between the state and the church. The daily life of the institution, the actual operational work was controlled by the board of directors, headed by the director.[11]

The supervisory authorities were: the Diocesan General Assembly, the Reformed Bishop of Dunamellék, the Council of the Law Academy, the academic staff of the Law Academy and the director. According to the regulations, the Diocesan General Assembly drafts the rules, selects teachers to the department it maintains, confirms the selection of the other teachers, discusses the annual report, selects 2 members to the board of directors every 3 years. The bishop essentially conducts the relations between the state and the institute. The life of the institute is controlled by the board of directors. The body consisted of 20 members: 2 members of the diocesan district, 6 members of the Kecskemét Reformed Church, 8 delegates of the Kecskemét city municipal board and 3 members of the Law Faculty staff, as well as the director. If there was a vacancy, that body determined the order of the candidates to be nominated from the applicants (at least 3 were nominated if there were enough candidates with appropriate qualifications), every 3 years selected a director, a librarian on a permanent basis, private lecturers, honorary fellows in examination boards and generally took care of all internal affairs of the institute. In student affairs the decisions were taken by the academic staff, and it was the director who was responsible for the administrative work. Graduating from the school primarily qualified the students for public office careers. According to Act I of 1883 in some sectors the state examination in political science, in others the state examination in law was required, elsewhere the bar examination was also a requirement, but the latter could still be taken on the job.[12]

In 1913, the Ministry of Religion and Public Education with its decree No. 38025 placed law academy teachers at a disadvantage again because, under the new provision, only private lecturer qualifications obtained from their own subjects entitled them to being appointed as regular teachers. The plan to move the Catholic Academy of Law in Bratislava to Szeged – after establishing two new state universities – while the Reformed Institute in Debrecen would be closed, was in imminent danger. As they wrote in their protest memorandum: In this way, in addition to the disruption of the denominational balance, the Catholic College in Szeged would wither the school in Kecskemét.

In 1913, a doctorate in law and political science, which could only be obtained at universities at that time, was prescribed as a requirement for the prosecutorial and judicial LLM examination. It was Act LIII of 1913 which was in force. In

[10] Repertorium, p. 9.
[11] Pető, E., p. 29.
[12] Repertorium, p. 8.

the past, state exams, which could also be taken at law academies, had qualified for all legal posts; now there were hardly any administrative-office jobs that state exams qualified for. It was World War II that saved law academies. In 1913, the curriculum was re-regulated and the order of teaching certain subjects was also changed. At universities several special seminars had to be attended, so universities often required a graduate equivalency examination from law academy students applying for a doctorate.[13]

3.3 The first world war, the revolutions and the period of the two world wars

World War One upset normal academic life. According to the resolution of the board of directors, held on 27 August, 1914 – pursuant to Decree No. 116670/1914. IV. issued by the minister of religion and public education in view of war conditions – school enrollments lasted until 30 September Lectures began on 5 October, and the grand opening ceremony was cancelled. In the building of the college several educational institutions were hosted during the academic year. The premises of most of the local schools were transformed into reserve hospitals; some schools were located in buildings with non-educational purposes, others gave lectures in one building alternately, in the morning and in the afternoon. There were some who did not have a roof above their heads. „At that time, our church, for the secondary schools that were also left without a building, offered its new college building. Thus, the secondary grammar school specialized in science, the five classes of the secondary grammar school of the pious teaching order, the city secondary school of commerce, the state civil school for girls, and the elementary girls' school moved to the building of our institute, as a result of which two classrooms on the second floor and the two lecture halls of the law students' societies were designated for lecture halls. The reference library of the law academy was handed over as staff room for teachers of the girls' civil school, and the academic staff room of the Law Academy was offered for common use to the teachers of the pious order." [14]

No progress was made on the reform of legal education during the First World War, but as early as 1920-21, the Ministry of Culture stated that new teachers would not be provided grant-in-aid in departments fallen vacant, but those posts still would be considered vacant because Hungary's need for legal professionals was fully covered by the four universities, and it wanted to dissolve law academies. Based on the historical merits of the city, the Reformed Diocese of Tiszáninnen designated Sárospatak as the seat of the only remaining Reformed college. In a separate committee with the Ministry, the Diocese and the Reformed Church Council, as well as in the board of directors, the Kecskemét Law Academy took the decision to agree with the principle of concentration; however, Kecskemét was proposed as the headquarters because the local institute also had its historical traditions, and the city with a true Hungarian ethnic population was much bigger than Sárospatak. The Kecskemét Reformed Church offered its modern, new building for the purposes of the institute, and presumably the city of Kecskemét also maintained its previous financial support. The Reformed School Committee also recommended Kecskemét to the Synod. The decree of the Synod conferred the right to decide on the Convent and called on all three competing institutes (Sárospatak, Kecskemét and the Maramures Law Academy fleeing to Hódmezővásárhely) to present a detailed statement of their available conditions. The following year, the Ministry terminated grant-in-aid to all law academy teachers with almost immediate effect. The school should have been closed immediately, but the city of Kecskemét saved the situation again: it provided teacher salaries for a year and made it possible to teach according to the curriculum by offering substitution fees.[15]

3.4 The National Reformed Law Academy in Kecskemét, 1924–1944

From 1908 to 1922, denominational law academies received grant-in-aid supplementing teacher salaries. That aid, although it gave a great impetus to the development of non-state law academies, ultimately sealed the fate of some denominational law academies. Before the World War, even with great effort, the maintainers might still have been able to provide new resources for the maintenance and development of their schools, but after World War I it became impossible to find such means. Therefore, the withdrawal of grant-in-aid shattered these law colleges, especially the law academies of Sárospatak and Maramures, which fled to Hódmezővásárhely. The withdrawal of state aid also put the Kecskemét Law Academy and its maintainers in a new situation. However, as the Universal Convent declared the existence of a single Reformed law academy to be of great educational and ecclesiastical interest, and as the most viable of the three law academies proved to be Kecskemét; at its meeting held on 20-21 May, 1924, Kecskemét was recognized as a universal national academy of law, and thus the academic year of 1924/25 was opened by the Kecskemét Law Academy as such in national celebrations. Saving the Kecskemét Law Academy and reorganizing it into a national universal law school was largely made possible by the financial contribution of the city of Kecskemét, provided that the city's inhabitants continued to bear the costs of the five departments maintained so

[13] Ibidem p. 10.; PETŐ, E., p. 37.; JOÓ, Gy., *Ministerial decrees and drafts*. YEARBOOK 1913, p. 50-53. Amendment of academic and examination regulations, increase of the fees to be paid. An affiliated professor qualification is required for the post of affiliate professor/ 128172/1913. s./; statistics are to be linked to the Department of Economics and fiscal law to the Department of Administrative Law (No. 140683/1913); no women are allowed to matriculate at the Faculty of Law (No. 54379/1914).

[14] Repertorium, p. 57. JOÓ, Gy., *Data on the history of our law academy*. YEARBOOK 1914, p. 1-46. Changing the duration of the school year. Because of the military hospitals, other secondary schools were housed in the building of the institute, four rooms on the 2nd floor were left to the law academy.

[15] On the state of emergency: Repertorium, p. 58. Governing bodies. YEARBOOK 1918-1919. 1-2, 18. 1918 cf. 114; In 1919 only the changes (Dezső Buday was delegated instead of Andor Kováts). Repertorium, p. 58. JOÓ. Gy.: Data on the history of our law academy. YEARBOOK 1918-1919, p. 26-28. Certification procedure, co-optation of examining boards. Speech at the parade of the "national army" (7 February 1920) at a ceremony in honor of Miklós Horthy. Repertorium, p. 10-11.

far to degree II of pay grade VII; it waived its former right to vote and offered three acres of land for a boarding school; for the purposes of the institute, the Kecskemét Reformed Church relinquished the so-called Old College (Ókollégium). It was on this basis that the latter two reached an agreement with the Reformed Universal Church amending the Treaty of 1875. The city of Kecskemét thus bore the costs of three departments for 55 years, four for 51 years and five for 39 years. It was as if the events of a bygone, nearly three-hundred-year old era had been repeated, when according to an archived city minutes from the 17th century of the "ecclesia's will" "schola masters" are hired and paid by the town magistracy.[16]

Thus, on 21 May, 1924 the Reformed Universal Convent took a decision (resolution No. 93.). Prior to this decision several committees reviewed the building of „Ókollégium" offered by the church and the financial conditions, and both were found adequate. The decision terminated the functioning of the Maramures Law Academy; the Academy in Sárospatak had already announced its cessation on 3 October 1923. It was decided to operate the Kecskemét institute – based on the contract signed with the city – as the Universal Reformed Law Academy, and the interim organizational rules were established. The institute was under the direct supervision of the Universal Convent, instead of the former board of directors an interim governing committee was set up in which, in addition to the presidents and the legal professional education rapporteur of the Universal Convent, the 2 members of the Dunamellék Diocese and the academic staff were included. The committee itself elected its chairman, its deputy and the teachers of the Law Academy, but their appointment had to be approved by the Convention. The governing committee was also entrusted with drafting the new draft regulations. At the inaugural meeting the former director of the Hódmezővásárhely Law Academy was appointed as a teacher, the grouping of departments and subjects was approved, the teachers were taken over, and the private lecturers were confirmed for a year. It was decided that 100 students could be admitted to each year. Gyula Joó was elected as director and Gyula Dezső as deputy director. From September 1, 1925, they proceeded to electing deans and pro-deans, without any substantial change in powers. The dean was elected from year to year by the academic staff. In fact, that was all the new organizational rules changed in the interim regulations.[17]

According to István Halmai, conducting research in the history of law academies between the two world wars on an archival sources, the operation of the three denominational law schools between the two wars, apart from to the insufficient material conditions, was affected extremely negatively by the constant tug of war between the churches and the ministry of education. For example, the Minister of Public Education decided on the number of students to be admitted each year, and sometimes in different ways. Withdrawing the grant-in-aid supplementing salaries which also applied to law academy teachers, presented a great problem, as well as from the academic year of 1927/1928, the operation of the academic state examination boards was also suspended. This government decision meant that the acquisition of the qualifications required for public office careers became the exclusive right of universities. This should have led to a natural decline in demand for law colleges. For example, in the 1926/27 academic year, law students accounted for only 22% of all students enrolled in universities and colleges. However, there was only relative depopulation in these institutions. In the law lyceum of Eger between 1935 and 1944 – but in fact throughout the period between the two world wars – the number of law students was increasing extraordinarily, in absolute numbers; it was during this period that one-third of all students who enrolled between 1861 and 1944 began their studies. It is obvious from contemporary data that it was the most productive period in the life of the Kecskemét institution, considering the absolute number of students.[18]

However, the ministry still wanted to reduce the activities of law academies. In 1926, only 40 students were allowed to be admitted to the first year. In 1927, the work of the law academy state examination board was terminated.[19]

In the 1930 s, the issue of dissolving law academies was also raised again in connection with the reform of legal education. The issue was discussed at the National Higher Education Congress, but university professors Kálmán Molnár and Albert Kiss spoke safeguarding the law academies.[20]

In 1940, law academies were to be diminished practically into law preparatory courses, as a provision was made to terminate years 3 and 4. This idea was related to Act XXVIII of 1940, which arranged for relocating the University of Cluj-Napoca and establishing the Horthy Miklós University in Szeged, furthermore it was decided to set up a law faculty at the Univer-

[16] Joó Gy., *The centenary ceremony of the Law Academy*. Yearbook 1932, p. 14-15.; Repertorium, p. 60. Joó. Gy., *Declaring the Kecskemét Law Academy a universal / national / Reformed law academy*. Yearbook 1923, p. 3-10. The Reformed Universal Convent's decision No. 93 of 12 May 1924 on the establishment of the Universal Reformed Law Academy and the interim organizational and supervisory rules thereof.

[17] Repertorium, p. 11-13.; Dezsó. Gy., *Farewell of the Alma Mater. Kecskemét*, 1939, p. 20.

[18] Halmai, p. 127.

[19] Repertorium, p. 35-36, 61.; Joó, Gy., *The operation of the institute*. Yearbook 1927, p. 34-46 Cf. 155. Resolution of the Governing Committee – based on the proposal of Gyula Joó – against the dissolution of the state examination boards (VKM- rendelkezés/Provision of the Minister of Religion and Public Education). Resolution of the Diocesan General Assembly (No. 48) and the Universal Convent (No. 160/1928) to the same effect. Proposition of the Education Board to the Synod on strengthening the existence of the Law Academy. Decree of the Synod: It can only be dissolved if other denominations also dissolve their law academies. The resolution of the Diocese on the mandate of the General Assembly representative of the Law Academy.

[20] Repertorium, p. 191. Joó, Gy., *The operation of the institute.* Yearbook 1940, p. 13-25. It describes the act ordering the establishment of Miklós Horthy University terminating years 3 and 4. However, it was temporarily reinstated by Decree 24724/1940 of VKM. Joó, Gy., *Memorandum in the cause of the college in Kecskemét*. Yearbook 1940, p. 25-33. On behalf of the presidency of the Universal Convent, in a note to the VKM, an administrative faculty or college in Kecskemét was asked for – as compensation – because of the college degraded into a law preparatory course. It was estimated that the city had been contributing 1,350,000 Pengő since 1874 to the maintenance of the institute.

sity of Szeged, but to suspend it temporarily. At the same time, according to the act only two years were allowed to operate in law academies, the system of which and the first two basic level examinations had to correspond to the those of the state law faculties, but after that studies were supposed to be continued at one of the university law faculties.[21] However, this provision was not implemented and the four-year training permit was extended year by year during World War II.

Epilogue: the 1944-49 period

From the 1941/42 academic year onwards, there was a law to provide that law academies were allowed to be operated with only two years, and that the studies had to correspond to the study schedule of the first and second years of universities. However, that could not be put into practice. The act on the nationalization of schools mentioned law academies only as anachronistic institutions. Finally, the Government Decree 4105/1949 Korm. announced the dissolution of the – already state-owned – law academies of Eger, Kecskemét and Miskolc, with effect from 3 August.

The academic staff was formed on a temporary basis, and lectures began for the students who applied on 15 December 1944. The academic staff entrusted the office of dean to László Révész J.D. In the academic year 1948/1949 law academies had more and more difficulties, especially in terms of politics, and it did not come as a surprise, when in the summer of 1949 the three law academies together with the Law Faculty of the University of Debrecen were dissolved. The reason for these measures was that there were too many law faculties, which ultimately and to some extent was true and correct. However, the number of students was far from as large as would have been expected. For the few students, the remaining three faculties of law really proved to be sufficient in the then prevailing circumstances. Very few young people wanted to study law then because they did not want to hold judicial, prosecutorial, or similar post afterwards, because these meant solving not legal, but political tasks in the spirit of party politics. "With politics becoming more intricate, legal studies also became more complicated."[22]

On June 16, 1948, the Hungarian Parliament began debating an epoch-making bill. This very day, on behalf of the Public Education Committee, József Bognár, a Smallholder Party representative, submitted a proposal to the House, according to which maintenance of non-state schools had to be taken over by the state.[24] Under Act XXXIII of 1948 and Decree 198.996/1948 (VI. 1.) Okm. of the Ministry of Public Education, the state took over the Academy of Law. With the exception of church-owned property, all movable and immovable property came under the ownership of the state, and the academic staff was transferred to state employment status.

In 1948, together with other denominational schools the Kecskemét Law Academy was nationalized. Under the leadership of Dean Ferenc Réthey, it continued to operate as a state Law Academy. The institute was eventually dissolved only by Decree 4105/1949. /134/ Korm, stating the following: "The Eger State Law Academy, the Kecskemét State Law Academy and the Miskolc State Law Academy cease to operate on the 30th day of August 1949." However, the Ministry of Religion and Public Education ensured that the students at the institute were admitted to the faculty of law of any university…

[21] Repertorium, p. 12; Cf. STIPTA, I., *Two hundred years of Hungarian legal history*. Pólay Elemér Foundation. Szeged, 2015, p. 151-153.

[22] RÉVÉSZ, L., *Complicated decades. Biography until the end of January 1957*. Typescript. [without date and place] Bács-Kiskun County Archives of the Hungarian National Archives XV 43 d. No. 69 Without date, p. 10. Eleonóra KOVÁCS 2018, p. 94.

[23] The Journal of the Parliament convened for the 16th of September, 1947 Vol. IV, Budapest, 1947, p. 447.

History of Constitutions and the Organization of Constitutional Courts in Kosovo

*Bashkim Rrahmani**

Abstract

Three constitutions determined the power of state authorities, state institutions, its political and judicial status and its inner developments during half of a Century. Consequently judicial review was developed based on these three constitutions. These constitutions were adopted in different socio-political circumstances: the first one equalized position of Kosovo within the federation; the second one was a basis of a unique system – parallel system during the dissolution of federation and the third one served as a basis for creating the state of Kosovo. In the same way the judicial review was developed, since these constitutions regulated the issues of judicial courts and the judicial review. The author of this paper, using the method of political analysis, method of legal analysis, method of historical analysis, etc., analyzes Kosovo constitutions, circumstances on which these constitutions were adopted and judicial courts and their historical role of Kosovo development.

Keywords: *Kosovo; constitution; court; judicial review; system; history; constitutional framework.*

1. Introduction

1.1 Constitutions/constitutionalism in general

Constitution is considered to be the basic law of a state by which the main principles, structure and the main functions are determined. This can be taken as a simple definition accepted in general. Of course in theory we can find a lot more definitions about the constitution, and among them, an old one goes with "A CONSTITUTION is the fundamental law according to which the government of a state is organized, and agreeably to which the relations of individuals or moral persons to the community are determined" [1] Understanding the constitutional law as a set of norms of the highest power and applicable have existed since the Roman Empire and in the antic Athens. Even the word constitution derives from the Latin word constitution. In the Latin language term constitution by romans was used having various meanings as: order, behest, organization, the act of Imperator. *Constitutiones* were common normative acts and there was no essential distinction between constitution and lex. A soft distinction was seen in Middle Ages when vis-ŕ-vis constitution the term *lex fundamentalis* appeared, which constituted an act of political and organizational importance. In this period as synonyms of constitution terms *Carta* and *Statuto* were used.[2] A constitution consists of a set of norms (rules, principles or values) creating, structuring, and possibly defining the limits of, government power or authority. Understood in this way, all states have constitutions and all states are constitutional states. Anything recognizable as a state must have some means of constituting and specifying the limits (or lack thereof) placed upon the three basic forms of government power: legislative power (making new laws), executive power (implementing laws) and judicial power (adjudicating disputes under laws).[3]

Constitutionalism is only the name of the trust which man reposes in the power of a document as a means of controlling a government. It is a legal device for the prevention of tyranny and for the protection of the rights of man.[4]

Today constitution and the rule of law have millennium tradition. Most of nowadays civilized states during the last few centuries have strengthened political systems, economy, culture, constitutionalism and rule of law. Cicero learned a syntagma from Plato which in Latin form was accepted in XIII Century by the English Supreme judges and this is that people cannot be above entrenched laws.[5]

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1 BORGEAUD, CH., *The Origin and Development of Written Constitutions*, The Academy of Political Science. https://www.jstor.org/stable/2139444?seq=1#metadata_info_tab_contents, (21. 03. 2021).

2 OMARI, L., ANASTASI, A., *E Drejta Kushtetuese*, Tirana, 2017, p. 9.

3 WALUCHOW, W., „Constitutionalism", *The Stanford Encyclopedia of Philosophy* (Spring 2018 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/, (06. 03. 2021).

4 PATERSON, P., *The General Welfare Clause*, Minnesota Law Review, Br.2, Volume 30, 1946 https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1933&context=mlr, (06. 03. 2021).

5 STANOVCIC, V., *Ustavno sudstvo i vladavina prava*, Uloga i znacaj ustavnog suda u ocuvanju vladavine prava, Ustavni sud Srbije,1963-2013, Zbornik radova Okrugli sto, Ustavni Sud Beograd, 2013.

Constitutions are old institutions of law whereas constitutional courts are relatively new institutions. Two antic famous constitution makers, Lykurgus and Solon when they created constitutions for their polis Sparta and Athens, they knew that they had to leave their countries, leave their constitutions not to change and to remain written but also the founders of constitutions escape so they be driven that these legal acts to not change.[6]

A small number of rulers respected legal norms, rules and other values (religious, patriotic, family, friendship and before those who are under their ruling) and respected that array. But most of them did not respect these norms while they imposed laws to the others whereas they accepted the role of tyrant and dictator. Let us mentions some of them that adhered to norms.[7]

Hammurabi Codex was composed of old laws and new parts whereas King in a human way interpreted with religion and with the rule of law norms. When Hammurabi died the state failed and the codex trampled. Similarly the kingdom of Alexander the Great has fallen down…Moses has brought the Jews out of Egypt slavery and gave them religion and laws and this has ensured integrity and survival until now. The political capital (i.e. deliverance) did not use for his personal power and he was prototype "prototype with sword", "armed prototype". From peoples leaders he asked for consent and thus he came in front of people and asked for consent on laws (two out of his five books were dedicated laws) and in the name of the authority of God gave to the people religious lectures, reached the social agreement (covenant, i.e. ceremonial agreement, promise), consent of people, promulgation of laws, oaths and proclaimed confederalism. He did not go as the leader with people but he had well directed, he called on Egyptian customs, Jews religious learnings that have legal resource (taken from Jews, whereas from Hammurabi he took the principle of talion). Followers of Moses brought to Europeans the system of values and norms (ten commandments).

Plato and Aristotle were the first to in a systemized way exposed the theory of rule of law…Plato criticized politicians who are immoral and who do not select means: "none orator note even Themistocles and Pericles did not try to make people better." Plato disappointment on ideal statesman and on ideal state put him between philosophic progenitors idea of rule of law.[8]

2. Kosovo constitutions

2.1 Constitution of Autonomous Socialist Province of Kosovo – circumstances which brought its adoption

In its own history, Kosovo had three constitutions which were originally adopted by Kosovo Parliament, whereas in its history Kosovo had also a legal act that was not adopted by Kosovo parliament and which was not named as a constitution---it is known as the Constitutional Framework which was adopted by the Special Representative of Secretary General (SRSG).

A written constitution in Kosovo in sense of what we understand with the constitution we see for the first time in 1974. Until then the highest legal act in Kosovo was its statute. But the constitutional position of Kosovo within the federal system of former Yugoslavia started to change with the amendments in the 1963 constitution. Changes were imposed by many political movements that appeared after fall of Aleksandar Rankovic and after the demonstrations held in many towns in Kosovo, Macedonia and in Monte Negro. During these demonstrations Albanians expressed their requests for equality within Yugoslavia and for the equal constitutional position of Kosovo within the federation. But there are also other factors and circumstances which pushed changes in the Yugoslav constitution with the amendments of 1971 that led towards the 1974 constitution.

Constitutional changes adopted in 1971 were as the result of Croatian Spring Movement whose leadership asked for changes of content of government in the three following directions: (1) independency of enterprises, reduction of the government influence in economy and free activities of economic legality, (2) democratization of the entire political system and abolition of monopoly of ruling party from all institutions of the system and (3) to determine the right to self-determination of all nations, including the right of creation of national states, republican original sovereignty, clear economic accounts between republics and the federal constitution in the basis of parity where the main decisions will be brought based on the consensus and not based on overvoting.[9] Federal Parliament, after six month public discussions, adopted amendments XX-XLII of the federal constitution, in 30 June, 1971.

With the XX amendment, point 4 socialist provinces strengthened their positions in the federation, gaining the possibility that with other republics (and with the same rights as republics) to decide with the federal affairs according to the consensus, to give their approval for changes of the RSFJ Constitution and on the other issues.[10] With this autonomous provinces in the legal constitutional view gained important elements of statehood (sovereignty), respectively the most important parts of the attributes of republic.[11] Among many intellectuals from the Serbian circle, Kosta Çavoski, an assistant at the Faculty of Law, criticized the power of virtual veto which with two amendments will give to each republic and province, a power, which he feels will paralyze whatever right change, even gradual changes in Yugoslavia.[12] In the second group of amendments (XXV-XX-

[6] Ibid.

[7] Ibid.

[8] BOSNJAK, B., Platon, Zakoni, Zagreb, 1957; *Urednistvo potpisalo "O cemu raspravlja Platon u 'Zakonima'";* "Platonova filozofija i njeno mjesto u povijesti filozofije". In: STANOVCIC, V., *Ustavno sudstvo i vladavina prava*, Uloga i znacaj ustavnog suda u ocuvanju vladavine prava, Ustavni sud Srbije, 1963-2013, Zbornik radova Okrugli sto, Ustavni Sud, Beograd, 2013, p. 121-122.

[9] SMERDEL, B., *Primjena federalnog nacela i pouke ustavne reforme iz 1971 godine*, Zagreb, 2007, p. 24-25.

[10] BUXHOVI, J., *Kosova histori e shkurtër*, Houston, 2021, p. 585.

[11] FEROVIC, A.,"*Autonomne pokrajine u savremenim ustavnim sistemima*", Prishtina, 1985, p. 255-256; BUXHOVI, J., *Kosova histori e shkurtër*, Houston, 2021, p. 585.

[12] MILLER, N., *Jokonformistët kultura, politika dhe nacionalizmi në rrethin intelektual serb 1944-1991*, Prishtinë 2019, p. 229.

VII) there were included changes that had to do with economic functioning of federation and with the economic relations in the federation. Here amongst the other, the obligatory agreement of republics and provinces was determined in concluding the international agreements with whom there were created obligations for republics and for provinces.[13] The third group of changes included amendments by which the Presidency of Federal Socialist Republic of Yugoslavia was established (amendment XXXIV) as the collective organ which was consisted of presidents of the parliaments of republics and provinces based on their positions then by two members from each republic and by one member from each province.[14] Thus Presidency in addition to the chief of state took over the rights and the duties in realizing the equality between nations and nationalities, to harmonize joint interests of republics and provinces. Following these changes, in 1973 the project constitution was put into the public discussions which lasted around half of a year. Finally the federal new constitutions was approved by the federal parliament in February 21, 1974.

These amendments were faced with strong critics and opposition of the Serbian nationalist-centralist forces which were led in a way by the Serbian intellectual circles. In fact, critics were positioned in the formulated amendments, which were treated by most popular and most devout expert in the field of law, Jovan Djordjevic. This expert criticized formulation of amendments from a weak federal center and inclusion of the right to veto of republics and provinces in the legislation.[15]

Right after this the federal units (republics and provinces) adopted their own constitutions. Only few days after the federal constitution was adopted, the Kosovo Parliament adopted the first Kosovo Constitution on February 28, 1974. Thus Kosovo for the first time gained the constitution by which in an independent way regulated socio-economic and political relations, of course, upon the basis of unique socio-economic and political system of Yugoslavia. In this way Kosovo gained the right to independently organize organs of province and to determine the rights and the duties together and reciprocally relations.[16] The year 1974 was the zenith of Albanian national interests, at least for the theory of the constitutional law.[17] With these changes the real sovereignty of republics and provinces was created over their natural wealth (property) and over the incomes that are product of common work of determined republics and/or provinces with what it could be said that there were created real circumstances for creating "eight national economies" which as the consequence had the re-organization of the federation od "eight equal units", among them Kosovo as well.[18] This is a constitution which brings the provinces in an equal position in the federation even though there were differences which were more of formal character rather than of a material character. Kosovo is now represented in the federal state organs in an almost similar way like other federal units were. Finally in this constitution, as noted by Noel Malcolm, were included series of amendments adopted in 1971: they gave to the autonomous provinces the status equal to the republics in various form of decision making for economic issues, and even in some fields of foreign politics. Amendment XXXVI determined that the Yugoslav Presidency was a collective body with two representatives of each republic and with one representative from the autonomous provinces.[19] The other connoisseur of Yugoslav circumstances, underlines that, regarding the politics, the highest point was 1974 year, when new Yugoslav Constitution re-determined the position of Kosovo within the Yugoslav state. Kosovo remained part of Serbia, but it was almost total federal entity: it had its national bank, parliament, government and police and thank to the growing Albanialism and the bigger number of qualified Albanians to work, Albanians had more or less the total control of Kosovo. Apart of their Assembly, its MPs had their seats in the federal parliament and the Serbian parliament.[20] But changes made with the constitutional changes and the 1974 Constitution were not well accepted by the Serbian Intellectual circle. They were indeed hardly opposed by the person sometimes known as the father of the Serbian nation, Dobrica Cosic and the other known intellectuals of that time. The Constitution of 1974, many have thought have by purpose angered Serbs and damaged their interests.[21] In this spirit, in a discussion, Dobrica Cosic stated:

> Risk, believes Cosic, was that decentralization of power in Yugoslavia will result with localisms which will "accept old ideologies defeated by revolution" by which, he clearly alluded the Croatian nationalism incarnated by Ustash, Serbain nationalism of cetnik movement and other nationalisms, defeated by partisans in the Second World War".[22]

However, new constitution at the federal level was adopted and it was followed by the adoption constitutions of other federal units of the federation. And indeed these were the last constitutions of the Yugoslav federation which was unfortunately dissolved through an un-consensual process with lots of devastations and victims which were not seen in the Europe since the World War II.

2.2 Kosovo 1974 Constitution – content

In the text bellow, there will be presented the main issues related to the Kosovo status and its inner regulation. This con-

[13] BUXHOVI, J., *Kosova histori e shkurtër*, Houston, 2021, p. 585.
[14] Ibid.
[15] MILLER, N., *Jokonformistët kultura, politika dhe nacionalizmi në rrethin intelektual serb 1944-1991*, Prishtina, 2019, p. 228.
[16] BUXHOVI, J., *Kosova histori e shkurtër*, Houston, 2021, p. 586.
[17] MALCOLM, N., *Kosova një histori e shkurtër*, Tirana, 2001, p. 340.
[18] MIRIC, J., *Sistem u krizi*, Zagreb, 1984, p. 14-32. In: BUXHOVI, J., *Kosova histori e shkurtër*, Houston, 2021, p. 586.
[19] MALCOLM, N., *Kosovo një histori e shkurtër*, Tirana, 2001, p. 341.
[20] JUDAH, T., *Kosova çfarë duhet të dijë secili*, Prishtinë 2020, p. 95-96.
[21] MILLER, N., *Jokonformistët kultura, politika dhe nacionalizmi në rrethin intelektual serb 1944-1991*, Prishtina, 2018, p. 249.
[22] Ibid, chapter 6.

stitution is consisted of 402 articles divided into 16 chapters whereas the basic principles are given in the first part of the text and in Roman numbers, totaling with ten where the tenths says: "by expressing the basic principles of the socialist self-governing society and its advancement, this part of the constitution is the basis and direction for interpretation of constitution and the laws, as well as for the deeds of all and each".[23] Before describing and explaining chapters and the main articles of the constitution, it is important to present the following article

> Autonomous Socialist Province of Kosovo is autonomous socialist, socio-politic, democratic and self-governing society of working people and citizens, Montenegrins, Muslims, Serbs, Albanians, Turks and members of nations and nationalities and other equal ethnic groups, based on the power and the self-governance of working class and all working people.[24]

This act, which is always said to be the highest legal and political act of a country, sanctioned socio-economic and socio-politic relations of socialist nature, which was quite different from the countries from the so-called communist bloc. This is a very broad constitution which also sanctions the ideology of the system build by famous communist leader Josip Broz Tito, a system that right after Tito death started to demolish itself, inward. In fact even before the adoption of the 1974 federal constitution and other constitutions of the federal units, in Serbia there were strong opponents, who opposed this process of democratization of reports within the federation. However, Kosovo was governed based on this constitution until 1989 when constitution was changed forcefully which noted the beginning of the dissolution of former Yugoslavia.

2.3 Kosovo Institutions based on 1974 Constitution

Assembly of Autonomous Socialist Province was the highest organ of self-governance in Kosovo. It was consisted of three chambers: chamber of associated work which had 90 members; the chamber of communes with 50 members (delegates) and socio-political chamber with 5o members.[25] The constitution has assigned 25 specific duties with the possibility to add more to these. Thus, exclusively and directly: - decides on changes of the Autonomous Socialist Province Constitution, it gives the consent for changes of the federal and the Serbian constitution.[26] This provision shows a specific position of Kosovo and indeed a unique position of it within the federation. Kosovo could change its constitution by its own decision for changes whereas the federal and Serbian constitutions could not have been changed without the consent of Kosovo Assembly.

Constitution further assigns to the Assembly the authority to decide on basic issues of importance for political, economic, and cultural as well as for people defense and the social development of province; assembly adopts laws and makes the authentic interpretations of laws; adopts the social plan, budget; adopts the regional plan and the development plan of Kosovo surface; reviews issues in the field of foreign affairs, gives consent on international treaties in cases foreseen with the federal constitution, ratifies treaties which are concluded by province with international organs and organizations within the framework of foreign policy determined by federation and international treaties; determines proposals respectively gives consent on regulation of relationships upon which the federal parliament based on the proposals of the assembles of republics and provinces; constitutes and suppress the organs of administration of province who exercise duties in the interest of province and determines the basis of their organization and their field of activities; declares the referendum; makes the political control on the work of government and administrative organs of province and the carriers of public functions, annuls disposals of the government[27] and other organs which are not in accordance with the law or in accordance with the other general acts of the Assembly; it reviews opinions and proposals of the constitutional court on realizing the constitutionality and the legality and makes its attitudes about them; gives consent on changes of the territories of Autonomous Socialist Province of Kosovo; elects and revokes Kosovo delegation in the Chamber of Republics and Provinces in the federal parliament; elects and revokes the member of the federal presidency from Kosovo; elects and revokes the members of Kosovo presidency; and other duties which are characteristic for the parliaments.[28] The composition of chambers were determined by: delegates for the chamber of associated work were elected with the secrete vote taken in the chambers of associated work of communes. These delegates were proposed from their composition, from working people, from people who worked in the field of agriculture, etc. The list of candidates was determined by a political organization known as Social League of working people. Delegates for the chamber of communes were elected by the delegates of the local societies of the commune assembles with the secrete vote. The list was determined by Social League of working people. Delegates for the socio-political chamber were voted in the socio-political chamber of the commune assembly.[29]

Regarding the Kosovo Assembly, in the field of legislation, the following could be as summary: 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 limited with the ex-

[23] See X principle of the Constitution.
[24] Article 1, par.1 of the Constitution of the Autonomous Socialist Province of Kosovo, Official Gazette nr.4, year XXIX.
[25] Ibid, articles 300 and 302.
[26] Ibid, article 301, paragraph 1.
[27] The word government is used by the author of this paper for the organ which was named Executive Committee of Kosovo Assembly, which should be understood as the government.
[28] For the competences and the duties of the Autonomous Socialist Province of Kosovo see article 301 of the Constitution, Official Gazette, Nr.4, year XXIX.
[29] See articles: 304, 305, 306 and 307 of the Autonomous Socialist Province of Kosovo, Official Gazette, Nr.4, year XXIX.

ception in the cases which had to be covered with the federal laws.[30]

An important organ based on this constitution was Kosovo Presidency as a collective organ which reviewed issues of political, economic, social and cultural importance, it realizes equality between nations and nationalities and other issues regarding further social and self-governance development in all fields of social life and it takes initiatives to be reviewed in the Assembly and in the other organs and organizations, it reviews general issues of cooperation of province with other republics and with the Autonomous Socialist Province of Vojvodina, declares amnesty in accordance with the law, etc.[31]

Executive Council of Province is executive organ-government of province. It monitors the situation and the realization of the policies, of the Assembly and proposes to the Assemble determination of policies, proposes laws and other disposals, proposes to the assembly the social plan and Kosovo budget, adopts decrees, takes care on the realization of policies and on the realization of general acts of Assembly, determines main principles of inner organization of the province administration, forms the professional services, appoints and discharges officials, etc.[32] The work of executive council, its composition, election and other assignments of this executive organ, is further regulated with the articles 352,353,354,355,356,357,358,359,360 and 361. As a conclusion for the Kosovo Executive organ (government) was an organ who 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.[33]

In order to exercise the duties of the administration within the province competences there were created secretariats and the other organs of administration. Administrative organs of province were independent in doing their job, based on the constitution and laws. Province secretaries and other functionalities who led the organs of administration were elected and discharged by the Kosovo Assembly. Thus the work of the organs of administration was regulated with the articles 362-371.

Chapter XVI of the constitution regulates the issue of the Kosovo Supreme Court, which was responsible to decide on the appeals against decisions which were taken by the regular courts[34]; Public Prosecutor uses legal means on the issues for what responsible is the Supreme court as the highest court in Kosovo and it exercises other works determined by the law.[35]

2.4 Parallel system and the Constitution of 1990

This is a constitution which was adopted after the Declaration of the Independence by the Kosovo Assembly.

The Declaration of Independence also was adopted by the Kosovo Assembly in front of the Assembly Building, since due to the obstructions made by Serbian official politics, in an unconstitutional was, it was made impossible for Kosovo MPs to enter into the building and hold the meeting in the Assembly building and its rooms. This was the time, when actually the ruining of the Yugoslav Federation started. Since that process was obvious and since the attributes of the Province were taken over by Serbia with the imposed changes in the Constitution of 1974, the Kosovo Assembly with the Declaration of Independence positioned itself, and Kosovo as well, in a negotiating position for the future of the federation. However, on July 2, 114 MP out of 128 Albanian MPs gathered in the street in front of the closed Assembly and promulgated a resolution for declaring Kosovo "as an equal and independent entity within the Yugoslav Federation." This voting like the voting of March 23, 1989, maybe was invalid, for the procedural reasons, but it was at the same time an unexpected signal and symbolically strong.[36] It is important to underline that at the same date, on July 2, a referendum was organized in Serbia by which new Constitution of Serbia was adopted, by which all prerogatives of Kosovo and Vojvodina were taken off. Paradoxically, at the same date Slovenian Parliament adopted a very similar declaration.[37] This Declaration [Kosovo Declaration] was modest initially by notifying further existence of Kosovo within Yugoslavia as an equal constitutional unit. It expressively said that Kosovo would respect federal constitution, and not the unilateral changes which were made by Serbia. The Declaration annulled the decision of 23. 03. 1989 by which it was pretended that virtually it was legitimized the extinguishing of the autonomous status of Kosovo.[38]

In this regard, few months after the Declaration Kosovo Assembly gathered in Kaçanik (not in Prishtina that is Kosovo capital) and adopted the new Kosovo Constitution known as the Constitution of the Republic or the Constitution of Kaçanik. Many of the Albanian MPs who took part in the voting for the Declaration of July 2, organized a meeting in Kaçanik, in secrete circumstances.[39] This constitution with its disposal is not an ideological constitution as it was the previous one. But in comparison to the Constitution of 1974, the Constitution of Republic of Kosovo of the September 7, 1990 contains a short text, which determines a total political and constitutional independent organization of Kosovo.[40] By 1991, Kosovo's Albanian

[30] RRAHMANI, B., Kosovo Judicial Position from the Second World War until 1974. In: *Journal of European History of Law,* vol. 11, Nr.1, 2020, p. 179.
[31] Article 340, Constitution of Autonomous Socialist Province of Kosovo, Official Gazette, Nr.4, year XXIX.
[32] Ibid, articles 349, 350.
[33] RRAHMANI, B., Kosovo Judicial Position from the Second World War until 1974. In: *Journal of European History of Law,* vol. 11, Nr. 1, 2020, p. 179.
[34] Article 390 of the Constitution of the Autonomous Socialist Province of Kosovo, Official Gazette nr.4, year XXIX.
[35] Ibid, article 392.
[36] MALCOLM, N., *Kosova një histori e shkurtër*, Tiranë, 2001, p. 361.
[37] DUFOUR, P., *Kosova paqja e shpërfillur*, Prishtinë, 2010, p. 36.
[38] WELLER, M., *Shtetësia e kontestuar,* Prishtina 2011, p. 89.
[39] MALCOLM, N., *Kosova një histori e shkurtër*, Tiranë, 2001, p. 361.
[40] BAJRAMI, A., *Sistemi Kushtetutes i Republikës së Kosovës*, Prishtina, 2014, p. 60.

political elites had already drafted and adopted the so-called Kaçanik Constitution after a declaration of independence in the process of the dissolution of rump -Yugoslavia dominated by Milosevic. Due to the efforts of the international community to stop the ongoing war in Croatia and to prevent the outbreak of war in Bosnia and Herzegovina these legal acts were simply ignored despite the fact that they had been adopted in a democratic and peaceful way in reaction to the abolition of the territorial autonomy and the establishment of an unconstitutional regime of discrimination and violent suppression of Albanian speaking citizens by Serb state authorities-so these authorities could no longer be qualified as "representing government" in the legal terms of the Friendly Relations Declaration of the UN.[41]

The constitution which was adopted in Kaçanik was amended once. Thus, Kosovo Assembly in October 19, 1991 adopted Amendment I, by which the Republic of Kosovo is determined as the sovereign and independent state and with the Amendments II-VI the institution of Kosovo Presidency was replaced with the institution of the President of Republic as an individual organ and then the competences were transferred to the Kosovo Government until the end of the extraordinary measures end.[42] Now this constitution determines Kosovo as "democratic state of Albanian nation and parts of other nations and the national minorities, its citizens; Serbs, Muslims, Montenegrins, Croats, Turks, Roma and others that live in Kosovo".[43]

Most of MPs who took part on the session where the Constitution was adopted were forced to escape from Kosovo since they faced the risk of being arrested by Serbian police or military forces that were present in Kosovo. Indeed Serbian official politics considered this Assembly to be illegal. Hence only few MPs stayed in Kosovo and the others went to Macedonia, Albania, Slovenia and elsewhere.

Finally on May 24, 1992 Kosovo Albanians held presidential and parliamentary elections[44] which were won by Democratic League of Kosovo. Then Rugova was directly elected as the President of Kosovo. The Kosovo Government was created led by Bujar Bukoshi. This government that functioned in exile, in Germany, approached the Kosovo diaspora especially in Germany, Switzerland and Sweden for big financial help. These means were used to keep the administrative parallel system in Kosovo.[45] The parallel system existed in various forms and in various content until 1999.

It is worth mentioning that this constitution underwent through some changes where the institution of president was included with these changes. Before the changes, Kosovo, according to the Constitution had its presidency which was the main representing organ of Kosovo. The Kosovo Presidency was responsible for people defense and it would lead the resistance of people in the war. It adopts the degrees in the direct risk of war or during the war; with decrees it may suspend some constitutional disposals regarding the human rights; it decides in some affairs of foreign policy and international relations; with the agreement with the political parties it proposed to the Kosovo Assembly candidate for Prime Minister; proposes to the Assembly the candidates for the president of the constitutional court and the judges for this court and it exercises some other functions of a ceremonial character.[46]

2.5 UNMIK and Constitutional Framework

The expression constitutional framework is not enough known in constitutional theory and practice. This act was adopted by the Special Representative of Secretary General in form of a regulation. However this act is of a constitutional nature and aims to determine the basis of the constitutional order of Kosovo during the international civil administration. The legal basis of this document are found in the UN Security Council Resolution 1244, which like the resolution was foreseen to be of a short duration. This document originally was titled as Constitutional Framework for provisional self-government in Kosovo. This document was signed by the SRSG (Hans Haekkerup) on May 15, 2001. The Constitutional Framework on Interim Self-Government in Kosovo describes the institutions which will be put in the hands of Kosovo's leaders and civil servants after general elections, on 17 November 2001.[47] This is a truly historic document: It will guide the people of Kosovo toward the establishment of democratic structures, and its successful implementation will greatly assist the process of determining Kosovo's final status.[48]

This important document of constitutional nature has a relatively long preamble which says

> … Acknowledging Kosovo's historical, legal and constitutional development; and taking into consideration the legitimate aspirations of the people of Kosovo to live in freedom, in peace, and in friendly relations with other people in the region… Considering that gradual transfer of responsibilities to Provisional Institutions of Self-Government will, through parliamentary democracy, enhance democratic governance and respect for the rule of law in Kosovo… Recognizing the importance of creating a free, open and safe environment which facilitates the participation of all persons including all members of Communities in the process of establishing democratic institutions of self-government…[49]

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41 MARCO, J., The New Kosovo Constitution in a regional comparative perspective. In: *Review of Central and Eastern European Law,* 33, 2008, available at http://www.observatori.org/paises/pais_55/documentos/The%20New%20Kosovo%20Constitution%20in%20Regional%20Comparative%20Perspective.pdf, (08. 03. 2021).

42 BAJRAMI, A., *Sistemi Kushtetues i Republikës së Kosovës*, Prishtina, 2014, p. 55.

43 Article 1, Kosovo Constitution of September 7, 1990.

44 JUDAH, T., *Kosova çfarë duhet të dijë secili*, Prishtinë 2020, p. 112.

45 WELLER, M., *Shtetësia e kontestuar*, Prishtina, 2011, p. 90.

46 See more, article 108 of the 1990 Constitution.

47 BAJRAMI, A., *Sistemi Kushtetues i Republikës së Kosovës*, Prishtina, 2014, p. 76.

48 See Constitutional Framework for the Provisional self-government in Kosovo, UNMIK Regulation nr.2001/9, 2001.

49 Ibid, Preamble.

The Constitutional Framework is divided into 14 chapters. Thus according to this document, Kosovo is an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes.[50] Under this chapter (1) the following is also regulated: Assembly, President of Kosovo, Government, courts and other bodies and institutions set forth in this Constitutional Framework. Chapter 2 gives Principles to be Observed by the Provisional Institutions of Self-Government; chapter 3 regulates the issue of human rights and under this chapter there are included several international documents which are to be directly applicable in Kosovo and they are: (a) The Universal Declaration on Human Rights; (b) The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (c) The International Covenant on Civil and Political Rights and the Protocols thereto; (d) The Convention on the Elimination of All Forms of Racial Discrimination; (e) The Convention on the Elimination of All Forms of Discrimination Against Women; (f) The Convention on the Rights of the Child; (g) The European Charter for Regional or Minority Languages; and (h) The Council of Europe's Framework Convention for the Protection of National Minorities.[51] Special Chapter is dedicated to minorities whom is ensured a special protections. This chapter is very broad including 6 paragraphs where paragraph 4.4. is divided into 16 points presented in an alphabetic order.[52] Chapter 5 titled Responsibilities of the Provisional Institutions of Self Government is even broader which describes the responsibilities of the Provisional Institutions in specific fields starting with economic and financial policy and ending with the Directing and coordinating fire and rescue services in close cooperation with the municipalities. Thus there are given 47 fields of the responsibilities which are divided into 8 groups.[53] Chapter 6 deal with the law and order whereas chapter seven deals with the Kosovo Protections Corps. The very important chapter of the constitutional framework is chapter 8. With this chapter there are given the authorities which were entrusted to the SRSG which were known as the reserved power. The scope of such an authority is all-encompassing, as it gives the SRSG complete control over the legislature, the executive and the judiciary of Kosovo.[54] The first regulation adopted by UNMIK (better known as the "Mother of all Regulations") reinforced the SRSG's preeminence in Kosovar politics, stating that "all legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the SRSG" (UN 1999a, Sec. 1, Art. 1).[55] Chapter 9 of the constitutional framework, titled Provisional Institutions of Self-Government, regulates the work of the Assembly which is consisted of 120 members, where One hundred (100) of 120 seats of the Assembly shall be distributed amongst all parties, coalitions, citizens' initiatives, and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly[56]. In addition to this, twenty (20) of the 120 seats shall be reserved for the additional representation of non-Albanian Kosovo Communities, and from these seats 10 were reserved for the Serb Communities and other ten for the other communities as Turk, Roma, Ashkali, Egyptian, Gorani, and Bosniak communities.[57]

Section 2 of this chapter determines the position of the Kosovo President who shall represent the unity of the people and guarantee the democratic functioning of the Provisional Institutions of Self-Government and who shall, in coordination with the SRSG, represent Kosovo and exercise his rights and duties in accordance with the provisions of this Constitutional Framework and the applicable law.[58] Section 3 of this chapter is dedicated to the work, competences and the way of creation of the government. Section four deals with the judicial system, ascribing the court structures, court proceedings, judges and prosecutors. Ombudsperson shall give particular priority to allegations of especially severe or systematic violations, allegations founded on discrimination, including discrimination against Communities and their members, and allegations of violations of rights of Communities and their members.[59] Further the constitutional framework in chapter 11 talks about independent bodies and offices. Then, in the chapter 12 titled Authority of SRSG gives the following: the exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244(1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244(1999) or this Constitutional Framework[60]. With the final chapter 14 the supremacy of the power of SRSG is stressed out, which goes as: In case of conflict between this Constitutional Framework and any law of the Assembly, this Constitutional Framework shall prevail.[61]

[50] Chapter 1. under 1.1.
[51] Ibid, Chapter 3.
[52] Ibid, Chapter 4.
[53] Ibid, Chapter 8.
[54] FRIEDRICH, J., *UNMIK in Kosovo: Struggling with Uncertainty*, Max Planck UNYB 9, 2005, https://www.mpil.de/files/pdf2/mpunyb_friedrich_9_225_293.pdf, (01. 03. 2021).
[55] This regulation drew on the Report of the Secretary-General on the UNMIK, 12 July 1999 (UN 1999 b). His competencies will later be defined by the Constitutional Framework for Provisional Self-Government, which clarifies the relation between UNMIK and the local institutions instituted by the international mission (UN 2001, chapter 8). In: LEMAY-HEBERT, N., *State-Building from the Outside-In: UNMIK and Its Paradox*, https://jpia.princeton.edu/sites/jpia/files/2009-4.pdf, (28. 02. 2021).
[56] Chapter 9, P. 9. 1. 3, point A of the Constitutional Framework, UNMIK Regulation nr.2001/9, 2001.
[57] Ibid, point B.
[58] Ibid, 9. 2. 1 and 9. 2. 2.
[59] Ibid, Chapter 10.
[60] Chapter 12, Constitutional Framework, UNMIK Regulation nr.2001/9, 2001.
[61] Ibid, 14.1.

3. Judicial review in general

Various systems of judicial review could be mentioned in the comparison theory and in the practice. All post-communist countries in CEE have constitutional courts: Some were established earlier (in Poland, for instance, the existence of the Constitutional Tribunal preceded by a few years the round table talks and the democratic transition), others—later (for instance, in Ukraine and Latvia constitutional courts became operative only in 1996).[62] In this regard Kosovo has its own Constitutional court, which was founded in 2009 and which will be elaborated further in the text. But the ideas of the constitutional justice until the first half of XX century were not realized in Europe with the exception of cases of Austria and Czechoslovakia, who under the influence of the famous jurist Hans Kelsen, sanctioned for the first time, creation of the constitutional court.[63] Kelsen[64] himself has noted that the creation of Constitutional courts charged with the control of constitutionality of laws is totally in accordance with the theory of division of powers. Austria was the first state that established a constitutional court. According to the Austrian Constitution, Constitutional Court as the competence had annulment of unconstitutional decrees and illegal law (federal or federal units). It had the right to decide about the violation of international law acts, about the appeals against administrative acts, appeals regarding elections in the federal parliament, for solving disputes about competences between administrative organs and courts, etc.[65]

The case Marbury vs.Madison[66] notes the first case which established the judicial review and indeed this case became a precedent based on which the system of judicial review was build up in many countries, including Canada, Australia, New Zealand and also in many countries of Europe. In the United States of America the control on constitutionality (judicial review) is done by the regular courts where the top position is held by the Supreme Court, whereas in Europe and out of it the system of judicial review was accepted and developed. Of course there were supporters as well as opponents of this system of the court control over constitutionality. Not all countries of the world have established constitutional courts. In this regard, it is known that Great Britain, one of the most advanced democracies in the world, has no constitutional court. In Great Britain it is thought that the best control could be done by the parliament, whereas there are others that consider that the constitutional courts are not needed for the review of legislation if it is in accordance with the constitution. "Parliament is supreme and court may strike down a law that it passes. As the second Earl of Pembroke is supposed to have said, 'A parliament can do anything but make a man woman and a woman a man'". All that prevents Parliament from acting contrary to the (unwritten) constitution of Britain are the consciences of its members and the opinion of the citizens.[67] On the other side, among the countries that practice the court review of legislation there are noted various forms of defending constitutionality and legality, as follows: protection of constitutionality by the representative organs; protection of the constitutionality by the regular courts; protection of constitutionality by a special constitutional organ; and protection of constitutionality by the constitutional courts. It is almost always that issues raised in the court, from their nature are to certain extent political. But this doesn't mean that the constitutional courts have to decide politically. In practice, however in concrete cases, sometimes is difficult to assess what is political and what is juridical issue because every legal-judicial question caries certain political consequences according to addressee provisions. This derives from the nature of constitution as the legal-political act based on what the decisions are made, and that represents peculiar "linkage between politics and law"(Luhman).[68]

Opinions could be divided about which system is more supported or is more to be supported. But one thing is very clear regarding the countries in transition or in the countries of democratic consolidation. And period of democratic consolidation cannot be though without constitutional courts, as Tom Ginsburg says

> In the process of democratic consolidation, constitutional courts can play various roles. (1) they could be agents of the past who contest democratic processes by making efforts to save the politics of old authoritarian regime which are leav-

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62 SADURSKI, W., *Judicial Review in Central and Eastern Europe: Rationales or Rationalizations*?, International Law Forum of the Hebrew University of Jerusalem Law Faculty, 2010.

63 OMARI, L., *Ndarja e pushteteve dhe pavarësia e institucioneve kushtetuese*, Tirana, 2011, pg. 120-121.

64 Kelsen is considered to be one of the most remarkable lawyers of the XX Century. Kelsen was the compiler of the Austrian Constitution which entered into force in 1920. He was nominated as the judge of the Constitutional Court of Austria. Kelsen doctrine, known as a model of creation of the modern European judicial review, was later used in the Federal Republic of Germany, Italy, Spain, Portugal and in many other countries of the Central and Eastern Europe.

65 SADUSHI, S., *Drejtësia kushtetuese në zhvillimi*, Tirana 2012, p. 81.

66 William Marbury was a Federalist partisan whose name would have long since disappeared from U.S. history if it were not for a piece of paper he didn't receive on the night of March 3,1801. Just before leaving office, President John Adams appointed fifty-eight new federal judges. Secretary of State John Marshall worked furiously into the night to get formal appointment papers delivered but even with the help of his brother was unable to deliver four commissions. The four became known as the "midnight judges" and William Marbury was among them. When on the morning of March 4 Thomas Jefferson took the oath of office of president, he was clearly angered by the efforts on the Federalists to pack the federal bench. His secretary of state, James Madison, therefore, refused to deliver the appointment papers. Marbury filed suit with every expectation that he would receive a favorable decision. After all, the John Marshall who had been secretary of state was now the chief justice of the United States. Moreover, Marshall was known as a staunch Federalist and a leading opponent of the dangerous radical Thomas Jefferson. Alas, for William Marbury, he never became a judge. Marshall's opinion skillfully finessed the politics of the case by asserting a critical principle: federal courts have the authority to declare laws passed by Congress as unconstitutional. (See more at: NEUBAURER,D. W., *Judicial Process*, Second edition, Fort Worth, 1997, p. 52.

67 WILSON, Q,W., DILULIO,J,J., *American Government*, Seventh Edition, Boston-New York 1998, p. 439.

68 VRBAN, D., *Uprava, dobro vladanje i autopoiesis, Hrvatska i komparativna javna uprava*, 2-2011, p. 419. In: ANTIC, T., *Reagiranje Ustavnih sudova na negativne kritike njihovih odluka*, Prethodno znanstveno priopćenje, UDK 342.565.2, p. 51.

ing, (2) could be agents of the future, who actively take part in the transformation of political order and encourage democratic consolidation, (3) constitutional courts in the procedures of democratic consolidation can take the passive role of observer, who neither push nor oppose the democratic consolidation.[69]

In favor of the court control of constitutionality there were many followers of it (like Kelsen, Djakometi, Bruner, etc) who underline numerous arguments in this regard and among the other two main principles: principle of hierarchy and the principle of legality.[70] According to the principle of legality the laws are promulgated by the parliament and they are formally and materially in accordance with the constitution. But it could happen that they are not and in these cases there should exist a court control who will make a control and who will come up with the sanctions against this. Principle of hierarchy also finds that there is a mechanism which has to ensure the accordance of the lower acts with the upper ones, and that mechanism should be a mechanism of court control. From the political viewpoint, constitutionality identifies the constitution with a big social pact. This meaning about the constitution and its supremacy have formed one of the main reasons for the debate on changeability of constitution, a debate which had accompanied the entire history of constitutions.[71]

In the types of judicial review procedures, there also could be noted various forms of review as, abstract control, incidental control, preventive control, the control of international agreements, etc. In this regard, Kosovo as a new state has managed to create the Constitutional Court, which will be presented bellow.

3.1 Kosovo Constitutional Courts and judicial review over the decades - from the last to the first

In its history Kosovo, even when it was part of former Yugoslavia had its own constitutional court, which indeed is quite different compared to the current one. A description of the process of development of this court is presented in the web page of the constitutional court. Based on this, historically, Kosovo as a federal unit of the former Yugoslav Federation exercised constitutional control through its Constitutional Court. Although, the first Constitutional Court in Federal Yugoslavia was established as early as in 1963, due to political and social situation the constitutional control in Kosovo began to be exercised only in 1969.[72]

The Kosovo position within the constitutional system of former Yugoslavia changed from a phase to the other and thus the system of courts as well as the control of constitutionality changed accordingly. Based on the Constitutional Law of the Socialist Autonomous Province of Kosovo (SAPK) initially was established the Constitutional branch of the Judiciary within the Supreme Court of Kosovo. The extension of provincial legislative functions following the constitutional amendments of 1971 also influenced on a broader organization in the protection of constitutionality and legality. In this regard, the amendment X of the Constitutional Law of SAPK established the Kosovo Constitutional Court as an independent authority for protection of constitutionality and legality, which had the same position and functions as other constitutional courts of republics in the former Yugoslav Federation.[73] During the process of the dissolution of Yugoslav federation, Kosovo with its governing institutions positioned itself towards its future opposing the actions the Serbian regime which were undertaken on that time. And, it is known that the process of devolution of Yugoslavia was initiated from Serbia which led to the war and atrocities which were not seen in Europe since the World War II. With the efforts of building its future, Kosovo Assembly adopted a constitution which has to be known as the second constitution of Kosovo. This is known as the Kaçanik Constitution. The Constitution of Kaçanik of 1990, also provided for the establishment of institution of the Constitutional Court as guarantor and protector of constitutionality and legality, which due to the abolishment of the Kosovo autonomy and establishment of the Serbian rule over Kosovo, it was never constituted.[74] After NATO air strikes attacks against military forces of Serbia (Federal Republic of Yugoslavia - FRY), an agreement between FRY and NATO was reached and signed in Kumanovo[75] (a town in the North Macedonia) which made the UN Security Council adopt the Resolution 1244, by which Kosovo was put under the international civil administration – known as UNMIK (UN mission in Kosovo). Thus, after the end of war in 1999 and since Kosovo was put under the UN administration, the Constitutional Framework for Provisional Self Government of 15 May 2001, provided for the establishment of the so-called Special Panel of the Supreme Court on matters related to the Constitutional Framework. Although, this institution was never established and never became operational in practice, the Constitutional Framework determined only the functions of this panel and the entities that may request initiation of procedure, yet not defining the number of judges or the rules of procedure of the Panel.[76]

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[69] GINSBURG, T., *Courts and New Democracies: Recent Works*, (2012) 37 Law & Social Inquiry 720, pp. 720-742. In: BESIREVIC, V., *Ustavno sudstvo u zemljama tranzicije: lekcije iz uporednog prava*, *Uloga i znacaj ustavnog suda o cuvanju vladavine prava,* Beograd, 2013, p. 272-273.

[70] BLAGOJEVIC, S., *Место и функције Уставног суда Југославије у уставном и политичком систему* СФРЈ, докторска дисертација, Правни факултет, Универзитет у Београду, Београд, 1971. год. стр. 54. In: MIHAJLOVIC,V., *Ustavno Pravo*, Краљево, 2009, p. 596.

[71] ANASTASI, A., *Çështje të rishikimit dhe të qëndrueshmërisë së Kushtetutës*, "E Drejta Parlamentare dhe Politikat Ligjore" nr.10/2002.

[72] https://gjk-ks.org/en/the-constitutional-court/history/, (01. 02. 2021)

[73] Ibid.

[74] Ibid.

[75] This was a military technical agreement reached and signed by the NATO representatives and the representatives of FRY in a town called Kumanovo, which lies north-east of Skopje (Northern Macedonia), and which brought to the end of NATO air strikes against Serbia/FRY and which preceded the approval of Resolution 1244 by the UN Security Council that factually noted the end of war in Kosovo and the establishment of international civil administration in Kosovo. (Note by the author.).

[76] https://gjk-ks.org/en/the-constitutional-court/history/, (01. 02. 2021).

During a period of time, Kosovo passed through various processes of monitoring that measured the achievements of Kosovo provisional institutions, which opened doors for the negotiations for the final status between Kosovo and Serbia and afterward the creation of the Independent State of Kosovo. Actually Kosovo Assembly in February 2008, proclaimed the Declaration of Independence which up until now has been recognized by more than 100 states of the world. In regard to the Constitutional court, it has to be noted that, this court was established based on the Kosovo new Constitution which was adopted by Kosovo Assembly in April 9, 2008. As a result of the new political developments in the country and the need to establish key institutions of the Republic of Kosovo, in May 2008, in accordance with the decision of the President of the Republic of Kosovo Prof. Dr. Fatmir Sejdiu and the Prime Minister Mr. Hashim Thaçi, Working Group on Establishment of the Constitutional Court was established. This Working Group was authorized to prepare legal framework needed for functioning of the Court; budget for the period 2009, 2010 and 2011; design the organizational structure of the Constitutional Court, as well as prepare the plan for location of the premises of the Constitutional Court of Kosovo. Working Group reflected comprehensive representation of the institutions of Republic of Kosovo (Government and Office of the President), international organizations (USAID, ICO, Council of Europe) and both local and international legal experts, who during the period May – December 2008, have given valuable contribution in realization of all duties assigned to them.[77]

And, according to this, the Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.[78] Further on, on the Chapter eight from article 112 to the article 118 are regulated in details issues of organization of the constitutional court; the procedure of electing judges; the subjects that raise issues of the court, etc. In addition, the Law on the Constitutional Court of the Republic of Kosovo regulates in more details the organization, composition, procedures, etc., of the constitutional court. In regard to the independence the intention of the independence could be taken among the other form as follows:

> Notwithstanding provisions of other laws, the Constitutional Court shall prepare its annual budget proposal and forward the said budget proposal to the Assembly of the Republic of Kosovo for adoption. Neither the Government nor any other budget organization shall be entitled to amend or otherwise modify or influence the budget proposal prepared by the Constitutional Court. The budget proposed by the Constitutional Court shall be included in its entirety in the Republic of Kosovo Consolidated Budget submitted to the Kosovo Republic Assembly for adoption.[79]

This provision shows the clear intention, at least formally, of having the constitutional court to be an independent institution, as it should actually be. But, beyond the perceptions, big debates are being developed if this institution was independent with all of its decisions and whether its current composition is of independent judges.

Kosovo Constitutional Court exercises abstract control of constitutionality, preventive control of constitutionality, control of international agreements and incidental referrals. It does abstract control of the constitutionality in the cases of verification if the decrees of the President and the Prime-minister are in accordance with the constitution as well as control over the government regulations, etc. Constitutional court also based on the article 113 of the Constitution exercise the preventive control of any law or decision adopted by the Kosovo Assembly on the content and on the procedure these laws were adopted. Constitutional court is competent to review the constitutionality of the international agreements, ratified by the Assembly. This court reviews laws based on the referrals from the regular courts and it also reviews conflict of competences between the main state organs as conflict of competences between Assembly, President and the Government, etc.[80]

3.2 Procedure on electing and Mandate of the Constitutional Court judges

Legal basis of election of the judges is the Constitution and the Law on Constitutional Court of Kosovo. According to the Law on Constitutional Constitution, a Commission of the review the applications of candidates exercises the entire procedure up to the voting in the Assembly on electing judges. This special Commission is composed as follows: -the speaker of the Assembly or someone delegated by him; -the heads of each parliamentary group; -president of the Kosovo Judicial Council; -Kosovo Ombudsperson; -representative of the Consultative Council for communities and the representative of Constitutional Court.[81] Commission, makes the short list of candidates which is to be sent to the Assembly and the judges after voted by the Assembly are to be appointed by the President where they after appointed take the oath before the President.[82] The mandate of a judge is 9 years whereas they can be dismissed by the President by the proposal of 2/3 of the Assembly. The mandate for the first composition of the constitutional court was different: two judges had the mandate of two three years, two others were of 6 years mandate; two other judges representing the minorities were with 9 years mandate and in the first court mandate there were also international judges.[83]

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77 Ibid.

78 Article 112, para.2 of the Kosovo Constitution.

79 Article 14, para.2 of the Law on the Constitutional Court of the Republic of Kosovo, Law No. 03/L-121, 2008.

80 For more, consult article 113 of the Kosovo Constitution; BAJRAMI, A., *Sistemi Kushtetues i Republikës së Kosovës,* p. 341-345, and Chapter III, articles 29-54 of the Law on the Constitutional Court of the Republic of Kosovo.

81 Law on Constitutional Court of the Republic of Kosovo, Law No. 03/L-121, 2008.

82 Ibid, article 7.

83 BAJRAMI, A., MUCAJ, F., *E Drejta Kushtetuese*, 2018, p. 473.

3.3 Constitutional Court and the 1990 Constitution

The issue of the constitutional court and the judicial review was regulated with the articles 128 – 134 of the Constitution. Thus,

- constitutional court of Kosovo decides on the compliance of laws, other disposals, commune statutes and the city with the constitution; - decides on the compliance of the disposals and other republican acts with the law;-decides on the compliance of all disposal and other acts with the law and/or with the other republican disposal;- decides on the compliance of statute or other act of political parties, movements and leagues and associations with the constitution respectively on the opposition with the law;-decides on forbidding the work of political parties, movements, leagues and the associations; - decides on the responsibilities of the president and the other members of the Presidency of Republic for the violation of the constitution;- solves contested issues if they do not belong to the competences of the courts and to the competences of other organs;-exercises other duties that were let in its competences by the constitution.[84]

The mandate of a judge of the judicial court is eight years whereas constitutional court has 7 judges whose mandates could be repeated. Judges elect the president of the court and one of them could be elected for the position of the president.[85] It is interesting to note that according to this constitution every one could bring an issue to the constitutional court and then there are mentioned state organs who can bring issues to the court whereas it is also regulated that the courts itself can start the procedure for constitutionality or the legality of an act, ex officio. Decisions are taken with the majority of judges and the decisions are applicable and obligatory for all. Judges may be discharged from the parliament and reasons have to be sent to the Kosovo Assembly from the court. Procedure and inner organization of the court will be regulated with the court regulation which will be done and approved by the court.

The above mentioned related to the constitutional court was sanctioned with the constitution, but it is hard to come to a conclusion if there were initiated procedures or if cases were brought in and if they were finalized with a court decision or a court judgement. This because this is a constitution which regulated all necessary fields like all constitutions do. But some state institutions under the circumstances which existed in Kosovo from 1989 until 1999 could not be created or formalized and consequently could not fulfil their constitutional duties.

3.4 Constitutional court and the 1974 Constitution

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, 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.[86]

The Constitutional of Court of Socialist Autonomous Province of Kosovo is regulated with the Chapter XV of the constitution. Based on this, it decides on the compliance of province laws with the constitution of the Autonomous Socialist Province of Kosovo; decides on the compliance of commune statutes with this constitution and the laws of Kosovo, decides on the compliance of disposals and general acts of state organs, organizations of joint work and other associations of self-governance with the constitution and with the province laws and with the of Kosovo laws and the republican law by which are regulated reports for the entire territory of the republic as well as if these act are in contradiction with the federal law for whose application, responsible are organs of the province, it decides on the compliance of disposals of province organs and communes in the territory of province if with the laws this is not regulated differently, solves the conflict between province and communes in the territories of province as well as the conflicts between two or more communes if this is not regulated with the law to be the competence of the other court, it decides on the conflicts of competences between courts and other province organs, and it exercises other works assigned to it.[87] The activities of the constitutional court are not limited only to what was said. It follows phenomenon of interests on realizing the constitutionality and the legality and it informs Assembly regarding the situation of constitutionality and legality to whom it gives opinions and proposals for adopting or changing laws or to undertake measures in order to ensure constitutionality and legality.

Constitutional court was consisted of president and six judges who were elected by the Assembly of the Autonomous Socialist Province of Kosovo. Their mandate was of eight years and they had no right to be re-elected.[88] It is important to describe article 380 where we find that if the court concludes that the province law is not in compliance with the constitution, it will conclude this with its decision and it sends then the decisions to the Assembly who is obliged, within 60 days, to harmonize that law with the constitution.[89] Court held public judicial review whereas it decided with the majority of votes finalizing it with the acts which were called decisions. The possibility of holding the separate opinion was known with the constitution and the judge who held the separate opinion was obliged to present this opinion to the court in written.[90] Court based on the request of the Assembly could extend the deadline of harmonizing law

[84] Article 128, 1990 Constitution.
[85] Ibid, Article 129.
[86] RRAHMANI, B., Kosovo Judicial Position from the Second World War until 1974. In: *Journal of European History of Law,* vol. 11, Nr.1, 2020, p. 181.
[87] Article 372, Constitution of the Socialist Autonomous Province of Kosovo, Official Gazette, Nr.4, year XXIX.
[88] Ibid, Article 377.
[89] Ibid, Article 380.
[90] Ibid, Article 385.

for additional six months, but not more than that. If Assembly fails to harmonize law within the given deadlines, then disposals which are not in compliance with the constitution fall from force and courts concludes this with its decision.[91]

When the court concludes that the province law is not in compliance with the constitution, it will decide that before taking the final decision, the disposals which are not in compliance with the constitution, do not have to be implemented.

When the constitutional court concludes that disposals apart from the other general law, the general acts of socio-political organs societies and other self-governing acts, are not in compliance with the constitution or with the law or not in compliance with the federal law for whose implementation are responsible Kosovo organs, court will annul or abrogate the disposal.

When constitutional court concludes that disposal of the province organ which is promulgated to implement the law in the entire territory of the republic, is not in compliance with the constitution, it will annul or abrogate this disposal or those norms that are not in compliance with the law.[92] The number of subjects that can raise issues before the constitutional court is relatively big. These subjects are:1) Assembly of the Autonomous Socialist Province of Kosovo; 2) presidency of Kosovo; 3) government with the exception of issues which can be raised by Assembly; 4) courts if the issue of constitutionality or legality appears in the court proceedings; 5) Province public prosecutor if the issue of constitutionality and legality appears in the work of the public prosecutor; 6) Province Social Lawyer of self-governance; 7) organization of the joint work, local association-society of interest or other society of self-governance if its right determined by province constitution, province law or federal law, for which implementation is responsible province, is violated; 8) province secretary or other province organ, each in its field of activity; 9) organ who according to the constitution and the law is authorized to suspend implementation of disposal, other general act from the organs of socio-political societies because these acts were not in compliance with the constitution and the law, respectively opposition with the federal law for whose implementation the province organs are responsible and 10) Service of Social Accounting. Finally constitutional court may start itself procedure for evaluating constitutionality and legality.[93]

4. Conclusions

1. Kosovo 1974 Constitution is the first constitution which made the foundations for creation of Kosovo as a state. In the constitutional law debates, opinions are different regarding this. But no matter of the various arguments brought on building thesis in favor or against, this constitution equalized almost entirely Kosovo position within the federation. It was, to some extent different from other federal units only by the name, i.e.it was not named republic. It had its own independent institutions who took decisions on behalf of Kosovo and it was also represented in the same way as republics in the federation. This constitution came at a time when Federal Republic of Socialist Yugoslavia entered into a process of restructuring which was understood in at least two ways: first, Yugoslavia was going towards more democratization and the second, it took a direction towards dissolution. Kosovo was named as Autonomous Socialist Province and this was in a way more a formal difference from the republics rather than a difference by the content. It was quite similar to the republics and if a Constitution is the fundamental law according to which the government of a state is organized, and agreeably to which the relations of individuals or moral persons to the community are determined, then it is good to conclude that Kosovo was established like other republic within the federation, as a federal unite. Organization of the constitutional court based on this constitution, in addition to other institutions goes quite well in favor to a conclusion that this was a process which sanctioned the foundation of Kosovo statehood.

Kosovo state institutions continued to exercise their duties even when they were declared as outlawed by the other federal unit of federation. Their authority was accepted and supported by majority in Kosovo. Attempts of the other federal unite to intervene and with unconstitutional measures interrupt inner political developments were unsuccessful. Thus adoption of Kosovo Constitution in 1990 established foundations of a parallel system which for the majority population was totally respected and it functioned as a republic considered to have been occupied by the other federal unit. Some of the institutions, based on this constitution exercised their duties within Kosovo, whereas some of them were in exile. Kosovo Government based on this constitution was in exile.

International civil administration, established in Kosovo in 1999, did not allow Kosovo to have its own constitution. Even SRSG did not issue a constitution. SRSG, however issued a document which was not named constitution and this because the international civil administration, in a way wanted to keep a neutral position regarding the Kosovo political status.

The last constitution, was adopted by Kosovo Assembly shortly after Kosovo declared its independency. This constitution within its body incorporated many solutions which were parts of the Comprehensive Proposal for the Final Status of Kosovo, known as Ahtisaari document, which in some important issues did not give exact solution which make the constitutional court to be very busy on solving frequent issues raised by authorized subjects. Just because of this further under the conclusions it will be given a bit more about the engagement of the Kosovo constitutional court, which surely may be the object and the guide of next study made not necessarily by the author of this paper. As it is at the end of the paper it may be taken out of the paper but, based on the opinion of the author, it enriches the part of conclusions.

Constitutions, as presented in this paper show that they came during a long process of creating a new state which was not a new idea and a purpose that existed only during the mod-

[91] Ibid, Article 380.
[92] Ibid.
[93] Article 381 of the Autonomous Socialist Province of Kosovo, Official Gazette, Nr.4 year XXIX.

ern times. The first constitution had some ideological colors, since it was adopted during the socialist-communist system of Yugoslavia.

2. Kosovo Constitutional Court, according to the Kosovo Constitution is the only independent institution to make the final interpretation of the constitution. This institution is, compared to the other similar institutions is relatively new. Kosovo Constitutional Court is relatively new institution in Kosovo which with its decisions time after time contributed to the polarization of the processes in Kosovo. Its decisions were many times contested, debated, questioned, etc., in various occasions but it is important to underline that no matter of this, its decisions were all the time respected and the subjects applied based on provisions of the court decisions. The discussions and the discourse of distrust and some doubts on the work of the constitutional court are based mainly in the personalities of judges that compose the constitutional courts. Many of them, if not all of them are mentioned in various occasions, as they became judges due to their political affiliations or connections they have to these political parties. Thus, for example two of them were members of the political parties [one even candidate for the Kosovo Assembly]; two served in the diplomacy; one as reported by media was under the arrest in Serbia from 2006 to 2009 as a part of the process known "Customs Mafia" in Serbia and he was sentenced to jail with 10 years and he was forbidden to exercise his profession for ten years, etc. When electing judges of the constitutional court, an appropriate legitimacy of court should be ensured because its function to control the representative body since in fact itself is elected by citizens and it disposes with the direct political legitimacy.[94] The composition of court and election process of judges of the Kosovo constitutional court, is something not to have a clear legitimacy. However, decisions of the constitutional court in some cases, prior to these described in this paper have, have imposed resignation of two Kosovo presidents. It has also found and international agreement, known as Agreement on establishing the Association of Serb Municipalities to be unconstitutional. In various political crisis that appeared in Kosovo it appeared to be the center for solution of political difficulties in Kosovo. One of the long debated decisions, for example was the decision by which the court established the standard on the relative winner of elections according to which the winner of the elections is considered the party or coalition that won the biggest number of seats during the elections and thus it has the right to create the government. By being the only institution to have the exclusive right to make the final interpretation of the constitution and since its decisions are final, this institution [no matter of polarizations] is being overloaded with the raised issues.

The decisions and the coherence of judgements should continue to be discussed thoroughly and deeply. The best would be if they are discussed and debated more by professionals from whom we would expect shortcomings of the judgements and the procedures developed as well other findings which must be followed by concrete recommendations. Under the current political conditions and developments, the procedure for electing judges of this court should be changed. The way it is now, it could be always a politicized election process of judges where Assembly and the President have their final say. Perhaps more bodies involved in the election of judges contributes to lesser possibilities of having judges lay under the political pressure of those that selected them. Some changes of the constitution are more than important and if initiated by the constitutional court could be even more valuated. Not only for changes regarding to the constitutional court.

[94] On the relationship between the court and the parliament see more at: ORLOVIC, S., *Vladavina ustava ili ustavnog suda*, Novi Sad, 2013, p. 35-46. In: SIMOVIC, D., Problem Politizacije i sastav ustavnog suda, Ustavno sudstvo u zemljama tranzicije: lekcije iz uporednog prava, *Uloga i znacaj ustavnog suda o cuvanju vladavine prava,* Beograd, 2013, p. 243.

Conception of Law in Works of Earlier Founders of Modern Social Thought

*Jiří Bílý**

Abstract

This article presents a theoretically driven and research oriented vision of law on the basis of a discussion of the major accomplishments in this sociological and philosophical specialty since its initial formulation by the classics and its further development in the era of early modern science. Law constitutes one of the basic regulative mechanisms of social behavior of individuals, social groups and the whole society. It is, however, not only a normative feature, but also a social one. Legal theory approaches law as a branch of social life, it studies the relationship between law and society, analyses law in its social facticity, its real effect on social relations. A model of law is offered that is driven by the central theoretical questions of the social discipline as they have been addressed since the classic contributions in the works of Max Weber, Emile Durkheim, Eugen Ehrlich etc. Nevertheless, sociological issues connected with law were dealt with by many more sociologists and legal theoreticians, such as Herbert Spencer, William Graham Sumner, Georg Simmel and Ferdinand Tönnies.

This discussion thereby also addresses a variety of selected empirical themes that have been fruitfully addressed in early modern research on law and that have contributed to our understanding of the place and role of law in society.

Keywords: *sociology; society; law; science; jurisprudence; government; freedom; ideology.*

1. Introduction – rise of law as the social science

Thinking about law is as old as law itself, for legal discourse is always a part of law. But even beyond the boundaries of law, it is difficult to make a clear beginning on the discourse on law. Jurisprudence definition of law encompasses six basic types of meaning: law as a factual legal life, law as an agent of order, law as an instrument of social control, law as an enforcement order, law as an instrument of power and finally, law as a mental agent of social life. In the view of legal sociology law can be defined as a set of generally expressed binding rules of behavior, rendered and enforced by a public authority, that institutionalize social behavior and social relations, assert social interests and provide for social control in a society as well as for social demonstration of functioning of theses rules of behavior in social life of individuals and society.

Law is one of the basic structural elements of culture; it is part of the individual socio-cultural systems. Together with other normative systems and social values it constitutes an essential part of social regulators. The core of culture, made up of a set of patterns of behavior, consists particularly of these social regulators. The socio-cultural system is being reproduced in the process of socialization and acculturation. In terms of law, legal socialization plays an important part, since it reproduces legal forms of behavior, adequate modes of legal motivation and legal approaches of the addressees of law. Social values regulate impetus satisfaction in line with a hirarchal set of objectives of individuals and a socio-cultural system as well as modes accepted by law.

Thinking about the social role of law is part of this discourse as well, but not all thought that relates to society is sociological. At the same time, sociology originated from the evolution of philosophy, the humanities, and the move towards the development of other social sciences. It is therefore more than merely a matter of intellectual curiosity to review the intellectual schools of law in the nineteenth century that emanated from the Enlightenment to gradually pave the way for the institutionalization of the various social sciences and the establishment of sociology. Among the latter category is most distinctly the social philosophy of Karl Marx, while the former category includes the works of such classical thinkers as Charles de Montesquieu, Cesare Beccaria, Jeremy Bentham, Alexis de Tocqueville, and Henry Maine. Among these relatively neglected classic contributions are the works of Herbert Spencer, William Graham Sumner, Georg Simmel and Ferdinand Tönnies.

A useful entry into the origins of early social thought on law emanates from the critique of the conception of natural law, the most extreme opposite of even the most rudimentary form of social thinking. Natural law is the notion that law bears no relation to the actual workings of society but is instead the reflection of universal concepts of truth and justice so profound and foundational to existence that law is held to emanate from nature itself. As such, natural law theories preclude the very essence of social thinking on the origins, conditions, and effects

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of law as a social reality. Going back to the Aristotelian conception of law in ancient Greece and transported into modern society via medieval thought, such as the philosophy of St. Thomas Aquinas, natural law theory dominated legal thought in Europe for a long time. Only on the basis of analysis and critique of the principles of justice and order purportedly embodied in natural law could any social thought on law develop.[1]

The breakthrough of the Enlightenment from the eighteenth century onwards would open up the world of law to the reflection of critical-analytical thinking. The Enlightenment refers to the period and movement in (European) philosophy, including not only ethics but also art and knowledge, that placed the human ability to think and critique at the center of intellectual life. Best summed up in the words of the eighteenth-century Immanuel Kant, the Enlightenment, is defined as the public use of reason based on the ability of thought.[2] Enlightenment thinking is critical in potentially laying bare the societal and historically contingent conditions of existing social institutions such as politics and law. Rather than merely assuming that laws reflect the unalterable conditions of nature, law can become an object to be studied in terms of its societal constitution in particular periods and societies. As such, Enlightenment thinking does not merely take away the assumed stability of law, but can instead also lead to suggestions on how law can be organized to better serve its purposes given the societal circumstances to which it pertains.

A first important break with natural law was provided in the writings of the political philosopher Ch. de Montesquieu.[3] De Montesquieu argued that law was related to a society's culture and determined by various external circumstances, including social and natural conditions as well as historical antecedents. Laws were not good or bad in an absolute sense, but could be evaluated in terms of their relative degree of justice and morality. From this conception, de Montesquieu went a step further and, as a critic of the French absolutist monarchy, was among the first philosophers to argue for a democratic constitution of law. In order to ensure that laws would be reflective of the people's will, de Montesquieu specifically argued that two important principles needed to be guaranteed. First, on the basis of the principle of the division of power principle, the location of power could not be unduly centralized, but had to be spread across the center of power (the monarch) and intermediate bodies of representation, such as parliaments, voluntary groups, and churches. Second, on the basis of the separation of powers principle, the exercise of power would have to be functionally specialized into three branches of government. De Montesquieu's philosophy has historically been influential for many forms of democratic government, and it has also been the basis of the principle of legal autonomy that guides much of the inner workings of the law and the status of legal professionals (see Chapter 9). In the context of this historical overview, however, it is more important to emphasize in de Montesquieu's thought that it broke open the possibilities of unfettered thinking on the social dimensions of law and would ultimately pave the way for a real analysis, with scientific means, of law as a social institution.

Similarly arguing against the excesses brought about by absolutist rule, the Classical School of law and, in particular, of criminal law is important to discuss in this context because its ideas indicate how the justification of rights and law shifted from the central powers of monarchy and aristocracy to the growing class of an increasingly powerful bourgeoisie.[4] Showing how the development of social thought itself was influenced by the very conditions of the society its attention is devoted to, the Classical School emerged in conjunction with the rise of capitalism. The influence of capitalism is best observed in the Classical School's fundamental notion that human conduct is guided by a principle of economic rationality in that it is conceived as the outcome of a weighing of the anticipated costs and benefits of action alternatives.

Among the key proponents of the Classical School are Cesare Beccaria and Jeremy Bentham. Although today known mostly among criminological scholars for their theories of crime and criminal justice, both thinkers developed more comprehensive theories of law that form part of the progress towards the development of an authentic social science of law. Cesare Beccaria is best known for his 1764 pamphlet, *Dei Delitti e delle Pene,* in which he condemned the death penalty.[5] Beccaria opposed capital punishment on the grounds that the state cannot legitimately claim the right to take lives and because the death penalty is neither necessary nor useful. The reasoning behind this argument is Beccaria's contention that capital punishment does not have a deterrent effect towards other, potential and actual, wrongdoers for it is not the severity but the certainty of punishment that determines its deterrent impact.

Other proposals of legal reform suggested by Beccaria that hint at a more humane system - such as proportionality of the punishment relative to the crime committed and the public nature of legal proceedings - were likewise inspired, not by any humanistic ideals per se, but by a utilitarian orientation that contemplated the nature of human behavior as essentially rooted in the pursuit of self-interest. Therefore, to avoid a condition of all-out violence, citizens engage in a mutual contract whereby they agree to give up some of their freedoms in order to secure a peaceful co-existence. Influenced by the idea of social order as a contract, Beccaria thus defended the idea that the main function of the state is to enforce laws that limit a boundless pursuit of self-interest. For such laws to be effective, they need to be made public so they are widely known and involve swift and certain forms of punishment that increase the relative cost

[1] BÍLÝ, J., The Basic Methodology Problems in Study of Medieval Political and Legal Thought. In: *Journal on European History of Law,* vol. 8, No. 1, 2017, p. 130-134.

[2] KANT, I., Beantwortung der Frage: Was ist Aufklärung? In: *Berlinische Monatsschrift* 4, 1784, p. 48-494.

[3] EHRLICH, E., Montesquieu and Sociological Jurisprudence. In: *Harvard Law Review* 29(6), 1916, p. 582-600.

[4] PASQUINO, P., Criminology: The Birth of a Special Knowledge. In: BURCHELL, G., GORDON, C., MILLER, P. (Ed.), *The Foucault Effect.* Chicago, 1991, University of Chicago Press, p. 235-250.

[5] BEIRNE, P., Inventing Criminology: The, Science of Man' in Cesare Beccaria's, Dei delitti e delle pene' (1764). In: *Criminology* 29(4), 1991, p. 777-820.

associated with a violation of law, conceived as a breach of the terms of the social contract.

Offering a more systematic formulation of the utilitarian framework, Jeremy Bentham developed a political and legal philosophy on the basis of the principle of economic rationality that human conduct is guided by a search for pleasure and an avoidance of pain.[6] Bentham was originally trained as a lawyer and admitted to the bar, but he became a leading critic of the existing British legal system and sought to reform the law on the basis of his utilitarian philosophy. In his work, Bentham applied his utilitarian philosophy to law to argue that the legal system should be founded on the principle to provide the greatest possible happiness to the greatest possible number of people. Complementing the theory of human behavior as guided by the hedonic calculation to maximize utility from the individual's perspective is thus a theory of society on the basis of the social calculation to maximize utility from the aggregate point of view. To ensure an egalitarian society, Bentham argued, laws had to be applied fairly and equally to all, due process requirements had to be obeyed before a person could be found guilty or innocent, and evidence had to be investigated. Furthermore, judicial discretion had to be minimized by limiting judges' power only to a determination of guilt and innocence, while punishments were to be based on a calculation of the pleasure, pain, and mitigating circumstances associated with a legal violation and its penalties. In its concern for the effects of law, the role law actually played and could play in society, and the function of law as an aspect of policy and an instrument of social engineering, Bentham's work betrays a turn towards a social science of law, or towards what Bentham (1792) calls „law as it is".

The mounting criticisms of Europe's absolutist political systems would continue to be expressed by philosophers and thinkers throughout the nineteenth century. In most cases these works were marked by a distinct normative orientation, yet they also contained more empirical and theoretical directions. As such, these works paved the way for both the development of political philosophy and their applicability to the development of modern systems of government, on the one hand, as well as the elaboration of the social sciences, on the other. The works of Alexis de Tocqueville and Henry Maine are important to discuss in this context because they provide an important bridge between classical and modern thought and also devoted explicit attention to the role of law.

In 1831 visited the United States on behalf of the French government to study the US prison system. From the copious notebooks de Tocqueville kept during his nine-month journey, he would write his now famous work. *Democracy in America*.[7] De Tocqueville's admiration for democracy was rooted in the idea that only a democracy could provide a balance between freedom and equality, a notion akin to the principle of the social contract. Some special attention was given by de Tocqueville to the role of law and, especially, the place of judges in the US democratic system. Scrutinizing judicial authority in the United States, de Tocqueville particularly noted the power of judges to refuse to apply laws they held to be unconstitutional. De Tocqueville especially commended the qualities of the jury system to bring about an education into the law and create a sense of civic responsibility in contributing to society and its government.

De Tocqueville's work on the democratic system of the United States was primarily meant to formulate normative guidelines towards the reform of the French political regime. Yet, because of its comparative orientation, it also provided an important basis for the study of law in society. Even more distinguished in its scholarly merits for the study of law from a comparative-historical viewpoint is the work of Henry Maine. Maine was originally trained as a lawyer and practiced and taught law in the British system. On the basis of his lectures, he wrote *Ancient Law* (1861) in which he traced the connections between Roman jurisprudence and the system of British law. To this historical study he added important comparative insights, aided by a stay of several years in India, that would enable him to eventually teach historical and comparative jurisprudence at Oxford University. Although the goal of Maine's historical and comparative works was to acquire insight into the British legal system, its implications offer the way towards a more systematic study of law. For in seeking to bring out the potentially reforming qualities of law as an instrument of social change, Maine studied law as it was actually practiced by professionals and experienced by lay people.

In his historical work, Maine argued that societies of different historical epochs will share characteristics in their legal systems if they also share other societal circumstances. Thus, for example, Roman feudalism and, many years later, British feudalism shared basic characteristics in their legal systems. According to Maine, a stable pattern could be observed in the evolution of law across societies, specifically in the form of three stages from the development of primitive over feudal to modern societies. In primitive society, law is not formalized but based entirely on the structures of kinship, which are typically patrilineal and justified on the basis of divine inspiration and right. In the second stage of development, the autocratic rights of the patriarchal leader become subject to the demands of other leaders to be based on the prevailing customs of society. The third stage of legal development is ushered in when, under the influence of the spread of literacy and writing, laws become embodied more permanently in written codes. The codification of laws allowed for legal decisions to be compared, relative to one another and relative to the applied legal code, and to be rationally structured into a coherent set of laws in view of constructing an efficient legal policy.

As the form of law changed, Maine suggested, so too did its substance. In the course of history, family dependency gradually diminishes in favor of individual responsibility, rights, and obligations, as manifested in the increasing relevance of the practice of contract and the decline of social regulation by status. Whereas status is ascribed and determined by connection with one's family and, therefore, stable from birth onwards,

[6] LYONS, D., *In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law.* Oxford: Clarendon Press, 1991.
[7] GOLDBERG, CH. A., Social Citizenship and a Reconstructed Tocqueville. In: *American Sociological Review* 66(2), 2001, p. 289-315.

contract exemplifies the outcome of negotiation among free and independent individuals on the basis of their achieved positions and qualities. Contract, in the sense in which Maine uses the term, therefore, is not necessarily a particular document in writing that specifies certain obligations among parties, but a more generalized notion of agreement among free individuals who, in the context of a society, engage in social relations of various kinds.

What the utilitarians and the historical-comparative scholars of law shared was an attention to the study of law for mostly practical purposes of reform, which, however, was conducted in such a way that it also set off the origins and development of the systematic study of law from a more resolutely analytical and scientific point of view. As much, therefore, as utilitarianism and the historical school offer political and legal philosophies that have a strongly normative quality, they also contain empirical observations of the actual workings of law, in the comparative-historical context, moreover, of different societies and different epochs. These rudimentary seeds of anthropological and historical reflection would later mature more fully into specialized academic disciplines.

Early social science would likewise benefit from the roots of nineteenth-century social science and especially inherit from its predecessors an evolutionary perspective. These characteristics are perhaps best reflected in the writings of Karl Marx, whose work may count as the crowning moment of the merging of normative and systematic-analytical aspirations. Historically, also, the evolution of modern social science has been such that separate attention must be devoted to the work of Marx, although the value of his work for social sciences remains hotly disputed and the actual contributions Marx made to the study of law were minimal.

Marx did not develop a comprehensive perspective on law and his ideas on law are scattered throughout his writings, especially in some of his earlier works. Marx's theory of the state provides the most useful entry into his perspective on law.[8]

To Marx's notion of the state, his perspective on law is instrumentalist and views the legal system in function of its role as an instrument of control serving bourgeois interests. Rather than abiding by a principle of the rule of law that holds that it is just for the law to be applied equally and fairly to all, Marx maintains that capitalist law actually enhances the conditions of inequality that mark capitalist society. Specifically, Marx contends that the capitalist legal system contributes to, as well as legitimates, the inequalities that exist as a result of capitalist economic conditions. In the practice of law, it is revealed that the legal system contributes to inequality because capitalist law establishes and applies individualized rights of freedom, which benefit those who own while disfavoring those who are without property. The formal equality that is granted in law by treating the various parties that are in contract with one another or with the state as equal contributes to sustain and develop the economic inequalities that exist among legal subjects. Legal doctrine, moreover, justifies the practices of capitalist law on the basis of a notion of justice claimed to be universally valid but which in actuality serves the interests of only the dominant economic class. As such, the law takes on the form of a bourgeois ideology. In its ultimate triumph, moreover, the ideology of capitalist law becomes widely accepted, even among those members, of society who are economically disadvantaged and thus additionally subject to the inequalities brought about by the legal system.

The very essence of the theory of historical materialism implies that Marx did not devote much separate attention to law as one element of the superstructure of capitalist society. „There is no history of politics, law, science, etc.", Marx writes in *The German Ideology.* Yet, in a few instances Marx did write about aspects of law, albeit only briefly and clearly within a materialist framework that placed a premium on the economic conditions that underlay the constitution of law.

2. The early researchers – theoretical foundation

The work of Marx was not immediately influential in the development of the theory of law as no direct historical path led from his thought to subsequent sociological schools of thought. Marx's work, however, was later appropriated by critical scientists who sought to break with the consensual thinking that they felt characterized much of mainstream sociology in the years after World War II. Even more ambivalence is shown in the history of social engineering considering the fact that the selective appropriation of the early thinkers has occasionally also implied that some early social scientists who did develop explicitly sociological perspectives - and who did apply them to the study of law - have been all but forgotten in modern and sociology, including the sociology of law. A review of some of these forgotten classics of sociology is in order to at least highlight their contributions to law science and the sociology of law for reasons of intellectual curiosity.

Historical thinking, often evolutionary in kind, was in vogue in much of sociology and social philosophy throughout

[8] MARX, K., Debates on the Law on Thefts of Wood. In: *Supplement to the Rheinische Zeitung,* October-November 1842. Online: www.marxists.org/archive/marx/works/1842/10/25.htm.
MARX, K., Report of the General Council on the Right of Inheritance. Written on behalf of the International Workingmen's Association, 1869. Online: www.marxists.org/history/international/iwma/documents/1869/ inheritance-report.htm.
BÍLÝ, J., Marxism in the West Thought Interpretation of Law in Postwar Period. In: *Journal on European History of Law,* vol. 6, No. 2, 2015, p. 157-160.
CAIN, M., HUNT, A., *Marx and Engels on Law.* New York: Academic Press, 1979.
CAIN, M., The Main Themes of Marx' and Engels' Sociology of Law. In: *British Journal of Law and Society* 1(2), 1974, p. 136-148.
FINE, R., Marxism and the Social Theory of Law. In: BANAKAR, R., TRAVERS, M. (Ed.), *An Introduction to Law and Social Theory.* Portland, OR: Hart Publishing, 2002, p. 101-117.
HIRST, P. Q., Marx and Engels on Law, Crime, and Morality. In: *Economy and Society* 1(1), 1972, p. 28-56.
KELSEN, H., *The Communist Theory of Law.* New York: Praeger, 1955.
YOUNG, G., Marx on Bourgeois Law. In: SPITZER, S. (Ed.), *Research in Law and Sociology,* vol. II, Greenwhich, CT: JAI Press, 1979, p. 133-167.

the nineteenth century. This is perhaps nowhere better illustrated than in the work of Herbert Spencer.[9] Often described as social Darwinism, the evolutionary thought of Spencer was in fact written largely independent of and before that of his friend Charles Darwin. It was Spencer also who coined the phrase „survival of the fittest" and applied it to the evolution of society. Spencer argued that principles of natural selection and survival of the fittest could explain how human societies developed from relative simplicity and homogeneity to growing complexity and heterogeneity. Evolving from primitive or militant societies that are characterized by war and status as the main regulatory mechanisms, modern or industrial societies are primarily guided by peaceful negotiation and contractual obligations voluntarily agreed upon among free citizens. In the modern phase of human development, Spencer argued, the influence of governmental control declined in favor of individual liberty and the negotiated contractual obligations that are freely agreed upon among individual subjects.

As an evolutionary utilitarian, Spencer opposed government influences and public programs aimed to alleviate social concerns, such as hunger, poverty, and illness, in favor of minimal government regulation whereby policy and law would mainly serve to secure the freedom of the state's subjects and enforce the formal relations that they engage in. The only natural limitation to individual freedom is the recognition of freedom in others. On the basis of this liberal individualist standpoint, Spencer maintained that government action and law in modern societies would primarily have to protect human liberty.[10] Spencer formulated this perspective on the basis of an evolutionary theory of law from primitive to modern society. Most essentially, law transforms from the regulation of inequalities in status among people to the equal treatment of citizens in voluntary cooperation with one another. In modern society, therefore, Spencer advocated a policy of extreme *laissez faire* liberalism, whereby all law is to be condemned unless it is the expression of the consensus of individual interests and thus meant to promote and preserve individual liberty. Spencer was opposed to legislative efforts aimed at ameliorating the conditions of the poor and the weak and, correspondingly, also condemned any legal intrusions on free trade. The only rightful purpose of law was an administration of justice that sought to police and protect individual rights. In this sense, Spencer's thought goes against that of the eighteenth-century utilitarians who favored a conception of law as social engineering.

The liberal evolutionary thinking of Spencer influenced some early American researchers, most notably William Graham Sumner.[11] Sumner was originally educated in history and theology and for some years was a priest in the Episcopal church. He was attracted to sociology after having read an essay by Spencer, upon which he began to develop his sociological thought on the basis of an evolutionary conception of human history. In 1872, Sumner became a professor of political and social science at Yale University. In his writings, Sumner advocated an evolutionary perspective of society that, like Spencer's, limited the proper function of the state to administering the contracts individuals mutually and freely agreed upon. A steadfast defender of capitalism, or what he called „free-trade liberalism", Sumner opposed any and all attempts through government action and legal policy to promote social equality because they are in contradiction with the societal conditions of evolution that favor survival of only the strongest elements of society. Importantly, Sumner's thought was, by its own ambitions, not based on philosophical speculation but on a scientific orientation to uncover the underlying basic patterns and causes of human history and societal development. Sumner therefore turned his efforts to comparative-historical investigations to uncover the laws of society.

Sumner died before he finished a planned book on the systematics of sociology, but his 1906 book *Folkways* contains significant insights on his theory of law. With the term „folkways" Sumner refers to the habits of individuals and the customs of the society, which arise from efforts to satisfy certain needs. Folkways turn into mores when customs that pertain to the more important functions and institutions of society become of a more coercive nature and are endowed with sanctions. Embedded within mores are rights, conceived as ethical conceptions of justice. From mores also develop laws, although laws will never fully express rights. Along with the transformation of society, the nature of law changes as well. In pre-modern societies, the regulation of social life is not guided by formally enacted laws. Pre-modern law, therefore, is customary and typically not codified. In modern societies, by contrast, law is formally enacted by governments and written down. Regardless of the stage of societal development, law must, according to Sumner, reflect the mores of society in order to be an effective regulator of human behavior. As an instrument of social change, law can fulfill its proper role only if it conforms to the mores of a society or one of its sub-groups to which laws are applied.

Turning to some of the earliest practitioners of social science in Germany will reveal additional characteristics of the study of law during the founding days of the discipline. The sociology of Georg Simmel is commonly known for its contributions to the formal study of society and its observations on the development of modern culture.[12] It is as part of his formal sociology

[9] SPENCER, H., (1873), *The Study of Sociology.* Ann Arbor, MI: University of Michigan Press, 1961.
ibidem (1876/1882/1896), *The Principles of Sociology.* London: Williams and Norgate, the second volume of which contains a section on „Laws", 1997, p. 513-537.
ibidem (1884), The Sins of Legislators. In: *The Man versus the State, with Six Essays on Government, Society, and Freedom.* Indianapolis. In: Liberty Fund, 1992. Online: www.econlib.org/LIBRARY/LFBooks/Spencer/spn Mv S3.html#The%20Sins%20of%20Legislators).

[10] BÍLÝ, J., The Human Rights, Canonic Law and the Impact of Religion from the Perspective of Vatican II. In: *Journal on European History of Law,* vol. 11, No. 1, 2020, p. 182-187.

[11] SUMNER, W. G., *Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores and Morals.* Boston, MA: Ginn, 1906.
BALL, H. V., SIMPSON, G. E., Law and Social Change: Sumner Reconsidered. In: *American Journal of Sociology* 67(5), 1962, p. 532-540.

[12] SIMMEL, G., *Soziologie: Untersuchungen uber die Formen der Vergesellschaftung.* Leipzig: Duncker & Humblot, 1908.
SIMMEL, G., *Grundfragen der Soziologie (Individuum und Gesellschaft).* Berlin, Leipzig: G. J. Göschen, 1917.

that Simmel devoted attention to the role of law. Specifically in his study of the quantitative aspects of group life, focusing on the influence of the number of individuals associated with one another on the forms of social life, Simmel introduced a conceptualization of law in relation to custom and morality. Custom is conceived as an undifferentiated normative order that includes more specific rules, religious principles, and conventions. Both morality and law differentiate from custom. Morality refers to the capacity of individuals to confront themselves with normative principles. It is the private confrontation of one's behavior with the social codes of custom. Law is formally enacted at the level of the group or society through specialized organs that determine its contents and oversee its enforcement. Law is reserved for matters that are considered indispensable to the functioning of society as a whole, not mere private concerns. Law is coercive for the whole of the society to which it applies, while morality applies only to the individual. Custom stands in between morality and law as the two poles of a continuum ranging from free individuality to societal coercion. The movement among custom, law, and morality relates to quantitative aspects of the group, according to Simmel, inasmuch as small societies or smaller groups within a larger society are primarily guided by custom, while the enlargement of a united society favors the transition from custom into law.

Simmel did not investigate any concrete empirical dimensions of law in society, but besides his conceptualization of law, he did occasionally specify the role of law in some of his other theoretical excursions. In his work on the social forms of subordination and superordination, for example, he discusses various kinds of subordination, such as subordination under an individual, a plurality, and a principle. The latter form, Simmel maintains, is the most dominant kind of subordination in modern society, and it is particularly revealed in the subordination to law. Rather than subjecting to a leader or a plurality, in modern society people subject to an objective law as a form of depersonified subordination. The subjugation to law also translates in individual consciousness, but the power of obligation stems from the super-personal validity of the law, which now appears as an object.

The work of Simmel's compatriot Ferdinand Tönnies deserves special mention in this overview of relatively neglected classics - and not only for historical reasons. For Tönnies's theoretical and empirical writings were not only extremely extensive and systematic as part of a comprehensive law vision; Tönnies also developed a distinct evolutionary theory in which law played a central role.[13]

Tönnies's perspective of society centrally revolves around the conceptualization of the two distinct societal types of *Gemeinschaft* (community) and *Gesellschaft* (society). Importantly, *Gemeinschaft* and *Gesellschaft* are concepts representing ideal-types of a strictly analytical character. All societies, according to Tönnies, spring forth from the human will, which can either be essential as based on temper and character, or arbitrary in being able to differentiate among means in view of specified objectives. Tönnies conceives of *Gemeinschaft* societies as expressions of the essential will, organically organized around family, village or town, whereas *Gesellschaft* societies are based on mechanically structured arbitrary-will orientations organized in metropolis and state. The shift from agriculture to industry and the rise of free trade, the modern state, and science Tönnies considers the essential features of the gradual transformation from *Gemeinschaft* to *Gesellschaft.* Tönnies does not conceive of the historical evolution of society in unilinear terms as involving a shift from *Gemeinschaft* to *Gesellschaft,* but instead posits that any social formation will always but in varying degrees reflect characteristics of both types.

Tönnies's theory of law is a vital component of his theoretical perspective (also forming a bridge to his elaborate theoretical and empirical work on crime) and is developed on the basis of a more general theory of social norms. Tönnies defines social norms as commands and prohibitions that have validity for the individuals of a social entity and are differentiated among three classes: (1) order: the most general whole of norms providing unity to social life; (2) law: the totality of rules whose proclamation and enforcement are a function of a formal court; and (3) morality: the higher prohibitions and commands that spring from the idea of a beautiful and noble life. Order, law, and morality are differently expressed under conditions of *Gemeinschaft* and *Gesellschaft.*

Tönnies devoted a substantial part of his work on *Gemeinschaft* and *Gesellschaft* to law and suggested a transformation of natural law from common or customary law to contract or statutory law. Tonnies argues that the evolution of law revealed that while all law is both natural and artificial, the artificial element in law had become dominant in the course of history, involving a gradual evolution from common to statutory law. The most critical element of common law is that it had unleashed the capacity to trade and to form relationships in freedom. Thereupon, law gradually formalized in being elaborated, universalized, systematized, and codified because of a rationalization of jurisprudence in terms of efficiency and liberalization and because of an accompanying decline of family organization and habits. Whereas the law of habits (*Gewohnheitsrecht*) was a function of custom, modern legislation-law (*Gesetzesrecht*) was sanctioned by its purpose outside and possibly even against tradition. The resulting state of legal evolution in modern *Gesellschaft*-type societies, according to Tonnies, is not that modern law would only take on the form of the whole of laws proclaimed and enforced by the state. Tonnies stresses the fact that legislation had been monopolized by the state, but also argues for the relative autonomy of law in relation to the remains of other types of (customary) law and the social institutions

[13] TÖNNIES, F., *Gemeinschaft und Gesellschaft: Abhandlung des Communismus und des Socialismus als empirischer Culturformen.* Leipzig: Reisland, 1887.
ibidem (1935), *Gemeinschaft und Gesellschaft: Grundbegriffen der reinen Soziologie.* 8th edn. Darmstadt: Wissenschaftliche BuchGesellschaft, 1963.
ibidem (1935), *Fundamental Concepts of Sociology (Gemeinschaft und Gesellschaft).* New York: American Book Company, 1940.
DEFLEM, M., Ferdinand Tönnies on Crime and Society: An Unexplored Contribution to Criminological Sociology. In: *History of the Human Sciences* 12(3), 1999, p. 87-116.

of politics and economy. The relative part of *Gesellschaft*-like state legislation in comparison to other types of *Gemeinschaft* law within the legal constellation of a society Tonnies argues to be an empirical matter.

3. Conclusion

Reviewing the history of pre-sociological legal thought, a development can be noted in the progression of thought from the Classical School and the utilitarians over historical jurisprudence to the historical materialism of Karl Marx. Betraying a struggle over similar issues of societal and intellectual importance, normative aspirations and scholarly intentions mesh in variable ways. Whereas the utilitarians were oriented towards a social engineering perspective that sought to reform politics and legal policy on the basis of a theoretical assumption of utility rather than an analysis of the conditions of human conduct, the historical orientation was more distinctly analytical in its perspective, and social policy recommendations were more of a practical nature formulated on the basis of concrete investigations. In this light alone, it is an odd circumstance in the later development of modern sociology that the work of Karl Marx, which reintroduces a normative orientation in social thought, would be the most influential of the perspectives discussed here.

It is peculiar to the history of theory of law, that some of the more distinctly authors of the nineteenth century – with the exception of Max Weber and Emile Durkheim, of course - only moderately influenced later developments in sociology and have been all but forgotten by lawyers today, even though they developed comprehensive perspectives and engaged in substantial analyses of societal conditions and institutions, including law. The curious situation of the development of social science is therefore such that although the works of the likes of Spencer, Sumner, Simmel, and Tönnies are explicitly sociological - no less so than those of Weber and Durkheim, if perhaps not as masterful - as well as theoretically informed and empirically oriented, they are part of the past of social science but not its history as one of the building blocks of modern developments. What most early the works on law share with one another as well as with the more historically inclined legal thinkers is a focus on the transformation from pre-modern to modern law (which is variably conceived but typically coined in an evolutionary scheme) and, relatedly, a conceptual concern over the relationship between law as the whole of formally enacted rules, on the one hand, and a more comprehensive view of law as the whole of social practices associated with such rules, on the other.[14] These characteristics of thinking on law in one form or another - and for better or worse - are the essential foundations of modern theory as we know it today.

The early development of the theory of law nicely illustrates that the history and systematics, of law can only be distinguished analytically.[15] This pertains to both the pre-sociological movement towards the theory of law as well as to its later development. The philosophical precursors to the theory of law function as the necessary but insufficient conditions for a genuine theory of law. For to ponder law in the reality of its societal existence or even to query law's social constitution is not to be equated with a systematic study of law.[16] Moreover, the review in this article showed that some of the authors who contributed in their work in more distinct juridical ways than others nonetheless have historically had less influence on the development of the theory of law than some of those scholars who paid less attention to the systematic study of law or to the study of law from any viewpoint. In the latter case, the work of Marx is most exemplary. To be sure, Marx made a contribution to social science by suggesting the instrumentalist theory of law in contributing to and justifying social inequality. But Marx was not alone, and other scholars with a more pronounced sociological commitment studied law more intensely, although they do not fare well in our collective memory. The studies of law of Ferdinand Tönnies, for example, are virtually unknown today even though it presents an elaborate and systematic scheme of thought consistent with his broader juridical orientation.

Among the classics now considered central to modern theory of law, it is clear that Marx did not focus on law to any degree of intellectual satisfaction, while the sociological contributions of Weber and Durkheim are not only influential but foundational to the theory and sociology of law.

When Weber observed that social life in the modern era had become more and more rationalized in a purposive-rational sense, he not only contemplated the central role of economy, state, and bureaucracy, but along with it also discussed the role of law as the basis of modern political authority. Weber specifically outlined the characteristics of a formally rationalized legal system that is primarily guided by the application of procedures.

Weber's analysis is rivaled only by that of Emile Durkheim, whose sociology of law was likewise part and parcel of a more fundamental sociological perspective and theory of society. But it is special great issue.

[14] VANDEKERCKHOVE, L., De Vroege Rechtssociologie. In: Tijdschrift voor Sociale Wetenschappen 41(2), 1996, p. 147-166.
[15] ALEXANDER, J. C., On the Centrality of the Classics. In: GIDDENS, A., TURNER, J. (Ed.), *Sociological Theory Today*. Stanford, CA: Stanford University Press, 1987, p. 11-57.
[16] SPITZER, S., Marxist Perspectives in the Sociology of Law. In: *Annual Review of Sociology* 9, 1983, p. 103-124.

Sozialer Wandel und soziale Stellung in Chinua Achebes Things Fall Apart sowie Kazuo Ishiguros Remains of the Day – Teil II.

(Social Change and Social Standing in the Novels Things Fall Apart from Chinua Achebe and The Remains of the Day from Kazuo Ishiguro – Part II.)

*Kerstin Rupp**

Abstract

The following text deals with the topic social change and social standing in the novels Things Fall Apart from Chinua Achebe and The Remains of the Day from Kazuo Ishiguro. Both authors describe the change in parts of the Nigerian rather English society within a range of three generations. Achebe concentrates on a period between the middle of the 19th up to the beginning of the 20th century. He concentrates on the ethnic group of the Ibo. Considering exogenous factors like colonialism and missionary efforts as well as endogenous factors he describes the fundamental changes within the tribal society. Ishiguro's novel, beginning at the end of the Victorian Age, observes the changes in the English class system through the eyes of a loyal butler. Two world wars accompanied by radical social change result in big, formerly inconceivable, changes in social hierarchy.

Keywords: *Chinua Achebe; Things Fall Apart; Tribal Society; Nigeria; Colonialism; Imperialism; Missionaries; Ibo; Kazuo Ishiguro; The Remains of the Day; Social Change; Social Position; Status; Hierarchy; England; Class System; Diary; Upper Class; Middle Class; Lower Class; Butler; First World War; Second World War.*

2.3 Sozialer Wandel und soziale Stellung in Kazuo Ishiguros *The Remains of the Day*

2.3.1 England: historischer Hintergrund für The Remains of the Day

Ishiguros Roman spielt an sechs Tagen im Juli 1956, als der alternde Butler Stevens während einer Reise nach Devon und Cornwall auch eine Reise in seine Vergangenheit und in die Geschichte Englands unternahm. Die Tagebuchaufzeichnungen des Butlers kreisen aus seiner Perspektive als Ich-Erzähler um die Geschehnisse im fiktiven Landsitz Darlington Hall in der Zwischenkriegszeit und sein Leben, dass er in den Dienst von Lord Darlington stellte. Laut Parkes steht Darlington Hall als Synonym für ganz England und die Sozialstruktur des Landes zur damaligen Zeit. (vgl. Parkes 2001: 13; 55)

> Darlington Hall, moreover, is a miniature version of England itself, and the hierarchical arrangement of social relations inside its walls reflects the state of English society at large (Parkes 2001: 55).

Stevens Retrospektive kann man in drei Abschnitte unterteilen. Er berichtet über die berufliche Blütezeit seines Vaters, der ebenfalls als Butler arbeitete, die vom Beginn des 20. Jahrhunderts bis etwa zum Ende des ersten Weltkrieges dauerte. Er beschreibt sein eigenes Leben als Butler und legt einen besonderen Schwerpunkt auf die Dienstjahre in der Zwischenkriegszeit. Die letzte Epoche ist der Zeit nach dem zweiten Weltkrieg, insbesondere dem Jahr 1956, vorbehalten. Stevens senior dürfte etwa um 1850 geboren worden sein, da er im Roman 1923 im Alter von 72 Jahren verstarb (vgl. RD 94ff.). Historisch gesehen, erlebte er das viktorianische Zeitalter, den Tod seines älteren Sohnes Leonard im Burenkrieg[1], durchlitt den ersten Weltkrieg und war Zeitzeuge des Versailler Vertrags[2]. (vgl. RD 40; 71ff.) Stevens war noch ein Junge, als sein Bruder im Krieg fiel und dürfte daher um 1890 auf die Welt gekommen sein. Auch er erlebte den ersten Weltkrieg, doch in seinen Gedanken beschäftigte er sich hauptsächlich mit der Zwischenkriegszeit, die er im Dienst von Lord Darlington verbrachte. In den 1920ern und 1930ern gab es viele Diskussionen um die Gerechtigkeit des Versailler Vertrages, die Lockerung von Reparationszahlungen für die Deutschen und Chamberlains Appeasementpolitik. Der, auf Erhaltung des Friedens um nahezu jeden Preis gerichtete, außen-politische Kurs Chamberlains war in hohem Maße von der Absicht bestimmt, eine Auf-wertung der Arbeiterschaft und eine Stärkung ihrer Organisation, wie sie sich im bereits im ersten Weltkrieg vollzogen hatte, zu verhindern. In Folge des Krieges hatten sich Chamberlains Befürchtungen jedoch bewahrheitet, da der zweite Weltkrieg die Arbeiter-bewegung in Großbritannien wieder erstarken ließ. (vgl. Schröder 1998: 47) Das Selbst-bewusstsein der Arbeitnehmer spiegelt sich in Harry Smith, der die Bedeutung der Arbeiter für den Ausgang des Krieges in einer Diskussion mit Stevens leidenschaftlich verteidigte. (vgl. RD 186ff.) Außerdem macht Ishiguro deutlich, dass auch in England viele Menschen, besonders aus der einflussreichen Oberschicht, das Gefahrenpotential, das von

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1 1899 bis 1902 fand der Krieg der südafrikanischen Burenrepubliken gegen das Britische Empire statt (vgl. Ansprenger 2000: 64).

2 Der Versailler Vertrag trat am 10. Januar 1920 in Kraft und mutete den Deutschen gigantische Reparationszahlungen zu, die später etwas abgemindert wurden (vgl. Hilgemann 1991: 411).

Hitler ausging, weit unterschätzten und aus Furcht vor einem erneuten Krieg, zu spät gegen das deutsche Regime vorgingen. Da Stevens keine Kinder hatte, wird auch die Nachkriegszeit und das Jahr 1956 aus seiner Perspektive erzählt und es gibt im Gegensatz zu Achebes *Things Fall Apart* keine Generation der Kinder oder gar Enkel, deren Sicht der sozialen Veränderungen man mit der Generation ihrer Väter oder Groß-väter vergleichen könnte.

Die britische Nachkriegssituation zeichnete sich aus durch die Umwandlung Groß-britanniens von einer imperialen Weltmacht in einen europäischen Staat mit beschränkten Ressourcen, durch unzureichende wirtschaftliche Leistungsfähigkeit und nicht überwundene Klassengegensätze, die mit der langen Ausrichtung auf das Empire zusammen-hingen (vgl. Seeber 1993: 352). Noch im Februar 1945 hatte Winston Churchill empört abgelehnt, sich vom Empire zu verabschieden und auch nur „einen Fetzen britischen Erbes fortzuwerfen" (zitiert in Ansprenger 2000: 66), doch kaum ein Jahr später leitete sein Nachfolger Clement Attlee die Entkolonialisierung des Empires mit dem Abzug aus Indien ein. Der Prozess der Entkolonialisierung zwischen den vierziger und sechziger Jahren brachte eine neue Generation unabhängiger Staaten hervor und das Empire verwandelte sich in ein Commonwealth unabhängiger Nationen. (vgl. Ansprenger 1998: 409; Ansprenger 2000: 66; Morgan 1999: 127).

Die heroischen Anstrengungen Englands während des zweiten Weltkrieges konnten aber nicht darüber hinwegtäuschen, dass nur durch das massive Eingreifen der USA der Sieg über Hitler möglich wurde. (vgl. Seeber 1993: 352) 1956, das Jahr der Suez-Krise[3], kann man exemplarisch für die politische Schwäche der britischen Position nach dem zweiten Weltkrieg und den Niedergang der britischen Weltmachtstellung ansehen. Die Vormacht der USA reflektiert sich im Roman dadurch, dass gerade 1956 Darlington Hall nach über zwei Jahrhunderten im Besitz derselben britischen Familie, von einem reichen Amerikaner gekauft wurde. (vgl. RD 6; Schröder 1998: 55) Auch innenpolitisch brachte die Nachkriegszeit einige Veränderungen. Mit der Einführung einer kostenlosen medizinischen Versorgung für alle, der Verstaatlichung der Schlüsselindustrien und anderen Maßnahmen wandelten die nun regierenden Sozialisten England zwischen 1946 und 1951 in einen Wohlfahrtsstaat um, dessen Grundzüge auch spätere konservative Regierungen beibehielten. Die innenpolitischen Reformen der Labour-Regierung stießen auf breite Zustimmung in der Bevölkerung. Man stimmte darin überein, dass der Krieg, die Kriegswirtschaft und die Kriegspropaganda den Weg für sozialen Wandel bereitet hatten. (vgl. Sanders 1996: 584; Schröder 1998: 48; Seeber 1993: 353).

Vor dem Hintergrund der oben aufgeführten weltpolitischen, aber auch innenpolitischen Ereignisse, scheint es interessant, sich genauer mit Ishiguros Roman zu beschäftigen. Dabei kommt es darauf an, den sozialen Wandel in den oben aufgeführten drei Epochen herauszuarbeiten sowie dessen Auswirkungen auf den sozialen Status der Protagonisten hervorzuheben. Zunächst werde ich mich mit der Gesellschaftsordnung in der Generation von Stevens senior beschäftigen, dann auf die Zwischenkriegszeit mit Stevens eingehen, um danach die veränderte Situation im Jahr 1956 zu beschreiben.

2.3.2 Stevens Vater und die Gesellschaftsordnung Englands vom viktorianischen Zeit-alter bis zum Beginn der 1920er Jahre

2.3.2.1 Stevens senior – a great butler

Stevens Vater war für Stevens ein Musterbeispiel für den perfekten Butler. Immer wieder im Verlauf des Romans versuchte sein Sohn zu definieren, was einen herausragenden Butler ausmachte. Er griff dabei auf die Kriterien der fiktiven Hayes Society zurück, die als einzige versuchte, eine offizielle Antwort auf die Frage zu geben. Die Hayes Society behauptete von sich, Butler nur aus „the very first rank" (RD 31) in ihren Reihen auf-zunehmen und sah sich genötigt, ihre eigenen Aufnahmekriterien zu definieren. Die wichtigsten Kriterien waren, dass „an applicant be attached to a distinguished household" (RD 32) und besonders „that the applicant be possessed of a dignity in keeping with his position" (RD 33). Diese Erklärung warf natürlich die Frage auf, was denn unter Würde zu verstehen sei. Stevens war der Meinung, dass Würde im Verlauf einer Karriere von jedem Butler, der sich intensiv darum bemühte, erreicht werden konnte, tat sich aber dennoch schwer mit einer genauen Definition dessen, was er unter Würde verstand. Nichtsdestotrotz sah er in seinem Vater "[…] at the peak of his career at Loughborough House […] the embodiment of 'dignity'" (RD 34), obwohl sein Vater noch einer früheren Butlergeneration angehörte, bei der Attribute wie guter Akzent und Sprachbeherrschung sowie weitreichendes Allgemeinwissen weder als angemessen noch wünschenswert erschienen. Stevens behauptete gar, dass sein Vater Würde um so effektiver verkörpern konnte, weil er die oben aufgeführten Qualitäten - „superficial qualities that the uninitiated sometimes mistake for true dignity, but that are really no more than „icing on the cake" (RD 34)" (Parkes 2001: 4) - nicht bieten konnte. Damals genügte es, wenn ein Butler seine fundamentalen Aufgaben beherrschte. Stevens Vater „came of a generation mercifully free of such confusions of […a butler's] professional values" (RD 35). (vgl. RD 32ff.)

Um den Begriff der Würde weiter einzukreisen, griff Stevens auf die Geschichte von einem Butler in Indien zurück, die auch sein Vater so gerne erzählte, um seine unreflektierte Vorstellung bezüglich eines herausragenden Butlers zu verdeutlichen.

> My father's generation was not one accustomed to discussing and analysing in the way ours is and I believe the telling and retelling of this story was as close as my father ever came to reflecting critically on the profession he practised. As such, it gives a vital clue to his thinking. (RD 36)

Dieser Butler, der seinen Dienstherrn nach Indien begleitet hatte und in der englischen Kolonie für denselben hohen Stan-

[3] 1956 verstaatlichte Ägyptens Staatschef Nasser den Suezkanal, der von einer britisch-französischen Aktiengesellschaft betrieben worden war. In einer koordinierten Militäraktion versuchten die beiden Kolonialmächte England und Frankreich sowie Israel die Verstaatlichung rückgängig zu machen, um ihre Machtposition zu festigen. Engländer und Franzosen mussten sich jedoch auf Druck der Sowjet-union und insbesondere der USA wieder zurückziehen (vgl. Seeber 1993: 352; Woyke 2000: 377).

dard wie in England sorgte[4], erschoss einen Tiger, der sich ins Esszimmer geschlichen hatte, während im Nachbarraum Tee getrunken wurde. Auf die Frage seines Herrn, ob alles in Ordnung sei, bejahte er in völliger Gelassenheit und fügte hinzu: „Dinner will be served at the usual time and I am pleased to say there will be no discernible traces left of the recent occurrence by that time" (RD 36).

Doch auch die herausragende Bedeutung von Stevens senior wusste sein Sohn durch zwei Ereignisse zu illustrieren. Einmal musste er einige angetrunkene Gäste spazieren fahren. Er behandelte sie so lange mit ausgesuchter Höflichkeit und ignorierte ihre Beleidigungen bis sie anfingen, über ihren Gastgeber, also Stevens Boss, herzuziehen. Stevens senior konnte mit stoischer Ruhe alle Torheiten der Gäste ertragen, doch seine Toleranz endete, wenn sein Herr beleidigt wurde. (vgl. RD 38f.; Suter 1999: 242) Er unterbrach die Autofahrt, stieg aus, öffnete die Tür und starrte die Insassen, ohne ein Wort zu sagen, an. Erst nach einer Entschuldigung setzte er die Fahrt kommentarlos fort. (vgl. 39f.) Ein weiterer Beleg für die Würde von Stevens Vaters war sein Verhalten während des Besuchs eines Generals, der für den Tod seines Sohnes Leonard im Buren-krieg verantwortlich war. Sein Arbeitgeber wollte ihn für die Zeit des Besuches Urlaub geben, doch der Butler, der die Bedeutung des Generals für die Geschäfte seines Herrn kannte, antwortete, dass „he was most grateful that his feelings had been taken into account" (RD 41) und „that service would be provided to the usual standards" (RD 41). Da der Gast ohne Kammerdiener anreiste, übernahm Stevens senior auch diese Aufgabe freiwillig und verbrachte vier Tage auf engstem Raum mit dem Mann, den er so sehr verachtete. Stevens senior war immer nur am Wohl seines Herrn gelegen und daher unterdrückte er vollkommen seine Gefühle und agierte so professionell, dass der General bei der Abreise ein großes Trinkgeld hinterließ, dass Stevens Vater jedoch an eine Wohltätigkeitsorganisation weitergab. (RD 42)

Frank Huggett führte in seiner Studie über Hausdiener aus, dass obwohl manche „Victorian servants seem to have had a genuine respect for aristocratic masters", waren manch andere ihre „constant and inflexible judges. […] Behind the servants' mask of perfect politeness and consummate gentility, there were dark thoughts and hidden feelings […]". (Huggett 1977: 35; 46) Man kann sich vorstellen, wie schwer es für Stevens senior gewesen sein musste, dem Mann zu dienen, der seinen Sohn auf dem Gewissen hatte, doch allein der Respekt und die unbedingte Loyalität für seinen Herrn reichten aus, jegliches persönliches Gefühl vollständig zu unterdrücken und nur als professionelles Wesen aufzutreten. Diese Auffassung von Professionalität führte jedoch dazu, dass auch im Privatleben keine Gefühle gezeigt wurden. Vor allem am Beispiel von Stevens senior und junior wird deutlich, dass die Gefühlskälte, die sich aus dem Berufs-ethos des loyalen Butlers ergab, auch ins Privatleben, so weit denn eines bestand, über-tragen wurde. Auf das persönliche Verhältnis zwischen den beiden Butlern beziehungs-weise zwischen Vater und Sohn werde ich später genauer eingehen.

Die unbedingte Loyalität und Ergebenheit eines Butlers bei gleichzeitiger Verleugnung eigener Interessen und Gefühle, die Stevens senior an den Tag legte, stellten für seinen Sohn untrügliche Beweise für ein Verhalten dar, dass die Hayes Society „dignity in keeping with [one's] position" (RD 42) genannt hatte. Würde hatte also ganz entscheidend mit der Fähigkeit eines Butlers zu tun, die professionelle Person, die er gewisser-maßen bewohnte, nicht willkürlich zu verlassen, wenn er sich durch äußere Ereignisse provoziert oder angegriffen fühlte. (vgl. RD 42) Das unterschied laut Stevens einen herausragenden von einem bloß kompetenten Butler.

> Lesser butlers will abandon their professional being for the private one at the least provocation. For such persons, being a butler is like playing some pantomime role; a small push, a slight stumble, and the façade will drop off to reveal the actor underneath. The great butlers are great by virtue of their ability to inhabit their professional role and inhabit it to the utmost; they will not be shaken out by external events, however surprising, alarming or vexing. They wear their professionalism as a decent gentleman will wear his suit: he will not let ruffians or circumstance tear it off him in the public gaze; he will discard it when, and only when, he wills to do so, and this will invariably be when he is entirely alone. (RD 42f.)

2.3.2.2 Soziale Beziehung zwischen Vater und Sohn

Die Beziehung zwischen Vater und Sohn zeichnete sich aus durch Formalität, Distanz und Verlegenheit. Man kann nur darüber spekulieren, wie gering die Chance des jungen Stevens gewesen sein musste, irgendeine Form von individueller Spontanität oder gar Selbstbewusstsein zu entwickeln, wenn sein eigener Vater die strengsten Standards bezüglich seiner Karriere als Butler anlegte. (vgl. Winsworth 1999: 260) Stevens' gespanntes Verhältnis zu seinem Vater zeigte sich auch darin, dass er ihn nur in der dritten Person anredete und sogar auf die Schriftform zurückgriff, um ihm auf seine neuen, wegen seines Alters reduzierten, Aufgaben im Hause des Lords hinzuweisen (vgl. O'Brien 1996: 791; RD 66). Als Stevens senior nach Darlington Hall kam, war er bereits so alt, dass er nur noch die Aufgaben eines „Under-Butlers", also als Untergebener seines Sohnes, der als Butler die ranghöchste Funktion unter der Dienerschaft innehatte, aus-üben konnte. Obwohl er auch in dieser Position anfing, leichte Fehler zu machen, wollte sein Sohn dies nicht wahrhaben. Er wies Miss Kenton zurück, wenn sie auf Probleme aufmerksam machte und in dem alten Mann, der sein Leben lang ein loyaler und disziplinierter Butler war, nun nichts mehr als einen „Under-Butler" sah, der nicht alle Arbeiten erledigen konnte. Doch auch Lord Darlington blieben die Fehler nicht verborgen und er erklärte seinem Butler Stevens, dass Stevens senior von den Aufgaben eines „Under-Butlers" entbunden werden sollte. (vgl. RD 55ff.; Rothfork 1996: 96f.; Suter 1999: 244)

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[4] In diesem Verhalten spiegelte sich die Arroganz der Kolonialherren, die es als ihre gottgegebene Ver-pflichtung ansahen, „to go out and colonize those places unfortunate enough not to have been born under the [British] flag" (Paxman 1999: 65). Großbritannien fühlte sich, laut Kipling, vom Schicksal auserwählt „[…] to 'Take up the White Man's burden – Send forth the best ye breed' – to 'serve' peoples who were 'half-devil and half-child'" (Paxman 1999: 65), ohne dabei jedoch auf die Annehmlichkeiten des Mutterlandes verzichten zu wollen.

> These errors may be trivial in themselves, Stevens, but you must yourself realize their larger significance. Your father's days of dependability are now passing. He must not be asked to perform tasks in any area where an error might jeopardize the success of our forthcoming conference. (RD 62f.)

Auch als Stevens seinen Vater mit dem heiklen Thema konfrontierte, dass er wegen zu-nehmender Gebrechlichkeit und Unzuverlässigkeit nicht mehr als „Under-Butler" eingesetzt werden konnte, sondern nur noch bestimmte Tätigkeiten ausüben sollte, kam es zu keinerlei emotionalem Austausch oder gar persönlichen Worten. Stevens' Vater, dessen soziale Stellung im Haus sich wegen seines Alters erneut verringerte, zeigte keine Emotionen, auch nicht, als sein Sohn eine Auflistung der neuen Dienstanforderungen auf sein Bett legte, die dazu beitrug, die Konversation zwischen beiden auf ein Minimum zu redu-zieren. (vgl. RD 64ff.) Erst als er im Sterben lag, versuchte Stevens Vater, Jahre des Schweigens zwischen seinem Sohn und sich selbst wieder gut zu machen. „I hope I've been a good father to you" und „I'm proud of you. A good son. I hope I've been a good father to you. I suppose I haven't" (RD 97) waren Ansätze für ein persönliches Gespräch, wobei der sterbende Mann keinen Blickkontakt zu seinem Sohn herstellte, sondern nur angestrengt seine Hände anschaute. Aber auch in dieser Situation konnte Stevens keine Gefühle zulassen und nahm das Geständnis seines Vaters, als Elternteil[5] versagt zu haben, nicht an. Stattdessen wiederholte er gebetsmühlenartig die Floskel, dass er froh sei, dass es seinem Vater wieder besser gehe. Nur ein einziges Mal sprach er seinen Vater mit dem persönlichen „you" an bevor er das Zimmer des Sterbenden wieder verließ, um die Gäste einer Konferenz zu bedienen. (vgl. Jirgens 1999: 226; RD 97f.; Winsworth 1999: 260) Als Miss Kenton Stevens kurz darauf über den Tod seines Vaters unterrichtete, ging er nicht direkt zum Zimmer des Toten, um ihm die letzte Ehre zu er-weisen, sondern verwies darauf, dass er zur Zeit besonders beschäftigt sei. Als Rechtfertigung fügte er an, dass sein Vater gewollt hätte, dass er zuerst seinen beruflichen Verpflichtungen nachkomme. „To do otherwise, I feel, would be to let him down" (RD 106). Hier bleibt es jedoch der Interpretation des Lesers überlassen, ob mit „him" Stevens leiblicher Vater oder sein Dienstherr Lord Darlington gemeint war, den er nicht enttäuschen wollte. (vgl. RD 106; Shaffer 1998: 74) Es wird auf jeden Fall deutlich, dass Stevens die Lektionen seines Vater nur zu gut gelernt hatte und trotz dieser persönlichen emotionalen Krise nicht aus seiner Rolle als Butler schlüpfen konnte oder wollte, weil er seinem Ideal des herausragenden Butlers ein Stück näher kommen wollte. Lord Darlington war für Stevens eine Art „surrogate-father" und er „displaced Stevens senior from his natural place in his son's affections" (Parkes 2001: 50). Bevor ich näher auf das Verhältnis zwischen Stevens und Lord Darlington eingehe, möchte ich zunächst das soziale Welt-bild seines Vaters verdeutlichen, das die soziale Hierarchie Englands im ersten Viertel des vergangenen Jahrhunderts aus Sicht eines Butlers, stellvertretend für die untere soziale Schicht, beschreibt.

2.3.2.3 Soziale Stellung – die Welt als Leiter

Butler aus der Generation von Stevens Vater tendierten dazu, die Welt in Form einer Leiter zu sehen. Wer auf der obersten Stufe der Leiter stand, hatte die höchste soziale Stellung im Land. Ganz hoch oben auf der sozialen Leiter standen

> the houses of royalty, dukes and the lords from the oldest families […] those of 'new money' lower down and so on, until one reached a point below which the hierarchy was determined simply by wealth – or the lack of it (RD 115).

Den höchsten Status in England hatte also die königliche Familie, gefolgt von Mit-gliedern aus alten Adelsgeschlechtern. Die englische Gesellschaft zeichnete sich durch einen Feudalismus aus, der Menschen, wie Lord Darlington, nur auf Grund ihrer adeligen Herkunft, Autorität verlieh, die von den niederen Bevölkerungsschichten akzeptiert und sogar unterstützt wurde (vgl. Parkes 2001: 49). Nach dem Landadel folgte die Gruppe der Neureichen und der Geschäftsleute, die hauptsächlich in der Industrie zu Geld gekommen war und die es wegen ihres Reichtums zu Einfluss in der Gesellschaft gebracht hatten (vgl. RD 114). Soziale Merkmale für die reiche Oberschicht waren ein distinguierter Sprachstil, würdevolles Benehmen und Statussymbole wie elegante Kleidung und ein teures Auto (vgl. Jirgens 1999: 221).

Diese soziale Hierarchie bestimmte das Weltbild von Stevens senior, der wie alle ambitionierten Butler jener Generation versuchte, so weit die Leiter emporzusteigen wie irgend möglich. Je höher er kam, desto größer war auch sein berufliches Prestige und besonders begehrt waren daher Arbeitgeber, die einen Titel hatten. (vgl. RD 114f.) Man sollte jedoch nicht vergessen, dass ein Butler, egal wie hoch sein berufliches Prestige, immer noch zur Gruppe der Diener gehörte. Natürlich konnte man stolz darauf sein, einem edlen Herrn zu dienen und hob sich dadurch von anderen Berufskollegen ab, doch muss man sich klar vor Augen halten, dass ein Butler eine geringe soziale Stellung inne-hatte im Hinblick auf die gesamtgesellschaftliche Situation. Stevens senior gehörte zu der unteren Gesellschaftsschicht, die ihr Geld durch Arbeit im Dienst einer höher gestellten Person verdienen musste und seine soziale Stellung innerhalb des Herrenhauses wurde mit zunehmendem Alter immer geringer, da er den Aufgaben eines Butlers nicht mehr gewachsen war. (vgl. RD 65f.; Shaffer 1998: 73) Selbstverständlich gab es auch Rangunterschiede unter den Angestellten in einem herrschaftlichen Haus. Ranghöchste Diener waren der Butler und die Haushälterin. Sie koordinierten den gesamten Betrieb, verteilten die Aufgaben und waren für den reibungslosen Ablauf des häuslichen Geschehens verantwortlich. Weitere Angestellte, soweit es sich um einen großen und wohlhabenden Haushalt handelte, der sich viel Personal leisten konnte, waren der „Under-Butler", der Kammerdiener, die Köchin mit ihrem Küchenpersonal, Zimmermädchen, Gärtner sowie sonstige niedere Diener. Damals mussten nur Frauen aus der Unter- und gelegentlich der Mittelschicht arbeiten, um ihren Lebensunterhalt bestreiten zu können. Häusliche Dienstleistungen wurden als die angemessenste Arbeit für Frauen und Mädchen aus der

[5] Obwohl Stevens Vater zwei Söhne hatte, spielte die Mutter in dieser Familie offensichtlich keine große Rolle, da sie im Roman noch nicht einmal erwähnt wird (vgl. Winsworth 1999: 261).

Arbeiterklasse angesehen und deshalb verbrachten viele Frauen „the brief period of indepen-dence from domestic responsibility“ (Trodd 1998: 22) in einem fremden Haushalt. Die meisten von ihnen warteten darauf, geheiratet zu werden und die vorgeschriebene Rolle als Hausfrau und Mutter zu übernehmen, obwohl es natürlich auch Ausnahmen gab. Manche Frauen wollten ihr Leben nach ihren eigenen Vorstellungen gestalten, doch dafür waren sie auf Arbeit angewiesen, um zu überleben. (vgl. Trodd 1998: 119ff.)

Sowohl der Butler als auch die Haushälterin durften ihre direkten Untergebenen mit dem Vornamen anreden, was ihre höhere soziale Position gegenüber dem restlichen Personal zum Ausdruck brachte. Nichtsdestotrotz waren aber alle Angestellten eines Hauses von dem Urteil ihrer jeweils früheren Dienstherren abhängig, wenn sie sich um eine neue Arbeitsstelle bemühten (vgl. RD 51). Nur gute Referenzen machten eine berufliche Verbesserung oder gar einen Aufstieg innerhalb der Angestelltenhierarchie möglich. Das Personal musste also wohl oder übel allen Wünschen des Dienstherrn mit tadelloser Disziplin nachkommen und eigene Ideen oder Vorstellungen, falls sich durch die permanente Bevormundung überhaupt welche entwickeln ließen, unterdrücken. Die meisten kleinen Hausangestellten kamen jedoch aus den untersten Gesellschaftsschichten, hatten eine geringe Schulbildung, konnten sich schlecht ausdrücken und folgten treu ergeben den Befehlen ihrer Vorgesetzten (vgl. RD 49). Sie waren einfach nur froh, eine Arbeit zu haben und ihren Lebensunterhalt bestreiten zu können. Wer sollte diesen Menschen verübeln, wenn sie keine eigene politische Meinung entwickeln konnten und stattdessen die Positionen ihrer Arbeitgeber aus der englischen Elite übernahmen? Die Angestellten wohnten im Haus ihres Arbeitgebers in einem speziellen Dienertrakt. Jeder hatte sein eigenes Zimmer, doch darüber hinaus gab es keinen Raum für Privatsphäre oder gar eine eigene Familie. Stevens senior bewohnte zum Beispiel ein kleines Zimmer im Dachgeschoss, das seinem Sohn, bei einem seiner raren Besuche wegen seiner Enge und Nacktheit der Wände, wie eine Gefängniszelle vorkam. Auch Stevens eigener Raum ähnelte einer Gefängniszelle, war dunkel und etwas feucht, wie Miss Kenton bemerkte, da kaum Sonne ins Innere gelangen konnte. (vgl. RD 52; 64; 165) Da Stevens immerhin der höchste Angestellte im Haus war und auch die Position seines Vaters als „Under-Butler“ nicht zu den geringsten gehörte, kann man nur darüber spekulieren, wie möglicherweise die Unterkunft der niedrigsten Diener ausgesehen haben mag. Die Dienerschaft arbeitete den ganzen Tag in einem prachtvollen Haus, polierte Geschirr, kochte erlesene Speisen, sorgte für pingelige Sauberkeit und war eifrigst um das Wohl des Hausherrn und seiner Gäste bemüht, doch sie selbst konnten nicht an dem Wohlstand teilhaben. Umgeben von all dem Reichtum mussten sie nach getaner Arbeit in ihre engen, häufig sterilen Räume zurückkehren und waren somit Bestandteil des Hauses, dass sie nur an gelegentlichen freien Tagen, deren Anzahl vertraglich festgelegt war, verlassen konnten. (vgl. RD 170)

In *The Remains of the Day* schien sich die Welt für Menschen wie Stevens Vater nur innerhalb der Mauern eines hochherrschaftlichen Hauses abzuspielen. Die Gesellschaft im Roman war daher zweigeteilt. Zum einen gab es die Gruppe der Herrschenden, sprich den Adel oder auch neureiche Emporkömmlinge aus Industrie und Wirtschaft, zum zweiten gab es ihre Untergebenen, die in einem Dienstverhältnis zu ihnen standen. Die zahlenmäßig große Mittelschicht spielt in Ishiguros Roman kaum eine Rolle. Die Diener zeichneten sich durch Loyalität und Pflichtbewusstsein gegenüber ihren Herren aus und akzeptierten diese häufig als soziale oder politische Vaterfiguren, deren politische Über-zeugungen unhinterfragt übernommen und unterstützt wurden. Die herrschende Ober-schicht ging sogar meistens davon aus, dass nur sie in der Lage wäre, die großen Probleme des Landes zu lösen und dass der gewöhnliche Mann auf der Straße zu wenig über Politik, Wirtschaft und Handel wisse, um mitbestimmen zu können (vgl. RD 199). Die Diener waren in der Tat weitgehend unpolitisch, denn das feudale Band zwischen Herr und Diener konnte nur Bestand haben, wenn jene „[…] who occup[ied] servile roles […] g[a]ve their consent“ (Parkes 2001: 50) Shils führt aus, dass

> [t]he class system which took form in the nineteenth and early twentieth centuries in this country demanded a lot […] from those at the bottom. […] It demanded more than obedience, it demanded respectability. […] Respectability entailed not only self-restraint, it entailed deference to one's betters, which involved self-derogation. (Shils 1980: 498)

Die Menschen am unteren Ende der sozialen Hierarchie unterstanden damals fraglos der großen Macht des Adels und der übrigen Elite des Landes, deren “[…] mere ‘being’ qualified them to do what had to be done – to administer, to do research, to understand the essentials of any problem and to take the action called for“ (Shils 1980: 499). England war also zur damaligen Zeit ein „Paradies der Amateure“ (Döring 1998: 166), das vom Leitbild des Gentleman-Ideals die politische und gesellschaftliche Vormachtstellung der Oberschicht als selbstverständlich abzuleiten schien (vgl. Döring: 1998: 165ff.). Diesen Vorwurf, ein Amateur zu sein, musste sich auch Lord Darlington während einer von ihm organisierten internationalen Konferenz von dem amerikanischen Senator Lewis anhören (vgl. RD 102f.). Auf den Konflikt zwischen Amateuren und Professionellen, dem Ishiguro besonders in der Zwischenkriegszeit große Beachtung zukommen lässt, werde ich im weiteren Verlauf der Arbeit noch eingehen.

2.3.2.4 Sozialer Wandel im mythischen England

Das oben beschriebene England lässt bereits viel Konfliktpotential für die Zukunft erahnen, welches jedoch zum damaligen Zeitpunkt noch nicht ins kollektive Bewusstsein der Mehrheit der Bevölkerung gerückt war. Man nahm die Situation als gegeben hin und der Adel hatte sowieso nichts an seiner privilegierten Stellung auszusetzen[6]. Es lag also an der Unterschicht, ihre Benachteiligung zu erkennen und sich für Veränderungen

[6] Klassenstrukturen weisen eine hohe Resistenz gegenüber einem Wandel auf. Die Gruppen, die sich in einer hohen Position mit großem Einfluss befinden, werden daher auch nicht ohne Widerstand ihre Macht aufgeben, sondern sie werden eher versuchen, alle Ressourcen zu nutzen, um ihre Überlegenheit weiter auszubauen oder zu erhalten. (vgl. Goldthorpe 1980: 29)

zu ihren Gunsten stark zu machen. Im ersten Viertel des 20. Jahrhunderts spielte die Klassenstruktur noch eine wichtige Rolle in der britischen Gesellschaft. In Folge des ersten Weltkrieges setzte jedoch eine stärkere Demokratisierung ein. Alle erwachsenen Männer und Frauen über 30 erhielten durch den 'Representation of the People Act' von 1918 das Wahlrecht. Diesen Demokratisierungsschub erklärt der Historiker Peter Clarke damit, dass der Krieg Arbeiter in Soldaten verwandelt habe, die den unbestreitbaren Anspruch erhoben, als Bürger betrachtet zu werden. Erst 1928 erhielten Frauen zwischen 21 und 30 Jahren ebenfalls das Wahlrecht. (vgl. Atkins 1977: 57f.; Schröder 1998: 44f.; Trodd 1998: 4) Durch die Einführung des allgemeinen Wahlrechts wurde die Grundlage für eine Umbildung des Parteiensystems und die Voraussetzung für den Durchbruch einer eigenständigen Arbeiterpartei geschaffen, welche die Ober- und Mittelschichten gefürchtet hatten. Bei den Wahlen von 1918 konnte die Labour-Partei mit 22,7 Prozent der Stimmen bereits die Liberale Partei als die wichtigste Partei des Fortschritts ablösen und 1924 die Regierung bilden, wenn auch nur als kurzlebiges Minderheitskabinett. Trotz der beginnenden Emanzipation der Arbeiterschaft erwies sich das englische soziale System als weitgehend stabil und die soziale Stellung der Bevölkerung wurde bestimmt durch das Milieu, in das man geboren wurde.

Ishiguros Bild der feudalen Gesellschaft, in der Stevens senior zuhause war, zeigt zu Beginn keinerlei Auflösungserscheinungen. Der Autor beschäftigt sich mit der gesell-schaftlichen Oberschicht und den Dienern, als Repräsentanten der unteren Schichten unter völliger Auslassung der Mittelklasse und der übrigen Arbeiterschaft, die sich jenseits des Dienstleistungssektors verdingen musste. Er zeigt zunächst ein Bild von einer vermeintlich idealen Gesellschaft, in der jeder mit der ihm von Geburt zugedachten Rolle im Leben einverstanden zu sein scheint. Butler wie Stevens halfen durch ihre Dienste das System des britischen Feudalismus aufrecht zu erhalten und stärkten ihren Herren den Rücken, damit sie sich weiter um das Mutterland und sein Empire kümmern konnten. Ishiguro selbst betont, dass er in *The Remains of the* Day den Mythos von einem idealen England verarbeitet hat, von dem er aber persönlich annimmt, dass es in dieser Form nie existiert hat (vgl. Shaffer 1998: 88).

> The kind of England that I create in *The Remains of the Day* is not an England that I believe ever exited…What I'm trying to do there…is actually rework a particular myth about a certain kind of mythical England…, an England with sleepy, beautiful villages with very polite people and butlers…taking tea on the lawn…The mythical landscape of this sort of England, to a large degree, is harmless nostalgia for a time that didn't exist. The other side of this, however, is that it is used as a political tool…It's used as a way of bashing anybody who tries to spoil this „Garden of Eden"[7] (Shaffer 1998: 88f.)

Das Bild von England als einem ehemaligen Garten Eden wird jedoch häufig aus politischen Gründen ausgebeutet. Besonders die politische Rechte versucht, das nostalgische England heraufzubeschwören, um den Menschen vorzutäuschen, dass

> […] England was this beautiful place before the trade unions tried to make it more egalitarian or before the immigrants started to come or before the promiscuous age of the '60 s came and ruined everything (Parkes 2001: 62).

Mit der Erzeugung einer falschen Nostalgie wollte Ishiguro die gute alte Ordnung in Frage stellen und zeigen, wie

> the soil in this „Garden of Eden" could nourish the seeds of a destructive fascism, and how the protagonist's professionalism - which nurtures those same seeds - could mask a self-destructive, paralyzing disengagement (Shaffer 1998: 89).

Genau diesen Hang zum Nationalsozialismus zeigte auch Lord Darlington, dem Stevens aber trotzdem loyal ergeben blieb, ohne dessen politische Einstellung gegenüber Hitler zu hinterfragen. Sowohl Stevens als auch sein im Burenkrieg gefallener Bruder Leonard waren gewissermaßen Opfer des Feudalismus in der britischen Gesellschaft, der Menschen wie Lord Darlington politischen Einfluss gewährte, den diese oft naiv oder im schlimmsten Fall mit verbrecherischer Intention auszunutzen wussten. Falsch verstandener Professionalismus, der sich in emotionalem Masochismus und politischer Neutralität beziehungsweise bedingungsloser Überidentifikation mit den politischen Zielen des jeweiligen Dienstherrn äußerte, kennzeichneten auch das Verhältnis zwischen Stevens und Lord Darlington. (vgl. Parkes 2001: 49ff.) Dieses Verhältnis soll, stellvertretend für das soziale Verhältnis zwischen Unter- und Oberschicht, im Mittelpunkt der Betrachtungen über die 1920er und 1930er Jahre stehen.

2.3.3 Stevens junior und die Gesellschaftsordnung in der Zwischenkriegszeit

2.3.3.1 Stevens junior - Prototyp des loyalen Butlers

Für Stevens standen Professionalität, Pflichterfüllung und Loyalität gegenüber seinem Dienstherrn Lord Darlington an erster Stelle. Seine Loyalität gegenüber dem Lord ging sogar soweit, dass er für ihn einige Gäste ausspionierte und an ihren Türen lauschte. (vgl. Suter 1999: 241ff.) Stevens unterdrückte bereitwillig seine Identität, um seinem Herrn zu dienen. Dicht an der Radnabe imperialer Macht strebte er danach, ein herausragender Butler zu sein und behauptete sogar, dass solch ein Unterfangen nur in Großbritannien Erfolg haben könne. (vgl. Jirgens 1999: 222) Er war ein Butler, der die viktorianischen Werte „formality, repression […] and self-effacement" (O'Brien 1996: 788), die unter dem Oberbegriff der Würde zusammengefasst wurden, zutiefst verinnerlicht hatte. Für ihn stellte Würde eine ausschließlich englische Qualität dar, die sich darin zeigte, dass wahre Butler nur in England existierten.

> It is sometimes said that butlers only truly exist in England. Other countries, whatever title is actually used, have only manservants. I tend to believe this is true. Continentals are unable to be butlers because they are as a breed incapable

[7] Laut Moss kann der Garten Eden überall sein und er „[…] can become rustic, suburban, a jungle, or otherwise hellish - the desert is no more than a stone's throw away" (Moss 1979: 125). Dieser Garten wird, ebenso wie Ishiguros Mythos des idealen Englands, als „ideal setting" („Eden") beschrieben, doch wie wir alle wissen, gibt es eine Schlange, die Adam und Eva betrügt und für ihre Vertreibung aus dem Paradies verantwortlich ist (vgl. „Eden"; Genesis 2,4b-25; Moss 1979: 125).

> of the emotional restraint which only the English race is capable of. Continentals – and by and large the Celts, as you will no doubt agree[8] – are as a rule unable to control themselves in moments of strong emotion, and are thus unable to maintain a professional demeanour other than in the least challenging of situations. […] In a word, 'dignity' is beyond such persons. We English have an important advantage over foreigners in this respect and it is for this reason that when you think of a great butler, he is bound, almost by definition, to be an Englishman. (RD 43)

Vor dem Hintergrund dieses chauvinistischen Nationalismus stellte auch die Landschaft Großbritanniens für Stevens einen weiteren Beweis für die Überlegenheit seines Landes dar. Stevens charakterisierte sein Heimatland als ein Land, das „knows of its own beauty, of its own greatness, and feels no need to shout about it" (RD 29). Er fuhr fort, dass es in Afrika und Amerika sicherlich aufregende Sehenswürdigkeiten gäbe, sie dem objektiven Beobachter jedoch, wegen ihrer ungebührlichen Zurschaustellung, als minderwertig[9] erscheinen müssten. (vgl. RD 29). Solche Ansichten stellten aber wohl nicht Stevens eigene Ideen dar, weil er selbst kaum jemals die Grenzen von Darlington Hall überschritten hatte und die einzigen Ausländer, denen er begegnen konnte, die Gäste des Lords waren. Die Vorurteile, die der Butler hier pflegte, kamen also vermutlich aus anderen Quellen, hauptsächlich von Lord Darlington, vielleicht auch von seinem Vater und aus Büchern. (vgl. Parkes 2001: 58; RD 28)

Stevens sah seinen Beruf als eine Rolle, die er völlig verinnerlichen, quasi bewohnen und verkörpern, musste, um ein herausragender Butler zu sein.

> A butler of any quality must be seen to *inhabit* his role, utterly and fully; he cannot be seen casting it aside one moment to simply don it again the next as though nothing more than a pantomime costume. (RD 169)

Winsworth erklärt Stevens' ausgeprägte Fähigkeit, seine Rolle als Butler, unter Zurück-stellung seiner eigenen Identität, kompromisslos zu verinnerlichen, damit, dass er ein typischer Engländer aus der Zeit des Empires war.

> The codes of conduct that are associated with this particular kind of Englishness provide a ready made framework that both supports the creation of a false self, and offers ample justification for repressing the individuality of one's existence. (Winsworth 1999: 260)

Um die Rolle noch besser spielen zu können, versucht er sogar, seine Beherrschung der englischen Sprache weiter zu verbessern, indem er sentimentale Liebesromane las. Sehr wortreich erklärte er jedoch dem Leser, nachdem ihn Miss Kenton bei der Lektüre entdeckt hatte und er ihr mit Verweis auf seine Privatsphäre die Tür gewiesen hatte, dass er dies nur aus rein beruflichen Gründen tat. Miss Kenton musste gehen, weil sie ihn 'off duty' (RD 168) angetroffen hatte und ein Butler, der seinen Beruf mit Stolz ausübte, durfte sich diese Blöße niemals in der Gegenwart von anderen geben. (vgl. RD 167ff.; Winsworth 1999: 261) Stevens' einziger Zufluchtsort war sein persönliches Zimmer, „a place where he [could] relax and disrobe from his guise as „butler" without fear of being seen or heard by others" (Jirgens 1999: 219). Sein ganzes Leben wurde charakterisiert durch eine Stille bezüglich aller persönlichen Angelegenheiten. Daher war es ihm auch nicht möglich, sein öffentliches Selbst abzulegen, als sein Vater starb oder als Miss Kenton ihre bevorstehende Heirat ankündigte. (Jirgens 1999: 219) Stevens gratulierte ihr nur knapp und mit Hinweis auf „events of global significance" (RD 218), die gerade im Haus stattfanden, brach er das private Gespräch, in dessen Verlauf Miss Kenton möglicherweise sogar auf eine Liebeserklärung seinerseits gehofft hatte, ab. Als sie bemerkte, dass Stevens dem Beruf erneut den Vorrang gab, sagte sie, innerlich resignierend: „When are they not, Mr Stevens?" (RD 218). Besonders in Bezug auf Miss Kenton schien sich Stevens geradezu hinter seiner Rolle als Butler zu verstecken. Beziehungen zwischen Angestellten waren ihm ein Gräuel, da sie die Professionalität der Arbeit, seiner Meinung nach, in Frage stellten (vgl. RD 51). Aus diesem Grund dürfte Stevens seine Sexualität gänzlich unterdrückt haben[10] und konnte seine Zuneigung zu der Haushälterin weder sich selbst noch ihr gegenüber offenbaren. Freud beschrieb solches Verhalten folgender-maßen: „People are in general not candid over sexual matters. They do not show their sexuality freely, but to conceal it they wear a heavy overcoat woven of a tissue of lies" (Sigmund Freud zitiert in Shaffer 1998: 63). Stevens trug in der Tat einen Mantel aus Würde und professioneller Loyalität, der sein wahres Ich erfolgreich vor allen anderen verbarg und ihn als Mensch ohne Privatleben und Gefühle[11] darstellte. Stevens ganze Motivation lag darin, seinem Herrn zu dienen, der zur damaligen Zeit sehr dicht an den Schalthebeln der Macht saß (vgl. Jirgens 1999:

[8] Stevens wendet sich hier an eine nicht benannte Person, der er, um Zustimmung heischend, seine Auffassung erläutert, von der er mit bewundernswerter Engstirnigkeit und Ignoranz annimmt, dass nie-mand von ihr abweichen könnte. Es ist jedoch eher davon auszugehen, dass die Leser Stevens nicht zustimmen und die Ideologie hinter des Butlers kultureller Behauptungen zurückweisen oder ablehnen. (vgl. Teverson 1999: 257f.).

[9] Diese Idee der Minderwertigkeit anderer Nationen galt auch als Argument für Imperialismus und Ko-lonialismus. Cecil Rhodes sagte einmal, dass das Privileg, als Engländer geboren worden zu sein, dem ersten Preis in der Lotterie des Lebens entspräche. Er fuhr fort, dass „we happen to be the best people in the world, with the highest ideals of decency and justice and liberty and peace" (Paxman 1999: 66). Daher fühlten sich die Briten laut Lord Hugh Cecil dazu berufen, „to undertake the government of vast, uncivilised populations and to raise them gradually to a higher level of life" (Paxman 1999: 69) Stevens' Vorstellung der Minderwertigkeit bestimmter Landschaften kann daher auf die dort lebenden Völker übertragen werden, die deshalb auch von den Briten kolonialisiert wurden.

[10] Im gesamten Roman herrscht eine Atmosphäre großer Prüderie, die für die oberen Gesellschafts-schichten Englands zu jener Zeit typisch gewesen sein dürfte. Ein weiteres Beispiel dafür, dass über Sexualität nicht gesprochen wurde, ist der Versuch Stevens, dem 23-jährigen Patensohn des Lords, die „facts of life, […] birds, bees […]" (RD 82) zu erklären, da dieser bald heiraten sollte und sein Vater seit fünf Jahren vergeblich versucht hatte, ihn aufzuklären. (vgl. RD 82ff.)

[11] Miss Kenton warf dem Butler jedoch vor, dass er eine merkwürdige Aversion gegen hübsche Mädchen als Bedienstete in Darlington Hall hatte. Sie behauptete, dass der Anblick gut aussehender Frauen, Stevens' versteckte Sexualität wecken könnte und er trotz allem nur ein Mann aus Fleisch und Blut sei, der Angst davor habe, dem Charme einer Frau zu verfallen. (vgl. RD 156) Mit folgenden Fragen versuchte sie ihn aus der Reserve zu locken: „Might it be that our Mr Stevens fears distraction? Can it be that our Mr Stevens is flesh and blood after all and cannot fully trust himself?" (RD 156).

222). Daher ließ er es auch zu, als einer der Gäste des Lords ihn dazu missbrauchte zu beweisen, dass gewöhnliche Leute wie Stevens zu ignorant seien, die politischen Probleme des Landes zu verstehen und dass „[d]emocracy [was] something for a bygone era" (RD 198). (vgl. RD 195ff.; Suter 1999: 247) Stevens verstand, was in diesem Moment von ihm erwartete wurde und er sah es als seine Pflicht, als guter Diener seines Lords, den Erwartungen der Gäste zu entsprechen und völlige Ahnungslosigkeit zu signalisieren. Er hatte zwar eine Meinung, aber er fühlte, dass seine Auffassung über politische und wirtschaftliche Belange des Landes nicht zu den Kompetenzen gehörte, die gemeinhin einen Butler ausmachten. (vgl. Jirgens 1999: 222; RD 195f.) Diese Dienstbeflissenheit und uneingeschränkte Loyalität führte dazu, dass Stevens grundsätzlich alle Handlungen seines Dienstherrn positiv beurteilte und dessen Verhalten ohne Ausnahme guthieß und billigte. Dieses Selbstverständnis lässt sich auch an Stevens Auffassung über die Pflichten eines Butlers ablesen.

> Let us establish this quite clearly: a butler's duty is to provide good service. It is not to meddle in the affairs of the nation. The fact is, such great affairs will always be beyond the understanding of those such as you and I, and those of us who wish to make our mark must realize that we best do so by concentrating on what is within our realm; that is to say, by devoting our attention to providing the best possible service to those great gentlemen in whose hands the destiny of civilization truly lies. (RD 199)

Mr Cardinal konnte nicht verstehen, dass das Schweigen des Butlers, der zu keinerlei öffentlicher Kritik an seinem Lord bereit war, dessen Vorstellung professioneller Loyalität war.

> I'm sorry, sir, but I cannot see that his lordship is doing anything other than that which is highest and noblest. He is doing what he can, after all, to ensure that peace will continue to prevail in Europe. (RD 225)

Stevens mochte auch keine näheren Details über den Lord und seine Verbindungen zu den Nazis erfahren mit der Begründung: „I would not say I am not curious, sir. However, it is not my position to display curiosity about such matters" (RD 222). Aus Cardinals Perspektive sah es so aus, als kümmere sich Stevens nicht um das Wohl des Lords und sei nicht zum Handeln bereit. (vgl. Jirgens 1999: 226f.) Stevens erklärte je-doch, dass es für einen guten Butler unmöglich sei, eine kritische Haltung gegenüber seinem Arbeitgeber zu entwickeln und gleichzeitig gute Dienste zu leisten.

> […] A butler who is forever attempting to formulate his own 'strong opinions' on his employer's affairs is bound to lack one quality essential in all good professionals: namely, loyalty. (RD 200)

Man sollte jedoch nicht gedankenlos seine Loyalität an einen mittelmäßigen Herrn verschwenden, sondern es sei wichtige Aufgabe eines Butlers, nach einem Arbeitgeber zu suchen, der all das verkörperte, was man selbst als nobel und bewundernswert betrachtete. Menschen wie Stevens legten ihr volles Vertrauen in einen Dienstherrn, den sie als weise und ehrenwert ansahen und setzten alle ihre Energie daran, den bestmöglichen Service zu bieten und somit ihren Beitrag für eine bessere Welt zu leisten. (vgl. RD 200f.) Für Graham Swift ist der Butler daher „[…] a good metaphor for the relationship of very ordinary, small people to power" (Shaffer 1998: 4).

2.3.3.2 Lord Darlington - naiver Amateur oder Kollaborateur der Nazis?

Stevens verehrte Lord Darlington und porträtierte ihn als den idealen Gentleman. Im Verlaufe des Romans wird jedoch deutlich, dass der Lord im Zuge des zweiten Welt-kriegs gemeinhin als Sympathisant der Nazis und Verräter angesehen wurde. Während der 1920er Jahre hatte Darlington, der von der Rachsucht des Versailler Vertrages geschockt war, eine führende Rolle in Großbritannien gespielt, indem er versuchte, wichtige Staatsmänner der verschiedenen Westmächten zusammenzubringen, um eine Atmosphäre gegenseitigen Verständnisses und der Sympathie zu schaffen. Die Intention des Lords, welche Stevens als ehrwürdig betrachtete, bestand darin, eine Wiederkehr des ersten Weltkrieges zu verhindern und die, für die Deutschen, schwerwiegendsten Punkte des Versailler Vertrages etwas abzumildern. (vgl. Parkes 2001: 28; RD 75) 1923 wurde Stevens Zeuge einer Konfrontation zwischen seinem Arbeitgeber und dem amerikanischen Senator Lewis, der den Lord auf seiner ersten, von ihm organisierten, inoffiziellen internationalen Konferenz als Dummkopf und naiven Träumer bezeichnete. Darlington sei ein Amateur, doch Europa brauche Experten, um mit den internationalen Problemen fertig zu werden. (RD 102; Rothfork 1996: 92) Lewis wählte folgende Worte, um den Lord zu charakterisieren.

> A classic English gentleman. Decent, honest, well-meaning. But his lordship here is *an amateur*. […] He is an amateur and international affairs today are no longer for gentle-men amateurs. […] The days when you could act out of your noble instincts are over. Except of course, you here in Europe don't yet seem to know it. Gentlemen like our good host still believe it's their business to meddle in matters they don't understand. So much hog-wash has been spoken here these past two days. Well-meaning, naďve hog-wash. You here in Europe need professionals to run your affairs. If you don't realize that soon you're headed for disaster. (RD 102)

Lord Darlington wies die Vorwürfe zurück und erklärte, dass er die ihm vorgehaltene Amateurhaftigkeit lieber als Ehre bezeichnen würde. Auch machte er deutlich, dass er mit Lewis' Professionalismus nichts zu tun haben wollte.

> It appears to mean getting one's way by cheating and manipulating. It means ordering one's priority according to greed and advantage rather than the desire to see goodness and justice prevail in the world. If that is the „professionalism" you refer to, sir, I don't much care for it and have no wish to acquire it. (RD 103)

Lewis' Vorwürfe an die anwesenden Amateure, die sich um die Probleme Europas in Folge des ersten Weltkrieges kümmern wollten, erwiesen sich im Nachhinein als korrekt, da gute Absichten nicht genügten, um eine gerechte Welt zu erschaffen (vgl. Rothfork 1996: 92).

In den 1930er Jahren stellte sich dann heraus, dass die Nazis den guten Willen des Lords erfolgreich auszubeuten wussten und sie ihn zu einer Schachfigur ihrer Außenpolitik gemacht hatten. Damals war der deutsche Außenminister und Botschaf-

ter Ribbentrop ständiger Gast in Darlington Hall und 1936 kam es sogar zu einem geheimen Treffen zwischen Ribbentrop, sowie dem britischen Premierminister und dessen Außenminister, bei dem Darlington den Premier davon überzeugen wollte, sich mit Hitler zu treffen, da er glaubte, dass der Brite das deutsche Regime schrecklich missverstehe. Auch wurde die Idee diskutiert, dass sogar der König[12], laut Cardinal, dem Patensohn des Lords, ein Enthusiast für die Nazis, Hitler in Deutschland besuchen könnte. (vgl. Parkes 2001: 28; RD 217; 221ff.) Cardinal, der als Journalist eng in Verbindung mit moderner Politik stand, erkannte jedoch, dass Lord Darlington sich in die Dienste der Nazis hatte ein-spannen lassen.

> Over the last few years, his lordship has probably been the single most useful pawn Herr Hitler has had in this country for his propaganda tricks. All the better because he's sincere and honourable and doesn't recognize the true nature of what he's doing. (RD 224)

Natürlich wollte Stevens dies nicht eingestehen, denn, sollte sich Cardinals Behauptung als wahr herausstellen, dann wäre Stevens, der seine politische Meinung hinter „his lordship's good judgement" (RD 225) versteckt hatte, nichts anderes als „the pawn of a pawn" (Shaffer 1998: 73) der Nazis gewesen. Genau dies bestätigte aber Cardinal, als er sagte, dass nach der Besetzung des Rheinlandes[13] niemand mit gutem Urteilsvermögen noch den Versprechungen Hitlers Glauben schenken durfte (vgl. RD 225). Teverson erhebt schwere Vorwürfe gegen den Lord und seinen, wie er es nennt, Komplizen Stevens. Lord Darlington glaubte, dass ihm Kraft seiner Geburt als Engländer ehrenhaftes Verhalten als wahrer Gentleman quasi als Verpflichtung auf den Weg gegeben worden sei. Sowohl der Lord als auch sein Butler glaubten an ein elitäres Konzept der Nation und das damit einhergehende Prinzip, dass eine Kultur einer anderen überlegen sein kann. Das führte auch zu Darlingtons Sympathie für eine noch schädlichere Manifestation des Nationalismus, nämlich den Faschismus Hitlers und Ribbentrops, „in which „greatness" becomes „strength" and „cultural superiority" becomes „racial purity"" (Teverson 1999: 257). Beispiele für die Intoleranz der beiden Männer gegenüber anderen Kulturen reichten von dem bereits erwähnten Vorurteil Stevens', dass nur die englische Rasse die Fähigkeit besäße, einen herausragenden Butler hervorzubringen bis zu offenem Rassismus, der sich in der fristlosen Entlassung zweier Jüdinnen zum Wohle des Hauses äußerte, worauf ich noch eingehen werde. (vgl. RD 43; 146f.; Teverson 1999: 257)

Trotz der Zurückhaltung des Erzählers Stevens wird dem Leser bewusst, dass der Lord die Nazis in gewisser Weise unterstützt haben muss. (vgl. Suter 1999: 246) Ob er tatsächlich Anhänger der Ideologie der Nationalsozialisten war oder durch Gespräche und Verhandlungen einen Krieg verhindern wollte, sei dahingestellt. Es zeigt sich jedoch sehr deutlich, dass der Lord selbst in den 1930er Jahren immer noch glaubte, dass er als Aristokrat dazu bestimmt sei, sich um die Probleme der Welt zu kümmern. Der Adel fühlte sich durch seine hohe soziale Stellung dazu berufen, sich in internationale Angelegenheiten einzumischen, doch Orwell bemerkte einen „decay of ability in the ruling class" Englands, einem Land, das er als „[a] family with the wrong members in control" (Orwell 1973: 2152) charakterisierte. Wie sah sie aber nun aus, die soziale Ordnung Großbritanniens in der Zwischenkriegszeit, wie sie Ishiguro in seinem Roman darstellte?

2.3.3.3 Soziale Stellung – die Welt als Rad

Im Gegensatz zu seinem Vater verstand Stevens die Welt nicht als eine Leiter, sondern als ein Rad. Er ging davon aus, dass die großen Entscheidungen, die den Lauf der Welt mitbestimmten, nicht vor den Augen der Öffentlichkeit und der Presse stattfanden, sondern dass dort nur Ergebnisse präsentiert wurden, welche in den Häusern bedeutender Menschen, wie zum Beispiel Lord Darlington, erarbeitet wurden. Über Wochen und Monate wurden Debatten geführt und wichtige Entscheidungen in der Ruhe eines großen Privathauses vorbereitet, bevor die politischen Repräsentanten des Landes nach offiziellen Konferenzen an die Öffentlichkeit gingen und Ergebnisse präsentierten. Die Welt war also ein Rad, „revolving with these great houses at the hub, their mighty decisions emanating out to all else, rich and poor, who revolved around them" (RD 115). Für Stevens zählte daher besonders der moralische Status seines Arbeitgebers und er glaubte, dass jeder Butler mit beruflichen Ambitionen so dicht wie irgend möglich zur Radnabe der Macht vorstoßen wollte. Nicht mehr allein der Titel des Arbeitgebers war entscheidend, sondern es zählte der moralische Wert des Gentleman, der die Menschheit und Menschlichkeit voranbringen wollte. Es ließ sich, laut Stevens, jedoch nicht bestreiten, dass viele Gentlemen aus den edelsten Familien sich aus Tradition dazu verpflichtet fühlten, die großen Probleme der Zeit zu lösen oder zumindest abzumildern. Daher schien es auf den ersten Blick auch so, als seien die Ambitionen der Butler bezüglich der hochadligen Herkunft ihres Arbeitgebers gleich geblieben, doch gab es auch viele bedeutende Männer, die nach einem bescheidenen Lebensanfang große Beiträge für das zukünftige Wohlergehen des Empires geleistet hatten. Diese waren all jenen Aristokraten vorzuziehen, die ihre Zeit in Clubs oder auf dem Golfplatz vertrödelten. (vgl. RD 114ff.) Butler wie Stevens

> […] harboured the desire to make [their] own small contribution to the creation of a better world, and saw that, as professionals, the surest means of doing so would be to serve the great gentlemen of [their] times in whose hands civilization had been entrusted. (RD 116)

Stevens war stolz darauf, dicht am Angelpunkt des Empires gedient zu haben, dort, wo Debatten geführt wurden und wichtigste Entscheidungen in der Privatsphäre und Ruhe der großen Häuser des Landes getroffen wurden (vgl. RD 115; Rothfork 1996: 92). Daher blieb es ihm aber versagt, ein Privatleben aufzubauen oder gar eine Familie zu gründen, da unter Lord Darlington jegliche Romanze für einen loyalen Angestellten

[12] Nach dem Tod Georg V. im Jahr 1936 und der Abdankung Edward VIII. dürfte von König Georg VI. die Rede sein, der von 1936 bis 1952 König von Großbritannien war (vgl. Hilgemann 1991: 468).

[13] Im März 1936 kündigten die Deutschen den Locarno-Vertrag und marschierten in das entmilitarisierte Rheinland. Dies bedeutete das Ende der Ordnung von Versailles. (vgl. Hilgemann 1991: 475)

verboten war, weil „such liaisons [… constituted] a serious threat to the order in a house“ (RD 51). Stevens unterdrückte daher seine Sexualität und erwartete, dass auch alle anderen Angestellten den Beruf der Liebe vorziehen sollten[14]. Besonders verabscheute er aber niedere Angestellte, vor allem junge Frauen, die seiner Meinung nach, nur in der Hoffnung auf eine Romanze, eine Anstellung annahmen. Dies stellte für Stevens eine ernst-hafte Bedrohung für die Professionalität der Arbeit dar. (vgl. Shaffer 1998: 71; 76; RD 51; 157)

Bis zu seiner Tour nach Westengland im Jahr 1956 war Darlington Hall die gesamte Welt des Butlers Stevens. Ishiguro verdeutlicht damit, dass Personen wie Stevens auf Grund ihrer sozialen Position gewissen Einschränkungen unterlagen. Die politische Unterordnung Stevens' drückte sich auch in seiner geographischen Beschränkung aus, die ihn innerhalb des Landsitzes von Lord Darlington festhielt. Genauso wie Darlington Hall das Eigentum eines Lords war, so gehörte ein Großteil Englands einer feudalen Aristokratie, die weithin blind war für Probleme wie die soziale Gerechtigkeit. Im Gegensatz zu seinem Dienstherrn hatte Stevens kein eigenes Zuhause und gewisser-maßen auch kein eigenes Heimatland, da beides in den Händen weniger Aristokraten auf-geteilt war. (vgl. Parkes 2001: 55f.) Laut Orwell profitierten nur etwa eine halbe Million Menschen, nämlich die Besitzer und Bewohner der großen Landhäuser, von dem damals bestehenden System. 1920 gab es bereits viele Menschen, die sich über die bestehende soziale Ungerechtigkeit im Klaren waren. 1930 betrug ihre Zahl mehrere Millionen, da mit einem Anstieg der Demokratie in England, auch das politische Bewusstsein der unteren Schichten geweckt worden war. Nur die herrschende Klasse Großbritanniens konnte offensichtlich noch nicht einsehen, dass ihre alleinige Vormacht-stellung und Nützlichkeit am Vorabend des zweiten Weltkrieges eigentlich bereits zu Ende war. (vgl. Orwell 1973: 2153; Shils 1980: 499)

In Stevens' Welt dominierte, ebenso wie bei seinem Vater, die soziale Oberschicht, die hauptsächlich aus dem Adel und anderen angesehenen Persönlichkeiten bestand, die sich um das Empire verdient gemacht hatten. Die große Mittelschicht fand keine Beachtung im Umfeld von Darlington Hall, sondern neben der herrschenden Schicht gab es dort nur noch die Dienerschaft, deren soziale Stellung untereinander, wie in der Generation von Stevens senior, von ihrer Funktion im Haus abhing. Während sich der Lord wegen seines hohen Status als Adliger dazu berufen fühlte, sich um die Politik zu kümmern, blieb es Menschen wie Stevens überlassen, die richtige Politur für das Tafelsilber zu benutzen, welches damals als öffentlicher Index für den Standard eines Hauses angesehen wurde (vgl. RD 133ff.). Stevens glaubte jedoch, dass selbst eine ordentliche Silber-politur einem Butler das Gefühl vermitteln konnte, einen, wenn auch kleinen, Beitrag zum Lauf der Geschichte geleistet zu haben. Er war davon überzeugt, dass er eine relevante Rolle in der internationalen Politik gespielt hatte, da sein perfektes Tafelsilber einen Teil dazu beigetragen hatte, schwierige diplomatische Beziehungen zwischen Darlington und, zum Beispiel, Lord Halifax zu erleichtern. (vgl. RD 136f.; Suter 1999: 247)

2.3.3.4 Erste Anzeichen für sozialen Wandel

Die oben angesprochene Arroganz vieler Adliger, die sich kraft ihrer Geburt als Gentlemen dazu berechtigt fühlten, als vermeintliche Experten, die Politik beeinflussen zu können und sich den normalen Bürgern in allen gesellschaftlichen, wirtschaftlichen und politischen Fragen weit überlegen fühlten, kann auf Dauer nicht ohne Auswirkungen geblieben sein. Neben Lord Darlington gab es viele angesehen Menschen aus der Ober-schicht, welche die Demokratie in England für ein Auslaufmodell hielten, das man so schnell wie möglich loswerden musste, um die schwerwiegenden Probleme des Landes lösen zu können. Darlington vertrat die Ansicht, dass die Welt zu kompliziert sei, als dass man sich mit Dingen wie dem allgemeinen Wahlrecht oder langwierigen Parlamentsdebatten abgeben durfte. Großbritannien befinde sich inmitten einer großen Krise und die Bevölkerung leide darunter, dass nur argumentiert und diskutiert werde und jede neue Idee zum Scheitern verurteilt sei, weil sie auf ihrem Weg durch die Komitees bis zur Unkenntlichkeit verändert würde. Deutschland und Italien galten daher als Musterbei-spiele für Länder, die durch starke Führerpersönlichkeiten - Hitler und Mussolini - aus der Krise geführt worden seien. (vgl. RD 198f.) Der Lord war Anhänger eines „Kults des starken Mannes“ (Bracher 1999: 141), wie er in Europa ab 1933 auf dem Vormarsch war. Daraus erklärte sich seine Abneigung gegenüber Demokratie und Parlament:

> If your house is on fire, you don't call the household into the drawing room and debate the various options for escape for an hour, do you? It may have been all very well once, but the world's a complicated place now. The man in the street can't be expected to know enough abut politics, economics, world commerce and what have you. And why should he? (RD 199)

Außerordentliche Leute waren daher der Maßstab für das Empire. Europäische Aristokratien früherer Jahrhunderte hatten, ebenso wie die faschistischen Regimes des 20. Jahr-hunderts, ein Umfeld für einige überlegene Personen bereitgestellt. Daher waren Lord Darlingtons Sympathien für die Nazis, laut Rothfork, keine Spinnereien und Stevens hätte in seiner Loyalität auch eine Nazi-Uniform tragen können. (vgl. Rothfork 1996: 92)

Neben der Abneigung vieler Mitglieder der Oberschicht gegen Demokratie und eine starke Labour-Partei, welche den normalen Bürgern ein größeres politisches Mitsprache-recht gewährleisteten, war der wachsende Antisemitismus, besonders bei Anhängern der Oberschicht, ein weiteres Beispiel für sozialen Wandel. Auch Lord Darlington ließ sich, unter dem Einfluss einer faschistischen Organisation, dazu hinreißen, starke Vorurteile gegenüber Juden zu entwickeln. Er begann, die Juden für die Misere des Landes und die große Armut in weiten Teilen des Londoner East End verantwortlich zu machen und Stevens

[14] Stevens konnte daher kaum glauben, dass Miss Kenton nach 14 Jahren im Haus eine Beziehung aufnahm und gar die Absicht hatte, zu heiraten. Er hielt sie für „a devoted professional“, die keinen „wish for a familiy“ (RD 170) hatte, sondern ihr Leben, wie er auch, einzig in den Dienst von Lord Darlington gestellt hatte. (vgl. RD 170)

bemerkte einige, wie er es nannte, untypische Verhaltensweisen bei dem Lord, der bislang keinerlei negative Ansichten gegenüber Juden gehabt haben soll. So sprach Darlington plötzlich von einer Zeitung als jüdischem Propagandablatt und hörte auf, eine Wohltätigkeitsorganisation zu unterstützen, da „the management committee was 'more or less homogeneously Jewish'" (RD 146). Am schwersten wog jedoch die Entscheidung des Lords, zwei jüdische Hausmädchen zu entlassen. Stevens unterstützte die Anordnung widerstandslos und wies Miss Kentons Protest zurück (vgl. Jirgens 1999: 228; RD 145ff.).

> Miss Kenton, let me suggest to you that you are hardly well placed to be passing judgements of such a high and mighty nature. The fact is, the world of today is a very complicated and treacherous place. There are many things you and I are simply not in a position to understand concerning, say, the nature of Jewry. Whereas his lordship, I might venture, is somewhat better placed to judge what is for the best. (RD 149)

Er betonte, dass es seine Pflicht sei, zu gehorchen und dass Leute in seiner Position nicht die Motive ihrer Vorgesetzten in Frage stellen dürften. Er sorgte also für die Entlassung der Jüdinnen, obwohl ihm, wie er im Nachhinein behauptete, die Angelegenheit große Sorge bereitet hatte. Einige Zeit später änderte der Lord jedoch seine Meinung und bat Stevens die beiden Frauen zu suchen und zu entschädigen, da er falsch gehandelt habe. Stevens teilte Miss Kenton die Sinneswandlung des Lords sofort mit, da er wusste, wie sehr sie der Vorfall getroffen hatte. (Jirgens 1999: 228; Suter 1999: 243; RD 151ff.)

> But it is at least a great comfort to hear his lordship declare so unequivocally that it was all a terrible misunderstanding. I just thought you'd like to know, Miss Kenton, since I recall you were as distressed by the episode as I was. (RD 153)

Dieses Geständnis veranlasste Miss Kenton zu ihrem verzweifelten Ausbruch: „Why, Mr Stevens, why, why, why do you always have to *pretend*?" (RD 154). (vgl. RD 153f.; Winsworth 1999: 264) Stevens Antwort, dass es wohl offensichtlich gewesen sei, dass er gegen die Entlassungen war, sind nicht völlig überzeugend und so bleibt es dem Leser überlassen, sich ein Bild darüber zu machen, ob Stevens wirklich nur den Anordnungen seines Herrn gehorchte oder ob er im Grunde seines Herzens ebenfalls antisemitische Gefühle hegte, die er hinter dem Gehorsam gegenüber Lord Darlington verstecken konnte. (vgl. Jirgens 1999: 228; RD 154) Doch auch Miss Kenton unterstützte in gewisser Weise den Antisemitismus des Lords, da sie entgegen ihrer Ankündigung, nicht ihr Dienstverhältnis gekündigt hatte, um ihrem Widerstand gegen die unrechtmäßigen Entlassungen Ausdruck zu verleihen. Im Gegensatz zu Stevens machte Miss Kenton aber deutlich, dass sie sich sehr schämte, trotz ihrer hehren Prinzipien, nicht stark genug gewesen zu sein, ihre Anstellung zu kündigen, da sie Angst um ihre persönliche Zukunft gehabt hatte. (vgl. RD 149ff.)

Auch in England herrschte in der Zwischenkriegszeit, wie in weiten Teilen Europas, ein latenter, manchmal auch offen ausbrechender, Hass gegen Juden. Der Faschismus war auf dem Kontinent unaufhaltsam auf dem Vormarsch und neben den überzeugten Nationalsozialisten gab es sehr viele Mitläufer, die zur Wahrung ihrer Interessen, die neuen Ideologien unterstützten. Daraus ergab sich ein ideales Umfeld für eine Führer-person wie Hitler, der seinen Einfluss auch auf Teile der britischen Bevölkerung auszuweiten verstand. Da Lord Darlington zunächst das deutsche Regime unterstützte und zeitweise antisemitische Haltungen erkennen ließ, die von seinen Diener mitgetragen wurden, kann man sowohl Stevens als auch Miss Kenton als Mitläufer bezeichnen, die ebenfalls den Nazis zuarbeiteten.

Es gab natürlich auch Mitglieder der Oberschicht, welche die internationalen Angelegenheiten Großbritanniens weit objektiver betrachteten als die restliche Elite der Gentle-man-Amateure und sich um das Verhalten des Landes am Vorabend des zweiten Welt-krieges sehr besorgt zeigten. Ein Beispiel dafür war Cardinal, der sich als Kolumnist einen Namen gemacht hatte und sich auf Kommentare über internationale Politik spezialisiert hatte. Es wird jedoch deutlich, dass sein Patenonkel, Lord Darlington, Cardinals Ansichten als großen Unsinn abtat. Cardinal hatte nämlich erkannt, dass Chamberlains' Appeasement-Politik und die gleichgültige Sorglosigkeit Großbritanniens gegenüber den Nazis und ihrem Antisemitismus Fehler waren. Außerdem hatte Hitler-Deutschland den Lord in den letzten drei bis vier Jahren dazu benutzt, unter Umgehung des britischen Außenministeriums, Kontakte zu über 60 der wichtigsten Persönlichkeiten Englands her-zustellen. Cardinal gestand zwar zu, dass der Lord noch ein wahrer englischer Gentleman sei, der einen Krieg gegen die Deutschen geführt habe und nun aus einem Gefühl der Großherzigkeit heraus, alles versuchen wolle, eine Freundschaft zwischen den Ländern zu etablieren, doch habe sich gezeigt, dass er, ohne dass er es bemerken würde, von den Nazis manipuliert wurde. Die Welt sei „too foul a place for fine and noble instincts" (RD 224) und daher befinde sich der Lord „in deep waters" und ganz entschieden „out of his depth" (RD 221). (vgl. RD 212ff.; Rothfork1996: 82f.)

Während Autoren wie Jane Austen das Landhaus noch als idealen Zufluchtsort vor städtischer Industrialisierung und der Verderbtheit des Empires ansahen, so nutzt Ishiguro seinen Roman, um die Unfähigkeit der aristokratischen Landbesitzer darzustellen, internationale Politik weiter kontrollieren zu können. Anstelle, wie in früheren Zeiten, die Fäden zu ziehen, waren nun Lord Darlington und seinesgleichen die Spiel-puppen in einer Welt, von der sie kontrolliert wurden. Der amerikanische Berufsdiplomat Lewis nannte die Aristokraten Amateure. Diese verstanden nicht, dass England nicht länger die Achse war, um die der Rest der Welt sich zu drehen hatte. Durch den Auftritt des Amerikaners macht Ishiguro deutlich, dass der Ehrenkodex, der für die erfolgreiche Führung von Darlington Hall und in gewisser Weise auch für das restliche England galt, nach und nach Platz machen musste für eine neue professionalistische Ethik, in der „the value of knowing one's place los[t] currency in a new emphasis on social and economic freedom" (O'Brien 1996: 792). Interessanterweise waren in *The Remains of the Day* bei genauerer Betrachtung nicht nur die Diener Marionetten ihrer Dienstherrn, sondern auch die meist adligen Besitzer der englischen Landhäuser stellten sich als Marionetten heraus, die in der Komplexität der internationalen Entwicklungen den Überblick verloren hatten. (vgl. O'Brien 1996: 792; Parkes 2001: 66) Obwohl sich der Lord, laut Stevens, nur mit bedeutenden Männern und Frauen mit wirklichem Einfluss, wie Ministern, Senatoren, Diplomaten, hohen Vertretern des Militärs und des

Klerus, im Landsitz Darlington Hall traf, konnten die Geschikke der Menschheit nicht länger bloß durch den guten Willen mancher Adliger und deren Vorstellung von Ehre gesteuert werden (vgl. RD 138). Der Gentleman-Amateur hatte ausgedient, doch es brauchte erst noch einen weiteren Welt-krieg, der Menschen wie Lord Darlington letztlich bewies, dass ihre Zeit als informelle Führungsschicht des Landes, die, unter Umgehung der gewählten Volksvertreter, die politische und wirtschaftliche Richtung des Landes bestimmen konnten, endgültig vorbei war. Neben der europapolitischen Situation, die besonders in der Oberschicht eine Zunahme antidemokratischer und antisemitischer Überzeugungen zur Folge hatte, zeigte sich auch ein beginnender Niedergang des Weltmachtstatus Großbritanniens, unter anderem, am Flottenabkommen von 1922[15]. Großbritannien sah sich durch seine auswärtigen Beziehungen vielerlei Einflüssen und Impulsen ausgesetzt, die selbstverständlich ihre Wirkung auf die gesamtgesellschaftliche Situation nicht verfehlten. Es kam zu Veränderungen im politischen Bewusstsein einiger führender Persönlichkeiten des Landes, doch hatten die exogenen Antriebskräfte des sozialen Wandels noch keine direkten Auswirkungen auf die soziale Stellung der Bevölkerung. Wichtiger waren in dem Zusammen-hang die Gewerkschaften und die Politiker der Labour-Partei, welche das Bewusstsein der Bevölkerung für die bestehenden Ungerechtigkeiten in der Verteilung von Macht, Geld und sozialer Stellung geweckt hatte und weiter zu schärfen versuchten, um durch ein Aufbegehren der unterdrückten Massen, also der großen Unterschicht des Landes, dagegen vorgehen zu können. Das Wahlrecht für alle war eine wichtige Voraussetzung für den Machtgewinn der Labour-Politiker, da das gewöhnliche Volk nun eine Möglichkeit besaß, die Menschen zu wählen, welche ihnen Vorteile bringen konnten und die Privilegien der Mittel- und Oberschichten abzubauen bereit waren. Je größer der Einfluss der Labour-Partei und der Gewerkschaften wurde, desto größer wurde die Einsicht der Unterschicht, dass das bestehende politische System zu ihren Ungunsten funktionierte und dass es an der Zeit war, die Macht der konservativen Führungselite sowie des Adels einzuschränken und mehr soziale Gerechtigkeit einzufordern. Auch sollte man den Ein-fluss des Radios, der mit dem Monopol von BBC 1927 einsetzte, nicht unterschätzen, da über den Rundfunk viele Menschen erreicht werden konnten, die früher wenig oder gar-nicht über die laufenden Ereignissen und Entwicklungen in Großbritannien informiert waren (vgl. „Great Britain").

In der Zwischenkriegszeit gab es also bereits ein stetig wachsendes Konfliktpotential innerhalb der Gesellschaft, das mit der politischen Emanzipation großer Bevölkerungs-schichten zusammenhing und sich im Erstarken der Gewerkschaften und der Labour-Partei zeigte. Darüber hinaus mussten sich große Teile der englischen Elite mit einem schleichenden Machtverlust in der Weltpolitik auseinandersetzen, man befand sich in den 1930er Jahren am Vorabend eines weiteren Weltkriegs, große Teile Europas standen unter der Kontrolle von Führerpersönlichkeiten und auch die Inselbewohner waren nicht gänzlich vor faschistischen und antisemitischen Tendenzen gefeit. Trotz allem glaubten Amateure, wie Lord Darlington, dass sie den Lauf der Welt weiter bestimmen könnten, brachten aber, ebenso wie die gewählten Politiker, ihr Land durch die Appeasement-Politik an den Rand der Katastrophe. Diese Mixtur aus äußeren und inneren Konflikt-herden musste unweigerlich zu einem massiven sozialen Wandel innerhalb der Sozial-struktur der Gesellschaft führen. Dieser Wandel, der die Veränderung der sozialen Stellung vieler Menschen zur Folge hatte, erfuhr jedoch durch den zweiten Weltkrieg eine Beschleunigung, wie ich im Kapitel über das Jahr 1956 zeigen möchte.

2.3.4 Stevens und die Gesellschaftsordnung 1956

2.3.4.1 Stevens – Rückblick auf ein gescheitertes Leben?!

Stevens war sehr stolz auf seine Rolle als Butler eines wichtigen Gentlemans und er betonte im Verlauf des Romans immer wieder die Bedeutung seiner Tätigkeit für den Erfolg der Arbeit seines Dienstherrn. Auf der anderen Seite schien er aber auch seine eigene Verantwortung als „pawn of a pawn" (Shaffer 1998: 73) der Nazis vermeiden zu wollen, indem er ebenfalls erklärte, nur ein Diener zu sein, „who is not in a position to judge his master's actions" (Suter 1999: 246). (vgl. RD 222ff.; Suter 1999: 246) Man kann sogar sagen, dass Stevens dazu tendierte, das Verhalten des Lords zu rechtfertigen, um sein eigenes Verhalten ins rechte Licht zu rücken. (vgl. Suter 1999: 246) Stevens nahm das enge Verhältnis des Lords zu Ribbentrop mit dem Hinweis darauf in Schutz, dass der Deutsche besonders 1936 und 1937 häufig Gast in den wichtigsten Häusern des Landes gewesen war. Lord Darlington habe Ribbentrop für einen Gentleman gehalten und eine Arbeitsbeziehung zu ihm aufgebaut. Auch sei es ungerecht, dem Lord vorzu-werfen, bei seinen Besuchen in Deutschland die Gastfreundschaft der Nazis akzeptiert zu haben. Ein Blick auf die Gästelisten der Deutschen würde genügen, um viele Kritiker des Lords zum Schweigen zu bringen. Wer dem Lord heimliche Verschwörungen mit einem anerkannten Feind vorwerfe, verkenne daher schlichtweg das wahre politische Klima der damaligen Zeit. Des Weiteren dementierte der Butler Behauptungen, der Lord sei ein Antisemit gewesen und habe enge Verbindungen zu Organisationen, wie der Britischen Union der Faschisten, gepflegt. (vgl. RD 136f.) Obwohl Stevens alle negativen Behauptungen über den Lord und seine Rolle in der internationalen Politik als Unsinn abtat und er sogar dazu neigte, die Handlungen und Motive seines früheren Arbeitgebers zu idealisieren, so leugnete er dennoch zwei Mal, für ihn gearbeitet zu haben[16]. (vgl. RD

[15] Großbritannien gab sich mit der bloßen Parität gegenüber der Flotte der USA zufrieden und akzeptierte eine vertragliche Limitierung seiner Flottenstärke. Dieser Machtverlust wurde aber noch durch den Sieg über Deutschland im ersten Weltkrieg sowie die Tatsache, dass das britische Empire den größten Umfang aller Zeiten hatte, verschleiert. Viele Politiker waren sich allerdings in den 1930er Jahren der Überdehnung der weltweiten Verpflichtungen ihres Landes und der Knappheit seiner Ressourcen bewusst. (vgl. Schröder 1998: 54)

[16] Auf seinem Weg nach Cornwall traf Stevens auf einen Butler, der ihn auf Lord Darlington ansprach. Stevens behauptete aber, nicht für den Lord gearbeitet zu haben. Ebenso leugnete er gegenüber einer amerikanischen Besucherin von Farraday, in Diensten des vorherigen Besitzers gestanden zu haben. Stevens rechtfertigte sich mit der Begründung, er habe sich entschieden „to tell white lies in both instances as the simplest means of avoiding unpleasantness" (RD 126). (vgl. RD 120ff.)

61; 120ff.) Man muss sich dann jedoch fragen, warum Stevens seine 35 Dienstjahre bei Lord Darlington verleugnete, wenn er doch darüber hinaus behauptete, das er froh und stolz darüber sei, für einen solchen Mann gearbeitet zu haben. Trotz dieses Widerspruchs beharrte er weiterhin auf seiner Darstellung, dass er weder verlegen sei, noch sich schäme, ihm als Butler gedient zu haben. Er spreche jedoch nicht gerne über diese Zeit, da er nicht noch mehr Verleumdungen und Lügen über seinen Herrn hören wollte, in dessen Dienst er so dicht an die Radnabe der Weltpolitik gekommen sei, wie er sich nur hatte erträumen können. (vgl. RD 125f.; Winsworth 1999: 262) Für den Leser erhärtet sich jedoch der Verdacht, dass Stevens durch das Leugnen seines Verhältnisses zu Darlington auch eine Bewertung seines Verhaltens als Komplizen des Lords vermeiden wollte. Stevens gelang es nämlich in den 1920er und 1930er Jahren nicht, die historischen Ereignisse richtig einzuordnen und er wurde daher zum Komplizen seines Herrn und dessen elitären politischen Ansichten. Hätte er Nachforschungen betrieben und die Meinungen des Lords hinterfragt, anstelle sie bedingungslos zu unterstützen, so hätte er, laut Teverson, die Fehler in Darlingtons Denken erkennen können. Er hätte die damaligen weltpolitischen Ereignisse für sich selbst interpretieren und analysieren können und er hätte es vielleicht vermeiden können, sich auf der falschen Seite der Geschichte wiederzufinden. (vgl. Teverson 1999: 253)

Ishiguro erklärt, dass seine Romane sich auf Protagonisten, wie zum Beispiel Stevens, konzentrieren, deren „lives are spoiled because they don't have any extraordinary insight into life. They're not necessarily stupid, they're just ordinary." (Shaffer 1998: 6) Diese Charaktere sind normale Individuen, die nicht über ihre unmittelbare Umgebung hinaus-schauen können und daher auf eine Interpretation der Welt durch andere Menschen angewiesen sind. (vgl. Shaffer 1998: 6) Dieser andere Mensch war für Stevens Lord Darlington. In seiner frühen Karriere wechselte Stevens seine Arbeitgeber in schneller Folge, bis sein Engagement mit der Möglichkeit, wie er es nannte, belohnt wurde, Darlington zu dienen. Da auch Stevens einen kleinen Beitrag zu einer besseren Welt leisten wollte, stellte er sein Talent als Butler in den Dienst dieses hochrangigen Gentlemans, und beabsichtigte dadurch, auch der Menschlichkeit dienen zu können. (vgl. RD 116f.)

> In looking back over my career thus far, my chief satisfaction derived from what I achieved during those years, and I am today nothing but proud and grateful to have been given such a privilege. (RD 126)

Stevens zeigte eine nahezu obsessive Begeisterung für Ideen wie Ehre und Pflichterfüllung, die auch zum Vokabular des Rittertums zu zählen sind, und sein höchstes Ziel bestand darin, einem Gentleman zu dienen. Seine Vorstellungen von Würde, Ehre und bedingungsloser Dienstleistung stellten sich jedoch als nicht mehr zeitgemäß und sogar zerstörerisch heraus, da er indirekt, durch seine unbedingte Loyalität zu Darlington, den Nazis zuarbeitete. (vgl. Teverson 1999: 255) Stevens versuchte jedoch, jegliche Schuld von sich zu weisen, indem er betonte, dass alle Entscheidungen vom Lord ausgingen und er sich auf die Dinge beschränkte, welche zu den Aufgaben eines Butlers gehörten.

> How can one possibly be held to blame in any sense because, say, the passage of time has shown that Lord Darlington's efforts were misguided, even foolish? Throughout the years I served him, it was he and he alone who weighed up evidence and judged it best to proceed in the way he did, while I simply confined myself, quite properly to affairs within my own professional realm[17]. And as far as I am concerned, I carried out my duties to the best of my abilities, indeed to a standard which many may consider 'first rate'. It is hardly my fault if his lordship's life and work have turned out today to look, at best, a sad waste – and it is quite illogical that I should feel any regret or shame on my own account. (RD 201)

Diese Aussage stellt aber einen Widerspruch zu Stevens früher geäußertem Standpunkt dar, dass er erst an dem Tag ein zufriedener Mann sein könnte, wenn die Arbeit seines Herrn erfolgreich vollendet sein würde.

> […] My vocation will not be fulfilled until […] *he* is able to rest on his laurels, content in the knowledge that he has done all anyone could ever reasonably ask of him, only on that day […] will I be able to call myself […] a well-contented man. (RD 173)

Stevens' größter Fehler lag darin, dass er seine eigenen Wünsche, Meinungen und An-sichten ignorierte, um den bestmöglichen Service denjenigen „great gentlemen" zukommen zu lassen „in whose hands the destiny of civilisation truly lies" (RD 199). Das Pech des Butlers war allerdings, dass der Gentleman, dem er blind vertraute und absoluten Glauben schenkte, schwere und für England zerstörerische Fehleinschätzungen machte. (vgl. Teverson 1999: 256)

> His lordship was a courageous man. He chose a certain path in life, it proved to be a misguided one, but there, he chose it, he can say that at least. As for myself, I cannot even claim that. You see, I *trusted*, I trusted in his lordship's wisdom[18]. All those years I served him, I trusted I was doing something worthwile. I can't even say I made my own mistakes. Really - one has to ask oneself - what dignity is there in that? (RD 243)

In einem der wenigen Moment kritischer Selbstbetrachtung machte Stevens deutlich, dass er seine Freiheit nicht genutzt hatte, eine eigene Interpretation der Welt anzustreben. Selbst eine schlechte Interpretation, wie die des Lords, wäre besser gewesen als auf das Recht auf Meinungsfreiheit zu verzichten.

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[17] Stevens lehnte hiermit jegliche Verantwortung für die politischen Verfehlungen seines Herrn ab, der ihm zu früherer Gelegenheit bereits öfter die Kompetenz abgeschrieben hatte, eine Meinung über weltpolitische Ereignisse zu haben, wogegen Stevens auch nicht protestiert hatte (vgl. Machu 1999: 238).

[18] Auch Machu beschreibt Stevens' blindes Vertrauen in den Lord und vergleicht es mit dem Einsatz seines Bruders Leonard im Kampf für das Vaterland. Stevens

> a […] servi aveuglément un homme de haut rang auquel il avait donné sa confiance, persuadé d'œuvrer pour le progrès de l'humanité et le triomphe de la justice et de la paix, comme son frĕre croyait se battre „for king and country" (40) et aller vers une fin douce et glorieuse […]. (Machu 1999: 234)

Stevens hatte sich jedoch keine eigene Meinung gebildet und damit auch jede Verantwortung abgelehnt, die sich daraus ergeben hätte. (vgl. Teverson 1999: 256) Da Stevens seine Rolle als Butler völlig verinnerlicht hatte, gab er auch vor, keine eigene Identität, außerhalb der von ihm gewählten Rolle, zu haben und damit auch keinerlei moralische Verantwortung als stummer Komplize Lord Darlingtons in dessen Verbindungen zu den Nazis (vgl. Teverson 1999: 256). Stevens schaffte es sein Leben lang meisterlich, sich selbst zu täuschen und zu zensieren. Er unterdrückte seine Gefühle für Miss Kenton, unterdrückte seine Enttäuschung, als er von ihrer bevorstehenden Heirat erfuhr, er unterdrückte sein politisches Bewusstsein durch eine totale Identifikation mit seinem Herrn und er unterdrückte jegliches Gefühl beim Tod seines Vaters, um den Gästen einer internationalen Konferenz zu Diensten zu sein und seinem Ideal des herausragenden Butlers ein Stück näher zu rücken. (vgl. Shaffer 1998: 69) Nach vielen emotionalen Entbehrungen, die in dem Geständnis gipfelten, dass sein Herz zerbrach, als Miss Kenton ihm bei ihrem Treffen indirekt ihre Liebe gestand, nahm sich Stevens vor, nicht mehr so sehr in die Vergangenheit zu blicken, sondern zu versuchen, „to make the best of what remains of […his] day" (RD244). (vgl. RD 239; 244)

> After all, what can we ever gain in forever looking back and blaming ourselves if our lives have not turned out quite as we might have wished? The hard reality is, surely that for the likes of you and I, there is little choice other than to leave our fate, ultimately in the hands of those great gentlemen at the hub of this world who employ our services. […] And if some of us are prepared to sacrifice much in life [19] in order to pursue such aspirations, surely that is in itself, whatever the outcome, cause for pride and contentment. (RD 244)

Laut O'Brien war „Stevens […] failure to find personal fulfilment […] directly proportional to his commitment to the ideal of the faithful servant" (O'Brien 1996: 789). Stevens behauptete zwar gegenüber seinem neuen amerikanischen Dienstherrn Farraday, dass es sein Privileg gewesen sei, über die Jahre das Beste Englands in den Räumen von Darlington Hall gesehen zu haben, doch hatte sich die gesamtgesellschaftliche Situation Großbritanniens nach dem zweiten Weltkrieg so dramatisch verändert, dass es für Butler wie Stevens, eigentlich keinen rechten Platz mehr gab. (RD 4; Suter 1999: 248) Stevens hatte zwar sein Ziel erreicht, ein, nach seinen Gesichtspunkten, herausragender Butler zu werden, doch zeigte sich im Nachhinein, dass der Gentleman, für den er sich aufgeopfert hatte, entgegen der Interessen seines Landes, enge Kontakte mit den Nazis geknüpft hatte, und daher in Verruf geraten war. Stevens' Leben muss daher objektiv betrachtet als gescheitert angesehen werden, da er alle seine persönlichen Bedürfnisse dem Dienst an Darlington untergeordnet hatte und dann nach dem Krieg damit konfrontiert wurde, dass der Lord als Kriegsverbrecher gebrandmarkt wurde. Der Butler gab auch seiner Liebe zu Miss Kenton keine Chance, hatte keinerlei persönliches Verhältnis zu seinem Vater und war ein Mensch, für den Gefühle höchstens als Vokabel existierten. Stevens mag zu seinen Glanzzeiten ein, nach den Kriterien der Hayes Society, herausragender Butler gewesen sein, doch stellte sich sein Leben nach dem Krieg als weitgehend nutzlos heraus, da sich die Gesellschaft endgültig verändert hatte und seine Vorstellungen von Würde und Loyalität keine Gültigkeit mehr besaßen.

> But when the values of a society change radically, Stevens has to confront a world in which dignity and good service are not valued anymore, and neither is his master someone who furthered the progress of humanity, but a war criminal. (Suter 1999: 248)

2.3.4.2 Sozialer Wandel durch endogene und exogene Faktoren

In Folge des zweiten Weltkriegs kam es in Großbritannien zu weitgehenden Veränderungen bezüglich der sozialen Stellung eines Großteils der Bevölkerung. Die Gesellschaftsordnung des Jahres 1956 aus Ishiguros Roman erklärt sich aus einer Kombination aus exogenen und endogenen Faktoren. Bereits vor dem Krieg herrschte ein beachtliches Konfliktpotential zwischen den sozialen Gruppen des Landes. Die Oberschicht, besonders aber Land- und Geldadel, teilten weitestgehend die Macht unter sich auf. Dann gab es eine große und keineswegs homogene Mittelschicht, die im Roman jedoch kaum eine Rolle spielt, und die soziale Unterschicht der Arbeiter, kleinen Angestellten und Diener, die keine Lobby hatten und sozial stark benachteiligt waren. (vgl. Marwick 1998: 122)

Der zweite Weltkrieg hatte nun ein weiteres Mal die Arbeiterbewegung in England gestärkt. Gewerkschaftsführer Bevin, der 1940 in die von Churchill geführte Koalitions-regierung eintrat, wirkte wie ein Symbol der Arbeitermacht, vor allem, da das Prestige der konservativen Führungsschicht durch die Appeasementpolitik und ihre, das Land an den Rand der Niederlage treibende, Inkompetenz schwer beeinträchtigt worden war. Auf Grund der neuen innenpolitischen Machtverteilung und dem Angewiesensein auf die Arbeiterklasse im Krieg, ergaben sich einige Konsequenzen. Dazu gehörten eine Berücksichtigung ihrer aktuellen Forderungen in Bezug auf Ernährung, Arbeitsbedingungen und Sozialleistungen, sowie eine veränderte Perspektive mit Blick auf die Nachkriegsordnung. Das Erstarken der Labour-Partei hatte auch mit einem grundlegenden Wandel innerhalb der Gesellschaft zu tun und stand im Zusammenhang mit dem Abbau einer Ehrerbietungshaltung gegenüber der Oberschicht. Passivität, Fatalismus und Fügsamkeit waren gerade als Folge des Krieges in der Bevölkerung stark zurückgedrängt worden [20]. (vgl. Schröder 1998: 47f.) Der Triumph der Labour-Partei gipfelte im Wahlsieg von Clement Attlee, der von 1945-1951 an der Macht war. Innerhalb dieser Zeit vollzog sich der Wandel Großbritanniens zum Wohlfahrtsstaat, was sich am National Insurance Act von 1946 und der Gründung des National Health

[19] In diesem Moment dachte Stevens vielleicht auch daran, dass er ein glückliches Leben mit Miss Kenton geführt haben könnte, wenn er nur seine Gefühle für sie zugelassen hätte. Im Rückblick auf die Ereignisse kurz vor Miss Kentons Heirat, kam der Butler jedoch zu dem Schluss, dass „[t]ere was surely nothing to indicate at the times that such evidently small incidents would render whole dreams forever irredeemable" (RD 179).

[20] Orwell sagte bereits 1941 voraus, dass „[t]his war, unless we are defeated, will wipe out most of the existing class privileges. There are every day fewer people who wish them to continue." (Orwell 1973: 2159)

Service zwei Jahre später ablesen lässt. Die Labour-Partei wollte ein sozialistisches England aufbauen. Dazu wurden neben der Bank of England auch die Kohle- und Gasindustrie, die Eisenbahnen, Elektrizitätswerke und die meisten Fluggesellschaften verstaatlicht. Auch begann man, das Empire aufzulösen[21]. (vgl. „Great Britain") Mit dem Ende des zweiten Weltkriegs wurde also das Ende des englischen und europäischen Kolonialismus eingeleitet. Der Zeitpunkt ent-sprach dem allgemeinen historischen Muster der Dekolonisation. Im Augenblick der Schwäche des Mutterlandes, also am Ende eines Krieges, zerfiel Großbritannien von seinen Rändern her und bislang gedemütigte Nationalisten in den kolonialisierten Peripherien ertrotzen durch eine Mobilisierung der Massen die staatliche Unabhängigkeit. (vgl. Tetzlaff 2000: 42ff.) Das Land hatte, obwohl es zu den Siegermächten gehörte, durch den zweiten Weltkrieg seine Weltmachtstellung endgültig verloren. Die industriellen Schwächen des Landes waren wegen der starken Zerstörungen in den meisten Industriestaaten nicht sofort erkennbar und auch die Liquidierung des Empire vollzog sich zunächst allmählich und in einer das britische Selbstbewusstsein schonenden Form.

> By and large, the British have handled the end of Empire well, bowing to the inevitable, running down the flag and packing their bags with relatively little fuss. But the psychological consequences for themselves have taken much longer to deal with. It would have been a great deal easier for the English to cope with had the whole enterprise not been invested with such extraordinary moral purpose. (Paxman 1999: 64)

Die in der Zwischenkriegszeit eingeleitete Umgestaltung des Empire zu einem Commonwealth of Nations wurde fortgeführt und die wahre politische Schwäche der neuen Mittelmacht Großbritannien zeigte sich erst durch das Suez-Abenteuer von 1956. (vgl. Schröder 1998: 55) Ishiguro stellt ansatzweise einen Bezug zur Welt als Ganzem her, indem er den Bericht des Butlers in eben dieses Jahr legt. Damals wurde der Status Englands als imperialer Macht heftig erschüttert. Parkes behauptet daher, dass man Stevens' Unterwerfung unter den Lord in Beziehung zu der politischen Unterwerfung Ägyptens durch die Engländer setzen könnte, wogegen sich die ägyptische Regierung allerdings zur Wehr zu setzen begann. Das Schicksal des Butlers, in einem Haus zu leben, welches ihm nicht gehörte, sieht Parkes als eine Analogie zu dem Schicksal eines kolonialisierten Landes als Untertan der Krone. Daher könnte Ishiguro die Situation Stevens' dazu benutzt haben, anzudeuten, wie der Kolonialismus bereits zu Hause beginnt. Der Autor zeigt aber auch, wie die nationalistische Ideologie Großbritanniens, die sich in Kolonialismus und Imperialismus ausdrückte, im Bewusstsein eines gewöhnlichen Menschen, wie Stevens, Form annahm und sich in dessen, bereits angesprochenen, chauvinistischen Ansichten widerspiegelte. (vgl. Parkes 2001: 57)

Stevens fand sich nach dem zweiten Weltkrieg in einer postapokalyptischen Situation. (vgl. Jirgens 1999: 229) Der Krieg hatte gezeigt, dass der Professionalismus endgültig das Amateurwesen der englischen Oberschicht ersetzt hatte[22] und der Idealismus mancher Menschen, wie zum Beispiel des Lords, keine Chance mehr hatte (vgl. Machu 1999: 236). Die Verleumdungsklage des Lords, in der er sich nach dem Krieg von fort-dauernden Anschuldigungen wegen seiner Verbindungen zu den Nazis befreien wollte, führten schließlich zu einer kompletten Erniedrigung des Mannes, der sich als Gentleman um das Wohl seines Volkes kümmern wollte. Stevens erklärte das, für den Lord, negative Urteil mit dem politischen Klima in Großbritannien, welches kurz nach dem Krieg noch nicht reif gewesen sei für eine objektive Beurteilung der Beziehungen zwischen Darlington und den Nazis. (vgl. Teverson 1999: 256; RD 235)

Als Stevens 1956 eine Reise nach Devon und Cornwall unternahm, konnte er das erste Mal England außerhalb der Mauern von Darlington Hall sehen und eigene Erfahrungen aus erster Hand sammeln. Die Reiseberichte von Mrs Symons aus den 1930er Jahren waren dabei seine Begleiter. Obwohl diese natürlich nicht mehr aktuell sein konnten, behauptete Stevens dennoch, dass er sich nicht vorstellen könne, dass deutsche Bomben die englische Landschaft so bedeutend verändert haben könnten. Dies ist für Teverson allerdings nicht überzeugend. Er schreibt, dass

> German bombs may not have altered the countryside that much in a physical sense, but they have altered the social climate to such a degree that it is no longer the country that Mrs Symons would have been familiar with (Teverson 1999: 253).

Mrs Symons' Bericht würde Stevens zwar helfen, die Landschaft als solche zu erkennen, doch das Land und seine Menschen konnte er damit nicht mehr verstehen. Der Butler schien jedoch zu glauben, dass die Permanenz der Landschaft eine Garantie für die Permanenz des Englands war, das er im Haus von Lord Darlington kennen gelernt hatte. Das England, welches ihm auf seiner Reise begegnete, zeigte sich jedoch nachhaltig durch die deutschen Bomben verändert. Der Butler konnte dieses neue Land weder vollständig verstehen, noch gab es eine angemessene Rolle für ihn, der einer früheren Ära angehörte. (vgl. Teverson 1999: 253)

> The England of „great houses" that Mrs Symons' book reflects and that Stevens has founded his identity upon has passed away, and it has been replaced by an England characterised by men such as Harry Smith whose democratic political ideals are inimical to Stevens' way of life (Teverson 1999: 253).

Das neue Selbstbewusstsein von Teilen der Unter- und Mittelschicht zeigte sich in der Tat besonders ausgeprägt an Harry Smith, der das demokratische, politische Interesse der Bevölkerung beschwor. Er sprach mit großem Enthusiasmus über die Vorteile der Demokratie und erklärte Stevens seine Vorstellung von Würde, die gänzlich von dessen eigenem Model der Selbstverneinung zu Gunsten eines ausgewählten Herrn abwich. (vgl.

[21] 1947 erlangten Indien, das Herzstück des britischen Weltreichs, und Pakistan ihre Unabhängigkeit. Ein Jahr später folgten Burma und Ceylon. (vgl. „Great Britain"; Seeber 1993: 352)

[22] Paxman schreibt, dass „[e]ven the schools which tried to mass-produce English gentlemen, driven by the spirit of the amateur, now preach that the only way to survive is by professionalism in a meritocratic world" (Paxman 1999: 64).

O'Brien 1996: 794; Shaffer 1998: 85) Harry Smith argumentierte, dass Würde keines-wegs einem Gentleman vorbehalten sei. Der zweite Weltkrieg habe gezeigt, dass die ganze Bevölkerung, unter anderem wegen des Rechts auf Würde, gegen Hitler gekämpft habe, denn sonst wären alle Menschen Sklaven unter nationalsozialistischer Führung geworden. (vgl. RD 185ff.; Winsworth 1999: 262)

> 'That's what we fought Hitler for, after all. If Hitler had had things his way, we'd just be slaves now. The whole world would be a few masters and millions upon millions of slaves. And I don't need to remind anyone here, there's no dignity to be had in being a slave[23]. That's what we fought for and that's what we won. We won the right to be free citizens. And it's one of the privileges of being born English that no matter who you are, no matter if you're rich or poor, you're born free and you're born so that you can express your opinion freely, and vote in your member of parliament or vote him out. That's what dignity's really about […].' (RD 186)

Smith engagierte sich auch in Parteikampagnen und er versuchte, seinen Teil zur Erhaltung der Demokratie beizutragen, da seiner Meinung nach zu viele Menschen vergessen würden, ihren Pflichten als Bürger nachzukommen.

> The way I see it, England's a democracy, and we in this village have suffered as much as anyone fighting to keep it that way. Now it's up to us to exercise our rights, every one of us. Some fine young lads from this village gave their lives to give us that privilege, and the way I see it, each one of us here now owes it to them to play our part. (RD 189)

Stevens hielt jedoch an seiner aristokratischen Perspektive fest und behauptete, dass man eine solche Interpretation von Würde nicht ernsthaft in Erwägung ziehen konnte. Außerdem sah er es als nicht wünschenswert und sogar als unrealistisch an, dass sich gewöhnliche Menschen ihre Meinung über politische Angelegenheiten bilden konnten und sollten. (vgl. RD 186ff.)

> There is, after all, a real limit to how much ordinary people can learn and know, and to demand that each and every one of them contribute 'strong opinions' to the great debates of the nation cannot, surely, be wise. (RD 194)

Der Dorfarzt hingegen, der früher ein überzeugter Sozialist war, hatte erkannt, dass sich bei der vorwiegend ländlichen Bevölkerung über die Jahre zwar ein gewisses politisches Bewusstsein entwickelt hatte, sie sich aber trotzdem ein ruhiges Leben ohne viele Veränderungen wünschte. Es gab trotz breiter politischer Mitwirkungsmöglichkeiten und weitgehender politischer Gleichberechtigung nicht viele Aktivisten wie Harry, die sich intensiv in die Politik einbringen wollten.

> They feel they *ought* to have strong feelings on this and that, just as Harry urges them to. But really, they're no different from people anywhere. They want a quiet life. Harry has a lot of ideas about changes to this and that, but really, no one in the village wants upheaval, even if it might benefit them. People here want to be left alone to lead their quiet little lives. They don't want to be bothered with this issue and that issue. (RD 209f.)

Selbst in einem modernen westlichen Staat wie Großbritannien gab es immer noch Gegenden, die ohne Stromversorgung auskommen mussten oder wo für zwei Monate der Strom komplett ausfallen konnte, ohne dass Abhilfe geschaffen wurde. (vgl. RD 181). Es gab also noch viel zu tun, um allen Menschen dasselbe Maß an Komfort und Lebens-qualität zukommen zu lassen, denn gerade in abgelegenen ländlichen Gebieten war die Versorgung der Bevölkerung nicht immer gewährleistet und dadurch waren besonderes Menschen mit geringer sozialer Stellung betroffen. Trotz bestehender Unterschiede in der Versorgung der Menschen mit den modernen Errungenschaften der Technik, bestand allerdings für Herrenhäuser wie Darlington Hall im Zeitalter von Elektrizität und modernen Heizsystemen prinzipiell keine Notwendigkeit mehr, die gleiche Anzahl von Dienern zu beschäftigen, wie es noch eine Generation früher notwendig gewesen war. Auch Stevens erkannte den technischen Fortschritt und gab zu, dass man nun weniger Diener in einem Haus brauchte. Er glaubte gar, dass der Niedergang des professionellen Standards unter den Angestellten darauf zurückzuführen sei, dass viele von ihnen einfach nicht mehr genug zu tun hatten und zu viel Freizeit für sich beanspruchen konnten. (vgl. RD 7)

Durch den oben aufgeführten sozialen Wandel, der sich als Wirkungszusammenhang aus exogenen und endogenen Faktoren erklärt, mussten sich zwangsläufig Veränderungen bezüglich der sozialen Stellung großer Bevölkerungsteile ergeben. Durch die Auflösung des Empire verringerte sich zweifelsohne der Einfluss der kolonialen Verwalter, die ihre Arbeit in den Kolonien verloren, zurück in ihr Mutterland mussten und sich dort erst eine neue gesellschaftliche Stellung erkämpfen mussten. Auch der Einfluss des Adels nahm im allgemeinen ab. In den Herrenhäusern ergaben sich daher Veränderungen für die Diener, besonders auch des Butlers, da weniger Angehörige der Oberschicht in der Lage waren, sich die Bewirtschaftung eines großen Hauses zu leisten und weniger Angestellte gebraucht wurden. Dadurch hatte der Butler weniger Personen unter seiner Aufsicht und folglich verringerte sich sein Ansehen, da er häufig als Relikt aus alter Zeit angesehen wurde, dessen Nützlichkeit in Frage gestellt wurde. Es gab also eine große Anzahl von Menschen, die sich nach dem Krieg neu orientieren mussten, eine neue Arbeit brauchten oder mit veränderten Anforderungen konfrontiert waren, und somit die Chance hatten, gesellschaftlich auf- oder auch abzusteigen.

2.3.4.3 Neuordnung der sozialen Hierarchie als Konsequenz des zweiten Weltkriegs

Laut O'Brien liest sich Stevens Bericht wie eine Elegie auf eine sterbende soziale Ordnung, die die Leser noch einmal beurteilen können und bei der sich unweigerlich Mängel finden, die zu ihrem Niedergang beigetragen haben (vgl. O'Brien 1996:

[23] Stevens war jedoch in der Tat ein Sklave des Lords, zumindest in intellektueller Hinsicht. Er war nie frei in seinen Entscheidungen oder Handlungen und nicht in der Lage, eine eigene Meinung über ir-gendein Thema zu entwickeln. Daher versuchte er auch, Harrys Definition von Würde als völlig verfehlt abzutun, da er sonst hätte eingestehen müssen, dass er sich willentlich zum Sklaven eines Freundes der Nazis gemacht hatte. (vgl. Parkes 2001: 52f.; Shaffer 1998: 85; Winsworth 1999: 262)

795). In *The Remains of the* Day stellte das Herrenhaus Darlington Hall noch ein Relikt[24] des großen alten Englands dar und Stevens erinnerte sich mit Wehmut an die Zeiten, als er noch 17 Diener befehligen konnte. 1956 musste er mit drei Angestellten zurechtkommen, die laut Farraday „worthy of a grand English house" (RD 6) sein sollten. Stevens erkannte, dass die Zeiten vorbei waren, als er noch eine große Angestelltenschar unter sich hatte und dass sie wohl auch nicht mehr wiederkehren würden. Viele Mitglieder der Oberschicht konnten sich sogar überhaupt keine voll beschäftigten Angestellten mehr leisten oder sie hatten einen einzigen Angestellten, der gleichzeitig als Butler, Kammer-diener, Chauffeur und Putzhilfe fungierte. (vgl. RD 19; 48; 119)

Für den Amerikaner Farraday, der Darlington Hall gekauft hatte, ermaß sich der Wert des Butlers Stevens daran, dass er, ebenso wie das Haus, ein authentisches Stück des alten Englands repräsentierte. Als Farraday dennoch von Zweifeln gepackt wurde, fragte er Stevens, den er als Stereotyp des englischen Butlers engagiert hatte:

> 'I mean to say, Stevens, this *is* a genuine grand old English house, isn't it? That's what I paid for. And you're a genuine old-fashioned English butler, not just some waiter pretending to be one. You're the real thing, aren't you? That's what I wanted, isn't that what I have?' (RD 124)

In dem Moment erschien es so, als habe Farraday den Mythos des großen alten Englands kaufen wollen und fürchtete, dass er betrogen worden sei. (vgl. O'Brien 1996: 796; RD 6f.; 123ff.) Auch Stevens wusste, dass er „part of the package" (RD 242) war und gewissermaßen als Zugabe zum Haus von dem Amerikaner engagiert worden war, der sich, im Gegensatz zu vielen Engländern, ein solches Herrenhaus noch leisten konnte (vgl. Parkes 2001: 32; Rothfork 1996: 97; RD 242). Im Vergleich zu Lord Darlington war der Amerikaner sehr liberal und erlaubte seinen Angestellten die Verfolgung ihrer individuellen Interessen und Wünsche und ermutigte sie sogar gelegentlich, eine Auszeit zu nehmen, da er nicht von ihnen erwartete, ihr ganzes Leben „to be locked up here in this house" (RD 3). (vgl. O'Brien 1996: 795) Farraday hatte also eine gänzlich andere Auf-fassung über das Verhältnis zwischen Herr und Diener und wollte ein freundschaftliches und kameradschaftliches Verhältnis zu Stevens aufbauen. Für ihn stand nicht blinder Gehorsam im Mittelpunkt, sondern er zeigte sich an einem wortgewandten Butler interessiert, der seine eigene Meinung vertreten konnte.

Stevens, der damit zu kämpfen hatte, den Wandel innerhalb seines Heimatlandes zu akzeptieren, entschied sich jedoch, sich den neuen Anforderungen seines amerikanischen Dienstherrn zu stellen. Trotzdem blieb er zögerlich, „to change too much of the old ways" (RD 7). Zunächst empfand er die Neckereien seines Arbeitgebers als störend, doch dann betrachtete er den von ihm gewünschten Humor „comme un domaine de la connaissance qu'il devra maîtriser dans le cadre de ses obligations professionnelles […]" (Baneth-Nouailhetas 1999: 211). Er begann, humorvolle Kommentare zu üben und immer, wenn er etwas Zeit zur Verfügung hatte, versuchte er, „to formulate three witticisms based on [his] immediate surroundings at that moment" (RD 131). Humor stellte eine große Herausforderung für Stevens formale Art dar. (vgl. Winsworth 1999: 261). Gegen Ende des Romans fühlte Stevens jedoch, dass es an der Zeit sei, sich etwas enthusiastischer mit der Kunst des Humors auseinander zu setzen, da es möglich sei, dass darin der Schlüssel zur menschlichen Wärme versteckt liege. Dieser menschliche Faktor wurde aber gleich durch berufliche Überlegungen relativiert. Stevens glaubte, dass „[…] bantering [was] hardly an unreasonable duty for an employer to expect a professional to perform" (RD 245). Abschließend kündigte Stevens gar an, dass er sich intensiver mit dieser Thematik auseinandersetzen wolle, um seinen Arbeitgeber positiv zu überraschen. (vgl. RD 245)

Trotz der Bedeutungsabnahme der Oberschicht in Großbritannien gab es immer noch viele Menschen, die zu dieser Kategorie gehörten und sich durch eine Reihe von Statussymbolen von den gewöhnlichen Menschen abhoben. Auch Stevens, der bei seiner Fahrt nach Cornwall großen Wert auf seine Kleidung legte, um als angemessener Botschafter von Darlington Hall auftreten zu können, ließ zu, dass die Bewohner eines Dorfes ihn fälschlicherweise als Gentleman und Mitglieder der Oberschicht identifizier-ten. Der Butler hatte es durch sein Auftreten und diverse Statussymbole geschafft, dass die normale Bevölkerung seinen wahren gesellschaftlichen Status nicht erahnen konnte[25], sondern seine Verkleidung nur durch einen anderen, echten Gentleman, nämlich einen Arzt, erkannt wurde. (vgl. Jirgens 1999: 221; Machu 1999: 231)

> These [social] signifiers[26] include[d] evidence of wealth or „old money" such as fine clothing, a distinguished manner of speaking, a fine automobile, impeccable manners, and dignified behaviour (Jirgens 1999: 221).

Stevens' Unfähigkeit, sich vor dem Arzt als Aristokraten auszugeben, stellte einen Beleg für die weitgehende Undurchdringlichkeit der Klassenbarrieren dar. (vgl. Parkes 2001: 65) Auch 1956 gab es noch bedeutende Klassenunterschiede, deren Rigidität sich jedoch abgeschwächt hatte. Diese Unterschiede

[24] Zwischen 1875 und 1975 wurden über 1000 Landhäuser zerstört. Übrig blieben aber immer noch über 1500 der großen Herrenhäuser. Paxman erklärt den Niedergang der Häuser als Zeichen für die Unfähigkeit der Oberschicht „to cope with taxation, agricultural depression, the loss of a generation in the Great War and, often, their own unworldliness" (Paxman 1999: 156). (vgl. Paxman 1999: 156)

[25] Die Dorfbewohner waren sich in ihrer Fehleinschätzung über Stevens einig, obwohl sie behaupteten, sich nicht von Statussymbolen täuschen zu lassen.
You can tell a true gentleman from a false one that's just dressed in finery. Take yourself, sir [= Stevens]. It's not just the cut of your clothes, nor is it the fine way you've got of speaking. There's something else that marks you out as a gentleman. Hard to put your finger on it, but it's plain for all to see that's got eyes. (RD 184)

[26] Man sollte berücksichtigen, dass ein Großteil der Statussymbole, die Stevens als Gentleman erscheinen ließen, nicht ihm persönlich gehörten. Die Anzüge wurden ihm von Lord Darlington und einigen Gästen vor mehr als 20 Jahren geschenkt, während der Ford seinem neuen Arbeitgeber, Farraday, gehörte. Auch Sprache und Verhalten hatte sich der Butler über Jahrzehnte von seinem Dienstherrn abge-schaut und sie entsprachen somit nicht seiner eigentlichen Persönlichkeit. Stevens konnte also selbst in seiner Freizeit seine Professionalität nicht ablegen, sondern fuhr fort, seine Rolle perfekt zu spielen. (vgl. Machu 1999: 232; Parkes 2001: 56; RD 10)

wurden auch nicht mehr von allen Bürgern als gegeben hingenommen. Die britische Kultur hatte sich sehr lange ehrerbietig gegenüber der Elite und deren Einrichtungen, also dem Kult um Pfarrkirche, Public School und Herrenhaus gezeigt, doch hatte der soziale Wandel in Folge des Krieges auch Veränderungen bezüglich der sozialen Stellung vieler Menschen verursacht. (vgl. Harvie 1998: 563; Marwick 1998: 121) Das ständige Fortschreiten der Demokratie hatte die Macht der Aristokratie bedeutend verringert und durch den Einfluss der Gewerkschaften sowie die Verstaatlichung der Schwerindustrie wurde die Macht der Plutokratie eingeschränkt. Die Auflösung des Empire bewirkte, dass sich die Größe der Gesellschaft, über die die britische Elite herrschen konnte, deutlich verkleinerte. Wegen dieser nahezu simultan einsetzenden Ereignisse verlor die Elite „that effortless superiority which came from 'being' what they were" (Shils 1980: 499). Dieser Bedeutungsverlust der Oberschicht und Teilen der Mittelschicht machte sie anfällig für Kritik, da die normale Bevölkerung in England sich nicht mehr länger beeindruckt zeigte von den vorgegebenen Standards der ehedem unangefochtenen Elite. (vgl. Shils 1980: 499)

Die Neuordnung der sozialen Hierarchie als Konsequenz des zweiten Weltkriegs fiel aber nicht so extrem aus, als dass man eine komplett veränderte oder gar umgekehrte Auflistung der sozialen Stellung der Bevölkerung vornehmen müsste. Auch der zweite Weltkrieg hatte die Oberschicht nicht zerschlagen können, doch nahm der Einfluss eine Teils der englischen Elite ab, da das Leitbild des Gentleman-Ideals keine Gültigkeit mehr hatte und auch die finanziellen Möglichkeiten des Erbadels häufig ausgeschöpft waren und man sich die Aufrechterhaltung von Großgrundbesitz oftmals nicht mehr leisten konnte. Adlige mit gutem Ruf wurden jedoch von der niederen Bevölkerung weiterhin bewundert, obgleich die meisten Menschen kaum jemals einen echten Lord zu Gesicht bekamen. Ishiguro zeigt in seinem Roman, dass neben der weiter existierenden englischen Oberschicht auch einige Amerikaner nach Großbritannien kamen und dort die Landhäuser verarmter Adliger übernahmen, da sie über die nötigen Geldmittel verfügten. Neben einer fortschreitenden Vermischung von Land- und Geldadel stießen also Ausländer in die Oberschicht vor, die das Bild von einer einheitlichen, geschlossenen Elite zu verändern begannen. Nichtsdestotrotz verfügte die Oberschicht immer noch über überproportionale Macht in der Wirtschaft und in den oberen Rängen des öffentlichen Dienstes. (vgl. Marvick 1998: 122) Neben der Oberschicht gab es weiterhin die große Mittelschicht, deren Vertreter, wie zum Beispiel Harry Smith, zumindest teilweise begannen, ihre politische Freiheit zu nutzen und gegen immer noch bestehende Privilegien mancher Menschen vorzugehen.

Der Zerfall des Kolonialreiches hatte auch einen Bedeutungsverlust für die ehemaligen Kolonialherren zur Folge, die hauptsächlich aus der oberen Mittelschicht rekrutiert worden waren. Mit der Auflösung des Empire hatten diese Kolonialverwalter keine Aufgabe mehr und mussten nach ihrem hohen Status als hochrangige Vertreter der englischen Weltmacht mit ihrer neuen Mittelmäßigkeit im Heimatland Großbritannien zurechtkommen. (vgl. Shils 1980: 499) Für die Unterschicht gab es 1956 zwar viele Vorteile gegenüber früheren Zeiten, doch hatte sich neben den sozialen Verbesserungen an ihrem geringen gesamtgesellschaftlichen Status nicht viel getan. Die, im Roman weit-gehend politisch nicht interessierte, Unterschicht aus Arbeitern und kleinen Angestellten nahm die Einführung einer umfassenden Sozialversicherung „von der Wiege bis zum Grab" (Schröder 1948: 47) zwar positiv auf, engagierte sich aber kaum für weitere Ver-besserungen ihrer Situation und reagierte mit relativem Gleichmut auf den weiterhin bestehenden Klassengegensatz, da die Oberschicht ihre Privilegien, laut Döring, unaufdringlich und mit diskretem Charme ausübte (vgl. Döring 1998: 167).

Zur Unterschicht gehörten weiterhin die Diener, die ihr ganzes Leben lang für ein anderes, höherrangiges Mitglied der Gesellschaft arbeiteten, ohne dabei viel Geld zu verdienen[27] oder Eigentum, wie zum Beispiel eine eigene Wohnung, erwerben zu können. Die meisten Diener wohnten im Haus ihres Herrn, doch waren sie, laut Stevens, nicht mehr das, was sie früher einmal waren und anstelle sich bei Feuerschein in der Dienerhalle zu unterhalten, würden die Newcomer sich nur noch für Fußball interessieren und sich in Gaststätten vergnügen (vgl. RD 18f.). Stevens gehörte zwar noch zur alten Schule der Butler, doch musste auch er mit einem Statusverlust zurechtkommen, da er weniger Angestellte zu befehligen hatte, sein neuer Herr keinen überloyalen Diener wollte und das alte England der Vorkriegszeit keine große Rolle mehr spielte.

Bei den kulturellen Determinanten für den sozialen Status eines Menschen stand also auch 1956 weiterhin hauptsächlich das Vermögen, sei es geerbt oder selbständig erworben, im Vordergrund. Darüber hinaus gab es hoch angesehene Berufe, wie zum Beispiel Arzt, die einen hohen gesellschaftlichen Status garantierten. Die Zugehörigkeit zur Mittel- oder Unterschicht ergab sich daher generell aus dem Einkommen, dem Ansehen des ausgeübten Berufs und teilweise aus der sozialen Herkunft eines Menschen. Bei Ishiguro nimmt der Einfluss des Adels zwar tendenziell ab, doch bleibt trotz aller Veränderungen zwischen dem ersten Weltkrieg und dem Jahr 1956 das soziale Gefüge aus relativ kleiner Oberschicht sowie großer Mittelschicht und der Unterschicht bestehen. Auch die Zugangskriterien haben sich nur unwesentlich verändert, da Geld immer noch einen hohen Status garantiert. Neu war jedoch die politische Gleichberechtigung der Bevölkerung und damit verbunden vielfältige soziale Verbesserungen, die allen Menschen zugutekamen. Der Butler Stevens war zwar immer noch ein Diener, doch durfte er jetzt am politischen Leben des Landes teilnehmen, kam in den Genuss der sozialen Sicherungssysteme und musste nicht mehr dem Ideal des herausragenden Butlers nach-eifern, da die dafür benötigten Kriterien der Selbstverneinung definitiv der Vergangenheit angehörten.

[27] Obwohl Stevens als ranghöchster Diener bei Farraday beschäftigt war, konnte er sich nach über 40 Dienstjahren kaum seine erste Urlaubsreise finanzieren. Sein Arbeitgeber versprach ihm jedoch, das Benzin zu bezahlen und ihm seinen Wagen zu leihen. Stevens besaß auch kaum eigene Kleidungsstücke, sondern er griff für seine Fahrt auf Anzüge zurück, die ihm über die Jahre von Lord Darlington und seinen Gästen geschenkt worden waren. (vgl. RD 4ff.)

III. Schluss

Zusammenfassend möchte ich noch einmal auf die wichtigsten Ergebnisse der Studie eingehen. Zunächst ging es darum, die Begriffe Gesellschaft, sozialer Wandel und soziale Stellung zu erläutern, um sie dann gezielt auf *Things Fall Apart* und *The Remains of the Day* anwenden zu können. Grundsätzlich kann man zwischen einfachen und komplexen Gesellschaften unterscheiden. Achebes Ibo aus Umuofia gehören eindeutig zu den einfachen Gesellschaften, in denen sozialer Wandel, also die Veränderung sozialer Strukturen, gewöhnlich sehr langsam vonstatten geht. Ishiguros Roman hingegen handelt von der komplexen Gesellschaft Großbritanniens vom Ende des viktorianischen Zeitalters bis ins Jahr 1956. Hier müssen die Menschen in Folge der Weltkriege mit zahlreichen Veränderungen ihrer sozialen Umwelt zurechtkommen, ihre persönliche Stellung in der Gesellschaft neu definieren und versuchen, mit der Geschwindigkeit der Veränderungen Schritt halten zu können.

Es gibt sowohl endogene als auch exogene Faktoren, die den sozialen Wandel voran-treiben können. Zu den endogenen Faktoren gehören zum Beispiel Konflikte innerhalb der Herrschaftsordnung, soziale Konflikte, Widersprüche im Wertesystem oder auch Spannungen zwischen gesellschaftlichen Gruppen. Exogene Antriebskräfte für sozialen Wandel sind unter anderem Krieg und Naturkatastrophen. Die Veränderungen innerhalb beider, in den Romanen thematisierten, Gesellschaften, können aus einem Wirkungszusammenhang zwischen endogenen und exogenen Faktoren erklärt werden.

Sozialer Wandel hat selbstverständlich auch Auswirkungen auf die soziale Stellung der Menschen, wie gleich noch einmal gezeigt werden soll. Unter dem sozialen Status eines Menschen versteht man seine Position innerhalb der Sozialstruktur der Gesellschaft, die bestimmt, wo sein Platz in der sozialen Ordnung ist. Man unterscheidet zwischen zugeschriebenem Status, der durch die Geburt bestimmt wird und erworbenem Status, den man sich durch Bildung und Leistung erarbeiten kann. Die kulturellen Determinanten für soziale Stellung variieren zwischen unterschiedlichen Gesellschaften, wie anhand der beiden Romane sehr deutlich wurde. Allgemein gesprochen gehören Kriterien wie Abstammung, Besitz, Bildung, Religion, Alter und Geschlecht zu den Determinanten, die den Wert einer Person in seiner jeweiligen Gesellschaft ausmachen. Status-symbole vereinfachen gewöhnlich den Blick auf die Gegenstände oder Werte, die in der jeweiligen Gesellschaft als besonders hoch angesehen werden. Bei Achebe sind dies die Anzahl der erworbenen Titel, die Anzahl der Frauen und Kinder, sowie die Größe der Behausung und der mit Yamwurzeln gefüllten Scheunen. Auch bei Ishiguro spielen Adelstitel, der große Landsitz, das Auto, Kleidung und Gesellschaftskreise eine bedeutende Rolle als Symbole für Reichtum und Einfluss im Land.

Sowohl in *The Remains of the Day* als auch in *Things Fall Apart* kann man drei Phasen unterscheiden: die Generation der Großväter, der Väter und der Söhne. Verein-facht ausgedrückt, wird in der jeweils ersten Phase der Romane eine relativ stabile Gesellschaftsordnung beschrieben, in der das bestehende soziale Gefüge trotz aller Ungerechtigkeiten kaum in Frage gestellt wird. In der mittleren Generation treten die Probleme innerhalb der Gesellschaft schon deutlicher zu Tage, gewisse Ansätze für einen unaufhaltsamen sozialen Wandel und damit eine Veränderung der sozialen Hierarchien sind erkennbar, doch fehlt es bei Achebe noch an dem entscheidenden Auslöser, der die Veränderungen in Gang setzen kann, während bei Ishiguro der Wandel bereits angefangen hat. Erst in der Generation der Enkel lassen beide Autoren einen tatsächlichen, deutlich zu spürenden, Wandel zu. Bei Achebe werden wir Zeuge des langsamen Prozesses, der die traditionelle Stammesgesellschaft zerfallen lässt und das alte soziale Gefüge auf den Kopf stellt. Ishiguro, hingegen, konfrontiert seine Leser, nach einem zeitlichen Sprung zwischen der Zeit vor dem zweiten Weltkrieg und dem Jahr 1956, mit einer bereits deutlich veränderten Situation in der Gesellschaft Großbritanniens. Er beschreibt keine Einzelheiten aus dem Krieg, keine Kampfhandlungen, keine Beispiele für die Solidarität und gemeinsame Auflehnung der britischen Bevölkerung gegen die existentielle Bedrohung aus Nazi-Deutschland. Ishiguro lässt einfach eine Zeitspanne von etwa 17 Jahren offen und überlässt es der Phantasie oder dem Wissen des Lesers, die historischen Ereignisse der damaligen Zeit in die Handlung einzubauen. *The Remains of the Day* erklärt nicht, wie es zu den dramatischen gesellschaftlichen Änderungen kommt, mit denen Stevens 1956 klar kommen muss, während *Things Fall Apart* versucht, die schrittweise Veränderung der Lebensbedingung der Ibo, die sich plötzlich mit Missionaren und Kolonialherren konfrontiert sahen, zu beschreiben.

Jetzt möchte ich aber noch einmal getrennt auf die Romane eingehen, die darin enthaltenen Belege für sozialen Wandel aufzeigen und die damit einhergehende Veränderung der sozialen Stellung der Protagonisten beschreiben.

> *Things Fall Apart* […] is about a clan which one thought like one, spoke like one, shared a common awareness and acted like one. The white man came and his coming broke this unity. In the process many heads rolled; new words, new usages and new applications gained entrance into men's heads and hearts and the old society gradually gave way. (Higo 1985: V)

Higos Einschätzung stellt eine etwas zu starke Vereinfachung der Ereignisse in der Gesellschaft Umuofias zu Beginn des 20. Jahrhunderts dar. Achebe hingegen bemüht sich um den Entwurf eines ausgewogenen historischen Bildes, das bei aller Aufwertung des Stammeslebens vorkolonialer Prägung, jede idyllische Verklärung vermeidet (vgl. Kreutzer 1993: 423). Zunächst präsentiert Achebe eine intakte Dorfgemeinschaft, die über Jahrhunderte ohne Kontakt mit der Außenwelt ihre ganz speziellen Gepflogenheiten und Bräuche entwickeln konnte und deren Gesellschaft nach einer festen sozialen Hierarchie aufgebaut war. Vornehmlich Reichtum, physische Stärke und das Geschlecht eines Menschen bestimmten seine soziale Stellung in Umuofia. Zweifelsohne spielten die Götter die größte Rolle im Leben der Menschen. Im Dorf hatten die Priester, Egwugwus und verdienten Stammesältesten, die sich durch viele Titel, also Reichtum, auszeichneten, den größten Einfluss. Sie bestimmten über die Geschicke des Clans, der die Entscheidungen der Egwugwus und Priester klaglos anerkannte. Die Männer hatten in dieser patriarchalischen Gesellschaft eine höhere Stellung als ihre Ehefrauen. Frauen und Kinder gehörten dem Mann und dieser konnte über sie bestimmen. Männliche Nachkommen

wurden gegenüber Mädchen bevorzugt, doch obwohl die Ibos großen Wert auf eine hohe Kinderzahl legten, wurden Zwillinge direkt nach der Geburt ausgesetzt, da sie eine Beleidigung der Götter waren und Unglück über den Stamm gebracht hätten. Die niedrigste soziale Stellung nach den Sklaven belegten die Ozus, die von der Gesellschaft geächtet, in einem speziellen Gebiet leben mussten. Nach ihrem Tod wurden sie wie Selbstmörder und Aussätzige ohne Begräbnis im Evil Forest entsorgt. Diese, seit Urzeiten bestehende soziale Hierarchie, schien bis zu Unokas Generation von keinem Mitglied des Clans öffentlich hinterfragt worden zu sein und niemand hatte etwas dagegen unternommen. Erste Anzeichen für einen sich abzeichnenden sozialen Wandel werden erst um die Jahrhundertwende deutlich. Unokas Sohn Okonkwo verkörperte alle Ideale des Clans, doch hatte er auch Schwächen. Aus Angst, als Feigling angesehen zu werden, agierte er mit unglaublicher Brutalität, indem er zum Beispiel seinen Ziehsohn Ikemefuna ermordete, beinahe seine Ehefrau erschossen hätte und häufig Prügel verteilte. Obwohl Ikemefunas Tod als Opfer zum Wohle des Clans angesehen wurde, so hätte Okonkwo zwar dem Wunsch der Götter gehorchen können, ohne aber eine aktive Rolle bei der Tötung einzunehmen. Die Rigidität, mit der Okonkwo das stammesinterne Rollenbild der betont männlichen Härte auslebte, ließ es bei einigen seiner Zeitgenossen fragwürdig erscheinen. Nicht umsonst wurde sein Sohn Nwoye, der den Tod seines Freundes Ikemefuna ebenso wenig verstehen konnte, wie die Praxis, Zwillinge nach der Geburt ihrem Schicksal zu überlassen, abtrünnig und suchte in der Missionsschule nach Erfüllung seiner unbefriedigten Sensibilität. (vgl. Kreutzer 1993: 423)

Auch Obierika, ein hochrangiges Mitglied der Gesellschaft Umuofias, wurde gelegentlich von Zweifeln geplagt. Warum mussten unschuldige Menschen bei rituellen Opferungen ihr Leben lassen und warum wurde ein Mann mit sieben-jährigem Exil bestraft, weil er aus Versehen den Tod eines Menschen verursacht hatte? Er fand keine Antworten auf seine Fragen, die er jedoch für sich behielt und nur in seinem Inneren zulassen konnte. Diese Dualität zwischen dem Wohl des Clans und den persönlichen Interessen und Gefühlen machte vielen Menschen zu schaffen, doch wurde dieser Interessenkonflikt nicht öffentlich ausgesprochen oder diskutiert, so dass die Mehrheit der Bevölkerung sich ihrer ständigen Dualität nicht bewusst war, da die Worte zur Beschreibung ihrer Situation noch nicht geprägt waren.

Achebe zeigt also auch negative Aspekte der traditionellen Gesellschaft der Ibo, wie die Opferung von Zwillingen, Ritualmorde und die Behandlung der Ozus (vgl. Booker 1998: 76). Er deutet somit „latente Erosionserscheinungen der traditionellen Kultur" (Kreutzer 1993: 423) an, die jedoch um 1900 noch nicht stark genug waren, um einen Wandel aus dem Inneren des Gesellschaftssystems zu bewirken. Es bedurfte noch eines äußeren Anstoßes, um die inneren Konflikte des Clans zu offenbaren. Dieser Anstoß erfolgte mit der Ankunft der weißen Missionare und Kolonialherren.

Laut Yeats zerfällt jedes System aus seinem Inneren heraus und die Außenseiter und Verlierer einer Zivilisation werden zu den ersten Anhängern der neuen Ordnung, die ihnen Vorteile verspricht (vgl. Wright 1991: 79f.). Das würde bedeuten, dass Achebe, dessen Roman mit einem Ausschnitt aus Yeats` Gedicht „The Second Coming" beginnt, die Schuld für den Auflösungsprozess der afrikanischen Stammeskulturen nicht allein beim kolonialen Imperialismus der Briten sucht. Es gibt sogar Anhaltspunkte für positive Entwicklungen, die im Zusammenhang mit Christianisierung und Kolonialisierung zu verstehen sind. (vgl. Booker 1998: 76; Kreutzer 1993: 423) Die Missionare retteten Zwillinge, denen der sichere Tod gedroht hätte, sie nahmen Mütter, die ihre Kinder nicht opfern wollten, Ozus und sonstige Außenseiter in ihrer Gemeinschaft auf und stellten das Wohl des Individuums über das des Clans. Die anrückende Kolonialmacht, die im Verbund von Missionstätigkeit, Handelsbelebung und administrativer Organisation die Ibo strategisch unter Druck setzte, hatte leichtes Spiel, da sie den Ausgestoßenen des Stammes Aufnahme gewährte und somit immer mehr Überläufer anlockte (vgl. Kreutzer 1993: 423). Durch dieses Vorgehen wurde die traditionelle soziale Ordnung nahezu auf den Kopf gestellt, denn Menschen mit der ehemals niedrigsten sozialen Position, stellten nun die neue Elite unter ihren weißen Herrschern dar. Bereits nach kurzer Zeit in der Missionsschule besetzten die neuen Christen Ämter in der Kolonialregierung. Sie wurden als Übersetzer, Gerichtsdiener, Polizisten, Angestellte und Lehrer eingesetzt, was ihnen ein sicheres Gehalt einbrachte. Da die neuen Machthaber der Sprache der eroberten Völker nicht verstanden, kam besonders den Übersetzern eine Schlüsselrolle zu, die sie sich in Form von Bestechungsgeldern gut bezahlen ließen.

Zu Beginn des 20. Jahrhunderts trafen also die weißen Kolonialherren auf eine Gesellschaft, die bereits Risse in ihrer traditionellen Ordnung aufwies, die sich aber erst durch das Einwirken der Missionare und neuen Verwalter so sehr vertieften, dass die alte Gesellschaftsordnung nicht mehr dagegen halten konnte und letztlich in sich zusammenstürzte. Achebes Rekonstruktion des Lebens in einem Ibo-Dorf um die Jahrhundertwende trägt dazu bei, all jene Kräfte aufzuzeigen, die sowohl im Inneren der Gesellschaft existierten, als auch von außen auf sie einwirkten und damit den Weg bereiteten für ihren letztlich unausweichlichen Zerfall (vgl. Irele 1980: 177). In *Things Fall Apart* sieht man, dass auch die negativen Aspekte der Ibo-Gesellschaft Teil eines organischen Ganzen waren und dass es durch die Zerrüttungen, die mit ihrem Wegfall einhergingen, zum Kollaps der gesamten Sozialstruktur kommen musste (vgl. Booker 1998: 76).

Die neu entstandene Sozialstruktur zeichnete sich in Folge durch zweierlei Hierarchien aus. Zum einen galt die alte Stammeshierarchie für all jene Menschen fort, die sich noch gegen das neue System entschieden hatten und weiterhin den Ahnen und ihren Göttern huldigen wollten. Dort galt weiterhin die bereits beschriebene Rangordnung der patriarchalischen Stammesgesellschaft. Zum zweiten war es jedoch offensichtlich, dass niemand etwas gegen die Übermacht der Kolonialherren unternehmen konnte und dass sie, objektiv betrachtet, die wirklichen Machthaber in Umuofia und darüber hinaus waren. Den höchsten Status hatten daher die Bezirksverwalter, gefolgt von den Gerichts-dienern, Polizisten und Übersetzern sowie den Angestellten und Lehrern. Diese neue Elite kontrollierte alle Vorgänge innerhalb des Clans. Für sie gehörten alle anderen Personen,

unabhängig von deren ursprünglichem Status, zu den Eroberten, die es im Sinne der britischen Regierung zu befrieden und kontrollieren galt. Achebes Roman schließt mit den Gedanken des Bezirksverwalters, der Okonkwos Selbstmord, in seinem Buch *The Pacification of the Primitive Tribes of the Lower Niger* aufnehmen wollte. Mit dem Titel des Buches macht Achebe jedoch sehr deutlich, dass der Verwalter aus rein europäischer Sichtweise auf die Ereignisse in Umuofia blickte. Die Briten wollten Nigeria befrieden, doch aus Sicht der meisten Afrikaner brachte der Kolonialismus keine Zivilisation[28], sondern Chaos und Zerstörung. *Things Fall Apart* beinhaltet daher scharfe Kritik am Kolonialismus, wenn man sich die Darstellung der korrupten kolonialen Verwaltung und des fanatischen Missionars Smith vor Augen hält. (vgl. Booker1998: 75) Der Kolonialismus war aber nichtsdestotrotz nicht der alleinige Grund, sondern höchstens der Auslöser für den massiven Beginn des sozialen Wandels, der vor niemandem Halt machte und zu einer radikalen Umkehrung der sozialen Rangstellung fast aller Beteiligten führte.

Die soziale Stellung vieler Menschen zeigt sich 1956 in weiten Bereichen stark verändert, insbesondere hat sich die herausragende Position des Adels weitgehend verschlechtert, während die normale Arbeiterschicht mehr Rechte für sich in Anspruch nehmen kann und die durch Geburt bestimmte Vormachtstellung vieler Menschen nicht mehr als gottgegeben hinzunehmen bereit ist. Auch bei Ishiguro brauchte die Gesellschaft einen äußeren Anlass, also den zweiten Weltkrieg, der die Konflikte im Inneren der Gesellschaft zu bündeln half und folglich den sozialen Wandel unaufhaltsam voranbrachte.

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[28] In diesem Zusammenhang scheint die Aussage von Mahatma Gandhi von Interesse, der bei einem Besuch in England gefragt wurde, was er von der englischen Zivilisation halte. Seine Antwort lautete: „I think it would be a good idea." (zitiert in Rushdie 1991: 138)

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Peter Dinzelbacher

Das fremde Mittelalter. Gottesurteil und Tierprozess (Schriftenreihe des Mittelalterlichen Kriminalmuseums Rothenburg ob der Tauber, Bd. XI) Zweite, wesentlich erweiterte Auflage

Darmstadt: Wissenschaftliche Buchgesellschaft, wbg, 2020, 384 Seiten

Peter Dinzelbachers Werk „Das fremde Mittelalter" hat eine stark erweiterte zweite Auflage erfahren, wobei der Textteil von 231 auf 350 Seiten angewachsen ist und die zweite Auflage durch eine Einführung von Andreas Deutsch ergänzt wurde.

In seinem Werk spürt Peter Dinzelbacher dem Gefühl der Fremdheit nach, dass bei der Beschäftigung mit mittelalterlichen Quellen entstehen kann (S. 16) und dass, wenn es bei einer Verurteilung und einem Gefühl der Unerklärbarkeit der in den Quellen überlieferten mittelalterlichen Begebenheiten stehen bleibt, letztlich zu einer für den Erkenntnisgewinn nicht fruchtbaren Distanzierung von der „finsteren Epoche des Mittelalters" führt, weshalb der Autor den Eindruck von Fremdheit gerade nicht als trennendes Element verstanden wissen will, sondern die fremd wirkenden Elemente zu deuten sucht. Dabei zeigt Dinzelbacher, dass nicht die Mentalität des Mittelalters fremd ist, sondern einzelne Denk- und Verhaltensweisen und dass sich diese trotz ihrer Fremdheit erschließen lassen, wenn man nur zunächst die Quellen sprechen lässt, um diese dann unter Heranziehung der Methodik verschiedener Forschungsdisziplinen – allen voran der Mentalitätsgeschichte – eingehend zu analysieren (S. 22). In diesem Sinne geht es Dinzelbacher besonders darum, zwei auf den ersten Blick besonders befremdlich wirkende Denk- und Handlungsstrukturen mittelalterlicher Strafrechtsprozesse – nämlich Gottesurteil und Tierprozess – für den modernen Menschen fassbar zu machen.

Dabei lag die Bedeutung der Vorauflage von Peter Dinzelbachers Untersuchung insbesondere darin, die Ansätze der Mentalitätsgeschichte auf die zwei gerade erwähnten und bislang eher rechtsgeschichtlich erforschten Phänomene anzuwenden und die hinter dem Gottesurteil stehenden Denk- und Handlungsstrukturen mit denen hinter den Tierprozessen herauszuarbeitenden Mentalitäten zu kontrastieren. Die vorliegende zweite Auflage macht nicht nur in erweiterter und aktualisierter Form diese Grundlagenforschung als Standardwerk erneut zugänglich, sondern hat auch die Gelegenheit ergriffen, den Gang der Forschung seit dem Erscheinen der ersten Auflage im Jahr 2006 aufzugreifen.

Peter Dinzelbacher selbst legt eingangs dar, dass er in Anlehnung an Frantisek Graus' Beitrag zur Bestimmung des Begriffs Mentalität als Ausgangspunkt seiner Untersuchung nicht theoretische Erwägungen wählt, sondern zunächst die Quellen selbst zur Sprachen kommen lassen will, um daraus verallgemeinerungsfähige Erklärungsmodelle und theoretische Erwägungen abzuleiten. Dabei legt der Autor sein Werk methodisch umfassend breit an, indem er nicht nur verschiedene Disziplinen für die Untersuchung nutzbar macht, sondern auch indem er zum einen die ganze Bandbreite des mittelalterlichen Rechts (römisch-antikes Recht, germanisches Recht, kanonisches Recht, Stadtrechte, Sachsenspiegel usw.) heranzieht und daneben Urkunden, narrative Quellen und diskursive Texte, die die Rechtspraxis abbilden, sprechen lässt (S. 33), wobei der Autor die ganze Epoche des Mittelalters vom Früh- bis zum Spätmittelalter und das für ganz Europa abzubilden sucht. Dabei geht es Dinzelbacher darum, dass zusätzlich zu dem, was die Verfasser der untersuchten Quellen bewusst überliefern wollten, insbesondere das herausgearbeitet werden soll, was die Autoren unbewusst über sich und ihre Umwelt verraten, da sich die Denk- und Empfindungsweisen und somit gerade die Mentalität in den durch die Quelle überlieferten Äußerungen und im Verhaltensweisen manifestieren (S. 17f.)

Mit dieser sowohl methodisch als auch thematisch breit und integrativ angelegten Untersuchung, spricht der Verfasser einen großen Leserkreis an, stellt aber gleichzeitig auch fest, dass, um den Rahmen der Untersuchung nicht zu sprengen, das Wissen um die materiellen, sozialen und politischen Lebenswelten des Mittelalters vorausgesetzt werden müsse, wobei es ein großes Verdienst des Autors ist, dass das Werk aufgrund seiner quellenbasierten Darstellung auch für Leser ohne Vorwissen eine überaus fruchtbare Lektüre darstellen wird.

In der Einleitung seines Werks arbeitet Dinzelbacher Ziel und Methode seiner Untersuchung heraus und ordnet seinen methodischen Ansatz in den Forschungsstand ein. Im Anschluss wird ein kurzer Abriss über das mittelalterliche Recht aus mentalitätsgeschichtlicher Perspektive gegeben. Im ersten Teil der Untersuchung (S. 35-145) wendet sich Dinzelbacher sodann dem Gottesurteil zu und stellt die in den Quellen belegbare Rechtspraxis wie auch die zeitgenössischen kritischen Stimmen differenziert und auf eine Vielzahl von Quellen gestützt dar, wobei er auf geografische, geschlechterspezifische und soziale Forschungsdesiderate hinweist. Hier tritt das besondere Anliegen von Dinzelbachers Werk hervor – nämlich auf noch offene Forschungsansätze und Desiderate der Forschung aufmerksam zu machen.

Dies wird im zweiten, sich mit Tierprozessen beschäftigenden Teil der Darstellung (S. 147-257) in einem eigenen Kapitel Desiderata nochmals explizit aufgegriffen. Dabei unterscheidet Dinzelbacher bei den Tierprozessen zwei unterschiedliche Ausformungen: zum einen das weltliche Verfahren gegen ein Tier quasi als Straftäter (Tötung eines Menschen) mit dem Ergebnis seiner Hinrichtung und zum anderen die gegen Tiere (Insekten als Schädlinge) angestrengten geistlichen Tierprozesses, die mit der Exkommunikation der Schädlinge endeten. Die dabei zu beobachtende „Vermenschlichung" des Tieres, dass wie ein vernunftbegabter Mensch angesprochen wird, wie ein Mensch in der Verantwortung gesehen wird und daher auch wie ein Mensch bestraft wird. Der Autor setzt sich intensiv mit der zum Thema der Tierprozesse seit 2006 erschienenen Forschungsliteratur auseinander (S. 225ff.) und beklagt dabei, dass eine Vielzahl von neueren Studien ohne neuen methodischen Ansatz im Wesentlichen die Sekundärliteratur wiederhole (S. 225). Der Autor ergänzt seine differen-zierende Einordnung vor dem Hintergrund der neueren Veröffentlichungen über Tierprozesse, in dem er nicht nur zwischen weltlichen und geistlichen Tierprozessen, sondern zusätzlich zwischen Tierstrafen (S. 232) und Tiertötungen (S. 234) unterscheidet. Allerdings beschäftigen Peter Dinzelbacher die folgenden, bereits in der ersten Auflage aufgeworfenen Fragen, noch weiter: Zum einen ist dies die Frage, warum in den Quellen der Antike und des Frühmittelalters Tiere nicht als Angeklagte in Strafprozessen nachweisbar sind, sondern vielmehr die Sachhaftung des Tierbesitzers die entscheidende Rolle spielt, während von den Quellen des 13. Jahrhunderts an, die Praxis der Tierprozesse belegbar wird. Zum anderen geht Peter Dinzelbacher eingehend der zweiten Frage nach, wie die geistiges Elite des Mittelalters – namentlich Theologen und Juristen – daran glauben konnten, dass es möglich sei, eine Kommunikation zwischen Mensch und Tier zu etablieren, in der das Tier gleichsam wie ein Mensch religiöse, strafprozess- und strafrechtliche Sachverhalte und Erwägungen in einem offiziellen Prozess verstehen können würde. Diesbezüglich weist er hier ergänzend darauf hin, dass dies auch die Vorstellung/Erwartung voraussetzt, dass Tiere „vernünftigen" Argumenten zugänglich seien und dass sie im Fall der Prozesse gegen Schadinsekten auch in der Lage seien, entsprechenden der von menschlichen Interessen diktierten Entscheidungen geistlicher Gerichte zu agieren. Der Autor bietet in einem eigenen Kapitel eine ausführliche Auseinandersetzung mit aktuellen Erklärungsversuchen der Forschung zu diesen Fragen (S. 238ff.), wobei Dinzelbacher die Fülle an Forschung entsprechend der einzelnen methodischen Ansätze, nach rechtsgeschichtlichen, religionswissenschaftlichen, sozialpsychologischen und mentalitätsgeschichtlichen Erklärungshypothesen. In diesem Zusammenhang weist Dinzelbacher auch auf Ansätze hin, die er als „methodische Holzwege" für nicht zielführend hält (S. 253).

Im dritten Hauptkapitel seines Werkes wendet sich Dinzelbacher einzelnen Aspekten der Fremdheit des Mittelalters zu (S. 258-311). Im Einzelnen werden die folgenden Themen behandelt, die aus den von Dinzelbacher als charakteristische Unterschiede zwischen dem Mittelalter und der Gegenwart identifizierten Aspekten folgen (S. 259): 1) Dominanz des Religiösen, 2) assoziativer und bildhafter Denkstil, 3) konkretes Erleben von Raum und Zeit, 4) Körperlichkeit mit den Unterpunkten Askese, Reliquienverehrung und Seelenleib, 5) Spontaneität sowie 6) Ethik und Recht.

In dem die Untersuchung zu Gottesurteil und Tierprozess beschließenden Kapitel „Phasen der Mentalitäten im Mittelalter" (S. 312-325) werden unter Beachtung der geistes- und ideengeschichtlichen Umbrüche des Hochmittelalters der Zeitraum von Augustinus bis ins 17. Jahrhundert zusammenfassend nachvollzogen und hier wird auch kurz zusammenfassend auf hinsichtlich Tierprozess und Gottesurteil zu beobachtende Kontinuitäten und Differenzierungen zwischen verschiedenen europäischen Ländern eingegangen (S. 325).

Angesichts seines Befundes, dass hinsichtlich der Praxis der Tierprozesse eine Reprimitivisierung der mittelalterlichen Mentalitäten angenommen werden könne, stellt Dinzelbacher in dem mit „Verständnishilfen" betitelten Kapitel (S. 326-350) Verbindungen zur Moderne her, um im Anschluss an Marc Bloch einem menschlichen Phänomen dadurch besser auf die Spur zu kommen, indem Erklärungsmodelle zu anderen Phänomen derselben Art bereits verstanden wurden, herangezogen werden sollen (S. 327). Hierfür zeigt der Autor auf, welche Möglichkeiten, Chancen, aber auch Probleme und Grenzen die Heranziehung der Disziplinen Völkerkunde, Volkskunde und Psychologie als Verständnishilfen für bislang nicht abschließend erklärbare mittelalterliche Phänomene wie den Tierprozess darstellen können.

Angesichts der schon angesprochenen Flut an Forschungsliteratur plädiert Dinzelbacher für eine kommentiere Bibliographie zum Thema der Tierprozesse, wobei er sogleich mit dem sich ab S. 351 anschließenden eigenen ausführlichen Literaturverzeichnis einen ersten Schritt hin zur Schließung des Desiderats unternimmt, indem er eine kleine Rubrik anfügt, in der auf Beiträge hingewiesen wird, die sich dem Titel nach auf den ersten Blick mit Tierprozessen zu befassen scheinen, aber inhaltlich andere Fragestellungen verfolgen.

Der Autor wird seinem Ziel, mit seiner Darstellung Forschungsanstöße für die weitere Beschäftigung mit befremdlichen Phänomenen des Mittelalters zu geben, vollumfänglich gerecht. Lücken und Fragen, die (noch) offenbleiben müssen, entsprechen gerade dem Ziel der Untersuchung, die sich genauso intensiv mit den methodischen Ansätzen wie den Quellen auseinandersetzt und nicht vorschnell zu einer nicht tragfähigen Erklärung kommen will, sondern mit einem wichtigem Standardwerk zu einer lebendigen wissenschaftlichen Debatte beitragen möchte, wozu auch gehört, Fragen aufzuwerfen und (neue) methodische Wege zu deren Beantwortung aufzuzeigen und anzuregen.

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Bart Wauters / Marco de Benito

The History of Law in Europe. An Introduction

Cheltenham: Edward Elgar Publishing, 2017, 190 p.

The aim of this book, which was published by Edward Elgar Publishing (UK, USA) in 2017, is to present the brief overview of European legal history from the times of Roman law until the beginning of the 20th century. Its authors, Bart Wauters and Marco de Benito, both work as professors of law at private IE University in Spain.

The History of Law in Europe An Introduction consists of introduction, six chapters on legal history and epilogue. We ought to commend the authors for the very clear and coherent structure of this book. The chapters are chronological and each chapter contains a brief general outline of historical and social context, in which the legal development described in the pertinent chapter took place.

The first section of this book deals with Roman law. It exceptionally breaks the chronological spirit of this book and starts with Justinian's *Corpus Juris Civilis* from the sixth century before engaging with the history of Rome and then with the evolution of Roman law since archaic law of Roman kingdom until the post-classic period of the Dominate.

The legal development of Europe in the early middle ages is covered in the second chapter. It describes the incursions of Germanic tribes into the area of the former Western Roman Empire and their traditional customary law. Then it deals with the mutual relationship of Germanic law and Roman law in the context of the personality of law, which was corporealized in the two categories of legal precepts: *Leges Romanorum* for subjects of Roman origin and *Leges Barbarorum* for dominant Germanic people. However, even in those times, as the authors accentuate, there were unifying factors such as royal legislation (of which the most important examples were capitularies of Carolingian age) and the rise of the Canon law with its own ecclesiastical sources of law.

The third chapter is dedicated to the period of the late middle ages. The crucial emphasis is put on the difference between *ius commune* and *ius proprium* and on their respective developments. The most important developments, which influenced *ius commune* and its position in late medieval Europe, were the foundations of universities and the discovery of Roman law, which prompted emergence of two schools of legal scholars: glossators and commentators. The authors also deal with the development of the Canon law in those times and mention the most important collections of canonical precepts and scholars of canon law known as decretists and decretalists. When describing *ius proprium* of late medieval Europe (this term stands for specific existing and contemporary laws, which were applied through Europe) there is an eloquent discourse on the relationship between legislation and customary law, which was subject of unification in many European countries during that period. The problem of the administration of justice is also covered in this chapter.

The next section deals with the early modern age. This era was determined by the shift in legal philosophy of cardinal importance, mainly the entrance of legal humanism into the European legal thought. According to the authors it was legal humanism which paved the way for the academic study of *ius proprium*, even though universities did not offer courses of national or local law until the 18th century (p. 95). However, legal humanism was not only intellectual movement forming the jurisprudence of this period. The scholastic method was still of great influence as is demonstrated through the school of Salamanca and its importance for the evolution of European legal thinking. Another concepts, which became subjects of legal theory, were ideas of international law and rational natural law. The practical area of law was greatly influenced by the state centralization, which further caused legislation activities and subsequent attempts to consolidate and systematize national laws. The centralization of the state changed also the administration of justice, in which the goal of the centralized system of royal courts was often sought for very purposefully.

The bourgeois age is the subject matter of the fifth chapter. Its chronological scope is framed by the War of the Spanish Succession (1701 – 1714) on the one hand and by World War I (1914 – 1918) on the other hand. The authors put great emphasis on the Enlightenment philosophy and its influence on legal thinking and legal practise. In the legislative area of crucial importance were the codification projects undertaken through European continent. What follows is a rather compendious overview of Napoleonic codifications in France (predominantly the *Code civil* of 1804) and of the so-called pandectist codification in Germany – the *Bürgerliche Gesetzbuch* of 1896. These codifications had (and in fact still have) enormous influence over other civil law countries, not only in Europe. This chapter also includes a brief description of the development of jurisprudence in pertinent period, namely the exegetic school, the historical school and pandectism.

The last chapter of this book is quite different from previous ones. It deals, quite asymmetrically, with the legal evolution of one single country, i. e. England. There is, however, a good reason for that, as England has substantially different legal culture based on the common law. This chapter thus delves deep into the English history to explain such different legal development compared to the rest of Europe. The authors note that until the twelfth century England was quite similar to the rest of Europe, however,

'*the key divergence is that a legal system of a national nature was established in England very early in its history*' (p. 165). Brief attention is in this chapter also dedicated to the peculiar Scots law and the influence of English common law over the legal systems of former British colonies.

One may also comment upon some shortcomings of this book. Mainly it is almost exclusively focused on the legal development of Western Europe, not the whole Europe, which is actually acknowledged by its authors (p. 2). The scope of this book is also limited by the beginning of the 20th century, thus omitting the whole century of legal evolution in Europe. As another problem the different treatment of civil law and common law may be mentioned, however, we understand that one cannot escape some asymmetry when dealing with the whole civil law continental Europe and basically one common law country (England).

Finally, we have to conclude that the authors accomplished their stated goal by this book, namely to offer brief and cohesive treatment of the historical development of law in Europe for students or interested laymen.

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Meder, Stephan (Hrsg.)

Geschichte und Zukunft des Urheberrechts II.

Göttingen: Vandenhoek & Ruprecht, 2020, 262 S.

Wieviel Zukunft fürs künftige Recht vermögen gescheite Blicke in der fragilen, der schneckenähnlichen Geschichte des Urheberrechts auszumachen? Antworten suchte die 18. Tagung des Arbeitskreises Geschichte und Zukunft des Urheberrechts an der Universität Hannover. Der von Manfred Rehbinder1986 begründete und geleitete, ab 2017 von Stephan Meder, Rechtshistoriker und Zivilrechtler, übernommene Kreis von Spezialisten widmete sich vielschichtigen, farbigen Themen zwischen dogmatisch-rechtshistorischer Tradition und garstigem Gegenwartsbezug - Streifzüge durch 500 Jahre Nachdruck, Plagiat, Text- und Musikprivilegien, Theater- und Musikaufführungen bis hin zur komplexen Dialektik von Literatur und global-internationalen Übersetzungsrechten.

„Sacher und Widersacher" betitelte dereinst Friedrich Torberg den erbitterten Kampf zwischen.dem k.u.k. Hofzuckerbäcker Demel und dem Wiener Hotel Sacher ums richtige „Original"-Rezept für die Sacher-Torte mit „Marillenmarmelade" - einfach oder doppelt „aprikotiert" - davon handelt die amüsante Sacher-Frage! Welches der schmackhaften Produkte trifft den ungeteilten Beifall von „Tante Jolesch", des Publikums, welche den subtilen Gaumen der Obersten Handels- Richter? (Thomas Rüfner, Frankfurt a.M.). Torberg, das sei in Parenthese zum Thema Original-Etikettierung angemerkt, dessen denkbar objektivstes Zeugnis die II. Instanz historisch besserwisserisch belegt nicht zu goutieren gedachte, gönnte im Zwist um die bange, rein „ideologische" Frage, ob von zwei Originalen gerade das spätergeborene als das einzige gelten sollte, in schöner Eintracht beiden kulinarischen Konkurrenten den End-Sieg – ihm, der dem „Tafelspitz" den Vorzug gab Sachers, schmeckte die Torte in beiderlei Gestalt, mit Marmelade wie auch ohne sie, subjektiv überhaupt nicht (Friedrich Torberg: Die Tante Jolesch oder Der Untergang des Abendlandes…1961).

Monopole und Privilegien - der Autor, der Drucker, der Verleger vs. den überall waltenden Plagiator und den „verfluchten diebischen Bücher-Nachdrucker", ewiglich wiederkehrende Themata in den Codices der Carolina, in Kunst und Literatur (David von Mayenburg, Frankfurt a.M; Andreas Deutsch, Heidelberg). Und dann noch: Darf ein Winkelmaß aus Blei plagiatorisch zu sehen sein, im uralten Kontext zwischen strengem jus strictum und milderer aequitas? (Renate Frohne, Trogen/Schweiz)

Die befristeten kaiserlichen Privilegien soll der Reichshofrat schützen: profitable Kölner Volkskalender und andere Bestseller stehen zur Diskussion. Wie weit reichen die hehren kaiserlichen Schutzbriefe? Wie stehen die grundgelehrten 445 Reichshofräte zwischen dem 16. und dem 19.Jahrhundert zum Wirkungsbereich der allerhöchsten Schutzbriefe, wie streng sieht man die zwingend erforderliche, politisch gewichtete Unversehrtheit kaiserlicher Reservatrechte? Schier endlos scheinende Verfahrensdauer, kurz und schmerzhaft jedoch die Entscheide, ohne jegliche Begründung, und der „auctor" spielt hier so gar keine Rolle, versteht sich. (Thomas Gergen, Luxemburg). Zwischen der hochbedeutenden Druck- und Verlagsstadt Köln, ihrem Verbreitungsgebiet bis ins nahe Frankreich, und den grünen Tisch- Höhen der Wiener Reichshofs- und Rats-Gerichtsbarkeit liegen Welten. Thomas Gergens fundamentale Forschungen zum Privilegienwesen werden durch eine case study ad calendas weiter bereichert.

Mit allerlei wild wuchernden, fälschlich tradierten Legenden um die überaus werthaltigen Rechte an der berühmten neapolitanischen Melodie „funiculě, funiculí", um Richard Strauß, ums musikalische Urheberrecht und Musikzitat, wird resolut aufgeräumt (Stephan Meder, Hannover). Wie weit reicht der postmortale Schutz an beliebten Kompositionen von Lortzing? Es ist das leidige Vertragsrecht, das engere Grenzen zieht. (Bernd-Rüdiger Kern, Leipzig).

Vermag sich Rudolf von Ihering - im Verlauf seines Jahrzehnte währenden edlen Gelehrtenlebens einen immateriellen Eigentumsschutz dogmatisch-römischrechtlich vorzustellen? (Christoph-Eric Mecke, Hannover). Man tut sich schwer im 19. Jahrhundert in Elfenbeintürmen - die zahlreichen deutschen Ländergesetze zum nicht gerade unbeachtet oder willkürlich aus dem Boden sprießenden Urheberrecht von Preußen über Sachsen bis Württemberg und Baden bleiben außer Betracht.

Das Recht am eigenen Bild, hier: der tote Bismarck in Friedrichsruh – hoher Handelswert, nach heutigem Gelde 400 000 € für frühe Paparazzi und sensationsfreudige Presse - gibt dem Strafrecht schwerwiegende Rätsel auf (Fedor Seifert, Berlin). Das Reichsgericht kurz vorm BGB von 1900 hatte es dieses Mal unerhört eilig. Die Familie derer von Bismarck wartete mit Ungeduld im Herzogtum

Lauenburg, dort wo noch der Sachsenspiegel galt. Die inkriminierten Fotografien: auf Jahrzehnte tabu.

Nicht Jhering liefert ein Rüstzeug fürs modernere Urheber- und Bildrecht, vielmehr der ebenso große, wortgewaltige Universal-Gelehrte Josef Kohler. Sein Blick gilt der Rechtsvergleichung. Doch der wissenschaftliche Austausch übers „Autorrecht" zwischen zwei „Alphatieren" tendiert jedenfalls auf diesem Forschungsfeld gegen Null.

Und doch vermehren sich im Urheberrecht im 19. Jahrhundert unweigerlich auch internationale Bezüge. Bilaterale Verträge überbrücken europäische Grenzen. Nur Großmächte und weite Landstriche, im Westen die USA, im Osten Russland machen sich im wachsenden Netzwerk rar. Die Nachdruckfreiheit ist in Nordamerika verfassungsrechtlich abgesichert. Für Jahrhunderte toben „battles of copyright"; Kämpfe um wohlfeile Freiheit, für und wider den Nachdruck, um Werkschutz und um längere oder kürzere Fristen für Klassiker, Kunst und Musik belasten Gerichte und Gutachter. Die Grenzen – durch Technik und Ökonomie gefordert – verschieben die Koordinaten, sie öffnen sich. Das immaterielle Eigentum, dem Grundeigentum nicht gleichgesetzt, soll rechtlich nicht ewig überdauern, nur kulturelle Dauer im Wechsel zwischen Grundrecht, Gemeinsinn und sozialer Gemeinfreiheit finden.

Es führen weite Wege vom lang postulierten, theoretisch sorgsam errichteten Verlags-Eigentum bis zur kargen Alimentation der Schriftsteller, der Künstler, der Musiker. Die Theorie von der Werkherrschaft verträgt sich schlecht mit der wachsenden, der bleibenden „Propertisation" (Hannes Siegrist), der Herrschaft über Werke und Leistungen.

Alexander Nebrigs (Düsseldorf) tiefschürfende und geistreiche Analysen und Thesen – intertextual, medial, topologisch, rhetorisch – zeigen: „Kulturelle Räume" werden seit dem19. Jahrhundert mit der Ausformung und Bedeutung des Übersetzungsrechts zu Verwertungsräumen. Eine internationale Rezeptionskultur mit sich ausweitenden multiliteralen, interlingualen „Lizenzräumen" deutet mit interdisziplinärer, epochenübergreifender Perspektive, mit ihren gleichermaßen weitreichenden Auswirkungen hin auf den Wandel künstlerisch-literarischer Produktion, Reaktion auf veränderte Verhältnisse zwischen originaler und übersetzter, zwischen alter und neuer Literatur. Es scheint, dass fächer-übergreifende Forschung viele der Desiderata, die Inkonsistenzen von Dogmatik, Normativität und Schutzbereichen zwischen größtmöglicher Werkherrschaft, Gemeinfreiheit und Gemeinwohl historisch und rechtspolitisch gut auszuleuchten versteht.

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Aßmann, Jaron

Zwischen Weltanschauung und Wissenschaft. Staats- und verwaltungsrechtliche Promotionen an der Berliner Fakultät von 1933 bis 1945 bei Reinhard Höhn, Carl Schmitt und Hans Peters

Hamburg: Verlag Dr. Kovac, 2020, 727 S.

Mit dem politisch und rassisch radikal vollzogenen Personalrevirement an den Universitäten nach 1933 war auch ein schneller Wechsel der Generationen verbunden. „Zerstörung und Selbstzerstörung" (Michael Stolleis) charakterisieren den sich länger schon abzeichnenden Umbruch dieser wenigen Monate. Zwar gab es einige Übergangsphasen, auch bei Neubesetzungen und, wie diese Arbeit zeigt, bei möglicher Weiterführung und dem Abschluss von Dissertationen. An der Berliner Universität bestimmten der neu berufene *Carl Schmitt* (1888-1985) und zudem nicht lange nach ihm *Reinhard Höhn* (1904-2000) das den Ansprüchen des Staates entsprechende Staatsrecht, jedenfalls bis in die Jahre 1936/7, als sich dann beide durch ihre machtpolitischen Abstürze dem Völkerrecht zuwandten. Ihrem Einfluss in Lehre, Ausbildung und Forschung stand dieser äußere gewichtige Machtverlust nicht im Wege. Dem Zusammenhang zwischen der sog. Rechtserneuerung zu dem in den Dissertationen sichtbaren Staats- und Verwaltungsrecht gilt diese nach Methode, Gehalt und Ertrag so exemplarisch wie ungewöhnlich aussagekräftige Arbeit.

Aus der Summe von 333 Promotionen bot sich die Eingrenzung auf 81 aus dem Öffentlichen Recht - unter Ausschluss von Völkerrecht und Rechtsgeschichte - also Staats- und Verwaltungsrecht an. Die archivalische Überlieferung grenzte das Sample weiter ein, bleibt aber immer noch immens (Aufstellung, auch der abgebrochenen Promotionen, im Anhang). Einige der Arbeiten setzten auf rechtsgeschichtliche Rückgriffe aufs 19. Jahrhundert oder auf vielfach polemische Abgrenzungen zu früheren Positionen der Weimarer „Systemzeit". Dennoch bleibt die Rechtsgeschichte in den Themenstellungen ein Randgebiet oder oftmals ganz außen vor.[1] Oder sie ermöglicht den Verfassern, in weniger verfängliche Gefilde jenseits aktueller Kontroversen auszuweichen.

Welche Themenzuschnitte und weltanschaulichen Einflüsse unter den Perspektiven „Führertum und Volksgemeinschaft", „Rasse" und andern zentralen, ideologisch aufgeladenen Begriffsinstrumentarien sind im Einzelnen zu registrieren, welche Freiräume

[1] Dazu Felix Kraushaar, Aufbruch zu neuen Ufern – Die privatrechtlichen und rechtshistorischen Dissertationen der Berliner Universität im ersten Drittel des 20. Jahrhunderts im Kontext der Rechts- und Fakultätsgeschichte. Berlin 2014.

und welche Kontroversen waren möglich? Das Gesamtbild ist vielfarbiger als angesichts der Machtergreifung vorauszusetzen. Es zeigt interessante Schattierungen; von der Gleichförmigkeit bis hin zu abwegigen Konstruktionen und gern akzeptierten bis gewünschten Abgrenzungen zu vorangehender Forschung ergeben sich bemerkenswerte Abstufungen.

Aßmanns Systematik orientiert sich an sichtbaren Schwerpunkten. Neben einer ausführlichen Darstellung zu den wichtigsten Betreuern, ihrer wissenschaftlichen Herkunft und Entwicklung, konzentriert sich die Einzeldarstellung auf Lebensläufe, Inhalte und Bewertungen generell und en détail. Auf diese Weise werden unterschiedliche Biografien, wissenschaftliche, parteipolitische, militärische und berufliche Karrieren nach zwei Umbrüchen mehr als nur in skizzenhaften, sondern in den gemeinsamen oder auch differierenden Einflüssen, Entwicklungen und Wirkungen punktuell und im Kontext deutlich. Erst die peniblen Einzeldarstellungen lassen überzeugende Generalisierungen zu, ermöglichen andererseits fragmentarische Einblicke in die engeren Beziehungen zwischen Betreuern und Doktoranden in den auch zum Teil fragilen, zum Teil erfolglosen Bestrebungen zu unter den gegebenen Voraussetzungen über die üblichen Examina hinausgehenden Qualifizierungen.

Eine derart intensiv recherchierte und stringent und systematisch durchgehaltene Studie, die auf der Basis eines fachlich sinnvoll eingeschränkten,[2] gleichwohl immer noch enormen Materialbestandes sich in einer Mischung aus biografischen, inhaltlichen und quantitativen Momenten rechts- und universitätshistorisch dem übergreifenden Thema „Zwischen Weltanschauung und Wissenschaft“ widmet, darf für sich in Anspruch nehmen, eine geradezu solitäre Spitzen-Leistung auch zur speziellen Dissertationsforschung vorgelegt zu haben. (Betreuer: Rainer Schröder, nach dessen Tod Volker Neumann). Sie ist auch in dem mikrohistorischen Bereich für sozialgeschichtliche Einschätzungen der Doktoranden nach Herkunft, Vor- und Ausbildung, partei- und organisationspolitischer Eingliederung und nach sonstigen Kriterien aufschlussreich und lässt Rückschlüsse auf den Kontext zu juristischen Examensergebnissen und, wenn auch nur bedingt, zu besonderen Anforderungen der Promotionsprüfungen oder zu Einwirkungen anderer persönlicher oder politisch zu gewichtender Momente zu.

Die Gruppe der in den ersten Jahren nach der „Machtergreifung“ noch mitwirkenden Betreuer verringerte sich eilends um die missliebigen und ausgegrenzten herausragenden Protagonisten wie *Heinrich Triepel, Martin Wolff, Rudolf Smend und Erich Kaufmann. Hans Peters* (1986-1966) sollte in der Fakultät als einziger nicht mit dem Regime paktierender, sondern dann mit dem Widerstand in Verbindung stehender Gelehrter eine rühmliche Ausnahme bleiben.

Konkrete Aufschlüsse werden nicht nur geboten in Hinsicht auf die bezeichnende Verteilung von Erst- und Zweitkorrekturen, auf die sich einspielenden „Gespanne“ der Betreuer und Bewerter, auf die Generationskohorte der Doktoranden, sondern in diesem universitären Mikrokosmos auch zum meist gut verfestigten Organisationsgrad der Aspiranten in Partei und Staat, zu ihren Lebensläufen bis und nach 1945.

Nun zu Führerprinzip, Volksgemeinschaft und Rassismus.

Nach der Darstellung der damaligen spezifischen Abläufe von Promotionsverfahren liegt ein Schwerpunkt auf den Themen, Methoden und - für rechtswissenschaftliche Arbeiten ein Novum – eingehenden Sprachanalyse mit ihren Spannweiten von weitgehender Anpassung an bestimmte erwartete oder verlangte Anforderungen bis hin zu krassen völkisch, rassisch und antisemitisch formulierten Abschnitten und den neuen Begrifflichkeiten und verbal aufgeladenen stilistischen Formulierungskünsten. Man orientiert sich an unausweichlichen, akzeptierten Grundlinien wie dem „Führerprinzip“, greift neben „Mein Kampf“ auf Teile des Parteiprogramms und Zitate aus Werken oder Reden politischer Größen zurück, sei es als Rechtsquellen, zur Legitimation oder Unterfütterung von Thesen oder auch nur als dekorative Versatzstücke, wenn nicht in der gelenkten Vorstellung, neben den Prüfern auch der jetzt für die notwendige Publikation bedeutsamen parteiamtlichen Prüfungskommission zu entsprechen.

Die zielbewusste Ausrichtung oder gelenkte Anpassung an die ideologischen Grundsätze wie Volksgemeinschaft und Rasse oder – vor allem bei Höhn – an seine Grundlehre von der staatsrechtlichen Volksgemeinschaft anstelle des Staates als juristischer Person werden deutlich. Auf dem Hintergrunde von Höhns freilich von einer Reihe anderer Staatsrechtslehrer kritisierten Lehre waren seine Doktoranden mehr oder weniger davon affiziert.

Carl Schmitts weitgehend akzeptiertes oder jedenfalls sehr einflussreiches, elastisches „konkretes Ordnungs- und Gestaltungsdenken“ prägte seine Forderung nach einem neuen rechtswissenschaftlichen Denktypus. Das schon fast geflügelte Wort fand in vielen Arbeiten starken konkreten methodischen, zum Teil auch schwächeren Widerhall. Das erste zeigte sich etwa in Arbeiten mit Eigentums-Bezug, hier auch mit Rückgriffen auf die ähnlich konzipierten Ansichten *Franz Wieackers* („Gestaltungen völkischer Ordnungslagen“) und *Werner Webers*[3]. Carl Schmitts maßgeblicher Einfluss auf die antisemitisch begründete Ablehnung von Zitaten jüdischer Autoren oder Übernahme ihrer Dogmatik ist ohnehin vielfach erforscht.[4]

Wie sich solche Vorverständnisse und ideologischen Grundlagen der NS-Rechtserneuerung und die Zwänge des „literarischen Judensterns“ in Theorie, Ausführung und Sprache auswirkten, ist Gegenstand der minutiösen Einzeluntersuchungen.[5] Das biblio-

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[2] Siehe dazu die Vorstudie von Jaron Aßmann: Die Dissertationen der juristischen Fakultät der Friedrich-Wilhelms-Universität zu Berlin zwischen 1933 und 1945, in: Schröder, Rainer/Klopsch, Angela/Kleibert, Kristin (Hrsg.): Die Berliner Juristische Fakultät und ihre Wissenschaftsgeschichte von1810 bis 2010, Berlin 2010, S. 105-141.

[3] Thorsten Keiser, Eigentumsrecht im Nationalsozialismus und Fascismo. Tübingen 2005, S. 120ff. zu Carl Schmitt.

[4] Siehe dazu nur Volker Neumann, Carl Schmitt als Jurist, Tübingen 2015.

[5] Vgl. Otmar Jung, Der literarische Judenstern – Die Indizierung der „jüdischen“ Rechtsliteratur im nationalsozialistischen Deutschland. In: VjhfZ = Vierteljahrshefte für Zeitgeschichte 2006, S. 25-59.

grafische Rüstzeug und entsprechende Anweisungen, Zusammenstellungen und Anleitungen wurden vom Ansatz her möglichst flächendeckend geliefert, aber nicht durchgängig umgesetzt.

Im Staatsrecht wird die je unterschiedliche, aber nach Themenwahl, Ausführung und bereitwilligen sprachlichen Übernahmen der erwünschten Argumentationsmuster und Nomenklaturen deutliche Distanz zur bisherigen Staatsauffassung nur allzu deutlich. Das zeigt sich etwa an meist „machtnahen" Arbeiten zur Eigentumslehre, zur Enteignung und den Schranken im NS-Staat, zum Reichsarbeitsdienst oder Reichsbürgergesetz, zur Volkstumspolitik, zur Wehrpflicht, zur staatsrechtlichen Stellung der Frau, zur Reichsreform, zum Kommunal- und Reichsorganisationsrecht, in Arbeiten über das Verhältnis von Partei und Staat oder der Kompatibilität von Ämtern. Dass schon durch Interesse für ein gewünschtes, angeregtes oder selbst gewähltes Thema eine besondere Ideologisierung und Politisierung Eingang fand, kann nicht verwundern. Wie stark der Einfluss des Betreuers jeweils auf die Auswahl und Bestimmung des Themas war, lässt sich eher indirekt aus dem Zusammenhang entnehmen, den er mit Lehre und Forschung des Betreuers hatte.

Höhn widmete sich nicht zufällig bis zu seiner partiellen Entmachtung durch Entzug der Leitungsposition im SD (= Sicherheitsdienst in der Schutzstaffel/SS) der auslandswissenschaftlichen „Gegnerforschung", vorzugsweise in Konfrontation seiner aggressiven Konzeption gegen den Erzfeind Frankreich, gegen England und die USA. In ihnen prägte sich neben der ideologischen Ausrichtung gegen liberale und demokratische Staatsverständnisse seit 1939 dann der Zusammenhang zum Kriegsgeschehen spürbar aus. Eine seltene weltanschaulich neutrale Ausnahme bildete eine Arbeit über die verfassungsrechtliche Stellung zur britischen Krone. Dem Verf. gelang das Kunststück, der deutschen staatsrechtlichen Diskussion trickreich aus dem Weg zu gehen - vom Erstgutachter *Conrad Bornhak* mit „gut", von Carl Schmitt als „ausreichend" bewertet.

Im Fach Verwaltungsrecht dominierten Polizeirecht, ständische Ordnung, Disziplinar- und Ehrengerichtsbarkeit, Gewerbe- und sogar dem durch Gleichschaltung schnell besonders stark umgestalteten und gleichgeschalteten Presserecht sowie einzelne Themen des besonderen Verwaltungsrechts.

Auf welche Weise sich Höhns Staatsverständnis in den bei ihm vorgelegten Arbeiten manifestierte, wird sichtbar: Der Staat als nicht eigenständiger „Apparat" und nur untertäniger Diener der Volksgemeinschaft.

Es ist nicht ohne Reiz, wie sich die Doktoranden zuweilen in Arbeiten, die von Carl Schmitt und Peters betreut wurden, in weniger eleganten als mühevollen Drahtseilakten zu Höhns Gemeinschaftsdenken und seinen Folgen fürs Staatsrecht stellten. So wie den Ansichten Höhns erwiesen Doktoranden Carl Schmitts ausgefeiltem, funktional verwendbaren „konkreten Ordnungsdenken" auf zuweilen etwas unterschiedliche Weise letztlich doch ihre ergebene Reverenz. Peters gelang es, bei Themenwahl und Durchführung den möglichen Spielraum abseits der vorherrschenden Doktrinen geschickt zu nutzen und offene Konflikte zu vermeiden.

Kleinkriege im Elfenbeinturm: Eine Gesamtbetrachtung zeigt, nicht unerwartet, dass die Mehrzahl der strikt nationalsozialistisch ausgerichteten Arbeiten bei Höhn geschrieben worden sind. Die bekannten staatsrechtlichen Kontroversen mit Höhn wurden in den bei Carl Schmitt und Peters vorgelegten Arbeiten überwiegend umschifft oder allenfalls versteckt oder gestreift, ein Beispiel für fortdauernde systemimmanente Kontroversen und die politisch wenig relevante Zulässigkeit der in Elfenbeintürmen nicht seltenen Kleinkriege unter Großordinarien. Wenn Carl Schmitt sich aus verschiedenen Gründen in unterschiedlichen Phasen mal mehr, dann weniger auch die Macht oder den Luxus abweichender Meinungen leisten konnte, die freilich sich in der Regel nicht in den Arbeiten seiner Schüler unvermittelt ausprägten, steht auf einem anderen Blatt.[6] Für die fast unüberschaubare Carl-Schmitt-Forschung ist diese Perspektive auf einen Teil seiner großen - hier der weniger prominenten - Schülergruppe eine willkommene, anspruchsvolle und aussagekräftige Ergänzung.

Die sorgfältig für die Zeit vor und nach 1945 recherchierten Karrieren, durch Kriegsteilnahme, Einsatz in Verwaltungs- oder Parteipositionen geprägt, nach 1945 zunächst durch bekannte nachkriegsbedingte Hindernisse beeinträchtigt, lassen selten eine nachhaltige Behinderung durch wissenschaftlich-publizistische oder parteibezogene Belastungen erkennen, selbst wenn sie die Nachkriegszeit bald in Höhen auf Bundes-, Landes- oder Kommunalebenen, ins Auswärtige Amt, in die Politik oder in höhere Richterämter führten. Dass einem späteren deutschen Botschafter in Stockholm die hier nicht untersuchte völkerrechtliche Dissertation bei Carl Schmitt – Gustav von Schmoller, 1944 zur Großraumtheorie – und seine Tätigkeit in Ostgebieten den durch Krankheitsgründe beschönigenden Rücktritt verursachten, gehört zu den seltenen Ausnahmen. Pauschalisierend gesagt wird insgesamt in Wissenschaft und Justizwesen das durchgängige Portrait einer an eindringlicherer Aufarbeitung der Vergangenheit nicht interessierten Nachkriegsgesellschaft bestätigt. Die kollektiven Verstrickungen tauchten im Dickicht kollektiver Verdrängungseffekte unter.

Ob und wie sich gegebenenfalls Verbindungen zu den „Doktorvätern" nach 1945 erhalten haben oder auch nicht, lässt sich den Lebensläufen nicht entnehmen. Man ist insofern auf die reichhaltige Forschung zu Höhn und Carl Schmitt, zu ihren speziellen Einflüssen und Nachwirkungen angewiesen. Solche über die Fragestellungen hinausgehenden, persönlichen Verbindungen der Doktorväter zu Doktoranden, die für die Wahl von Themen und Lehrern, für die Akzeptanz und Entwicklung der Kooperation mit entscheidend sein konnten, wären womöglich nur durch Einbeziehung von internen Korrespondenzen und weiteren Archiven, wie sie vor allem in der Carl-Schmitt-Forschung genutzt worden sind, im Einzelnen instruktiv zu klären gewesen. Für die Fragestellungen hätte es jedoch wahrscheinlich letztlich allenfalls zu kleineren Retuschen oder nicht unwesentlichen, subjektivierten Einsichten

[6] Vgl. Albrecht Götz von Olenhusen, Filmkünstler und Filmproduzenten zwischen Urheberrecht und gewerblichem Rechtsschutz. Die Filmurheberrechtsreform in der Zwischenkriegszeit 1929-139. In: Gergen, Thomas (Hrsg.), Vom Reichshofrat zur Reichsfilmkammer, Berlin 2019, S. 325-402, hier zu Carl Schmitt in der Akademie für Deutsches Recht, mit weiteren Nachweisen.

in die Genese der Arbeiten und Gutachten geführt. Weitere ähnlich anspruchsvolle und ertragreiche Arbeiten für andere Bereiche, Fakultäten und Universitäten könnten vergleichbare Ergebnisse ermöglichen.

Die vielfältigen, wenngleich auch in großen Teilen erwartbaren Befunde spiegeln subtile Entwicklungen staats- und verwaltungsrechtlicher Promotionen von der Konsolidierung des Nationalsozialismus bis zu den kriegsbedingten Verfallsperioden wider. Gewisse Differenzierungen lassen es zu, kein *gänzlich* gleichgeschaltetes Spektrum, sondern facettenreiche Abstufungen zu konstatieren. Dass mit *Sidney Jacoby* 1933 noch ein Jude (bei *Friedrich Glum*), 1936 auch ein als sog. „Mischling" geltender Doktorand abschließen durfte, entspricht Entwicklungen in anderen Fächern und - ja nach stärkerer oder schwächerer NS-Durchdringung – der Lage an anderen deutschen Universitäten. Je nach Rektorat oder herausgehobener Lage konnten sich bekanntlich trotz zunehmender dynamischer Radikalisierungsschübe, markiert durch die „Nürnberger Gesetze", die Pogrome um 1938 und die innenpolitische und Kriegsentwicklung, noch teilweise Juden und sog. „Mischlinge 1. und 2. Grades" unter besonderen Umständen an den Universitäten halten und sich qualifizieren.

Seit Mitte der dreißiger Jahre waren Höhn, Schmitt und Peters ganz überwiegend die Betreuer. Höhns weltanschauliche Prägung tritt in den Arbeiten deutlicher als bei den von Carl Schmitt betreuten hervor. Sein methodisch-inhaltlicher Ansatz des konkreten Ordnungs- und Gestaltungsdenkens zieht sich jedoch durch die Mehrzahl der Arbeiten zuweilen weniger zitiert, sondern als eine Art allgemein vorausgesetzte „Blaupause" (S. 672) durch, in der Tendenz bei etwa der Hälfte der Dissertationen in einem neutraleren fachlichen Duktus.

Anpassungsleistungen, Konformitätsdruck, starke Orientierung am Betreuer sind sodann die weiteren Ecksteine der hier besprochenen Studie. Die Mischung von echten Überzeugungen, von Opportunismus und vorauseilender Selbstzensur bildeten eine Art Korsett für eine ganz überwiegend deutlich linientreue Funktionselite - nach Aßmann eine für die Wissenschaft jedenfalls „verlorene Generation". Es handelte sich jedoch individuell und generell regimegeprägt regelmäßig nicht um lediglich angepasste Mitläufer, sondern um mit dem Nationalsozialismus weitgehend übereinstimmende Aspiranten auf laufbahnfördernde akademische Qualifikationen. Sie zielten jedoch, wie die Übersicht zeigt, fast durchweg nicht auf einen Verbleib in universitären Institutionen. Neben den üblicherweise für Juristen offenen Stellungen wurden neben aussichtsreichen Leitungsfunktionen - Ortsgruppen, Standort- oder Kreisleiter -, auch exponiertere Funktionen in Verwaltung und Justiz angepeilt - bis hin zum Sicherheitsdienst der SS, der sich ohnehin als aussichtsreicher Standort und Sprungbrett für erfolgreiche Juristenkarrieren erweisen sollte.

„Schmitt und vor allem Höhn gaben…einen nationalsozialistischen Ton vor." (S. 675f.). Erst der differenzierte, subtile Blick auf die Ergebnisse von akademischen Arbeiten in der Diktatur in solchen fundamentalen, materialreichen Arbeiten vermag es, die generalisierenden theoretischen und wissenschaftsgeschichtlichen Einschätzungen eines wichtigen Teilbereichs der Universitätsgeschichte differenziert und aufs Anschaulichste zu belegen. Sie erweitern und vertiefen das durch andere Teiluntersuchungen und Einblicke in benachbarte Forschungsbereiche unter den Bedingungen der Diktatur mögliche Bild der Interdependenz von Weltanschauung und Wissenschaft. Sie lassen in den Brennspiegeln der eindringlich vorgestellten Arbeiten, vor allem aber auch der Bewertungsmodi und Stufungen jene marginaleren Unterschiede erkennen, die in der monokratisch ausgerichteten, partiell geduldeten Polykratie einer Diktatur ansatzweise aufscheinen.

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Giacomo D'Angelo, Monica De Simone, Mario Varvaro (a cura di)

Scritti per il novantesimo compleanno di Matteo Marrone

Torino: G. Giappichelli editore, 2019, xvi+391 p.

The reviewed book *Scritti per il novantesimo compleanno di Matteo Marrone* [Writings for the Ninetieth Birthday of Matteo Marrone] is a *Festschrift* dedicated to professor Matteo Marrone, a renowned Roman law scholar who spent most of his life at the university of Palermo. The main body of the book consists of nineteen papers written by notable colleagues of Matteo Marrone both from Italy and abroad, which are arranged in alphabetical order. In the beginning of the book, there are three short forewords, titled *Presentazione della collana* [Presentation of the Series] (p. xi–xii) by Aldo Schiavello, *Presentazione del volume* [Presentation of the Volume] (p. xiii) by Giuseppina Aricň Anselmo, and *Nota dei curatori* [Note of the Editors] (p. xv) by the three editors, which briefly introduce the book and the personality and impact of Matteo Marrone. At the end, there is a list of Marrone's publications (p. 365–371) and a list of sources cited (p. 373–391).

Martin Avenarius in *Gentilnamen, Grundstücke und Gedächtnis. Die Förderung der memoria als Zweck römischer Familienfideikommisse an Immobiliarvermögen* [Gentilic Names, Tracts of Land, and Memory. The Requirement of Memory as Purpose of Roman Family Bequest regarding Ownership of Immovables] (p. 1–25) analyses the development and purpose of *fideicommissum familiae relictum*. He examines its basic principle of keeping the property to the family members. Another point is keeping the family name (which usually comes together with the previous point, but continuation of the name might have been secured also by freedmen or *extra-*

neus who takes over the family name). Such *memoria* and *propagatio nominis* was mainly remarkable in connection with names of bequeathed land, which in some cases survive until nowadays (keeping in mind that such name can remain even after the land was transferred outside the family).

Mariagrazia Bianchini in *Un'interpolazione 'ideologica' in CI. 8. 11. 5* [An 'ideological' Interpolation in CI. 8. 11. 5] (p. 27–32) deals with the parallel and later prevailing position of Constantinople in comparison with Rome. She especially focuses on attestation of denomination of Constantinople and Rome as *nova* and *vetus Roma*, respectively, in legal sources (Codex Theodosianus and the Codification of Justinian incl. the opening constitutions and *Novellae*).

Luigi Capogrossi Colognesi in *Gli antichissimi sacra dei popoli latini e le origini delle relazioni giuridiche romano-latine* [The Oldest Cults of Latin People and the Origins of Roman-Latin Legal Relations] (p. 33–46) examines the oldest stage of legal development in the areas closest to the city of Rome (*Latium vetus, mons Albanus*). He states that alliances between various cities/states were connected with cult and sacred places. He follows Dieter Nörr's idea of continuity of pre-Roman inter-village relations and denies the statement that there were contracts and marriages between Romans and Latins because they had *ius commercii* and *connubii*.

Giovanna Coppola Bisazza in *Ancora una riflessione sulla successione di M. Anneo Carseolano* [Once Again a Reflection on the Succession of M. Anneus Carseolanus] (p. 47–55) examines a case of omission of M. Anneus Carseolanus from the testament of his natural father (Carseolanus was adopted by his uncle) as attested by Valerius Maximus. Thus, the case is about application of *querella inofficiosi testamenti*. She examines the position of a son who left the testator's family by the adoption vs. the appointed heirs – an *extraneus* and two other blood relatives.

Alessandro Corbino in *La vendita di arbores stantes (D. 19. 1. 40)* [The Sale of Standing Trees (D. 19. 1. 40)] (p. 57–90) analyses a sale of trees, which are part of a tract of land. Pomponius' solution is that there is no vindication (as the trees are not a separate thing yet), but *actio empti* is applicable. He compares the situation with similar cases such as the question whether a *dolium* was transferred by tradition when it was signed by the buyer in D. 18. 6. 1.2, acquisition of possession *animo* in D. 41. 2. 51, or implantation of trees in D 6. 1. 5. 3.

Felice Costabile in *'Tardoantico' ed era constantiniana: convenzione storiografica di un concetto moderno* ['Late Antiquity' and Era of Constantine: Historiographical Convention of a Modern Conception] (p. 91–106) examines the notion of late antiquity and its meaning. He deals with the problem of proper periodization as various authors understand the period of late antiquity somewhere between the 2nd a 7th century. Important milestones in the periodization is the passage to Christianity and the reforms of the emperor Constantine the Great; still, we must keep in mind that we are still speaking about "our" perception of historical development.

Norma Xóchitl Di Censo García is author of the only paper written in Spanish: *Innovación educativa utilizando el método de casos explicado a la enseñanza de las instituciones de derecho privado romano en México* [Educational Innovation Using the Method of Case Explication for Teaching Institutes of Roman Private Law in Mexico] (p. 107–111). She briefly describes the importance of Roman law for legal studies in Mexico and focuses on teaching Roman law via the method of case analyses, which has been applied since the year 1870 by Christopher Langdell. She explains that solving a specific case enables students (who have theoretical bases) to decide which norm or legal institution is applicable. This improves critical, creative, and analytical thinking of the students; such benefits emphasize the importance of Roman law studies for the students of law.

Thomas Finkenauer in *Riccobono und die Stipulation* [Riccobono and the Stipulation] (p. 113–136) analyses the works of famous Italian Roman law scholar Salvatore Riccobono regarding stipulation. He examines Riccobono's approach and also points out that his approach was slightly changing through the course of time. Also non-legal aspects had influence on his work as he was active in Italian politics (this was connected with his conservative attitude towards interpolations, which enabled him to avoid exaggeration of *Interpolationenjagd*). For all these reasons (and despite some of them), Riccobono's works are useful even nowadays.

Tomasz Giaro wrote one of two papers, which are in English (the other being written by Boudewijn Sirks): *Roman Law and Consensual Rationality* (p. 137–153). He describes the law as the art of compromise (*communis opinio, tacitus consensus omnium*), which corresponds both to traditional and modern theories of state as well as Roman legal (Digests) and non-legal (Cicero) sources. He further examines the possibilities to (mis)use highly rational (or sometimes irrational) *argumentum ad absurdum*. He gives several examples of formulations which are problematical from the logical point of view, such as unallowed legacy *post mortem heredis* vs. allowed legacy *ultimo vitae eius tempore*. He concludes that the norms are formulated generally for regular situations, and if an absurd situation might occur, Roman law (and other law systems as well) shall have (and indeed has) remedies to neutralize absurdities.

Éva Jakab in *Der letzte Wille eines Sonderlings?* [The Last Will of an Eccentric?] (p. 155–167) examines the case of Lucius Titius as preserved in Cervidius Scaevola's D. 31. 88. 17. Lucius Titius wrote his testament without assistance of a lawyer (he felt it is unnecessary to consult a lawyer in such matter). Apart from the expressed statement, the lack of lawyer's assistance is also apparent from the fact, that the testament was written in first person (whereas testaments are usually written in third person).The testament itself was invalid (due to the lack of formal requirements, as we may expect), but the testator's will was preserved by its interpretation as *fideicommissum*.

Umberto Laffi in *Acquisto della citadinanza romana da parte dello straniero: ruolo ed efficacia del census* [Acquisition of Roman Citizenship by the Stranger: role and effectiveness of the census] (p. 169–182) examines the process of acquiring Roman citizenship via census. First, he deals with the position of magistrates and adding the new citizens to a new or already existing *tribus*. Subsequently, he examines the legal position of *census*, which is not seen as the constitutive moment of granting citizenship, but as an act of de-

claratory nature that the citizenship already exists (this may, however, not apply in all cases, such as the acquisition of citizenship of Latins by migration, where subsequent census has constitutive nature).

Rosalia Marino in *Sulla mobilitŕ verticale in etŕ giulio-claudia tra intersezioni politiche e culturali* [On Vertical Mobility Between Political and Cultural Intersections in Julio-Claudian Times] (p. 183–191) deals with the social status and changes thereof in the beginning of the principate. She focuses on the fluid situation of the power in the state as attested by various non-legal sources such as Tacitus, Suetonius, or Cassius Dio.

Giovanni Nicosia in *Uno spiritu continetur* [Holds Together by One Spirit] (p. 193–198) examines the Pomponius' division of things on *corpus quod continetur uno spiritu*, *ex contingentibus* (compound from things which hold together), and *ex distantibus* (compound form things which do not hold together). He further examines the legal regime of various conjunctions (*scriptura, pictura*) and the applicability of lawsuits. Finally, he states that the usual meaning of *spiritus* in the context of the first group of things (slave, beam, stone, and statue) does not make sense and that *spiritus* here does not mean spirit/soul, but rather natural internal unity.

Salvatore Puliatti in *Aspetti della riflessione giurisprudenziale in materia criminale. Un giurista di etŕ severiana: Callistrato* [Aspects of Jurisprudential Reflection on Criminal Matters. Un Lawyer of Severan Times: Callistratus] (p. 199–217) examines several fragments from the Digests, whose author was Callistratus, who wrote i. a. about *cognitio extra ordinem* and who was dealing with criminal law (thus, we can find his numerous fragments in the books 47 and 48 of the Digests – some of them were analysed in the paper – but of course, we can find many in other books as well). The paper deals with proper punishment in various situations, such as the punishment of a prison guardian who enabled/allowed the prisoner to escape, of those who (re)moved boundaries, poisoners, fugitive slaves, etc. In all these cases all the circumstances, social status, and personality of the perpetrator were examined (and the punishment then differed from the light one up to the most severe ones).

Gianfranco Purpura in *Varia de iure maris* [Various on Maritime Law] (p. 219–239) deals with the position of the sea as *res communis omnium*. Similar position has the coast, even though private persons can build there their edifices. An island which appears in the sea (similarly as island in a river provided the shores belong to *agri limitati*) is *res nullius*, which enable its occupation. Finally he deals with applicability of *lex Aquilia* in case of a damage caused by a ship.

The other author of an English paper is Boudewijn Sirks with *Paelex, Conubium and the lex Canuleia* [Female Lover, Right to Marry, and Canuleian Law] (p. 241–253). First, he analyses the proper Greek roots ant the meaning of the word *paelex*, which might by translated as concubine or amie. Subsequently, he examines the ways of entering into the marriage (*confarreatio, usus, and coemptio*), the power of husband (*manus*) with its consequences, and the prohibition of *paelex* to touch the altar of Juno issued by Numa Pompilius. This problematics is of higher importance especially in the earlier times, i. e. before the Canuleian law enabled marriages between patricians and plebeians in the year 450 Bc. He suggests that the original meaning of *paelex* might not be "concubine", but "plebeian woman married to a patrician".

Laura Solidoro in *Strategie deflattive nell'esperienza giuridica romana: la 'decarcerizzazione'* [Deflationary Strategies in the Roman Legal Experience: 'decarceration'] (p. 255–285) mentions current tendency to reduce the number of incarcerations and then shifts to analysis of Roman approach thereto. She starts with D. 48. 19. 8.9 which states that the purpose of carcer is not to punish someone, but to hold him in a custody (which, unfortunately, could last even several years), even though unofficially it might have been used as a punishment as well. There were several means of moderation of a punishment in respective cases (and thus indirectly also preventing from being incarcerated) – *ius provocationis, in integrum restitutio*, and *indulgentia principis*. There were also several imperial constitutions which generally mitigated the punishments (this was influenced also, but not exclusively, by Christianity), especially in case of less serious crimes.

Mario Varvaro in *Alcune considerazioni sulle ricostruzione delle formule delle azioni divisorie* [Several Considerations on Reconstruction of Formulas of Lawsuits on Division of Property] (p. 287–331) focuses primarily on *actio familiae erciscundae* and *actio communi dividundo*. He starts the reconstruction of the formula with Gai Inst. 4.42, continues by the duplex nature of adiudication (which is followed by condemnation), using apart from the Digest also the reconstructions esp. by Rudorff and Lenel, which he finds non convincing.

Andreas Wacke in *Die senectus in kaiserzeitlichen Rechtsquellen* [The Notion of Old Age in the Legal Sources of Imperial Times] (p. 333–363) states that in Roman law, there was not a strict boundary for old age, unlike there are well known limitations connected with young age (*infantes, impuberes, minores*). Still, we find in legal sources several cases dealing with *senectus* – but the old age alone constitutes a ground for limitation of capacity to act legally in none of them (unless accompanied by mental illness). On the other hand, sometimes old age is a ground for milder liability/punishment (D. 29. 5. 3.7; D. 47. 21. 2).

As is apparent from the previous lines, the reviewed book is not a monograph which would deeply analyse a specific topic, but (as it is usual for such festschrifts), collection of papers on various topic. While some of them are rather short (but valuable) remarks or case studies, most of them are detailed scientific analyses of complex problems. Their unifying aspect is that they are written by colleagues (and in some cases, we might even say friends) of a distinguished scholar; to certain extent, they are also dealing with topics and approaches which are close to Matteo Marrone. Such variety of topics makes the book as whole (or at least some parts of it) interesting for all people interested in Roman law.

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Urszula Kicińska

W tym osieroconym stanie. Pozycja wdowy w społeczeństwie szlacheckim w Rzeczypospolitej (od schyłku XVII do połowy XVIII wieku)

[In this orphaned state. The position of widow in the noble society in the Polish State (from the end of the XVII to the middle of the XVIII century)]

Kraków: Scientific Publishing House of Pedagogical University, 2020, 678 p.

The author, Urszula Kicińska, specializes in research on the period of the XVII and XVIII centuries, with a special focus on women's subject matter. Her research area mainly refers to Polish lands. This work, which is very extensive in terms of volume, consists of five chapters. These are: Chapter I – the legal situation of widows in a noble society in the modern era; Chapter II – the position of the widow in the family; Chapter III – the economic activity of widows; Chapter IV – widow as a caregiver and animator of public life and Chapter V – religious practices of widows. It is apparent from the titles of the various chapters that a significant part of the paper relates to the social position of the widow, and only the first chapter is devoted entirely to legal issues. In my opinion, this is a mistaken evaluation because the legal theme accompanies each of these chapters. Indeed, it is particularly emphasized in chapter one, but in the remaining chapters the author very smoothly and freely refers to the legal regulations of the time.

The main topic around which the whole narrative of this publication is built is the widow's social and family position. Before I go into the characteristics of the various parts of that publication, taking into account the legal theme discussed there, it is necessary to characterise in a few words the time frame adopted in the work. This is already the end of the Republic. Attempts made at the end of the 18th century (which does not fall within the scope of the work in question) to reform the state together with the introduction of the Constitution on 3 May 1791 and the attempt by King Stanislaus August Poniatowski to codify the legal system failed to save the failing state, which became an easy prey for the three neighbouring states. The statehood of the law, as well as its particularism with numerous regulations based on customary law and regionalism, became an inglorious showcase of the then Polish legal system.

I would like to draw particular attention to Chapter I, which refers to the legal position of the widow, the most important aspect, bearing in mind the interests of the historian of law. Chapter I is divided into four parts.

The first part concerns the formation of the legal basis for the widow's˝position. The author began her deliberation with a brief description of the Polish legal system, presenting the most significant codifications from the 15th to the 18th centuries. As the most important piece of legislation relating to the position of the widow, the author mentions the so-called Prussian Corrective (or "Land Law of the Prussian Nobility corrected in 1598"), which was an auxiliary codification on the territory of the Polish Crown. The Corrective consisted of seven parts, but due to the paper subject, the author focused on the problem of inheritance – separately discussing the inheritance of earthly and movable goods.

The second part concerns the spouses' property agreements and their impact on the widow's financial position. In this case, the author explained the functioning of the dowry contract and the special provision in which the woman renounced the right to family property in favor of other heirs. As for the dowry, this institution seemed troublesome because of its form. In this section, on the basis of numerous examples, the dowry paid in the currency in force at the time, as well as in the form of granting lands, was discussed.

A separate point of the author's deliberations was the question of the bridewealth. In her analysis, the author cited two constitutions (of 1501 and 1588) relating to the prohibition of establishment of bridewealth in the will by the husband and the burden on him of debts, which were discussed with the reference to certain examples.

Speaking of bridewealth and dowry, it is also necessary to mention wife's possessions, which aimed at securing of bridewealth and dowry, in the form of a pledge on properties belonging to the husband.

Although dowry and bridewealth were legal institutions characteristic of Europe's legal system at the time, given Polish and Lithuanian circumstances, the author introduced a number of individual solutions based on contracts relating to the financial protection of a woman in the event of the death of her husband (e.g. a life contract). A valuable element of this part are very numerous examples based on an archive query. The reader is presented not only with the most crucial legal aspects concerning the financial (property) security of a woman, but also, through particular examples, with the rules for the functioning of these contracts.

Apart from the discussed points of this section of the chapter, I would like to pay particular attention to an interesting topic, which was the role and position of widow-mothers. Based on the archival material, the author discussed situations where a widow

deciding to get married again participated in pre-wedding agreements on her protection in case of re-widowing. At that time, the widow's position was a much more complicated one since she sometimes already had offspring from her first marriage, which in such case required a separate financial protection.

Another key point (also covered in the archival material) concerned a situation where a widowed woman represented the property interests of the heir.

The third part of Chapter I refers to the widow's position in inheritance law. The author begins her deliberations by briefly discussing the system of succession law, which was in place in the territory of the Polish Crown and Lithuania, while clearly emphasising that Polish succession law was characterized by its own legal solutions, distinguishing it from the system of succession law of Europe at the time. In the case of women's position, the author demonstrated the evolution of the legal arrangements for inheritance. As a starting point, she adopted regulations from the middle of the 13th century, when a woman could inherit only the movable goods that were part of her dowry. Subsequently, the author presented the formation of legal regulations allowing, under certain conditions, the possibility of inheriting a property by women.

With regard to this part of the Chapter, the author mentioned two forms of succession that were in force at the time – testamentary and non-testamentary. As regards testamentary succession, the constitutions issued from the 15th to the 17th centuries were highlighted, which limited the position of women in favour of the so-called necessary heirs (these were the constitutions of 1510 – *De testamentis condendis*, 1519 – *De testamentis non confirmandis*, 1676 – *On wills*, 1677 – *Reassumptio of the will law* and of 1776 – *On the Testamentary transactions*).

Another important piece of legislation discussed by the author was the Prussian Corrective, which introduced an obligation to have an annuity agreement and post-mortem records.

The next legal institution mentioned by the author was an inventory of movable property, aimed at demonstrating the division of marital property.

In the case of testamentary succession, the author, on the basis of her archival research, set forth a thesis that in almost every will the husband bequeathed certain goods from the property covered by the will and established a guardian for the wife and their offspring. Regarding the legal protection of dowry, on the basis of her research, the author makes an interesting point that the will clauses sometimes covered half of the bequeather's land assets.

On the other hand, part four of Chapter I is entitled *Widow's Financial Position – Law and Reality*. This part is not only an attempt to confront the legal regulations relating to the widow's position, but also constitutes a polemic with the lingering thesis in Polish historiography that a woman's position is a low position and dependent on the will of her husband.

For the purposes of analysis, the author argued that the position of the widow in the Polish State depended on how it was secured both legally and financially. Interestingly, although the inheritance institutions had been subject to numerous legal regulations over the centuries, in the case of widows who, after the husband's death, gained the opportunity to control all the property of the deceased husband, their situation did not change even when the sons of the marriage reached the age of majority. However, this rule was sanctioned under customary law. The limit point of the widow's independence was her death or remarrying.

Moreover, despite the legal regulations relating to dowry, bridewealth or the life contract, in this section (as in the second part, using numerous examples) the author presented customary law solutions that allowed to increase financial security in the event of becoming widowed. Such a solution was marriage contract and life contract.

In this section, the author raised an interesting issue, which was the payment of the dowry. Although this issue concerned part three of Chapter 3 relating to succession law, the author presented very interesting results of her research. The issue of the payment of the dowry, although it was the basis for the further existence of the woman after the death of her husband, was settled by customary law. The timing of the payment, its manner and form were only sanctioned under the 1588 *Constitution on the Equipment of the Sisters*. The author, as in previous points of her work, presented a number of examples illustrating the problems with the recovery of the dowry by widows. This issue perfectly corresponds to the thesis that the letter of the law is not always in line with the practices developed over the years.

Another example of the legal inability to provide financial security in the event of the husband's death was the debt of the property. As a result, widows found themselves under the care of their children, brothers or other family members, which sometimes negatively impacted their existence.

In this part of the paper, the author introduces the situation when, despite giving the legal rights, in the event of the death of the husband, women had to prove that the property was transferred to them in accordance with the letter of the law. At that time, the woman, who was deprived of her husband's protection, could expect a raid on the property she administered. To this end, appropriate records were made by family members confirming the granting of the property rights.

Based on her research, the author argued that the most important document to secure the widow's position was a life contract. On the basis of the legal regulations and individual situations of the time, the author stated that it was a provision giving only the right to own and use a particular property. However, it did not transfer the property to the widow. Another drawback of the life contract was its validity until the widow remarried. In a situation where the woman did not decide to remarry, the trade of her property was significantly hampered as her sons were in control of it. In this situation, in view of the interests of the family, the widows renounced their part (or even the whole) of the property within their life contract.

Another issue discussed by the author and relating to the situation when the then legislation was helpless was having a large number of children, especially when the family consisted of children from a previous relationship (or relationships) of a woman. There were disputes regarding the management of the assets as well as its subsequent possible acquisition. According to the author's research, a specific form of the records was developed as well as earlier drawing up of the will, in which the division of the property was made.

Due to potential conflict situations, the widow transferred her life contract assets to her children. As the author stated, it was a "common practice, but not an obvious practice". Sometimes the resignation from life contract was a consequence of the use of coercion.

The author in this part of Chapter I discussed another issue, which was the claim of property belonging to the late husband by the widow in court. An interesting technique used by the author is mentioning a number of factual events illustrating the issues presented by her.

As I indicated at the outset, although the other chapters do not directly address legal issues, the author presented a lot of information relevant to the historian of law. In the case of Chapter II entitled *Widow's Position in the Family*, I would like to highlight the issues relating to the funeral of the deceased husband. The author introduces a thread relating to the execution of a will in which records were made about the form of the funeral ceremony as well as the cultivating of the memory of the deceased. Referring to the re-education of the land law, the author also introduces mandatory forms of widow's behavior, who should dress in modest robes as well as avoid wearing jewels. The author is right that mourning should be treated not only as a mental and emotional state, but also as a legal state. Land law, for example, stipulated that mourning should last one year. The Mazovian law, on the other hand, mentioned one year and six months. In turn, if the woman did not dress modestly during the mourning period, she was threatened with punishment of losing the goods received after her husband's death. In addition, the Mazovian law prohibited widows from being sued during mourning. The author also provides an interesting information that sometimes the behavior of a woman after the death of her husband was specified in the will.

Further part of this chapter concerns the widow's takeover of childcare. The author discusses the wills as well as the appointment of guardians to help the widow in the care of children (explaining that most often these were men related to the deceased husband).

The third point of Chapter II corresponds to Chapter I, referring to the position of the widow as the dispatcher of the descendants' property. At the outset, the author signalled that this issue was not uniformly regulated in the territory of the Polish-Lithuanian Commonwealth. For example, the law of the Grand Duchy of Lithuania and Royal Prussia allowed the possibility of the widow taking care of her husband's property on her own, receiving as remuneration "every tenth penny of income of the offspring". When the widow lived in the Polish Crown area, she was forced to use the guardianship when making her economic decisions.

The author in this part of the work explains complex property relationships, such as the distribution of property to individual children from different marriages, as well as taking care of the children of the widow's sisters or brothers.

Chapter II brings closer the matrimonial policy of widows relating to marrying their children or relatives off, which sometimes impacted the family position.

Another point of the author's analysis was related to the new relationships of widows as well as the widow's relationship with the family. At this point, I would like to emphasise a significant issue which the author presented on the basis of an analysis of the will records. Although the testament is associated with the last will of the testator, it sometimes served as the last opportunity to get square with some family members.

In turn, the economic activity of widows is covered in the third chapter, in which the author analysed private documents, the issue of which was initiated by widows, or which were created with the participation of widows, such as economic instructions. On the basis of documents relating to economic transactions, legal regulations relating to individual contracts may be established. The author also emphasized that there was legal duality in the Polish State regarding the scope of the widow's freedom to conduct a business. In the provisions of the Statute of Lithuania (and the Statute of Volyn referring to it), that freedom was much broader than under the legislation in force in the Polish Crown.

The second point of Chapter III deals with the relationship between the widow, the servants and the help. The author presented the hierarchy of the service and cooperation of the widow with officials (economists) managing her assets, as well as the relationship of widows with Jews and peasants. In the case of relations with officials, the role of leaseholders, who also included women, was discussed. An interesting thread about the widow's relationship with the service was mourning after their death (and the adopted form).

When describing legal issues, particular attention should be paid to the issue of legacy – will provisions, discussed by the author. Most often they referred to the widow's nearest service (e.g. her children's childminder) and these were records made from her personal property.

The subsequent point of Chapter III concerned the organisation of work on the farm. The author gave an analysis of various forms of economic activity related to the running of farms or educational workshops owned by widows. An interesting point (very widely discussed) was the looting of farmhouses by foreign troops. The author presented the actions taken by widows to limit these practices.

Chapter IV of this work concerns the widow, as a carer and animator of public life. It consists of three parts concerning patronage and client relationships of widows, and educational care provided by widows as animators of social life. However, this issue was related to the position of the widow's husband in the public life of the state. The higher it was, the greater the ability to connect. With regard to this chapter, I would like to draw particular attention to the creation of servilistic systems of subordination and dependency, which may constitute an inducement for further research into society between the 17th and 18th centuries.

The last – fifth chapter deals with the religious practices of widows. The author touched on issues such as the piety of widows, the collator activity of widows, cooperation between widows and religious orders and clergy, the position of widow-residents in the monastery and the charity practices of widows. In assessing this part of the work from the perspective of the history of the law, I would like to draw attention to the legacy discussed by the author for the benefit of the church, religious orders, religious fraternities and hospitals with an emphasis on legal obligations such as the amount of the sum, its security and the time limit for its payment. An interesting issue that appeared in the widows' wills were the regulations concerning the preparation of their funeral (the number of masses, securing the appropriate funds for this purpose, the organization of the funeral reception and the list of guests, including the poor, who could sit at the funeral table).

To sum up the above analysis, in my opinion it is one of the most interesting works concerning the period of the 17th and 18th centuries of the Polish-Lithuanian Commonwealth, which has been published in recent years. To conclude, I would like to draw attention to a number of points. Firstly, (as I have already indicated) the issues presented are illustrated by numerous examples of the results of the query studies. Additionally, the scope of this query was very wide, which indicates a very strong commitment to the preparation of the source database of work. Each thesis put forth by the author is described by quoting particular situations, which is a valuable source of knowledge for the historian of law. The author cites, for example, the content of contracts, testamentary records or materials from court proceedings.

Secondly, the paper complements knowledge of the application of the law to a particular social group. The author has repeatedly demonstrated the dissonance between the current laws and their practical application, as well as the legal differences between the Polish Crown and the Grand Duchy of Lithuania.

Moreover, many issues relating to the widow's position were regulated, but by customary law. Distinguishing these situations, describing them and elaborating them through specific examples may constitute an incentive for a separate analysis.

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In memoriam
Hans Hermann Seiler (* 24. 12. 1929 – † 16. 6. 2019)

Ganz offenkundig fiel es den vielen Freunden und Kollegen, wie sonst oft, nicht schwer, die „richtigen Worte“ zu finden. Die Trauerbriefe zum Tode von Hans Hermann Seiler am 16. 6. 2019 enthielten auffallend übereinstimmend dieselbe Charakterisierung des Menschen und Wissenschaftlers, von dem wir Abschied nehmen mußten. Es ist immer wieder die Rede von seinem freundlichen und uneitlen Auftreten, von seiner ruhigen und ausgleichenden Art, von Unbeirrbarkeit, Standfestigkeit und Verantwortungsbewußtsein.

Es wäre reizvoll, die Texte der Trauerbriefe, auch mit den Schilderungen der Begegnungen mit Hans Hermann Seiler, hier wiederzugeben. Doch der Reihe nach.

I. Seiler ist am 24. 12. 1929 in Münster geboren. Von seiner eigenen Vergangenheit erzählte er, persönlich bescheiden, nur, wenn es sich ergab oder er befragt wurde. Er stammte aus einer weit verzweigten Familie mit Juristen und Theologen; ein Großvater war Altphilologe und pflegte sehr die Literatur, eine Tradition, die in seinem Elternhaus fortgesetzt und von ihm übernommen wurde. Er war bewandert in der klassischen Literatur und hatte seine Lieblingsdichter. Seilers Vater war Richter am Oberverwaltungsgericht Münster und im Nebenamt Kurator der Universität. Das Elternhaus war, inmitten des katholischen Münster, protestantisch geprägt. Seiler liebte es; er schilderte es als harmonisch, interessant und lebendig. Es war ein gastfreundliches Haus. Unter den Gästen fanden sich Vertreter verschiedener Fakultäten, mit denen der Vater die Gesprächskultur pflegte, so wie auch innerhalb der Familie.

Dass Seiler selbst das Gespräch immer wichtig war, spürte jeder, der ihm begegnete. Obwohl im Auftreten freundlich, aber eher distanziert – ein Kollege schrieb der Verfasserin dieser Zeilen von seiner „sachlichen Ausstrahlung“ –, besaß er das Talent, Gespräche mit der ihm eigenen noblen Höflichkeit unaufdringlich in Gang zu setzen, in oft heiterer Form, aber mit Ernst in der Sache, inspirierend für den Gesprächspartner und offen für dessen Argumente. Ein frisch herausgesagtes Wort war ihm in seiner geistigen Unabhängigkeit und Unbestechlichkeit gerade recht.

Zurück zum Lebenslauf: Seiler besuchte das humanistische Gymnasium, das traditionsreiche „Paulinum“ [1]. Er hat bis gegen Ende seines Lebens die Verbindung zu den „Paulinern“ durch alljährliche Klassentreffen und Freundschaften gehalten.

Die glückliche Kindheit endete für ihn, als er zehn Jahre alt war, mit dem 2. Weltkrieg und den schweren Bombardierungen Münsters ab 1940, die er voll Angst erlebt hat. Er wurde, wie auch Mutter, Bruder und Schwester, evakuiert und kam in die Familie eines Kunsthistorikers nach Marburg, wo er weiter zur Schule ging. Die Zeit sei lehrreich gewesen, aber auch nicht einfach durch die Trennung von seiner Familie. Gegen Kriegsende, fünfzehn Jahre alt, machte er sich auf eigene Faust auf den abenteuerlichen Weg 120 Kilometer zu Fuß und per Bahn nach Göttingen, wo Mutter und Schwester bei der Großmutter lebten. Unterwegs ist er knapp einer Inhaftierung durch Militär entgangen.

Seiler studierte zunächst in Freiburg und setzte sein Studium dann in Münster fort. In Freiburg teilte er sein Zimmer mit zwei Kommilitonen, die sich nach und nach bei ihm einmieteten. Beide hatten mit Seiler in dem angesehenen Münsteraner „Musikvereins-Chor“ gesungen, vor allem die großen Oratorien. Er sei, so schrieb er in einem seiner vielen Leben und Studium in Freiburg lebhaft schildernden Briefe nach Hause, „natürlich sehr froh“, mit den beiden Zimmergenossen „hier ein Stück Münster zu haben“, eine Bemerkung, an der sich seine enge Verbundenheit zu seiner Heimatstadt zeigt, die Zeit seines Lebens andauerte.

Musikliebend und Kenner der Musikliteratur, war ihm das Chor-Singen immer wichtig, in späteren Jahren als Ersatz für das Klavierspiel, für das er keine Zeit mehr fand. Aus Freiburg wird er seine Wanderleidenschaft mitgebracht haben, die ihn das weitere Leben begleitete. Vor dort aus hatte er sich wandernd mit Kommilitonen den Schwarzwald erschlossen, aber auch fast die gesamte nahe gelegene Schweiz mit dem Fahrrad.

II. Es war das Wintersemester 1969. Die Verfasserin dieser Zeilen saß mit 200 Kommilitonen im Großen Hörsaal der Fakultät in der „Digestenexegese“. Das ist eine Hörerzahl, die auch damals ungewöhnlich war. Ungewöhnlich war auch die rege Beteiligung bei der mündlich erst einmal zu erarbeitenden Übersetzung der Digestenstelle, die der Professor für die jeweilige Stunde ausgewählt hatte, denn an sich hatte

[1] Vgl. den Nachruf auf HANS HERMANN SEILER der „Vereinigung der Alten Pauliner e.V.“, Internet unter: In memoriam, www.alt-pauliner.de.

es ängstliche Vorbehalte wegen der Übersetzungsarbeit gegeben, von der man gehört hatte. Was die Bemühungen um Übersetzung und Exegese in einer konzentrierten Atmosphäre beflügelte, war die Persönlichkeit des Professors in seiner freundlichen und ruhigen, aber in der Sache zielstrebigen und klaren Art. Dieser Professor war der jüngst an die Universität Hamburg berufene Hans Hermann Seiler (1968).

Seiler war seinem akademischen Lehrer Max Kaser aus Münster, wo er bei ihm während seiner Referendarzeit nach dem 1. Juristischen Staatsexamen promoviert hatte, nach Hamburg gefolgt (1962), unter Umsiedlung seiner inzwischen gegründeten Familie.

Die Dissertation befasste sich mit dem Thema „Die Systematik der einzelnen Schuldverhältnisse in der neueren Privatrechtsgeschichte" (1957). Darin untersuchte Seiler die für das Schuldrecht wichtigen Einteilungskriterien der römischen Juristen. Sie waren, wie er zeigte, von Bedeutung für die weitere Privatrechtsgeschichte, jedoch nicht wesentlich für das BGB – „ein erstes Lehrstück für die Erfahrung, dass keineswegs in allen schuldrechtlichen Materien das römische Recht Spuren im BGB hinterlassen hat"[2]. Ganz anders die Erfahrung bei der negotiorum gestio, der er seine Habilitationsschrift widmete (dazu sogleich).

Nach der Promotion und dem 2. Juristischen Staatsexamen war Seiler kurze Zeit Wissenschaftlicher Referent der Deutschen Forschungsgemeinschaft und wurde dann Assistent zunächst bei Harry Westermann und wenig später bei Max Kaser, bei dem er sich habilitieren wollte.

Seiler legte die Habilitationsschrift vor: „Der Tatbestand der negotiorum gestio im römischen Recht" (erschienen 1968[3]). Sie ist bis heute von grundlegender Bedeutung. Es geht in der Arbeit um die, wie Seiler sagt, „langwierige"[4] Überprüfung der Echtheit des tradierten Textes des Corpus Iuris Civilis, die von der Forschungsrichtung der Interpolationenkritik für die römischen Rechtsquellen generell bezweifelt wurde. Die Frage war also, ob der Text klassisch ist oder (wenigstens teilweise) justinianisch.

Seiler gelangte unter Erkenntnissen der Methodik römischer Rechtsfindung zum Ergebnis der Echtheit des Quellentextes und konnte auf dieser Grundlage in einem zweiten Schritt den Tatbestand der negotiorum gestio „detailliert und glaubwürdig darstellen"[5]. Über diesen inhaltlichen Erkenntnisgewinn hinaus war die Schrift also auch methodisch bedeutsam: Sie leistete einen gewichtigen Forschungsbeitrag zur Methodik der Römer und zur Überwindung der über die Jahrzehnte einflußreichen Interpolationenkritik durch die heutige gemäßigte Quellenkritik.

Die negotiorum gestio, eine der „originalen Schöpfungen", die das römische Recht der Nachwelt hinterlassen hat[6], findet sich, so Seiler, in den Entwürfen und Gesetzgebungen des deutschen und ausländischen Zivilrechts der späteren Jahrhunderte wieder[7]. Auch für das deutsche BGB war sie Vorbild[8]. Zehn Jahre nach Erscheinen seiner Habilitationsschrift übernahm Seiler die Kommentierung der Geschäftsführung ohne Auftrag der § 677 ff BGB in einem Großkommentar (Münchener Kommentar, dazu unten V). Aus einer genauen Kenntnis des antiken Rechts gewann er unmittelbar Einsichten für das geltende Recht. Er hielt diese Kenntnis nicht nur für nützlich, sondern sogar für notwendig[9].

III. Nach seiner Habilitation (1965) erhielt Seiler einen Ruf an die Freie Universität Berlin, den er zugunsten des schon erwähnten (oben II) weiteren Rufes an die Universität Hamburg ablehnte. Er übernahm den Lehrstuhl für Römisches Recht und Bürgerliches Recht als Nachfolger von Wilhelm Felgentraeger und wurde Geschäftsführender Direktor des Seminars für Römisches Recht und Vergleichende Rechtsgeschichte (1968).

Damit hatte die Fakultät eine ihrer tragenden Persönlichkeiten gewonnen. Er blieb ihr trotz weiterer Rufe (Bielefeld, Regensburg, Köln) dreißig Jahre lang treu bis zu seiner Emeritierung nach seinem 65. Lebensjahr 1996, beteiligte sich aber auch als Emeritus weiter an Lehre und Prüfungen.

Es war und ist bis heute immer wieder bewundernd davon die Rede, wie Seiler als Dekan in den stürmischen Zeiten der 68-er Jahre (Studentenunruhen) die Fakultät durch seine besonnene und ausgleichende, gleichwohl aber „unbeirrbare und standfeste" Art[10] durch die schwere Zeit hindurchgesteuert hat. Auch in verschiedenen weiteren Ämtern der universitären Selbstverwaltung, zum Beispiel als langjähriges Mitglied des Fakultätsrates oder als langjähriger Vorsitzender des Promotionsausschusses, sowie ganz generell hat er sich stets uneigennützig mit dem ihm eigenen Verantwortungsbewußtsein für die Belange der Fakultät eingesetzt.

Auch in außeruniversitären wissenschaftlichen Institutionen, die auf Seiler als Vertrauensperson, seine Fachkenntnis und Objektivität nicht verzichten mochten, hatte er verschiedene Positionen inne. So war er Mitglied und zeitweise Präsident der Joachim-Jungius-Gesellschaft der Wissenschaften, einer Hamburger Sonderform der Akademie (gegründet im 17. Jahrhundert), Mitglied der Akademie der Wissenschaf-

[2] Dazu SEILER, H. H., *Geschichte und Gegenwart im Zivilrecht, Ausgewählte Schriften,* Hrsg. HERRMANN, E., Köln, Berlin, München, 2004, S. 345, 346 (im folgenden zitiert als: SEILER, *Geschichte und Gegenwart*).
[3] bei Böhlau, Köln, Graz (im folgenden zitiert als: SEILER, *Der Tatbestand der negotiorum gestio*).
[4] SEILER *Geschichte und Gegenwart* (vgl. Fn. 2), S. 347.
[5] Instruktiv der Forschungsbericht SEILERS ebd. (vgl. Fn. 2), S. 346 ff; ferner die Zusammenfassung der Gesamtergebnisse SEILER, *Der Tatbestand der negotiorum gestio* (vgl. Fn. 3), S. 314 ff.
[6] SEILER, *Geschichte und Gegenwart* (vgl. Fn. 2), S. 346.
[7] Ders. ebd. S. 346, 349.
[8] Ders. ebd. S. 349.
[9] Ders. ebd. S. 349.
[10] ZIMMERMANN, R., Hans Hermann Seiler zum 80. Geburtstag. In: *JuristenZeitung* 2010, S. 36.

ten Hamburg (Rechtsnachfolger der genannten Gesellschaft) und Mitglied des Vorstandes der Joachim-Jungius-Stiftung. Mehrere Jahre war Seiler (im Nebenamt) Richter am Oberlandesgericht Hamburg.

In seiner Eigenschaft als Direktor des Seminars hat Seiler deren Bibliothek systematisch und zielstrebig ausgebaut. Vorausschauend legte er Wert auf die Erweiterung durch Literatur der Privatrechtsgeschichte der Neuzeit, die damals noch kein eigenständiges Fach war. Auf diese Weise erlangte die Bibliothek Reputation auch über die Grenzen Deutschlands hinaus, so dass am Seminar immer wieder Gäste aus dem In- und Ausland empfangen wurden, die in der Bibliothek arbeiteten, darunter Gäste aus Finnland, Ungarn oder Südafrika. Die Verbindung zu Südafrika war entstanden, weil Seiler sich auf Einladung der Südafrikanischen Regierung längere Zeit in dem Land aufgehalten hatte[11]. Eine Verbindung zu Tschechien ergab sich durch Vorlesungen, die er auf Bitten der Prager Universität dort über viele Jahre, auch als Emeritus, hielt.

IV. 1. Es existieren viele Zeugnisse dafür (vgl. schon oben II), wie seine Lehre beeindruckte. Hören wir einen seiner Schüler: Er berichtet aus seiner Studentenzeit, dass er „BGB bei einem Dozenten hörte, der einen bleibenden Eindruck hinterließ. Er wirkte nicht durch Äußerlichkeiten, nicht durch didaktische Spielereien oder rhetorische Effekte. Er wirkte durch die Art und Weise, wie er seine Studenten ernst nahm und auf ihre Fragen einging, durch die Freundlichkeit, Seriosität und Integrität, die er ausstrahlte, durch seine unaufdringliche sachliche und didaktische Kompetenz und durch die große Klarheit seines Vortrags. Der Dozent hieß Hans Hermann Seiler“[12].

Ein Journalist macht bei einem Streifzug durch juristische Lehrveranstaltungen zunächst folgende Erfahrungen mit den Dozenten: Das Gedächtnis der Hörer strapazierende Schachtelsätze. Wer „mit Unsinn antwortet“, erntet Sarkasmus. Um sich auf das Konstruieren seiner Sätze zu konzentrieren, schließt der Dozent bisweilen die Augen und dehnt die Silben, was geradezu hypnotisch wirkt. Es ist „Quälerei durch staubtrockenes Gebiet“. Dennoch fangen einige Feuer. Es gibt den Zivilrechtler Hans Hermann Seiler. „Selbst Vorlesungen über abseitige Rechtsgebiete wie das gesetzliche Schuldverhältnis zwischen dem Finder und dem Empfangsberechtigten einer Sache geraten ihm zum intellektuellen Vergnügen – und siehe da: Die feine Ironie bringt ermattete Studenten zum Schmunzeln, plötzlich macht Jura Spaß“[13].

Die Verdienste Seilers in der Lehre sind vielfältig. So übernahm er immer wieder neben den Pflicht- und Wahlpflichtveranstaltungen arbeitsintensive Examenskurse oder die maßgeblich von ihm mit ins Leben gerufenen Repetitorien, die das Monopol der privaten Repetitorien auflösen und die Studierenden stärker an die Universität binden sollten, eine damals als bahnbrechend geltende Lehrveranstaltung.

Mit seiner Denkungsart, wonach Geschichte und Gegenwart zusammen gehören, machte er auch in der Lehre ernst: Er hatte eine großangelegte Lehrveranstaltung konzipiert mit zwei semesterweise wechselnden Vorlesungen Privatrechtsgeschichte I (Vermögensrecht, Rechtsgeschäftslehre, Schuldrecht, Sachenrecht) und Privatrechtsgeschichte II (Personenrecht, Erbrecht). Es ging um die Institutionengeschichte anhand von ausgewählten Quellentexten. Daran schloß sich eine Übung an. Am Ende stand eine Zusammenfassung in Form einer Thementypologie, die sichtbar machte, inwieweit sich Regelungen und Begriffe des römischen Rechts bis ins moderne Recht verfolgen lassen. Sie wurde, so berichtet Seiler, von den Studenten besonders geschätzt[14].

2. Von der ruhigen und konzentrierten Atmosphäre war die Verfasserin dieser Zeilen beeindruckt, als sie an das Seminar für Römisches Recht kam. Jeder ging in freier Gestaltung des Wo und Wie seiner Arbeit nach. Der „Chef“ lenkte nicht durch Äußerlichkeiten. Der Eindruck, den er bei seinen Mitarbeitern hervorrief, entstand allein durch die freundliche und auf natürliche Weise Respekt gebietende Ausstrahlung seiner Persönlichkeit. Alles Belehrende und Missionarische lag ihm fern. Die rechtlichen Fragen und Probleme entwickelte Seiler im wissenschaftlichen Gespräch. Vorurteilsfrei und begabt mit Scharfsinn stellte er, seinen Gesprächspartner manches Mal überraschend, die „richtigen“ Fragen, oft hinsichtlich Themen, die als solche noch gar nicht erkannt waren oder als „erledigt“ galten. Erfundene („neue“) Rechtsfiguren und Konstruktionen zur Lösung offener Rechtsprobleme waren ihm suspekt. Oft genug wies er nach, dass das vorhandene Instrumentarium, richtig angewendet, ausreicht (Grundsatz: sparsamer Umgang mit den Rechtsformen)[15].

Eine Episode: Der junge Referendar, gerade aus Freiburg angekommen, wollte in Hamburg promovieren. Er postierte sich am Fuß der Treppe zur juristischen Fakultät, die er noch nie betreten hatte, und fragte die herausströmenden Studenten, wer hier der netteste Professor sei. Einhellige Antwort: „Professor Seiler“. Der Referendar suchte den Professor auf, wurde sein Wissenschaftlicher Mitarbeiter und promovierte bei ihm mit Erfolg[16].

V. 1. Bei seinen Forschungen zum geltenden Recht hat Seiler sich stets der historischen Gründe und Lösungen ver-

[11] Vortrag SEILER 1977 an der Universität Bloemfontein/Pretoria: Roman Law in Germany today, *Geschichte und Gegenwart* (vgl. Fn. 2), S. 331 ff = *Tydskrif vir die Suid-Afrikaanse Reg, Journal of South African Law,* 1978, S. 60 ff.

[12] ZIMMERMANN, R., ebd. Fn. 10, S. 35 f.

[13] von RANDOW, G. In: *„Die Zeit“,* Hamburg, vom 28.5.1993.

[14] Details bei SEILER, *Geschichte und Gegenwart* (vgl. Fn. 2), S. 355 ff.

[15] Vgl. etwa das von SEILER aufgedeckte Beispiel der sog. unbenannten Zuwendungen unter Ehegatten, SEILER, *Geschichte und Gegenwart* (vgl. Fn. 2), S. 199 ff.

[16] Vgl. SEIBERT, U. (später Ministerialrat im BJM), Erfüllung durch finale Leistungsbewirkung, Diss. Hamburg 1982; die Episode ist nachzulesen bei SCHMIDT, K., „Doktormütter“ und „Doktorväter“ – Wahl ohne Qual? In: *Juristische Schulung*, 2018, S. 33.

gewissert, mit einer Konsequenz, die in dieser Form selten ist. Das bezeugt unter anderem seine beständige Arbeit an seinen Kommentierungen zu Materien des Schuld- und Sachenrechts wie zu: Schenkung, Werkvertrag, Reisevertrag, Verwahrung[17], zu Auftrag und Geschäftsführung ohne Auftrag[18], Eigentum (§ 903 BGB) und Notstand (§ 904 BGB)[19]; dazu gehört seine Einleitung zum Sachenrecht und seine monographische Darstellung der Allgemeinen Lehren des Sachenrechts[20].

Seilers Kommentierungen unterscheiden sich grundlegend vom herkömmlichen Stil. Sie erschöpfen sich nicht im Zusammentragen von Literatur und Judikatur, gelegentlich versehen mit nur sparsam begründeten „Meinungen", sondern sie leisten immer Forschungsarbeit im strengen Sinne und bieten auf diese Weise ein bedeutendes Arbeitsinstrument. Ein Kollege und Freund schrieb der Verfasserin dieser Zeilen in seinem Kondolenzbrief, er schaue bis heute als erstes in die alte Seilersche Kommentierung.

Seiler hat durch seine Methode des Rückblicks in die Rechtsgeschichte Einsichten für das geltende Recht gewonnen, wo die nicht historisch arbeitende Jurisprudenz sich vergeblich abmüht. Er hat auf diese Art Streitfragen als überflüssig entlarvt oder zumindest relativiert. Oder er stellte nüchtern fest, dass „einfach die Schwierigkeit der Sachprobleme die Schwankungen der Problemlösungen im Laufe der Rechtsgeschichte erklären"[21], so dass es, mit anderen Worten, auch heute keine endgültige Lösung geben kann.

Seine rein rechtsgeschichtlich angelegten Schriften schließen gewöhnlich mit dem Bezug zum modernen Recht, um festzustellen, was aus der Materie geworden ist. Beispiele bieten Untersuchungen zur Teilunwirksamkeit von Rechtsgeschäften im römischen Recht, zur römischen Ehe und der augusteischen Gesetzgebung, zum römischen deliktischen Schadensersatzrecht oder zum Miteigentum nach Ulpian, um nur einige zu nennen[22].

Seilers Schriften zu übergreifenden Themen, wie etwa seine Studien zum Verhältnis von Rechtsgeschichte und Rechtsdogmatik, zur Bewahrung von Kodifikationen in der Gegenwart oder zum praktischen Nutzen der Rechtsgeschichte[23] zeigen in eindrucksvoller Weise, wie er die komplexe Thematik durch seine souveräne Stoffbeherrschung in klarer und dichter Gedankenabfolge zu entfalten vermochte.

Die Lektüre der Seilerschen Schriften ist immer ein Vergnügen. Das gilt selbst für seine Kommentierungen, eine bei dieser Literaturgattung eher ungewöhnliche Wirkung. Das liegt an der stofflichen Durchdringung, der Klarheit von Inhalt und Sprache, seiner Urteilskraft und dem seltenen Talent, streng sachbezogen und unprätentiös, aber dennoch in zugleich sprachlich fast literarischer Form darzustellen.

2. Seiler war einer der Initiatoren und Herausgeber der Übersetzung des Corpus Iuris Civilis ins Deutsche und hat seit ihrem Beginn (1985) fast dreißig Jahre lang zusammen mit drei weiteren Romanisten daran gearbeitet. Nach Erscheinen des gegenwärtig letzten Bandes V im Jahre 2012[24], an dem er noch vollständig beteiligt war, zog er sich zurück, hat aber aus dem Hintergrund weiter an der Übersetzung mitgewirkt.

Es verwundert nicht, dass ihm die Übersetzung des „wichtigsten Buches des Abendlandes nach der Bibel" (Knütel) am Herzen lag. Sie gilt als „Jahrhundertwerk". Seiler hat daran „mit hoher Sachkenntnis und behutsam abwägendem Urteil" mitgearbeitet[25]. Man habe, so schrieb der Übersetzer-Kollege Okko Behrends der Verfasserin dieser Zeilen zum Tode Seilers, „einen Freund verloren, der uns ein ganzes Forscherleben begleitet hat", einen „von starkem Verantwortungsgefühl geprägten Charakter", der die Mitübersetzer „ebenso kritisch-treffend wie wohlwollend" beurteilt habe.

Der von Seiler verfaßte Bericht „Streiflichter aus dem Alltag des Übersetzens"[26] ist äußerst amüsant (Motto der Übersetzer: fortiter in re, fortiter in modo), läßt aber keinen Zweifel an der enormen Mühe der Übersetzungsarbeit. In kurzen Perioden kamen die vier Übersetzer für jeweils mehrere Tage mit einem täglich hohen Arbeitspensum zusammen, um die schriftlich vorbereitete, schon von allen studierte Übersetzung des jeweiligen Referenten der vier zu beraten und die endgültige Übersetzung festzulegen. Typisch für die systematische und sorgfältige Arbeitsweise Seilers ist, dass er im Laufe der Übersetzungsarbeiten ein umfangreiches Glossar mit immer wiederkehrenden Begriffen erstellte, das als Arbeitsinstrument diente.

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[17] ERMAN, *Bürgerliches Gesetzbuch*, Handkommentar, Band I, ab 1975 fortlaufende Auflagen bis 2008 unter Abgabe der Kommentierung von Schenkung, Bürgschaft, Verwahrung an HERRMANN, E. ab 2004 und unter eigener Weiterführung der Kommentierung von Werk- und Reisevertrag.

[18] *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 4, Schuldrecht Besonderer Teil II, ab 1. Aufl. 1980 fortlaufende Auflagen bis 2012.

[19] *Staudingers Kommentar zum Bürgerlichen Gesetzbuch,* Drittes Buch, Sachenrecht, ab 1989 fortlaufende Auflagen bis 2012.

[20] Einleitung zum Sachenrecht, *Staudinger* ebd. ab 1986 fortlaufende Auflagen bis 2012; Allgemeine Lehren des Sachenrechts, *Staudinger-Eckpfeiler des Zivilrechts* ab 2005, S. 877 ff; 2008, S. 955 ff; 2012/13, S. 1119 ff; weitere Schriften zum geltenden Recht vgl. auch in SEILER, *Geschichte und Gegenwart* (vgl. Fn. 2).

[21] SEILER, *Geschichte und Gegenwart* (vgl. Fn. 2), S. 356.

[22] Vgl. SEILER, *Geschichte und Gegenwart* (vgl. Fn. 2).

[23] Vgl. SEILER ebd. S. 299 ff, 315 ff, 345 ff; zu dem SEILER wichtigen Thema: Rechtsgeschichte und Rechtsdogmatik vgl. den ihm zum 70. Geburtstag gewidmeten Band: *Rechtsgeschichte und Privatrechtsdogmatik*, Hrsg. ZIMMERMANN, R., in Verbindung mit KNÜTEL, R., und MEINCKE, J. P., Heidelberg, 1999.

[24] *Corpus Iuris Civilis, Text und Übersetzung*, Band V, Digesten 28 – 34, gemeinschaftlich übersetzt von ROLF KNÜTEL, BERTHOLD KUPISCH, THOMAS RÜFNER, HANS HERMANN SEILER, Heidelberg, 2012.

[25] Vgl. die Todesanzeige der Übersetzer, Frankfurter Allgemeine Zeitung vom 29.6.2019, S. 12.

[26] In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Romanistische Abteilung. vol. 108., 1991, S. 715 ff = *Geschichte und Gegenwart* (vgl. Fn. 2), S. 339 ff.

Seiler hatte Sinn für Formen, nahm sie aber immer mit nobler Gelassenheit. Aber es war natürlich ein Anlaß der Freude für ihn, dass er dem damaligen Bundesjustizminister den I. Band der Übersetzung mit den Institutionen[27] im Rahmen eines Festaktes überreichen konnte, zu dem die Übersetzer im Festsaal der Universität Bonn eingeladen hatten (11. 5. 1990), ebenso wie fünf Jahre später die Übergabe des II. Bandes der Übersetzung mit den Digesten (Buch 1 – 10) an den damaligen Bundespräsidenten bei dessen Empfang in Schloß Bellevue (Berlin, 1995)[28].

VI. Seiler war ein Freund kluger Aphorismen. Den Satz seines Lieblingsdichters Theodor Fontane, dass es unanfechtbare Wahrheiten überhaupt nicht gebe, hätte er, zur Skepsis neigend, sicher sympathisch gefunden, aber auch entschieden eingeschränkt. Denn ein paar Wahrheiten gibt es denn doch. Dazu gehörte für Seiler die Erkenntnis der Nicht-Wandelbarkeit rechtswissenschaftlicher Gegenstände. Er stellt fest, dass es zwar „eine abwegige Vorstellung" sei, „im römischen Recht für jede Rechtsfrage eine auch heute noch einleuchtende Antwort finden zu wollen"[29]. Die Äußerungen der römischen Juristen seien aber „mindestens eine reich bestückte Fundgrube für überzeugende Pro- und Contra-Argumente und für gerechte Lösungen…, die überzeitliche Bedeutung haben…"[30].

Sorge bereiteten ihm die „Verfallserscheinungen"[31] des geltenden Rechts durch Eingriffe des modernen Gesetzgebers in ein „bedeutendes Erzeugnis unserer Rechtskultur"[32], das BGB. Er kritisiert in deutlichen Worten mangelnden Sachverstand und schlechte Gesetzgebungstechnik[33]. Dazu bietet er „deprimierende" Beispiele[34]. Wie kann man solche „Fehltritte"[35] vermeiden?

Hier findet sich eine Art Vermächtnis. Die Verantwortung liegt nach Seilers Überzeugung (auch) bei der Rechtswissenschaft. Es gehöre „zu ihren Aufgaben mit den ihr gegebenen Mitteln, Wort und Schrift, die geschilderten Verfallserscheinungen nachhaltig zu benennen und Abhilfe zu fordern"[36].

„Er war kein Alter, freilich auch kein Neuer, er hatte das, was über alles Zeitliche geht…" Diesen Satz Fontanes, mit dem er seinen „Stechlin" charakterisiert, können wir auf Seiler übertragen; er paßt auf ihn als Persönlichkeit insgesamt.

Hans Hermann Seiler gehörte zu den Menschen, die man gern um Rat fragt. Das lag an seiner inneren Unabhängigkeit und Vorurteilslosigkeit, seinem Augenmaß und seinem ruhigen und sicheren Urteil. Darauf müssen wir nun verzichten.

Wir sind voll Dankbarkeit, dass wir an seinem menschlichen und wissenschaftlichen Reichtum teilhaben durften.

Ein Kollege schrieb der Verfasserin dieser Zeilen: „Ein Großer ist von uns gegangen".

Elke Herrmann*

[27] *Corpus Iuris Civilis, Text und Übersetzung*, Band I, Institutionen, gemeinschaftlich übersetzt von OKKO BEHRENDS, ROLF KNÜTEL, BERTHOLD KUPISCH, HANS HERMANN SEILER, Heidelberg, 1990; die Angaben in der 4. Auflage 2013 (Taschenbuchausgabe) sind fehlerhaft, da HANS HERMANN SEILER und OKKO BEHRENDS als Übersetzer aus der Titelei herausgenommen wurden und an ihrer Stelle SEBASTIAN LOHSSE und THOMAS RÜFNER erscheinen. Diese waren aber an der Übersetzung der Institutionen nicht beteiligt, woran auch der gelegentliche Austausch von Begriffen nichts ändert. Falsch daher auch die Angabe, dass (neben KNÜTEL und KUPISCH) SEILER und BEHRENDS die Übersetzung „bis zur 3. Auflage besorgt" hätten.

[28] *Corpus Iuris Civilis, Text und Übersetzung*, Band II, Digesten Buch 1 – 10, gemeinschaftlich übersetzt von OKKO BEHRENDS, ROLF KNÜTEL, BERTHOLD KUPISCH, HANS HERMANN SEILER, Heidelberg, 1995; die Übersetzung fand Beachtung auch außerhalb der Fachwelt mit begleitenden Artikeln u.a. in der Frankfurter Allgemeinen Zeitung (FAZ), vgl. z.B. FUHRMANN, M., FAZ vom 4.9.1990 („Pionierleistung"); STOLLEIS, M., FAZ vom 23.1.1996; DILCHER, G., HÄBERLE, P., HUBER, U., STOLLEIS, M., FAZ vom 13.11.1996; STOLLEIS, M., FAZ vom 14.7.2000; DILCHER, G., Die juristischen Bücher des Jahres. Eine Leseempfehlung. In: *Neue Juristische Wochenschrift,* 1996, S. 3256 ff („lesenswerteste juristische Veröffentlichung der letzten Zeit"; Leseempfehlung auch für Nichtjuristen).

[29] SEILER, *Geschichte und Gegenwart* (vgl. Fn. 2), S. 356.

[30] Zum Ganzen SEILER ebd. S. 356, 357.

[31] Ders. ebd. S. 328.

[32] Ders. ebd. S. 327.

[33] Ders. ebd. S. 319.

[34] Ders. ebd. S. 320 ff.

[35] Ders. ebd. S. 328.

[36] Ders. ebd.

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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.

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- 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.