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TABLE OF CONTENTS

BOOK REVIEWS

REPORTS FROM HISTORY OF LAW

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From Brest-Litovsk via St. Germain to Sèvres - A Legal Perspective on the Peace Treaties and the Disintegration of Three Multi-ethnic Empires at the End of the First World War*

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Abstract

The paper aims at shedding light on the initial situation of the Russian, Habsburg and Ottoman Empire at the end of the First World War and discusses the development of the Peace Treaties of Brest-Litovsk, St. Germain and Sèvres. It analyses and compares the provisions of all three peace treaties in question and tries to put them in context. As the German Reich and the Treaty of Versailles already have been subject of numerous academic studies, the paper deliberateley focuses on three before mentioned Peace Treaties, which all played a key role in the decline of multi-ethnic empires.

Keywords: *First World War; Treaty of Brest-Litovsk; Treaty of St.Germain-en-Laye; Treaty of Sèvres; Paris Peace Treaties; Russian Empire; Habsburg Monarchy; German Reich; Ottoman Empire.*

1. Introduction

In the summer of 1914, perhaps the most brutal war of all time began, which was later to become known in the history books as the First World War.[1] As the historian Patrick O.Cohrs puts it aptly, it was essentially a war between empires and imperial states, into which smaller states and imperial subject populations were drawn on both sides.[2] Austria-Hungary had triggered the First World War on 28 July 1914 with its declaration of war on Serbia on the occasion of the assassination of the Austrian Archduke and heir to the throne Franz Ferdinand by a Serbian nationalist.[3] Only a few days earlier, on 24 July 1914, the Russian Crown Council officially decided to support Serbia, and the following day a telegram was received in Belgrade with a guarantee of Russia's protection of Serbia. Russia wanted to expand at the expense of the Habsburg Monarchy and become the only dominant power in the Balkans. In addition, Constantinople seemed to be beckoning.[4] It is worth mentioning that Austria- Hungary handed over the declaration of war, even though Russia had once more made it clear that it would not remain on the sidelines.[5] The Austro-Hungarian declaration of war against Serbia was answered by Russia with the order for a partial mobilisation, which led to the German Reich's declaration of war against Russia on 1 August 1914.[6] Only five days later Austria-Hungary on its part also declared war on Russia.

From the Russian point of view, this all happened still under the rule of Tsar Nicholas II of the House of Romanov-Holstein-Gottorp. Nicholas II, who was of primarily German and Danish descent[7], pretty much continued the foreign policy of his father, who had concluded the Franco-Russian[8] Alliance in

* This paper is based on a presentation given at the ATINER Annual Conference for History in May 2022 and is an extended version of my paper, that was circulated among conference participants. Therefore, this paper partly is identical with the paper published in the ATINER's Conference Paper Proceedings Series HIS2022-0236.

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1 In English, French and Italian literature, the phrase „Great War" (*Grande guerre, Grande guerra*) became established, while after the war, the German Imperial Archives opted for the term „World War". (See: STRACHAN, H., Towards a comparative history of World War I. In*: Militärgeschichtliche Zeitschrift,* Vol. 67, Nr. 2, 2008, 339–434.

2 COHRS, P., *The New Atlantic Order*. Cambridge, 2022, p. 171.

3 RAUCHENSTEINER, M., *The First World War and the end of the Habsburg Monarchie*. Wien, 2014, p. 129-130.

4 Ibid, p. 136.

5 Ibid, p. 131.

6 Ibid.

7 Nicholas II was related to several monarchs in Europe, included Kings Frederick VIII of Denmark and George I of Greece, as well as the United Kingdom's Queen Alexandra (consort of King Edward VII). Nicholas II, his wife Alexandra, and German emperor Wilhelm II were all first cousins of King George V of the United Kingdom.

8 The French-Russian Alliance was the result of an initially secret defensive treaty between Russia and France that came into force on January 4, 1894. Since Russia suddenly found itself without an international partner as a result of the non-renewal of the reinsurance treaty with the German Empire and since German-Russian relations were cooling down more and more, it approached isolated France in search of new allies. (See: PACKARD, L., Russia and the Dual Alliance. In: *The American Historical Review*. Vol.25, 1919/1920, p. 391–410.)

January 1894. In 1907 Nicholas II signed the Anglo-Russian convention[9], which should finally led to the formation of the Triple Entente[10].

Already in 1915 Russia lost its important western territories of Congress Poland, Courland, and Lithuania as a result of the Great Retreat that followed the Austro-German breakthrough at Gorlice-Tarnów.[11] In 1917, after three years of war with little success, the public support for Nicholas II had collapsed and he was forced to abdicate the throne as a result of the February Revolution. Already in spring 1917 Russian troops, inspired by the February revolution, partly had began to disintegrate.[12] The October Revolution (between 6 and 8 November 1917, or 24 and 26 October according to the Russian Calendar) then brought the Bolsheviks to power. Economically, Russia was no longer existent. The Bolsheviks needed time and all possible ressources to stabilize their own rule and to counter the protests forming throughout the country against their seizure of power. On 8 November, the day after the successful Bolshevik coup, the new Russian government released its "Decree on Peace," wherein it abolished secret diplomacy, proposed an immediate general peace without annexations and indemnities, and demanded that each nation be granted the right to self-determination.[13] On 28 November Lenin and Trotsky issued an official peace offer, to which the Central Powers gave their consent on 29 November.[14] Thus, on their initiative, an armistice was negotiated in November and December 1917. The Russian peace proposal was based on national self-determination and therefore posed a risk for the multinational Habsburg Monarchy.[15] However, the Monarchy was under domestic pressure as its population was sick of the war. The increasingly strong Social Democrats openly sympathized with Lenin's proposal to end the war, which was one of the reasons why the foreign minister Count Czernin promptly agreed on entering into peace negotiations.[16] On 15 December 1917, an armistice between Soviet Russia and the Central Powers was concluded. By then Ukraine, the Finns and the Kazakhs had declared independence from (Soviet) Russia and the Crimean People's Republic, which was the first secular Muslim state to declare sovereignty,[17] had been established. Only a few days later on 22 December, peace negotiations began in Brest-Litovsk.

The Russian Empire was not the only one to suffer severe losts in the First World War: During the First World War, Austria-Hungary not only suffered bitter defeats at the side of the German and Ottoman Empires, but was also weakened by the unresolved nationality conflicts. At the end of October 1918, the Austro-Hungarian army was in such a bad shape that the army command felt obliged to seek an armistice.[18] Thus, the Habsburg Monarchy signed the Armistice Treaty on November 3, 1918 in the Villa Guisti near Padua, Italy.

When the Armistice Treaty was concluded, the Austro-Hungarian Monarchy had already fallen apart. Inspired by Wilson's Fourteen Points, the Czechoslovak Republic was proclaimed on 28 October 1918, and the State of Slovenes, Croats and Serbs was founded the following day. On 31 October 1918, Hungary denounced the Real Union, which meant that the Austro-Hungarian Monarchy had disintegrated. In view of the disintegration of the Habsburg Monarchy, the German-speaking members of the Austrian Imperial Council had formed a Provisional National Assembly on 21 October 1918 and decided to found the Republic of German-Austria, which was proclaimed on 30 October 1918.[19] The name German-Austria (*Deutschösterreich*) was intended on the one hand to signal a certain distance from the Habsburg Monarchy, and on the other hand to demonstrate a commitment to the German nation. The (legal) opinion[20] that German-Austria was a newly founded state and therefore could not be considered the legal successor of the Habsburg Monarchy was predominant in the Austria of the years that followed the First World War. The "discontinuity thesis" met with acceptance only in Great Britain,[21] but was rejected by the other Allied and Associated Powers - first and foremost by France, which regarded Austria alongside with Hungary, as the clear legal successor to the Habsburg Monarchy.[22] Unlike in the

[9] The Anglo-Russian Convention of 1907 ended the longstanding rivalry in Central Asia and enabled the two countries to outflank the Germans, who were threatening to connect Berlin to Baghdad with a new railroad that could potentially align the Ottoman Empire with Imperial Germany. (See also: EDAWARDS, E., The Far Eastern Agreements of 1907. In: *Journal of Modern History,* Vol. 26, Nr. 4, 1954, 340–355.)

[10] The Triple Entente was built upon the Franco-Russian Alliance of 1894, the Entente Cordiale of 1904 between Paris and London, and the Anglo-Russian Entente of 1907. At the start of World War I in 1914, all three Triple Entente members entered it as Allied Powers against the Central Powers: Germany and Austria-Hungary. (See: GILDEA, R., *Barricades and Borders: Europe 1800–1914.*ł New York, 2003, chapt. 15.)

[11] CHERNEV, B., *Twilight of Empire: The Brest-Litovsk Conference and the Remaking of East-Central Europe*, 1917–1918. Toronto, 2017, p. 12.

[12] RAUCHENSTEINER, *The First World War,* chapt. 22.

[13] Ibid. 15; STEGLICH, W., *Die Friedenspolitik der Mittelmächte, 1917/18*. Wiesbaden, 1964.

[14] BIHL, W., Österreich-Ungarn und die Friedensschlüsse von Brest-Litovsk. In: Kommission für die Geschichte der österreich-ungarioschen Monarchie 1848-1918) an der ÖAW (ed.*), Studien zur Geschichte der österreichisch-ungarischen Monarchie,* Vol. VIII, Wien, 1970, p. 32.

[15] CHERNEV, *Twilight of Empire*, p. 17.

[16] Russian democracy asks the proletariats of all countries to fight for its peace offer," reported the Arbeiter Zeitung, official organ of the Social Democratic Workers' Party of Austria (Sozialdemokratische Arbeiterpartei Österreichs, SDAPÖ) on 11 November. "The workers of Austria will fulfill their duty [to do so]."

[17] MAGOCI, P., *Ukraine: An Illustrated History*. Seattle, 2007, p. 187.

[18] RAFFEINER, A., Der Staatsvertrag von St. Germain- „Der Rest ist Österreich". In: RAFFEINER, A. (ed.) *100 Jahre Staatsvertrag von St. Germain*. Wien, 2020, p. 156.

[19] OLECHOWSKI, Th., *Introduction to Austrian and European Legal History*. Vienna, 2021, p. 92; BOYER, J., The Foundation oft he Republic (1918). In: FISCHER, H. (ed.) *The Republic of Austria 1918-2018*. Wien, 2018, p. 16.

[20] See also the legal opinion by Hans Kelsen from Nov. 29, 1918, printed in: JESTAEDT, M. (ed) *Hans Kelsen Werke,* vol. 5. Tübingen, 2011, p. 61-64.

[21] HEADLAM-MORLEY, J., *A memoir of the Peace Conference 1919.* London, 1972, p. 126-130.

[22] RAUCHENSTEINER, M., St. Germain – Das Ende einer Illusion Tirol. In: RAFFREINER, A. (ed) *100 Jahre Staatsvertrag von St. Germain*. Wien, 2020, p. 170.

armistice negotiations with the Ottoman Empire, Italy set the tone in the armistice negotiations with Austria: In contrast to the other Entente Powers, which regarded Germany as the main adversary and dismissed the Habsburg Monarchy as a „trivial enemy,“[23] Italy referred to Austria as its „main enemy in the war“ and asserted territorial claims against Austria.[24]

The situation of the Ottoman Empire was different, when the Treaty of Sèvres was signed in August 1920. As one of the in total twenty-one treaties concluded in the suburbs of Paris in 1919/1920, the Treaty of Sèvres was intended to end the First World War for Turkey. That Turkey would enter the First World War alongside Austria-Hungary and the German Reich had by no means been clear from the beginning: Only when the negotiations about a possible neutrality of Turkey finally failed because of the Turkish counter-demands (abolition of the capitulations[25], the delivery of the alraedy paid warships ordered in Great Britain), the Ottoman Empire entered the First World War at the side of the German Reich and Austria-Hungary on 24 October 1914.[26] In the fourth year of the war, the British troops had advanced into large parts of Mesopotamia and Palestine, capturing Baghdad and Jerusalem in 1917. The Ottoman Empire, whose army had already shrunk to one-fifth of its original strength, finally had no choice but to sign an armistice agreement[27] in Moudros Bay (Lemnos) on 30 October 1918. Peace negotiations were held bilateral between the Ottoman Empire and Great Britain; the other Allies[28] were not involved.[29] With the Moudros Armistice Agreement, the Ottoman Empire was effectively reduced to Asia Minor, especially since the Hejaz[30], Yemen, Syria and Mesopotamia - as well as the countries of Tripolitania, Cyrene (Libya) and Egypt, which at that time only formally still belonged to the Ottoman Empire - were finally lost. Other than in the armistice negotiations with Austria-Hungary, there was no reference to the Fourteen Points proclaimed by President Wilson in the case of Turkey. The Allies were therefore free of any obligation.[31]

During the First World War, in November 1916, the Austrian Emperor Franz Joseph died after having ruled the Austrian-Hungarian Monarchy for over 68 years. He was succeeded by his grand-nephew Emperor Charles I. Having died in 1916, he did not have to witness the execution of his Russian colleague Nicholas II in July 1918. Emperor Franz Joseph and Nicholas II had met in person in 1897 when Franz Joseh paid a state visit. Both seemed to have been fond of each other as the meeting produced a „gentlemen's agreement“ to keep the status quo in the Balkans.[32] However, this changed on 7 October 1908 when the Austrian Emperor proclaimed the annexation of Bosnia and Herzegovina, which were to become 'normal' provinces of the Austro-Hungarian Monarchy in the future.[33] The annexation of Bosnia and Herzegovina led to a deterioration of relations between Austria and Russia, and particularly between Austria and Serbia, which regarded the constitutional changes in the Balkans as a threat and above all as an obstacle to its own expansion.[34]

The Ottoman Sultan Mehmet V. Reşad outlived his Austrian ally Franz Joseph by a little more than two years. After his death in July 1918 he was succeeded by his brother Mehmet VI Vahidettin. Like Charles I, Mehmet VI was handed over a multiethnic state that was literally swamped by the rising wave of nationalism. Both monarchs focused exclusively on ensuring the continuity of their empires and dynasties and therefore tried to cooperate with the Allies as far as possible.[35] However, in the case of Austria, the times of the Monarchy had come to an end: Shortly after the Armistice was signed, Emperor Charles I in a half-hearted declaration of 11 November 1918, renounced „his share in the affairs of state“, thus reconfirming the republican form of government of the new state.[36] He therefore no longer was involved in the signing of the peace treaty with the Allies - whereas the Turkish Sultan was not formally deposed until after the signing of the Treaty of Sèvres.

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[23] PELINKA, A., Intention und Konsequenzen der Zerschlagung Österreich-Ungarns. In: KUMREICH, G. (ed) *Versailles 1919. Ziele- Wirkung – Wahrnehmung* (= Schriften der Bibliothek für Zeitgeschichte Vol.14) Essen, 2001, p. 203.

[24] DOTTER, M., Der Vertrag von St. Germain und Tirol. In: RAFFREINER, A. (ed), *100 Jahre Staatsvertrag von St. Germain.* Wien, 2020, p. 77.

[25] The so-called capitulations resulted from a special form of treaty concluded between the Ottoman Empire and most of the Christian states of Europe since the early modern period. They created a system of exterritorial privileges in favor of many European states in the Ottoman Empire. The United States was also granted such extraterritorial rights in Article IV of the 1830 American-Turkish Treaty. (see also: GORDON, L., Turkish-American Treaty Relations. In: *The American Political Science Review*, Vol. 22, Nr. 3, 1918, p. 714.; BANKEN, R., *Die Verträge von Sèvres 1920 und Lausannes 1923*. Berlin/Münster, 2014, p. 118-120.

[26] BROWN, Ph., From Sèvres to Lausanne. In: *The American Journal of International Law*, Vol. 18, no.1 (Jan.1924), p. 113-116 (114); KREISER, K., *Der Osmanische Staat 1300-1922*, 2. ed., München, 2008, p. 51.

[27] Printed in: HELMREICH, P., *From Paris to Sèvres*. Ohio, 1974, APPENDIX, A. p. 341; see also: TEMPERLEY, H., *A History of the Peace Conference of Paris*. Vol. 1, London, 1920, p. 495-497.

[28] In the Treaty of Sèvres the British Empire, France, Italy and Japan are referred to as the Principal Allied Powers. Together with Armenia, Belgium, Greece, Hejaz, Poland, Portugal, Romania, the State of Slovenes Croats and Serbs and Czechoslovakia, they formed the Allied Powers.

[29] ZÜRCHER E., The Ottoman Empire and the Armistice of Moudros. In: CECIL/LIDDLE (eds.), *At the Eleventh Hour: Reflections, Hopes and Anxieties at the Closing of the Great War 1918*. Barnsley, South Yorkshire, 1998, p. 266-275.

[30] Hejaz was originally an Ottoman province and included the two holy sites of Islam, Mecca and Medina.

[31] SCHMITT, B., The Peace Treaties of 1919-1920. In: *Proceedings of the American Philosophical Society*, Vol. 104, no.1, 1960, p. 101.

[32] WARTH, R., *Nicholas II, The Life and Reign of Russia's Last Monarch.* Lexington, 1997, p. 49.

[33] RAUCHENSTEINER, *The First World War*, p. 19.

[34] Ibid., p. 20.

[35] GÜNAY, C., *Geschichte der Türkei. Von den Anfängen der Moderne bis heute*. Wien/Köln Weimar, 2012, p. 118; RAFFREINER, A., Der Staatsvertrag von St. Germain. In: RAFFREINER, A. *(ed.) 100 Jahre Staatsvertrag,* p. 157.

[36] However, Emperor Charles' declaration did not constitute a formal renunciation of the throne, which is why the so-called Habsburg Act concerning the expulsion of the Habsburgs and the takeover of the assets of the House of Habsburg-Lorraine were passed in April 1919.

2. Intentions and interests behind the negotiations for a peace treaty

2.1 The interests of the Central Powers in Brest-Litovsk

At this point, it should be pointed out that a comparison of all three treaties and the interests behind them can only be made to a very limited extent due to the different parties signing the Treaty of Brest-Litovsk and the other Paris Peace Treaties. (The Peace Treaty of Brest-Litovsk was more or less dictated by the Central Powers, whereas it was the Allies who dictated the terms of the Paris Peace Treaties.)

The main comun interest of the Habsburg Empire and German Reich in the peace negotiation with Russia was to permanently detach Congress Poland, Courland, and Lithuania from Russia. Moreover, the Central Powers in the very beginning agreed on the fact that they did not want to support Ukraine's independence efforts, but already by the end of december the Austrian-Hungarian foreign minister Count Czernin began to appriciate the idea of a new, independent Ukrainian state.[37] Whereas the German Reich intended to extend its spheres of interest to Livonia (today's Estonia and most of today's Latvia) and to this end, considered a personal union with Livonia/Estonia, the Habsburg monarchy's main interest consisted in Poland and Ukraine. Concerning the Polish question, the Habsburg Empire and the German Reich for a long time could not agree on a commun policy: The Habsburg Empire promoted the so-called Austro-Polish Solution, which would have forseen Congress Poland join Galicia and become an equal partner in a reformed trialist Habsburg Monarchy, to which the German Reich opposed.[38] Wilhelm II insisted that Germany had the right to secure its borders in Poland (presumably against Austrian demands), as it alone had liberated that country.[39] For what concerned Ottoman war aims, in December an Extraordinary Ministerial Council in Constantinople had discussed Ottoman policy at Brest-Litovsk. `Items on the agenda included Russian evacuation of Ottoman territory in Eastern Anatolia and regulation of sailing in the Black Sea. The Grand Vizier told the Austro-Hungarian ambassador, Margrave Pallavicini, that their main concern must be to reach an agreement with Russia as soon as possible and assured him that the Ottomans would make no difficulties. The final terms authorized by the council were Russian evacuation of occupied Ottoman provinces and abolition of the much-hated capitulations system, which the Great Powers had used to interfere in the empire's domestic affairs and effectively undermine its sovereignty. If the Russians brought up the question of the regulation of the Black Sea straits, which had played such a prominent role in international diplomacy in the decades leading up to the First World War, the Ottoman delegates could consult with their allies, but otherwise they would not broach the subject.'[40]

2.2 The interests concerning German-Austria at the Paris Peace Conference

As it became already apparent during the armistice negotiations, the Great Powers attached little importance to Austria, especially since the greater part of the newly formed successor states of the former Habsburg Empire had changed sides and become Allies.[41] The main question discussed by the Allies with regard to Austria was therefore to what extent Austria-Hungary could be called upon to pay reparations. The British appeared sympathetic to Austria, so did the Americans, neither of whom had - apart from reparations payments - any economic or other interests with regard to Austria.[42] In reality, even France's interest in Austria was limited: It directed all its energies toward defeating its German archrival and, in this respect, also had an interest in Austria only insofar as it served to weaken Germany. This was expressed in particular with regard to Austria's desire to join its German neighbor: The so-called *„Anschluss"* was by no means a product of the First World War, but it acquired new relevance as a result of the disintegration of the monarchy, especially since German-Austria was not considered economically viable on its own.[43] In the Treaty of St. Germain, France finally enforced the prohibition of the annexation. In this context also the name of the new state had to be changed from German-Austria to Austria. For France the support of Czechoslovakia was of high importance, given the fact that Czechoslovakia on the one hand provided a good buffer with regard to the approaching Bolshevism and on the other hand also weakened Germany with its territorial claims. For this reason, France also supported all the territorial demands that Czechoslovakia made with regard to Austria.[44] Among the Principal Allied Powers, only Italy had its own genuine interest in Austria, namely territorial claims and in the absence of conflicting interests on the part of the other Allied Powers also successfully enforced them.

2.3 The interests in the Ottoman Empire at the Paris Peace Confernce

While the interests of the Great Powers in Austria were limited, the interests of the Allied Powers in the Ottoman Empire were too diverse to handle.[45] Because of the conflicting interests of the Allies the road to the Treaty of Sèvres was a long one. In contrast to the peace treaties with Russia and Austria, where the peace treaties was concluded within a couple of months af-

[37] ORTNER, Ch., Österreich-Ungarn und der Frieden von Brest-Litowsk. In: KÖHLER/MERTENS/PELINKA (eds.) *Ultimo*. Wien, 2022, p. 189.
[38] CHERNEV, *Twilight of Empire.* p. 32.
[39] Ibid. 34; KOCK, H., *Die Friedensverhandlungen von Brest-Litowsk im Spiegel der Wiener Presse*. Hamburg, 1937, p. 28.
[40] Ibid.
[41] MacMILLAN, M., *Paris 1919: six months that changed the world*. New York, 2002 / German Version: *Die Friedensmacher: wie der Versailler Vertrag die Welt veränderte*¸. Berlin, 2015, p. 330.
[42] Ibid.
[43] OLECHOWSKI, Th., Das „Anschlussverbot" im Vertrag von St. Germain. In: *Zeitgeschichte,* Vol. 46, Nr. 3, 2019, p. 64.
[44] MacMILLAN M., Die Friedensmacher, p. 312.
[45] MONTGOMERY, A., The Making of the Treaty of Sèvres of 10 August 1920. In: *The Historical Journal,* Vol. 15, Nr. 4, 1972, p. 775-787.

ter the signing of the respective armistice treaties, it took almost two years for the Turkish Peace Treaty to be signed.

From the conclusion of the Armistice of Moudros onwards, British and French interests in relation to the Ottoman Empire openly clashed. As far as the interests of Great Britain were concerned, it should be recalled that at that time Great Britain had a Colonial Empire on the Indian subcontinent that included not only the territory of the present-day Republic of India, but also the territories of other present-day states such as Pakistan and Bangladesh - and thus several million Muslims. In addition to the demand for free, secure and permanent access to the Indian subcontinent, which Great Britain hoped to achieve by creating an independent Armenia - also as a buffer to Russia[46] - Great Britain was trying not to endanger the stability within its Empire. Therefore, Muslim interests had to be taken into account. In the conflict between the Sharif of Mecca and the Sultan, the „Indian Muslims" had sided with the latter which did not exactly simplify Britain's position, especially since it had entered into an alliance with the anti-Ottoman Sharif of Mecca.[47] Moreover, since the First World War, the Great Powers had become increasingly aware of the importance of oil, which prompted Great Britain to demand the establishment of British rule on the Euphrates and Tigris rivers and to expand its sphere of influence in Baghdad and Basra.[48] For this reason a contiguous chain of territory from the Mediterranean to the Indus was to be placed under British control. Since the opening of a British consulate in Palestine in 1838, Great Britain acted as the protecting power of the Jews (and Protestants) in the Holy Land, positioning itself there as a counterweight to France, which traditionally saw itself as the protecting power of the Chatolic Christians in the Middle East. With Lloyd George's accession to power in December 1916, exclusive British control over Palestine became one of Britain's most important political goals, since Palestine was to provide a (secure) land link between British Egypt and a future British Mesopotamia.[49] In order to be able to realize the project of a safe land connection between British Egypt and Mesopotamia, the Sykes-Picot-Agreement[50], had to be eliminated in first place. Moreover France had to be stopped in Palestine, which was to be done with the help of the Jews living in Palestine and the Balfour Declaration.[51] Finally, it should not be forgotten that British Prime Minister David Lloyd George had great personal sympathies for Greek Prime Minister Eleftherios.[52] This also coincided with the public opinion of the British people: Since the Armenian genocide[53] during the First World War, an extreme anti-Turkish (and pro-Armenian) sentiment spread among the British public, which should by no means be underestimated.[54]

Unlike Britain, France had long enjoyed good economic relations with the Ottoman Empire. For example, about 60 % of the *Dette publique ottoman*, the pre-war Ottoman public debt, was in the hands of French private creditors.[55] Thus, already for economic reasons France advocated the preservation of the Ottoman Empire. Since Catholic France had established itself over the centuries as the protective power of Christianity in the Middle East, it claimed territories with relatively significant Christian minorities, such as Syria or Lebanon, for itself.[56] However, for France weakening its German archrival was top priority, so it had to back down behind Britain's demands on the Ottoman question and thus ultimately concentrated its forces on preventing British control of the straits.

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[46] RENTON, J., Changing languages of empire and the orient: Britain and the invention oft he middle east 1917-1918. In: *The Historical Journal*, Vol. 50, Nr. 3, 2007, p. 647.

[47] ROTH, E., *Der Untergang des Osmanischen Reiches*. Darmstadt, 2021, p. 391.

[48] HABIBOLLAH, H., *Great Powers, Oil and the Kurds in Mosul: (Southern Kurdistan/Northern Iraq), 1910-1925.* Lanham, 2003, p. 60.

[49] MACFIE, A., *The Straits question 1908-36*. Thessaloniki,1993, p. 93.

[50] The secret agreement concluded between Great Britain and France on May 16, 1916, was named after the British and French diplomats, Mark Sykes and François Georges-Picot. It defined the colonial spheres of influence of the two states in the Middle East in the event of the defeat of the Ottoman Empire. Later, Russia and Italy also joined this agreement. Britain was granted dominion over an area roughly equivalent in total to present-day Jordan, Iraq, and an enclave around the ports of Haifa and Akka. France wwas to assume dominion over southeastern Turkey, northern Iraq, Syria, and Lebanon. The „rump Palestine" with Jerusalem and Jaffa was to be placed under international administration. Each country was free to determine the state borders within its zone of influence. Later, the Sykes-Picot Agreement was expanded to include Italy and Russia. Russia was to receive the city of Constantinople and the western shore of the straits, as well as northern Armenia and parts of Kurdistan; Italy was to receive some Aegean islands (Dodecanese) and a sphere of influence around Smyrna (Izmir) in southwestern Anatolia. The entire Sykes-Picot Agreement can be found in: GRENVILLE, J., *The major international treaties of the twentieth century*. London, 1974, p. 30.

[51] In the Balfour Declaration of November 2, 1917, Britain told the Zionist movement to support the establishment of a „national home" for the Jewish people in Palestine. For the Balfour Declaration see also: STEIN, L., *The Balfour Declaration*. New York, 1983; LUSTICK, I., The Balfour Declaration a Century Later: Accidentally Relevant. In: *Middle East Policy,* Vol. 24, Nr. 4, 2017, p. 166-176; MATHEW, W., The Balfour Declaration and the Palestine Mandate, 1917-1923: British Imperialist Imperatives. In: *British Journal of Middle Eastern Studies*, Vol. 40, Nr. 3, 2013, p. 231-250.

[52] MONTGOMERY, A., Lloyd George and the Greek Question 1918-1922: In: TAYLOR, J.P. (ed), *Lloyd George: Twelves Esseys*. London, 1971, p. 283; MACATHUR-SEAL, D., Intelligence and Lloyd Georges's secret diplomacy in the Near East 1920-1922. In: *The Historical Journal,* Vol. 56, Nr. 3, 2013, p. 710.

[53] To this day, the Turkish government denies that it was a genocide. For the genocide see also: TUSAN, M., „Crimes against Humanity": Human Rights, the British Empire and the Origins of the Response to the Armenian Genocide. In*: The American Historical Review*, Vol. 119, Nr. 1, 2014, p. 47-77; TANER, A., *A shameful act: the Armenian genocide and the question of Turkish responsability.* New York, 2006; BLOXHAM, D., *The great game of genocide: imperialism, nationalism, and the destruction of the Ottoman Armenians*. New York, 2009.

[54] ENTON, J., Changing languages. In: *The Historical Journal,* Vol. 50, Nr. 3, 2007, p. 649; BENES, A., British national dailies and the Outbreak of War. In: *The internationl history review*, Vol. 36, Nr. 1, 2014.

[55] BANKEN, R., *Die Verträge von Sèvres 1920 und Lausannes 1923*, p. 317.

[56] SHORROCK, W., *French Imperialism in the Middle East: The Failure of Policy in Syria and Lebanon, 1900-1914*.Wisconsin, 1976, p. 13; SCHÖLCH, A., Europa und Palästiona 1838-1917. In: MEJCHER, H. (ed) *Die Palästina-Frage 1917–1948*¸. Paderborn, 1993, p. 17.

Italy's main goal with regard to the Ottoman Empire was to strengthen its position in the Mediterranean region and to expand its colonial empire in East and North Africa, where it had *de facto* colonies in Italian Somaliland and in Italian Libya. However, it soon had to realize that some of its territorial claims, such as those regarding Antalya were not compatible with Wilson's Fourteen points and thus were hardly enforceable due to the lack of an Italian population.[57]

The only two issues on which France and Britain seemed to agree in principle were Thrace and Armenia. Both France and Britain supported Greece's demands regarding Thrace, and both powers were in favor of an independent Armenia.[58]

The U.S. itself seemed to have no real interest in the Middle East and thus essentially limited its demands regarding the Ottoman Empire to the creation of an international zone for the straits under the supervision of the League of Nations.[59]

Although Greece was not one of the Great Powers, its claims to Turkish territory carried special weight at the Paris Peace Conference, as there was a large Greek minority in the Ottoman Empire. When Greece entered the war in 1917 on the side of the Allied Powers, it had not received any territorial promises.[60] Nevertheless, the Greek Prime Minister Eleftherios Venizelos vigorously pursued his *Megali Idea* at the Paris Peace Conference.[61]

A similar - though not comparable - role to that played by Greece with regard to the Ottoman Empire was played by Czechoslovakia with regard to Austria: Although the Czech foreign minister Edvard Beneš was nowhere near as charismatic as the Greek Venizelos, he was similarly proactive with regard to Czechoslovak interests at the Paris Peace Conference. Similar to Greece's occupation of Smyrna, the Czechoslovakian Republic with the approval oft he Allies occupied Hungarian territory shortly after the Communist revolution in Hungary.[62] Thus, Czechoslovakia became one of those states that profited considerably from the consequences of the First World War.

3. Peace Conferences

3.1 Brest-Litovsk

Unlike the other peace treaties that ended the First World War the armistice negotiations and peace negotiations with Russia took place in the same place and merged seamlessly. As Borislav Chernev describes it aptly, two vastly different worlds met at the negotiating table in Brest-Litovsk from December 1917 to March 1918, as revolutionary tactics crossed swords with Imperial cabinet diplomacy for the first time.[63] At the peace negotiations in Brest-Litovsk a Russian delegation first led by Adolf Jeffe[64] - from 10 January 1918 on also a Ukrainian delegation - and delegations of the four Central Powers faced each other. The gathering of the delegates can be best described as a complete „*Clash of Civilizations*": On the one side representatives of the European high aristocracy, on the other side Russian revolutionaries, some of them simple workers, who had been rewarded for their struggle in the revolution with important posts. The atmosphere - and generally - the relationship between the Central Powers and Russia in Brest-Litovsk was completely different from the one between victorious and losing states at the Peace Conference in Paris: Especially in the first round of negotiations Russia was formally treated as an equal partner. Dinners were organized to which delegates from both parties were invited. The German State Secretary of Foreign Affairs, Richard von Kühlmann noted about the first joint dinner:

"The Muscovites had, of course only out of propaganda, made a woman a peace delegate who came directly from Siberia. She had shot a governor-general unpopular with the Left and, according to the tsarist practice, she had not been executed but sentenced to life imprisonment. This lady, who looked like an elderly housekeeper, Madame Bizenko, apparently a rather mindless fanatic, told Prince Leopold of Bavaria at dinner how she had carried out the assassination. She showed, holding a menu card in her left hand, how she had handed the Governor General - 'he was an evil man' she added explanatorily - a voluminous memorandum and at the same time shot him in the stomach with a revolver held in her right hand. Prince Leopold, in his usual friendly politeness, listened with rapt attention, as if the murderess's report interested him most vividly."[65]

When the peace negotiations began on 22 December 1917, the leader of the Austrian-Hungarian delegation Count Czernin presented the draft of a peace treaty, which contained the essential conditions for a peace treaty with Austria-Hungary in a few points.[66] However, Czernin's draft was not coordinated with the German Reich. Thus, the Central Powers entered the peace negotiations without a common program. The peace negotiations were held in public, as Russia had demanded. Meetings of all delegates were relatively rare, the main work was done in the commission meetings, where only the representatives of the German Empire, Austria-Hungary and Russia (partly also Ukraine) were present. The most important of the three commissions was the political-territorial commission.[67] Already in the first ses-

[57] BOSWORTH, R., Italy and the end oft he Ottoman Empire. In: KENT, M.(ed), *The Great Powers and the End of the Ottoman Empire*. London, 1996, p. 55.
[58] HOVANNISIAN, R., The Allies and Armenia 1915-18. In: *Journal of Contemporary History,* Vol. 3, Nr. 1, p. 145-168.
[59] RICHTER, H., Der griechisch-türkische Krieg 1919-1922. Wiesbaden, 2016, p. 21-23
[60] WOODHOUSE, C.M., *Modern Greece, A short History.* Kent, 1977, p. 197.
[61] HIRSCHON, R. *Crossing the Aegean. An Appraisal of the 1923 Compulsory Population Exchange between Greece and Turkey.* New York, 2004; FINEFROCK, M., Atatürk, Lloyd George and the Megali Idea In: *The Journal of Modern History,* Vol. 52, Nr.1, D1047-D1066 (D1051).
[62] MacMILLAN, *Die Friedensmacher*, p. 322.
[63] MacMILLAN, *Die Friedensmacher*, p. 40.
[64] From 7 January 1918 the Russian delegatio was led by Leon Trotsky.
[65] Cited after: KÜHLMANN, R., *Erinnerungen.* Heidelberg, 1948, p. 531 (translated by me) (The same passage has also been published on wikipedia: https://de.wikipedia.org/wiki/Friedensvertrag_von_BrestLitowsk)
[66] KOCK, *Friedensverhandlungen von Brest-Litowsk*, p. 28-29.
[67] BIHL, *Österreich-Ungarn und die Friedensschlüsse von Brest-Litovsk*, p. 43.

sion, the Russian delegation issued a declaration of principles, which spoke of peace without annexations, enshrined the right of self-determination of the people, and excluded reparation payments.[68] As there was no common draft of the Central Powers, the Russian declaration was the basis for the discussions of the first round of the peace negotiations. On 25 December the Central Powers published their counter proposals. While Austria-Hungary was in favor of immediately signing a peace treaty, the German Reich wanted to see its main demands realized, so that Austria-Hungary threatened to sign a separate peace treaty with Russia by the end of the year.[69] However, the prospect of signing a separate peace treaty on the part of Austria-Hungary left the German Reich indifferent, as Austria-Hungary was at the mercy of its German allies for better or worse.[70] The first round of the peace negotiations at Brest-Litovsk ended on 28 December. Before the peace negotiations continued on 9 January 1918, the Russian delegates had asked to continue the peace negotiations in Stockholm, which the Central Powers refused.[71] The second round of the peace negotiations were marked by the Russian attempt to prolong the talks, hoping that in the meantime the revolution would spread to Western Europe.

Apart from the general fear of a revolution like the one Russia had experienced in October (November) of the previous year and strategic military considerations, the Central Power's (especially Austria-Hungary's) concern about the lack of grain supplies led to the signing of a separate peace treaty with the Ukrainian People's Republic on 9 February 1918, by which the Central Powers recognized the latter's sovereignty.[72] When looking at the „Ukrainian question" in 1917/1918, parallels can be drawn to Ukraine's struggle for maintaining its independence today: Right after the October Revolution the Ukrainian People's Republic was proclaimed on 19 November 1917. Soviet Russia, who concidered the Ukrainian People's Republic as a „bourgeois Republic", a „creation of the Central Powers", had prompltly sent troups to Ukraine, so when the delegates of the Central Powers and Soviet Russia met at Brest-Litovsk, there in fact already was a war going on between the Ukrainian People's Republic and Soviet Russia.

After the conclusion of a separate peace with Ukraine on 9 February 1918 („Treaty of Brest-Litovsk between the Central Powers and the Ukrainian People's Republic") Russia broke off the peace talks. Trotsky threatened to order Russian troops to completely demobilize on all fronts, but not to sign a peace treaty. Thus, he advocated a formula which became known as „neither war nor peace".[73]

As a result the German Reich considered the armistice agreement to have expired and went back to war, launching the military Operation" *Faustschlag*" on 17 February 1918. Russian forces were unable to put up any serious resistance and the Central Powers soon gained territories in Estonia, Latvia, Belarus and Ukraine. On 25 February 1918 the Austrian-Hungarian and the German delegation discussed the draft of a peace treaty based on the terms of the German ultimatum of 21 February.[74] The legal and economic issues were supposed to be settled in supplementary treaties. At the request of the Turkish delegation, the demands for the evacuation of the districts of Kars, Erdehan, and Batum and for the recognition of Persian and Afghan independence were included in the draft, against which Russia protested. According to Russia, the peace to be concluded was an annexationist and imperialist one, which, under the pretext of liberating Russia's peripheral areas, turned them into German provinces and undermined their right to self-determination.[75] On 3 March 1918 Russia signed the Treaty of Brest-Litovsk under protest.[76]

3.2 The Paris Peace Conference

A little more than ten months after the Peace Treaty of Brest-Litovsk had been signed by Russia and the Central Powers, the Paris Peace Conference, or more precisely the Pre-Peace Conference[77], was opened on 18 January 1919. All states that had been at war with the German Reich or at least had broken off its diplomatic relations were admitted to the Peace Conference - the Ottoman Empire and Austria-Hungary were not. Concerning Russia, the Allied and Associated Principal Powers pretended it did not exist.[78]

For all matters concerning the former Habsburg Monarchy and the Ottoman Empire the *Supreme Council*, also known as the „Council of Ten", which consisted of the respective heads of government and foreign ministers of the Allied and Associated Principal Powers, was initially responsible.[79] The first half of the year 1919 was dominated by the drafting of the Peace Treaty with Germany. Only after that, the Allied and Associated Principal Powers effectively started to deal with Austria-Hungary and the Ottoman Empire.

3.2.1 Austria at the Paris Peace Conference

The Austrian delegation, led by the Social Democratic State Chancellor Karl Renner, had actually expected to be invited to France at the beginning of 1919. However the Austrian delegation was only summoned in May1919, when the conclusion

[68] Ibid.
[69] Ibid, p. 35.
[70] KOCK, *Friedensverhandlungen von Brest-Litowsk*, p. 28-29.
[71] BIHL, *Österreich-Ungarn und die Friedensschlüsse von Brest-Litovsk*, p. 52.
[72] ORTNER, Ch., Österreich-Ungarn und der Frieden von Brest-Litowsk. In: KÖHLER/MERTENS/PELINKA (eds.) *Ultimo.* Wien, 2022, p. 176.
[73] BIHL, *Österreich-Ungarn und die Friedensschlüsse von Brest-Litovsk*, p. 93.
[74] Ibid., p. 114-115.
[75] Ibid.
[76] ORTNER, *Österreich-Ungarn und der Frieden von Brest-Litowsk*, p. 192-194.
[77] The actual Peace Conference began with the handing over of the peace terms to the German delegation in May 1919 (RATHMANNER, L., Die Pariser Friedensverhandlungen und die deutschösterreichische Friedensdelegation. In: *Zeitgeschichte,* Vol. 46, Nr. 3, 2019, p. 14.
[78] MacMILLAN, *Die Friedensmacher*, p. 109.
[79] WEDRAC, St., Historische Einleitung. In: KALB/OLECHOWSKI/ZIEGERHOFER (ed.), *Der Vertrag von St. Germain*. Wien, 2021, p. 13.

of the Peace Treaty with Germany became apparent. Thus, on 12 May 1919, the seven-member Austrian delegation traveled to Paris, where it was accommodated in a separate area, which it was only allowed to leave in the company of an officer.[80] Unlike the Russian delegation in Brest-Litovsk, the members of the Austrian delegation were treated more like prisoners than diplomatic representatives. On 2 June 1919, a first, still incomplete draft was submitted to the Austria delegation, which underwent fundamental revisions in a second phase. For example, in the first draft the financial and military provisions and the reparation provisions were still missing. Also the political provisions were incomplete, especially in regard to Italy.[81] The Austrian delegation was given fourteen days to comment on the first draft of the Peace Treaty, which it did in the form of memoranda containing counterproposals. In order to strengthen Austria's negotiating position, even the Austrian Secretary of Foreign Affairs Otto Bauer, one of the most colorful figures of the Austro-Marxism movemnent, who was strongly supporting the *Anschluss* and sympathized with the Hungarian council system, resigned.[82] On 6 August 1919, the Austrian delegation received a detailed reply from the Allies, in which it was already clear that the Austrian delegation had succeeded in achieving selective improvements. In the new draft, Austria was still considered responsable for the war (Art.177), but the financial provisions now took into account the dissolution of the Monarchy. Also, the confiscation of the property of German-Austrian citizens in the territories of the Monarchy was abandoned. With regard to the nationality issue, unlike in the other Peace Treaties, the point of reference was not the habitual residence but the so called *Heimatrecht*.[83]

On a territorial level, it can be stated that in general Austria was to be reduced to the territory from which it had emerged in the Middle Ages. In August 1919, it was already clear, that South Tyrol was to be annexed to Italy. Suprisingly, Austria was able to gain a new territory: Although not foreseen in the first draft, the German-speaking western Hungarian territories (today's Burgenland) were to be annexed to Austria. This can be interpreted as a generous act of the Allies, who hoped that Austria would support them in containing communism in Hungary. As a result, Austria ended up being the only state loosing the First World War, which achieved a territorial gain.

On 2 September the final draft was handed over to the Austrian delegation, and on 10 September 1919 the Treaty of St.Germain -en-Laye was signed by Karl Renner on behalf of the Republic of Austria.[84]

3.2.2 The Ottoman Empire at the Paris Peace Conference

Only a few weeks after the opening of the Peace Conference, Greece and its territorial claims was the subject of negotiations for the first time.[85] In March 1919, shortly after the establishment of the *Greek Affair Committee*, Italy sent troops to Antalya and Marmaris without even consulting Great Britain or France to "peace and order" there.[86] At the same time, it also claimed the formerly Hungarian city of Fiume, which was supposed to be incorporated into the State of Slovenes, Croats and Serbs. The Italian actions stated a clear violation of the Fiume agreement and so the Allies authorized Greece, to intervene and also send troops to Smyrna.[87]

On 17 June 1919, a few weeks after the occupation of Smyrna by Greek troops, a four-member Ottoman delegation led by the Sultan's brother-in-law and Grand Vizier of the Ottoman Empire, Damad Ferit Pasha, arrived in Paris.[88] On the same day, the Turkish delegation was allowed to appear before the „Council of Ten". The Turkish delegation appeared self-confident, its main concern was to avert the „dismemberment" of the former Ottoman Empire; only on the Egyptian and Cyprus issues it showed willingness to negotiate.[89] It argued that the Ottoman Empire had been a guarantor of security and prosperity on the European, African and Asian continents for many centuries. The borders of the Muslim Empire, according to Ferit Pasha, should run according to the borders of 1878, the region of Mosul and other parts of Iranian and Russian territory should be returned to the Sultanate in Istanbul.[90]

Great Britain and France were stunned by the uncompromising, almost arrogant Turkish demands. Only a few days later, the conference decided that negotiations on the peace treaty with Turkey should be suspended until the U.S. had made a decision on whether it wanted to take over part of Turkey as a mandated territory.[91] Thus, the peace negotiations were put on hold between July and November 1919. Only the Thrace issue, which was necessary for the demarcation of the borders in southern Bulgaria, could not be postponed, especially since the Peace Treaty with Bulgaria was still to be signed in the fall of 1919.

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[80] RATHMANNER, L., Die Pariser Friedensverhandlungen. In: *Zeitgeschichte,* Vol. 46, Nr. 3, 2019, p. 26.
[81] FELLNER, F. (ed.), *Saint-Germain im Sommer 1919: Die Briefe Franz Kleins aus der Zeit seiner Mitwirkung in der österreichischen Friedensdelegation Mai- August 1919*. Salzburg, 1977, p. 95.
[82] RATHMANNER, L. Die Pariser Friedensverhandlungen. In: *Zeitgeschichte*, Vol. 46, Nr. 3, 2019, p. 28.
[83] The so-called *Heimatrecht* describes a belonging of a certain person to a certain municipality. It was determined by descent, was inherited and could therefore differ from the actual residence The Heimatrecht was introduced in Austria in 1849 and was only abolished in 1939 (KALB/OLECHOWSKI/ZIEGERHOFER (ed.) *Der Vertrag von St. Germain,* p. 252)
[84] Staatsvertrag von Saint-Germain-en-Laye vom 10. 9. 1919, StGBl. 1920/303.
[85] PETSALIS-DIOMIDIS, N., *Greece at the Paris Peace Conference 1919*. Thessaloniki, 1978, p. 200.
[86] HELMREICH, *From Paris to Sèvres*, p. 94.
[87] FINEFROCK, *Ataturk, Lloyd George and the Megali Idea*. D1051.
[88] MacMILLAN, *Die Friedensmacher*, p. 575.
[89] HELMREICH, *From Paris to Sèvres*, p. 110.
[90] CICEK, H., Der Friedensvertrag von Sevres und die osmanische Haltung. In: *BRGÖ,* Vol. 9, Nr. 2, 2019, p. 447.
[91] RICHTER, H., *Der griechisch-türkische Krieg 1919-1922,* p. 68.

It was not until December 1919, that Great Britain and France - with Italy's tacit disapproval - began to draft the Peace Treaty with Turkey.[92] However, by that time, things in Turkey had already changed significantly: In those areas of Turkey that were at risk of being taken over by Armenians or Greeks, especially in Cilicia, local resistance groups had formed.[93] Mustafa Kemal, the later Atatürk, who had already become known to the public in the successful defense of the Gallipoli peninsula in 1915, had risen rapidly within this newly established resistance movement. When he was transferred to Anatolia in May 1919 to disarm the remaining military units in accordance with the Armistice Agreement, he defied the sultan's order and resigned from military service. With him, considerable parts of the soldiers stationed in Anatolia also left the army. In the summer of 1919, the Erzurum Congress was held. Mustafa Kemal called the government in Istanbul „a hostage of the occupying powers" and declared the centrally located provincial city of Ankara the „center of resistance".[94]

In the late autumn of 1919, the French government under Prime Minister Georges Clemenceau already regretted that it had supported the Greek expedition in Asia Minor.[95] When Clemenceau traveled to London on 2 December 1919, he urged British Prime Minister Lloyd George to preserve Turkish integrity. The de facto assumption of power by Mustafa Kemal, who had exercised effective control over Anatolia since the fall of 1919, would necessitate a „change of plan" on the part of the Allies, he argued, but this was vehemently opposed by Lloyd George.[96]

The „Council of Ten" met again in London on 12 February 1920, with the aim of reaching a fundamental agreement among the Great Powers. However, already a couple of days later the Council decided to transfer the preparation of the pending Peace Treaty to a Committee of Foreign Ministers and Ambassadors.[97] At the London Conference, which lasted until 10 April 1920, the project of a neutralized „Straits Free State" based on the model of Danzig was discarded.[98] However, all participants agreed that the straits had to be brought under some sort of international control. Thus, at the London Conference, the much milder option of placing the demilitarized straits under the supervision of an international commission finally prevailed.[99] Concerning the French request to bring Turkey under French financial control, an agreement was obtained, when the British proposal regarding a formal waiver of the reparation claims was accepted. Great Britain and France finally agreed on the establishment of an (interallied) Financial Commission for the economic and fiscal supervision of Turkey.[100]

The reports from Cilicia, where the Kemalists were making great territorial gains, significantly accelerated negotiations on the Constantinople issue: On 5 March 1920, the Allies decided to occupy Constantinople. Constantinople was to be formally left with Turkey for the time being, but it was to be used as a kind of „hostage" for good behavior on the part of Turkey: Should uprisings or massacres occur (again), the Principal Allied Powers would reconsider their decision.[101]

As for the Smyrna question, the Principal Allied Powers had begun to distance themselves more and more from Greece, but Kemalist gains in Asia Minor now left them in serious doubt as to whether a harsh Peace Treaty could actually be implemented domestically in Turkey. A report by Marshal Foch, speaking for the Inter-Allied Command, stated that the Peace Treaty would not be enforceable unless some 325,000 men were sent into the field, which neither Britain nor France were prepared to do.[102] Here, Greece once again appeared as the „savior": It declared that, if necessary, it could defeat the Turkish nationalists in the capital also by itself. Thus, in June 1920, Greece was authorized to occupy Eastern Thrace. Venizelos' *Megali Idea* thus for a moment seemed to have come true.

With regard to the former Turkish territories in North Africa, it was agreed that Turkey had to give up all its rights with regard to Libya, Tunisia, Morocco and the Sudan. Egypt was to become a British protectorate.

In the Syria question, the demarcation of the borders had long been a matter of dispute, but finally a solution emerged at the London Conference, whereby France was to receive a mandate for Syria and Great Britain a mandate for Palestine and Mesopotamia. The oil of Mosul should be more or less shared between these two states. In the Kurdish question[103], a turnaround in Great Britain's attitude became apparent at the London Conference: Lloyd George no longer advocated a Kurdish state of its own.[104]

The Kurdish question, like the Armenian question, remained unresolved at the London Conference: Thus, it was agreed that the Principal Allied Powers would meet again in April in San Remo to finalize the peace treaty.

[92] MONTGOMERY, *The Making of the Treaty of Sèvres*, p. 775.
[93] GÜNAY, *Geschichte der Türkei*, p. 125.
[94] Ibid, p. 127.
[95] MONTGOMERY, *The Making of the Treaty of Sèvres*, p. 776.
[96] Ibid.
[97] HELMREICH, *From Paris to Sèvres*, p. 242.
[98] BECK, R., *Die Internationalisierung von Territorien: Darstellung und rechtliche Analyse.* Stuttgart, 1962, p. 60-65.
[99] MACFIE, A., The British Decision regarding the Future of Constantinopel, November 1918-January 1920. In: *Historical Journal,* Vol. 18, Nr. 2, 1975, p. 391.
[100] Ibid.
[101] Ibid, p. 243.
[102] BANKEN, R., *Die Verträge von Sèvres 1920 und Lausannes 1923*, p. 164.
[103] GALVIN, T., No friends but the mountains: The fate of the Kurds. In: *World Affairs,* Vol. 177, Nr. 6, 2015, p. 57-66.
[104] RADPEY, L., Kurdistan on the Sèvres Centenary. How a Distinct People Became the World's Largest Stateless Nation. In: *Nationalities papers*, 2021, p. 8; CELALETTIN, K., *Der Rechtsstatus der Kurden im Osmanischen Reich und in der modernen Türkei – Der Kurdenkonflikt, seine Entstehung und völkerrechtliche Lösung*, 2001.

The San Remo Conference began on 18 April 1920, in San Remo, Italy. On 22 April 1920 Sultan Mehmed VI was personally invited to attend the final negotiations.[105] On the Kurdish question, Great Britain and France jointly decided to create a Kurdish autonomous region. The Kurdish dream of a state of their own was not realized.[106] Armenia was also led down by the Principal Allied Powers, as it was decided to leave the young Armenian state more or less to itsself.

Behind the scenes, the San Remo Oil Agreement was negotiated between France and Great Britain without taking the USA into account: It was agreed that France would relinquish Mosul. Mosul, together with the provinces *("vilayets")* of Baghdad and Basra, was to be provisionally integrated into the British mandated territory of Mesopotamia.[107] In return, France was to share in the oil exploitation in Mosul.[108]

After the negotiations in San Remo, a Turkish delegation from Constantinople led by Grand Vizier Ahmet Tevik Pasha was invited to Paris. On 11 May 1920 the delegation received a draft of the Peace Treaty.[109] The head of the Turkish delegation was replaced by Damad Ferit Pasha after only a few days. After several unsuccessful attempts to make their demands heard, the Ottoman delegation finally left Sèvres.[110] The Allies ignored the domestic events in Turkey, such as the fact that Mustafa Kemal had convened a National Assembly in Ankara on 23 April 1920, which made him its chairman or that Mustafa Kemal had declared the Sultanate abolished, and appointed a government opposed to the Sultan and the Allies.[111] On 10 August 1920, in one of the exhibition rooms of the famous porcelain factory of Sèvres, a Peace Treaty was signed with a contracting party that in reality no longer existed. The historian Philip Marshall Brown wrote about the Treaty of Sèvres: „*The Treaty of Sèvres was fragile as the porcelain of that name, though lacking its charm.*“ [112]

4. Peace Treaties

4.1 The Treaty of Brest Litovsk

The Brest Litovsk Peace Treaty was signed more than a year before the Paris Peace Treaties, at a time when the First World War was still in full swing. Its signatories were Soviet Russia on the one side and the German Reich, Austria-Hungary, Bulgaria, and Ottoman Empire on the other. Counting no more than fourteen articles is way shorter than the Paris Peace Treaties, even though, Russia also had to sign a supplementary agreement with each of the Central Powers. Those supplementary agreements were dispoed of about 35 articles, containing regulations on the future mutual relationship between Russia and the respective countries. (Reestablishment of diplomatic and consular relations, reestablishment of political treaties, restoration of private juridical relations, compensation for Civil losses, exchange of war prisoners and Civil prisoners, care of the repatriated, amnesty). As the Treaty of Brest-Litvsk is completely different in structure and style, no substantive comparison can be made with the Paris Peace Treaties. The before mentioned difference can alraedy be seen when taking a look at the first article of the Brest-Litovsk Treaty (there is no preamble such as in the Paris Peace Treaties) Art.1 of the Treaty of Brest-Litvosk neutrally decrees that Germany, Austria-Hungary, Bulgaria and Turkey on the one hand and Russia on the other declare that the condition of war between them has ceased and that they have decided to live in peace and accord in the future, whereas in the Paris Peace Treaties already in the very first paragraph of the preamble it is made clear that the state of war resulted from the hostilities opened by the respective Central Power member state. As the Treaty of Brest-Litovsk does not forsee any provisions of war indemnities or reparation payments in the sense the Paris Peace Treaties do, the most interesting part of the treaty concerns the provisions on territorial cessions: Article 3 detached Poland, Lithuania, Courland and part of Livonia from Russian sovereignty and granted these territories a limited right to self-determination under the supervision of Austria-Hungary and the German Reich. Concerning the Caucasus the treaty declared that the territory Russia took from the Ottoman Empire in the Russo-Turkish War (1877–1878), specifically Ardahan, Kars, and Batumi, were to be returned. Russia also undertook to do all in her power to have the provinces of eastern Anatolia promptly evacuated and returned to Turkey (Art.4). Article 5 provided for the demobilization of the Russian army and fleet, Art. 6 oblied Russia to conclude peace at once with the Ukrainian People's Republic. Furthermore it stipulated that Estonia and Livonia, as well as Finland and Aland Island had to be immediately cleared of Russian troops. Consequently, Estonia and Livonia were occupied by German police units and thus de facto placed under German administration. Art.7 stipulated that Persia and Afghanistan are free and independent countries. In Article 9 all parties mutually waived compensation for the war. In all, the treaty took away territory that included a quarter of the population and the industry of the former Russian Empire.[113]

4.2 The Treaty of Sèvres and the Treaty of St. Germain-en-Laye

It can generally be stated that all major Paris Peace Treaties follow a certain structure, as laid down in the Treaty of Versailles. In other words, one can say that the Treaty of Versailles was used as a template for the other Paris Peace Treaties, which were modified or adapted wherever necessary.

[105] ZIEGERHOFER, A., Historische Einleitung. In: KALB/OLECHOWSKI/ZIEGERHOFER. (ed.), *Der Vertrag von St. Germain*, p. 34.
[106] CELALETTIN, K., *Der Rechtsstatus der Kurden im Osmanischen Reich*, p. 64.
[107] After bloody uprisings of the population, the Kingdom of Iraq was to be proclaimed in this area in 1921.
[108] HABIBOLLAH, A., *Great Powers, Oil and the Kurds in Mosul; Banken, Die Verträge von Sèvres 1920 und Lausannes 1923*, p. 241.
[109] HELMREICH, *From Paris to Sèvres*, p. 309.
[110] CISEK, Der Friedensvertrag von Sevres und die osmanische Haltung. In: *BRGÖ*, Vol. 9, Nr. 2, p. 450.
[111] GÜNAY, *Geschichte der Türkei*, p. 129; see also: KREISER, KLAUS, *Geschichte der Türkei*.
[112] BROWN, From Sèvres to Lausanne. In*: The American Journal of International Law*, Vol. 18, Nr.1, 1924, p. 113.
[113] KEEGAN, J., *The First World War*. New York, 2000, p. 342.

All Paris Peace Treaties list at the beginning the contracting parties and the names of their respective representatives. In each of the treaties, different countries appeared on the side of the "Allies".[114] The Treaty of Sèvres differed from the other Paris Peace Treaties by the fact, that the United States were not a party in the treaty. In the other Paris Peace Treaties, the USA had insisted on being referred to merely as an "associated" (principal) power, which is why those treaties regularly refer to the "Allied and Associated (Principal) Powers".[115] All states that signed the Treaty of Sèvres, also signed the other four Paris Peace Treaties as well. The only exception was Armenia. However, some other states, notably China, Cuba, Nicaragua, Panama, and Siam, had signed all or almost all of the other four treaties, but not the Treaty of Sèvres. Of particular interest is Hijaz, which, although located within the territory of the former Ottoman Empire, was a signatory state only to the Treaties of Versailles and Trianon, but not to the Treaty of Sèvres.

The fact that neither the Treaty of Sèvres nor the Treaty of St. Germain were concluded between two equal parties becomes already clear when reading the preamble: After listing the contracting parties, in the case of the Treaty of Sèvres it is stated that on the request of the Imperial Ottoman Government, Turkey was *granted an armistice by the Allies on October 30, 1918*, with which *the hostilities begun by Turkey against the Allies on October 29, 1914* were replaced by a firm and durable peace. The term Peace Treaty is not mentioned in the original version of the Treaty of Sèvres. Unlike the other Paris Peace Treaties, which speak of a *firm, just and lasting peace*, in the French version - and thus in the decisive version of the Treaty of Sèvres - the word *just* is missing.[116]

In all major Peace Treaties, the first part of the treaty (Art. 1-26) consists of the Covenant of the League of Nations and its annexes.[117] Since President Wilson had demanded that the Covenant of the League of Nations was linked to the Treaty of Versailles, which served as the basis for all further peace treaties. The provisions on the demarcation of the new borders form the second part of all Paris Peace Treaties. The Treaty of Sèvres as well as the Treaty of St. Germain in this section provide for the establishment of Boundary Commissions.

The political clauses make up the the third part in all Paris Peace Treaties. While the Treaty of Versailles, the Treaty of St. Germain and the Treaty of Trianon deal with the provisions on Europe and non-European interests (especially colonies) separately, the Treaty of Sèvres does not make such a division. Apart from provisions concerning Constantinople[118], the Straits[119] and the other Ottoman territories[120], the third part in the Treaty of Sèvres dealt with the question of nationality.

Similar to Articles 64, 65, 70-82, 90-92 and 230 of the Treaty of St. Germain with regard to the inhabitants of the former Habsburg Monarchy, Articles 123 to 131 of the Treaty of Sèvres contained provisions regarding the citizenship of the inhabitants of the former Ottoman Empire: While the Treaty of St. Germain was based on the *Heimatrecht,* all former Ottoman citizens who now resided in a new state founded on the territory of the former Ottoman Empire were automatically to receive the citizenship of this new state. Art. 125 of the Treaty of Sèvres stipulated that every person whose race differed from the majority of the population in that territory had the right, to opt for Armenian, Azerbaijani, Georgian, Greek, Mesopotamian, Syrian, Bulgarian, Turkish citizenship - or the citizenship

[114] In the Treaty of Sèvres the British Empire, France, Italy and Japan are referred to as the "*principales puissance alliées*", the Principal Allied Powers. Together with Armenia, Belgium, Greece, Hejaz, Poland, Portugal, Romania, the State of Slovenes Croats and Serbs and Czechoslovakia, they formed the "*puissance alliées*", the Allied Powers. In its preamble, the Treaty of Sèvres also mentions Hejaz in the course of listing the Allied Powers, but curiously the Treaty of Sèvres has never been signed by Hejaz. Due to the fact that the US had never been in a state of war with the Ottoman Empire, it was neither mentioned in the preamble of the Treaty of Sèvres nor did it sign it. This is also the reason, why the Allied Powers are not referred to as Allied and Associated Powers or Allied and Associated Principal Powers in the Treaty of Sèvres as they were referred to in the Treaty of Versailles or the Treaty of St. Germain.

[115] See also: OLECHOWSKI/RATHMANNER, Kommentar zur Präambel. In: KALB/OLECHOWSKI/ZIEGERHOFER, *Der Vertrag von St.Germain*, p. 71.

[116] The French version of the Treaty of Sèvres is printed in: Deutsches Außwärtiges Amt, *Die acht Verträge von Sèvres*. Berlin, 1921, p. 4-152.

[117] For the Covenant of the League of Nations see: ZIEGERHOFER, A., League of Nations [https://encyclopedia.1914-1918-online.net/article/league_of_nations] (6. 4. 2022); PARRY CLIVE, P., Leage of Nations. In: BERNHARDT, R. (ed), *Encyclopedia of Public International Law*, Vol. 3, Amsterdam, 1981.

[118] Article 36 stipulated that Constantinople was to remain with Turkey until further notice and could therefore remain the seat of the Sultan and the Caliphate. The provision in the second paragraph of Art. 36 of the Treaty of Sèvres can be seen as a counterpart to Art. 428 of the Treaty of Versailles for the German Rhineland, with the difference that the Rhineland was kept occupied as security for the implementation, while Turkey got back its capital "until further notice".

[119] According to Art.37-61, the Turkish Straits were placed under international administration by the Straits Commission, the waters were neutralized and the shores demilitarized.

[120] With regard to Kurdistan (Art. 62-64), the realization of a Kurdish autonomous area with local self-government was not decided in the Treaty of Sèvres itself, but was left to the decisions of a British-French-Italian commission. Similar to Kurdistan, a provisional autonomy statute was envisaged for the Smyrna zone, although Greece was to be granted comprehensive administrative rights. The city of Smyrna itself was to remain formally part of Turkey, but Greece was allowed to maintain troops in Smyrna. (Art.71) With respect to Greece, Articles 84-87 regulated the territorial transfers of some Aegean islands and the former Ottoman territories in Eastern Thrace (the up tot hat point Bulgarian Western Thrace was to be transferred to Greece in a separate treaty). Art. 88-93 stipulated with regard to Armenia and Art. 98-100 with regard to the Hedjaz, that Turkey had to recognize both as free and independent states. The exact boundary between Armenia and Turkey was to be determined by an arbitration award by the U.S. President. With regard to Syria and Mesopotamia, it was stipulated that, in accordance with Article 22 of the League of Nations Statute, both were to be provisionally recognized as independent states but would be subject to the administrative advice and assistance of a mandate holder "…until they were able to stand alone." (Art.94) Palestine was also to be placed under a mandate power (Art. 95). With regard to Egypt, the British protectorate already established in 1914 was recognized retroactively (Art.101), and the anenexion of Cyprus by Great Britain was declared legal. (Art.115) For both Libya and the Dodecanese, Turkey renounced all rights in favor of Italy. (Art.121)

of Hijaz - provided that the majority of the population of the chosen state, belonged to the same race as the person exercising the right of option. Article 126 was also of particular importance in this context: people who exercised the aforementioned option had to transfer their residence to the state for whose citizenship they had opted within the following 12 months. In the course of the "transfer of domicile" they had the right to keep their immovable property in the state from which they de facto had to emigrate. With regard to Jews living within the borders of Palestine, Art.129 stipulated that they should ipso facto become Palestinian citizens and as such were excluded from other citizenships. The entire provisions of Art. 123 to 131 Treaty of Sèvres are of particular importance, since they are based on migration and thus have no equivalent in either the Treaty of Versailles or the Treaty of St. Germain. They focus on the "ethnic disentanglement" of the former Ottoman population and can thus be seen as the first harbingers of the population exchange that was actually implemented after the Treaty of Lausanne in 1923.

Unlike Articles 136-140 of the Treaty of Sèvres, which dismembered the Ottoman Empire, Articles 36-62 of the Treaty of St. Germain essentially regulated mainly border issues and relations with Austria's neighboring countries. In this context, a referendum had to take place with regard to Klagenfurt, by means of which it was to be decided to which state the area in question was to be annexed. Interestingly, the Treaty of Sèvres does not forsee such a referendum or anything alike. The "heart" of the political provisions of the Treaty of St. Germain was Article 88 on the "unalterable independence of Austria" ("*Anschlussverbot*").The fourth part of the Treaty of St. Germain, in particular the provisions concerning Morocco, Egypt, Siam and China, were for the most part copied from the Treaty of Versailles and, since Austria had no colonies, were meaningless.[121]

While the provisions on the protection of minorities are integrated into the third part (Art. 62- 82 of the Treaty of St. Germain), in the Treaty of Sèvres they form a separate fourth part (Art. 140-151). In the Treaty of Versailles, there is no comparable part.

For what concerns the protection of minorities, the relevant provisions in the Treaty of Sèvres - as well as those in the Treaty of St. Germain - were based on the minority protection provisions of the "small Versailles Treaty" with Poland concluded on June 28, 1919.[122] Therefore, most provisions also correspond to each other. In the case of Turkey, the minority protection provisions were intended to regulate the rights of people living in the territory left to Turkey, who were ethnically and/or religiously different from the Turkish Muslim majority. First and foremost, the minority protection provisions were aimed at protecting the Greek, Armenian and Jewish minorities. Minority protection was tripartite with respect to the former Ottoman Empire: Apart from the minority protection provisions in the Treaty of Sèvres, a twenty-article long minority protection treaty for the protection of former Ottoman citizens in the parts of the Ottoman Empire assigned to Greece was also signed between the Principal Allied Powers and Greece on August 10, 1920. Furthermore a corresponding treaty between the Principal Allied Powers and Armenia was concluded. With regard to the individual minority protection provisions, Art.144 of the Treaty of Sèvres is particularly worth mentioning: According to this, so-called "*Emval-i-Metroukeh*" houses or businesses of Ottoman nationals of non-Turkish race, who had been forcibly expelled from their homes or had left them for fear of massacre, had to be returned to the victims of Turkish aggression free of charge. Also, in the chapter on the protection of minorities, there is again a precursor of the later population exchange: Article 143 obliged Greece and Turkey to conclude a special agreement regarding the mutual and voluntary emigration of the Turkish and Greek populations in those areas that were either transferred to Greece or remained Turkish. Generally, the protection of minorities in the Treaty of Sèvres itself, did not go beyond that in the other Paris Peace Treaties.

In accordance with the Treaty of Versailles, the Treaty of St. Germain and the Treaty of Trianon, the fifth part of the Treaty of Sèvres contained military provisions concerning the Turkish military forces. The articles in question of the Treaty of Sèvres stipulated the demobilization of the existing Ottoman military forces, the limitation of the military apparatus (e.g. the total land forces were to be limited to 50,000 men) and the absolute prohibition of an air force (Article 191). As far as the reduction of land forces is concerned, this was limited to 100,000 men in the Treaty of Versailles and to a maximum of 30,000 men in the Treaty of St.Germain. Thus, in terms of the territorial size of the three countries, Turkey's restrictions were the most severe.

The sixth part in all Paris Peace Treaties regulated the fate of the prisoners of war and the gravesites: With regard to the repatriation of prisoners of war, the provisions of Art. 208-217 of the Treaty of Sèvres largely correspond to those of Art. 215 onwards of the Treaty of Versailles and Art.160-172 of the Treaty of St.Germain. However, the provisions concerning graves in the Treaty of Sèvres differ significantly from those in the other Paris Peace Treaties: Article 218 stipulated that the Turkish government had to transfer to the British, French and Italian governments the full and exclusive rights of ownership over the land within the boundaries of Turkey in which the graves of their soldiers who fell in the war were situated. However, in reality this only affected the Gallipoli peninsula, where more than 40,000 allied soldiers, mainly from Australia and New Zealand, had died when trying to conquer the peninsula.

The seventh part oft he Treaty of Sèvres is entitled "Penalties" and is dedicated to the punishment of war crimes, whereby the provisions of Art. 226-229 Treaty of Sèvres, but Art. 230, which refferred to the genocide of the Armenian minority, are almost identical to those in the other Paris Peace Treaties.[123]

[121] OLECHOWSKI, Kommentar zu Art.95-117. In: KALB/OLECHOWSKI/ZIEGERHOFER, *Der Vertrag von St.Germain*, p. 283.

[122] See aslo: KALB, Kommentar zu Art.42-82 (Minderheitenschutz) In: KALB/OLECHOWSKI/ZIEGERHOFER, *Der Vertrag von St. Germain*, p. 240.

[123] In this context see also: GARIBIAN, S., From the 1915 allied joint declaration to the 1920 treaty of Sèvres. Back to an international criminal law in progress. In: *The Armenian review,* Vol. 52, Nr.1-2, 2010, p. 87-102.

The financial provisions formed the eighth part of the Treaty of Sèvres and the Treaty of Neuilly, and the ninth part of the other Paris Peace Treaties. Articles 231 to 260 of the Treaty of Sèvres dealt with the reimbursement of occupation costs, compensation for private individuals (Art. 235) and the establishment of an inter-allied *Financial Commission* to reform and monitor the Turkish state budget (Art. 232). A novelty in the history of international law was the formulation of the so-called *„war guilt articles"* in the Paris Peace Treaties (Treaty of St.Germain: Art. 177, Treaty of Versailles: Art. 231, Treaty of Neuilly: Art. 121), which formed the basis for a far-reaching - until then unprecedented – aggressor's liability. In those *war guilt articles*, the respective country was held responsible as the author (or contributor) of the losses and damage suffered by the Allies. Although the Treaty of Sèvres also contains a *"war guilt article"* (Art. 231, first paragraph) the Ottoman Empire was only accorded reduced responsability especially since it had acted as mere assistants of the German Empire. The reparation provisions contained in the eighth part of the other Paris Peace Treaties had only an indirect counterpart in the Treaty of Sèvres: Unlike the Treaty of Versailles or the Treaty of St. Germain, Art. 231, second paragraph formally waived reparation claims. Art. 231, paragraph 2 however stands in sharp contrast to Art. 235, which obliged the Turkish government to pay for all losses or damages suffered by civilian citizens of the Allies during the war.

The ninth part of the Treaty of Sèvres was dedicated to the economic provisions (Art. 261-317) It contained a wide variety of provisions concerning economic relations, taxes and customs duties. Thus, in the Treaty of Sèvres, the system of capitulations was renewed and extended to all allied powers in accordance with the most-favored-nation principle. (Art. 261). The economic provisions in the Treaty of Sèvres can be seen as the reverse of those contained in Art. 155 onwards of the Treaty of Versailles.

In the Treaty of Sèvres the economic provisions were followed by regulations concerning aviation (Part Ten), which, with a few exceptions, corresponded to the regulations in the other Paris Peace Treaties: Aircraft of the Allied powers were granted full freedom of flight and landing within the territory of the respective state. Of particular interest with regard to the eleventh part of the Treaty of Sèvres ("Ports, Waterways and Railways") are Articles 335 to 345, which provided for the establishment of „ports of international concern". These ports included Constantinople and Haidar-Pasha, the Mediterranean ports of Smyrna, Alexandretta and Haifa, as well as Basra on the Persian Gulf and Trabzon and Batumi on the Black Sea. Within the territoy of the ports *free zones* were to be established, in which no customs duties or other import and export restrictions were to be imposed.

Finally, as in all Paris Peace Treaties, last part contains the Statute of the International Labor Organization (ILO).

5. Conclusion

The Treaties of Brest-Litovsk, St. Germain-en-Laye and Sèvres all stand in the shadow of the Treaty of Versailles and yet are essential components of the new world order. They all mark the end of multi-ethnic empires whose political significance was far behind their territorial expansion even before 1914. The disintegration of the Russian Empire as well as of the Habsburg and the Ottoman Empire took place already before the peace treaties were actually signed or in other words: the disintegration of all three empires was sealed only legally by the respective peace treaty ending the First World War. Out of all three beforementioned peace treaties only the Treaty of St. Germain entered into force (and indeed is still in force and partly in constitutional rank today). The Treaty of Brest-Litovsk was annulled by the German armistice in November 1918 and the Treaty of Sèvres, which was never ratified, was finally superseded by the Treaty of Lausanne in 1923. Given the different powers dictating the respective treaties, the Treaty of Brest-Litovsk is completely different in its history, set up, rhetoric and style from the Paris Peace Treaties. Other than the Paris Peace Treaties, the Treaty of Brest-Litovsk contains neither war guilt clauses nor forsees reparation payments. Due to the fact that the Treaty of Versailles served as the textual basis of all Paris Peace Treaties, there are considerable parallels in the structure of all Paris Peace Treaties. However, of all five major Paris Peace Treaties, it is the Treaty of Sèvres that differs the most. At first glance, the peace terms concerning the Ottoman Empire are not quite as harsh as those in the Treaty of Versailles, but at second glance it becomes clear that here, too, the Allies were aiming at the defeat of the Ottoman Empire. Symbolic of this is the occupation of Constantinople, which - unlike Vienna or Berlin - was taken by the Allies.[124] Post-imperial Austria, Hungary and Turkey witnessed the emergence of sizeable paramilitary subcultures shaped by the successive traumatising experience of war, defeat and territorial disintegration. Although the levels of violence in the former imperial territories differed significantly, the logic underpinning violent action did not.[125]

[124] FINEFROCK, *Atatürk, Lloyd George and the Megali Idea* (D1049).

[125] GERWARTH, R./Ugur Ümit Üngör, The Collapse of the Ottoman and Habsburg Empires and the Brutalisation of the Sucessor States. In*: Journal of Modern European History,* Vol. 13, Nr. 2, p. 246.

Die Diskussion um die Rückwirkung bei Einführung der Untreue in Österreich 1931

(The Discussion about the Retroactive Introduction of Embezzlement in Austria in 1931)

*Christoph Schmetterer**

Abstract

In December 1931 a new crime, embezzlement, was incorporated into Austrian law. This was done retroactively although ex post facto penal laws had been considered highly objectionable since the late 18th century. This article analyzes how this idea was generally developed in legislation and jurisprudence as well as the discussion specific to the ex post facto law of 1931.

Keywords: *Austrian criminal law; Embezzlement; ex post facto law; Friedrich Ehrenfest; nulla poena sine lege.*

1. Einleitung

Als 1931 der neue Tatbestand der geschäftlichen Untreue eingeführt wurde, war unbestritten, dass damit eine Lücke im österreichischen Strafrecht geschlossen wurde. Immerhin war seit den 1860er-Jahren an einer neuen Kodifikation des Strafrechts gearbeitet worden, und seit 1874 war in jedem Entwurf das neue Delikt der geschäftlichen Untreue vorgesehen gewesen.[1] Was durch die Strafgesetznovelle 1931 eingeführt wurde, war daher nicht umstritten, wie es eingeführt wurde, aber umso mehr, denn die Strafbarkeit der Untreue wurde rückwirkend eingeführt, um Friedrich Ehrenfest, den vermeintlich Schuldigen am Zusammenbruch der Creditanstalt im Frühjahr dieses Jahres, bestrafen zu können.[2]

2. Das Rückwirkungsverbot in der Gesetzgebung

Die rückwirkende Einführung der Untreue widersprach einem Rechtsgrundsatz,[3] der in Österreich spätestens seit dem Ende des 18. Jahrhunderts konsequent eingehalten worden war. Schon als Kaiser Franz II./I. 1794/5 im Zuge der sogenannten Jakobinerprozesse für den Hochverrat die Todesstrafe rückwirkend wiedereinführen wollte, hatte sich der Vernunftrechtler Karl Anton von Martini strikt dagegen ausgesprochen – und sich damit gegen den Kaiser durchsetzen können.[4]

Martini hatte auch in seinen Entwurf für ein Zivilgesetzbuch in § 17 ein Verbot rückwirkender Gesetze vorgesehen,[5] das in etwas verkürzter Formulierung dann auch in § 5 des ABGB übernommen wurde. Diese bis heute unveränderte Bestim-

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1 SCHMETTERER, C., Die Untreue in den österreichischen Strafgesetz-Entwürfen von 1874 bis zum Ersten Weltkrieg. In: SCHENNACH, M. (Hrsg.), *Strafrechtsgeschichte im „langen" 19. Jahrhundert. Forschungen und Perspektiven*. Wien, 2020, S. 177-202.

2 Dazu nur: SCHMETTERER, C., Die Einführung des Tatbestands der Untreue in das österreichische Strafrecht 1931. In: *Journal on European History of Law*, vol. 13, Nr. 2, 2022, S. 32-40 mit weiterer Literatur.

3 Generell zum Rückwirkungsverbot: COTE BARCO, G., *Rückwirkung und die Entwicklung der internationalen Verbrechen Elemente einer allgemeinen Konzeption des nullum-crimen-sine-lege-Prinzips im Völkerstrafrecht*. Berlin, 2018; HECKER, M., *Das Verbot rückwirkender Strafgesetze im amerikanischen Recht*. Bonn, 1971; KREY, V., *Keine Strafe ohne Gesetz. Einführung in die Dogmengeschichte des Satzes ‚nullum crimen, nulla poena sine lege'.* Berlin/New York, 1983; SCHÖCKEL, G., *Die Entwicklung des strafrechtlichen Rückwirkungsverbots bis zur französischen Revolution.* Göttingen, 1968; SCHREIBER, H-L., *Gesetz und Richter. Zur geschichtlichen Entwicklung des Satzes nullum crimen, nulla poena, sine lege*. Frankfurt am Main, 1976.

4 AMMERER, G., *Das Ende für Schwert und Galgen. Legislativer Prozess und öffentlicher Diskurs zur Reduzierung der Todesstrafe im Ordentlichen Verfahren unter Joseph II. (1781-1787).* Wien, 2010, S. 409-414; DOMANIG, J., *Von der Josephina zur Franciscana: eine Untersuchung der österreichischen Strafrechtslegistik zwischen 1787 und 1803. Zugleich ein Beitrag zur Erforschung der Grundlagen des modernen österreichischen Strafrechts*. Diss., Univ. Wien, 2021, S. 204-211; RÖTHLISBERGER, L., Die „Jakobiner" in der Habsburgermonarchie. Frühe Demokraten und ihre Ideen. In: *Beiträge zur Rechtsgeschichte Österreichs*, Vol. 2, Nr. 2, 2012, S. 365-380, hier S. 377-378.

5 „Gesetze wirken nicht zurück: Sie verbinden nur in Ansehung derjenigen Handlungen und Begebenheiten, welche nach Ihrer Kundmachung vorgefallen sind; auf vorher geschehene Handlungen und auf vorher geschehene Rechte haben Sie keine Einfluß, ausser im Falle, daß ein vorher Jemandem von dem Gesetze zugedachtes, aber noch nicht erworbenes durch ein Gesetz für erloschen erklärt würde; denn in diesem Falle hört die Fähigkeit zu einem solchen Rechte sogleich auf." (HARRASOWSKY, P., *Der Codex Theresianus und seine Umarbeitungen 5: Die Umarbeitungen des Codex Theresianus 2: Entwurf Martini's*. Wien, 1886).

mung lautet: „Gesetze wirken nicht zurück; sie haben daher auf vorhergegangene Handlungen und auf vorher erworbene Rechte keinen Einfluß."

Aus heutiger Sicht ist § 5 ABGB lediglich eine einfachgesetzliche Bestimmung, der durch jede andere einfachgesetzliche Bestimmung derogiert werden kann. Damit ist seine normative Bedeutung ziemlich gering. Die heute herrschende Lehre leitet aus § 5 ABGB lediglich ab, dass Gesetze im Zweifel nicht rückwirken und eine Rückwirkung daher ausdrücklich festgelegt werden muss.[6]

Die Intention des historischen Gesetzgebers ging aber weiter. Schon aus der Formulierung des § 5 ABGB ergibt sich, dass hier nicht bloß eine bloße Zweifelsregel, sondern eine allgemein verbindliche Vorgabe für künftige (Zivil-)Gesetze beabsichtigt war. Aus heutiger Sicht wäre das eher eine verfassungsrechtliche Bestimmung gewesen, wie überhaupt viele Bestimmungen der Einleitung des ABGB mehr staatsrechtlichen als zivilrechtlichen Charakter haben.[7] Freilich gab es in der absoluten Monarchie des frühen 19. Jahrhunderts noch keinen Begriff eines übergeordneten formellen Verfassungsrechts mit erhöhter Bestandskraft.

Es ist klar, dass mit § 5 ABGB ein allgemeiner Grundsatz für die Gesetzgebung normiert werden sollte, doch Strafgesetze waren bei der Entstehung dieser Bestimmung kein besonderes Thema. Bei der Beratung wurden verschiedene zivilrechtliche Details im Zusammenhang mit der Rückwirkung diskutiert, während das Strafrecht nicht erwähnt wurde.[8]

Auch Franz von Zeiller, der nicht nur das ABGB, sondern auch das StG 1803 maßgeblich gestaltet hatte,[9] ging in seinem Kommentar zum ABGB im Rahmen des § 5 überhaupt nicht auf die Rückwirkung von Strafgesetzen ein.[10] Das mag auch damit zusammenhängen, dass sich die Einleitung des ABGB laut ihrer eigenen Überschrift auf die „bürgerlichen Gesetzen überhaupt" bezog ist und nicht etwa auf die „Gesetze überhaupt".

Nicht für Gesetze überhaupt, sondern nur in Bezug auf Strafgesetze, dafür nun aber explizit auf Verfassungsebene, wurde die Rückwirkung am Kremsierer Reichstag verhandelt, was schließlich zu folgender Bestimmung in § 4 Abs 1 des Kremsierer Grundrechtsentwurfs führte: „Eine Strafe kann nur durch gerichtlichen Spruch nach einem zur Zeit der strafbaren Handlung schon bestandenen Gesetze verhängt werden."[11] Die in Kremsier ausgearbeiteten Grundrechte blieben aber Entwurf, und in allen folgenden Verfassungen der Monarchie war ein strafrechtliches Rückwirkungsverbot nicht mehr vorgesehen.

Am selben Tag, dem 4. März 1849, an dem Kaiser Franz Joseph die oktroyierte Märzverfassung – ohne Rückwirkungsverbot – erließ, richtete er durch kaiserliches Patent auch das Reichsgesetzblatt ein, und erließ dabei allgemeine Regeln über das Inkrafttreten von Gesetzen war.[12] In § 3 dieses Patents wurde festgelegt, dass die Gesetze grundsätzlich 30 Tage nach Versendung des Reichsgesetzblatts in Kraft treten sollten, allerdings nur „wenn diesfalls nicht in einzelnen Fällen eine andere Bestimmung getroffen wird."

Durch ein Patent von 1852 wurde die 30-tägige Legisvakanz auf 45 Tage verlängert,[13] und diese Regelung wurde vom Gesetz über die Kundmachung von Gesetzen von 1869 übernommen. Sie galt weiterhin nur, „wenn in denselben [den Gesetzen] selbst nicht ausdrücklich eine andere Bestimmung getroffen wird".[14] Aus dem Wortlaut dieser Regelungen über das Inkrafttreten der Gesetze ging nicht notwendigerweise hervor, dass Gesetze auch zurück wirken konnten;[15] sie wurden aber allgemein so verstanden, dass die Rückwirkung eines Gesetzes möglich war, wenn dieses Gesetz sie ausdrücklich vorsah.[16] Tatsächlich wurden auch rückwirkende Gesetze, allerdings nicht im Strafrecht, erlassen.[17]

Die Republik übernahm zunächst das Konzept einer grundsätzlich 45-tägigen Legisvakanz, von der einzelne Gesetze bei ausdrücklicher Anordnung abweichen konnten.[18] Mit dem B-VG wurde das Inkrafttreten der Gesetze 1920 erstmals auf verfassungsrechtlicher Ebene geregelt. Die Legisvakanz als Normalfall wurde aufgegeben und Art. 49 Abs. 1 ordnete bezüglich der Bundesgesetze an: „Ihre verbindende Kraft beginnt, wenn nicht ausdrücklich anderes bestimmt ist, nach Ablauf des Tages, an dem das Stück des Bundesgesetzblattes, das die Kundmachung enthält, herausgegeben und versendet wird".[19]

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[6] BYDLINYKI, P. § 5 Rz 1. In: KOZIOL, H., BYDLINSKY, P., BOLLENBERGER, R. (Hrsg.), *ABGB. § 1-43*. Wien, 2014.

[7] WALTER, R., ABGB und Verfassung. Zur einhundertfünfzigjährigen Geltung des ABGB in Vorarlberg. In: *Österreichische Juristenzeitung*, Vol. 21, Nr. 1, S. 1-11, hier S. 4-5.

[8] OFNER, J., *Der Ur-Entwurf und die Berathungs-Protokolle des Österreichischen Allgemeinen bürgerlichen Gesetzbuches 1*. Wien, 1889, S. 19-22.

[9] NESCHWARA, C., Franz Zeiller und das Strafrecht: Seine Ambitionen zur Verbesserung des österreichischen Strafgesetzes von 1803. In: *Revista Chilena De Historia Del Derecho*, Vol. 22, Nr. 1, 2010, S. 363-388.

[10] ZEILLER, F., *Commentar über das allgemeine bürgerliche Gesetzbuch für die gesammten deutschen Erbländer der österreichischen Monarchie 1*, Wien/Triest, 1811, § 5.

[11] BERNATZIK, E., *Die österreichischen Verfassungsgesetze*. Wien, ¸1911, Nr. 39a; dazu: LEWISCH, P., *Verfassung und Strafrecht. Verfassungsrechtliche Schranken der Strafgesetzgebung*. Wien, 1993, S. 87-88.

[12] RGBl. 153/1849 = BERNATZIK, *Verfassungsgesetze, Nr. 151*.

[13] § 8 RGBl. 260/1852 = BERNATZIK, *Verfassungsgesetze* (wie FN 11), Nr. 152.

[14] § 6 RGBl. 113/1869 = BERNATZIK, *Verfassungsgesetze* (wie FN 11), Nr. 150.

[15] Die Möglichkeit, in einzelnen Gesetzen „etwas anderes" anordnen zu können, hätte ja auch nur bedeuten können, dass die Legisvakanz verlängert oder verkürzt werden konnte.

[16] ULBRICH, J., *Lehrbuch des österreichischen Staatsrechts. Für den akademischen Gebrauch und die Bedürfnisse der Praxis.* Berlin, 1883, S. 400.

[17] Z.B. § 13 des Wuchergesetzes RGBl. 47/1881.

[18] § 6 StGBl. 7/1918.

[19] Tatsächlich war schon zuvor in den meisten Gesetzen angeordnet worden, dass sie mit dem Tag ihrer Kundmachung in Kraft treten sollten. Somit machte Art. 49 Abs. 1 B-VG den schon bisher faktischen Normalfall auch zur rechtlichen Grundregel; dazu KELSEN, H., FROEHLICH, G., MERKL, A., *Die Bundesverfassung vom 1. Oktober 1920*. Wien, 1922, S. 130. Seit 1. 1. 2004 stellt Art. 49 Abs. 1 B-VG (BGBl. I 100/2003) nicht mehr auf das Versenden des BGBl. ab, sondern auf die Kundmachung.

Durch die Möglichkeit, etwas Anderes zu bestimmen, ergab sich schon aus der Verfassung, dass rückwirkende Gesetze zulässig waren – und zwar auch Strafgesetze. Hans Kelsen, Georg Froehlich und Adolf Merkl meinten in Ihrem Kommentar zum B-VG allerdings: „Rückwirkungen sind jedoch aus naheliegenden Gründen nur aus ganz besonders wichtigen Gründen zu rechtfertigen."[20]

Im Gegensatz dazu wurde in Deutschland 1919 in Art. 116 der Weimarer Reichsverfassung verfassungsrechtlich verankert: „Eine Handlung kann nur dann mit einer Strafe belegt werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Handlung begangen wurde."[21] Damit wurde ein Grundsatz, den § 2 Abs. 1 des Reichsstrafgesetzbuchs von 1871[22] schon nahezu gleichlautend auf einfachgesetzlicher Ebene in normiert hatte, in den Verfassungsrang gehoben.[23]

In Österreich hingegen war die – nachteilige – Rückwirkung von Strafgesetzen 1931 verfassungsrechtlich zwar zulässig, aber völlig unüblich. Die Strafrechtskodifikationen der Habsburgermonarchie aus dem späten 18. und dem 19. Jahrhundert folgten dem Günstigkeitsprinzip und wirkten nur insofern zurück, als ihre Regelungen günstiger waren als die des früheren Rechts.[24] Auch sonst gab es – soweit ersichtlich – in Österreich im 19. Jahrhundert und in den ersten drei Jahrzehnten des 20. keine rückwirkenden Strafgesetze, durch die ein Verhalten nachträglich für strafbar erklärt wurde.[25]

Im ersten Weltkrieg gab es aber einen Fall, in dem eine Strafdrohung rückwirkend erhöht wurde. § 60 der kaiserlichen Notverordnung über die Versorgung der Bevölkerung mit Bedarfsgegenständen ordnete an: „Wird eine Tätigkeit oder Handlung, die nach den Kaiserlichen Verordnungen vom 1. August 1914, R.G.Bl. Nr. 194, 7. August 1915, R.G.Bl. Nr. 228, und vom 21. August, R.G.Bl. Nr. 261, über die Versorgung der Bevölkerung mit Bedarfsgegenstände, strafbar war, nach Beginn der Wirksamkeit des neuen Rechts fortgesetzt oder wiederholt, so sind dessen Vorschriften auch auf die früher begangenen Handlungen anzuwenden, wenngleich das neue Recht strenger ist."[26]

Erst die autoritäre Maiverfassung von 1934 brachte ein verfassungsrechtliches Verbot rückwirkender Strafgesetze. Ihr § 21 lautete: „Niemand darf wegen eines Verhaltens bestraft werden, der gegen keine rechtsgültige Strafandrohung verstößt und dessen Strafbarkeit nicht schon vorher gesetzlich bestimmt war." Das Verfassungsübergangsgesetz 1934 legte aber fest: „Artikel III. der Strafgesetznovelle vom 1. Dezember 1931, B.G.Bl. Nr. 365, bleibt unberührt." Es blieb also bei der Rückwirkung in Bezug auf die Untreue.[27]

Die NS-Zeit brachte im Strafrecht eine Abkehr von Legalitätsprinzip und Rückwirkungsverbot.[28] Als 1945 wieder die Bundesverfassung von 1920 in der Fassung von 1929 eingeführt wurde, entsprach die Verfassungsrechtslage jener des Jahres 1931. Es gab also wiederum kein verfassungsrechtliches Verbot der Rückwirkung von Strafgesetzen, wodurch es schon auf einfachgesetzlicher Ebene zulässig war, die Rückwirkung von Strafgesetzen anzuordnen.

Eine verfassungsrechtliche Verankerung des Rückwirkungsverbots wurde nach dem Zweiten Weltkrieg vielleicht auch deshalb nicht erwogen, weil rückwirkende Strafgesetze im Hinblick auf die juristische Aufarbeitung der Verbrechen der NS-Zeit nötig schienen. Tatsächlich wurden mit dem NS-Verbotsgesetz[29] und dem Kriegsverbrechergesetz[30] noch im Jahr 1945 zwei Gesetze erlassen, die auch rückwirkende Strafbestimmungen enthielten.[31] Beide Gesetze wurden allerdings als Verfassungsgesetze und somit in einer Form erlassen, die sogar bei einem verfassungsrechtlichen Rückwirkungsverbot zulässig gewesen wäre.

In (West-)Deutschland wurde das Rückwirkungsverbot auch nach dem Zweiten Weltkrieg wieder verfassungsrechtlich verankert. Wie schon zuvor die Weimarer Reichsverfassung untersagte auch das Bonner Grundgesetz die Rückwirkung von Strafgesetzen.[32] In Österreich hingegen wurde das Rückwirkungsverbot erst 1958 mit dem Beitritt zur EMRK bzw. 1964 mit der Klarstellung, dass sie in Österreich im Verfassungsrang steht und unmittelbar anwendbar ist,[33] verfassungsrechtlich verankert.

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20 Dazu: KELSEN, FROEHLICH, MERKL, *Bundesverfassung* (wie FN 19) 130.

21 dRGBl. 1919, S. 1383.

22 dRGBl. 1871 S 127.

23 Dazu: GERLAND, H., Artikel 116. Nulla poena sine lege. In: NIPPERDEY, H.C., *Die Grundrechte und Grundpflichten der Reichsverfassung. Kommentar zum zweiten Teil der Reichsverfassung 1*. Berlin, 1929, S. 368-287; zu den Wirkungen der Grundrechte der Weimarer Reichsverfassung: GUSY, C., *Die Weimarer Reichsverfassung*. Tübingen, 1997, S. 280-286.

24 Josephinisches Strafgesetz I, § 1 (JGS 611/1787), dazu DOMANIG, *Josephina zur Franciscana* (wie FN 4) S. 34-35; Kundmachungspatent zum StG 1803 letzter Absatz (JGS 626/1803); Kundmachungspatent StG 1852 Art. IX (RGBl. 117/1852), dazu HYE, A., *Das österreichische Strafgesetz über Verbrechen, Vergehen und Übertretungen und die Preßordnung vom 27. Mai 1852*. Wien, 1852, S. 129-132.

25 Auch in Deutschland gab es zwischen der Reichsgründung und der Weimarer Reichsverfassung nur eine einzige rückwirkende Strafbestimmung, die allerdings eher eine legistische Panne war. Durch den Zollvertrag zwischen dem Deutschen Reich und Österreich-Ungarn wurden Verstöße gegen österreichisch-ungarische Zollvorschriften auch nach deutschem Recht strafbar. Der Zollvertrag sah sein eigenes Inkrafttreten am 1. Juli 1881 vor, wurde aber erst am 26. Juli 1881 im deutschen Reichsgesetzblatt kundgemacht, sodass er mit einem knappen Monat Rückwirkung in Kraft trat. Obwohl die Strafbestimmung wohl nie rückwirkend angewendet wurde, löste diese kurze Rückwirkung in der deutschen Literatur heftige Kritik aus (HECKER, *Verbot rückwirkender Strafgesetze* (wie FN 3) 63).

26 RGBl. 131/1917; KANTOR, S., Der Gesetzentwurf über die „Untreue". In: *Neue Freie Presse*, Nr. 24111 vom 29. 10. 1931, S. 13.

27 Dazu ENDER, O., *Die Übergangsbestimmungen zur neuen österreichischen Verfassung*. Wien/Leipzig, 1934, S. 7.

28 SCHREIBER, *Gesetz und Richter* (wie FN 3), S. 191-200; KREY, *Keine Strafe ohne Gesetz* (wie FN 3), S. 79-80.

29 StGBl. 13/1945.

30 StGBl. 32/1945.

31 MALANIUK, W., *Lehrbuch des Strafrechts I: Allgemeine Lehren*. Wien, 1947, S. 47.

32 Art. 103 Abs. 2 GG: „Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde."

33 BGBl. 59/1964.

Art. 7 Abs. 1 der Konvention besagt: „Niemand darf wegen einer Handlung oder Unterlassung verurteilt werden, die zur Zeit ihrer Begehung nach innerstaatlichem oder internationalem Recht nicht strafbar war. Es darf auch keine schwerere als die zur Zeit der Begehung angedrohte Strafe verhängt werden.“ [34]

Anders als das deutsche Grundgesetz sieht Art. 7 Abs. 2 EMRK als Reaktion auf die NS-Verbrechen in der sogenannten „Nürnberg-Klausel“ aber eine Einschränkung des Verbots vor: „Dieser Artikel schließt nicht aus, daß jemand wegen einer Handlung oder Unterlassung verurteilt oder bestraft wird, die zur Zeit ihrer Begehung nach den von den zivilisierten Völkern anerkannten allgemeinen Rechtsgrundsätzen strafbar war.“ [35]

Auch in den Pakt über politische und bürgerliche Rechte von 1966 wurde ein strafrechtliches Rückwirkungsverbot aufgenommen, das ebenfalls durch die sogenannte Nürnberg-Klausel eingeschränkt wird. Österreich ist seit 1978 Partei dieses Paktes, der aber im Gegensatz zur EMRK nicht unmittelbar anwendbares Verfassungsrecht ist.[36] Für die Europäische Union ist das strafrechtliche Rückwirkungsverbot samt Nürnberg-Klausel schließlich in Art.49 der Charta der Grundrechte der Europäischen Union verankert.[37]

Auch im österreichischen StGB von 1974 wurden Gesetzmäßigkeitsprinzip und Rückwirkungsverbot gleich zu Beginn in § 1 Abs. 1 verankert: „Eine Strafe oder eine vorbeugende Maßnahme darf nur wegen einer Tat verhängt werden, die unter eine ausdrückliche gesetzliche Strafdrohung fällt und schon zur Zeit ihrer Begehung mit Strafe bedroht war.“ Ursprünglich war vorgesehen gewesen, diese Bestimmung im Verfassungsrang zu beschließen, doch da das StGB schließlich wegen der Fristenlösung beim Schwangerschaftsabbruch nur mit den Stimmen der Regierung beschlossen wurde, ist auch § 1 nur eine einfachgesetzliche Bestimmung.[38]

3. Das Rückwirkungsverbot in der Lehre

1801 führte Paul Johann Anselm von Feuerbach am Beginn seines Strafrechts-Lehrbuchs aus:[39] „Nulla poena sine lege. Nulla poena sine crimine. Nullum crimen sine poena legali.“ [40] Diese Sätze stammten trotz der lateinischen Sprache nicht aus dem antiken römischen Recht, sondern waren in dieser Form eine Neuschöpfung Feuerbachs, der damit allerdings Gedanken zusammenfasste, die sich schon zuvor in der Aufklärung entwickelt hatten.[41]

Die Forderung Feuerbachs ohne gesetzliche Anordnung keine Strafen zu verhängen, schloss die rückwirkende Schaffung von Delikten nicht notwendigerweise aus, solange sie durch Gesetz erfolgt wäre. Schon Feuerbach selbst lehnte rückwirkende Strafgesetze aber vor dem Hintergrund seiner Strafrechtstheorie des psychologischen Zwangs ab. Danach war die Abschreckung der wesentliche Strafzweck. Strafdrohungen sollten im Vorhinein einen psychologischen Zwang auf potentielle Straftäter ausüben und sie dadurch von Straftaten abhalten. Das war bei rückwirkender Pönalisierung aber nicht möglich, weshalb rückwirkende Strafgesetze nach Feuerbachs Theorie sinnwidrig waren.[42]

Feuerbachs Grundsätze wurden in der österreichischen und deutschen Strafrechtswissenschaft des 19. und frühen 20. Jahrhunderts weitgehend anerkannt.[43] Ihr wichtigster Kritiker war der prominente deutsche Strafrechtler Karl Binding.[44] Nach seiner Auffassung kam es darauf an, dass ein bestimmtes Verhalten schon im Vorhinein verboten war; eine konkrete Strafdrohung konnte nach Binding hingegen auch durch ein rückwirkendes Strafgesetz eingeführt werden. Diese Auffassung ist vor dem

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[34] Dazu PAIUSCO, S., *Nullum Crimen Sine Lege, the European Convention on Human Rights and the Foreseeability of the Law*. Baden-Baden, 2021. Ein Rückwirkungsverbot wurde auch in Art. 11 Abs. 2 der Allgemeinen Erklärung der Menschenrechte postuliert: „Niemand darf wegen einer Handlung oder Unterlassung verurteilt werden, die zur Zeit ihrer Begehung nach innerstaatlichem oder internationalem Recht nicht strafbar war. Ebenso darf keine schwerere Strafe als die zum Zeitpunkt der Begehung der strafbaren Handlung angedrohte Strafe verhängt werden.“ (A/RES/217, UN-Doc. 217/A-(III)).

[35] Die Bundesrepublik Deutschland ratifizierte die EMRK zunächst mit einem Vorbehalt zur „Nürnberg-Klausel“ (dBGBl. 1954 II S. 14) nahm den Vorbehalt dann aber 2003 zurück (dBGBl. 2003 II S. 1580).

[36] „Artikel 15 (1) Niemand darf wegen einer Handlung oder Unterlassung verurteilt werden, die zur Zeit ihrer Begehung nach inländischem oder nach internationalem Recht nicht strafbar war. Ebenso darf keine schwerere Strafe als die im Zeitpunkt der Begehung der strafbaren Handlung angedrohte Strafe verhängt werden. Wird nach Begehung einer strafbaren Handlung durch Gesetz eine mildere Strafe eingeführt, so ist das mildere Gesetz anzuwenden. (2) Dieser Artikel schließt die Verurteilung oder Bestrafung einer Person wegen einer Handlung oder Unterlassung nicht aus, die im Zeitpunkt ihrer Begehung nach den von der Völkergemeinschaft anerkannten allgemeinen Rechtsgrundsätzen strafbar war.“ (BGBl. 591/1978).

[37] „(1) Niemand darf wegen einer Handlung oder Unterlassung verurteilt werden, die zur Zeit ihrer Begehung nach innerstaatlichem oder internationalem Recht nicht strafbar war. Es darf auch keine schwerere Strafe als die zur Zeit der Begehung angedrohte Strafe verhängt werden. Wird nach Begehung einer Straftat durch Gesetz eine mildere Strafe eingeführt, so ist diese zu verhängen. (2) Dieser Artikel schließt nicht aus, dass eine Person wegen einer Handlung oder Unterlassung verurteilt oder bestraft wird, die zur Zeit ihrer Begehung nach den allgemeinen, von der Gesamtheit der Nationen anerkannten Grundsätzen strafbar war.“ (ABl. C 202 vom 7. 6. 2016, S. 389-405).

[38] LEWISCH, *Verfassung und Strafrecht* (wie FN 11), S. 89.

[39] MERZBACHER, F., Feuerbach, Paul Johann Anselm Ritter von. In: *Neue Deutsche Biographie 5*. Berlin, 1961, S. 110-111; RADBRUCH, G., *Paul Johann Anselm Feuerbach. Ein Juristenleben*. Göttingen, ł1969.

[40] FEUERBACH, A., *Lehrbuch des gemeinen in Deutschland geltenden Peinlichen Rechts*. Gießen, [1]1801, S. 20.

[41] SCHREIBER, *Gesetz und Richter*, S. 17; zur Vorgeschichte: SCHÖCKEL, *Entwicklung* (wie FN 3).

[42] FEUERBACH, *Lehrbuch* (wie FN 40) S. 12-20; dazu auch COTE BARCO, G., *Rückwirkung* (wie FN 3), S. 115-119; HECKER, *Verbot rückwirkender Strafgesetze* (wie FN 3), S. 60-62; KREY, *Keine Strafe ohne Gesetz* (wie FN 3), S. 59-60; SCHREIBER, *Gesetz und Richter* (wie FN 3), S. 102-112.

[43] KREY, Keine Strafe ohne Gesetz (wie FN 3), S. 61-62; SCHREIBER, *Gesetz und Richter* (wie FN 3), S. 121-155.

[44] SCHRÖDER, J., Karl Binding (1840–1920). In: KLEINHEYER, G./SCHRÖDER, G. (Hrsg.), *Deutsche und Europäische Juristen aus neun Jahrhunderten*. Heidelberg, [5]2008, S. 62–66.

Hintergrund von Bindings strikter Unterscheidung zwischen (Straf-)Norm und Strafgesetz zu sehen.[45]

Normen waren nach Bindings Auffassung Befehle, durch die ein bestimmtes Verhalten geboten oder verboten wurde. Sie sollten sich nur zum Teil in Gesetzen finden. Gerade die wichtigsten gehörten – so Binding – dem Gewohnheitsrecht an.[46] Im Gegensatz dazu waren Strafgesetze nach dieser Auffassung keine Befehle, sondern berechtigende Rechtssätze, die regelten, welche Verletzungen von Normen der Staat wie bestrafen konnte.[47] Aus dieser Differenzierung ergab sich für Binding, dass Normen nicht zurückwirken konnten,[48] Strafgesetze hingegen schon, weil letztere nur ein bereits verbotenes Verhalten auch strafbar machten.[49]

Trotz seiner Prominenz konnte sich Bindings Lehre nicht durchsetzen – weder in Deutschland noch in Österreich. In der deutschen Strafrechtswissenschaft wurde sie zumindest diskutiert, in Österreich weniger. Für die überwiegende Mehrheit der österreichischen Strafrechtler des 19. und frühen 20. Jahrhunderts war das Rückwirkungsverbot ein selbstverständlicher Grundsatz.[50]

Nur August Finger[51] übernahm in seinem Lehrbuch des österreichischen Strafrechts die Theorie seines akademischen Lehrers Binding. Auch er differenzierte zwischen Normen und Strafgesetzen und sprach sich grundsätzlich für eine allgemeine Rückwirkung der Strafgesetze aus.

Dann musste freilich auch Finger einräumen: „Vom Standpunkte der Billigkeit werden hier Ausnahmen festzustellen sein. In dieser Hinsicht dürfte besonders das Verlangen gerechtfertigt sein, dass ein neues Gesetz, welches eine früher nicht mit Strafe bedrohte Handlung unter Strafe zieht, auf die frühere Handlung ebensowenig Anwendung finden sollte, als das Gesetz, welches gegen eine schone früher strafbare Handlung strengere Strafe androht.“[52] Im Ergebnis gab es in der österreichischen Lehre im 19. und frühen 20. Jahrhundert also niemanden, der eine nachteilige Rückwirkung von Strafgesetzen befürwortete.

4. Die Rückwirkung bei Einführung der Untreue

Vor dem Hintergrund der allgemeinen Ablehnung rückwirkender Strafgesetze ist es nicht erstaunlich, dass die Rückwirkung bei der Einführung der Untreue in allen Stellungnahmen zum Gesetz thematisiert und nahezu einhellig abgelehnt wurde. Daher ist es umso interessanter, mit welchen Argumenten die Rückwirkung in Regierung und Parlament begründet wurde.

Auch die Befürworter einer rückwirkenden Einführung der Untreue gestanden zu, dass sie ein Abgehen von einem alten und anerkannten Grundsatz der Strafgesetzgebung bedeutete.[53] Das einfachste – und nicht sonderlich juristische – Argument für dieses Abgehen war der Verweis auf die außergewöhnlichen Umstände im Zusammenhang mit der CA-Krise.

Generalprokurator Erw(e)in Höpler[54] wies etwa in der Wiener juristischen Gesellschaft zunächst darauf hin, dass es in der jüngeren österreichischen Strafgesetzgebung keine rückwirkenden Strafgesetze gegeben hatte, und meinte, dass es sich dabei auch um einen wichtigen Grundsatz handelte. Dann aber erklärte Höpler: „Dagegen können kriminalpolitische Forderungen eine Rückwirkung des Gesetzes ausnahmsweise rechtfertigen. Solche kriminalpolitische Gründe liegen hier vor.“[55]

Für den Generalprokurator bestanden diese kriminalpolitischen Gründe in einer Vertrauenskrise gegenüber der Justiz. Die war seiner Meinung wohl dadurch entstanden, dass die Justiz die – tatsächlichen oder vermeintlichen – Schuldigen an der CA-Krise bisher nicht hatte betrafen können.

Die Befürworter der Rückwirkung verwiesen außerdem darauf, dass die Einführung der Untreue schon lange vorgesehen war somit keine (reine) Anlassgesetzgebung war. Immerhin war schon lange geplant gewesen, die Untreue unter Strafe zu stellen – zuletzt im gemeinsamen deutsch-österreichischen Strafrechtsentwurf von 1927 in § 348.[56]

Die Regierungsvorlage selbst nannte zwei Argumente für die Rückwirkung der Untreue. Sie verwies zunächst darauf, dass

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[45] BINDING, K., *Die Normen und ihre Übertretung eine Untersuchung über die rechtmäßige Handlung und die Arten des Delikts.* Leipzig, 1872; BINDING, K., *Handbuch des Strafrechts 1.* Leipzig, 1885, S. 60.

[46] BINDING, *Normen* (wie FN 45), S. 31-33.

[47] Ebd. S. 13-14.

[48] Ebd. S. 96-98.

[49] Ebd. S. 78-96.

[50] HYE-GLUNEK, *Strafgesetz* (wie FN 24), S. 130: „Die legislative Rechtfertigung der in dem vorstehenden Artikel IX enthaltenen Bestimmung unseres Gesetzes liegt auf flacher Hand. Es ist ein gleich unbestritten von der Wissenschaft, dem schlichten Menschenverstand und den Gesetzen aller civilisirten Völker anerkannter Grundsatz, daß Strafgesetze allerdings, allein auch nur in so weit auf früher begangene Handlungen zurückwirken dürfen, als dadurch dem Thäter kein größeres Uebel zugefügt wird, als ihn nach der zur Zeit der Begehung seiner Handlungen bestandenen Strafgesetze treffen könnte.“; LAMMASCH, H., *Grundriß des Strafrechts*. Leipzig, [4]1911, S. 21: „Zweifellos können nur solche Handlungen bestraft werden, die schon im Zeitpunkt ihrer Begehung mit Strafe bedroht waren. […] Die Bestrafung ist daher ausgeschlossen, wenn die Tat nach dem zur Zeit ihrer Verübung geltenden Gesetze überhaupt nicht mit Strafe bedroht war oder wenn dem Täter nach diesem Gesetze ein Schuld- oder Strafausschließungs-, Rechtfertigungs- oder Strafaufhebungsgrund zugute kam. Keinesfalls aber hat der Verbrecher aus seinem Verbrechen ein Recht darauf erworben, daß ihn keine strengere Strafe treffen dürfe als diejenige, welche zur Zeit der Begehung auf seine Tat gedroht war. Wohl aber spricht die Billigkeit dafür, daß der zufällige Zustand, daß seine Tat erst später, zur Zeit der Geltung eines strengeren Gesetzes, bekannt wurde, ihm nicht schaden solle.“

[51] Zu Finger: LIEBERWIRTH, R., Finger, August. In: *Neue Deutsche Biographie 5*. Berlin, 1961, S. 157-158.

[52] FINGER, A., *Das Strafrecht 1.* Berlin, 1894, S. 80.

[53] Regierungsvorlage (RV) 222 der Beilagen zu den Stenographischen Protokollen des Nationalrats (BlgNR) IV. Gesetzgebungsperiode (GP) S. 2.

[54] *Österreichisches Biographisches Lexikon 2*. Wien, 1994, S. 363-364.

[55] Wiener Juristische Gesellschaft. Die Regierungsvorlagen zum Strafgesetz und zur Strafprozessordnung. In: *Österreichische Anwaltszeitung*, Vol. 9, Nr. 1, 1932, S. 5-14, hier S. 8.

[56] RENTROP, K., *Untreue und Unterschlagung (§ 266 und 246 StGB). Reformdiskussion und Gesetzgebung seit dem 19. Jahrhundert.* Berlin, 2007, S. 121-125; KADECKA, F., *Der österreichische Strafgesetzentwurf vom Jahre 1927 mit Erläuterungen aus der Begründung und Anmerkungen*. Wien, 1927, S. 123-124.

die Rückwirkung mit Feuerbachs Theorie des psychologischen Zwanges nicht vereinbar war, weil nur eine im Vorhinein bekannte Strafdrohung ihren Zweck erfüllen und die Rechtsunterworfenen von Straftaten abhalten konnte.

Dem hielt die Regierungsvorlage entgegen, dass man bei konsequenter Fortführung dieses Gedankens niemanden wegen der Übertretung eines Gesetzes bestrafen könne, das der Täter bei der Übertretung nicht gekannt hatte. Das war aber nicht der Fall, weil die Unkenntnis der Strafdrohung kein Entschuldigungsgrund war.[57] Daher meinte die Regierungsvorlage: „Ob nun aber eine Strafdrohung noch nicht besteht oder ob sie der Täter nur nicht kennt, das kann für seine Beurteilung und Behandlung keinen Unterschied machen."[58]

Außerdem berief sich die Regierung in ihrer Begründung für die Rückwirkung des neuen Strafgesetzes auf die Lehre Bindings. Ferdinand Kadecka,[59] der als Leiter der Strafrechtsabteilung im Justizministerium die Regierungsvorlage ausgearbeitet hatte, führte in den Erläuterungen dazu aus, dass man zwischen Verbot und Strafdrohung differenzieren müsse. Eine undifferenzierte Ablehnung jeglicher Rückwirkung war für ihn ein bloßes Vorurteil. Auch Kadecka meinte, es wäre „eine schreiende Ungerechtigkeit, jemand für eine Handlung zu bestrafen, die zur Zeit, als er sie beging, noch erlaubt war."[60]

Ganz anders war seiner Meinung nach der Fall zu beurteilen, dass eine zivilrechtlich bereits verbotene Handlung rückwirkend unter Strafe gestellt wurde. Hier sah Kadecka keinen Grund, das Vertrauen darauf zu schützen, dass eine bestimmte Handlungsweise zwar verboten, aber nicht strafbar war. In seiner Verteidigung der Regierungsverlage in der Neuen Freien Presse erklärte er:

„Die ungetreue Vermögensverwaltung ist nun, seit es Recht und Gesetze gibt, immer unrecht gewesen. Wer sich dieses Unrechtes schuldig macht, hat nicht auf die Rechtsordnung vertraut, sondern sie verhöhnt und von Treu und Glauben auf seiner Seite zu reden, wäre bittere Ironie. Wer bewußt Unrecht tut, muß die Folgen auf sich nehmen: nicht nur die, die er vorher einkalkuliert hat, sondern alle, mit denen sich die Gesellschaft gegen Rechtsbrüche zur Wehr setzt."[61]

Ob Kadecka persönlich wirklich von der Rückwirkung der Untreue überzeugt war, ist zumindest fraglich. Als der christlich-soziale Nationalratsabgeordnete Erwin Waihs[62] im Juni 1931 das Justizministerium um einen Gesetzesentwurf zur Einführung der Untreue gebeten hatte, schrieb Kadecka zur dort vorgesehenen Rückwirkung: „Ich möchte jedoch zur Erwägung stellen, ob diese Bestimmung, die sich als ein Novum in der Strafgesetzgebung darstellt, nicht besser zu streichen wäre."[63] Auch in seiner Verteidigung des Regierungsvorlage zur Untreue erklärte er zur Rückwirkung: „Das ist die Auffassung der Regierungsvorlage. Sie ist gewiß nicht die einzig mögliche. Aber mit bloßen Schlagworten kann man sie nicht widerlegen."[64]

Tatsächlich war die Kritik an der Untreue-Vorlage juristisch nicht immer besonders fundiert. Manche Kritiker, die sich in ihrer Analyse nicht auf bloße Schlagworte beschränkten, gestanden zu, dass die Regierungsvorlage zumindest überlegt begründet war, auch wenn sie von deren Argumentation letztendlich trotzdem nicht überzeugt waren.

Friedrich Schnek, ein der Sozialdemokratie zumindest nahestehender Anwalt,[65] etwa erkannte an: „Die sonst so fein durchgeführte Unterscheidung von Norm und Sanktion ist auf diesem Gebiete [dem Strafrecht] tatsächlich arg vernachlässigt worden und es gebührt dem Verfasser der RegVorl. jedenfalls das Verdienst, diesen dogmatisch und kriminalpolitisch gleich interessanten Fragenkomplex in neue Beleuchtung gerückt zu haben."[66] Trotzdem kam Schnek zu dem Ergebnis: „Eine Strafe auf Grund der Rückwirkung dieses Gesetzes verhängt, wird immer nur als Racheakt der Staatsgewalt aufgefasst werden."[67]

Die Wiener Rechtsanwaltskammer meinte in ihrem Gutachten hingegen, dass Bindings Lehre in der Begründung zur Regierungsvorlage nicht richtig wiedergegeben worden sei. Die Regierungsvorlage rechtfertigte die Rückwirkung damit, dass der Vollmachtsmissbrauch schon bisher nicht erlaubt, sondern zivilrechtlich verboten, wenn auch nicht strafrechtlich sanktioniert gewesen war. Die Rückwirkung sei von Binding – so die Kammer – „nur für solche Handlungen als zulässig erklärt worden […], die auch schon früher ‚strafgesetzlich' verboten, wenngleich nicht strafbar war."[68]

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[57] § 2 ABGB: „Sobald ein Gesetz gehörig kund gemacht worden ist, kann sich niemand damit entschuldigen, daß ihm dasselbe nicht bekannt geworden sey.", dazu nur ZEILLER, *Commentar 1* (wie FN 10), S. 34-37; § 3 StG: „Mit der Unwissenheit des gegenwärtigen Gesetzes über Verbrechen kann sich Niemand entschuldigen.", dazu nur HYE-GLUNEK, *Strafgesetz* (wie FN 24), S. 213-218.

[58] RV 222 BlgNR IV. GP, S. 2-3.

[59] GRASSBERGER, R., Kadecka, Ferdinand. In: *Neue Deutsche Biographie 10.* Berlin, 1974, S. 721.

[60] RV 222 BlgNR IV. GP, S. 2.

[61] KADECKA, F., Der Gesetzentwurf über die Bestrafung der untreuen Vermögensverwaltung. In: *Neue Freie Presse*, Nr. 24120 vom 7. 11. 1931, S. 10 und Nr. 24123 vom 10. 11. 1931, S. 10, hier Nr. 24123.

[62] Lebensdaten auf: https://www.parlament.gv.at/person/1401.

[63] Österreichisches Staatsarchiv (ÖStA), Allgemeines Verwaltungsarchiv (AVA), Justizministerium (BMJ), Allgemeine Reihe, Z. 11.352 (= Grundzahl), Schreiben des BMJ an NR Dr. Erwin Waihs, 18. 7. 1931; die im Akt enthaltene Kopie des Schreibens ist nicht unterschrieben; der dazugehörige Bericht an den Justizminister ist allerdings von Kadecka unterzeichnet; daher ist davon auszugehen, dass das Schreiben an Waihs von ihm stammt oder zumindest mit seiner Zustimmung erstellt wurde.

[64] KADECKA, *Gesetzentwurf, Nr. 24123 vom 10. 11. 1931*, S. 10.

[65] LEBENSAFT, E. / MENTSCHL, Ch., Schnek, Friedrich (1900-1947), Rechtsanwalt und Jurist. In: *Österreichisches Biographisches Lexikon 10*. Wien, 1994, S. 390-391.

[66] SCHNEK, F., Der Gesetzentwurf über die Bestrafung der Untreue. In: *Juristische Blätter,* Vol. 20, Nr. 22, 1931, S. 478-481, hier S. 480.

[67] Ebd.

[68] Gutachten der Rechtsanwaltskammer in Wien zum Gesetzentwurf über die Bestrafung der ungetreuen Vermögensverwaltung. In: *Oesterreichische Anwalts-Zeitung*, Vol. 8, Nr. 24, 1931, S. 473-475, hier S. 474.

Tatsächlich lag der Irrtum über Bindings Lehre hier weniger bei der Regierungsvorlage als bei der Anwaltskammer. Schon die Terminologie des Gutachtens der Kammer entsprach nicht jener Bindings, für den sich das Verbot gerade nicht aus einem „Strafgesetz", sondern aus einer „Norm" ergab.[69] Außerdem differenzierte Binding gerade nicht zwischen strafrechtlichen und anderen Normen – für ihn konnte die Übertretung jeglicher Normen strafgesetzlich sanktioniert werden.[70]

In einem waren sich Befürworter und Kritiker der Rückwirkung der Untreue aber einig: dass Ehrenfests Verhalten höchst verwerflich gewesen war. Auch die Autoren und Institutionen, die sich gegen die Rückwirkung aussprachen, verteidigten ihn nicht.[71] In der großen Mehrheit der Stellungnahmen wurde der Grundsatz, dass Strafgesetze nicht zurückwirken, aber über die Möglichkeit einer Bestrafung des ehemaligen CA-Direktors gestellt.

Deshalb wurde die Regierungsvorlage zur Untreue mit harten Worten bedacht. Sie wurde als Ungeheuerlichkeit und Monstrosität bezeichnet,[72] der Regierung wurden Populismus und Demagogie vorgeworfen[73] und die Novelle als mögliche Vorstufe der Tyrannis gesehen.[74] Wie umstritten die Rückwirkung war, wurde nicht zuletzt daran deutlich, dass in der Neue Freie Presse vor Kadeckas Verteidigung der Regierungsvorlage ausdrücklich festgehalten wurde: „Wir veröffentlichen die folgenden Ausführungen des geehrten Verfassers, ohne uns mit ihnen zu identifizieren."

Mit einer Ausnahme bezweifelte keiner der Kritiker, dass rückwirkende Strafgesetze in Österreich verfassungsrechtlich zulässig waren. Lediglich nach Meinung eines in der linksliberalen Boulevardzeitung „Die Stunde"[75] zitierten, namentlich nicht genannten „hervorragenden Juristen" war ein „Verfassungsgesetz notwendig, weil es bedenklich erscheint, die persönliche Freiheit für Dinge, die nach dem bisherigen Strafgesetz nicht strafbar waren, für die Zukunft aufzuheben".[76] Schon dieser Artikel wies darauf hin, dass diese Meinung nicht von allen Juristen geteilt wurde, und tatsächlich wurde im Lauf des Gesetzgebungsprozesses nicht weiter thematisiert, ob wegen der rückwirkenden Einführung der Untreue ein Verfassungsgesetz notwendig war.

Allerdings wurde darauf hingewiesen, dass die Rückwirkung von Strafgesetzen im Deutschen Reicht durch Art. 116 Weimarer Reichsverfassung verboten war und daher nur durch ein Verfassungsgesetz hätte eingeführt werden können. Im Hinblick auf die angestrebte Rechtsvereinheitlichung zwischen Österreich und Deutschland gerade im Bereich des Strafrechts,[77] war es daher problematisch, in Österreich ein Gesetz einzuführen, das in Deutschland verfassungswidrig gewesen wäre.[78]

Besonders ausführlich beschäftigte sich der später in Auschwitz ermordete Rechtsanwalt Fritz Flandrak[79] mit der Frage, ob die rückwirkende Einführung der Untreue zulässig war. Auch er kam zu dem Ergebnis, dass sie in Österreich verfassungsrechtlich zulässig war, in Deutschland hingegen nicht. Vor allem analysierte Flandrak aber – in einer eher begriffsjuristischen Weise –, ob die Rückwirkung mit dem Wesen des Strafrechts vereinbar war. Für Feuerbachs Theorie des psychologischen Zwanges verneinte er das eindeutig, meinte aber, dass Feuerbachs Theorie nicht die einzige war und dass die Rückwirkung mit allen anderen Strafrechtstheorien bzw. Strafzwecken vereinbar war.[80]

Konkret nannte Flandrak Generalprävention, Spezialprävention und Vergeltung. Bezüglich der Generalprävention war für ihn klar, dass auch die rückwirkende Bestrafung geeignet war, andere von vergleichbaren Straftaten abzuhalten. Genauso konnte die rückwirkende Bestrafung seiner Meinung einen einzelnen Täter spezialpräventiv von weiteren Taten abhalten. Bei der Vergeltung war die Sache aus Flandraks Sicht nicht so einfach. Vergeltung durch rückwirkende Strafgesetze kam für ihn nur in Betracht, wenn die bestrafte Handlung schon zuvor verboten, wenn auch nicht strafbar gewesen war – so wie die Untreue in Österreich.[81]

Flandrak kam also zu dem Ergebnis, dass die Rückwirkung von Strafgesetzen in Österreich verfassungsrechtlich zulässig und rechtstheoretisch möglich war. Trotzdem lehnte er sie ab. Er bejahte zwar die Frage, ob ein Strafgesetz zurückwirken kann, verneinte aber die, ob ein Strafgesetz zurückwirken soll.[82]

Das begründete er mit der Rechtssicherheit, wobei es dafür seiner Meinung nach gleichgültig war, ob die bestrafte Handlung früher bereits verboten war oder nicht. Die Rechtssicher-

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[69] In weiterer Folge folgte das Gutachten dann aber doch Bindings Terminologie, indem es sich auf Handlungen bezog, „bezüglich welcher nach der Lehre Bindings schon früher eine strafrechtliche Norm ohne die strafrechtliche Sanktion bestanden hat." (ebd.).

[70] BINDING, *Handbuch* (wie FN 45), S. 60; hier nannte er im HGB enthaltene Normen als Beispiel.

[71] Z.B. LESIGANG, H., Die Untreue bei Vermögensverwaltungen. In: *Reichspost,* Nr. 301 vom 1. 11. 1931, S. 5.

[72] HITSCHMANN, M., Die ‚Untreue' im Gesetz. In: *Neues Wiener Tagblatt,* Nr. 299 vom 30. 10. 1931, S. 12.

[73] KALLIR, M., Das Gesetz gegen Vertrauensmißbrauch. In: *Reichspost,* Nr. 301 vom 1. 11. 1931, S. 5.

[74] RITTLER, Th., Einige Bemerkungen zu den Regierungsvorlagen über die Zusammensetzung der Strafgerichte und über die strafrechtlichen Bestimmungen gegen die Untreue. In: *Allgemeine österreichische Gerichts-Zeitung,* Vol. 82, Nr. 20, 1931, S. 306-308, hier S. 308.

[75] LANG, H./LANG, L./BUCHINGER, W., *Bibliographie der österreichischen Zeitungen 1621–1945, 3.* München, 2003, S. 290-291.

[76] ANONYMUS, Der Plan eines neuen Haftungsgesetzes. Bedenken gegen die vorgeschlagene Fassung. In: *Die Stunde,* Nr. 2589 vom 29. 10. 1931, S. 8.

[77] Zu den strafrechtlichen Vereinheitlichungsbestrebungen: WIETEK, W., Einzelne Rechtsgebiete. In: BRAUNEDER, W. (Hrsg), *Österreichischdeutsche Rechtsbeziehungen I: Rechtsangleichung 1850-1938*. Frankfurt am Main, 1996, S. 199, hier S. 204-223.

[78] So etwa der Rechtsanwalt Ernst Lohsing (SAUER, B./REITER-ZATLOUKAL, I., *Advokaten 1938. The fate of the lawyers and trainees registered with the Austrian Regional Bar associations who were barred from practicing in the legal profession from 1938 to 1945.* Wien, ¸2022, S. 403) in der Diskussion in der Wiener Juristischen Gesellschaft (Wiener Juristische Gesellschaft. Regierungsvorlagen S. 10).

[79] SAUER/REITER-ZATLOUKAL, *Advokaten 1938* (wie FN 78), S. 255.

[80] FLANDRAK, F., Bemerkungen zum Tatbestand der Untreue. In: *Österreichische Richter-Zeitung*, Vol. 25, Nr. 2, 1934, S. 25-27, hier S. 25-26.

[81] Ebd.

[82] Ebd. 26.

heit war für ihn wichtiger als das Schließen von Lücken im Strafrecht – auch wenn es sich wie bei Ehrenfest um Strafbarkeitslücken handelte, die gerade für Laien nur schwer nachvollziehbar wären. Schließlich wies Flandrak darauf hin, dass die einmalige Durchbrechung des Rückwirkungsverbots schon dessen Aufgabe bedeutete:

„Praktisch ist durch eine einmalige Durchbrechung der Grundsatz als solcher bereits aufgehoben und es besteht nunmehr die Gefahr, daß auch künftige Gesetze mit rückwirkender Kraft erlassen werden. In dem Maß als dies der Fall ist, wird die Rechtssicherheit beeinträchtigt und der Charakter unseres Staates als eines Rechtsstaates gefährdet." [83]

Auch andere Autoren betonten, dass schon ein einziges rückwirkendes Strafgesetz ein sehr gefährliches Präjudiz sein konnte. Der Rechtsanwalt Ludwig Raabe etwa meinte in der linksliberalen „Wiener Allgemeinen Zeitung": [84] „Was dies bedeutet, käme unseren Gesetzgebern am deutlichsten zu Bewußtsein, wenn man ihnen vor Augen hielte, daß – sollte sich das Prinzip der Strafrückwirkung einbürgern – bei einem monarchistischen oder kommunistischen Umsturz mit gleichem Rechte die Teilnahme an einer republikanischen Regierung und die Abwehr extremer Rechts- und Linksbestrebungen unter Strafe gestellt werden könnte." [85]

Die Kritik an der Regierungsvorlage zur Untreue kam interessanterweise gerade auch aus regierungsnahen Kreisen. Auch in der christlich-sozialen Reichspost erschien ein Artikel, in dem der Anwalt Hermann Lesigang die Rückwirkung eindeutig negativ beurteilte: „Es ist eine Ironie des Schicksals, daß gerade eine Vorlage, die das anerkennenswerte Bestreben verwirklichen soll, Treue, Glauben und Vertrauen des Vollmachtgebers zum Vollmachtsträger zu stützen und auch strafrechtlich zu schützen, daß gerade dieses Gesetzes selbst sich des größten Verstoßes gegen Treue, Glauben und Vertrauen schuldig macht." [86]

Ebenso wurde die Rückwirkung von den wirtschaftlichen Interessenvertretungen, die der Regierung zumindest näherstanden als der sozialdemokratischen Opposition, praktisch durchgehend abgelehnt. Das galt für die Banken-, Handels- und Industrieverbände ebenso wie für die Handelskammern oder die Börsekammer.[87] Die Stellungnahmen mancher dieser Organisationen machten aber deutlich, dass deren Ablehnung der Rückwirkung nicht so sehr aus Sorge um grundlegende Rechtsprinzipien resultierte, sondern aus handfester Interessenpolitik.

Der Wiener Handels- und Industrie-Verein etwa kritisierte einerseits die Rückwirkung der Untreue, und erklärte andererseits: „ Erscheint es wegen des speziellen Falles notwendig Ausnahmsbestimmungen zu treffen, weil die geltenden Gesetze keine hinreichende Handhabe bieten, dann möge eine eigene lex Creditanstalt erlassen werden." [88] Ganz ähnlich schlug die Klagenfurter Handelskammer vor, „dass der bestimmte Zweck, zu dessen Erfüllung der bekämpfte Gesetzentwurf in Kraft treten soll, doch wahrscheinlich einfacher und ohne so grosse Beunruhigung der gesamten Wirtschaft durch ein ‚Drittes Kreditanstaltsgesetz' erreicht werden könnte." [89]

Alle rechtsstaatlichen Bedenken gegen die Rückwirkung eines allgemeinen Gesetzes zur Untreue mussten zumindest in demselben Ausmaß, wenn nicht sogar noch mehr für ein hier gefordertes Spezialgesetz zur Bestrafung Ehrenfests und allfälliger anderer Funktionäre der CA gelten – zumal auch ein solches Spezialgesetz notwendigerweise hätte zurückwirken müssen, um seinen Zweck zu erfüllen.

Dass die Rückwirkung auch in den Regierungsparteien nicht unumstritten war, wurde auch an der Rede des christlich-sozialen Berichterstatters Karl Gottfried Hugelmann [90] im Bundesrat am 15. Dezember 1931 deutlich, in der er seine diesbezügliche Skepsis nicht verbarg. Er erklärte, „daß wir damit einen Weg einschlagen, der unter Umständen nicht ganz unbedenklich sein könnte." [91]

Außerdem sagte Hugelmann, dass er die Auffassung der Regierungsvorlage, das Rückwirkungsverbot sei nur ein tradiertes Vorurteil, nicht teilen könne. Schließlich ließ er sich aber von der Argumentation der Regierungsvorlage, man müsse zwischen bereits verbotenen, aber nicht strafbaren und bislang erlaubten Handlungen unterscheiden, überzeugen. Außerdem verwies der Katholik Hugelmann auf das kanonische Recht, das für ihn eine besonders hochstehende Rechtsordnung war und trotzdem kein bedingungsloses strafrechtliches Rückwirkungsverbot kannte.[92]

Für die sozialdemokratische Opposition war das kanonische Recht kaum ein Argument zur Rechtfertigung der Rückwirkung. Trotzdem gab es bemerkenswert wenig sozialdemokratischer Kritik an der rückwirkenden Einführung der Untreue. Die Arbeiter-Zeitung schrieb am 29. Oktober 1931 über die Strafprozessnovelle und die Untreue-Vorlage lediglich: „Man wird sich alle diese Gesetzentwürfe noch genau anschauen." [93] Bei

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[83] Ebd.

[84] LANG/LANG/BUCHINGER, *Bibliographie* (wie FN 74), S. 402-403.

[85] RAABE, L., Das Gesetz gegen „Untreue". Der Entwurf eine Gefahr für alle. In: *Wiener Allgemeine Zeitung*, Nr. 16025 vom 30. 10. 1931, S. 2.

[86] LESIGANG, H., Die Untreue bei Vermögensverwaltungen. In: *Reichspost*, Nr. 301 vom 1. 11. 1931, S. 5.

[87] In ÖStA, AVA, BMJ, Allg. Reihe, Z. 11.352 (= Grundzahl) sind folgende Stellungnahmen enthalten: Kammer für Handel, Gewerbe und Industrie in Wien, 28. 10. 1921 und 5. 11. 1931; Verband österreichischer Banken und Bankiers, 2. 11. 1931; Verband der Wiener Bank- und Kommissionsfirmen, 6. 11. 1931; Kammer für Handel, Gewerbe und Industrie in Klagenfurt, 14. 11. 1931; Wiener Handels- und Industrie-Vereins, 17. 11. 1931; Zentralbverband der Handelsvertreter und Kommissionäre Österreichs, 20. 11. 1931; Ausschuss der Rechtsanwaltskammer in Wien, 18. 11. 1931 (= *Oesterreichische Anwalts-Zeitung*, Vol. 8, Nr. 24, 1931, S. 473-475); Hauptverband der Industrie Österreichs, 14. 11. 1931.

[88] ÖStA, AVA, BMJ, Allg. Reihe, Z. 11.352 (= Grundzahl), Stellungnahme des Wiener Handels- und Industrie-Vereins, 17. 11. 1931.

[89] ÖStA, AVA, BMJ, Allg. Reihe, Z. 11.352 (= Grundzahl), Stellungnahme der Kammer für Handel, Gewerbe und Industrie in Klagenfurt, 14. 11. 1931.

[90] Zu Hugelmann: WEGENER, W., Hugelmann, Karl Gottfried. In: *Neue Deutsche Biographie 10*. Berlin, 1974, S. 9-10.

[91] StenProt Bundesrat (BR) 171. Sitzung v. 15. 12. 1931 IV. GP, S. 1774-1775.

[92] Zu rückwirkenden Strafgesetzen im kanonischen Recht (allerdings anhand des Corpus Iuris Canonici 1983): EICHOLT B., *Geltung und Durchbrechungen des Grundsatzes ‚Nullum crimen nulla poena sine lege' im kanonischen Recht, insbesondere in c.1399 CIC/1983*. Frankfurt am Main/Wien 2006.

der Generaldebatte im Justizausschuss erklärte der sozialdemokratische Abgeordnete und Rechtsanwalt Arnold Eisler,[94] dass die Frage der Rückwirkung bei diesem Gesetz die entscheidende sei. „Ohne diese Rückwirkung würde das Gesetz" – so Eisler – „seine Bedeutung verlieren."[95]

Bei der Debatte im Plenum des Nationalrats stellte sich die sozialdemokratische Position dann aber etwas anders dar. Der Abgeordnete Josef Pazelt[96] erklärte als Vertreter dieser großen Oppositionspartei: „Die Regierung wird sozusagen revolutionär, sie bricht wie es Revolutionären geziemt, mit Tradition, […] Sie sieht nämlich als Termin für das Inkrafttreten dieses Gesetzes den 15. Dezember 1931 vor, stattet aber gleichzeitig das Gesetz mit rückwirkender Kraft für alle derartigen Delikte aus, deren Verjährungszeit nicht abgelaufen ist. Das ist gewiß etwas Neues in der Strafgesetzgebung."[97]

Pazelt befürwortete die Rückwirkung weder ausdrücklich, noch kritisierte er sie klar. Seine Formulierung deutete aber eher Kritik als Zustimmung an und einen gewissen Hohn gegenüber der Regierung. Jedenfalls war in Pazelts Ausführungen im Plenum im Gegensatz zu Eislers Position im Unterausschuss nicht mehr die Rede davon, dass die Rückwirkung das Um-und-Auf des Gesetzes zur Untreue war. Pazelts Rede machte deutlich, dass die Sozialdemokratie eine ziemlich ambivalente Position zur rückwirkenden Einführung der Untreue hatte.

Einerseits deutete er Kritik an der Rückwirkung zumindest an, andererseits meinte er, dass die konkrete Ausgestaltung der Rückwirkung zu milde war, weil das neue Gesetz nur für die Verjährungsfrist von fünf Jahren zurückwirken sollte. Das scheint nicht sehr konsequent, und in der Retrospektive kann man sich des Eindrucks nicht erwehren, dass die Sozialdemokratie als typische Opposition jede Vorgehensweise der Regierung zur Einführung der Untreue kritisiert hätte – einfach, weil es Vorschläge der Regierung waren.

Gleichzeitig betrieb auch die bürgerliche Regierung bezüglich der Untreue nicht gerade besonders sachorientierte Politik. Das Gesetz über die Untreue war ein Anlassgesetz, das wegen Ehrenfest erlassen wurde. Diesen Anlass hätte das Gesetz ohne Rückwirkung nicht erfassen können, und so wichen die Regierungsparteien bewusst und gezielt von einem grundlegenden rechtspolitischen Grundsatz ab, um zu demonstrieren, wie entschlossen sie waren, gegen den vermeintlich am CA-Zusammenbruch Schuldigen vorzugehen.

Dabei hätte bei nüchterner Betrachtung schon damals klar sein können, vielleicht sogar müssen, dass Ehrenfest zwar höchst zweifelhafte Geschäfte gemacht hatte, damit aber keineswegs der Hauptverantwortliche für die CA-Krise war, als der er von den Zeitgenossen oft dargestellt wurde.[98] Abgesehen von grundlegenden rechtspolitischen Bedenken war die gezielt gegen Ehrenfest gerichtete Rückwirkung somit auch kein konkret geeignetes Mittel, um die Schuldigen an der CA-Krise zur Verantwortung zu ziehen. Dabei war das Ziel der Regierung doch, Entschlossenheit bei deren Verfolgung zu zeigen.

Außerdem war im Herbst 1931 wohl schon absehbar, dass die lex Ehrenfest wahrscheinlich nie auf Ehrenfest angewendet werden würde, der zu dieser Zeit schon längst in Portugal war, wobei seine Auslieferung nach Österreich zumindest sehr zweifelhaft war.[99] Das Gesetz über die Einführung der Untreue vom Dezember 1931 war also nicht nur ein offenkundiges Anlassgesetz, sondern auch ein für diesen Anlass ungeeignetes Gesetz. Die Regierungsparteien betrieben hier wenig mehr als populistische Symbolpolitik.

Freilich war der (publizistische) Druck auf die Regierung, die Schuldigen an der CA-Krise, insbesondere Ehrenfest, strafrechtlich zur Verantwortung zu ziehen, zumindest ebenso stark, wie es dann die Kritik an der Regierungsvorlage zur Untreue war. Vor diesem Hintergrund klagte Justizminister Hans Schürff[100] im Justizausschuss:

„In der Diskussion öffentlicher Ereignisse hat man noch selten eine solche Inkonsequenz beobachten können wie bei der Einstellung zum vorliegenden Gesetzentwurf. Solange der Entwurf dem Nationalrat nicht vorgelegt war, wurde das Justizministerium ständig gemahnt, seine Pflicht zu erfüllen. Da war […] der Ruf nach dem Strafrichter deutlich vernehmbar. Als der Entwurf eingebracht war, begann der Kampf gegen die Vorlage[.]"[101]

In gewisser Hinsicht mochte Schürffs Frustration nachvollziehbar sein; vor allem aber zeigt sie, dass ein Regieren auf Zuruf nicht der nachhaltigste Umgang mit einer Krise ist – allein schon, weil sich die Zurufe sehr schnell ändern können.

[93] *Arbeiter-Zeitung*, Nr. 298 vom 29. 10. 1931, S. 3.
[94] Lebensdaten auf: https://www.parlament.gv.at/person/286.
[95] *Wiener Zeitung*, Nr. 270 vom 21. 11. 1931. S. 1
[96] Lebensdaten auf: https://www.parlament.gv.at/person/1171.
[97] StenProt NR 57. Sitzung vom 1. 12. 1931 IV. GP, S. 1426.
[98] Spätestens durch den Bericht der StA Wien vom 14. 10. 1931 war bekannt, dass Ehrenfest bei der CA zwar gewaltige Schulden (nämlich 1,4 Millionen Schilling) hatte, dass sich die immensen Verluste der CA allein für 1931 aber zumindest auf das Hundertfache beliefen.
[99] SCHMETTERER, *Einführung* (wie FN 2), S. 40.
[100] Lebensdaten unter: https://www.parlament.gv.at/person/1779.
[101] *Wiener Zeitung*, Nr. 270 vom 21.11.1931.

Iudex sceptro aequitatis armandus est. Richterliche Insignien in der europäischen Rechtstradition bis zum 18. Jahrhundert

(Iudex sceptro aequitatis armandus est. Judicial Insignia in the European Legal Tradition until the 18th Century)

*Vid Žepič**

Abstract

In spite of the variety and multitude of judicial authorities, a survey of the judicial insignia in continental Europe between the High Middle Ages and 18th century reveals a surprising uniformity and constancy both in the particular as well as the ius commune legal tradition. The sword of Justice, the Rod of Justice, the Judge's chair, his robes and book figure prominently in the medieval illuminations. Insignia formed the identity of the judge and served as a reminder of his transpersonal character: the judicial authority was hence represented through the display of the inisignia. The aim of the article is to defend the proposition that the exterior signs of delegated judicial authority in pre-codification continental Europe manifested themselves in a rather consistent appearance because they reflected a common idea of a delegation of judicial authority, which was to be accompanied by the visual transfer of materialised symbols.

Keywords: *Insignia; Judge; Sword of Justice; Rod of Justice; Book; Ceremonial vestment; Judge's Chair; Legal symbolism; Legal archaeology; Dignity; Ius commune.*

1. *Si judex perit, jurisdictio remansit…*

Stößt der Mensch an die Grenzen seiner rationalen Weltwahrnehmung, greift er auf Bilder, Allegorien, Attribute und Symbole zurück.[1] Wohl kaum ein anderes Rechtsinstitut, das für die menschliche Gesellschaft – in welcher Gestalt sie auch immer erscheinen mag – nahezu unverzichtbar ist, genießt in der europäischen Ideengeschichte einen derartigen Mystifizierungsgrad wie die juristische Person. Diese äußerst abstrakte dogmatische Entität erzeugt völlig neuartige und unbegreifliche Aspekte, besonders wenn der Begriff der Rechtspersönlichkeit des Staates erklärt werden soll. Obgleich sich in den römischen Rechtsquellen einige wenige, aber fundierte Begründungen für die tatsächliche Vorstellung von der Rechtsfähigkeit des Staates finden lassen,[2] beschäftigten sich überwiegend mittelalterliche und neuzeitliche Juristen mit dieser Frage. Insbesondere standen sie vor der Aufgabe, auf relativ einfache Art und Weise das Fortbestehen des Staates nach dem Tod des alten Regierenden im Rahmen der vorherrschenden personenbezogenen Auffassung vom Herrschertum zu erklären. Der tief verwurzelte Volksglaube, dass ein Staat mit dem Tod seines Herrschers untergehe, wird durch die Ereignisse in Pavia im 11. Jahrhundert eindrucksvoll verdeutlicht. Nach dem Tod Kaiser Heinrichs II. hatte seine Nachfolger Konrad II. zum Pöbel in Pavia, der die dortige Kaiserpfalz geplündert hatte, in Anlehnung an die Vorstellung, dass mit dem Tod eines Herrschers auch die Staatsgewalt ende und der Palast damit herrenlos sei,[3] gesprochen: *„Wenn der König stirbt, dann bleibt das Reich fortbestehen, wie ein Schiff, dessen Kapitän fällt."*[4] Konrad II. könnte somit als einer der ersten Vertreter der These einer transpersonalen, von der Person des Herrschers unabhängigen Konzeption des Staates

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1 ERLER, A. Körperschaftssymbolik. In: ERLER, A., KAUFMANN, E. (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte*, 2. Bd., Berlin, 1978, Sp. 1155 ff.

2 Dazu KASER, M., *Das römische Privatrecht, Erster Abschnitt: Das altrömische, das vorklassische und klassische Recht.* München, 1971, § 72.

3 *Dicebant Papienses: Quem offendimus? Imperatori nostro fidem et honorem usque ad terminum vitae suae servavimus; quo defuncto cum nullum regem haberemus, regis nostri domum destruxisse non iure accusabimur*. („Die Bürger von Pavia sagten: ‚Wen haben wir beleidigt? Wir haben unserem Kaiser bis zum Ende seines Lebens Treue und Ehre erwiesen. Als er starb, hatten wir keinen König; daher kann man uns nicht beschuldigen, den Königspalast zerstört zu haben.") BRESSLAU, H. (Hrsg.), *Wiponis gesta Chuonradi II. ceteraque quae supersunt opera*. Hannoverae, 1878, S. 22.

4 *Scio, inquit, quod domum regis vestri non destruxistis, cum eo tempore nullum haberetis; sed domum regalem scidisse, non valetis inficiari. Si rex periit, regnum remansit, sicut navis remanet, cuius gubernator cadit. Aedes publicae fuerant, non privatae; iuris erant alieni, non vestri. Alienarum autem rerum invasores regi sunt obnoxii. Ergo vos alienae rei invasores fuistis, igitur regi obnoxii estis*. („Ich weiß", sagte er, „dass ihr den Palast eures Königs nicht zerstört habt, weil ihr ihn damals nicht hattet, aber dass ihr den königlichen Palast zerstört habt, ist nicht zu leugnen. Wenn der König stirbt, bleibt das Reich bestehen, so wie ein Schiff, dessen Kapitän fällt, fortbesteht. Das Gebäude war öffentlich, nicht privat; ein Dritter hatte Rechte daran, nicht ihr. Wer das Eigentum anderer Menschen in Besitz nimmt, ist dem König gegenüber feindselig. Und da ihr das fremde Gut genommen habt, seid ihr dem König gegenüber feindlich eingestellt." BRESSLAU, H. (Hrsg.), *Wiponis gesta Chuonradi II. ceteraque quae supersunt opera*. Hannoverae, 1878, S. 22 f.

gelten.[5] In seinem berühmten Buch *Die zwei Körper des Königs: Eine Studie zur politischen Theologie des Mittelalters* (1957) stellte Ernst Kantorowicz nach sorgfältigem Studium der historischen Quellen die politisch-theologisch fundierte These auf, dass gemäß verbreiteter Meinung nach dem Tod eines Herrschers nur einer der beiden Körper des Königs, der so genannte *Body natural*, stirbt, während sein mystischer *Body politic* (*corpus politicum*) ein Nachleben führt.[6] Da aber die Theologen und Juristen vor der Aufgabe standen, den unsichtbaren zweiten Körper des Königs dem Volk deutlich zu vergegenständlichen, wandten sie sich den immer gleichbleibenden Insignien[7] (Krone, Reichsapfel, Zepter, Thron, Lanze)[8] zu, die zum einen die Konstanz der Staatsgewalt nach dem Tod des Herrschers zu verkörpern und zum anderen somit die noch unvollständige Lehre von der Rechtssubjektivität des Staates[9] im Mittelalter auszugleichen vermochten.[10]

Seit der Karolingerzeit wurde der König auch als oberster Richter betrachtet.[11] Es war ihm gestattet, seine richterlichen Hoheitsrechte (*iurisdictio*) in Form der *regalia minora*[12] an eine niedrigere Ebene zu delegieren.[13] Dies bedeutete, dass er gleichzeitig das äußerlich sichtbare Zeichen der Ausübung der hoheitlichen richterlichen Funktion delegieren konnte. Die richterlichen Insignien unterlagen daher *mutatis mutandis* derselben Logik wie die königlichen bzw. kaiserlichen Insignien. So wie der Staat nach dem Tod des Kaisers bestehen blieb, so bestand auch die Judikative nach dem Tod des Richters fort. So wie der Kaiser nach der Krönung besaß der Richter kraft der Investitur rechtmäßig die ihm zugewiesenen Insignien. Bereits zur Zeit Heinrichs II. hatte sich der Gedanke eingebürgert, dass allein der Besitz der Insignien eine Gewere auf die Herrschaft über das Reich verleihe. In der Krone findet die Herrschaft ihre Verdinglichung.[14] Somit hatten daher auch die richterlichen Insignien, wie Fillitz treffend veranschaulichte, eine „dingliche Wirkung".[15]

In diesem Aufsatz soll gezeigt werden, dass trotz der Mannigfaltigkeit der gerichtlichen Instanzen in Kontinentaleuropa der Vorkodifikationszeit die äußeren Zeichen der delegierten richterlichen Gewalt sich in einem eher einheitlichen Bild manifestierten, weil sie eine gemeinsame Delegationsidee abbildeten. In den erhaltenen mittelalterlichen Manuskripten sowie anderen Typen der bildenden Künste, die mehr oder weniger das tatsächliche äußere Erscheinungsbild des Richters wiedergeben, sind die Richterrobe, der Richterstab, das Gerichtsschwert und der Gerichtsstuhl besonders hervorzuheben. Darüber hinaus sind aber die Darstellungen der Richter häufig von einer Reihe symbolischer Motive begleitet, vor allem von einem Buch, aber auch von stilisierten Löwen und Hunden.[16]

2. *Insignia magistratus* in der Antike

Obwohl die Idee der Delegation richterlicher Gewalt bereits in den römischen Dominaten verankert war,[17] blieb die Frage der Insignien als äußeres Zeichen der Repräsentation des Richters in der Antike vergleichsweise vernachlässigt. Es ist allerdings sinnvoll, einige Hinweise in den antiken Quellen auf Insignien im Folgenden kurz zu erwähnen.

Römischer Bürger hatten sich gegenüber den Magistraten, d. h. den Vertretern der Staatsmacht, möglichst ehrenhaft zu benehmen. Sobald der Römer einen Magistrat erblickte, war er nach einer alten Konvention aufgefordert, sein Pferd abzu-

[5] BOSL, K., Staat, Gesellschaft, Wirtschaft im Mittelalter. In: GEBHARDT, B., *Handbuch der deutschen Geschichte*, 8. Auflage, Stuttgart, 1954, S. 630, Fn. 2: „Wir stehen hier am Anfang eines überpersönlichen Staats- und Rechtsdenkens; die Idee des Staates regt sich." Zum Übergang von einer personalistischen zu einer transpersonalen Auffassung des Herrschertums siehe BEUMANN, H., Zur Entwicklung transpersonaler Staatsvorstellungen. In: *Vorträge und Forschungen: Das Königtum. Seine geistigen und rechtlichen Grundlagen*, Bd. 3, 1956 (1965, 2. Aufl.), S. 185–224; VON MOOS, P., Das Öffentliche und das Private im Mittelalter. Für einen kontrollierten Anachronismus, in: MELVIELLE, G.; VON MOOS, P. (Hrsg.), *Das Öffentliche und Private in der Vormoderne*. Köln, Weimar, Wien, 1998, S. 7 f.

[6] KANTOROWICZ, E. H., *The King's Two Bodies. A Study in Mediaeval Political Theology*. New Jersey 1997, S. 7 und 314 ff. So entstand die bekannte Redewendung, dass „der König niemals stirbt" (*rex nunquam moritur*) bzw. „Der König ist tot, es lebe der König." (*Le roi est mort, vive le roi*).

[7] Insignien sind äußerlich sichtbare Zeichen, die den Inhaber eines bestimmten Amtes in einzigartiger Weise kennzeichnen, unterscheiden und hervorheben. AMIRA, K. v., SCHWERIN, Cl. v., *Rechtsarchäologie. Gegenstände, Formen und Symbole germanischen Rechte.* Berlin-Dahlem, 1943, S. 31; SCHÄFER, T., *Imperii insignia, sella curulis und fasces. Zur Repräsentation Römischer Magistrate.* Mainz, 1989, S. 18.

[8] Dazu ERLER, A., Reichsinsignien, Reichskleinodien. In: ERLER, A., KAUFMANN, E. (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte*, 4. Bd., Berlin, 1990, Sp. 638.

[9] Der Staat als Rechtsperson wurde erstmals durch den Göttinger Staatsrechtler Wilhelm Eduard Albrecht in seiner Rezension von Maurenbrechers *Grundsätze des heutigen Staatsrechts* ausdrücklich (1837) erläutert. Dazu UHLENBROCK, H., *Der Staat als juristische Person. Dogmengeschichtliche Untersuchung zu einem Grundbegriff der deutschen Staatsrechtslehre*, Berlin, 2000.

[10] SCHÄFER, T., *Imperii insignia, sella curulis und fasces. Zur Repräsentation Römischer Magistrate.* Mainz, 1989, S. 20; STOLLBERG-RILINGER, B., *Des Kaisers alte Kleider. Verfassungsgeschichte und Symbolsprache des Alten Reiches*. München, 2008, S. 60.

[11] DEUTINGER, R., Der König als Richter. In: HARTMANN, W. (Hrsg.), *Recht und Gericht in Kirche und Welt um 900*, Berlin, Boston, 2007, S. 31–48.

[12] *Iurisdictio inter regalia minora connumerantur.* VORBURG, J. P. v., *Encyclopaedia iuris publici, privatique, civilis, criminalis, feudalis,* Francofurti, 1640, S. 354.

[13] WEGENER, W., Regalien. In: ERLER, A., KAUFMANN, E. (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte*, 4. Bd., Berlin, 1990, Sp. 471–478.

[14] Laut Wipo empfing Konrad II. von der Witwe Heinrichs II. die Insignien, die ihn zu seinem Amt stärken: *Supradicta imperatrix Chunegunda regalia insignia, quae sibi imperator Heinricus reliquerat, gratanter obtulit, et ad regnandum, quantum huius sexus auctoritatis est, illum corroboravit*. („Die oben genannte Kaiserin Kunigunda empfing dankbar die königlichen Insignien, die Kaiser Heinrich hinterlassen hatte, und überließ sie dem Konrad, um die Macht desjenigen zu stärken, dessen Geschlecht eine besondere Autorität verschafft, um zu herrschen.") BRESSLAU, H. (Hrsg.), *Wiponis gesta Chuonradi II. ceteraque quae supersunt opera*. Hannoverae, 1878, S. 15. Dazu siehe auch DECKER-HAUFF, H., Die ‚Reichskrone', angefertigt für Kaiser Otto I. In: SCHRAMM, P. E., *Herrschaftszeichen und Staatssymbolik II*, Stuttgart, 1955, 625 ff.

[15] FILLITZ, H., *Die Insignien und Kleinodien des Heiligen Römischen Reiches.* Wien, 1954, S. 6.

[16] Der Löwe soll mit Motiven aus dem Alten Testament assoziiert werden, während der Hund als Symbol der Treue (zum Gesetz) und damit der Gerechtigkeit gilt. Dazu SCHILD, W., *Die Geschichte der Gerichtsbarkeit, Vom Gottesurteil bis zum Beginn der modernen Rechtssprechung, 1000 Jahre Grausamkeit*. Hamburg, 2003, S. 132.

[17] KASER, M., HACKL, K., *Das römische Zivilprozessrecht,* München, 1996, § 78 (insbes. II.4).

spannen, seine Mütze abzunehmen und zur Seite zu treten.[18] Im sechsten Buch des Kommentars zum Prätorischen Edikt beschreibt Ulpian, wem es nicht gestattet war, vor dem Prätor aufzutreten bzw. sich zu postulieren, um die Würde des Magistrats zu schützen (*dignitatis tuendae et decoris sui causa*).[19] Es gab eine „Behinderung, indem der Prätor den auf beiden Augen Blinden zurückweist, weil dieser nämlich die Ehrenzeichen des Magistrats (*insignia magistratus*) nicht sehen und ihnen keine Ehrerbietung erweisen kann."[20] Labeo erzählte sogar, wie ein gewisser Blinder namens Publius mit dem Rücken zum Richterstuhl stand und der Prätor Brutus ihn deshalb nicht hören wollte.[21]

Die Insignien, die den magistratischen Handlungen allein eine rechtsverbindliche Wirkung verliehen, spiegelten einerseits die gesellschaftliche Stellung und andererseits Teil die Funktion wider, die die einzelnen Mitglieder der römischen Magistratur innehatten. Wie Otto feststellte, bezeichnete der Begriff „Insignien" die Rutenbündel, den Kurulensitz, die Toga und die Liktoren.[22] Der scharlachrote Gürtel (*latus clavus*), die

Der Prätor sitzt pro tribunali auf dem Kurulensitz. Darstellung aus Pompei. SCHÄFER, Imperii insignia. Sella curulis und fasces. Zur Repräsentation Römischer Magistrate (1989), Tafel 95.

toga praetexta und die roten Schuhe (*mulleus*), die nur die drei höchsten Magistrate tragen durften, waren stets ein Zeichen der Zugehörigkeit zur senatorischen Klasse. Das wichtigste Kennzeichen der höheren Magistraturen war der kurulische Stuhl (*sella curulis*), den die Römer von den etruskischen Königen übernommen haben sollen. Die höheren Magistrate (*cum imperio*) – der Diktator und Reiteroberst (*magister equitum*), der *Interrex*, der Konsul, der Prätor, der Edile, der Stadtpräfekt, in den Provinzen der Provinzstatthalter und der Prokonsul – durften auf der *sella curulis* sitzen.[23] Die Magistrate wurden von Liktoren begleitet, die mit *fasces* bewaffnet waren, zu denen Beile (*securi*) als Zeichen der Zwangsgewalt außerhalb Roms gehörten.[24]

3. *Insignia iudicis* im Mittelalter und in der Neuzeit

3.1 Der Richterstab

Der Richterstab bzw. das Richterzepter (Blutstab, Gerichtsstab, Richtstab; altdeutsch: des gerichtes staf, richtstaf, schrannenstap; lat.: *baculus judiciarius, baculus judicii, sceptrum, festuca*; frz.: *baston judicial*; span.: *la vara de la justicia*; niederl.: *roede van justicie*)[25] war die bedeutendste Insignie des Richters. Er wird bereits im deuterokanonischen Brief des Jeremia erwähnt.[26] In der Kodifikation Justinians spielt der Richterstab laut Stryk keine spezifische symbolische Rolle; sein Erscheinen als richterliche Insignie ist vielmehr das Ergebnis der mittelalterlichen Rechtstradition.[27] Es wird angenommen, dass sich der Richterstab aus den pragmatischen Bedürfnissen des mittelalterlichen „peripatetischen" Richters entwickelt hat, für den der Stab ein wichtiges Hilfsmittel bei seiner ständigen Bewegung durch das Territorium war.[28] Auch Alkuin von York erwähnt das Richterzepter (*sceptrum aequitatis*): *„Haben sie alle Insignien? Sie haben. Der Richter muss mit dem Zepter der Gerechtigkeit bewaffnet sein, der Ankläger mit der Flinte der Bosheit, der Angeklagte mit dem Schild der Frömmigkeit, die Zeugen mit der Trompete der Wahrheit."*[29]

Der Richterstab versinnbildlicht in erster Linie die Delegation des Gerichtsverfahrens vom Herrscher als oberstem Richter

[18] Seneca, *Epistula* 63, 10: *Si consulem videro aut praetorem, omnia quibus honor haberi honori solet faciam: equo desiliam, caput adaperiam, semita cedam*. („Wenn ich einen Konsul oder einen Prätor treffe, werde ich ihm alle Ehre erweisen, die seinem Ehrenamt gebührt: Ich werde absteigen, mich abdecken und den Weg frei machen.")

[19] D. 3, 1, 1 pr. (Ulp. 6 ad ed.). Vgl. auch D. 3, 1, 1, 2 (Ulp. 6 ad ed.): *Postulare autem est desiderium suum vel amici sui in iure apud eum, qui iurisdictioni praeest, exponere: vel alterius desiderio contradicere*. („Vor dem Prätor auftreten heißt aber, sein eigenes Begehren oder das eines Freundes vor demjenigen, der die Gerichtsbarkeit innehat, darzulegen oder dem Begehren eines anderen zu widersprechen.") Deutsche Übersetzung nach KRAMPE, in: BEHRENDS, O., KNÜTEL, R., KUPISCH, B., SEILER, H. H., *Corpus Iuris Civilis. Text und Übersetzung. II. Digesten 1-10.* Heidelberg, 1995, S. 265.

[20] D. 3, 1, 1, 5 (Ulp. 6 ad ed.) *[…] casum: dum caecum utrisque luminibus orbatum praetor repellit: videlicet quod insignia magistratus videre et revereri non possit*. Deutsche Übersetzung nach KRAMPE, in: BEHRENDS, O., KNÜTEL, R., KUPISCH, B., SEILER, H. H., *Corpus Iuris Civilis. Text und Übersetzung. II. Digesten 1-10.* Heidelberg, 1995, S. 266.

[21] D. 3, 1, 1, 5 (Ulp. 6 ad ed.): *[…] refert etiam Labeo Publilium caecum Asprenatis Noni patrem aversa sella a Bruto destitutum, cum vellet postula*re.

[22] OTTO, E., *De jurisprudentia symbolica exercitationum trias*. Trajecti ad Rhenum, 1730, S. 169.

[23] OTTO, E., *De jurisprudentia symbolica exercitationum trias*. Trajecti ad Rhenum, 1730, S. 238; SCHÄFER, T., *Imperii insignia, sella curulis und fasces. Zur Repräsentation Römischer Magistrate.* Mainz, 1989, S. 19.

[24] CUJACIUS, J., *Iacobi cviacii i.c. praeclarissimi, observationvm et emendationvm libri XXVIII*. Köln, 1598, obs. Lib. 26, cap. 38 und obs. Lib. 20, cap. 37.

[25] AMIRA, K. v., *Der Stab in der germanischen Rechtssymbolik,* München, 1909, S. 85.

[26] Brief Jeremias, 1, 13: „Sie tragen ein Zepter wie ein Richter in der Provinz; aber sie können keinen töten, der sich gegen sie vergeht."

[27] STRYK, S., *Dissertationium Juridicarum Francofurtensium de selectis utriusque juris materiis, Vol. III,* Firenze, 1838, Rn. 28.

[28] KÖBLER, G., *Bilder aus der deutschen Rechtsgeschichte on den Anfängen bis zur Gegenwart*, München, 1988, S. 161.

[29] ALCUIN, *Dialogua de rethorica et uirtutibus*: *An insignia [sua] singuli ex illis habent? Habent. Iudex sceptro æquitatis armandus est, accusator pugione malitiæ, defensor clypeo pietatis, testes tuba ueritatis.* Ed. B. Flacci Albini seu Alcuini abbatis et Caroli Magni imperatoris magistri, Opera Omnia. In: MIGNE, J. P., *Patrologiae cursus completus. Series Latina, 101,* Paris, 1863, S. 919–946.

auf die untere Ebene.[30] Der Gebrauch des Richterstabs war, insbesondere in den neuzeitlichen Vorschriften, genau vorgeschrieben. Die Bamberger Malefizordnung (*Constitutio Criminalis Bambergensis*) sah vor, dass der Richter das Zepter während der Verhandlung stets in der Hand halten müsse.[31] Die aufrechte Haltung des Richterstabs war ein wesentliches Element des Verfahrens, sodass gerichtliche Handlungen nur dann gültig waren, wenn der Richter den Stab hielt. Der Richter, der der Stab auf den Boden fallen ließ, zeigte damit an, dass das Verfahren beendet war. In manchen Fällen mussten die Parteien auf den Richterstab (den Eidesstab) schwören. Interessanterweise entschied die Oberste Justizstelle Österreichs noch im Jahr 1770, dass der Stock des Richters in einem Strafverfahren nicht fehlen dürfe, da er ein konstitutives Element des Prozesses sei.[32]

Partei mit Vorsprecher vor einem amtierenden Richter. Der Richter mit überkreuzten Beinen trägt einen Richterstab, hat ein Schwert zwischen den Beinen und ist deutlich prunkvoller gekleidet als die Parteien. Nur er trägt eine Kopfbedeckung. Cod. Johannis Notarii 1365 Fol 6. Die rechtsarchäologische Sammlung Karls von Amira (1848–1930) (https://amira.digitale-sammlungen.de/blaetter/blatt.php?id=456).

In Strafsachen war das Brechen des Richterstabs eine alte rituelle Handlung, mit der der Richter anzeigte, dass er ein Urteil fällen, das dem Verurteilten das Leben nehmen würde.[33] Das Zerbrechen des Stabes ist stets ein Zeichen für die Verurteilung.[34] In innerösterreichischen Ländern, so der slowenische Rechtshistoriker Dolenc, war es üblich, dass „der *Blutrichter, nachdem er ein Geschäft voller Schrecken und Absurdität abgewickelt hatte, die Urteilsurkunde, auf der das Todesurteil geschrieben war, um einen Stock wickelte und sie so vom Beratungsraum zum Ort der Vollstreckung des Todesurteils trug*".[35] Aus dem Herzogtum Steiermark wird von der Aberglaube der Bevölkerung berichtet, wonach die Bruchstücke eines zerbrochenen Richterstabs magische Kräfte enthielten, die aber ihren Träger vor Raubüberfällen schützten.[36]

Ursprünglich war der Richterstab aus Holz und wurde für jede Verhandlung neu angefertigt. In Steiermark haben sich beispielsweise Richterstäbe erhalten, die aus Ahorn-, Ebenholz, Kirsch- oder Nussbaumholz, ansonsten aber meist aus Haselholz gefertigt waren.[37] Der in der Regel helle Richterstab, in seinen luxuriöseren Ausführungen häufig mit einer stilisierten Lilie gekrönt, war seinerseits ein Symbol der richterlichen Gnade.[38] Es gibt auch dreifache

[30] Als 1495 das Reichskammergericht gegründet wurde, überreichte Kaiser Maximilian dem damaligen Kammerrichter Graf Eitelfriedrich von Zollern feierlich einen Nussbaumstab als Symbol der kaiserlichen Autorität, die nun teilweise auf die Richter übertragen wurde. KISSEL, O. R., *Die Justitia, Reflexionen über ein Symbol und seine Darstellung in der bildenden Kunst*, München, 1997, S. 108; SCHILD, W., *Die Geschichte der Gerichtsbarkeit, Vom Gottesurteil bis zum Beginn der modernen Rechtssprechung, 1000 Jahre Grausamkeit*, Hamburg, 2003, S. 132. Hierzu auch AMIRA, K. v., *Der Stab in der germanischen Rechtssymbolik,* München, 1909, S. 87; GRIMM, J., *Deutsche Rechtsalterthümer,* Göttingen, 1881, S. 761 ff, Rn. 15.

[31] Art. 95 CCB: *Item am gerichtsstag, so die gewönlich tagsszeyt erscheynt, sol man das peinlich gericht mit der gewönlichen glocken beleuten, vnd sollen sich Richter vnd vrteyler an die gerichtsstat fügen, da man das gericht nach guter gewonheyt pfligt zu sitzen vnd sol der Richter die vrteyler heyssen nidersitzen vnd er auch sitzen, seinen stabe in den henden haben vnd ersamlich sitzend pleyben biss zu ende der Sachen*. Ed. SCHWARZENBERG, J. *Bambergische halßgerichts ordenung*, Bamberg, 1507.

[32] KOCHER, G., *Zeichen und Symbole des Rechts. Eine historische Ikonographie.* München, 1992, S. 142.

[33] Siehe auch Art. 117 CCB und Art. 96 Constitutio Criminalis Carolina: *Item wann der beklagte entlich zu peinlicher straff geurtheylt wirdet, soll der Richter an den orten da es gewonheyt, seinen stabe zerbrechen, […].* Beim Zerbrechen des Richterstabes sollte der Richter die folgenden Worte sagen: *‚Nun helf dir Gott, ich kann dir nicht mehr helfen*.'" (Zerbrochener Richterstab, Germanisches Nationalmuseum https://www.gnm.de/objekte/zerbrochener-richterstab/, 11. Januar 2023) Dazu auch CARPZOV, B., *Practicae novae Imperialis Saxonicae Rerum Criminalium,* Leipzig, 1723, S. 260, Rn. 36 f: *Sententia hac condemnatoria lata ac publicata, Judex baculum, quem ex more gestat, frangere, & executionem carnificis manibus demandare debet, ut ille omni studio poenae destinatum commerito afficitat supplicio […] Huncque morem frangendi baculum Germania ab antiquis habet moribus, quo judex fidem videtur facere, de reo jam actum esst, uti de baculo, reumque vitam amisisse […]*. Siehe MOELLER, E. v., Die Rechtssitte des Stabbrechens. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung*, Vol. 21, Nr. 1, 1900, 27–115. Siehe auch BECK, C. A., *Diss. de solenni fractionis baculi ritu in exequenda supplici extremi sententia.* Jena, 1732); AMIRA, K. v., *Der Stab in der germanischen Rechtssymbolik.* München, 1909, S. 84 ff.

[34] Erhalten blieb bis heute die Redewendung „den Stab über jemanden (oder jemandem) brechen." Es bedeutet „ein (zu) hartes Urteil über jemanden sprechen", allerdings nicht unbedingt vor Gericht.

[35] DOLENC, M., Simbolična dejanja in izražanja med Slovenci. In: *Slovenski pravnik. Glasilo društva „Pravnika" v Ljubljani*, Jg. 52, Nr. 9–10, 1938, S. 246.

[36] Bericht des Richters und Rates der kaiserlichen Kammerstadt Pettau an die innerösterreichische Regierung über die Strafsache gegen Johann Georg Stikhl wegen Magie und Ehebruch vom 19. August 1740 (L. R. A. Cop. 1741, I, 36). Johann Georg Stikhl, Bürger und Hutmacher in Pettau (heute Ptuj) wird wegen abergläubischer Künste verfolgt, weil bei ihm ein versiegeltes Päckchen gefunden worden ist, das er nach dem Ergebnisse der Untersuchung auf einem Markte zu dem Zwecke eingetauscht hat, um auf seinen Marktreisen vor Raubüberfällen sicher zu sein. Das Päckchen wird bei Gericht eröffnet und enthält: *„sothane verbotene stückh, so in ainen stikhl von ainen gerichtsstahl, ainen finger von ainen armben sünder, ainen eysennagl, wo(r)mit der armbe sünder angenaglet gewesen, item ainen pain von ainen armben sünder schlaff, ainen erdten unter den hohgericht, dahin der s. v. urin des armben sünders gefahlen, nebst ainen andern khugerl unwissent, was es seye."* Zitat nach BYLOFF, F., *Volkskundliches aus Strafprozessen der österreichischen Alpenländer: mit besonderer Berücksichtigung der Zauberei- und Hexenprozesse 1455 bis 1850.* Berlin, 1929, S. 52.

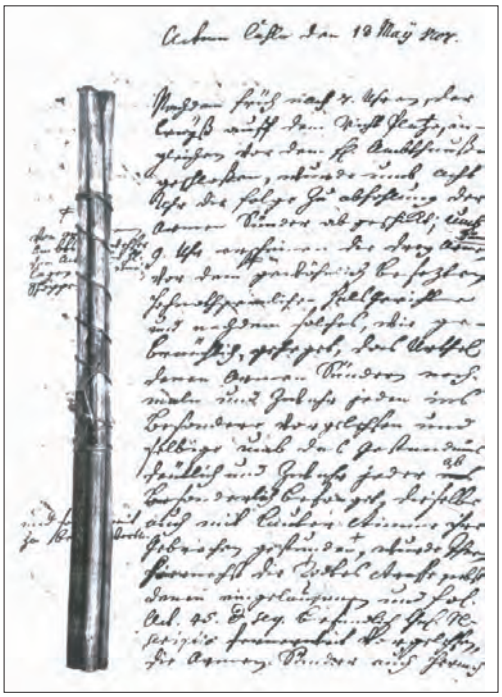
[37] KÖBLER, G., *Bilder aus der deutschen Rechtsgeschichte von den Anfängen bis zur Gegenwart*, München, 1988, S. 161.

[38] EBEL, F., FIJAL, A., KOCHER, G., *Römisches Rechtsleben im Mittelalter*, Heidelberg, 1988, S. 42; Kocher, G., *Zeichen und Symbole des Rechts. Eine historische Ikonographie.* München, 1992, S. 142.

und runde Endstücke, Palmen[39], Lilien[40], Sterne, die Hand der Gerechtigkeit (frz.: *main de justice*) oder Wappen[41]. Die immer kunstvollere Verzierung (Heiligenbilder, Justitia, Wappen, Richterinschriften)[42] der meist silbernen oder zumindest versilberten Richterstangen, die im 16. und 17. Jahrhundert die einfachen weißen Holzstangen ablösten, entsprachen auch ihren neuen, repräsentativen Namen: Richterzepter.[43]

Das Zerbrechen des Richterstabes (Stuttgart, 1738). SCHILD W., Geschichte des Verfahrens. In: HINCKELDEY, Ch. Justiz in Alter Zeit, VI c, Rothenburg ob der Tauber 2005, S. 196.

Die Handwaschung des Pilatus (Thomas von Villach, 1527) an der Nordwand der Pfarrkirche St. Andreas in Thörl-Maglern-Greuth (Arnoldstein, Villach). Der Maler hat das Todesurteil Christi mit dem zerbrochenen Richterstab vor dem Stuhl des Richters (Pilatus) bildlich dargestellt. Pilatus trägt das richterliche rote Gewand und die Kopfbedeckung und sitzt pro tribunalo. *Wikimedia Commons.*



An ein vom Stadtgericht Kahla (Altenburg) erlassene Strafurteil gebundener Richterstab (Kahla-C I. XIII I-1707, Nr.1, St1107U05). SCHILD W., Geschichte des Verfahrens. In: HINCKELDEY, Ch. Justiz in Alter Zeit, VI c, Rothenburg ob der Tauber 2005, S. 197.

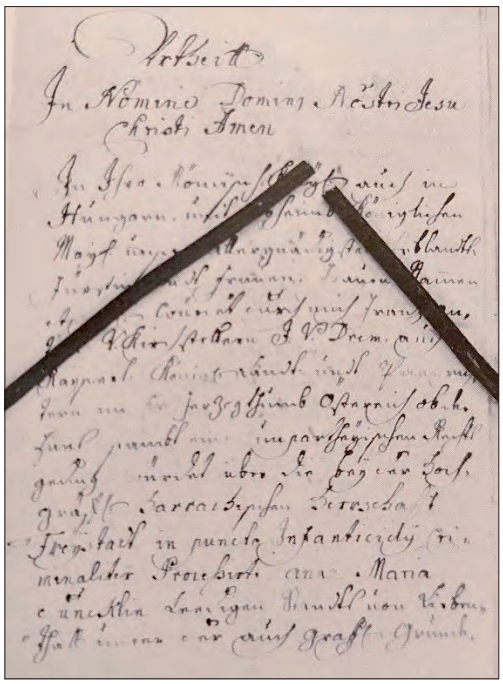
[39] Der Palmzweig gilt als Symbol des Friedens, der Gnade und der Gerechtigkeit, insbesondere in der religiösen Kunst. Wenn Christus als Richter dargestellt wird, trägt er neben seinem Schwert einen Palmzweig. KISSEL, O. R., *Die Justitia, Reflexionen über ein Symbol und seine Darstellung in der bildenden Kunst*, München, 1997, S. 116. Das Palmenmotiv, das Attribut des Gerechten, wird in Psalm 92 erwähnt: *„Der Gerechte wird grünen wie ein Palmbaum; er wird wachsen wie eine Zeder auf dem Libanon."* Der Palmzweig wurde zusammen mit dem Zepter den Herrschern bei Krönungen überreicht. DU CANGE, C. D., *Glossarium ad scriptores medić et infimć latinitatis, tomus quintus,* Venetiis, 1739, S. 72.

[40] Die Lilie stand als Symbol für Macht, Frieden und vor allem Gnade. KISSEL, O. R., *Die Justitia, Reflexionen über ein Symbol und seine Darstellung in der bildenden Kunst*, München, 1997, S. 116.

[41] Carlen, L., Stab. In: ERLER, A., KAUFMANN, E. (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte,* IV, Berlin, 1990, Sp. 1843; Schild, *Die Geschichte der Gerichtsbarkeit* (2003), 38, Bild Nr. 59.

[42] In Slowenien sind mehrere Richterstäbe aus dem 17. bis 19. Jahrhundert erhalten, von denen der älteste aus der Mitte des 15. Jahrhunderts stammt und die Inschrift *Salve sancta iusticia* auf einem spiralförmigen Messingband trägt. NABERGOJ, T., VIDMAR, P., MILIĆ, Z., Dises Geriht Swert hat Lasen Mahen… O insignijah ptujskega mestnega sodnika. In: *Zbornik Pokrajinskega muzeja Ptuj*, 1, 2003, S. 74; ŽEPIČ, V., NABERGOJ, T., VIDMAR, P., ZEMLJIČ, I., Sodniške insignije v evropskem in slovenskem pravnem izročilu (2023), S. 17-17, 31-41; zu den Gerichtsstäben in der Steiermark siehe BALTL, Rechtsarchäologie des Landes Steiermark (1957), 46–48.

[43] NABERGOJ, T., VIDMAR, P., MILIĆ, Z., Dises Geriht Swert hat Lasen Mahen… O insignijah ptujskega mestnega sodnika. In: *Zbornik Pokrajinskega muzeja Ptuj*, 1, 2003, S. 81.



Das Urteil „im Namen unseres Herrn Jesus Christus“, zu dem die Keile des zerbrochenen Richterstabes hinzugefügt wurden. Oberösterreichisches Museum in Linz. SCHILD, Die Geschichte der Gerichtsbarkeit (1980), 169.

3.2 Das Richterschwert

In einigen mittelalterlichen Darstellungen wird der Richter mit einem Richterstab abgebildet, in anderen mit einem Gerichtschwert. Das Schwert in der Hand eines Richters tauchte erst im Hochmittelalter auf. Im fränkischen Staat konnte nur der Herrscher das Schwert tragen, wobei es schwer zu beurteilen ist, ob das Schwert neben seiner normalen Kampffunktion auch die Autorität des Richters symbolisierte.[44]

Das Richterschwert, in erster Linie die Behörde bezeichnend, die die richterliche Funktion ausübt,[45] symbolisierte die Übertragung der blutgerichtlichen Macht an den Richter, während der Richterstab die breitere Befugnis des Richters darstellte. Stryk merkte an, dass der Stab die niedere Gerichtsbarkeit (*causae minores*) symbolisierte und das Schwert dagegen die höhere, d. h. die Blutgerichtsbarkeit (*causae maiores*), so dass in einigen Darstellungen, zumindest in Blutgerichtsfällen, das Schwert den Stab als Gerichtsinsignie ablöste.[46] Der Begriff „Schwertrecht“ (*ius gladii*) bezeichnete die juristische Vollmacht, die Todesstrafe auszusprechen und diese vollstrecken zu lassen. Die kirchlichen Richter wurden aber niemals mit den Schwertern dargestellt, denn die Kirche dürstet nicht nach Blut (*Ecclesia non sitit sanguinem*).[47]

Die *Constitutio Criminalis Carolina* schreibt in Artikel 82 ausdrücklich den Gebrauch des Richterschwertes in Strafverfahren vor.[48] Bis zum Ende des achtzehnten Jahrhunderts war in einigen deutschen Ländern das Mitführen eines Stabs oder eines Schwerts in der Hand des Richters bei Blutgerichtsverfahren vorgeschrieben.[49] In einigen Quellen legt der Richter das Schwert während der Sitzung der Blutgerichtsverhandlung auf den Boden, in anderen trägt er es zusammen mit dem Richterstab.[50]

Es ist zu unterscheiden zwischen dem Richtschwert und dem Gerichtsschwert: Ersteres diente der Vollstreckung der Todes-

Die Darstellung der Verhandlung des Femegerichts im Herforder Rechtsbuch (ca. 1375). Auf dem Tisch liegen ein Richterschwert und ein Reliquiar, auf den die Parteien einen Eid abgelegt haben. Stadtarchiv Herford. Wikimedia Commons.

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44 SCHWERIN, C. Frh. v., Zur Herkunft des Schwertsymbols. In: *Festschrift Paul Koschaker*, III, Weimar, 1939, 326 f.

45 KISSEL, O. R., *Die Justitia, Reflexionen über ein Symbol und seine Darstellung in der bildenden Kunst,* München, 1997, S. 104.

46 STRYK, S., *Dissertationum Juridicarum Francofurtensium de selectis utriusque juris materiis, Vol. III,* Firenze, 1838, Rn. 35; SCHILD, W., *Folter, Pranger, Scheiterhaufen. Rechtsprechung im Mittelalter,* München 2010, S. 60. LEISER, W., Richtschwert. In: Erler, A., Kaufmann, E. (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte* IV, Berlin, 1990, S. 1060 f.

47 Dazu JEROUSCHEK, G., Ecclesia non sitit sanguinem. In: Albrecht Cordes u.a. (Hg.), *Handwörterbuch zur deutschen Rechtsgeschichte*, 2. Aufl. 2004 ff., Bd. III, 24. Lfg., Sp. 1174–1176.

48 Art. 82 Constitutio Criminalis Carolina: *„Item am gerichtßtag, so die gewonlich tag zeit erscheint, mag man das peinlich gericht mit der gewonlichen glocken beleuten, vnd sollen sich Richter vnd vrtheyler an die gerichts statt fügen, da man das gericht nach guter gewonheyt pflegt zusitzen, vnd soll der Richter die vrtheyler heyssen nidersitzen, vnnd er auch sitzen seinen stabe oder bloß schwert, nach lendlichem herkommen eyns jeden orts inn den henden haben, vnd ehrsamlich sitzen bleiben, biß zu ende der sachen.“*

49 DÖHRING, E., *Geschichte der deutschen Rechtspflege*, Berlin, 1953, S. 217.

50 *„Uff seiten des Richters aber ist in acht zu nehmen / daß derselbe ein blosses Schwerdt oder Stab in der rechten Hand habe / welches nach eines jeden Gerichts Gewonheit zu practiciren, denn an etlichen Oertern auch der Richter beedes zugleich nemlichen einen Stab und blosses Schwerdt pfleget in Händen zu haben.“* CARPZOV, B., Peinlicher sächsischer Inquisition- und Achts-Proceß (1673), 167, IV; DÖHRING, *E., Geschichte der deutschen Rechtspflege,* Berlin, 1953, S. 219.

strafe, während das Gerichtsschwert ein Zeremonienschwert war und als solches zu den Insignien des Richters gehörte. An die Richtschwerter waren verschiedene Bilder der Heiligen[51] und Inschriften angebracht, mit denen die Henker versuchten, ihr Gewissen zu entlasten: *„An Gottes Segen ist alles gelegen“*; „Die Obrigkeit steuert dem Unheil, ich exequire ihr Ends Uhrtheil“; *„Fiat Justitia aut periat Mundus“*; „Firch Got und lieb das Recht, so sein die Engel dein Knecht“.[52]

3.3 Der Richterstuhl

Auch der Richterstuhl (Richtgesäß, lat.: *sedes (judiciaria), sella, thronus, cathedra*) ist ein uraltes Symbol der (richterlichen) Autorität. Bereits in den römischen Rechts- und Literaturquellen lässt sich die Regel nachweisen, dass der römische Prätor bei der Ausübung seiner richterlichen Gewalt auf einem hohen Stuhl der Basilikaapsis sitzen müsse – *pro tribunali*.[53] Anders als der Prätor waren die Richter im Formularverfahren jedoch keine Magistrate, sondern bevollmächtigte Laien. Dementsprechend saßen sie im Gericht nicht auf einem Kurulensitz, sondern auf einem sogenannten *subsellium*, einem Stuhl, der einer Bank ähnelte, was auf die Unterordnung dieses Richteramtes hindeutete.[54]

Der Sitz der römischen höheren Magistrate wurde *sella curulis* genannt. Von der Etymologie dieses Begriffs erzählt der römischen Schriftsteller Gellius: „Dass in alten Zeiten alle die Rathsherren, welche ein kurulisches Amt bekleidet hätten, die Auszeichnung genossen, stets zu Wagen nach dem Rathhause fahren zu dürfen. Auf diesem Wagen befand sich ein Sessel, auf dem sie sassen, der deshalb auch *sella curulis* (Wagen-) Sessel genannt wurde. Allein diejenigen Senatoren, welche noch keine hohe curulische Magistratswürde bekleidet hatten, mussten stets zu Fusse auf's Rathhaus gehen. Daher also die Rathsherren, die noch keine höheren Ehrenämter verwaltet hatten, mit dem Namen *pedarii* (gleichsam als Fussgänger) wären bezeichnet worden.“[55]

Noch in den römischen kaiserlichen Kognitionsverfahren mussten die Richter während des Prozesses sitzen, wohingegen die Anwälte standen.[56] In der Konstitution von Valentinian und Valens wird dies ausdrücklich unterstrichen: *„Wenn aber jemand von denen, welchen wir Rechtssachen zu verhandeln erlaubt haben, Anwalt sein will, möge wissen, dass er die Rolle, welche er zur Zeit der Prozessverhandlung übernehmen wird, nur so lange habe, als er Anwalt ist, und niemand soll glauben, dass seine Ehre in irgendeiner Weise beeinträchtigt wird, wenn er sich selbst der Notwendigkeit stehen zu müssen unterworfen, ebenso wie er selbst das Recht abgelehnt hat, zu sitzen*.“[57]

In den mittelalterlichen Handschriften wird der Richterstuhl in der Regel eine oder mehrere Stufen über den Boden des Gerichtssaals erhöht dargestellt. Da er oft unter einem stilisierten Baldachin aufgestellt war, erinnerte er stark an den Herrscherthron. Im Gegensatz zum Richter, der auf einem Stuhl sitzen musste, hatten aber die mittelalterlichen Schöffen in der Regel auf einer Bank zu sitzen.

Der Sachsenspiegel sieht ausdrücklich vor, dass der Richter während der Verhandlung sitzen muss.[58] Die Gerichtsordnung von Soest (Westfalen) schrieb detailliert sogar die Haltung des Richters auf der Richterbank vor: *„Der Richter soll wie ein Löwe sitzen, sein rechtes Bein über das linke kreuzen und, wenn er die Sache nicht richtig beurteilen kann, dreimal darüber nachdenken*.“[59] Obwohl es keinen anderen ausdrücklichen Hinweis auf die Geste des Richters gibt, ist es sehr wahrscheinlich, dass dieselbe Regel in anderen europäischen Ländern angewandt wurde, bevor das römisch-kanonische Verfahren eingeführt wurde.[60] Die „rituelle Haltung“ des gekrümmten Sitzens sollte die Unabhängigkeit

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[51] Das älteste erhaltene Richterschwert sowie der älteste erhaltene Richterstab aus dem Gebiet des heutigen Sloweniens stammen aus dem Jahr 1555. Sie wurden für Jakob Ris, einem Stadtrichter aus Ptuj (Pettau), angefertigt. Die Scheide des Richterschwertes aus Ptuj stellt den Heiligen Georg dar. NABERGOJ, T., VIDMAR, P., MILIĆ, Z., Dises Geriht Swert hat Lasen Mahen… O insignijah ptujskega mestnega sodnika. In: Zbornik Pokrajinskega muzeja Ptuj, 1, 2003, S. 110.

[52] SCHILD, W., *Die Geschichte der Gerichtsbarkeit, Vom Gottesurteil bis zum Beginn der modernen Rechtssprechung, 1000 Jahre Grausamkeit,* Hamburg, 2003, S. 72. Siehe auch die Fotos der Gerichtsschwerter auf S. 79–81.

[53] Es ist aus der englischen Rechtsgeschichte bekannt, dass der King's Bench nach dem King's Bench (Assizes) benannt wurde. Dazu WATKIN, Th. G., „The Powers that Be Are Seated“. Symbolism in English Law and in the English Legal System, In: SCHULZE, R. (Hrsg.), *Rechtssymbolik und Wertevermittlung,* Schriften zur europäischen Rechts- und Verfassungsgeschichte 47, Berlin, 2004, S. 149–166.

[54] Juvenal, *Saturae* 16, 13. Dazu OTTO, E., *De jurisprudentia symbolica exercitationum trias*, Trajecti ad Rhenum, 1730, S. 241.

[55] Gell., *Noctes atticae* 3, 18, 4: *Senatores enim dicit in veterum aetate, qui curulem magistratum gessissent, curru solitos honoris gratia in curiam vehi, in quo curru sella esset, super quam considerent, quae ob eam causam „curulis“ appellaretur: sed eos senatores, qui magistratum curulem nondum ceperant, pedibus itavisse in curiam; propterea senatores nondum maioribus honoribus „pedarios“ nominatos*. Deutsche Übersetzung nach WEISS, F., *Die attischen Nächte des Aulus Gellius zum ersten male vollständig übersetzt und mit Anmerkungen versehen.* Erster Band. Leipzig, 1875, S. 216 f.

[56] Die zahlreichen römischen Quellen über den „sitzenden“ Prätor werden von JUNGLER, J. F., *Iudex sedens ex antiquitate derivatus,* Leipzig, S. X–XIII angeführt. Zum *ius sedendi* des Richters im Gegensatz zur *necessitas standi* des Anwalts siehe LIVA, S., *Il ‚Iudex Pedaneus' nel Processo Privato Romano: Dalla procedura formulare alla ‚Cognitio extra ordinem'*, Milano, 2012, S. 84 ff.

[57] Valentin. Valens C. 2, 6, 6, 6: *Quisquis igitur ex his, quos agere permisimus, vult esse causidicus, eam solam, quam sumit tempore agendi, sibi sciat esse personam, quousque causidicus est, nec putet quisquam honori suo aliquid esse detractum, cum ipse necessitatem elegerit standi et ipse contempserit ius sedendi*.

[58] SSpgl III, 69 § 3: *„Schilt ihr Urteil einer ihrer Standesgenossen, er soll die Bank erbitten, um ein anderes [Urteil] zu finden; so soll jener aufstehen, der das Urteil fand, und dieser soll sich setzen an seine Stelle, und er finde, was ihm recht dünkt, und ziehe damit, wohin er von Rechts wegen soll, und erstreite es oder lasse es gerichtlich wie hiervor geredet ist.“* SSpgl II, 12 § 13: *„Stehend soll man Urteil schelten, sitzend soll man Urteil finden unter Königsbann, jedermann auf seinem Stuhle […].“* Übersetzung nach KALLER, P., *Der Sachsenspiegel In hochdeutscher Übersetzung*, München, 2002, S. 132 und 65.

[59] *„[D]ey richter sal sitten op syneme richtestole als eyn grysgrymmich lowe und slan den rechteren voit over den luchteren und dencken an dar strenge ordel.“* DEUS, W.-H. (Hrsg.), *Soester Recht. Eine Quellen-Sammlung,* 1–6 (1969–1978), S. 366.

[60] ARLINGHAUS, Fr.-J., Gesten, Kleidung und die Etablierung von Diskursräumen im städtischen Gerichtswesen (1350–1650). In: BURKHARDT, J.; WERKSTETTER, C. (Hrsg.), *Kommunikation und Medien in der Frühen Neuzeit* (München 2005), S. 476 f; OSTWALDT, L., *Aequitas und Justitia. Ihre Ikonographie in Antike und Früher Neuzeit,* 2009, S. 103.

und die Ruhe des Richters symbolisieren, kann aber auch als apotropäische Geste während des Prozesses gedeutet werden.[61] Auch in der süddeutschen und österreichischen Rechtsliteratur (*Weisthümer*) findet sich die Ansicht, dass ein Richter, der während einer Verhandlung steht, das Gerichtsverfahren wesentlich verletzen würde.[62]

Im römisch-kanonischen Verfahren galt das Sitzen des Richters als wesentliches, prägendes Element des Prozesses.[63] Baldus interpretierte diese formale Erfordernis, im Lichte des kanonischen Rechts und unter Bezugnahme auf Aristoteles: „Und ihr wisst, dass die Richter an manchen Orten nicht sitzen, sondern, wie Jacobus Butriga schreibt, auf dem Tribunal stehen, wenn sie (ein Urteil) verkünden. Und merkt euch, dass einige Doktoren des Zivilrechts sagen wollen, dass ein Urteil nicht ergehen kann, wenn der Richter nicht auf dem Tribunal sitzt, aber trotzdem bindet, wenn es ergangen ist, was im letzten Kapitel *De regulis iuris* im *Liber Sextus* getadelt wird. Die Begründung für diese Bestimmung bestand darin, dass, so wie sich der Körper bewegt, dies auch die Seele tut, und die Seele nicht in der Festigkeit des Verstandes ist. Während der Körper sitzt, ist aber die Seele intellektuell aktiv, und aus diesem Grund sagt Aristoteles in seinem Buch über Physik, dass die Seele durch das Sitzen und Schweigen besonnen wird, da sie den Verstand nicht anderen Aktivitäten überlässt […]. Diese Feierlichkeit des Sitzens wurde jedoch für die Würde des Richters festgelegt und ist keine substanzlose Feierlichkeit, sondern hat einen substanziellen Charakter. Und es ist um die Anbetung der Majestät des Richters willen, dass (diese Zeremonie) eingeführt wurde, wie C. 2, 6, 6, 6 es ausdrückt."[64] Das Sitzen des Richters diente somit der richterlichen Mäßigung (*temperantia*).[65] Ein Richter muss sitzen, um sich zu entspannen und *„mit ruhigem Herzen, Seele und Mut […] den Verstand für den Mut zu öffnen"*.[66] Ausnahmen vom Grundsatz, dass der Richter sitzen muss, gab es in Zeiten von Gewittern, Prozessionen[67] und Epidemien.[68] Für die Parteien galt das Gegenteil: Sie waren verpflichtet, während der gesamten Verhandlung zu stehen, und zwar sowohl im Straf- als auch im Zivilverfahren.[69]

3.4 Das Buch

Im Unterschied zu dem mittelalterlichen gelehrten Laienrichter wird der gelehrte Richter in der Regel mit einem Buch dargestellt, das stets die Insignie des gelehrten Juristen war.[70] Mit diesem Zeichen wollten die Illuminatoren darauf hinweisen, dass der Richter sich bei seinem Urteil auf die geschriebene Rechtsnorm berufen müsse und somit nur als „Sprachrohr des Gesetzes" verstehen werden könne.[71] Das Buch stellte üblicherweise eine der beiden mittelalterlichen Korpora: das *Corpus iuris civilis* oder das *Corpus iuris canonici*, aber auch die Bibel dar.

Johannes von Viterbo schrieb 1238, dass die Richter Geistliche seien, da der Richter durch die Gegenwart Gottes geweiht sei. „Man in allen Rechtsangelegenheiten glaubt, dass Gott

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[61] GRIMM, J., *Deutsche Rechtsalterthümer,* Göttingen, 1881, S. 763, r. št. 17; EBEL, F., FIJAL, A., KOCHER, G., *Römisches Rechtsleben im Mittelalter*, Heidelberg, 1988, S. 20; ERLER, A., Der Hochsitz in der deutschen Rechtsgeschichte. In*: Paideuma* 1, 1939, S. 177; VILFAN, S. (*Pravna zgodovina Slovencev*, Ljubljana, 1961, S. 215) zitiert das Sprichwort „Sédi krivo, sodi pravo." („Sitz krumm, urteile richtig").

[62] GRIMM, J., *Deutsche Rechtsalterthümer*, Göttingen, 1881, S. 763, Rn. 16: „Wie der könig auf dem thron, sitzt der richter auf einem stuhl, […]. Der richter *muß sitzen* […] sein *aufstehen* hindert den fortgang der verhandlung." Zum sitzenden Richter als symbolische Geste siehe LEPSIUS, S., Das Sitzen des Richters als Rechtsproblem. In: STOLLBERG-RILINGER, B., NEU, T., BRAUNER, C., *Alles nur symbolisch? Bilanz und Perspektiven der Erforschung symbolischer Kommunikation*, Köln, Weimar, Wien, 2013, S. 109–130.

[63] JUNGLER, *Iudex sedens ex antiquitate derivatus* (1738). Siehe z. B. den Auszug aus dem Manuskript Paris, BN lat. 4604, fol. 74va, wo erklärt wird, dass ein Urteil angefochten werden kann, wenn der Richter zum Zeitpunkt der Verkündung nicht saß, sondern sich bewegte oder stand: *Sententiae obicitur multis modis. Primo eo quod iudex non sedet, licet pedibus ambulat et ambulando profert eam que tunc non valet ut* § de dilat*, A procedente* (C. 3, 11, 4), ff. *quis ordo in possessionibus servetur*, *l. ii § dies* (D. 38, 15, 2, 1) *et § in bonorum* (D. 38, 15, 2, 2*), in aut. ab illustribus et superillustres ei sancimus* (Aut. 5, 18, 1 = Nov. 71, 1) *et ff. ad turpill l. Sui pignus § plt*. (Dig. 48, 16). *Sed ad idem quae reducuntur acci l. i, in fi*." Zitat nach LEPSIUS, S., Das Sitzen des Richters als Rechtsproblem. In: STOLLBERG-RILINGER, B., NEU, T., BRAUNER, C., *Alles nur symbolisch? Bilanz und Perspektiven der Erforschung symbolischer Kommunikation*, Köln, Weimar, Wien, 2013, S. 121, Fn. 36. Dies galt auch für die gemeinrechtliche Doktrin – DA SUZARIA, G., *De ordine iudiciorum*, 1584, fol. 38va: *Sed nunquid sententia potest ferri a iudice stante et non sedente, videtur quod glosatum est communiter, quod talis sententia non teneat, cum officium iudicis est sedere, advocati stare, ut…* C. 2, 6, 6; C. 3, 11, 4 pr; Nov. 71, 1, D. 38, 15, 2, 1.

[64] *Et scias quod in quibusdam locis de consuetudine iudices non sedent sed stant recit tamen pro tribunali, secundum Jacobum Butriga. Et nota quod quidam doctores iuris civilis dicere voluerunt, quod sententia non debet proferri, nisi iudex sedeat pro tribunali, tamen lata tenet et istud reprobatur in capitulo ultimo de regulis iuris libro vi. Et ratio huius statuti fuit, quia cum movetur corpus, movetur anima et non est in soliditate rationis, sed cum sedet corpus, anima laborat circa intellectum et ideo dicit Aristoteles in libro Physic. quod sedendo et quiescendo fit anima prudens, quia non distrahitur intellectus ad aliam operam… Ista etiam sollenitas sedendi est introducta propter honorem iudicum et non est levis solennitas cum fit de substantia et ob reverentiam maiestatis iudicum introducta ut l. quisquis in fin. § de postul* (C. 2, 6, 6, 6). BALDUS DE UBALDIS, *Super VII., VIII., et IX. codicis… commentaria*, Lugduni, 1539, S. 49.

[65] FLECHSIG, K., *Von Causenflickern und Rittern der Rechte*, Göttingen, 2021, S. 129.

[66] GUAZZO, Rechtschaffener Richter, 1688, C 3r. Zitiert nach FLECHSIG, K., Von Causenflickern und Rittern der Rechte, Göttingen, 2021, S. 130.

[67] KOCHER, G., *Zeichen und Symbole des Rechts. Eine historische Ikonographie.* München, 1992, S. 141.

[68] ŽEPIČ, V., Kužni privilegiji v občepravni doktrini in evropskih civilnih kodifikacijah. In: *Acta Histriae,* Heft 30, Nr. 1, 2022, S. 16.

[69] Noch im 19. Jahrhundert wurde dem Angeklagten erlaubt, sich zu setzen, um den Inhalt der Anklageschrift besser verstehen zu können. DÖHRING, E., *Geschichte der deutschen Rechtspflege*. Berlin, 1953, S. 216.

[70] LÜCK, H., Insignien. In: *Handwörterbuch zur deutschen Rechtsgeschichte*, Bd. II, 2011, Sp. 1255–56; Bauer, A., Das Recht im Bild. Bildquellen des Mittelalters als Informationsträger für die Rechtsgeschichte. In: KRUPPA, N., WILKE, J. (Hrsg.), *Kloster und Bildung im Mittelalter*, Göttingen, 2006, S. 282.

[71] *„Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi, des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur*." MONTESQUIEU, Ch. L. d. S., De l`esprit des lois, v: *Oeuvres complètes de Montesquieu*, Paris, 1822, S. 320. Dass sich Montesquieus Beschreibung auf einen englischen und nicht auf einen kontinentalen Richter bezieht, wird treffend von NOVAK, A., *Imago iudicis,* štiri podobe iz idejne zgodovine sojenja. In: *Zbornik znanstvenih razprav*, 75, 2015, S. 72, betont.

in Beziehung zu den Menschen steht“,[72] was sich darin widerspiegele, dass der Richter vor jeder Verhandlung einen Eid (*sacramentum*) ablege und während der Verhandlung stets ein Exemplar der Bibel bei sich trage. Auch der berühmte Kanonist Hostiensis berichtet, dass der Richter, nachdem er einen Eid auf ein gerechtes Urteil abgelegt hatte, die Bibel während des Prozesses in der Hand halten musste.[73] Er allegierte dabei auf die Konstitution Justinians, die vorschrieb, dass der Richter stets auf das Evangelium zu schwören hatte, bevor er das Urteil verkündete: „*Wir verordnen, dass alle Richter […], welche nach dem römischen Recht entscheiden, nicht anders den Anfang mit der Untersuchung von Prozessen machen sollen, als wenn zuvor vor den Richterstuhl die heiligen Schriften niedergelegt werden, und diese sollen nicht nur zu Anfang des Prozesses sich daselbst befinden, sondern bis zum Ausgang desselben und zur Vorlesung des Endurteils liegen bleiben*.“[74]

Der Richter sitzt auf dem Tribunal und trägt einen roten Talar mit Hermelinkragen und ein Barett. Er hält ein Buch in seiner Hand. Infortiatum, Latein 14340, fol. 283. Nationalbibliothek von Frankreich.

3.5 Richterlicher Ornat

Am Ende des Mittelalters herrschten in Kontinentaleuropa strenge Kleiderordnungen, mit denen der Gesetzgeber den Platz der jeweiligen sozialen Gruppe in einer hierarchischen Gesellschaftsordnung festlegen wollte.[75] Mit der zunehmenden, sich ausbreitenden Rezeption des römischen Rechts und der entsprechenden Tendenz zur Professionalisierung der Gerichtsbarkeit vereinheitlichte sich das Bild des juristischen Ornats.[76] Vor jener Rezeption trugen die Schöffen und Richter, wie die partikularrechtlichen *codices picturati* zeigen, Gewänder ohne erkennbare typische Farbe. Allerdings gehörte die Kopfbedeckung schon in dieser Zeit zum festen Bestandteil der Richtertracht.[77]

Für gelehrte Juristen dagegen hatte sich im Universitätsbereich das Tragen von roten Talaren durchgesetzt.[78] Wie Kaufmann feststellt, bedeutete die Formulierung *clericalis vestitus* nicht immer geistliche Bekleidung, sondern bezeichnete die Kleidung sämtlicher Gelehrter.[79] Entsprechend setzt sich in der rechtshistorischen Literatur die Bezeichnung „Klerikerjuristen“ durch.[80] Die meisten Jura-Studenten erhielten eine niedere Weihe (z. B. Akolythenweihe), um einen höheren Grad der Sicherheit zu genießen. Somit wurde für sie als eine Gruppe

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[72] *[N]am iudex alias sacerdos dicitur quia sacra dat […]; et alias dicitur: ludex dei presentia consecratur* (C. 3, 1, 14, 2) *[…] dicitur etiam, immo creditur, esse deus in omnibus pro hominibus* (C. 2, 58 (59), 2, 8). JOHANNES VON VITERBO, De regimine civitatum, c. 25, ed. Gaetano Salvemini, In: Bibl. jurid. med. aevi, 111, S. 226 (zitiert nach KANTOROWICZ, E. H., *The King's Two Bodies. A Study in Mediaeval Political Theology*. New Jersey 1997, S. 122, Fn. 105).

[73] *Debet autem iudex evangelia a principio usque ad finem coram se tenere, sciturus quod sicut iudicat homines, et ipse iudicabitur a Deo*. HOSTIENSIS, (DE SEGUSIO, H.), *Summa Aurea*, Venetiis, 1570, lib. 2, tit. 1, f. 117v, num. 10. Dazu DECOCK, W., *Theologians and Contract Law, The Moral Transformation of the Ius commune* (ca. 1500–1650). Leiden und Boston, 2013, S. 27.

[74] Iust. C. 3, 1, 14: *[…] sancimus […] omnes omnino iudices Romani iuris disceptatores non aliter litium primordium accipere, nisi prius ante iudicialem sedem sacrosanctae deponantur scripturae: et hoc permaneat non solum in principio litis, sed etiam in omnibus cognitionibus usque ad ipsum terminum et definitivae sententiae recitationem*.

[75] Dazu HÜLSEN-ESCH, A., *Kleider machen Leute. Zur Gruppenrepräsentation von Gelehrten im Spätmittelalter.* In: OEXLE, O. G., VON HÜLSEN-ESCH, A. (Hrsg.), *Die Repräsentation der Gruppen. Texte – Bilder Objekte,* Göttingen, 1998, S. 225 ff.

[76] Das Ornat (lat.: *ornatus*, Ausstattung, Ausschmückung, Schmuck) war die offizielle Amtstracht, die von Würdenträgern bei feierlichen Anlässen getragen wurde, um zu zeigen, dass sie in der Eigenschaft einer Autorität handelten und dass ihre Funktion eine spezifische performative Dimension hatte. Es bestand aus einem Kleid, einer Kopfbedeckung, Handschuhen, Schuhen und Zepter. Dazu SCHMIDT-WIEGAND, R., Ornat. In: ERLER, A., KAUFMANN, E. (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte*, Bd. 3, Berlin, 1990, 1305–1312.

[77] HÜLLE, W., Richterkleidung. In: ERLER, A., KAUFMANN, E. (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte*, Bd. 4, Berlin, 1990, S. 1044.

[78] Da der langärmelige Mantel in der Regel bis zu den Knöcheln (lat.: *talus*, Knöchel) reichte, wie es in den Statuten der italienischen Rechtsschulen üblich war, erhielt das Kleidungsstück die Bezeichnung „Talar“. Es soll seinen Ursprung in den Tuniken spätrömischer Beamter haben. Erst später wurde der Talar zum Synonym für das kirchliche Kleidungstück. Im französischen Sprachgebrauch ist der Talar gleichbedeutend mit der Robe, wie aus der Bezeichnung der hohen Beamtenadel (*gens de robe longe, noblesse de la robe*) hervorgeht. Hierzu, SCHMIDT-WIEGAND, R., Robe. In: ERLER, A., KAUFMANN, E. (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte*, Bd. 4, Berlin, 1990, Sp. 1092–1094.

[79] KAUFMANN, G., *Die Geschichte der deutschen Universitäten II*, Stuttgart, 1888, S. 82.

[80] KROESCHELL, K., CORDES, A., NEHLSEN-VON STRYK, K., *Deutsche Rechtsgeschichte,* Bd. 2: 1250-1650. Köln, 2008, S. 42. Das englische Wort für einen Gerichtsdiener (*clerc*) lässt vermuten, dass er anfangs ein Geistlicher war. Hierzu BRINGEMEIER, M., *Priester- und Gelehrtenkleidung.* Münster, 1974, S. 2.

der „erbarmungswürdigen Personen“ (*personae miserabiles*)[81] der Bischof zuständig.[82]

Die Juristentracht entsprach den Modetrends der Zeit und des Ortes, so dass verallgemeinernde Aussagen nur mit entsprechender Zurückhaltung und örtlicher Eingrenzung getroffen werden dürfen. Trotz des breiten Spektrums von individuellen Abbildungen hat die Forschung aber einige charakteristische Konstanten aufgedeckt, wie etwa die prinzipielle Länge der Kleidung gelehrter Juristen, ihre Farbe und ihre Attribute.[83] Um sich von den Theologen abzugrenzen, trugen die juristischen Doktoranden rote Talare mit Pelzkragen. Auch nach ihrem Abschied aus den Reihen der Studenten behielten die gelehrten Juristen ihr akademisches Gewand bei, das einen direkten Einfluss auf die Kleidung der verschiedenen geistlichen Würdenträger hatte.[84] In mittelalterlichen Handschriften mit juristischem Inhalt, die in erster Linie (aber nicht ausschließlich) einen gelehrten Juristen zeigen, werden die Richter in einem knöchellangen, langärmeligen Mantel (*cappa cum manicis, cappa manicata, tabardum*) dargestellt, der entweder scharlachrot oder rosarot und gewöhnlich mit einem (pelzigen) Kragen versehen ist.[85] Gegen Ende des 15. Jahrhunderts setzte sich im Reich der faltige, offene Mantel mit langen und weiten Ärmeln (Schaube) durch. Nach 1550, als dieses Kleidungsstück aus der Mode kam, griffen die Juristen wiederum zum mittelalterlichen Talar.[86]

Die Robe des Richters wurde zuweilen mit Perlen oder anderen Verzierungen geschmückt, um seine außerordentliche Würde und gesellschaftliche Macht zu demonstrieren. Richter aus dem kirchlichen Stand sind an ihrer Tonsur und ihrem roten Mantel, jedoch ohne Pelzkragen, zu erkennen.[87] Darüber hinaus werden an einigen Orten Ringe und Ketten als Zeichen des richterlichen Amtes erwähnt.[88] Es scheint, dass die Kleidung der Stadtrichter, die keine Adligen, sondern Bürger waren, manchmal der des Adels ähnelte. Daher ist es nicht überraschend, dass im Jahr 1530 nach einer umfassenden Definition dessen, was der Adel tragen durfte, in der staatlichen Polizeiverordnung festgelegt wurde, dass die gleichen Privilegien auch für *„Doktoren und ihre Frauen gelten, d. h. Kleider, Schmuck, Ketten, Goldringe und andere Dinge zu tragen, die ihrem Rang und ihrer Freiheit entsprechen“*.[89] Interessanterweise verbot Erzherzog Karl 1577 in der Polizeiordnung für Innerösterreich den Richtern das Tragen von Samt, Damast, Seide und Satin sowie von Silber- und Goldschmuck, da dies nur dem Adel und den privilegierten, dem Adel gleichgestellten Berufsgruppen gestattet war.[90] Der so genannte Adel um der Wissenschaft willen (*nobilitas propter scientiam*) umfasste

Unbekannter Künstler, Gerichtstafel des Stadtrichters Niclas Strobel, 1478 (Graz Museum): Der Richter sitzt auf einem hohen Richterstuhl unter einem Baldachin und trägt einen Stab, einen roten Samtmantel und eine Mütze. In einem Gehäuse, das die Grenzen der städtischen Gerichtsbarkeit symbolisiert, sitzen sechs Schöffen, mit denen sich der Richter berät und die über den Streitfall entscheiden. Der Kammerdiener des Richters trägt das Schwert des Richters und einen Stab, auf den einer der Zeugen mit zwei geschworenen Fingern schwört. Über dem Richter befindet sich das göttliche Gericht, das schon immer ein Beispiel für ein weltliches Gericht war; im Hintergrund wird das Urteil des göttlichen Gerichts vollstreckt (der Teufel führt die Sünder in die Hölle). Vor dem Richter schläft ein Hund, der die Weisheit König Salomons symbolisiert.

[81] Siehe DUVE, T. *Sonderrecht in der frühen Neuzeit. Studien zum ius singulare und den privilegia miserabilium personarum, senum und indorum in Alter und Neuer Welt.* Frankfurt am Main, 2008, 8 f.

[82] Z. B. nach der Konstitution von Friedrich Barbarossa, der sogenannten Authentica „Habita“. Dazu STELZER, W., Zum Scholarenprivileg Friedrich Barbarossas (Authentica „Habita“). In: *Deutsches Archiv für Erforschung des Mittelalters*, Bd. 34, Köln, Wien, 1978.

[83] HÜLSEN-ESCH, A., Kleider machen Leute. Zur Gruppenrepräsentation von Gelehrten im Spätmittelalter. In: OEXLE, O. G., VON HÜLSEN-ESCH, A. (Hrsg.), D*ie Repräsentation der Gruppen. Texte – Bilder Objekte*, Göttingen, 1998, S. 228 f.

[84] SCHMIDT-WIEGAND, R., Ornat. In: ERLER, A., KAUFMANN, E. (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte,* Bd. 3, Berlin, 1990, Sp. 1311.

[85] HÜLSEN-ESCH, A., Kleider machen Leute. Zur Gruppenrepräsentation von Gelehrten im Spätmittelalter. In: OEXLE, O. G., VON HÜLSEN-ESCH, A. (Hrsg.), *Die Repräsentation der Gruppen. Texte – Bilder Objekte*, Göttingen, 1998, S. 232.

[86] HÜLLE, W., Richterkleidung. In: ERLER, A., KAUFMANN, E. (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte*, Bd. 4, Berlin, 1990, Sp. 1044.

[87] HÜLSEN-ESCH, A., Kleider machen Leute. Zur Gruppenrepräsentation von Gelehrten im Spätmittelalter. In: OEXLE, O. G., VON HÜLSEN-ESCH, A. (Hrsg.), *Die Repräsentation der Gruppen. Texte – Bilder Objekte*, Göttingen, 1998, S. 230.

[88] BALTL, H., *Rechtsarchäologie des Landes Steiermark*, Graz, 1957, S. 50.

[89] Reformation guter Policey: XII. Von Doctoren: *„Deßgleichen sollen und mögen die Doctores, und ihre Weiber, auch Kleider-Geschmuck, Ketten, güldene Ringe, und anders ihrem Stande gemäß tragen*.“ SENCKENBERG, H. C., SCHMAUSS, J. G. (Hrgs.), *Neue und vollständigere Sammlung der Reichs-Abschiede.* Frankfurt, 1747, S. 594.

[90] Ordnung guter Policey, Augsburg, 1588 [1577], s. v. *Von Advocaten* in *Von Doctorn*.

eine Gruppe gelehrter Juristen, zu der bis zum 18. Jahrhundert die ungelehrten Richter nicht gehörten.[91]

In den österreichischen und deutschen Ländern trugen ab dem 16. Jahrhundert die Richter nach spanischem Vorbild eine schlichte und fast unansehnliche schwarze Tracht,[92] die in scharfem Kontrast zu den Roben der französischen Richter standen, insbesondere vor den höchsten Gerichten (*parlements*).[93] Als deutsche Richter im 17. und 18. Jahrhundert versuchten, mit ihren französischen Kollegen in Bezug auf die Mode gleichzuziehen, wurden sie oft verspottet.[94]

Rot war die traditionelle Farbe der Richter, die angeblich den Fluss des menschlichen Blutes symbolisieren sollte.[95] In der christlichen Symbolik ist Rot aber auch die Farbe des Heiligen Geistes, was sich heute noch in der Bezeichnung der den Juristen gewidmeten Gottesdienste zeigt. Mancherorts läutet die *Rote Messe* den Beginn eines neuen Gerichts- und akademischen Jahres ein.[96]

Auch Handschuhe gehörten zur Kleidung von gelehrten Juristen, insbesondere von Richtern. In Padua war es im 14. Jahrhundert für einen angehenden Doktor der Rechtswissenschaften (*doctor iuris utriusque*) sogar vorgeschrieben, seinen Prüfern bei der Abschlussprüfung Leder- oder Seidenhandschuhe zu überreichen.[97]

Der gelehrte Richter wird regelmäßig mit einer Kopfbedekkung dargestellt, typischerweise mit einem roten oder schwarzen Barett[98] oder sogar einem Diadem mit drei Lilien.[99] Das Barett hatte eine doppelte Funktion: Es diente sowohl als Zeichen der Investitur als auch als Zeichen der Klassenzugehörigkeit.[100] Im Gegensatz zu den Insignien der Richter ist das Barett in erster Linie das Berufsabzeichen der Doktoren (*insignium doctoralium*).[101] Um die Autorität der Gerichte zu stärken, ordneten in der frühen Neuzeit einige deutsche Staaten an, dass bei Gerichtsverhandlungen ausschließlich die Richter eine Kopfbedeckung tragen durften.[102] In der Barockzeit trugen die Richter Perücken, aber in der kontinentalen Justiz erhielten sie nie eine solche repräsentative Funktion wie in England.

4. Schlusswort

Der historische Überblick über die gerichtlichen Insignien in Kontinentaleuropa offenbart deren Stabilität im Lichte sowohl partikularistischer als auch gemeinrechtlicher Entwicklungen. Selbstverständlich ist zu bedenken, dass die richterliche Repräsentanz auch mit dem Ansehen und der Bedeutung des Gerichts in einem bestimmten Territorium zusammenhängt. Die richterlichen Insignien verleihen ihrem Träger eine besonders ausgeprägte Würde.[103] *„Auch die Keckesten und Verwegensten wenn*

[91] Derjenige, der den Titel eines Doktors beider Rechte erhielt, stand auf der gleichen Stufe wie der niedere Adel. Dies ist eines der wenigen Beispiele für einen vertikalen sozialen Aufstieg, der weder von der Geburt noch vom Reichtum abhing und am ehesten mit einer Position innerhalb der kirchlichen Hierarchie vergleichbar war, in der theoretisch jeder vom ärmsten Studenten bis zum höchsten kirchlichen Amt aufsteigen konnte. GRUNDMANN, H., *Vom Ursprung der Universität im Mittelalter*, Berlin, Boston, 1957, S. 19 und 24. Wie KANTOROWICZ (*The King's Two Bodies. A Study in Mediaeval Political Theology*, New Jersey, 1997, S. 124) feststellt, hatten die Doktoren des Rechts bereits im dreizehnten Jahrhundert die Anerkennung der Grafenwürde erlangt und waren neben dem kirchlichen (*militas coelestis*) und weltlichen Adel (*milita equestris*) in der so genannten *militia legum* (auch: *milita litterata* oder *doctoralis*) eingestuft. Dazu auch FITTING, H., *Das Castrense peculium in seiner geschichtlichen Entwicklung und heutigen gemeinrechtlichen Geltung*, Halle, 1871, S. 547.

[92] Bis zu ihrer Abschaffung im Jahr 1806 wurde am Reichskammergericht die so genannte spanische Tracht getragen, d. h. ein schwarzer Anzug mit schwarzen Samtstrümpfen, ein schwarzer kurzer Mantel und ein Degen. DÖHRING, E., *Geschichte der deutschen Rechtspflege*, Berlin, 1953, S. 217.

[93] Die französischen Richter trugen reichhaltige rote Togen von präziser Materialauswahl (Samt, Seide, Satin, Taft) mit Hermelin-Kragen und goldenen gewebten Baretts. DE LA ROCHE-FLAVIN, B., *Treize Livres des parlements de France, ès quels est amplement traité de leur origine et institution, et des présidents, conseillers, gens du roi, greffiers, secrétaires, huissiers et autres officiers,* Bordeaux, 1617, Buch 8.

[94] *„Das sind die Pflastertreter mit Perüquen / und aufgeknebelten Hofbarten / die zwey Stunden / vor dem Spiegel stehen / wenn sie ins Collegium oder zu Tisch gehen wollen. Lernen an statt der Rechte eine Französische Mine und Complimente machen / und wenn sie etwas schreiben, so ist's ein Jungserbrief, oder ein Sonnet auf einen unfreundlichen Blick den ihnen Jungser Lißchen gegeben. Spaziergänger, so alle Tage Sonntag halten / von denen gedachter* Caccia lupus *reimet*: Qui vult Sanctorum celebrare singula festa, non poterit clarè cum Codice scire Digesta." STIELER, K. von, *Der teutsche Advokat,* Nürnberg, 1678, S. 136.

[95] KOCHER, G., *Zeichen und Symbole des Rechts. Eine historische Ikonographie,* München, 1992, S. 141.

[96] Die Rote Messe wird in der katholischen Kirche für Angehörige der Rechtsberufe gefeiert und leitet in einigen Ländern traditionell das neue Gerichtsjahr ein. Es ist eine Gelegenheit, bei der der Heilige Geist angerufen wird, um die Juristen bei der Entscheidungsfindung zu unterstützen. Die Rote Messe wurde erstmals 1245 in Paris gefeiert. Es ist nach den flammenartigen Feuerzungen benannt, die den Heiligen Geist symbolisieren, der am Pfingsttag auf die Apostel niederkam (Apostelgeschichte 2,1–4). Daher die scharlachroten liturgischen Gewänder der Priester und das rote Zeremonialgewand der Richter. Von der Feier der dem Heiligen Geist geweihten Messe, die auf den Abschluss des alten und den Beginn des neuen Schuljahres folgte, berichtete der Glossator Odofredus: *Et est consuetudo diutius obtenta in civitate ista, quod cantatur missa quando liber finitur, et ad honorem sancti Spiritus; et est bona consuetudo et ideo est tenenda*. SAVIGNY, F. C. v., *Geschichte des römischen Rechts im Mittelalter* III, Heidelberg 1822, S. 244, Fn. 233.

[97] HÜLSEN-ESCH, A., Kleider machen Leute. Zur Gruppenrepräsentation von Gelehrten im Spätmittelalter. In: OEXLE, O. G., VON HÜLSEN-ESCH, A. (Hrsg.), *Die Repräsentation der Gruppen. Texte – Bilder Objekte*, Göttingen, 1998, S. 248.

[98] HÜLSEN-ESCH, A., Kleider machen Leute. Zur Gruppenrepräsentation von Gelehrten im Spätmittelalter. In: OEXLE, O. G., VON HÜLSEN-ESCH, A. (Hrsg.), Die Repräsentation der Gruppen. Texte – Bilder Objekte, Göttingen, 1998, S. 236. „Die Barettmütze war eine runde oder quadratische Kopfbedeckung, die oft mit Ornamenten verziert war und von weltlichen Würdenträgern, z. B. Richtern, getragen wurde. Die Biretta hingegen bleibt die liturgische Kopfbedeckung der Priester." BRINGEMEIER, M., *Priester- und Gelehrtenkleidung*. Münster, 1974, S. 12.

[99] BRINGEMEIER, M., Priester- und Gelehrtenkleidung. Münster, 1974, S. 32.

[100] HÜLSEN-ESCH, A., Kleider machen Leute. Zur Gruppenrepräsentation von Gelehrten im Spätmittelalter. In: OEXLE, O. G., VON HÜLSEN-ESCH, A. (Hrsg.), Die Repräsentation der Gruppen. Texte – Bilder Objekte, Göttingen, 1998, S. 244.

[101] Ders. 141.

[102] DÖHRING, E., *Geschichte der deutschen Rechtspflege*, Berlin, 1953, S. 216.

[103] Ab 1347 mussten die Pariser Bacheloraten geloben, *ad honorem totius universitatis,* stets die *capa rotunda* zu tragen. DENIFLE, H. *Chartularium Universitatis Parisiensis,* Tom. II, Sectio prior, S. 680.

sie des Richters Majestät und Herzlichkeit ansichtig werden verstummen zumal wenn ihre böse Sache ihnen das Gewissen rühret daß sie nun an dem Orte sich befinden wo die Wahrheit von dem Betrug abgesiebet werden sol." [104] Nach Garzoni soll die Richtertracht *„ehrbar vnnd gleichsamb Majestätisch seyn zur Anzeygung der Ehren vnnd Nobilitet seines Ampts wie dann jedermĺnniglich mußbekennen daß es ein hochehrlich vund adelich Ampt ist*." [105]

Das 19. Jahrhundert bedeutet einen Wendepunkt in der Geschichte der Insignien, da einige der alten Insignien durch neue ersetzt wurden. Die auffälligsten Beispiele sind die Abschaffung des Gerichtsstabes und des Gerichtsschwertes, was sicherlich auf die Abkehr von der feudalen Mentalität und der damit verbundenen strengen Strafjustiz zurückzuführen ist.[106] Die Justizkette, die in vielen modernen Gerichtszeremonien als repräsentatives Symbol des Obersten Gerichtshofs zu finden ist, kommt vor dem 19. Jahrhundert selten vor.[107] Ebenso unhistorisch wie die Justizkette ist der Gerichtshammer (*Gavel*), der in der anglo-amerikanischen Rechtsfamilie seinen Ursprung hat. Ebenso interessant ist es, dass der Richter seit dem 19. Jahrhundert bei der Urteilsverkündung zu stehen hat – genauso wie die Parteien und das Publikum. Das Stehen bei der Urteilsverkündung, die heute als Ausdruck des Respekts vor der Urteilsverkündung im Namen des Souveräns bzw. des Volkes gewertet werden kann,[108] ist in der europäischen Rechtsgeschichte aber ohne Vorbild. Das Tragen einer speziellen Richtertoga, die direkt vom Talar der gelehrten Juristen abstammt, hat sich seit dem Mittelalter bis heute ununterbrochen erhalten.

Das Bild des Richters in mittelalterlichen Handschriften kann nicht ohne weiteres als verlässliche Darstellung seines tatsächlichen Aussehens betrachtet werden. Illuminationen waren nicht immer eine Quelle der Wirklichkeit, sondern in ihrer ganzen Symbolik vor allem ein Mittel der Kommunikation. Sie vermitteln ihren Benutzern eine Botschaft über den juristischen Habitus,[109] das Gesamtbild des Juristen, das ihn prägt und gleichzeitig seinen Lebensstil, seinen Sprachcode, seinen ästhetischen Geschmack und sein äußeres Erscheinungsbild bestimmt, welches durch Kleidung, Körperhaltung und symbolische Zeichen (Insignien) zum Ausdruck kommt. Die Gesamtheit all dieser Elemente bildet die gesellschaftliche Identität des Richters, sie bindet ihn an die breitere soziale Gruppe und ruft den Menschen in Erinnerung, dass sie es mit einer transpersonalen, ewigen staatlichen Institution zu tun haben, die, sofern sie Insignien trägt, durch ihr Organ lediglich repräsentiert wird.

[104] STIELER, K. von, *Der teutsche Advokat.* Nürnberg, 1678, S. 54.

[105] GARZONI, T., *Piazza universale: Das ist: Allgemeiner Schawplatz, Marckt vnd Zusammenkunfft aller Professionen, Künsten, Geschäfften, Händeln vnd Handwercken.* Frankfurt am Main, 1659, S. 1035.

[106] Dazu ŽEPIČ, V., Sodniške insignije v evropskem pravnem izročilu, in: ŽEPIČ, V., NABERGOJ, T., VIDMAR, P., ZEMLJIČ, I., Sodniške insignije v evropskem in slovenskem pravnem izročilu (2023), S. 29.

[107] Über Gerichtskette siehe LÜCK, H., Kette. In: *Handwörterbuch zur deutschen Rechtsgeschichte* (2011), Bd. II, Sp. 1717–1720.

[108] ERLER, A., Richterstuhl. In: ERLER, A., KAUFMANN, E. (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte*, Bd. IV., Berlin, 1990, Sp. 1058.

[109] Vom *habitus* siehe BOURDIEU, P., *Esquisse d'une théorie de la pratique précédé de Trois études d'ethnologie kabyle*, Seuil 2000, 256 ff. Dazu REHBEIN, B., *Die Soziologie Pierre Bourdieus*. 3. Auflage, Konstanz, 2016, S. 86–87.

Virtuous Promises: The Changing Oaths of the Reichshofrat and the Appearance of Impartiality

*Peter Roethke**

Abstract

As the Imperial Aulic Council of the Holy Roman Empire grew in stature over the course of the early modern period, the integrity of its membership came increasingly into focus. This article analyzes that heightened scrutiny through the lens of oaths. Working from the promulgated versions, drafts, and legislative history of the court ordinances, it argues that the oaths sworn by court officials were specifically tightened in order to deter corruption and the appearance of corruption. The close textual analysis reveals a keen appreciation of bureaucratic mores by the political masters of the court. For such an important instrument of imperial power as the Imperial Aulic Council, perceptions mattered.

Keywords: *Imperial Aulic Council; corruption; Holy Roman Empire; Reichshofratsordnungen; judiciary; judicialization; law; bribery; integrity; reform.*

1. Introduction

While under cross-examination by a judicial ethics committee in November 1676, the lawyer Johann Anton Lesenich was asked "whether he remember[ed] his oath given to the Imperial Aulic Council." Lesenich replied that "he remembered it" but asked rhetorically "if the opposing party is dealing the same way [paying bribes], should he neglect his clients and not give them the same assistance?" [1] The committee was not impressed by Lesenich's concern for his fiduciary duty and disbarred him for "several attempted prohibited corruptions of the [officers of the court], and punishable misguidance" of his clients.[2] The disgraced attorney then wrote to the Holy Roman Emperor, claiming that "he had not corrupted anyone, but rather had intended to remunerate one or the other so that Justice would turn out well for his clients." [3] Emperor Leopold I pardoned him, and he was practicing before the court again by April 1677.

As this anecdote indicates, preventing corruption was an institutional interest of the Imperial Aulic Council and oaths were a key part of furthering that interest. If the rehabilitation of Lesenich seems improbably swift, there is nonetheless a recognizable form to his suspension: one who violates an oath may incur serious penalties. This may seem self-evident, but the evolution of the ordinances of the court – the *Reichshofratsordnungen* – reveals an increasingly elaborate series of oaths for an expanding number of court officials over the course of a century from the 1550s to the 1650s. This article traces the evolution of those oaths, arguing that the centrality of the Imperial Aulic Council to the dwindling authority of the Holy Roman Emperors heightened the importance of judicial integrity for the imperial administration.[4]

Oaths are an ancient practice, of course. The Bible exhorts the faithful to "obey the king's command, because you took an oath before God." [5] The religious framework has a long pedigree; Cicero labeled the oath an *affirmatio religiosa*.[6] Social sci-

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1 "Int: Ob er sich seines bey RHRath gelaisten aidts nicht erinnere? R: Er erinnere sichs, wan aber contraria pars mit d.gleichen umb gehe, ob dan er seine partheyen verwahrlossen und nicht gleiche mittel an handt geben solle?" Constitution Lesenich, 19. 11. 1676. HHStAW, RHR RK – Verfassungsakten, RHR 51, 1. As cited by DORFNER, T., *Mittler zwischen Haupt und Gliedern – Die Reichshofratsagenten und Ihre Rolle im Verfahren (1658–1740).* Münster, 2015, p. 204. All translations are mine.

2 "einiger tentirter verbottener corruptelen der Referenten, und strafbahrer verleitung der Partheyen." DORFNER, *Mittler zwischen Haupt und Gliedern,* p. 205. (citing Decretum für Johann Anton Lesenich).

3 "das er niemandten zu corrumpiren, sondern nur allein zum fall die Justitia für seine Partheyen glücklich ausschlagen würde, einen oder andern zu remuneriren intentionirt gewesen sei." DORFNER, T., *Mittler zwischen Haupt und Gliedern*, p. 207. (citing Decretum für Johann Anton Lesenich).

4 The argument that the *Reichshofrat* was central to the reconstruction of imperial authority after the Thirty Year War is not new; Siegrid Westphal, for instance, argues that "[d]er Wiederaufsteig des Kaisertums in der zweiten Hälfte des 17. Jahrhunderts wird in der Forschung wesentlich auf die wachsende Bedeutung des Reichshofrats zurückgeführt." WESTPHAL, S., Der Reichshofrat – kaiserliches Machtinstrument oder Mediator? In: AUER, OGRIS, ORTLIEB (Hrsg.) *Höchstgerichte in Europa: Bausteine frühneuzeitlicher Rechtsordnungen.* Köln, 2007, p. 116-117.

5 New International Version, *Ecclesiastes* 8:2.

6 CICERO, *De Officiis*, Loeb Classical Library, p. 382-383.

entists Patrick Overeem and Fritz Sager argue that "the oath of office creates a double link: first, between oath taker and fellow citizens; second, between an individual's conscience and the public good."[7] The early history of the Holy Roman Empire was fatefully impacted by the famous Strasbourg Oaths of 842, where the Carolingian royal brothers Louis the German and Charles the Bald pledged mutual aid against their eldest brother, the Emperor Lothar.[8] Of more immediate relevance for the history of the imperial judiciary is the inclusion of three oaths in the ordinance of the Imperial Chamber Court, or *Reichskammergericht*, from 1495: those of the judges, the court secretaries, and the "speakers" (*Redner*).[9] In addition to promising honesty, diligence, and strict adherence to royal and imperial laws, the judges pledged "neither to take oneself or let be taken by another any gifts, presents, or self-interest of which the human mind can conceive."[10]

The Imperial Aulic Council, or *Reichshofrat*, was both a complement to, and a competitor with, the Imperial Chamber Court.[11] Although various iterations of a "Hofrat" had existed from the period of Imperial Reform under Maximilian I to the mid-sixteenth century, it was only after the abdication of Emperor Charles V and the accession of his brother Ferdinand that the first ordinance of the court, or *Reichshofratsordnung*, appeared in 1559.[12] Historians disagree about the extent to which the *Reichshofrat* was an advisory body to the Emperor or exercised an exclusively judicial role.[13] Eighteenth-century legal theorist Friedrich Carl Moser argued that demand for the court arose from the German estates' dissatisfaction with the polyglot Charles' largely non-German council of advisors.[14] Nonetheless, the 1555 ordinance of the Imperial Chamber Court served as a model for the 1559 ordinance of the Aulic Council, although this provenance did not translate into an imitation of the articles of the Chamber Court concerning oaths.[15]

2. The 1559 Ordinance of the Imperial Aulic Council

The 1559 *Reichshofratsordnung* did not contain any oaths. Promulgated at Augsburg on 3 April, the ordinance contains twenty-five short articles in the space of a few pages. It laid out the itinerant nature of the court, described the responsibilities of the court functionaries, and detailed procedures for the continued functioning of court business in the absence of members. It prescribed the manner in which judgments were to be recorded and ordered the judges to keep "a copy of the golden bull, our imperial public peace, other imperial chamber court and police ordinances, as well as the agreements of the German nation on the table, so that our councilors, so often it is possible, read these laws so that they remember them better."[16] In addition to these intimations of dilettantism, the ordinance proscribed bribery. Article twenty-three prohibited councilors from "promising their vote in specie," but did not require them to swear to that effect.[17]

The 1559 *Reichshofratsordnung* remained in effect for nearly a century. More surprisingly, the 1559 and the 1654 ordinances were the only two *Reichshofratsordnungen* formally adopted over the entire 247-year span of the court's operation. Nonetheless, modifications and proposals for change did find their way into court practice. Prior to the adoption of the post-Westphalian ordinance, two significant amendments to court procedure were hotly debated.[18] The first, a mere "instruction," occurred during the reign of Rudolf II while the second, a contentious political fight over a new ordinance, failed to garner consensus in the tense atmosphere immediately preceding the Thirty Years War.[19]

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[7] OVEREEM, P., SAGER, F., *The European Public Servant: A Shared Administrative Identity?* Colchester, 2015, p. 55.

[8] BECK, A., *Die Strassburger Eide in der Frühen Neuzeit: Modellstudie zu Vor- und Frühgermanistischen Diskursstrategien.* Wiesbaden, 2014.

[9] RKGO Articles 3, 4, and 5 respectively.

[10] "kain Gab, Schenck oder ainichen Nutz durch sich selbs oder ander, wie das Menschen Synn erdencken möcht, tzu nemen oder nemen lassen." Ordnung des Camergerichts. (Reichskammergerichtsordnung vom 7. 8. 1495) *Quellensammlung zur Geschichte der deutschen Reichsverfassung,* ZEUMER, K. (Hrsg.), 2. A. 1913, Neudruck 1987, p. 284. *Also available at* http://www.koeblergerhard.de/Fontes/Reichs-Kammergerichts-Ordnung1495.htm.

[11] For a thorough analysis of the competing jurisdictional claims of the two courts, see SELLERT, W., *Über die Zuständigkeitsabgrenzung von Reichshofrat und Reichskammergericht insbesondere in Strafsachen und in Angelegenheiten Der Freiwilligen Gerichtsbarkeit.* Aalen, 1965.

[12] Oswald Gschließer attributes a *Hofordnung* to Maximilian from 1498, with subsequent iterations under Charles in 1518 and 1531 respectively, albeit without the promulgation or institutional apparatus constructed after the 1559 ordinance. See, v. GSCHLIEßER, O., *Der Reichshofrat: Bedeutung und Verfassung, Schicksal und Besetzung einer Obersten Reichsbehörde von 1559 bis 1806.* Wien, 1942.

[13] Michael Hughes, for instance, claims that "the aulic council was not a law court but a council to advise the Emperor on the exercise of his judicial authority" whereas Gschließer maintains that the RHR lost its advisory role to the *Geheimer Rat* and *Reichshofkanzlei* under Emperor Leopold I and continued exclusively as a law court thereafter. *Compare* HUGHES, M., "The Imperial Aulic Council ('Reichshofrat') as Guardian of the Rights of Mediate Estates in the Later Holy Roman Empire: Some Suggestions for Further Research. In: *Herrschaftsverträge, Wahlkapitulationen, Fundamentalgesetze*. Rudolf VIERHAUS, R. (Hrsg.), Göttingen, 1977), p. 200; with GSCHLIEßER, O., *Der Reichshofrat*, p. 15.

[14] MOSER, F. C., *Pragmatische Geschichte und Erläuterungen der Kayserlichen Reichs-Hof-Raths-Ordnung Erster Band*. Frankfurt, 1751, p. 10-11.

[15] HUGHES, M., *Law and Politics in Eighteenth-Century Germany: The Imperial Aulic Council in the Reign of Charles VI*. Woodbridge, 1988, p. 31.

[16] "sambt ainem exemplar der güldenen bull, unsers kay. landtfriedens und anderer reichscammergerichts- und polliceyordtnungen, auch der concordaten germanicae nationis auf des hofraths tafel liegen, damit unsere hofräth yeder, so offt es inen geliebt, solche ordnungen lessen und sich derselben desto pesserer erindern möge." § 24 Imperial Aulic Council Ordinance (RHRO) 1559, reproduced in SELLERT, W., *Die Ordnungen des Reichshofrates 1550 – 1766 1. Halbband bis 1626*. Wien, 1980, p. 36.

[17] "ihnen in specie ir stim zu versprechen" § 25 Imperial Aulic Council Ordinance (RHRO) 1559, reproduced in SELLERT, W., *Die Ordnungen des Reichshofrates 1. Halbband*, p. 35.

[18] Although historian Stefan Ehrenpreis argues that, prior to the 1654 ordinance, the Reichshofrat had no formal procedural law. EHRENPREIS, S., *Kaiserliche Gerichtsbarkeit und Konfessionskonflikt der Reichshofrat unter Rudolf II 1576–1612.* Göttingen, 2006, p. 13.

[19] Arguably, the Emperor did not need to garner consensus, since the *Reichshofratsordnungen* were not subject to approval by the Reichstag, but rather promulgated by the Emperor alone as the prerogative of his office as *oberster Gerichtsherr*. ULLMANN, S., *Geschichte auf der langen Bank: Die Kommissionen des Reichshofrates unter Maximilian II. (1564–1576).* Göttingen, 2006, p. 31.

3. The "Instruction" of Rudolf II.

The instruction of Rudolf II was the first constitutional document of the court to contain oaths. Appearing in 1594, the preamble of the document explained the need for revision to the courts' governing statutes as the result of "the change and passage of time [causing] all sorts of falsities to seep in, so that an elaboration and renewal [of the ordinance] was necessary."[20] The instruction detailed five categories of personnel subject to oath: the president of the council, councilors, council secretaries, the "door keepers" (*Türhüter*) and imperial vassals.[21] Interestingly, the text contains a sub-heading for the councilor oath with a blank space underneath.[22] Whereas the oath for the council president makes no mention of conflicts of interest or prohibited practices, the oath for the council secretaries does. It enjoins "demanding or begging presents from [anyone]" instead pleading that secretaries "content themselves with their salaries."[23]

The text of the 1594 instruction does not mention which "falsities" had crept into judicial practice, but the rapid expansion of court business in the preceding reign suggests that an expanded pool of litigants had an interest in court outcomes. As historian Sabine Ullman notes, under Emperor Maximilian II the practice of establishing commissions to investigate and mediate disputes had become firmly established.[24] Furthermore, by the reign of Rudolf II, *Reichshofrat* jurisdiction extended to the granting of copyright and patent protections, alongside competence to adjudicate all matters concerning imperial Italy, criminal cases involving immediate estates, and exclusive jurisdiction over *Rangstreitigkeiten* – disputes over precedence.[25] Yet this wide purview was not matched by a concomitant oath of impartiality. Even the oaths stipulated here that proscribe official requests for extra compensation do not extend that proscription to unsolicited offers. The text of the oath for *Türhüter,* for instance, prohibited "demanding payment from the parties in addition to his usual wages" with the word "demanding" replacing a crossed-out "taking."[26]

Nor are the full range of court actors included in the list of oaths. For instance, two classes of legal officers – *Agenten* and *Sollizitatoren* – are omitted. Historian Thomas Dorfner notes how the *Eidbuch* listing all officers sworn in to the court did not appear until 1609, so the omission is perhaps merely one of timing.[27] As the aforementioned Lesenich affair illustrates, however, Agents and Solicitors were implicated in corruption scandals at court. At the same time, a gulf exists between late sixteenth-century and late seventeenth-century institutional practice. Historian Stefan Ehrenpreis argues that this gulf rendered the Agents and Solicitors incapable of corruptly influencing court decisions, since judgments in Rudolf's reign emerged from the convergence of interests of the *Reichshofrat*, the *Geheim Rat*, and those of the Emperor himself.[28] Viewed from this perspective, the omission was not a glaring one.

Even if the 1594 instruction appears deficient with four centuries of hindsight, there was also a push for an entirely new *Reichshofratsordnung* during the reign of Rudolf II himself. Historian Oswald Gschließer pins the impetus for reform squarely on the Protestant estates of the Empire, describing how they viewed the court warily as a tool of counter-reformation policy.[29] Wolfgang Sellert notes how in a 1584 *Gravamina*, the Palatinate, Brandenburg, Denmark, Magdeburg, Saxony, Coburg, Braunschweig, Lüneburg, Hessen, Anhalt, Baden, and the free imperial cities formally protested the jurisdiction of the court in religious matters.[30] This confessional brinkmanship escalated as the century drew to a close, with Habsburg demands for an increased *Türkensteuer* against the backdrop of the long Turkish war (1593 – 1606) tied to Protestant demands for an end to *Reichshofrat* jurisdiction over disputes involving religion.[31] Friedrich Carl Moser relates how the 1612 election of Matthias again raised calls for a new *Reichshofratsordnung*, to which Matthias' administration agreed.[32] Two drafts emerged, one drafted by the Archbishop of Mainz, and the other by the Emperor's office. Yet because the court, the Emperor, the Archbishop, and the estates failed to agree on a final version, neither of the proposed drafts came into effect. The negotiations collapsed in 1617 over the issue of annual visitations demanded by the Protestant estates.[33]

4. The "Mainzer Konzept"

Although neither draft of the 1617 ordinance came into effect, both contained more elaborate anti-graft language than their predecessors. The so-called "Mainzer Konzept" enlarged

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[20] "Diweweilen aber durch veränderung der zeit und leufft inmittelst allerhand unrichtigkeiten eingerissen, daß dieselbe wohl einer eleuterung, auch erneurung bedürfftig." Reichshofratsinstruktion Rudolfs II, reproduced in SELLERT, W., *Die Ordnungen des Reichshofrates 1. Halbband*, p. 35.

[21] This final category requires some explanation: the *Reichshofrat* possessed exclusive jurisdiction over feudal enfeoffments, and functioned as the imperial institution tasked with investing the Emperor's nominal vassals with the privileges of lordship. GSCHLIEßER, *Der Reichshofrat*, p. 25.

[22] SELLERT, *Die Ordnungen des Reichshofrates 1. Halbband*, p. 59.

[23] "und darumb kein schenckh von niemandts fordern oder heischen, sondern sich der tax und seiner belohnung begnügen lassen." SELLERT, *Die Ordnungen des Reichshofrates 1. Halbband*, p. 60.

[24] ULLMANN, *Geschichte auf der langen Bank*.

[25] EHRENPREIS, *Kaiserliche Gerichtsbarkeit*, p. 66.

[26] "von den partheyen über seinen gewohnlichen und gebürlichen lohn nichts fordern" Titulus XIII Des hoffrathsdiener oder thürhueter aydt, as reproduced in SELLERT, *Die Ordnungen des Reichshofrates 1. Halbband*, p. 60. Sellert notes the crossing-out of the word "nemen" in footnote "z."

[27] DORFNER, T., *Mittler zwischen Haupt und Gliedern – Die Reichshofratsagenten und Ihre Rolle im Verfahren (1658 – 1740)*. Münster, 2015, p. 23.

[28] EHRENPREIS, *Kaiserliche Gerichtsbarkeit*, p. 72.

[29] Gschließer himself discounts this logic, citing the numerous lawsuits brought by Protestant litigants before the court. GSCHLIEßER, *Der Reichshofrat*, p. 25.

[30] In a so-called *Gravamina*. SELLERT, *Die Ordnungen des Reichshofrates 1. Halbband*, p. 79.

[31] GSCHLIEßER, *Der Reichshofrat*, p. 53.

[32] MOSER, *Pragmatische Geschichte*, p. 60.

[33] GSCHLIEßER, *Der Reichshofrat*, p. 53; see also SELLERT, *Die Ordnungen des Reichshofrates 1. Halbband*, p. 101.

the number and comprehensiveness of the oaths contained in the 1594 instruction while the draft proposed by the Emperor contained an oath explicitly prohibiting *corruptionen*.[34] So, for instance, the Mainzer Konzept contained oaths to be sworn by the council president, the councilors, and the secretaries, as well as the *Protocollisten*, procurators, agents, *Hofratsdiener*, and *Türhüter*.[35] Aside from the text of the *Türhüter* oath which merely repeated the wording of the 1594 instruction, the language of the remaining oaths is interesting because of its broadened scope. It is therefore useful to explore in fuller detail.

Consider the councilors' oath from the "Mainzer Konzept." In addition to demanding allegiance to Matthias personally as Emperor it also demands allegiance to the Empire as whole. It stipulates the sources of law that should dictate judicial reasoning: namely the common law, imperial recesses, the religious and public peace, territorial ordinances, statutes, and customs.[36] These important statements concerning the origin of authority and their hierarchy of value precede a conspicuous borrowing from the oaths of the Imperial Chamber Court: "neither to take oneself or let be taken any gifts, presents, or self-interest of which the human mind can conceive" from the parties or any other.[37] With slight modifications, the language borrows from the *Reichskammergerichtsordnung* (RKGO) of 1555. This is a stricter oath than the president's oath detailed in the 1594 instruction. Moreover, the elevated strictness continues throughout the remaining oaths: the secretaries' oath, for instance, repeats the line that they should content themselves with their wages, but also adds that they should not even take any unsolicited gifts – a prohibition absent from the oath twenty years earlier.[38]

The desired deterrent effect of these oaths becomes more explicit in the 1617 ordinance proposal of Emperor Matthias. Here, the swearing of the oath is concretely tied to preventing corruption; indeed, the word "corruption" itself is used in this article for the first time in the constitutional documents of the court. Title I, article 11 reads:

> And since therefore our president and imperial aulic councilors are bound to us alone as Roman Emperor and the holy Empire, so they should […] accept improperly from no party more than any other [and] abstain from all *corruptions* through which justice could be hampered or even merely made suspect […] with god and the true justice of their personally sworn oath before their eyes at all times.[39] (emphasis added)

There is a great deal of information packed into this truncated quote. First, the phrase "bound to us alone" refers to the requirement detailed in the following article that *Reichshofrat* judges forswear all other allegiances and sources of income before joining the court.[40] The addition of the phrase "the holy Empire" itself is intended to delimit monarchical authority. Also, note the plural form of the word "corruptions"; the meaning is ambiguous but clearly not strictly congruent with "bribery" – leaving room for an expansive conception of "corruption" that awaits further analysis. Finally, the dual reference to the oath underscores both its deterrent function and the sacral element of a promise ensuring professional reputation.

In both their breadth and depth, therefore, the 1617 proposals for reform considerably developed the oaths required of court personnel. From the complete absence of oaths in the (still governing) 1559 ordinance, the deliberations surrounding a replacement ordinance assumed the importance of oaths for the maintenance of judicial integrity. These developments must be seen against the backdrop of competing tensions. The first is the so-called "juridification" of the Empire in early modernity, a term coined by historian Winfried Schulze to describe the increasing tendency of peasants and landlords to resolve conflicts in court rather than on the battlefield.[41] The *Reichshofrat*

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[34] A Germanized version of the Latin *corrumpere*.

[35] Mainzer Konzept Tit. XIX as reproduced in SELLERT, *Die Ordnungen des Reichshofrates 1. Halbband*, p. 150-153.

[36] "des reichs gemainen rechten, abschieden, religion und landtfrieden und nach redlichen erbaren und ländischen ordnungen, statute und gewohnheiten." Titulus 19: Von ayden und personen – Der reichshofräth ayd. As reproduced in SELLERT, *Die Ordnungen des Reichshofrates 1. Halbband*, p. 150.

[37] "von den partheyen oder yemandt anders kainer justicsachen halber einige gab, schenck oder nuzen durch mich stellen oder ander, wie das manchen synn erdencken möge, zu nemmen oder nemmen zu lassen." Titulus 19: Von ayden und personen – Der reichshofräth ayd. As reproduced in SELLERT, *Die Ordnungen des Reichshofrates 1. Halbband*, p. 151.

[38] "kainer iustichsachen halben schenck fürnemmen noch nur zu nuz nehmen, sonder mich meiner belohnung und ordenlichen tax begnüegen." Titulus 19: Von ayden und personen – Der secretarien und prothocollisten aydt. As reproduced in SELLERT, *Die Ordnungen des Reichshofrates 1. Halbband*, p. 151-152.

[39] "Und weillen dan allein unß alß römischem kayser und dem heil. Reich vielberührte unser praesident und reichshofräthe mit einem theuren aydt verbunden, so sollen sy… sich kheiner parthey mehr alß der andern ungebührlich annehmen, aller corruptionen, dadurch die justici behindert oder nur verdächtig gemacht werden khöndte, endthalten… allein gott und zu der wahren justitien leiblich geschwornen aydt allezeit vor augen halten." 1617 RHRO Tit. I § 11, as reproduced in SELLERT, *Die Ordnungen des Reichshofrates 1. Halbband*, p. 166-167.

[40] 1617 RHRO Tit. I § 14. This article, along with article 13, also govern instances of recusal, i.e. when personal or financial relationships with litigants require individual judges to remove themselves from deliberations and votes. Sellert quotes Moser here, noting how this provision engendered a great deal of discussion including demands from the Palatinate and Brandenburg that judges receive adequate salaries to reduce their susceptibility to bribery. See SELLERT, *Die Ordnungen des Reichshofrates 1. Halbband*, p. 169 ("Auch Brandenburg wandte sich gegen di Bestechungsmöglichkeit und verlangte, daß die Reichshofräthe einen Unterhalt beziehen, sich aber aller 'finanzerey' enthalten und dies auch mit einem Eid beschwören sollten. Im Falle des Eidbruchs sollten sie dann bestraft werden.").

[41] "Verrechtlichung" - For the application of the term to the role taken by the *Reichshofrat*, see PRESS, V., Der Reichshofrat im System des Frühneuzeitlichen Reiches. In: *Geschichte der Zentraljustiz in Mitteleuropa*, Friedrich Battenberg and Filippo Ranieri (Hrsg.) Vienna, 1994, p. 355. For the use of the term in its original application, see SCHULZE, S., Europäische und deutsche Bauernrevolten der frühen Neuzeit — Probleme der vergleichenden Betrachtung. In: SCHULZE (Hrsg.) *Europäische Bauernrevolten der frühen Neuzeit*. Frankfurt am Main, 1982, p. 36.

arguably gained prominence as the result of this trend, proving a popular forum for the adjudication of disputes.[42] The second trend, confessional polarization, may have had the opposite effect; historian Volker Press contends that the court functioned as an instrument of Habsburg monarchical aspirations during the Thirty Years War.[43] The result seems paradoxical: an increasingly popular court was, at least in the early seventeenth century, simultaneously becoming less impartial as a legal venue.[44]

5. The 1654 Ordinance of the Imperial Aulic Council

Oaths serve to safeguard the integrity of process. It is therefore perhaps unsurprising, given the countervailing tensions just described, that the post-Westphalian ordinance of the *Reichshofrat* would seek to anchor the legitimacy of court proceedings with a series of oaths drawn from the defunct 1617 reform movement. The 1654 ordinance, which served as the legal basis for *Reichshofrat* authority until the dissolution of the court in 1806, largely replicated the draft oath format from 1617, albeit with certain modifications. An original feature of the ordinance, however, are the detailed provisions governing court procedure: Title II spells out these rules with a level of detail not seen in earlier iterations of the *Reichshofratsordnungen*.

Yet if the court and Emperor Ferdinand III thought these provisions would assuage anxieties about *Reichshofrat* partisanship, the manner in which the new ordinance was published did precisely the opposite. Contrary to custom, the draft ordinance was not circulated at the *Reichstag* – the final imperial diet before the "perpetual" assembly at Regensburg – and the assent of the Archbishop of Mainz, in his role as imperial chancellor, was not secured.[45] According to Moser, the text of the new ordinance was simply published on March 16, two months before the *jüngster Reichsabschied*.[46] Historian Volker Press argues that this was a clever institutional power grab by a weakened monarchy. In a Westphalian system that sought to subsume *Reichshofrat* authority in a new RKGO, Ferdinand succeeded in retaining ultimate judicial authority for the imperial office.[47]

Whether inartful blunder or masterful *fait accompli*, the 1654 ordinance provided the legal basis for another one hundred and fifty years of court operations. As the first true successor to the 1559 ordinance, the 1654 document enshrined in law for the first time many of the textual developments that had emerged from the 1594 and 1617 drafts.[48] This holds true for the development of oaths as well: the number of sworn officeholders increased to match the 1617 proposals as did the regulation of gifts, recusals, and extra-judicial communication between parties and court officials. Yet if these modifications represent two steps forward in the direction of professionalization, the deletion of several provisions also represented a step back from the 1617 drafts. Two deletions in particular deserve mention.

The first concerns the clause prohibiting judges from accepting gifts. Whereas the "Mainzer Konzept," had located the prohibition of gifts in the judicial oath, the 1654 ordinance removed this clause from the oath and relocated it to Title I, article 16 – a provision concerning the duties of judges more generally.[49] The change was commented upon at the time: a 1653 report from the court noted that although the text differed from the 1617 version, the effect was the same because "each councilor begins by swearing on the whole ordinance," and since the anti-graft provision was contained elsewhere in the ordinance it was effectively incorporated into the oath.[50] As a legally binding provision this is, strictly speaking, correct. As a statement of priorities and an indicator of the institutional interest in eliminating gifts to judges, however, it suggests a diminished importance. The second deletion echoes the first: the aforementioned injunction that judges "abstain from all corruptions through which justice could be hampered or even merely made suspect" was also removed for its presumed redundancy.[51]

These deletions would seem to support the argument that the *Reichshofrat* did not take the ban on gifts to judges seriously. An anthropological analysis of the *Agenten* of the *Reichshofrat* argues that the formal ban on gifts to judges co-existed alongside the informal practice of allowing gifts to supplement judges' purportedly meager salaries.[52] The informal practice itself followed the alleged social logic of the late seventeenth century: gifts given after the judgment were allowed, but those delivered before the verdict were not. Gifts given publicly were similarly

[42] Gschließer, for instance, notes how the majority of Reichshofrat cases were between parties of varying status, i.e. between mediate and immediate estates. See GSCHLIEßER, *Der Reichshofrat*, p. 32.

[43] Press argues, for instance, that the Restitution Edict of 1629 led the court to a high point of authority in this regard. PRESS, V., "Der Reichshofrat im System des Frühneuzeitlichen Reiches," p. 354.

[44] For instance, the Electoral College complained to the Emperor in 1636 that the paralysis of the *Reichkammergericht* during the war had resulted in a vastly increased caseload for the *Reichshofrat*. SELLERT, *Die Ordnungen des Reichshofrates 2. Halbband*, p. 13.

[45] It is important to note that a major item of business during this Imperial Diet was the revision of the *Reichskammergerichtsordnung*; indeed the peace of Westphalia had envisioned the reform of both courts at a future Diet.

[46] MOSER, F. C., *Pragmatische Geschichte und Erläuterungen der Kayserlichen Reichs-Hof-Raths-Ordnung Erster Band*. Frankfurt, 1751, p. 247.

[47] PRESS, "Der Reichshofrat im System des Frühneuzeitlichen Reiches," p. 357.

[48] This does not hold true for all of the original features of the 1617 drafts. So, for instance, the introduction of oaths for procurators, agents, and solicitors featured as part of an imperial resolution in 1624. SELLERT, *Die Ordnungen des Reichshofrates 1. Halbband*, p. 254.

[49] *Compare* Mainzer Konzept Tit. XIX *Von ayden und personen; Der reichshofräth ayd*. (1617) with RHRO 1654 Titulus I, § 15 *Amtspflichten der Reichshofräte*, as reproduced in SELLERT, *Die Ordnungen des Reichshofrates 1. Halbband*, S. 150 and *2. Halbband*, p. 85, respectively.

[50] "weilen ein ieder rath gleich anfangs auf die ganze reichshofrathsordnung schwören thuet." RHR Gutachten vom 1. Sept. 1653 as reproduced in SELLERT, *Die Ordnungen des Reichshofrates 2. Halbband*, p. 86.

[51] SELLERT, *Die Ordnungen des Reichshofrates 2. Halbband*, p. 86.

[52] Scholarly analysis of Reichshofrat salaries comes primarily from Gschließer, GSCHLIEßER, *Der Reichshofrat*, S. 81 – 85. Wolfgang Sellert also notes that, when compared with other imperial administrative salaries, the *Reichshofräte* were quite generously compensated. SELLERT, W., "Besoldungen und Einkünfte der Richter am Kaiserlichen Reichshofrat". In: AMEND-TRAUT, A., CORDES, A., and SELLERT, W. (Hrsg.) *Geld, Handel, Wirtschaft – Höchste Gerichte im Alten Reich als Spruchkörper und Institution*. Göttingen, 2013, p. 288.

acceptable, whereas those given in private were suspect. Finally, payments in kind were considered gifts whereas payments in cash were considered bribes.[53] By locating the technical prohibition in a less prominent location and allowing court officials to avoid an explicit oath to that effect, the 1654 ordinance appears to encapsulate this duplicitous social logic.

The argument is a tenuous one, however, and on the whole the expanded 1654 oaths support the view that institutional impartiality was a concern of the Habsburg administration.[54] Dorfner himself acknowledges the reputational concerns that drove the introduction of admission examinations for court Agents in the 1650s.[55] Those concerns remained a core institutional interest of the Imperial Aulic Council; in his view "with every lawsuit made pending and every legal brief submitted, the highest judicial function of the Emperor was confirmed and perpetuated."[56] Crudely put, the Emperor wanted to attract litigants, because a larger caseload enhanced his power and prestige. This view was a contemporaneous one as well. As historian Michael Hughes relates, "[it] is clear from many of the council's recommendations to the Emperor that its members regarded it as the last substantial element in imperial authority."[57] Eighteenth century legal theorist Johann Jakob Moser, for instance, claimed that "a very large part of the imperial respect and authority rests on the Reichs-Hofrath […] however high or low its reputation stands in the Empire, so much the greater or lesser is the Emperor's own power."[58]

6. Decree of 1714

Yet although the 1654 *Reichshofratsordnung* established oaths and other mechanisms to secure procedural fairness, it failed to placate all interested parties. In addition to longstanding Protestant grievances with the court were joined the increasingly self-aggrandizing Electors' desire for sovereign immunity. These princely interests culminated in an attempt, during the 1711 election of Charles VI, to severely circumscribe *Reichshofrat* authority.[59] In response, the new Emperor admitted that certain "violators" of the court ordinance may have committed "contraventions and corruptions" that merited legitimate critique.[60] The result was a new decree promulgated in 1714 with the intention of elevating judicial probity. Although the decree contained no new oaths, it did significantly raise the salaries of judges, thereby seeking to reduce the incentive for bribery. This incentive – tacitly admitted in the oaths – was here made explicit: the emperor ordered

> the current salaries to be promptly paid, but also increased in the better times awaited by the grace of God, mercifully confident that each [judge] will conduct [himself] with such integrity, diligence, and assiduousness, but especially that [he] will abstain from all gifts, presents, and participation in things otherwise contrary and injurious to law and justice.[61]

Here the Emperor draws a surprisingly straightforward connection between the generosity of bureaucratic salaries and the prevalence of unethical judicial behavior. Such pragmatism sits uneasily on the same page with the idealism of the injunction that a judge will "reflect on the grave duty of his oath."[62]

Consistency aside, the repeated modifications to the *Reichshofratsordnungen* reinforce an old historiographical proposition: that of a post-Westphalian 'imperial reaction.' Coined by historian Hans Erich Feine in 1932, the 'reaction' entailed the reconstruction of Habsburg patronage in the Empire in the late seventeenth and early eighteenth centuries, primarily during the reigns of Joseph I and Charles VI.[63] Central to this project was the Imperial Aulic Council as an instrument of Habsburg authority: the peace of Westphalia placed strict constitutional limits on the executive, but it retained the imperial office and, implicitly, the role of the Emperor as supreme judge. As the

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53 DORFNER, *Mittler zwischen Haupt und Gliedern*, p. 193.

54 A methodological blemish also undermines the argument that informal practice renders irrelevant the formal procedures stipulated in the ordinances. Absent large-scale quantitative analysis, it is unclear why the aforementioned examples of judicial gift-acceptance constitute dispositive evidence for "normal" behavior rather than exceptions that prove the rule. Any analysis of scandal necessarily exaggerates the importance of those events vis-à-vis the mundane conduct of court business.

55 DORFNER, *Mittler zwischen Haupt und Gliedern*, p. 245. At the same time, Hughes contends that this "provision of the ordinance [had] not been rigorously observed under Leopold I." *See* HUGHES, "The Imperial Aulic Council," p. 203.

56 DORFNER, *Mittler zwischen Haupt und Gliedern*, p. 249-250.

57 HUGHES, The Imperial Aulic Council, p. 198.

58 "unweifentlich ist es auch, daß noch jezo ein sehr grosser Theil des Kayserlichen Respects und Autorität auf dem Reichs-Hofrath beruhet […] je mehr oder weniger er im Reich im Ansehen stehet; je grösser oder geringer ist auch des Kaysers Autorität selbst." MOSER, J.J., *Von der Teutschen Justiz-Verfassung Bd. 2*. Frankfurt am Main, 1774, S. 11, cited by HAUG-MORTIZ, G., "Des Kaysers rechter Arm: Der Reichshofrat und die Reichspolitik des Kaisers". In: *Das Reich und seine Territorialstaaten im 17. und 18. Jahrhundert*. Münster, 2004), p. 23.

59 HUGHES, p. 198. The Electoral strategy was clever: it offered substantial new revenue in exchange for diminished court jurisdiction. See SELLERT, *Die Ordnungen des Reichshofrates 2. Halbband*, p. 266.

60 "die übertretter der reichs-hoff-raths-ordnungen [hätten] sowohl alß die von denen angebern solcher gravaminum zweiffelsohne anzudeuten vermeinte contraventiones und corruptiones mit gemessener ahndung ansehen können." Letter from Emperor Charles VI to Archbishop of Mainz, 16 January 1714. SELLERT, *Die Ordnungen des Reichshofrates 2. Halbband*, p. 268, FN 43.

61 "die dermahlige besoldung richtig zahlen, solche aber in besseren durch gottes gnade erwarttenden zeiten ohngesäumt erhöhen zu lassen, in der gnädigsten zuversicht, daß ein jeder sich mit solcher integritet, fleiß und eyfer aufführen und betragen, sonderbar aber aller geschencken und theilnehmung an sachen und gaben oder sonstigen gegen recht und gerechtigkeit straffmäßigen thuns und lassens enthalten werde." Dekret 1714 Jan. § 20 as reproduced in SELLERT, *Die Ordnungen des Reichshofrates 2. Halbband*, p. 286-287.

62 "in bedenckung seiner obtragenden schwehren eyd und pflichten." Dekret 1714 Jan. § 20 as reproduced in SELLERT, *Die Ordnungen des Reichshofrates 2. Halbband*, p. 285.

63 FEINE, H. E., "Zur Verfassungsentwicklung des Heiligen Römischen Reiches seit dem Westfälischen Frieden". In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung,* Vol. 52, 1932, p. 65-133.

institution tasked with exercising this mandate, the argument goes, the Imperial Aulic Council used its position to restore imperial political fortunes. The jealously guarded control of the court's ordinances on display with Charles' 1714 decree seems to support this view. Yet historian Siegrid Westphal strikes a note of caution: "arbitrary justice" would quickly have "exploded the reputation of the court in the Empire."[64] The court was a political actor, she argues, but also one with a greater degree of independence than generally assumed.

The final modifications to the *Reichshofratsordnungen* before the collapse of the Empire reinforce the point. With the end of the male Habsburg line in 1740 and the election of Wittelsbach Emperor Charles VII in 1742, the electoral 'capitulation' of that year - a form of constitutional document that began each reign - demanded that the councilors of the *Reichshofrat* swear their oath both to the Emperor and to the Empire (*Kaiser und Reich*).[65] A seemingly modest change, this concession at least nominally wrested a degree of control over the court from the Emperor alone.[66] It had been proposed in the 1617 "Mainzer Konzept," but failed to make it into the 1654 ordinance.[67] More importantly, the change signaled judicial independence. The short Wittelsbach reign, followed by the titular reign of Francis Stephen of Lorraine, was otherwise inconsequential for the development of the procedure generally, and the oaths specifically, of the Imperial Aulic Council. It was only with succession of the reformer-cum-enlightened despot Joseph II that the court saw a final round of changes to its oaths before the dissolution of the Empire in 1806.

7. Modifications of 1766

Joseph had been crowned less than a year before he issued two decrees modifying court procedure in 1766.[68] Although he would later abolish capital punishment and serfdom in the Habsburg hereditary lands, at the time the *Reichshofrat* decrees were promulgated he had not yet assumed true authority from his mother, Maria Theresia. Nonetheless, his proposed changes reflected an Enlightenment-era rationalizing tendency; the Emperor suggested that, in order to improve court efficiency, the judges should work five days a week instead of four (with a commensurate one-thousand florin increase in salary).[69] This change failed to win the assent of the judges themselves (leaving the Emperor to comment disapprovingly about their work ethic). The changes that did pass, however, strengthened the link between the perceived incorruptibility of the court and the reputation it enjoyed throughout the Empire.

Most important for this discussion is § 17 of the decree issued on 5 April 1766. After a paragraph-length preamble praising the "honest, gallant, and irreproachable" judges of the Imperial Aulic Council, the decree mandates an added level of insurance.[70] It holds that

> In order to carefully head off everything that in the future could [be used to] denounce the court, his imperial majesty hereby gravely commands the president, vice-president, and collective imperial aulic councilors to accept nothing, directly or indirectly, contrary to his sacred oath nor any gifts or favors from those with matters before the Imperial Aulic Council, whether for himself or his own, regardless of whether [it is offered] before or after the judgment is issued, regardless of appearance or pretext or from who it [is] offered.[71]

The language is both expansive and detailed. In the level of detail it recalls Dorfner's analysis of the spectrum of permitted gifts, particularly with regards to the acceptance of gifts "before or after the judgment is issued."[72] Moreover, the provision di-

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[64] WESTPHAL, "Der Reichshofrat – kaiserliches Machtinstrument oder Mediator?", p. 122.

[65] Wahlkapitulation Karls VII. (Frankfurt am Main, 24. January 1742) Art. XXIV § 3 [Loyalität und Pflichten der Reichshofräte] reads: "und niemand dann Uns und dem Reich innhalts der in der Reichshoffraths-Ordnung enthaltenen, jedoch künfftighin auf das Reich nahmentlich mit zu richtenden Eyds Notul un sonsten keinem Churfürsten, Fürsten oder Stand des Reichs, vielweniger ausländischen Potentaten mit absonderlichen Pflichten, Bestellung oder Gnaden Geldt verwandt seynd." As reproduced in Wolfgang BURGDORF (Hrsg.), *Die Wahlkapitulationen der römisch-deutschen Könige und Kaiser 1519–1792*. Göttingen, 2015, S. 446.

[66] If only because subsequent Emperors generally adopted the electoral capitulations of their predecessors in full before assuming office themselves.

[67] Johann Christian Herchenhahn argued that the extension of the oath to the Empire as a whole was the primary reason for Emperor Matthias' rejection of the 'Mainzer Konzept.' HERCHENHAHN, J. C., *Darstellung der gegenwärtigen Verfassung des Kaiserlichen Reichshofraths und der allgemeinen Behandlungsart der reichshofräthlichen Geschäfte: nebst der Behandlungsart der bei demselben vorkommenden Geschäfte*. Mannheim, 1792, p. 83.

[68] Goethe himself was present at the coronation in Frankfurt am Main and later described the event in his autobiography, *Dichtung und Wahrheit*.

[69] See GSCHLIESSER, p. 472.

[70] "so redlichen, dapferen und unverdächtigen männern" Dekret 1766 April 5 - § 17, as reproduced in SELLERT, *Die Ordnungen des Reichshofrates 2. Halbband*, p. 325.

[71] "Um aber jedoch inskünfftige allem dem sorgfältig entgegen zu gehen, wodurch das gericht beschrien werden könnte, so wird von ihro kayserl. Mayt. Dem präsidenten, vicepräsidenten und sammtlichen reichshofräthen hiemit ernstlich anbefohlen, daß ihrer keener seinem geleisteten theuern eid zuwider in denen am reichshofrath rechtshängigen sachen weder durch sich selbst noch die seinige einiges geschenk oder nutzen, es seye vor- oder nach ergangenem urtheil, unter was schein oder vorwand und durch wen es auch angebothen werden möchte, weder directoe doch indirect anzunehmen macht haben solle." Dekret 1766 April 5 - § 17, as reproduced in SELLERT, *Die Ordnungen des Reichshofrates 2. Halbband*, p. 325-326.

[72] It is unclear, however, whether the prohibition on gifts and favors described here endorses the view posited by Dorfner that payment prior to a verdict constituted bribery; even today, the Foreign Corrupt Practices Act (FCPA) in the United States contains and exception for so-called "facilitation payments," i.e. payments to government officials for the purpose of expediting a decision to which one is entitled (rather than for the purpose of influencing that decision). The case law surrounding the FCPA draws distinctions between permissible and impermissible payments that in many aspects replicates the criteria Dorfner highlights for the late seventeenth century – amount, form, and timing of payment – suggesting that the anthropological analysis undertaken in *Mittler zwischen Haupt und Gliedern* may alienate the past more radically than otherwise warranted. For a summary of FCPA jurisprudence on the issue of facilitation payments, see for instance, Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corruption Practice Act* (2012), p. 25 – 26. *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

rectly links the potential for reputational harm to the judges' oath. Indeed, it goes on – at regrettably unquotable length – to denounce those who would "purchase justice" and "arouse an evil reputation" for the Imperial Aulic Council.[73]

In addition to these normative statements, the decree elaborates a series of punishments. These include, for instance, the three-fold repayment of actual bribes and the two-fold repayment of attempted bribes, as well as the conditions of suspension and dismissal. It is unclear how frequently these regulations were enforced; the judges of the court "vehemently rejected" any suspicions of bribery in a joint statement the year following the decree's promulgation.[74] Nonetheless, in an original move, the decree also foresees punishments for litigants, the bribe-payers. After initial fines, repeat offenders are potentially subject to unnamed "heightened punishments."[75] The result is a comprehensive anti-corruption provision, anchored by the oath of office taken by court officials and the personal honor of litigants who bring their cases to the court.

8. Conclusion

The decrees of 1766 represent the apotheosis of the trend traced throughout this article; namely, the increasingly explicit and exhaustive nature of oaths and other legislative measures designed to guarantee judicial integrity. The thickening web of regulation appears to mirror the heightened importance of the Imperial Aulic Council to an Emperor shorn of many of the other tools of power, whether military, fiscal, or otherwise.[76] From a 1559 ordinance lacking oaths altogether, the constitutional documents of the *Reichshofrat* evolved through the bitter and slow process of imperial consensus-making to encompass strict oaths for all court officers and even penalties for litigants offering unsolicited bribes. The purpose of those oaths was deterrent but, more importantly, reputational; perceptions mattered. If Johann Jakob Moser's 1774 claim that "a very large part of the imperial respect and authority rests on the Reichs-Hofrath" was correct, then – at least in part – the oaths described here were doing their job.

[73] "die justiz zu erkaufen" and "erweckende böse ruff" from Dekret 1766 April 5 - § 17, as reproduced in SELLERT, *Die Ordnungen des Reichshofrates 2. Halbband*, p. 326.

[74] SELLERT, "Besoldungen und Einkünfte," p. 293.

[75] "geschärffte straffen" Dekret 1766 April 5 - § 17, as reproduced in SELLERT, *Die Ordnungen des Reichshofrates 2. Halbband*, p. 326.

[76] Indeed, historian Barbara Stollberg-Rilinger argues that by the end of the eighteenth century, the Empire existed largely on paper and in the mind: "If it did not have its own architecture of power, in which it was manifestly represented as a whole, it could instead be depicted as an Empire of books." STOLLBERG-RILINGER, B., *Des Kaisers Alte Kleider: Verfassungsgeschichte und Symbolsprache Des Alten Reiches*. München, 2008, p. 274.

'ascendere a sommi gradi… cumular infinite ricchezze'/ 'Ascending to Great Heights… Cumulating Infinite Riches'. Legal Education and Professional Careers in the State of Milan (16th–18th Century)

Daniela Buccomino *

Abstract

The proposed contribution aims to fill some historiographical gaps on the legal formation of the 'power elite' of the State of Milan in the Modern Age in light of the changing cultural and institutional context.

The main focus of the research, which is part of broader research on the history of the University, is the relationship between the training of Milanese graduates in law at the Alma Ticinensis Universitas and the careers they pursued within the magistracies and judicial institutions at the territorial level. This is also in consideration of the role played by jurists in Lombard society (16th-18th centuries).

Through a series of concrete cases of ruling families, an attempt will be made to answer specific questions, such as the value of the doctoratus obtained at the Studium Publicum of the State of Milan and the role of the social class for the conferment of certain public offices and the performance of specific professions.

Keywords: *Legal education; Doctores; doctoratus in utroque iure; History of Universities; State of Milan; University of Pavia; Senate of Milan; legal careers; Italy.*

1. Introduction

Research on professional careers in the State of Milan from the beginning of Spanish domination to the arrival of Napoleon Bonaparte is inseparable from a reflection on the different values - economic, social, and political - that the *ordo doctoralis* assumed within the Spanish and Austrian systems of power, the Pavia graduates permeated the lay and ecclesiastical elites with their presence and influence.[1]

The historiography that has studied the institutions of the *Milanesado* has emphasized the importance of the *Studium* for the history of the Duchy, pointing out its traditional role as the highest body in charge of the education of those who wished to obtain an education - first and foremost a legal education - that could be spent if necessary to approach a socially privileged environment.[2] In this context, a university degree seems to be a sure means of succeeding in society, so much so that 'attendere alle leggi […] pare honorevolissima professione che se miri a l'honore, questa fa ascendere a sommi gradi. If you have your eye on the useful, this makes you accumulate infinite riches'.[3]

It is, therefore, on the actual value of the *doctoratus*, as a means of professional fulfillment and possible social affirmation that we will focus on this contribution. In particular, two areas will be addressed: the social class of origin of the doctores and the relationship between university education, professions, and public appointments.

An attempt will then be made to understand the extent to which university education constituted a necessary or relevant requirement for the conferment of certain public offices and the performance of specific professions,[4] in addition to university

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1 On the appropriateness of using *ordo, see* DI NOTO MARRELLA, S., *Doctores. Contributo alla storia degli intellettuali nella dottrina del diritto comune,* voll. I-II. Padova, 1994, p. 230-231.

2 ZORZOLI, M.C., L'educazione del giurista per la pratica (nello Stato di Milano tra Cinque e Seicento). In: MAFFEI, P. – VARANINI, G. M. (eds.), *Honos alit artes. Studi per il settantesimo compleanno di Mario Ascheri*. *La formazione del diritto comune Giuristi e diritti in Europa (secoli XII-XVIII)*. Firenze, 2014, p. 291-306. On the social role of the university, see VERGER, J., Sul ruolo sociale delle Universitŕ: la Francia tra Medioevo e Rinascimento. In: *Quaderni storici*, Vol. 23, 1973, p. 313-358.

3 ROERO, A., *Lo scolare*. Torino, 1630, p. 11-12.

4 'For the knowledge of the mentality of a society, a preliminary study of educational institutions, their structures, methods, the notions they intend to transmit, their equipment, their insertion in society, what links them to other nodes, family, military, religious, political, is indispensable'. The hermeneutic approach suggested by DUBY G. (*L'histoire et ses méthodes*. Paris, 1961, p. 958) for an in-depth understanding of the physiognomy of a society can also be optimally used for the Pavia case. On the relationship between legal training and careers see also ROMANO, A., *Legum doctores e cultura giuridica nella Sicilia aragonese. Tendenze, opere, ruoli*, Milano, 1984; PASCIUTA, B., *I notai a Palermo nel XIV secolo. Uno studio prosoprografico.*Soveria Mannelli, 1995; DEL BAGNO, I., Iustitia custos sit pacis: formazione universitaria e professioni giuridiche a Napoli in etŕ moderna. In: *ASUI*, 12, 2008, pp. 435-466; EAD., Dottorato e post-dottorato: i giuristi nel Mezzogiorno del Settecento. In: GUERRINI, M.T. – LUPI, R. – MALATESTA, M. (eds.), *Un monopolio imperfetto. Titoli di studio, professioni, università (sec. XIV-XXI),* Bologna, 2016, p. 81-92; EAD., Dottori e nobiles viri tra i monti dell'Amalfitano. In: *Iura & Legal Systems*, Vol. 6, 2019, pp. 32-39.

teaching, which was the natural outlet of the doctorate. The focus will then turn to the other activities practiced by doctors and masters, sometimes at the same time as university teaching.

The analysis of a few concrete cases will make it possible to 'put to the test' the graduation deed in order to verify its value in the course of the modern age. Far from being a mere exemplification of a notarial instrumentum, the knowledge of a rite or a biography, the graduation record, in fact, also represents a valuable trace for comparing the different dimensions of knowing and doing: both from the perspective of the content of academic knowledge transmitted by the *doctores* to their students through specific didactic techniques (and perpetuated in turn by the neo-doctor, who will ascend to the chair); and from the perspective of the practical context in which the neo-graduate is engaged in his future professional life (as a jurist, official or member of the ecclesiastical class).

2. The *doctores* legentes in the University of the Duchy. A Lombard monopoly

Doctores and *scholares* represent the two fundamental elements of the general Studium, clearly distinct on an institutional level: formal acts regulate the passage of status, such as the attainment of the doctoral degree and co-optation in the Colleges of Doctors. In reality, the cultural homogeneity between the two worlds is strong, evident in the identical *curricula*, the frequent existence of parental ties, and the subalternity to political power, which intervenes in the conduct of professors and decisions on critical student issues.

These distinctive elements, present at the University's foundation, are still in force and indeed reinforced in the 16th century.

After the long pause due to the Franco-Habsburg War, Public Study in Pavia resumed activities around the middle of the 16th century.

Once the Milanese court had disappeared, the Duchy passed to the direct dependencies of the Spanish crown, and the provincial law of the New Constitutions in 1541 entrusted the Senate of Milan with the care of the Studium Papiense, which had prospered in the Middle Ages thanks to the vigorous and tight control of the Visconti and Sforza families.

The Senate, the supreme body of jurisdiction and administration, inheriting a University considered one of the most prestigious educational structures in Europe, devised a program of explicit non-intervention precisely to maintain the organization of the *Studium* in the ways and forms of the ducal tradition.[5]

This solution, therefore, is a sign of continuity.[6]

These elements, however, should not lead us to underestimate the crucial repercussions that the changed geopolitical, economic, and institutional framework has had on the practice of university life.

Between the 1520s and 1530s, epidemics, looting, and economic crises, but above all, the political tension in the Lombardy region,[7] strongly conditioned university activity, not only leading to interruptions and transfers but also causing a gradual change in academic organization in practice,[8] and a departure from the original model.[9]

After 1541, with the reopening of the University, a phase of more excellent institutional stability began.[10] The Senate's intention to restore the *Studium* to its luminous medieval guise and to proceed with its revival is realized, on the one hand, by inviting to teach 'lettori celebri et idonei a satisfare quelli che vorranno imparare',[11] and on the other, by issuing a series of regula-

[5] 'Et quia ordinis nostri mens ea semper fuit ut nihil innovaretur, sed solitum servaretur' in Archivio di Stato di Pavia from now ASPv, Università, cart. 36, PARODI, G., *Acta varia Studii Ticinensis*, II, p. 158.

[6] ZORZOLI, M.C., *Università, dottori, giureconsulti*. *L'organizzazione della 'facoltà legale' di Pavia nell'età spagnola*. Padova, 1986, p. 11.

[7] From the chronicles of the time, as well as the works of ALEATI, G. – CIPOLLA, C. (Il trend economico nello Stato di Milano durante i secoli XVI e XVII. Il caso di Pavia. In: *Bollettino della Società pavese di Storia patria* from now *BSPSP*, n.s., Vol. 3, 1950-1951, p. 22-31; ID., Aspetti e problemi dell'economia milanese e lombarda nei secoli XVI e XVII. In: *Storia di Milano*, Vol. 11, Milano, 1958, p. 375-399) we know that Pavia suffered in the first half of the 16th century from a strong tendency towards depression, due to natural disasters such as the plague, the wars of Italy, of which the city was one of the centres most involved, as well as strictly economic factors. For a reconstruction of the devastating fury that struck the Ticino capital, see BRANCHINI, M.C., La peste a Pavia nel 1529. In: *BSPSP*, Vol. 22-23, 1970-1971, p. 79-97; CASALI, L. – GALANDRA, M., Pavia nelle vicende militari d'Italia dalla fine del XV e la battaglia del 24 febbraio 1525. In: *Storia di Pavia*, Vol. III, Milano, 1990, p. 7-9.

[8] The university situation must be placed in the overall socio-economic context of the formation of the new Spanish estimo, the significant aspects of which are also represented by the restriction of certain tax privileges and the struggle waged by tax-disadvantaged groups against the facilitated (Rizzo M., L'Università di Pavia tra potere centrale e comunità locale nella seconda metà del Cinquecento. In: *BSPSP*, Vol. 87, 1987, p. 99-112). In the century, students too gradually lost not only their tax exemptions but also all those privileges, such as, for example, the use of arms, which, together with a particular jurisdiction, had contributed to building the happy image of the university student, a benefited subject, free, freed from any conditioning that could derive from the environment in which he acted (BUCCOMINO, D., *Ingeniorum delectus. I dottori in diritto dello Studio di Pavia*, Torino 2023, in print).

[9] As noted by LUCCHESI, M. (L'organizzazione dell'Università spagnola di Pavia in età spagnola. In: *Almum Studium Papiensis*, vol. I, to. II. Milano, 2013, p. 855), the gradual modification of the organization of the Study took place in an 'underground manner, like a karst river that little by little advanced and affected the medieval model consolidated in the statutes of the doctors and students, while leaving it intact'.

[10] In the 1540s in Pavia, in line with what was happening in the Duchy, essential changes took place in the economic sphere, through the revival of manufacturing, and in the social sphere, through the granting of citizenship to people from the countryside (see, for example, ASPv, *Amministrazione città e Principato*, cart. 15702) and the return of workers and merchants from the silk industry, as well as the functioning of churches and public magistrate ships. Cf. SELLA D., Sotto il dominio della Spagna. In: *Storia d'Italia*. Torino, 1984, Vol. 11, p. 110 ss.; VICO G., L'economia urbana dall'avvento della Spagna al tramonto dell'ancien régime, In: *Storia di Pavia*, Vol. IV. To. I, Milano, 1995, p. 208-213.

[11] Grida 6 october 1547. On this, see ZORZOLI, M.C., Interventi dei duchi e del Senato di Milano per l'Università di Pavia (secoli XV-XVI). In: *Studi senesi*, Vol. 92, 1980, p. 128-149, now in *Università e società nei secoli XII-XVI*. Atti del Convegno internazionale di Studi (Pistoia-Montecatini Terme, 20-25 settembre 1979), Pistoia, 1982, p. 553-573. This fact, however, did not result in the absence of notable *doctores*, especially with regard to teaching in the Faculty of Law, on which see DI RENZO VILLATA, M. G. – MASSETTO, G. P., La facoltà legale in età spagnola. Il Ius civile. In: *Almum Studium Papiense*, Vol. I, to. II, p. 985-1006; EAD., Insegnare diritto a Pavia tra Cinque e Seicento. In: *Annali di storia delle Università italiane* (from now *ASUI*), Vol. 19, 1, 2015, p. 45-75.

tions to encourage the teaching of the *Studium*. On the other, by issuing a series of *ordines* to guarantee the Pavia degree.[12]

In practice, this senatorial will was only sometimes achievable, penalized by the impossibility of foreign lecturers practicing their profession in the city,[13] given that the local College of Judges and Lawyers only co-opted doctors from families who had been residents in Pavia for some time. The exclusion of foreigners from Pavia's Athenaeum in favor of local professors, which was to be a constant throughout the modern age, as well as the protectionist regulations that favored the attendance of local students, resulted in a limited circulation of ideas and the disappearance of the scientific communication that had been the hallmark of medieval academic and humanistic culture.[14]

The municipalization of the institution is also accentuated by the system of financing the University,[15] which conditions and often even determines academic policy. The financial difficulties that the Milan Senate faces in managing the University block any initiative aimed at incentivizing its activity and also affect the choice of lecturers.

In the appointment of the doctores legentes, it was necessary to give preference to local elements, which could take advantage of the privileged status of the lecturer, who could carry out professional activities in the city, and, last but not least, who were willing to accept modest fees.[16]

The result is that in public University, from the second half of the 16th century onwards, one breathes Lombard air and even Pavia air. To support this assertion, some factual data can be adduced, albeit marred by the approximation that comes from the sources' quality.[17]

Between 1499 and 1599, more than half of the law professors were from Pavia: 81 out of 149. Twenty, on the other hand, were foreign lecturers: four from the Subalpine area, two from Monferrato, seven from the States of the Church, two from Ferrara, one from Udine, one from Genoa, three Spaniards, to which must be added the two students from the Ultramontane area who occupy the reserved readings. The remaining teachers are from Lombardy.[18]

The teaching corpus, therefore, can count on the massive presence of national doctores (129, or 86.57% percentage terms), among whom the majority are from Pavia (54.36%), who develop their entire teaching career in the University. In the event of a chair becoming vacant, a new reader for the last teaching of the civil institutions is added to the teaching roster, while all the other senior lecturers are advanced to the chairs immediately above. There is a hierarchy of chairs, with the ordinary morning chairs of Civil Law and Canon Law at the top and the chair of Civil Institutions at the bottom, followed - when teaching was reintroduced in 1578 - by the chair of Criminal Law. With the promotion of lecturers from one professorship to a higher one, the expenditure for fees remained unchanged, while the requests for salary increases made by lecturers were met.

The higher professorship corresponded, as a rule, to a higher salary. As a result, most lecturers follow a natural career path within the Faculty.[19] Moreover, in this sense, one can speak of predominantly local training of the teaching staff and its scarce overall mobility.[20]

It may well be said, in this regard, that for the people of Pavia, the University was truly 'an office like any other and, at the same time, a fact of their own, a citizen';[21] while foreign lecturers, it seems, were unable to find in the city the ground to take root, nor concrete interests, nor the possibility of consistent professional outlets.

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[12] The Senate's orders aimed to bind the subjects to attend only the University of Pavia in order to stem the conspicuous phenomenon of the reduction of the student body (*Constitutiones Dominii Mediolanensis, decretis et senatus-consultis nunc primum illustratae, curante comite Gabriele Verro […], Editio undecima,* Mediolani, in Regia Curia sumptibus Joseph Richini Malatestae regii typographi, 1747, tit. IV, 16, p. 175-177). There were exceptions. The Supreme Court reserved the right to issue dispensations that allowed students who did not meet the requirements of the regulations to be able to study in the *Studium Publicum*. These dispensations are preserved passim both in ASPv, *Università*, *Doctoratus*, and in ASPv, *Università*, *Rettorato*, cart. 219. On this point, FERRARESI, A., Vie legali e non per esercitare la professione. Giuristi nello Stato di Milano tra Cinque e Settecento. In: *Un monopolio imperfetto*, p. 93-130.

[13] Foreign university professors, who are perhaps also awarded above-average salaries and who teach in the most prestigious professorships, suffer, like other professors, the inconveniences of chronic delays in salary payments without, more often than not, being able to enjoy the substantial exemption benefits enjoyed by their colleagues, because they do not own any property in Lombardy to be exempted.

[14] NEGRUZZO, S., *Theologiam discere et docere. La facoltà teologica di Pavia nel XVI secolo.* Milano, 1995; EAD., L'Estado de Milan e la sua università. In: *ASUI*, Vol. 7, 2003, p. 71-89; EAD., Sulle orme di Erasmo. Studenti europei nella Pavia di età moderna. In: BRIZZI, G.P. – ROMANO, A. (eds.), *Studenti e dottori nelle università italiane (origini-XX secolo). Atti del Convegno di studi (Bologna, 25-27 novembre 1999).* Bologna, 2000, p. 51-80.

[15] The amount of funds given for the running of the Athenaeum had remained virtually unchanged since the 14th century. The ‚modico subsidio' stood at 44,154 lire. See the *tabulae lectorum* for the last years of the 17th century and the first half of the 18th century (ASMi, *Fondo Spagnolo*, cartt. 373 e 401).

[16] See the letters from the Senate of Milan to the Vice-Chancellor of Pavia dated 2 July 1548 and his reply, dated 11 July 1548 (*Acta varia Studii Ticinesis*, PARODI, G., in ASPv, *Universit*, Vol. II, cart. 35, p. 25-27).

[17] The work *Memorie e documenti per la storia dell'Università di Pavia e degli uomini più illustri che vi insegnarono*, vol. I. Pavia, 1878 (anast. repr. Bologna, 1970), *passim* provides the data to build tables. The gaps and obvious errors contained in the lists have been tacitly corrected. They must therefore be read with the necessary caution, but the trend lines highlighted are to be considered plausible. for an overview of the university of siena, see MINNUCCI, G., Il conferimento dei titoli accademici nello Studio di Siena fra XV e XVI secolo. Modalit dell'esame di laurea e provenienza studentesca. In: ROMANO, A. (ed.), *Università in Europa. Le istituzioni universitarie dal Medio Evo ai nostri giorni. Strutture, organizzazione, funzionamento (Atti del Congresso Internazionale, Milazzo 28 sett. - 2. ott. 1993)*. Soveria Mannelli 1995, pp. 213-226.

[18] ZORZOLI, M. C., *Interventi dei duchi*, p. 144.

[19] Consider the case of Torquato Gambarana. Having held the chair of Institutions for eight years, in 1591, he was assigned the extraordinary morning reading of Civil Law before moving to the *Sexti Decretalium* chair the following year.

[20] Of the 149 professors mentioned, in fact, only eighteen appear to have had teaching experience in other universities. On the characteristics of the mobility of professors in the 15th century, see GABOTTO, F., *Giason del Maino e gli scandali universitari pavesi nel Quattrocento*. Torino, 1888.

[21] PETRONIO, U., La burocrazia patrizia nel ducato di Milano nell'età spagnola (1561–1706). In: GIULIANI, A. – PICARDI, N. (eds.), *L'educazione giuridica*, IV, to. I. Perugia,1981, p. 253-328.

In the following century, in correspondence with the downward phase of the city's economy, the attempts made by the Senate of Milan to restructure the Studio failed, and a period of stagnation began in academic life in Lombardy, also signaled by a notable reduction in the academic body, at least as far as the legal portico was concerned. The proportion of Pavia doctors remained proportionally unchanged (38 out of 78, or 48.71%), while there was a slight decrease in the number of Lombard doctors (23) in favor of foreign ones, particularly Spanish (10). At the beginning of the Austrian era, the figures are comparable to those at the beginning of the Spanish era: teachers from the Duchy make up 83.33%, with Pavia's teachers accounting for more than half.

The same proportion is maintained in the fifty years preceding Maria Theresa of Austria's reform of higher studies. Of thirty professors, twenty-five are from Lombardy (83.33%), more than half are from Pavia (56.66%), three are from Spain, one is from Alessandria, and one is from Sardinia.

As emerges from the analysis of these data, in the modern age, the University, also with specific regard to doctores, closed in on itself. The *peregrinatio* of lecturers waned considerably. The concomitance of protectionist regulations, the scarce financial resources of the Studio, and the impossibility for foreign lecturers to practice their profession in the city led to only one effect. The teaching career in Pavia has become less desirable for famous foreign personalities. Either they do not find the Lombardy seat of the University remunerative (or consequently prestigious), or if they accept a teaching post in Pavia, they do so because they are linked to the Milanese governmental environment.

Inclusion in the *Studium* became increasingly attractive to local elements, those who owned property in Lombardy and doctores from Spanish Lombardy provinces, bringing about the municipalization of the academic corpus. That the University suffered qualitatively is evident. Less certain, however, is that Pavia's readers suffered. On the contrary, they, or at least most of them, being able to hold local and state-level positions, compensated for the University's remunerative limitations.

An example of this state of affairs is that of Francesco Sannazzaro della Ripa.[22] Having graduated in Pavia, a collegiate jurisconsult, like one of his ancestors, Nicolino Ripa,[23] who had been a reader in the Gymnasium Ticinensis a century earlier, at the pope's request, in 1518, he went to teach law 'cum apparatu italico' in Avignon, where he put down roots by acquiring property. In the early 1530s, Francesco II Sforza, in an attempt to revalorize the *Studium*, called him back home (now considered 'per vallentissimo Dottor gintilhuomo et senator che legieva publicamente in questa cittŕ con gran fama (ASPv, Università, *Collegio dei giudici*, cart. 35) and entrusted him with the first chair of civil law. In return, he was appointed senator and created Count Palatine.[24] The merits he acquired through teaching thus opened the door to a senatorial career, allowing him and his family an essential social rise. Of his successors,[25] only Giorgio Ripa managed to reach such high rungs of the political career in 1598; the others, on the other hand, although they followed the ancient family tradition of legal studies and admission to the City College, mostly remained in limbo. The exception is Giulio, Francesco's nephew, who becomes a collegiate doctor and primary law reader in the *Studium publicum*.[26]

An even more striking example of professorships not only in Pavia but in the family is that of the Beretta della Torre family.[27] In the western passage between the Cortile dei Caduti and the Cortile di Volta, on the ground floor of the University, there is an epigraph erected in 1818 by Paolo Beretta della Torre to commemorate his ancestors - five of them - who had taught at the University of Pavia.[28]

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[22] See for all ASCHERI, M., *Un maestro del 'mos italicus': Gianfrancesco Sannazari della Ripa (1480 c.-1535)*. Milano, 1970; ID., A margine del titolo De constitutionibus del Liber Extra (I, 2). In: CONDORELLI, O. (hrsg. von), *Der Einfluss der Kanonistik auf die europäische Rechtskultur, 2. Öffentliches Recht*. Böhlau, 2011, p. 1-11; ASCHERI, M., s.v. Sannazari della Ripa, Gianfrancesco. In: *Dizionario biografico dei giuristi italiani* (from now *DBGI*), BIROCCHI, I., CORTESE, E., MATTONE, A., MILETTI, M. N. (ed.), Vol. I-II, Bologna, 2013, p. 1789-1790.

[23] Nicolino born in 1407 in Rivanazzano, in the province of Pavia, gave lectures in the Pavia Studium as early as 1460, was a lecturer in Civil Law from 1466 to 1469 and entered the Collegio dei Nobili Giudici. He taught until the year of his death, as can be deduced from the date of the last deed that bears his name, which is dated 22 March 1477. Nicolino's tombstone is also preserved in the Volta courtyard.

[24] Already in 1522, Francis II had appointed Francesco Corti, professor of civil law, as senator. The same (benevolent) fate had befallen Andrea Alciato who, in 1533, was recalled from Bourges. On Alciato see for all BELLONI, A. – CORTESE, E., s.v. Alciato (Alciati) Andrea. In: *DBGI*, Vol. I, p. 29-32.

[25] His grandson was Lodovico Settala, a famous physician, born in Milan on 27 February 1552 to Francesco Settala and his daughter Giulia. On Ludovico, see for all MELLERIO, G. G., s.v. Ludovico Settala. In: *DBI*, Vol. 92, 2018, online and quoted bibliography.

[26] *Memorie e documenti*, vol. I, p. 84; SANNAZZARO NATTA DI GIAROLE, G., *De Sancto Nazario, mille anni di una famiglia tra arte, libertá e territorio*. Sestri Levante, 2015, p. 57 ss.

[27] CONTILE, L., *Ragionamento di Luca Contile sopra la proprietŕ delle imprese, con le particolari degli academici affidati e con le interpretationi et chroniche*. Pavia, 1574, p. 50.

[28] On 23 August 1818, the Magnifico Rettore, Professor Prina, wrote to Paolo Beretta della Torre to inform him that the Milanese government had approved his request to place the plaque. The inscription reads: Eximiis professoribus in hoc i(mperiali) r(egio) Athenaeo/nob(ilis) familiae Beretta a Turre Ticin(ensis)/maioribus suis:/Maphaeo artis tabellion(is) an(no) MCCCCXVI,/Iacobo i(uris) c(onsulto) c(ollegii) iuris civ(ilis) et can(onici) an(no) MDLV,/Antonio Francisco i(uris) c(onsulto), gubernatori Ravennae,/iuris canon(ici) an(no) MDLXXIII,/Balthassari medic(o) et chirurg(o) an(no) MDCCXXI,/Syro abb(ati) ord(inis) s(ancti) Bened(icti) congr(egationis) Vallisumbr(osae)/s(anctae) scripturae et linguae hebr(aicae) an(no) MDCCLXXI,/nob(ilis) i(uris) c(onsultus) Paulus Beretta a Turre,/Francisci filius,/memoriae si potis est aeternae/et posterorum exempli/m(onumentum) p(osuit)/XVIII (die ante) Kal(endas) Sept(embres) an(no) MDCCCXVIII. Cf. *Cenni storici degli uomini illustri appartenenti al nobile casato de Beretti della Torre di Pavia*. Pavia, 1836, p. 6-7; *Cultura e vita universitaria nelle miscellanee Belcredi, Giardini, Ticinensia*, FERRARESI, A. – MOSCONI GRASSANO, A. – PASI, A. (eds.), Milano, 1986, n. 812. On the more than two hundred epigraphs placed in various parts of the University, see the recents contributions of ERBA, L., *Sotto i portici dell'Università di Pavia*. Pavia, 2019 and ANGELINI, G., Fontes o verae imagines? Lapidi e sepolture di docenti dell'Università di Pavia in età moderna. In: BRIZZI, G. P., FROVA, C., TREGGIARI, F. (eds.), *Fonti per la storia delle popolazioni accademiche in Europa*. Bologna, 2022, p. 69-83.

Except for a couple of cases, these are not teachers who have excelled in the Pavia environment. They are minor figures, less well known and yet capable of 'marking' with their teaching, an updating, an opening towards new horizons of the *Studium*. The happy transmission of their teaching activities, not only in the legal field, manage to give the figure of their being valuable lecturers.

The exceptionality of the plaque, therefore, derives from the fact that it is the only monument erected in the University for a family of professors.

The first professorship holder was Maffeo or Matteo Beretta, son of the progenitor, Pietro Francesco, who in 1416 found himself teaching Notaria instead of Agostino Pozzolo, who was prevented from teaching because he was ill.[29] Although his teaching lasted only one year, he managed to obtain the esteem of Filippo Maria Visconti, Duke of Milan, which earned him the privilege of exemption from the annual tax, known as the 'imbottato',[30] and which was also extended to his brother Paolo,[31] for the property he owned in Torre de Beretti and Frascarolo Lomellina.

It was in the following centuries, indeed, that the family reached higher academic levels in the various faculties.

In 1553, Giacomo Beretta,[32] after graduating from the University of Pavia and being admitted to the Collegio de' nobili giureconsulti of the same city,[33] was appointed to the chair of Institutions, which he held for two years when he moved on to the ordinary chair of Civil Law, which he held 'with continuous vigilance and extreme sweat'[34] for two lustrous until 1578.[35]

He was described as a 'celebrated doctor of the law';[36] his profound doctrine in legal science emerges, both from the accounts of his students - think of Giacomo Menochio's Autobiographical Notes - and from his work *Consiliorum, sive Responsorum D. Jacobi Berettae Patricii Papiensis*, published posthumously in Venice in 1582.[37]

Alongside his primary but only sometimes good university teaching,[38] he held other positions at the Collegio Borromeo and the Accademia degli Affidati.

It is within these different educational institutions but united by an intense sharing of humanistic culture, and an idea of the growth of knowledge based on dialogue and conversation in the context of an exchange between peers Giacomo Beretta's authoritativeness is definitively recognized. Suppose he is elected First Advocate and Reader at the Borromeo,[39] in the Accademia degli Affidati,[40] where he is nicknamed *Lo spedito* for his ability to deal with disputes and controversies 'con diligenza et con prestezza' and distinguished for being 'sincere, benigno et hospitale […] intento a soddisfare a ciascuno'.[41] In that case, he is entrusted with the highest office. He was entrusted with the highest office, that of Prince.

A contemporary of the academic Affidato is Antonio Francesco Beretta, a descendant of Maffeo. A graduate of the Studium, he was appreciated by Pope Pius V, the Pavia-born Michele

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[29] *Memorie e documenti*, p. 36.

[30] This was a tax on the wine harvest applied in Lombardy until 1780. Cf, as an example, SOLDI RONDININI, G., Aspetti dell'amministrazione del ducato di Milano al tempo di Filippo Maria Visconti (dal „Liber tabuli" di Vitaliano Borromeo, 1427). In: *Publications du Centre Européen d'Etudes Bourguignonnes*, 28, 1988, pp. 145-157; FILIPPINI, E., "Concessiones feudales iurisdictionum et regalium": alcuni esempi di rendite signorili nella Lombardia nord-occidentale. In *Studi di storia medioevale e di diplomatica-Nuova Serie*, 2019, pp. 217-239.

[31] In 1477 Paolo served as administrator and benefactor of the Ospitale grande de' poveri infermi in Pavia, to which he left his inheritance. His son Giovanni Antonio became potestŕ of Pavia in 1499. Cf. *Cenni storici degli uomini illustri*, p. 10 ss.; SPRETI, V., *Enciclopedia storico-nobiliare italiana*. Milano, 1928-32, vol. II, p. 44-45.

[32] Giacomo descended from Giroldo - brother of the progenitor Pietro Francesco - who generated Castellino, his father. He married Armellina Cemmo of the Counts of Mede and generated Paola, who was married to a nobleman from Alessandria, and Giacomo.

[33] ASPv, Università, *Collegio dei giurisperiti*, cart. 14.

[34] CONTILE, L., *Ragionamento*, p. 50.

[35] At his death on 9 November 1578, in the Church of St. Mark in Pavia, an inscription was placed on his tombstone, highlighting his virtues: 'D.O.M. Jacobo Beretta Patr. Ticin. J. C. celeberrimo atque integerrimo in patria an. 27 proficendi munere publico et primario loco magna cum omnium admiratione functo licet ad memoriam ejus sufficiant Jacobus Beretta alias Rambertengus (or Lambertengus) H.C. gratitudinis ergo hoc in templo abeo delecto P. 9. Kal. Novemb. 1578. Vix. An 78'.

[36] MAZZUCHELLI, G., *Gli scrittori d'Italia cioè Notizie storiche, e critiche intorno alle vite e agli scritti dei letterati italiani*, Vol. II, part 2. Brescia, 1760, p. 923; PORQUEDDU, C., *Il patriziato pavese in età spagnola. Ruoli familiari, stile di vita, economia*. Milano, 2012, p. 688-689.

[37] MENOCHIO, G., Note autobiografiche. In: *Contributi alla Storia dell'Università di Pavia, pubblicati nell'XI centenario dell'Ateneo*. FRANCHI, L. (ed.), Pavia, 1925, p. 331 ss. Su Menochio, see, for all, VALSECCHI, C., *Menochio, Jacopo*. In: *DBGI*, Vol. II, p. 1328-1330 and an updated bibliography in F. PALETTI, Profili giuridici della mendicità in Jacopo Menochio. In: *Politica.eu*, Vol. 6, 2020, p. 148-171.

[38] The university labours were not matched by particularly high remuneration. In fact, the salary for teaching civil law in the morning was 1500 lire (later increased to 1800 in the years 1569-1570 and, infinally, to 2000 in 1570-1571). See ASPv, Universitŕ, *Syllabus lectorum*, cart. 17, s.v. The low salary of professors, the loss of their privileges, and the clampdown on non-Pavine lecturers were the main causes that led to the provincial station and municipalization of the university in the modern age. As noted by Grendler, the Ticino *Studium* was, in fact, 'more provincial in the second half of the sixteenth century. An overwhelming majority of the professors in the faculty of law came from Pavia; Milanese citizens and men from other parts of the state made up the rest' (GRENDLER, P., *The University of the Italian Renaissance*. Baltimore and London, 2002, p. 92).

[39] BASORA, M., Le origini del Collegio Borromeo 'in casa del Dottor Gratiano'. In: *Quaderni Borromaici*, Vol. 2, 2015, p. 138, note 16.

[40] A detailed reconstruction on the Accademia degli Affidati can be read in COMI, S., *Ricerche storiche sull'Accademia degli Affidati e sugli altri analoghi stabilimenti di Pavia.* Pavia, 1792; MAYLENDER M., *Storia delle Accademie di Italia*, vol. 1, Bologna, 1926, p. 72-83; BERGONZI, P., *La nascita di una Accademia nel secondo Cinquecento: gli Affidati di Pavia*. In: *Quaderni milanesi*, Vol. 5, 1983, p. 88-110; REPOSSI, C., *L'Accademia degli Affidati e l'Università dal secolo XVI al XVIII.* In: *Almum Studium Papiense*, Vol. I, to. II, p. 1259-1261; RICCARDI, C., Radici pavesi di un nuovo impegno letterario e culturale. In*: Sette e Ottocento a Pavia: le radici della modernità (1764–1815): atti del convegno di Pavia, novembre 2018-marzo 2019*, Novara, 2020, p. 17-26.

[41] ASPv, Università, *Collegio dei giurisperiti*, cart. 10.

Ghislieri, who appointed him governor of Ravenna in 1562-1563.[42]

Returning home ten years later, he became a collegiate doctor and began his academic career by holding the ordinary chair of Canon Law for two decades.[43]

Antonio Francesco's story is undoubtedly crucial because it shows how the legal Faculty at the end of the century was ready to welcome 'new' professors, who came out of their restricted local environment to try new experiences and gain authority. Once they returned to Pavia, rich in cultural heritage and experience, they were introduced into the university circuit of the time.

From Antonio, Francesco descends Alfonso, father of Giulio Cesare Beretta della Torre, from whose marriage with Aurelia Giorgi comes Alfonso, Sforza, who is appointed archpriest of Pavia Cathedral, and Francesco, ducem peditum, who is first colonel of the Alemanni. He has two sons, Carlo and Stefano, ascribed to the artillery of the army of Lombardy as military graduates from 1660 to 1686.[44] Carlo is also the father of Bartolomeo, Baldassarre, and Carlo Giuseppe. The first is a notary and chancellor of the University of Pavia; the second, after receiving his doctorate in 1721,[45] becomes substitute professor to Pio Pansa at the chair of Simplicium, to then pass the following year to the chair of Surgery and hold it until the year of his death (1752);[46] the third, Carlo Giuseppe, is a collegiate doctor of Sacred Theology at the University of Pavia, as well as provost pastor of the Church of S. Maria Canonica Perone in Pavia.[47] Because of his chastened life and his piety towards the poor, Benedict XIII offered him an episcopal see, but he turned it down, not deeming himself worthy of such an investiture.[48]

The eldest son Bartholomew had, in turn, four sons: Bernardino, who succeeded his uncle in the provostship of s. Maria Canonica Perone in Pavia; Francesco, who graduated in Medicine on 29 April 1751;[49] Ignazio, a professed monk in the Congregation of the Vallombrosan Benedictine Fathers of the monastery of s. Lanfranco near Pavia, and Siro, who was to be the last professed of the family. He entered the Vallombrosian Benedictine Order at a very young age. He completed the entire course of his studies in Rome, where he distinguished himself for his remarkable expertise in the sacred sciences and, especially, in studying oriental languages.

His fame was such that he was contended by the University of Cagliari, which held the 'advantageous promise to promote him in a short time to a distinguished Episcopal position',[50] and by that of Pavia, where Firmian called him to the chair of Oriental languages and sacred hermeneutics. In addition to planning efforts, therefore, the Austrian government's work also involved identifying professors who could have constituted a teaching staff worthy of the aims of the reform.[51]

In the city of Lombardy, in addition to reigning as abbot of the monastery of St. Lanfranco until its suppression in 1781 as a consequence of Joseph II's edictal legislation, he was actively involved in the academic career until he reached the pinnacle of university honors with his election as rector of the Athenaeum in 1787.[52]

His nephew Cesare, Francesco's son, chose to follow in his footsteps in the ecclesiastical career and, after graduating in Sacred Theology and Canon Law, became a quiescent rector. His brother Paolo, on the other hand, a lawyer, will be the father of Cesare and Pio Beretta, both graduates of Pavia.

As can be seen from these few pages, the Sannazzaro della Ripa and Beretta della Torre families, although starting from a very similar family backgrounds, exploited the legal training of their members in different ways. If the Sannazaro della Ripa, especially in the 16th century, found in scientia, mainly in the legal field, and in the doctoral instrument, an effective means of gaining access to the essential government roles in the Duchy, the Beretta della Torre, on the other hand, through university studies, not only in law but also in Medicine and theology, created a family network of professors who, despite their doctoral status and their successful position in Pavia's social chessboard, remained fundamentally static for over two centuries.

The striking cases, because they lasted for several generations, of the Sannazzaro della Ripa and Beretta della Torre families represent only the tip of an iceberg, the submerged part of which is much larger.

In the eighteenth century, in the Faculty of Medicine, 20% of graduates were the son of a physicist or surgeon: this is the case of Pietro Moscati, who obtained his degree in Medicine in 1758 and is noted in his degree papers as the son of Bernardino, professor of Surgery.[53] There is also the case of Cosmo Parea from Milan, son of the surgeon Francesco Parea, who graduated

[42] ASPv, Università, *Syllabus lectorum*, cart. 17, s.v.; BERNICOLI, S., *Governi di Ravenna e di Romagna dalla fine del secolo XII* alla fine del secolo XIX. Ravenna, 1898 (ristampa Forni 1968), p. 280; WEBER, C., *Legati e governatori dello stato pontificio (1550-1809)*. Roma, 1994, p. 336.

[43] ASPv, Università, *Collegio dei giurisperiti*, cart. 14.

[44] SPRETI, V., *Enciclopedia storico-nobiliare italiana*, Vol. II, p. 44-45.

[45] ASPv, Università, *Doctoratus*, cart. 90, fasc. 175.

[46] *Memorie e Documenti*, I, p. 144. Cf. ASPv, Universitf, *Syllabus lectorum*, cart. 17, s.v.

[47] The graduation date was 15. 04. 1728. ASPv, Universitf, *Doctoratus*, cart. 96, fasc. 187.

[48] TETTONI, L. – SALADINI, F., *Teatro araldico*. Lodi, 1893, Vol. II, s.v. Beretta della Torre.

[49] ASPv, Università, *Doctoratus*, cart. 109, fasc. 205.

[50] *Cenni storici degli uomini illustri*, p. 28.

[51] For a reconstruction of the staff of *doctores* in the Theological Faculty, see BERNUZZI, M., *La Facoltà di Teologia*, in *Almum Studium Papiense*, Vol. II, to. I, p. 184.

[52] *Memorie e Documenti*, I, p. 18, 555, 557, 573 e 578 ss.; SALA, T., *Dizionario storico, biografico di scrittori, letterati ed artisti dell'ordinamento di Vallombrosa*. Firenze, 1929, p. 64-66; LUCCHESI, E., *I monaci benedettini vallombrosani in Lombardia*. Firenze, 1938, p. 131-133; PIGNATELLI, G., s.v. *Beretta della Torre Siro*. In: *DNI* Vol. 9, 1967, p. 57-58.

[53] ASPv, Università, *Doctoratus*, cart. 112.

in the arts of Medicine in 1741, and the Pavia-born Giuseppe Trovati, son of the surgeon Bartolomeo, who graduated in Surgery in 1742.[54]

On 27 June 1648, Carlo Lumino Gallarati, son of Agostino, lecturer at the UniversityUniversity, and member of the College of physicists, received his doctorate in arts and Medicine. Despite the importance of the colleges for access to the professions, among the paternities mentioned in the degree documents, only 13 names are indicated as members of the physicists' College in the city of origin; in six cases, we have factual information about a member of the jurists' colleges, while other graduates are the sons of causidicians and notaries, for whom, however, membership of the professional College is not indicated.

Still, in the Austrian period, these family professors mirror the predominantly 'local' education that characterized the Ticinensis Universitas in the modern age.

3. The *doctores* in the lay administration of the State of Milan. The senators between *nobilitas* and *rerum civilium scientia*

'Between 1535 and 1796, one could not, in principle, take civic office unless one belonged to certain families, later called patricians. By perusing the lists of those who held the various perpetual or annual offices [...] it would be possible to fully reconstruct all the family groups that formed the patriciate of Milan even before the matriculation list drawn up in 1770, almost on the eve of the extinction of the patrician privilege'.[55]

This is how Franco Arese expressed it in an article that appeared in the Archivio Storico Lombardo in 1957, presenting the first of a series of works carried out in order to provide a complete picture of the composition of the Milanese patriciate in the period between 1535 and 1796 through the publication of the lists of the holders of the central city and state administrative offices.[56]

In the fragment mentioned above, Arese highlighted one of the most distinctive features of the Ambrosian elite, namely the close connection between belonging to the patriciate and holding civic office. If, as seems to be established, the members of the Milanese ruling class - like the members of the other European 'urban elites'[57] - held the exclusive right to participation in the city government and the most important royal magistracies, the examination of the composition and variation over time of the political personnel of the Lombard capital, carried out also through the analysis of the Pavia graduates, should, consequently, represent a suitable tool to indicate, in a sufficiently precise and detailed manner, the changes that occurred over time at the top of Ambrosian society.

The aim, therefore, is to measure the intensity of the presence of the Pavia degree starting from an examination of the political personnel of the Duchy's main lay body, the Senate of Milan, in the time between the beginning of Spanish rule (1535) and the end of the Austro-Hungarian one (1796).

That the Senate and the University of Pavia were linked by a univocal relationship that had already emerged from the New Milanese Constitutions of 1541, which made the Studium an integral part of the structure of the State.[58]

In its policy of preserving the traditions of the past, the attention of the Supreme Magistrate about the University focuses mainly on the function of conferring doctoratus.

This, while always formally maintaining the value of licentia ubique docendi, thanks to the senatorial interventions, acquires a legal value so that only the title obtained in the public study, the supreme administrative and jurisdictional body, recognizes effectiveness in the State.

Nevertheless, in the early modern age, the doctoral title was also attainable completely independently of primary cultural education or professional training. The palatine county investiture made possible the widespread diffusion of doctorates conferred in return for payment by palatine counts, collectivities, or individuals.

It is not just that.

The doctorate as a title of competence and merit was considerably devalued, assuming secondary importance compared

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[54] ASPv, Università, *Doctoratus*, cartt. 101-102.

[55] ARESE, F., *Elenchi dei Magistrati patrizi di Milano dal 1535 al 1796. I Sessanta perpetui Decurioni*, in *Archivio Storico Lombardo* (from now *ASL*), 8 (1957), p. 149-199. CHABOD, F., *Usi ed abusi nell'amministrazione dello Stato di Milano a mezzo il '500*. In: *Studi storici in onore di G. Volpe*, Firenze, 1958, p. 93-194, esp. p. 158; VISMARA, G., *Le istituzioni del patriziato*. In: *Storia di Milano*, Vol. XI, Milano, 1958, p. 276-282. Already the Duke of Alba had proposed to eradicate the too-frequent ties of kinship in his famous letter to Philip II of 11. 1. 1556 in *Epistolario del III duque de Alba don Fernando Alvarez de Toledo*, Vol. I. Madrid, 1952, doc. 304, p. 352 ss.; PETRONIO, U., *Burocrazia e burocrati nel Ducato di Milano dal 1561 al 1706*. In: *Per Francesco Calasso. Studi degli allievi. Estratto*. Roma, 1978, p. 512-520. On this point, already, GARONI, A. S., *De senatoribus*, *praeludia*, chap. II, n. 60, p. 21 'non tamen umquam fuit auditum quod in nostro senatu ambo sederint, vidimus quidem nostris temporibus filios fuisse creatos senatores adhuc vivete patre, qui et ipse ob scientiam, et peritiam potuisset optime id munus implere'.

[56] ARESE, F., *Elenchi dei Magistrati patrizi di Milano dal 1535 al 1796. Le cariche della città di Milano*. In: *ASL*, Vol. 9, 1966, p. 5-27; ID., *Le supreme cariche del Ducato di Milano da Francesco II Sforza a Filippo V (1531-1706)*. In: *ASL*, Vol. 9, 1970, p. 57-156; ID., *Le supreme cariche del Ducato di Milano e della Lombardia austriaca (1706-1796)*. In: *ASL*, Vol.10, 1983, p. 535-598; ID., *Cardinali e Vescovi Milanesi dal 1535 al 1796*. In: *ASL*, Vol. X, 6, 1981, p. 163-232. All the contribution are now collected in *Carriere, magistrature e stato. Le ricerche di Franco Arese Lucini per l'Archivio Storico Lombardo (1950-1981)*. Milano 2008, *passim*.

[57] As noted by DEL BAGNO (Dottori e nobiles viri, p. 32), the stakes are always high, and the objects of interest appear particularly relevant: personal and family dignity, presence in government institutions, marriage, property, and money. This complex typology takes on essential tones, both theoretically and practically, in multiple socio-political contexts of the Ancient regime. On this point the literature is very extensive. For a general overview see DONATI, C., *L'idea di nobiltà in Italia. Secoli XIV-XVIII*. Roma-Bari, 1988; DEWALD, J., *The European Nobility. 1400-1800*, Cambridge 1996, *passim*.

[58] PETRONIO, U., *Il Senato di Milano. Istituzioni giuridiche ed esercizio del potere nel Ducato di Milano da Carlo V a Giuseppe II*. Milano, 1982. Already by decree of 12 January 1492, renewed on 22 December 1497, two of the duke's secret council members were entrusted with the university's supervision with the task of reporting to the council in deliberation.

to the requirements of class - family, patrimony, and reputation of nobility - required for admission to the Colleges of Judges, which not by chance at the end of the 16th century, also boasted the title *Collegio dei nobili giureconsulti*. To practice the legal profession, for example, it is necessary to demonstrate quarters of nobility, given that only by being enrolled in the College can one aspire to be part of the high offices of the State Senate in primis. This fundamental requirement demonstrates an initial closure of the patriciate towards newcomers that is not reflected in the internal regulations of the Studium Papiense. To enroll in the College, one had to have obtained a degree from Pavia or another university in the empire, but above all, one had to prove that one possessed the requisites linked to rank, not wealth: one had to be noble and in possession of a doctoral degree obtained in a Studium recognized by the government of His Catholic Majesty (Salamanca, Bologna…).

In this intricate context, the Senate sought to establish the obligation for subjects to graduate in the Gymnasium Ticinensis, foreseeing sanctions for those who 'went to other Universities, other than that of Pavia or to study, or took a doctoral degree' to 'take away this abuse pernicious to the Study of Pavia, and to the public good.'

However, the senatorial desire to guarantee the Studium publicum as a State University clashed in reality with the variegated local education system, increasingly attended by patrician elements and grown thanks to sovereign and papal concessions.

The ordines issued to protect the Pavia degree aim to eliminate all privileges and prerogatives that allow the possibility of granting doctorates regardless of actual course attendance. The Senate can only use diplomas conferred by Palatine counts in exceptional cases.

The Senate is therefore faced with the reality of a system in which the centrality of the university institution is, in fact, by no means guaranteed. Significant in this regard is the position of the *Collegio dei Giureconsulti* in Milan, in possession, from 1560, of the imperial privilege of the ius doctorandi, which made it self-sufficient in its ability to recruit.[59]

Since the Senate had finally become, in the late 16th century, a gathering of jurists only and the place of arrival, or recruitment for all public magistracies, membership of the College (not only to that of Milan, obviously, but to it more than to others, due to Milan's pre-eminence in the State) constituted a fundamental junction for linking civic and public offices, the patriciate and the government of the Duchy.

What were the requirements for access to the College of jurisconsults and, therefore, to the Senate? Of which and how many members did it consist? How was this framed within the education of senators?

In 1531, Francesco II Sforza confirmed the organization chart he had wanted with the 1522 edict for the Senate, i.e., a president, five prelate senators, nine militia senators, and thirteen togati.[60] He added the podestŕ senators and, in 1533, the professorial senators. Of these different categories of the Senate fifty years later, only the togato Senate survived.

Over time, however, the number of senators increased, and by 1535, when Milan finally passed into the orbit of the empire, there were twenty-seven, in addition to the president. There were, therefore, nine knights, five prelates, and thirteen jurisconsults, the latter all from Lombardy, according to the wishes of the last Sforza, Francis II.

As was quickly expected, the jurist senators, precisely because of their cultural background, took over from the lay members and arrogated to themselves the right to reserve the purely jurisdictional attributions. As the years went by, the non-jurist members gradually lost importance. These doctors of the law came from the Milanese patriciate, within which the study and practice of law were understood as the highest form of prestige and power. Indeed, at the height of the 17th century, a noble Lombard jurisconsult's greatest aspiration was to enter the ranks of senators, hoping to reach the most prestigious office: the presidency.

If we look more directly at the entry requirements, these include belonging to the urban patriciate, the absence of debts or pending lawsuits with the city, and the age of at least 35 years. Starting in 1652, admission to the ruling elite and entry into the Council was limited to 'nobles by birth and original citizens with habitatione of one hundred years.' Only members of the most prestigious city families with high economic status could aspire to the Senate.[61] It should also be emphasized that, unlike other bodies, whose statutes provided for the periodic alternation of members, the senatorial seat was a life-long one, so that a very high percentage of senators who alternated between 1535 and 1796 remained in office until their death or had to resign due to illness, while very rare were the cases of councilors who left office because they were forced to resign or because they were called to other positions of responsibility in the royal courts, in the diplomatic or military career or the ecclesiastical one. Lastly, it should be noted that although the transfer of senatorial seats in the same lineage - or at least the designation by the outgoing decurion of his successor - was formally prohibited, 80% of the councilors who resigned gave up their seats to a relative (brothers, nephews, sons-in-law and especially sons), thus ensuring the permanence of their lineage within the magistracy. From this, we can deduce that the rules regarding the succession of councilors were often disregarded, as is also confirmed by the frequent failure to comply with the provisions regarding the age of entry into the Senate: a comparison between the dates of entry into the Council and the dates of birth of the senators identified by Franco Arese shows that many of them were elected before reaching the age of thirty-five, a circumstance that would also help to explain the surprising longevity shown by some councilors.

In any case, to verify the role of doctorates in forming future senators, it was decided to consider only the *togati*, the only

[59] MOZZARELLI, C., *Antico regime e modernità*. Roma, 2008, p. 364.

[60] Originally, seventeen members were to be members, chosen from among the city's leading figures who had already served on the Sforza councils. Alongside these Milanese members sat several Frenchmen, men trusted by Louis XII.

[61] CATTINI, M. – ROMANI, M.A., *Una capitale e una periferia. La circolazione delle élite urbane a Parma e a Finale (secoli XVI e XVIII).* In: GUARDUCCI, A. (ed.), *Gerarchie economiche e gerarchie sociali, secoli XII-XVIII*, Atti della XII Settimana di Studi dell'Istituto Internazionale di Storia economica 'F. Datini' di Prato, Firenze, 1990, p. 535-560.

ones, together with the two professorial senators - Andrea Alciato and Francesco Sannazzaro della Ripa - who had to hold an academic degree.

Of the 368 men who occupied the senatorial seat between 1525 and 1796, 194 degrees were found.

The total number does not appear very high. Suppose one considers that a doctoral degree is required to enter the College of jurisconsults, from which senators were chosen, and that the awarding of the latter by the College above was exceptional. In that case, one must assume that by protectionist regulations, almost all senators must have graduated from the public College.

The loss and dispersion of documentary material in other archival fonds, especially about the 16th century, point in this direction.

We are, however, in the realm of hypotheses.

There are, in fact, degrees of illustrious personalities belonging to renowned Milanese families, of whom several generations had graduated or would graduate in Pavia. In addition to the case of Giacomo Menochio's degree, consider the case of the senatorial family of the Arese.[62] Giulio, the nephew of the famous jurist Giulio Claro, senator and regent in the Supreme Council of Italy, studied jurisprudence in Pavia, where he had jurist disciples such as Fabio and Paolo Belloni and Girolamo Bossi with whom he also shared literary and scientific interests according to the type of culture that seems to have prevailed in the Pavia Studio at the end of the 16th century and that was expressed in the numerous scientific-literary Academies that flourished in those years. Ascribed to the College of Jurists in Milan and recruited, on 13 Aug. 1596, to the Council of Sixty Decurions, Giulio rapidly progressed through the highest ranks of the administrative career. He was Quaestor in the Extraordinary Magistrate, Senator, and President of the Ordinary Magistrate. On 29 May 1613, he was appointed a member of the Secret Council. On 31 January 1619, he was finally elected president of the Senate. On the following 2 March, he took possession of his office by taking the prescribed oath, the decree of appointment, speaking of the merits acquired by Arese in public administration, also mentioning the virtues and values of his father, Marco Antonio, and his ancestor: a sign therefore that the political fortunes of the Arese family were now firmly established. When he died in early 1627, his son Bartolomeo III inherited the title of Count of Castellambro, confirmed to him by Philip IV by decree on 11 March, and on 26 April also the vacant seat on the Council of Sixty Decurions of Milan. In the same years, after studying in Pavia and graduating in utroque iure on 28 June 1630, he began a glittering career. In 1636, he was appointed captain of justice; on 19 Sept. 1638, he was quaestor of the ordinary Magistrate. On 29 March 1641, he was elected senator and, on 17 July, member of the Secret Council, then president of the Ordinary Magistrate; he was also honorary regent in the Supreme Council of Italy.

His career, culminating with his appointment as President of the Senate on 17 November 1660, was favored by his father's position, but also by his loyalty to Spain in the turbulent events of the Thirty Years' War. His son, Giulio II, with whom the Castellambro branch came to an end, managed to be invested in the lower magistracy, but did not have time to make a career of it because he died prematurely in 1665.[63]

4. The *doctores* in the administration of the Diocese of Milan: 'Ecclesia Dei filios desiderat eruditos'.

In order to verify the effectiveness of the degree with clerical careers, it was decided to devote an examination to the Cardinals that Milan was able to offer the Church during the Spanish and Austrian eras.[64] In order to find a unified line of the clergy, following Franco Arese Lucini, it was decided to limit ourselves - in principle - to only those prelates born in the city of Milan and in the territories of the ancient diocese under the jurisdiction of the Milanese archbishop.[65]

Between 1535 and 1796, there were sixty-two Cardinals who succeeded one another; in 270 years there is, on average, a new Cardinal every four years and four months, and if we consider all 1067 Cardinals existing or created during this period, on average we find a Milanese for every seventeen Princes of the Church.

The incidence of the 'Milanese' on the total number of Cardinals was not constant. If in 1535, the only Ambrosian was Agostino Trivulzio, elected in 1517 by Leo X, the situation changed when Gian Angelo Medici, Pope Pius IV, sat on the throne of Peter. Of the forty-seven appointments made in five years, eight came from the capital of the Duchy,[66] and Nicolň Sfrondati, Pope Gregory XIV, who, during his very brief pontificate, created two Milanese cardinals out of five chosen members.[67]

We must wait two centuries to find such a Milanese character within the College of Cardinals. Only with the pontificates of Benedict XIV (Prospero Lambertini) and Clement XIII (Carlo Rezzonico) was the red biretta imposed on ten Milanese cardinals.[68]

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[62] See for all PETRONIO, U., *Burocrazia e burocrati*, p. 517, note 163.

[63] LETI, G., *La vita del conte Bartolomeo Arese presidente del Senato di Milano*. Colonia, 1682, p. 156 ss.

[64] PICOTTI, G. B., *La giovinezza di Leone X. Il Papa del Rinascimento*. Milano, 1928, in particular the chap. II, *La caccia dei benefizi*, p. 67-159; LAZZARINI, I., s.v. Gonzaga, Francesco. In: *DBI*, Vol. 57, 2001, p. 756-760; PELLEGRINI, M., *Ascanio Maria Sforza. La parabola politica di un cardinal-principe del Rinascimento*. Roma, 2002; CHAMBERS, D. S., *A reinassance Cardinal and his Wordly Goods: the Will and Inventory of Francesco Gonzaga (1444-1483)*. London, 1992; SALVARANI, R. (ed.), *I Gonzaga e i Papi. Roma e le corti padane fra Umanesimo e Rinascimento (1418-1620)*, Atti del Convegno (Mantova-Roma 21-26 febbraio 2013). Cittŕ del Vaticano, 2013. For a systematic survey of cardinals and bishops, an essential reference point is the *Hierarchia Catholica medii et recentioris aevi*, EUBEL, C. et al. (eds.), München 1913-1923.

[65] Adding those who, although bearing a Milanese surname, were born to families permanently residing in other cities, could have resulted in mistaken homonyms. Cf. ARESE LUCINI, F., Cardinali e Vescovi, p. 163-232.

[66] Giovanni Antonio Serbelloni (1560-1591); Carlo Borromeo (1560-1584); Lodovico Simonetta (1561-1568); Carlo Visconti (1565-1565); Francesco Alciati (1565-1580); Francesco Abbondio Castiglioni (1565-1568); Alessandro Crivelli (1565-1574); Francesco Grassi (1565-1566).

[67] Gregory XIV appointed his nephew Paolo Emilio Sfrondati (1590-1618), son of his brother Paolo II Count of Riviera, and Flaminio Piatti (1591-1613).

[68] Between 1740 and 1769, Cardinals were created Giuseppe Pozzobonelli (1743-1783), Luigi Maria Lucini (1743-1745), Gioachimo Besozzi (1743-1755); Fabrizio Serbelloni (1753-1755); Giovanni Francesco Stoppani; Carlo Francesco Durini (1753-1769); Alberico Archinto (1756-1758); Antonio Maria Erba Odescalchi (1759-1762); Giuseppe Maria Castelli (1759-1780); Vitaliano Borromeo (1766-1793).

Another interesting fact concerns the noble origin of the cardinals. Of sixty-two, as many as fifty-six belong to a Milanese patrician family.[69] However, three of them belong to lineages that were admitted more or less simultaneously to both the cardinalate and the patriciate: this is the case of Giuseppe Maria Castelli (1759-1780) and the two Cardinals Durini, Carlo Francesco (1753-1769) and his nephew Angelo Maria (1776-1796).

Of the remaining six cardinals, three belong, although born in Milan, to the decurion nobility of the Duchy.[70] They are Luigi Maria Lucini (1743-1745) of the Order of Preachers, son of a senator, and Carlo Ciceri (1686-1694), both from Como. Carlo Opizzoni (1804-1855), on the other hand, from Pavia, comes from a family of senators and orators. The other three descend from noble Milanese families yet to be admitted to the patriciate: the first is the Cistercian Gioachimo Besozzi (1743-1755), formerly Abbot in Rome in s. Croce in Gerusalemme, undoubtedly from an ancient Milanese noble family; the second, Cardinal Giovanni Francesco Stoppani (1753-1774), whose father was created marquis in 1716; the third, finally, Carlo Crivelli (1802-1818), whose family, from Cremona, was decorated with the county of Ossolaro (1717).

The sixty-two cardinals above belong, for the most part, to the same families. Two are Durini, as many Litta, Omodei, Serbelloni, Simonetta, and Trivulzio, counts of Melzo; three descend from the Archinto and Sfrondati, and six from the Borromeo. From nine Ambrosian families, in short, come twenty-four Cardinals. Taking the other thirty-eight into account, we find forty-seven Milanese lineages that are the cradles of the Princes of the Church.

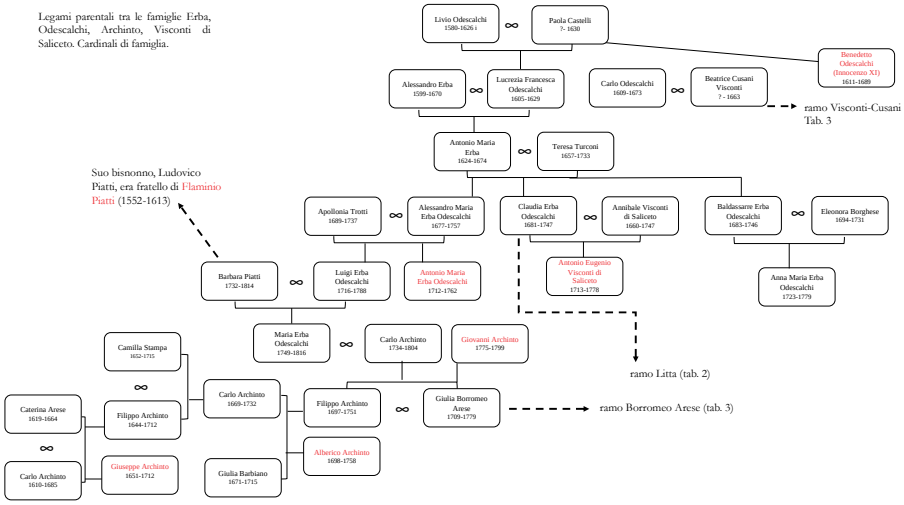
These dynasties linked by kinship relations have developed over the centuries thanks to a careful matrimonial and political strategy.[71] This is a fact that only emerges if one stops at the *cognomen* of individual families alone, as the graphs on the following pages show.

4.1 The private life, the public stage: Parental links between the Milanese Cardinals

In order to reconstruct the kinship ties between the Milanese Cardinals, the wedding of Carlo Archinto, Count of Tainate, son of Filippo and Giulia Borromeo Arese, with Maria Erba Odescalchi, daughter of Luigi, III Marquis of Mondonico and, ex uxor, first Prince of Monteleone, was chosen as a starting point (tab. 1).[72] The marriage with an exponent of the Archinto-Borromeo Arese, a very noble and ancient Milanese family, was undoubtedly a prestigious marriage that fulfilled the social aspirations of the Erba Odescalchi family. It is not just that.

Suppose it is framed within the family strategies. In that case, it emerges how Maria, niece and great-niece respectively of Cardinals Antonio Maria Erba Odescalchi and Antonio Eugenio Visconti, thanks to the marriage, became the sister-in-law of the cardinal Giovanni Archinto, initiated to an ecclesiastical career by his powerful uncle Alberico,[73] also a Cardinal, titular of the Archdiocese of Nicea before Antonio Maria.

Tab. 1 Parental ties between the Erba, Odescalchi, Archinto, and Visconti di Saliceto families. Family cardinals.



[69] A precise and exact definition of the patriciate appears in a response of the College of Jurists in 1663: 'quelli soltanto si devono ritenere patrizii, i quali traggono origine da una famiglia antica e di antica nobiltà; la famiglia si intende antica se supera i 100 anni […] E inoltre se i suoi membri si sono astenuti dalla marcatura, dagli affari e dalla lucri sordidi di qualsiasi genere sia procurati direttamente sia per il tramite di gestori; quei lucri soltanto sono ammessi – secondo quanto dice Cicerone nel II libro *De officiis* – per cui si costituisce il patrimonio familiare con atti e cose dalle quali esula ogni immoralità' in *Collectanea de legibus nobilitatibus*, § 19, p. 27.

[70] For a more general perspective see CASANOVA, C., *Gentilhuomini ecclesiastici: ceti e mobilità sociale nelle legazioni pontificie (secc. XVI-XVIII)*. Bologna, 1999, p. 29 ss.; MOZZARELLI, C., Patrizi e nobiltà nello Stato di Milano durante il regno di Filippo II. In: BELENGUER CEBRIÀ, E. (ed.), *Felipe II y el Mediterraneo*. Madrid, 1999, Vol. II, p. 127-138 e ID., Dalla grazia cortigiana alla ragion di Stato cattolica, ovvero un percorso della legittimazione politica da Carlo V a Filippo II. In: *Annali di storia moderna e contemporanea*, Vol. 7, 2001, p. 477-481.

[71] On parental strategies in *Milanesado*, see ALVAREZ-OSSORIO ALVARÎNO, A., *La república de las parentelas. El estado de Milán en la monarquía de Carlos II*. Mantova, 2002, p. 75-94.

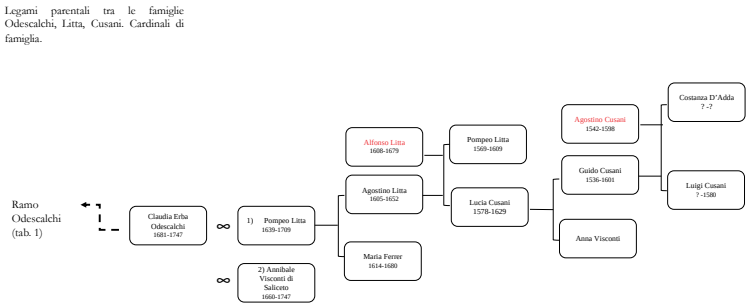
[72] To clarify the complexity of the events and relationships of the families, several family trees are proposed in the following pages to be used as an accompanying tool. Without any claim to completeness, these diagrams provide essential data on specific characters of particular interest.

[73] For a medieval perspective, see CAROCCI S., *Il nepotismo nel medioevo. Papi, cardinali e famiglie nobili*. Roma, 1999, spec. chap. *Il nepotismo cardinalizio*, p. 63-83.

Another interesting element that emerges from the graph is the protection of the kinship of both parents, since the mother's family seems to play the same role as the paternal one. This consideration stems from a rethinking of the concept of family, no longer understood exclusively as ‚patrilineal lineage' and ‚continuity of lineage through name',[74] but as a more articulated and complex web of social relations in which the maternal family also comes into play.[75]

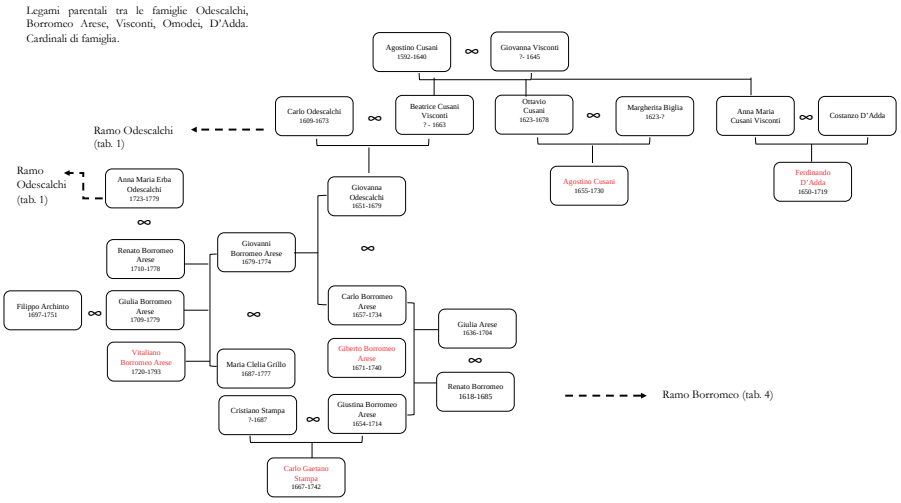
This is a phenomenon that is also evident if one widens one's gaze to family relations established with other noble lineages. Consider, for example, the marriage policy adopted by Antonio Maria Erba with his daughter Claudia (tab. 2). Married in first marriage to Pompeo Litta, 4th Marquis of Gambolň, nephew of Cardinal Alfonso Litta - in turn great-nephew of the prelate Agostino Cusani - on the death of her husband, she married Annibale Visconti, from whose marriage was born, the already mentioned, Antonio Eugenio, who was to become Cardinal in 1775.

Tab. 2 Parental ties between the Odescalchi, Litta and Cusani families. Family cardinals.



The same situation can also be seen in the marriage between Carlo Odescalchi and Beatrice Cusani Visconti (birth of parental ties with two Cardinals, Agostino Cusani and Ferdinando D'Adda), as well as in the marriage of their daughter Giovanna with Carlo Borromeo Arese (three Cardinals: Giberto and Vitaliano Borromeo Arese, Carlo Gaetano Stampa) (tab. 3). From these examples, it is clear that the women of the Erba Odescalchi family represent a natural resource. Through the shrewd use of alliances forged through women, they achieved a spectacular rise over a few decades.

Tab. 3 Parental ties between the Odescalchi, Borromeo Arese, Visconti, Omodei and D'Adda families. Family cardinals.



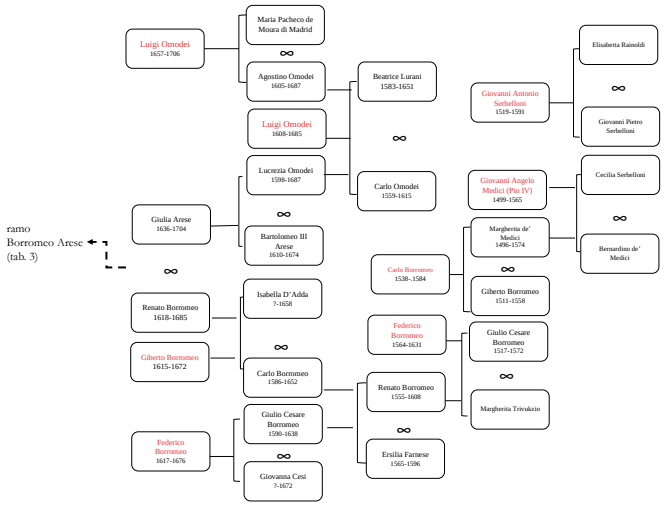
Finally, the importance and prominence assumed by the family are evident in the celebrated case of the Borromeos.

The creation of multiple ‚family cardinals' in the course of the modern age and the kinship ties established with other lineages - see in the chart, in particular, those with the Omodei family (tab. 4) -, through a careful matrimonial policy, allowed the Borromeos to deliver six cardinals to the Church in the course of their history, four of them in less than a century.

[74] AGO, R., *Carriere e clientele nella Roma barocca*. Bari, 1990, p. 36. On the extension of the concept of family, with particular reference to the ecclesiastical sphere, see GNAVI, A., Carriere e Curia romana: l'Uditorato di Rota (1472-1870). In: *Mélanges de l'École française de Rome. Italie et Méditerranée*, Vol. 106, 1, 1994, p. 161-202.

[75] On the role played by women, as an important ‚wealth creator and social lift' and with particular reference to the Bolognese context, see CARBONI, M., La formazione di una élite di governo: le alleanze matrimoniali dei senatori bolognesi (1506-1796). In: *Studi Storici Luigi Simeoni*, Vol. 52, 2002, p. 9-46; GUERRINI, M. T., Il ruolo delle donne nella formazione delle dinastie professionali (Bologna, secc. XVI-XVIII). In: GUERRINI, M. T. – LAGIOIA, V. – NEGRUZZO, S., *Nel solco di Teodora. Pratiche, modelli e rappresentazioni del potere femminile dall'antico al contemporaneo*. Milano, 2019, p. 284-297. In general, see GUERRA MEDICI, M. T., *Donne di governo nell'Europa moderna*. Roma, 2005.

Tab. 4 Parental ties between the Borromeo, Serbelloni and Medici families. Family cardinals.



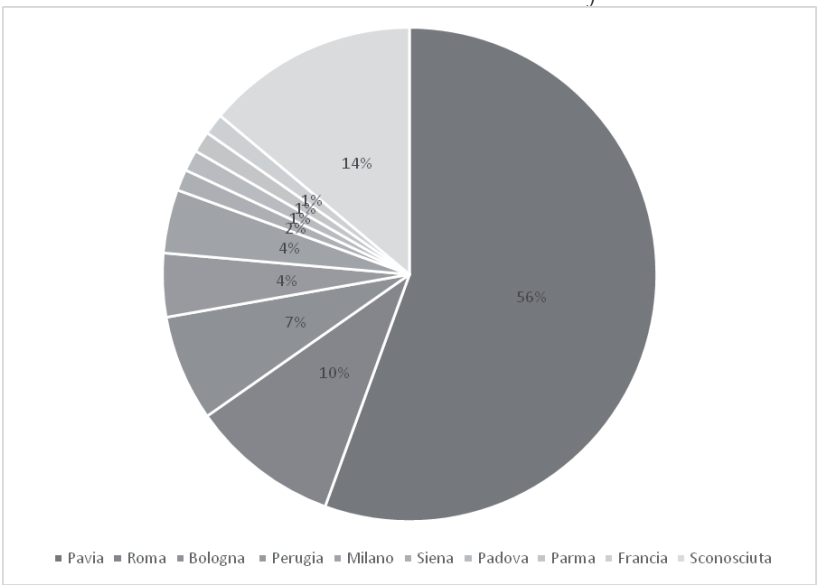
As can be seen from these graphs, twenty-two Cardinals (almost 1/3) come from nine families linked to each other through matrimonial strategies or, as in the case of the Erba Odescalchi, also through inheritance.

In this outlined picture, what is the role of the doctoratus? Was Pavia a hotbed of Milanese church princes?

To answer the first question, one can turn to doctrine. Brancaccini noted that the doctoral qualification was essentially for magistrates and the city government.[76] The same reasoning can be reapplied in ecclesiastical matters. On the other hand, the Tridentine reform insisted that significant ecclesiastical dignities be entrusted to doctors or at least to graduates in theology or canon law. As noted by Di Noto Marrella, 'one could see in these calls, the tendency of the century, to slowly, but consistently, fill the staff of the nascent administration with competent personnel, no less faithful, in the lay sphere than ecclesiastical'.[77]

The answer to this last question can only be in the affirmative. Looking again at the data from the graduation diplomas over the period considered, out of sixty-two Cardinals, twenty-nine graduated from the University of Pavia; three, although they had attended its courses - Giulio Roma, Camillo Melzi and Giuseppe Archinto - graduated elsewhere. The practice of graduating in universities other than that of the Duchy, although the Senate strongly hindered it, was widespread among the future Milanese prelates: as many as twenty-two prelates (30%) took their degrees outside Pavia: seven in Rome, five in Bologna, three in Perugia,[78] three in Milan, and one each in Padua, Siena, Parma, and France. Of the remaining ten, no information exists about the higher studies conducted (tab. 5).

Tab. 5 Where the Milanese Cardinals come from



[76] BRANCACCINI, F.D., *De jure*, Lib. II, cap. IX, n. 15.
[77] DI NOTO MARRELLA, S., *'Doctores'*, Vol. II, p. 121.
[78] LUPI, R., *Gli Studia del papa. Nuova cultura e tentativi di riforma tra Sei e Settecento*. Firenze, 2005.

The choice to graduate from La Sapienza in Rome is of no small importance, as demonstrated by the fact that 10% of future cardinals opted for this choice. The interest in the possible roles to be occupied within the Milanese Church is diverted by graduates towards Rome, the political centre of the Church State and religious centre for the whole of Christendom.

Another aspect not to be overlooked and closely linked to this, is the membership of many prelates in the Collegio dei Nobili Dottori Giureconsulti. Pius IV, who belonged to it, contributed to its development, not only by ordering the construction of the Palazzo dei Giureconsulti at his own expense, but also by reserving two positions in the Roman Curia for Milanese doctors that allowed access to the cardinalate. This explains why those who aspired to embark on the not easy career of prelacy were induced to deepen their studies and preparation in order to gain access to the College.

It is therefore necessary to present oneself well-armed at the appointment with Rome, with an armour laden with knowledge and specialisation. In order to be competitive, it is, without a doubt, necessary to start from the theoretical study of the laws on the benches of the University, then seeking the exercise of practice, which, combined with the elaboration of fine parental strategies, very often constitute winning ingredients to be used in the recipe for achieving the coveted professional success.[79]

From the mid-16th century, a large group of Milanese collegiate jurisconsults were called to the Curia for their legal skills and, having held various posts, ascended to the top of the ecclesiastical hierarchy.

Out of fifty-six patricians, we find thirty-three collegiate jurisconsults; of the remaining twenty-three, three belong to the secular clergy (Gioachimo Besozzi, Luigi Maria Lucini and Celestino Sfrondati), and the other twenty, despite having a legal education, have no interest in belonging to the College.

This suggests that not all the city's families, therefore, considered the inclusion of their members among the Milanese jurists a condicio sine qua non because, probably, the importance of the family was such that it was deemed unnecessary to take advantage of that springboard to rise to the highest ecclesiastical offices.

The positions of Consistorial Advocate, Auditor of the Sacred Rota - reserved since 1560 for Milanese jurists - and Nuncio held at the Roman Curia are an excellent test bench to confirm this. Of those appointed Consistorial Advocates,[80] seven were to become Cardinals, one of whom, Giacomo Simonetta,[81] was chosen in the early 16th century, the other six[82] from 1560 until the end of the 18th century.[83] With the exception of Giulio Roma, who had become a cardinal in the meantime, the other six later went on to become auditors of the Sacra Rota. To these should be added Vitaliano Visconti Borromeo and Federico Visconti who were selected as auditors from among the Milanese staying at the Curia.

Among the forty-four Monsignors who are chosen as Apostolic Nuncios with the delicate task of guiding Vatican diplomacy, twenty-seven are Cardinals.[84] Promoted to this task, they receive, if they did not already possess it, the title of a bishopric in Italy and, later, from the first half of the 17th century, that of an archbishopric in partibus infidelium.

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[79] Bologna, too, witnessed a new interest in Rome from the 16th century onwards. Cf. GUERRINI, M. T., Tra formazione e professione: i laureati bolognesi in diritto in età moderna. In: *Historia et ius,* Vol. 12, 2017, p. 1-13.

[80] CARAFA, J., *De Gymnasio romano et de eius professoribus*, vol. 2. Romae, 1751, p. 488-564; CARTARI, C., *Advocatorum Sacri Consistorii Syllabum*. Roma, 1656; CONTI, O. P., *Elenco dei defensores e degli avvocati concistoriali dall'anno 598 al 1905, con discorso preliminare*. Roma, 1905; ID., *Il Papato e la nazionalità italiana*, in *L'Osservatore Romano,* 138, 21 giugno 1898; ID., *Origine, fasti e privilegi degli avvocati concistoriali. Memorie storiche raccolte e coordinate su documenti inediti e poco noti*. Roma, 1898; ID., San Gregorio Magno e I Defensores Regionarii e i Defensores Gerionarii (echi del XIII centenario). In: *Giornale Arcadico* s. V, 1, 1904, p. 477-485. For general information: DE LANVERSIN, B., Avocat consistorial. In: *Dictionnaire historique de la Papauté*. Paris, 2003, p. 178-179; MORONI, G., Avvocati concistoriali. Collegio. In: *Dizionario di erudizione storico-ecclesiastica*, Vol. 3, p. 303-308; RAFFALLI, J., Avocats consistoriaux. In: *Dictionnaire du droit canonique*, Vol. 1 p. 1535-1536. For the statutes of the College see: ADORNI, G., Statuti del Collegio degli Avvocati Concistoriali e Statuti dello Studio Romano. In: *Rivista internazionale di diritto comune* (from now *RIDR*), Vol. 6, 1995, p. 293-355; EAD., Per il Settimo Centenario: i nuovi statuti degli avvocati concistoriali e dell'Università di Roma (9 settembre 1596-14 aprile 1605). In: *RIDR*, Vol. 13, 2004, p. 227-254.

[81] SITONI DI SCOZIA, G., *Theatrum equestris nobilitatis secundae Romae*. Mediolani, 1706, p. 78; PAPADOPOLI, N. C., *Historia Gymnasii Patavini*, II. Venetiis, 1726, p. 44 ss.; ARGELATI, F., *Bibliotheca scriptorum Mediolanensium*, II, coll. 1398-1400; CARDELLA, L., *Memorie storiche de' cardinali della Santa Romana Chiesa*, IV, p. 148-150; MORONI, G., *Dizionario di erudizione storico-ecclesiastica*, LXVI. Venezia, 1854, p. 163; SOL, E., Un canoniste du XVIe siecle: le cardinal G. S. In: *Annales de Saint-Louis-des-Français*, 6, 1901, p. 396-444, 7, 1902, p. 7-71; VON PASTOR, L., *Geschichte der Päpste seit dem Ausgang des Mittelalters*. IV-V, Freiburg, B. 1906-1909, ad ind.; EUBEL, C. – VAN GULIK, G., *Hierarchia Catholica Medii et Recentioris Aevi,* III. Monasterii, 1910, p. 21, 26, 236, 289, 292, 325; CERCHIARI, E., *Capellani Papae et Apostolicae Sedis auditores causarum Sacri Palatii Apostolici*, II. Città del Vaticano, 1920, p. 84 ss.; KATTERBACH, B., *Referendarii utriusque Signaturae a Martino V ad Clementem IX et Praelati Signaturae Supplicationum a Martino V ad Leonem XIII*. Città del Vaticano, 1931, p. 69, 79, 82, 88, 90, 101; JEDIN, H., *Geschichte des Konzils von Trient*, I, Freiburg, B. 1949, ad ind.; SURTZ, E., *Henry VIII's great matter in Italy. An introduction to representative Italians in the king's divorce, mainly 1527-1535*, Chicago, 1974, p. 1032-1048.

[82] This list does not include Carlo Alberto Guidobono Cavalchini who, although admitted to the Collegio dei Giureconsulti in Milan, appointed Consistorial Advocate and later created Cardinal in 1743, was born in Tortona.

[83] Flaminio Piatti (1591-1613); Giulio Roma (1621-1652); Federico Caccia (1695-1699); Bernardino Scotti (1715-1726); Marcellino Corio (1739-1742); Antonio Dugnani (1794-1818).

[84] BIAUDET, H., Les Nonciatures apostoliques permanentes jusqu'en 1648 (1560-1650). In: *Annales Academiae Scientiarum Fennicae, série B, 2*. Helsinki, 1910, p. 247 ss.; ARESE LUCINI, F., *Cardinali e Vescovi* p. 168 ss.

In the light of this data, the alternations in high ecclesiastical offices prove, once again, the skilful strategy of the Milanese patriciate: in its hands were concentrated the keys to non secular power (9/10 of the offices).

In conclusion, the clerical career of the Pavia graduates, especially with reference to the top positions, must be considered in relation to their kinship. As already noted in 1989 by Klaus Schreiner, *consanguinitas* is a structural principle of the formation of religious communities and orders in the Church.[85] If we consider Milan's noble and aristocratic families, as characterised by forms of cohabitation marked by their own power mechanisms, interests and conceptions of values, the controversial value of the degree for the career of their members clearly emerges.

The most explicit rhetorical expression of promotion through higher education is in the bull of Pius II, who claimed in it that study 'in infimo loco natos evehit in sublimes'. But this does not seem to apply to the most important roles of the Milanese diocese in the modern age.

In this context, in fact, the academic title can be seen as a means to maintain, rather than to conquer, a high social status. The very strong presence of noble cardinals (56 out of 62),[86] a sign of the stabilisation and aspiration of the patriciate, seems to confirm this. The Church, therefore, seems to have favoured above all a mobility within classes and not between classes, i.e. it was an instrument of 'reproduction of the existing borders between social orders'[87].

In this research horizon, the diploma tends to be considered a mere resource within a lively market.

5. From University studies to broader horizons: the leading case of the Erba-Odescalchi family in the 17th-18th centuries

Of the numerous members of the Odescalchi family in the 17th century, only Benedetto and his nephew Livio have found their place in later historiography: the former because he was elevated to the papacy under the name of Innocent XI,[88] the latter for having acquired the valuable art collection of Queen Christina of Sweden, and the latter for having been remembered by the Roman population as a symbol of disgrace – a strand of studies that have developed relatively recently on the Odescalchi.

Although Bustaffa's research has clarified the genealogy[89] and links with the Como environment,[90] much of the internal dynamics inherent in the socio-economic-political world where the family moved to remain in a grey area, it is on these that we shall attempt to contribute some further historical knowledge, starting from a particular source, that of the acta graduum of the individual members.

From the marriage of Livio Odescalchi - son of Guido Costantino, progenitor of the papal branch - with Paola Castelli towards the end of the 16th century, nine children were born:[91] Lazzaro Costantino, Paolo, Nicolò, Giuseppe Bartolomeo, Paolo Amanzio, Giulio Luigi (commonly called Giulio Maria), Lucrezia Francesca, Benedetto and finally Carlo.

The family's economic situation had undergone a rapid increase, following a frequent trend in European families: at first simple merchants and landowners in the Como and Valtellina areas, at least until the middle of the 16th century, by the beginning of the following century the branch 'of the Popes' was already an economically solid structure, based on a vast real estate in the Milanese territory and an ever-growing commercial-financial activity,[92] which had ramifications both in Italy and in the main European centers. All this was possible thanks to the support of the other branches of the family[93] and the numerous clientele they were able to structure within the commercial activity,[94] facilitated by shrewd matrimonial policies.

This economic strengthening was also favored by family events that did not allow the division and dismemberment of real estate and business interests and activities. Livio was, in fact, the universal heir on the death of his father, Guido Costantino, although he had four brothers and five sisters (Tab. 6).

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[85] SCHREINER, K., 'Consanguinitas', 'Verwandschaft' als Strukturprinzip religiöser Gemeinschafts- und Verfassungsbildung in Kirche und Mönchtum des Mittelalters. In: CRUSIUS, I. (hg.) *Beiträge zur Geschichte und Struktur der mittelalterlichen Germania Sacra*, Göttingen, 1989, p. 176-305.

[86] For intellectual training as a trigger and reinforcement of social mobility in the ecclesiastical sphere, see, in addition to the bibliography cited herein, ANHEIM, E. – MENANT, F., Mobilité sociale et instruction. Clercs et laïcs du milieu du XIII^{e} au milieu du XIV^{e} siécle. In: CAROCCI, S. (ed.), *La mobilità sociale nel medioevo*. Roma, 2010, p. 341-379. On the concept of 'cultural capital' cf. BOURDIEU, P., Ökonomisches Kapital, kulturelles Kapital, soziales Kapital. In: KRECKEL, R. (hrsg.), *Soziale Ungleichheiten*. Göttingen, 1983 (Soziale Welt. Sonderband, 2), p. 183-198; ID., The Forms of Capital. In: RICHARDSON, J.G. (ed.), *Handbook of Theory and Research for the Sociology of Education*. New York, 1986, p. 241-258.

[87] REINHARD, W., Kirche als Mobilitätskanal der frühneuzeitlichen Gesellschaft. In: SCHULZE, W. (hg.), *Ständische Gesellschaft und soziale Mobilität*. Munich, 1982, p. 333-351.

[88] MENNITI IPPOLITO, A., Innocenzo XI, beato. In: *Enciclopedia dei Papi*. Roma, 2000, Vol. III, p. 253-259; ID., Innocenzo XI, papa. In: *DBI*, Vol. 62, 2004, p. 478-495; COSTA, S., *Dans l'intimité d'un collectionneur: Livio Odescalchi et le faste baroque*. Paris, 2009; EAD., Odescalchi, Livio. In: *DBI*, Vol. LXXIX, Roma 2013, *ad vocem*.

[89] BENAGLIO, G., *La verità smascherata. Dignità e venture di 398 famiglie nobili lombarde, piemontesi, ticinesi e d'altre terre e città d'Italia nei ranghi del patriziato milanese tra XIV e XVIII secolo secondo il manoscritto del 1716-19*. Germignaga, 2009, p. 82.

[90] BUSTAFFA, F., La famiglia Odescalchi e i suoi rami comaschi. In: AA.VV., *Gli Odescalchi a Como e Innocenzo XI*. Como, 2012, p. 155-162.

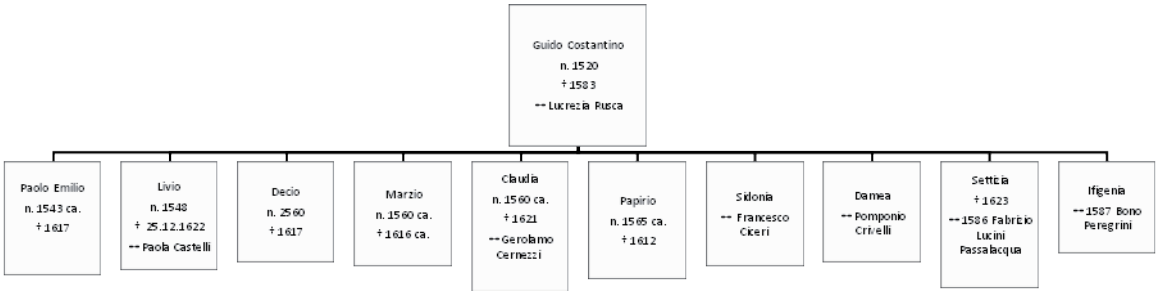
[91] ASR, *Fondo Odescalchi*, b. IV.D.6, fasc. 4. Cf. also MIRA, G., *Vicende economiche di una famiglia italiana dal XV al XVI secolo*. Milano, 1948.

[92] MIRA, G., *Vicende economiche*, p. 255 ss.

[93] This support also resulted, in 1677, in two inheritances, which came from part of the estate of Marcantonio Odescalchi, son of Tommaso.

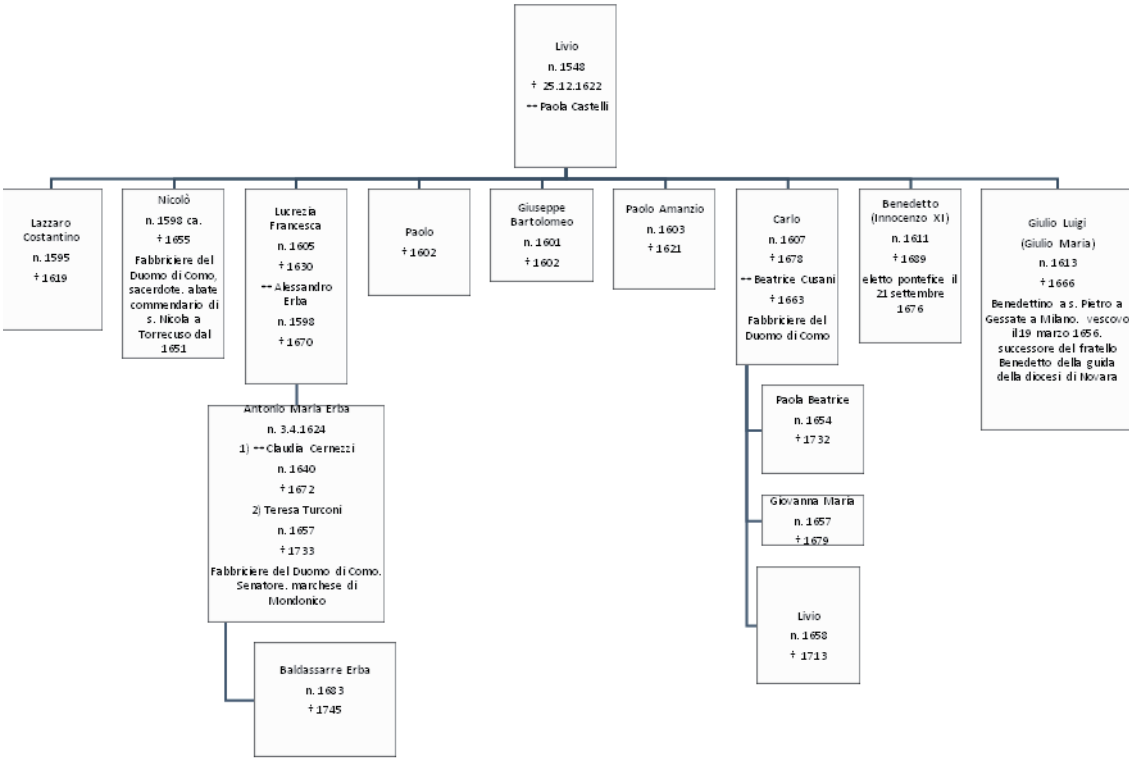
[94] SAN RUPERTO ALBERT, J., Coordinar mercancías y finanzas: la movilidad de una compañia subalpina en el Mediterráneo del Seiscientos. In: *Rime: rivista dell'Istituto di Storia dell'Europa Mediterranea*, Vol. 17/2, 2016, p. 41-74.

Tab. 6. The papal branch of the Odescalchi family



Of the female line of Livio's descendants, it was Lucrezia Francesca who fostered the social rise of the family, thanks to the important union contracted on 4 February 1621 with Alessandro,[95] a Milanese senator and exponent of the ancient and noble Como decurion family of Erba, who had moved to Milan in the 16th century (tab. 7).

Table 7. The links between the Erba and Odescalchi families



On the male side, it was only Carlo - under his marriage to the marquise Beatrice Cusani, by whom he had three sons - who continued the dynastic line: Lazzaro Costantino and Paolo died in 1619 and 1620, respectively; the other three surviving brothers - Nicolň, Giulio Maria and Benedetto - all gradually devoted themselves to religious life. Unlike Benedetto, the future pontiff, there is little and, for the most part, uncertain information on Nicolň: born at the end of the century, he graduated from the University of Pavia *in utroque iure* on 27 May 1621.[96] He became the Duomo's fabbriciere and later devoted himself to religious life, becoming a commendatory abbot of St. Nicholas in Torrecuso from 1651 until his death four years later.

On the other hand, Giulio Maria immediately pursued an ecclesiastical career, joining the Benedictine Order as a member of the Congregatio Casinensis around 1633. Master of novices at the Milanese monastery of St. Peter in Gessate consecrated Novara's bishop on 19 March 1656 after his brother Benedetto renounced the post.[97]

[95] From the two, Antonio Maria Erba was born in 1624. A supernumerary of the magistrate of Milan in 1657, he received the office of senator from his father four years later, then became regent of the Supreme Council of Italy in 1683, which earned him promotion to marquis of Mondonico the following year. He died in 1693. On his career, see MAFFI, D., *La cittadella in armi. Esercito, società e finanza nella Lombardia di Carlo II. 1660-1700*. Milano, 2010.

[96] ASPv, Università, *Doctoratus*, cart. 16, fasc. 75. Confirming his preparation in legal matters is the will of his brother Giulio Maria in which he is described as *iuris consultum* (ASR, *Fondo Odescalchi*, b. VII. G. 4, fasc. 5).

[97] STOPPA, A. L., L'episcopato novarese (1650-1656) del Cardinal Benedetto Odescalchi Papa Innocenzo XI dalle 'Memorie de' Cerimonieri'. In: *Novarien*, 19, 1989, p. 10. Returning to Rome from Novara on 10 March 1654 for the visit ad limita, Benedetto still needs to return. He, therefore, decided to resign, suggesting his brother as his replacement. The passing of a bishopric between two brothers was not a new phenomenon, but indeed rare, at least considering the Italian peninsula. Benedict, however, decided to reserve a pension (*Fondo Odescalchi*, b. III.D.II, fasc. 52).

Therefore, Carlo alone was born in Como in 1607; he took over the commercial and credit business inherited from his father, Livio. For a brief period, he carried out the work together with his brother Benedetto and uncle Papirio. The latter had taken over the Genoese bank, which he now managed alone: it was undoubtedly he who completed the education of his two young nephews, who both went to take up service at the Odescalchi bank in Genoa for a few years. With the death of his father Livio in 1622 and his uncle Papirio ten years later, when his brother Benedetto also decided to pursue the ecclesiastical career that would lead him to the papacy,[98] the complex and structured financial-economic system of the family fell entirely on his shoulders. A role of guiding the family that Charles managed to play brilliantly, proving himself a skillful strategist in both the financial and social spheres, thanks to his marriage to the Marquise Beatrice Cusani Visconti. The consequence of his wise choices was that the patrimonial inheritance remained, at his death, concentrated in the hands of his only son, Livio. With the latter still in his teens, Charles decided to rely on his relatives, seeking trusted men who could assist him in managing his children and in the delicate supervision of the Lombard fiefdom of banks and business companies scattered throughout Italy and Europe. The choice fell on his brother Benedetto,[99] universal curator of the inheritance and young Livio and Giovanna, and on his nephew Antonio Maria Erba, son of his sister Lucrezia, 'all the more so as he resides in Milan, in whose State there are the stable goods, many credits, and effects of my inheritance'.[100]

The universal heir to the Odescalchi patrimony resulted from both his father's will and that drawn up by his uncle, Livio, who was thus able to unite in his person the fortune and business activities of the descendants of his grandfather of the same name.[101] It was on him that the family's hopes were pinned.

In December 1674, Livio left Lombardy for Rome, where he completed his education under the strict control of the Cardinal. The latter, elevated to the papal throne in 1676 with the name of Innocent XI,[102] ceded his private Patrimony to his nephew and assisted him in purchasing the feud of Ceri (1678), which became a duchy for the occasion. However, in return, he decisively interrupted the traditional nepotism of the popes and did not grant him the office of 'cardinal nephew.'[103]

The unprecedented situation determined his subsequent personal, cultural, and political choices, which sought to harmonize the Roman 're-foundation' of the household[104] with his Lombard roots, also favored by the marriage of his sister Giovanna to Carlo Borromeo Arese (1677), which placed him within the highest Lombard aristocracy.[105] The relationship circuit was favored by the geographical bipolarity that the family was assuming and by the fact that it could take advantage of two different and complementary réseau systems: the Church and the gentilizio. Thus if many ecclesiastics were his prudent and trusted informants for all sorts of matters, the Erba family often dealt with the most delicate negotiations on his behalf. It was precisely to the Como branch of the family that he looked to maintain 'illesa et intiera', the fortune built up by his ancestors. Having no direct heirs, he adopted Baldassarre Erba, son of Antonio Maria, excluding from the succession 'all other families and descendants of the Odescalchi house and surname'.[106] To his nephew, he left the obligation of taking the surname Odescalchi and retaining the weapon and a conspicu-

[98] Having arrived with his brother Carlo in Rome around 1636, Benedetto was introduced - with letters of introduction from the governor of Milan - to Cardinal Alfonso de la Cueva, who convinced him to resume his previously abandoned university studies. This was the turning point in the Como man's life.

[99] 'perdonandomi, se con tanta confidenza gli accresco questo novo disturbo alle tante altre cure, che Sua Eminenza tiene'. In September 1673 Pope Clement X authorised the cardinal's guardianship of his grandchildren Giovanna Maria and Livio (not Paola Beatrice, by then a nun). Cf. ASR, *Fondo Odescalchi*, b. I.C.3., p. 28; ASR, *Fondo Odescalchi*, b. I.D.6, ff. 298r-304v.

[100] Antonio Maria entertained the prospect of a transfer to Rome. His cursus honorum, already favored by the interest of his uncle, the cardinal, progressed considerably from then on. Still, he always remained within the sphere of influence of the Spanish crown. 'On lit dans un dépêche de Bourlemont à Pomponne, en date du 29 décembre 1676: 'J'ai su très assurément que les Espagnols font leur possible vers le pape, afin qu'il appelle au gouvernement son neveu qu'il a à Milan, nommé le sénateur Herba, qui est homme d'esprit, entreprenant et entièrement espagnol' in MICHAUD, E., *Louis XIV et Innocent XI d'après les correspondances diplomatiques inédites Du Ministère Des Affaires Étrangères De France*, vol. I. Paris, 1882, p. 357.

[101] DE SYRMIA, E., *At the head of ration, the rise of the papal and princely house of Odescalchi*. New York, 1978, p. 67-92; AGO R., *Carriere e clientele nella Roma Barocca*. p. 132.

[102] Odescalchi's election came quickly. Already in 1669, on the death of Clement IX, the Lombardian cardinal had entered the conclave with a reputation as a papal candidate, and his candidature had fallen due to French reservations about a subject of the King of Spain.

[103] During his uncle's pontificate, Livy had no institutional power; however, his correspondence with much of the Italian and foreign aristocracy shows a vast, discreet, and effective radius of influence. As a result, his cursus honorum began with the death of Innocent XI. It was then, in fact, that the College of Cardinals appointed him General of the Holy Church, and Leopold I, as a reward for his loyalty to Habsburg policy, made him Prince of the Holy Roman Empire. Although his candidature for the elective throne of Poland failed, on 5 April 1698, following the death of Flavio Orsini, he was nevertheless appointed duke of Bracciano. Finally, Charles III honored him with the order of the Golden Fleece, which was conferred on him by his brother-in-law Carlo Borromeo Arese. Cf. MENNITI IPPOLITO, A., Nepotisti e antinepotisti: i 'conservatori di Curia' e i pontefici Odescalchi e Pignatelli. In: AA.VV., *Riforme religione e politica durante il pontificato di Innocenzo XII (1691-1700)*. Lecce, 1994, p. 233-248; ID., *Il tramonto della curia nepotista. Papi, nipoti e burocrazia curiale tra XVI e XVII secolo*. Roma, 2008.

[104] The presence of the Odescalchi family in Rome can be traced back to the early 16th century when some members of the Borgo Vico branch moved to the Urbe to practice the mercantile trade. Some of them were to embark on a prelatic career there: such as Paolo, bishop of Penne and Atri, Francesco, president of the Apostolic Chamber, and later their nephews, Pietro Giorgio - bishop of Alessandria and then Vigevano - and Giovanni Antonio, who left the Curia to succeed his uncle Giovanni Tommaso as a senator in Milan.

[105] RINALDI, M. V., Giovanna e Paola Beatrice Odescalchi: lettere al fratello Livio. In: CAFFIERO, M. – VENZO, M. I. (ed.), *Scritture di donne: la memoria restituita*. Atti del Convegno, Roma, 23-24 marzo 2004. Roma, 2007, p. 207-208.

[106] FIORENTINI, R., Le ultime volontà di un cardinale e la strategia di una famiglia. I testamenti di Benedetto Odescalchi (Innocenzo XI). In: *Dimensioni e problemi della ricerca storica*, Vol. 2, 2018, p. 31-68.

ous patrimony from the last house on pain of exclusion from the lineage. Baldassarre brought the Roman settlement of the family to completion by tying the marriage to members of the Borghese family,[107] two acts of high symbolic value: the purchase of the former Chigi palace (1745) and the completion of the chapel in the basilica of the Holy Apostles.[108]

Thus, the bond with the Erba family of Como was once again strengthened, having already been formalized through the marriage of Lucrezia Francesca, sister of Carlo and Benedetto Odescalchi, with Alessandro Erba, of an ancient and noble Como decurionate family that had moved to Milan in the 16th century, celebrated on 4 February 1621 and fortified with the decision to entrust the administration of the assets located in the Duchy of Milan to the latter's son, Antonio Maria.[109] A citizen and then a Milanese patrician invested with the fief of Mondonico (1676 and 1684), also honored with the citizenship of several Swiss cantons and communities (1689), Antonio Maria was an esteemed politician in Spanish Milan. A graduate in utroque iure from the Studium publicum of the Duchy on 2 June 1644,[110] he had a brilliant career that led him to hold, thanks to the strong support of his uncle the Cardinal, the posts of Quaestor togato of the Extraordinary Magistrate (supernumerary in 1656, effective in 1659), of decurion of the College of Jurists of Como (1657), of Senator of Milan (1661), just a breath away from the presidency, and of Grand Chancellor and regent ad honorem of the Supreme Council of Italy in Madrid (1682 and 1684). His apex position within the city's institutions and his belonging to a family that, since 1676, boasted a member on the papal throne placed him in a position to relate to an exclusive social entourage.

Antonio Erba's marriage policy also proved to be particularly shrewd. If his first marriage to Claudia Cernezzi strengthened the business association with this family of Como entrepreneurs,[111] combining economic success with social affirmation, his marriage to Teresa Turconi, who came from a critical Como decurionate family, was the definitive confirmation for himself and his countless children. These included Lucrezia Maria, Alessandro Maria, Benedetto, Anna, Claudia, Baldassarre and Gerolamo. As for the female line, Lucrezia Maria and Anna were initiated into a monastic career at the monastery of St Cecilia in Como, the latter becoming its first prioress in 1692. On the other hand, Claudia married twice, becoming related to important Milanese noble families, the Litta and Visconti families. In 1698, she married Pompeo Litta, the 4th Marquis of Gambolò. Later, on his death, she was married in a second marriage to Annibale Visconti, Marquis of Borgoratto, a descendant of the noble Visconti family of Saliceto.

As for the male line of descent, if we have mentioned Baldassarre in the previous pages, we should focus on Alessandro Maria, Benedetto, Luigi Francesco, and Gerolamo. The former, who graduated from the Studium publicum of the Duchy in 1709, married the noble Apollonia Trotti, daughter of the Count of San Giulietta Luigi, a collegiate jurisconsult and vice-president of the Milanese Supreme Magistracy in 1679. Eleven children were born in their marriage. These included Maria Anna and Claudia Maria, nuns at the monastery of St Cecilia in Como; Antonio Maria and Gerolamo, who graduated in utroque iure in Pavia in 1733 and 1741, respectively. Above all, Antonio Maria has ordained a priest on 22 September 1736, beginning a long and fruitful ecclesiastical career. Appointed secretary of the Sacred Congregation for Indulgences and Sacred Relics, he became preceptor of the Archispedale di Santo Spirito in Sassia in Rome. He later became the referendary of the Supreme Tribunal of the Apostolic Signatura and obtained the office of honorary protonotary and chamber master of His Holiness. Created cardinal presbyter in the consistory of 24 September 1759, he obtained at the same time the title of titular archbishop of Nicea and, from 28 September of that year, became vicar general of His Holiness for Rome and its district. On 14 October 1759, he also obtained episcopal consecration in the Church of St Thomas in Castel Gandolfo.

Benedict[112] embarked on an ecclesiastical career in parallel with his legal studies at the University of Pavia, where he graduated in utroque iure on 23 February 1700. Immediately after his admission to the priestly order, he was promoted to archbishop of Thessalonica and apostolic nuncio in Poland before

[107] Baldassarre married Flaminia Borghese, of the princes of Sulmona, on 7 January 1717, and, upon her death, he became related to her sister Maria Maddalena.

[108] ASHBY, T., The palazzo Odescalchi in Rome. In: *Papers of the British School at Rome*, Vol. 8, 1916, p. 55-90.

[109] ZANETTI, D.E., *La demografia del patriziato milanese nei secoli XVII, XVIII, XIX*. Pavia-Bologna, 1972, p. A-94; PITTONIO, G. (ed.), *Famiglie nobili di Milano raccolte e manoscritte nella prima meta del 18. Secolo*. Rapallo, 1993, p. 239; CREMONINI, C. (ed.), *Teatro genealogico delle famiglie nobili milanesi: manoscritti 11500 e 11501 della Biblioteca Nacional di Madrid*, vol. I, Mantova, 2003, p. 353.

[110] ASPv, Università, *Doctoratus*, cart. 22 fasc. 94.

[111] The marriage alliance between the families had already occurred in the second half of the 16th century when Claudia Odescalchi, Livio's sister, married Geronimo Cernezzi. Cf. SAN RUPERTO ALBERT, J., Imprenditori e reti nel XVII secolo milanese. Le basi economiche e sociali delle compagnie Cernezzi e Odescalchi. In: *Giornale di storia* 25, 2017, p. 1-16.

[112] Milano, Archivio della Curia arcivescovile, *Stampati A, Editto per la disciplina del clero* (1716); Biblioteca Braidense, *Regole istruttive e indirizzi pastorali per i confratelli coadiutori nella santa missione urbana e comunione generale introdotta a Milano dall'Em. Sig. Card. Arciv. B. E.O. l'anno 1723 e consegnate ai padri della compagnia di Gesù*; SASSI, G. A., *Archiepiscoporum mediolanensium series historico-chronologica*, III. Milano, 1755, ppag 1184-1199; MORONI, G., *Dizionario di erudizione ecclesiastica*, XLVIII, p. 269; *Acta Ecclesiae Medionalensis*, RATTI, S. (ed.), IV, Milano 1891, coll. 1532-1537; VON PASTOR, L., *Geschichte der Päpste*, ad ind.; ARESE, F., Genealogie patrizie milanesi. In: ZANETTI, D. E. (ed.), *La demografia del patriziato*, p. 94-99; VISMARA, P., Buon governo ecclesiastico e salute delle anime nella linea pastorale degli arcivescovi di Milano (XVIII secolo). In: *Quaderni milanesi* 11, 1986, p. 82-111; ACERBI, A. – MARCOCCHI, M. (ed.), *Ricerche sulla Chiesa di Milano nel Settecento*. Milano, 1988, ad ind.; *Dizionario della Chiesa Ambrosiana*, II. Milano, 1988, p. 1125-1127; PASSERINI, E., *Un vescovo del Settecento: B. E. O.*, thesis, University of Milan, a.a. 1990-91, ad ind.; WEBER, C., *Legati e governatori*, p. 651; ID., Il volto religioso di Milano nel primo Settecento. In: BONA CASTELLOTTI, M. – BRESSAN E. – VISMARA P. (ed.), *Politica, vita religiosa, carità. Milano nel primo Settecento*. Milano, 1997, ad ind.

being appointed archbishop of Milan in 1712 and proclaimed Cardinal on 30 January 1713. He was also a fundamental point of reference for his household. A former nephew of Innocent XI, he succeeded in initiating his nephew Antonio Maria, who, as we have seen above, was appointed Cardinal into episcopal life.

Instead, Gerolamo was voted for a brilliant political career. After graduating from Pavia in 1711, he held various posts in the Duchy: he was Quaestor togato of the Extraordinary Magistrate (supernumerary in 1714, effective in 1716), Senator of Milan (1723), intimate councilor of State (1740), lieutenant-governor of the Duchies of Parma and Piacenza, regent of the Supreme Council of Italy (1742).

Luigi Francesco also held top positions within the city's institutions: imperial chamberlain, vicar of providence in 1741, field master of the urban militia 1741/1776, decurion of Milan in 1742, conservator of the Patrimony in 1744, judge of the roads in 1755. The great prestige achieved also explains the marriage choice made by the Lombard scion. The union with Barbara Piatti, daughter of Lodovico, Prince of Monteleone, who brought the latter title to the Erba Odescalchi household, completed the picture. Of their children, it is worth remembering Maria, wife of Count Don Carlo Archinto, of an ancient Milanese noble family, Alessandro and Gerolamo, who graduated respectively in utroque iure in Pavia in 1781 and in theology in 1784, the latter later becoming ordinary canon of the Duomo.

From these genealogical notes emerges the image of a lineage that, although it developed along different family lines, was able to preserve a shared prestige and memory through matrimonial and educational strategies.

The Erba Odescalchi family, therefore, invested over the centuries, as much on the economic side as on that of the networks of social relations, in the 'cultural capital' - to use the well-known categories of anthropological sociology that have come into the use of historiography [113] - accumulated by some members of the lineage. The secular and ecclesiastical career projects, in particular, were designed not only to support the social mobility of the individual - declined in 'relational capital,' in economic benefits, and an increase in prestige - but also to ensure an active contribution to the governing policy of the entire lineage.

6. Conclusions

What has been said in the preceding pages makes it possible to attempt an answer to the questions posed: what was the value of a doctorate and university education for the conferment of certain public offices and the performance of specific professions? What role did the social class in general and the patriciate in particular play?

There are, first of all, a few fixed points.

While a university degree is a requirement, it is not a sufficient qualification for a career in law and for climbing the ranks of the social hierarchy. The link between law and the patriciate led jurists to hold the central and peripheral government's supreme offices, allowing the legal profession to play a socially enabling role in the Lombard society of the ancient regime structured by classes. However, law and the legal profession are only instruments of social success, which must nevertheless come to terms with the arbitrariness of the professional bodies and the individuals that make them up. On the contrary, the rule seems to be that the membership of an individual and his or her family and a particular social class is a condition for access to the high-level legal professions, those on which the city colleges of jurisconsults built their prestige and power in the cities. The individual jurist's membership in a dominant social group places him or her in the highest strata of the legal world. Therefore, the class requirements in the admission rules to the colleges of jurisconsults represent much more than the technical training acquired at university, the indispensable prerequisites of professional activity.

Another firm point is that the patriciate had great internal cohesion, and above all, due to the interweaving of kinship and matrimonial alliances that bound the various houses together. Consequently, the social extraction of the families was similar. They were the middle and upper strata, united by a unity of ambitions and behavioral models, if not of interests and ideals, so much so that they all aspired to the same goal and symbol of social affirmation. In short, the city population was dedicated to liberal professions, as suggested by the significant presence of collegiate jurisconsults. The presence of relatives enrolled in the College of Jurisconsults is always recalled in the testimonies as a highly positive and qualifying element for a family, even in lineages of ancient nobility.

The insistence on this last aspect gives the measure of how the political importance of education and the legal profession was perceived, the exercise of which, in a society institutionally founded on magistracies, could open the door not only to city offices but also to the highest offices of the State and thus to the chambers of power.

Therefore, the standard participation in the supreme secular and ecclesiastical offices represents a further cohesion factor and contributes to the unity of positions that were already largely homogeneous concerning interests and values.

[113] *La mobilità sociale nel Medioevo italiano. 3. Il mondo ecclesiastico (secoli XII-XV)*, CAROCCI, S., DE VINCENTIIS, A. (ed.). Roma, 2017, esp. VARANINI, G. M., Strategie familiari per la carriera ecclesiastica (Italia, sec. XIII-XV), p. 361-398.

Natural Law and the Defense of Freedom of Trade and Navigation in Hugo Grotius' *Mare Liberum* (1609) with Regard to the Seizure of the Portuguese Carrack *Santa Catarina* by the Dutch during the Reign of Philip III of Spain (1603)

*Carlos Sardinha**

Abstract

The conception of a Christianity submitted to Papal Power, also indirectly, on every matter concerning the spiritual well-being of the Faithful and implying a lordship of the whole world including the regulation of the relations among Christian princes and between Christians and infidels, caused the Pope to decide on the recognition of the rights of the Portuguese Crown over the discovered lands and seas. Further, according to several commentators like Baldus (1327-1400) every State could under Civil Law (iure civili) occupy part of the sea, exercising sovereignty over it "as to jurisdiction and protection" (quoad jurisdictionem et protectionem). The Portuguese Crown enjoyed a right of quasi possessio over the whole of the maritime area of the Estado da Índia (in English, State of India). The Portuguese Crown forbade to all and every person of whatsoever estate and condition, including foreigners, to sail to the lands and seas of Guinea and India and all other Portuguese lands, seas and places conquered by Portugal using ships other than the Portuguese under penalty of death and asset forfeiture. Therefore, we can say that from the establishing of the Estado da Índia flowed the imposition of the system of mare clausum upon the Indian Ocean economy. On the other hand, Hugo Grotius' Mare Liberum (1609) consists in a coherent refutation of the arguments put forward by the Portuguese to justify their claim to mare clausum. He stresses that no one can own the sea, no one can forbid another to sail without being guilty of wrong. Because of this, the Portuguese did not hold property over the East, they had no right to exclude the Dutch from sailing to the East Indies and do business with the Indians because this right belongs to all peoples. The Chapter 11 of Grotius' work De Indis (that is, De Jure Praedae) helps us to see the legal controversy over the seizure of the Santa Catarina from the viewpoint of a continuous and evident violation of natural law perpetrated by the Portuguese. This violation of natural law justified Admiral Van Heemskerck's initiative of punishing the inhuman economic and trade practices of the Portuguese with the aim of restoring the much-needed freedom of trade and navigation in the region.

Keywords: *Papal Power; mare clausum; mare liberum; Natural Law; Law of Prize and Booty; freedom of trade and navigation; Iberian Union.*

1. Introduction: The establishing of the *Estado da Índia* and the Portuguese dominion in the Indian Ocean and the Far East

The conception of a Christianity submitted to Papal Power, also indirectly, on every matter concerning the spiritual well-being of the Faithful and implying a lordship of the whole world including the regulation of the relations among Christian princes and between Christians and infidels, caused the Pope to decide on the recognition of the rights of the Portuguese Crown over the discovered lands and seas.[1] In his Bull *Romanus Pontifex*, issued on January 8, 1454,[2] the Pope Nicholas V (1447-1455) praises King Afonso V of Portugal and Henrique, *Infante* of Portugal,[3] for their military deeds and exploring expeditions into Western Africa and beyond. Nicholas V, ***motu proprio***, not at the instance of King Afonso V of Portugal or the *Infante*, or any other person, declares that all lands that have already been acquired and that shall come to be acquired and the right of conquest extended from the capes of Bojador and of Não in Western Africa as far as through all Guinea, and beyond belonged to King Afonso V of Portugal and his successors and to the *Infante*, "*not to any others*". Further, Nicholas V declares that King Afonso V of Portugal and his successors and the *Infante* have the power "*freely and lawfully*" to issue prohibitions, decrees, statutes, including penal statutes, and impose tributes in these acquisitions: "*We also by the tenor of these presents decree and declare that King Alfonso and his successors*

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1 See CAETANO, M. J. das N. A., *Portugal e a internacionalização dos problemas africanos (História duma batalha: da liberdade dos mares às Nações Unidas)*, 4th ed. Lisboa, 1971, p. 12ff.

2 See *Descobrimentos Portugueses,* Documentos para a sua História Publicados e Prefaciados por MARQUES, J. M. da S., Vol. I: 1147-1460, Reprodução Fac-similada, Edição Comemorativa dos Descobrimentos Portugueses. Lisboa, 1988, p. 503-513. An English translation of the Bull *Romanus Pontifex* can be found at DAVENPORT, F. G. (ed.), European Treaties bearing on the History of the United States and its Dependencies to 1648. Washington, D.C., 1917, p. 20-26.

3 That is, Henrique, the Navigator, Prince of Portugal (1394-1460) and uncle of King Afonso V of Portugal.

and the infante aforesaid might and may, now and henceforth, freely and lawfully, in these [acquisitions] and concerning them make any prohibitions, statutes, and decrees whatsoever, even penal ones, and with imposition of any tribute, and dispose and ordain concerning them as concerning their own property and their other dominions. (…)". Ultimately, Nicholas V prohibits under severe penalties (excommunication and interdict), including punishments incurred by those who carry arms and other prohibited things to the Saracens, all the Faithful, ecclesiastical or secular, to carry commodities prohibited by law from being in any way carried to the Saracens like arms, iron, wood for construction, and other goods, to the lands, seas and places whatsoever acquired or possessed in the name of King Afonso V of Portugal to the Saracens, infidels, or pagans. He further prohibits people not licensed by King Afonso V and the *Infante* to navigate the aforementioned seas, to fish in them or to meddle with those lands, seas and places and everything that might hinder King Afonso V and his successors and the *Infante* from peaceful enjoying their acquisitions and possessions. The Bull *Inter caetera*, issued by Calixtus III on March 13, 1455, confirms the Bull *Romanus Pontifex* and grants the "*…ecclesiastical and all ordinary jurisdiction… in ecclesiastical matters only, in the islands, villages, harbors, lands and places, acquired and to be acquired from Capes Bojador and Nam as far as through all Guinea, and past that southern shore all the way to the Indians…*" to the Order of Christ, a Portuguese military order successor to the Knights Templar of which Prince Henrique, the Navigator, was Grand Master.[4] Under the Treaty of Alcáçovas (September 4, 1479) the Catholic Monarchs, that is, Fernando II, King of Aragon and Isabel I, Queen of Castile, pledged themselves not to "*…disturb, trouble, or molest, in fact or in law, in court or out of court, the said King and Prince of Portugal or the future sovereigns of Portugal or their kingdoms, in their possession or quasi possession in all the trade, lands, and barter in Guinea, with its gold-mines, or in any other islands, coasts, or lands, discovered or to be discovered, found or to be found, or in the islands of Madeira…, or in all the islands of the Azores… as well as the islands of Cape Verde, or in all islands hitherto discovered, or in all other islands which shall be found or acquired by conquest [in the region] from the Canaries down toward Guinea*". For the Portuguese part, King Afonso V and Prince João recognized Castile's sovereignty over the Canary Islands: "*For whatever has been found or shall be found, acquired by conquest, or discovered within the said limits, beyond what has already been found, occupied, or discovered, belongs to the said King and Prince of Portugal and to their kingdoms, excepting only the Canary Islands…which belong to the kingdoms of Castile*". Further, they committed themselves not to interfere in the conquest of the Kingdom of Fez, in Morocco: "*… but the said King and Prince of Portugal and their kingdoms and successors shall be freely allowed to prosecute the said conquest and to defend it as they please*".[5] The Pope Sixtus IV issued on June 21, 1481 the Bull *Aeterni Regis* confirming the Bulls *Romanus Pontifex* (January 8, 1454) and *Inter caetera* (March 13, 1455) and approving the Treaty of Alcáçovas.[6] Against this background, Fernando II, King of Aragon, Isabel I, Queen of Castile, and João II, King of Portugal signed the Treaty of Tordesillas on June 7, 1494. This Treaty divided the newly discovered lands between Portugal and Spain along a meridian 370 leagues west of the islands of Cape Verde, off the west coast of Africa, specifying that the lands to the east of the line of demarcation would belong to Portugal and the lands to the west to Castile: "*That, whereas a certain controversy exists between the said lords, their constituents, as to what lands, of all those discovered in the ocean sea up to the present day, the date of this treaty, pertain to each one of the said parties respectively; therefore, for the sake of peace and concord, and for the preservation of the relationship and love of the said King of Portugal for the said King and Queen of Castile, Aragon, etc., it being the pleasure of their Highnesses, they, their said representatives, acting in their name and by virtue of their powers herein described, covenanted and agreed that a boundary or straight line be determined and drawn north and south, from pole to pole, on the said ocean sea, from the Arctic to the Antarctic pole. This boundary or line shall be drawn straight, as aforesaid, at a distance of three hundred and seventy leagues west of the Cape Verde Islands* (…). *And all lands, both islands and mainlands, found and discovered already, or to be found and discovered hereafter, by the said King of Portugal and by his vessels on this side of the said line and bound determined as above, toward the east, in either north or south latitude, on the eastern side of the said bound, provided the said bound is not crossed, shall belong to, and remain in the possession of, and pertain forever to, the said King of Portugal and his successors. And all other lands, both islands and mainlands, found or to be found hereafter, discovered or to be discovered hereafter, which have been discovered or shall be discovered by the said King and Queen of Castile, Aragon, etc., and by their vessels, on the western side of the said bound, determined as above, after having passed the said bound toward the west, in either its north or south latitude, shall belong to, and remain in the possession of, and pertain forever to, the said King and Queen of Castile, Leon, etc., and to their successors*".[7] The Treaty of Tordesillas was confirmed by Pope Julius II in the Bull *Ea quae pro bono pacis* (January 24, 1505) requested by Manuel I, King of Portugal following the discovery of the sea route to India by Vasco da Gama (1498) and the landing of Pedro Álvares Cabral in Brazil (1500).[8]

In the light of the above mentioned Papal Bulls, namely, of the Bull *Romanus Pontifex*, the compilation of Portuguese sources of law, namely Portuguese statutes, called *Ordenações Manuelinas*, defines, for example, the penalties incurred by those who sail or send people to Elmina on the Gold Coast[9] or Guinea without an express licence granted by the King.[10] After examination of the statutes issued by the Kings Afonso V and João II, the King

[4] See *Descobrimentos Portugueses,* Documentos para a sua História Publicados e Prefaciados por MARQUES, J. M. da S., Vol. I: 1147-1460…, p. 535-540; DAVENPORT, F. G., (ed.), European Treaties bearing on the History of the United States and its Dependencies to 1648…, p. 30-32.

[5] See DAVENPORT, F. G., (ed.), European Treaties bearing on the History of the United States and its Dependencies to 1648…, p. 42-48.

[6] See DAVENPORT, F. G., (ed.), European Treaties bearing on the History of the United States and its Dependencies to 1648…, p. 53-55.

[7] See DAVENPORT, F. G., (ed.), European Treaties bearing on the History of the United States and its Dependencies to 1648…, p. 95.

[8] See DAVENPORT, F. G., (ed.), European Treaties bearing on the History of the United States and its Dependencies to 1648…, p. 110-111.

[9] Present day Ghana.

[10] See *Ordenações Manuelinas*, reprodução «fac. simile» da edição feita na Real Imprensa da Universidade de Coimbra, no ano de 1797, Nota de Apresentação de COSTA, M. J. de A. Lisboa, 1984, Livro V, Título CXII (1521 version), p. 324ff.: "*Das penas, que aueram os que sem licença d'ElRey forem, ou mandarem aa Mina, ou qualquer parte de Guinee, ou hindo per sua licença nom guardarem seu Regimento*".

forbids to all and every person of whatsoever estate and condition, including foreigners, to sail to the lands and seas of Guinea and India and all other Portuguese lands, seas and places conquered by Portugal using ships other than the Portuguese under penalty of death and asset forfeiture.[11] Any Portuguese ship's captain or ship pilot with a license or the privilege to sail to the aforementioned lands and seas who finds ships navigating in those seas without a license, should prey upon these ships and conduct them to be judged by the "*Judge of Guinea*" (*Juiz de Guinee*, *Juiz de Guinee e Indias*). Half of all the forfeited assets belonged to those who had captured the ships.[12]

According to several commentators like Baldus (1327-1400) every State could under Civil Law (*iure civili*) occupy part of the sea, exercising sovereignty over it "*as to jurisdiction and protection*" (*quoad jurisdictionem et protectionem*). According to the system instituted by the Portuguese, every Asian trading vessel had to purchase a pass or *cartaz* from the Portuguese authorities, in return for which it qualified for Portuguese protection.[13] This fact, however, did not imply the acquisition of property over the sea, but only a *quasi possessio.*[14] The Portuguese Crown enjoyed a right of *quasi possessio* over the whole of the maritime area of the *Estado da Índia*. Therefore, we can say that from the establishing of the *Estado da Índia* (in English, *State of India*) flowed the imposition of the system of *mare clausum* upon the Indian Ocean economy.

In 1505 Manuel I, King of Portugal, decided to name a Viceroy to represent the Portuguese Crown in the Indian Ocean and the Far East: Francisco de Almeida. Some years later, in 1509, a new governor, Afonso de Albuquerque (1509-1515) managed to start a new era of power and prestige for the Portuguese in the East. The first conquests of territory in the region, above all Goa (1510), which served as capital city of the *Estado da Índia* (in English, *State of India*),[15] and Malacca, in the Southern region of the Malay Peninsula, took place during Afonso de Albuquerque's governorship. From Malacca, the Portuguese started to establish contacts with Java, the Moluccas, Sion and China (1512-1514). It is important to stress that the Indian Ocean trade succeeded in outperforming the trade between India and Europe. Afonso de Albuquerque's policies aimed at firmly establishing Portuguese rule over the above mentioned territories in the Far East.

The Portuguese Empire in Asia was based on a net of cities, fortresses and *feitorias* (in English, *factories*) and several fleets (e.g.: the Ormuz Fleet for patrolling the Persian Gulf) that navigated on a monopoly basis between the most important ports, the so-called *carreiras*. The *carreiras* executed several tasks, namely trade, supplying, military protection, and privateering. The most important *carreira* was the *carreira da Índia*, that is, the *carreira* which on a yearly basis connected Portugal with Goa, the capital city of the *Estado da Índia*. From Goa the ships navigated, for example, towards Ceylon, the Moluccas and Malacca and from Malacca towards Sion, Macao and Japan.

As we have said before, the trade with the East functioned on a monopoly basis. However, violations of the monopoly and smuggling caused the Portuguese Crown to decide around 1570 to put an end, with some exceptions, to the monopoly-system and to declare freedom of trade with India. An exception to free trade was, for example, the monopoly over the pepper trade.[16] Further, the Portuguese Crown allowed others to trade with India, but remained the most important trader or, in several regions (e.g.: Cannanore, Cochin) the only trader. Years later (1576), a new system was introduced, namely the monopoly over the trade with India was granted to private traders. For example, Philip II of Spain[17] granted the monopoly over the pepper trade to several private entrepreneurs, among others, to the Fugger and the Welser (1586).[18] In 1598, given the increasing Dutch and English attacks against the Portuguese trade routes in the East, it was decided to return to the old system of Crown's monopoly[19].

2. The Kingdom of Portugal during the reign of Philip III of Spain as background of the seizure of the Portuguese carrack *Santa Catarina* by the Dutch and Hugo Grotius' *Mare Liberum* (1600-1612)

The reign of Philip III of Spain (1598-1621)[20] began, therefore, with the prospect of a significant clash between the Hispanic Monarchy and its Dutch and English competitors.

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11 See *Ordenações Manuelinas*…, Livro V, Título CXII (1521 version)

12 See *Ordenações Manuelinas*…, Livro V, Título CXII, § 2.

13 See, for example, CAETANO, M. J. das N. A., *Portugal e a internacionalização dos problemas africanos (História duma batalha: da liberdade dos mares às Nações Unidas)*…, p. 19; SILVA, Á. F. da, "Cartaz". In: ALBUQUERQUE, L. de (direcção de), *Dicionário de História dos Descobrimentos Portugueses*, vol. I. s.l., 1994, p. 211-212; GONÇALVES, J., "Cartazes". In: SERRÃO, J. (dir.), *Dicionário de História de Portugal*, vol. I. Porto, s.d., p. 498-499.

14 See MERÊA, P., Os jurisconsultos portugueses e a doutrina do «mare clausum». In: MERÊA, P., *Estudos de História do Direito*, I – *Direito Português*. Lisboa, 2007, p. 132-133; CAETANO, M. J. das N. A., *Portugal e a internacionalização dos problemas africanos (História duma batalha: da liberdade dos mares às Nações Unidas)*…, p. 10-12, namely p. 11; WILSON, E., *The savage republic: De Indis of Hugo Grotius, republicanism, and Dutch hegemony within the early modern world system (c. 1600-1619)*. Leiden / Boston, 2008, p. 177ff., namely p. 179-180.

15 See THOMAZ, L. F., "Estado da Índia". In: ALBUQUERQUE, L. de (direcção de), *Dicionário de História dos Descobrimentos Portugueses*, vol. I…, p. 388-395.

16 See DISNEY, A. R., *Twilight of the Pepper Empire: Portuguese Trade in Southwest India in the Early Seventeenth Century*, Harvard Historical Studies 95. Cambridge, Massachusetts and London, England, 1978.

17 Philip II of Spain, I of Portugal.

18 See BOYAJIAN, J. C., *Portuguese Trade in Asia under the Habsburgs, 1580-1640*. Baltimore and London, 1993, p. 18ff.

19 See MARQUES, A. H. de O., *História de Portugal*, vol. II: *Do Renascimento às Revoluções Liberais*. 13th ed. Lisboa, 1998, p. 219-220; MAGALHÃES, J. R. de, A estrutura das trocas. In: MATTOSO, J. (dir.), *História de Portugal*, vol. III: *No Alvorecer da Modernidade (1480-1620)*. s.l., 1993, p. 348.

20 Philip III of Spain, II of Portugal. See COELHO, A. B., *História de Portugal*, vol. V: *Os Filipes*. Alfragide, 2015, p. 137-182; OLIVAL, F., *D. Filipe II*. 7th ed., reprint. s.l., 2013. Further, FEROS, A., Art. Felipe III. In: *Diccionario Biográfico electrónico (DB~e). Real Academia de la Historia. S.l., s.a*. In: *https://dbe.rah.es/biografias/10074/felipe-iii* (retrieved on 08. 02. 2023); ÁLVAREZ, F. B., *Portugal no tempo dos Filipes. Política, Cultura, Representações (1580-1668)*, Prefácio de António Manuel Hespanha. Lisboa, 2000.

Against this background the political and economic strategy of King Philip III's Chief Minister (*valido*) Francisco de Sandoval y Rojas, 1st Duke of Lerma, aimed at deepening the integration of the Kingdom of Portugal in the Hispanic Monarchy.[21] A sign of this strategy can be seen in the end, for the first time, of the collective system of government, the so-called *Governadores* (in English, *Governors*) and its substitution by a Viceroy, the Viceroy of Portugal. Active during Philip II's sickness as member of his executive,[22] Cristóvão de Moura, 1st Marquis of Castelo Rodrigo, was named Viceroy of Portugal by his son, Philip III (1600). He was the Viceroy of Portugal at the time the seizure of the Portuguese carrack *Santa Catarina* by the Dutch ocurred (February 24, 1603). Cristóvão de Moura's Viceroyaltyship gave expression to the above mentioned strategy of the Duke of Lerma of improving the integration of the Kingdom of Portugal in the Hispanic Monarchy. For example, not long after the beginning of his tenure of office, Cristóvão de Moura ordered a mixed Portuguese and Spanish fleet to meet the *armada* coming from India fully laden with riches setting the tone for a concrete collaboration between the Portuguese and Spanish Crowns in matters concerning what we can call the defense of the *carreira da Índia*[23] against the attacks of foreign powers, namely English Privateers.[24] In April 1603, three years after Cristóvão de Moura's arrival to Lisbon as Viceroy of Portugal and two months after the *Santa Catarina* incident, Philip III accepted Cristóvão de Moura's resignation letter. When we try to evaluate Cristóvão de Moura's tenure of office we can say that the fact that Lerma's policy of integration of Portugal in the Hispanic Monarchy may have failed due to the exhaustion of the Spanish Treasury does not mean that Cristóvão de Moura was against that policy or did not execute it. Quite the reverse as the letters of the Viceroy of Portugal to Philip III asking for financial and militarily support show. Afonso Castelo-Branco, Bishop Count of Coimbra, succeeded Cristóvão de Moura as Viceroy of Portugal (August 20, 1603). His Viceroyaltyship didn't last long (1603-1604). As a clergyman, he was accused of inexperience in Government Affairs.[25] The next Viceroy of Portugal, another clergyman, was Pedro de Castilho, Bishop of Leiria and Inquisitor General of Portugal, a friend of Henrique, the late Cardinal-King (1578-1580) and supporter of the Spanish party during the Portuguese succession crisis of 1580. During Pedro de Castilho's tenure of office, on January 4, 1605 Philip III issued an *Alvará* (in English, *Charter*) ruling as follows: "*I, the King make known to those who see this* Alvará*, that, inasmuch as in the* Ordem (in English, *Order*) *that I had published on February 27, 1603, it was allowed to the natives and residents of the islands of Holland, and Zeeland, and other Provinces of the Low Countries, who are out of due obedience, to be able to trade and contract in my Kingdoms, under the conditions that are declared in the above mentioned* Ordem (in English, *Order*); *and for just considerations I have had it revoked for England and France; and it is in my service to revoke it for the above mentioned Disobedients too, and together to take away from them from every point whatever the trade and commerce they have had, and presently have, with my Kingdoms, both by virtue of the above mentioned* Ordem (in English, *Order*)*, as covertly, and through other people:*

I see fit to revoke, and I revoke, and cancel, by this my Alvará*, and I give for none the aforesaid Ordem* (in English, *Order*), *towards the above-mentioned Disobedients – and I order that, from the day of its publication onwards, lasting as long as they persevere in their disobedience, they cannot trade, nor contract, in any part, nor port, of all my Kingdoms and Lordships of Portugal, themselves, nor through someone else, directly or indirectly, nor to come to them, nor to their ships, nor goods, under penalty of life and loss of property, applied the half to my treasury, the other to the accuser.* (…)".[26] This measure revoked the *Ordem* (in English, *Order*) that allowed the above mentioned Dutch to do business in the Kingdom of Portugal, an *Ordem* issued on February 27, 1603, that is, three days after the *Santa Catarina* incident.[27,28] On the next day, January 5, 1605, Philip III issued another *Alvará* in order to execute more rigorously the above mentioned *Alvará* of January 4, 1604 in its aim of taking away from the Disobedients of the islands of Holland, and Zeeland all "*…the trade and commerce between all my Kingdoms and Lordships…*".[29] As we can see, Philip III began to favour the Dutch trade with his Portuguese Dominions in spite of the struggle between the Dutch Republic and the Spanish Habsburgs, and the attacks of the Dutch against Portuguese shipping and holdings in the East. But now, in 1605, at the time of Pedro de Castilho's Viceroyaltyship, almost two years after the capture of the carrack *Santa Catarina* by the Dutch, the picture changed badly and Philip III decided to expell the Dutch merchants from Portugal and her holdings. The conflict with the Dutch escalated and in April 1606, a Dutch fleet blocked the Tagus estuary near Lisbon preventing an *armada* under Jerónimo Coutinho to depart for India.[30] On the other hand, Pedro de Castilho, holder of both the Viceroyaltyship

[21] See SERRÃO, J. V., *História de Portugal*, vol. IV: *Governo dos Reis Espanhóis (1580-1640)*, 2th ed. s.l., 1990, p. 50ff.
[22] During the last years of King Philip II's reign. See WILLIAMS, P., Philip III and the Restoration of Spanish Government, 1598-1603. In: *The English Historical Review*, vol. 88, No. 349, 1973, p. 754.
[23] See above.
[24] See SERRÃO, J. V., *História de Portugal*, vol. IV: *Governo dos Reis Espanhóis (1580-1640)…*, p. 52. Further, BURGUERA, A. D. y, *Diplomáticos Espanõles. Don Cristobal de Moura, primer Marqués de Castel Rodrigo (1538-1613)*, vol. III. Madrid, 1900, p. 789-790.
[25] Cf. SERRÃO, J. V., *História de Portugal*, vol. IV: *Governo dos Reis Espanhóis (1580-1640)…*, p. 60-62.
[26] See *Alvará* of January 4, 1605 (Philip III), § 1-2. In: *Collecção Chronologica da Legislação Portugueza compilada e annotada por José Justino de Andrade e Silva*, 1603-1612. Lisboa, 1854, p. 103f. Translation from Portuguese into English by me.
[27] See above.
[28] See SERRÃO, J. V., *História de Portugal*, vol. IV: *Governo dos Reis Espanhóis (1580-1640)…*, p. 64.
[29] See *Alvará* of January 5, 1605 (Philip III). In: *Collecção Chronologica da Legislação Portugueza compilada e annotada por José Justino de Andrade e Silva*, 1603-1612…, p. 104.
[30] See SERRÃO, J. V., *História de Portugal*, vol. IV: *Governo dos Reis Espanhóis (1580-1640)…*, p. 66.

and the General Inquisitorship of the Kingdom of Portugal, was the person whom Philip II and Philip III entrusted a *devassa geral*, that is, a general enquiry on all the members of the tribunals, councils and the administration of mainland Portugal and her overseas holdings, including the *Casa da Índia* (in English, *House of India*), the body responsible for organizing, regulating and managing the Portuguese Crown's monopoly of the spice trade and its factories, colonies and overseas facilities across Africa and Asia, namely the so-called *carreira da Índia.*[31,32] By letter, dated January 8, 1608, Philip III dismissed Pedro de Castilho from the Viceroyaltyship of Portugal. Cristóvão de Moura succeeded him as Viceroy of Portugal entering therefore a second term as holder of this office. Above all the prohibition of commerce with the Dutch and its negative consequences on Portuguese navigation caused Cristóvão de Moura to actively support the twelve-years truce finally celebrated with the Dutch Republic. Since the conclusion of peace between Philip III and James I, King of England and Ireland, in August 1604 that the Dutch, deprived of financial support and suffering under the opening of the English Channel to Spanish shipping, were inclined to stop the war with Spain. The cost of war became too onerous for the Dutch Republic. On the other hand, the Spaniards too were underfinanced. The horrific costs of their military commitments in the Netherlands caused the Hispanic Monarchy to favour talks with the Dutch in order to end the war. In early 1607, Spain agreed to negotiate accepting the independence of the Dutch Republic as the basis of a settlement between the parties in conflict. On the other hand, the Spanish King insisted on maintaining the exclusivity of the Spanish and Portuguese trade with the East and West Indies but in 1608 the Dutch rejected the bargain. Having reached this point, the French and English mediators intervened to propose a long truce instead which allowed hostilities to continue outside Europe. This formula was accepted.[33] Philip III's diplomacy succeeded in achieving a most needed truce between the Dutch Republic and Spain, a truce for twelve years, the so-called Truce of 1609 or Twelve Years' Truce (1609-1621),[34] the same year (1609) when the Dutch legal scholar Hugo Grotius published his famous defense of "the Right which the Dutch Have to Carry on Indian Trade", the full title of the *Mare Liberum.*[35] However, it is not correct to say that the Twelve Years' Truce represented a capitulation of Philip III towards the Seven United Provinces. In fact, Spain was not yet defeated. A truce is not to be confused with a peace treaty. However, it is true that with Great Pensionary Oldenbarnevelt the Dutch Republic succeeded in becoming a Great Power capable of negotiating a truce with Spain, a long truce lasting twelve years.[36] The two parties that signed the truce were, on one side, the Archdukes Albert VII, former Viceroy of Portugal (1583-1593), and his wife Isabella Clara Eugenia, joint sovereigns of the Habsburg Netherlands, both acting on behalf of Philip III, and, on the other side, the States General of the United Provinces. The Archdukes Albert and Isabella were expected to negotiate with the Seven Provinces as if they were a "free state" and not in the capacity of a "free state": that means that according to the Spanish King the United Provinces were not a free state. Negotiated was only the above mentioned 12-year truce; the North-Dutch sovereignty was not recognized.[37] Significantly, the prohibition of navigating to the Indies against the will of the citizens of the Seven Provinces was not mentioned in the text of the Twelve Years' Truce. An important consequence of the Truce of 1609 was that it was not possible to issue letters of marque and reprisal as during the period of war.[38]

3. Natural Law, the Law of Prize and Booty and the seizure of the Portuguese carrack *Santa Catarina* (1603)

It was during the Age of Discovery, in the 15th and 16th centuries, that seafaring powers undertook the exploration and colonization of the world providing a decisive impulse to the development and formation of a modern International Law. We can say that before the 17th century, the International Law was not developed enough. Actually, it was the freedom of navigation the first subject regulated by the modern International Law towards the beginning of the 17th century. In his work *Mare Liberum* published in 1609, Hugo Grotius states citing Francisco de Vitoria and Thomas Aquinas that the right to property does not depend on faith to exist. In other words, each person is entitled to own his property, not only the Christians but also the non-Christians, namely the Indians who were, as Grotius says, "*… in part idolaters, in part Mohammedans…*". The "*dominion*", that is, the right to property, proceeds from "*…natural or human law…*" (*ius naturale aut humanum*) and therefore "*faith*" does not

[31] See above.

[32] See VEIGA, C. M. V., Pedro de Castilho: Esboço de uma Carreira no Governo Espanhol de Portugal. In: *Primeiras Jornadas de História Moderna*, Centro de História da Universidade de Lisboa (Linha de História Moderna). Lisboa, 1986, p. 361-362, with note 22.

[33] Cf. PARKER, G., *The Dutch Revolt*. Ithaka, New York, 1977, p. 237ff.

[34] See LESAFFER, R. (ed.), *The Twelve Years Truce (1609): Peace, Truce, War and Law in the Low Countries at the Turn of the 17th Century*, Legal History Library, vol. 13, Studies in the History of International Law, vol. 6. Leiden / Boston, 2014; GROENVELD, S., *Het Twaalfjarig Bestand, 1609-1621, De jongelingsjaren van de Republiek der Verenigde Nederlanden*. s.l., 2009; EYSINGA, W. J. M. van, De wording van het Twaalfjarig Bestand van 9 april 1609. In: *Verhandelingen der Koninklijke Nederlandse Akademie van Wetenschappen*, Afd. Letterkunde, Nieuwe Reeks, Deel LXVI, No. 3. Amsterdam, 1959, p. 1-160.

[35] See GROTIUS, H., *Mare Liberum 1609-2009*, Original Latin Text (facsimile of the first edition, 1609) and Modern English Translation, Edited and Annotated by FEENSTRA, R. with a General Introduction by VERVLIET, J. Leiden / Boston, 2009, p. IX.

[36] See EYSINGA, W. J. M. van, De wording van het Twaalfjaarig Bestand van 9 april 1609. In: *Verhandelingen der Koninklijke Nederlandse Akademie van Wetenschappen*, Afd. Letterkunde, Nieuwe Reeks, Deel LXVI, No. 3…, p. 153ff.

[37] Differently, Philip IV on occasion of the "Peace of Münster" (1648).

[38] See GROENVELD, S., Het Twaalfjarig Bestand 1609-1621: De jongelingsjaren van de Republiek der Verenigde Nederlanden…, p. 59ff.

take it away.[39] Further, Grotius stresses that no one can own the sea, no one can forbid another to sail without being guilty of wrong. Because of this, the Portuguese did not hold property over the East, they had no right to exclude the Dutch from sailing to the East Indies and do business with the Indians because this right belongs to all peoples.[40] This is the main thesis of the Hugo Grotius' *Mare Liberum*. The *Mare Liberum* consists in a coherent refutation of the arguments put forward by the Portuguese to justify their claim to *mare clausum*. It is, ultimately, a defense of freedom of trade and navigation against unlawful monopoly.

Before the Iberian Union (1580-1640), that is, the personal Union of the Spanish and Portuguese Crowns under the Spanish King Philip II and his successors, and the beginning of the Dutch Revolt against Spain, the Dutch did not constitute competition on the lucrative spice trade in Asia which remained exclusively Portuguese.[41] In 1601 a Portuguese *armada* under the command of André Furtado de Mendonça[42] arrived in the East Indies commissioned by the Viceroy at Goa to force the Dutch out of the East India Trade. The extreme violence of the intimidation tactics used by the Portuguese got expression, for example, in the execution of Dutch sailors at the Portuguese *entrepot* Macao in Southern China in November 1601, in the besieging of Bantam in December 1601, and in the attacks on Ambon and the Moluccas, including scorched earth tactics against the Banda Islands. Paired with these naval and military operations, the Portuguese took diplomatic actions aimed at intimidating native rulers not to grant any privilege to Dutch merchants. It was against this background of systematic brutality against the Dutch and the native rulers willing to trade or cooperate with them that the idea of repeated transgressions of the natural law perpetrated by the Portuguese took form in Grotius' mind as a much needed legal argument to justify the decision of the Dutch Admiral Van Heemskerck to attack the Portuguese shipping in Southeast Asia.

When we try to understand the background against which Hugo Grotius wrote the *Mare Liberum* we must take under consideration the seizure of the Portuguese carrack *Santa Catarina* off Singapore in 1603 as part of a privateering campaign against the Spaniards and the Portuguese in the East Indies.[43] At the time of the seizure of the *Santa Catarina*, Philip III, King of Spain, was involved in a war against the Dutch Republic. During this conflict the Dutch East Indies trade was violently attacked and put under threat of extinction by both the Spaniards and the Portuguese. The Edict of the Estates General of the United Provinces of April 2, 1599 declared "*… for good and lawfull prize, all persons and goods, under the dominion of the Spanish King…*", making therefore possible the commissioning of privateers to attack the ships from Spain and Portugal.[44] The difficulties caused by the Portuguese *Estado da Índia* to the expansion of the activities of the *VOC*, (that is, the *Vereenigde Oost Indische Compagnie*, in English, *Dutch East India Company*) in this region were caused by a combined use of military power, namely naval power, and diplomacy aiming at generating and expanding a consistent net of marketplaces and commercial contacts to support the Portuguese claim to exclusivity in the East Indies trade. From Goa, Macao and Malacca the Portuguese could control and intercept any attempt of the Dutch to establish sustainable trade routes with the most profitable spice production regions. Unfortunately for the Portuguese when the Dutch Admiral Van Heemskerck approached the Malay Peninsula in 1602 local rulers like Raja Hijau, the Queen of Patani, or the Sultan of Johor were unhappy enough with the scare tactics of Portuguese merchants trying to persuade them not to grant any privilege to the

[39] GROTIUS, H., *Mare Liberum 1609-2009…*, Chapter II: "*But at the time when the Portuguese first came to the East Indies, the natives of that region - though they were in part idolaters, in part Mohammedans, and sunk in grievous sin – nevertheless enjoyed public and private ownership of their own property and possessions, an attribute which could not be taken from them without just cause. This is the conclusion expounded by the Spaniard Victoria with irrefutable logic and in agreement with other authorities of the greatest renown.*
(…) *For the factor of religious faith, as Thomas [Aquinas] rightly observes, does not cancel the natural or human law from which ownership has been derived. On the contrary, it is heretical to hold that infidels are not the owners of the property that belongs to them and the act of snatching from them, on the sole ground of their lack of faith, those goods which have been taken into their possession, is an act of thievery and rapine no less than it would be if perpetrated against Christians.*". See *Mare Liberum 1609-2009…*, p. 35-36.

[40] See *Mare Liberum 1609-2009…*, p. XIVff. On this issue, see FITZMAURICE, A., *Property, Trade and Empire*. In: LESAFFER, R. / NIJMAN, J. E. (Ed.), *The Cambridge Companion to Hugo Grotius*. Cambridge, 2021, p. 283-287.

[41] See GROESEN, M. van, *Global Trade*. In: HELMERS, H. J. / JANSSEN, G. H. (Ed.), *The Cambridge Companion to the Dutch Golden Age*. Cambridge, 2018, p. 167ff.

[42] See BOXER, C. R. / VASCONCELOS, F. de, *André Furtado de Mendonça (1558-1610)*, Reedição fac-similada do livro publicado com o mesmo título pela Agência Geral do Ultramar, Divisão de Publicações e Biblioteca, 1955, Fundação Oriente, Centro de Estudos Marítimos de Macau. S.l., 1989.

[43] See CAETANO, M. J. das N. A., *Portugal e a internacionalização dos problemas africanos (História duma batalha: da liberdade dos mares às Nações Unidas)…*, p. 26-45; LESAFFER, R., Grotius on Reprisal. In: *Grotiana*, vol. 41, 2020, p. 335ff.; BORSCHBERG, P., The *Santa Catarina* Incident of 1603. Dutch Freebooting, the Portuguese *Estado da Índia* and Intra-Asian Trade at the Dawn of the 17th Century. In: *Revista de Cultura / Review of Culture*, vol. 11, 2004, Instituto Cultural do Governo da R.A.E. de Macau / Cultural Institute of the Macao S.A.R. Government, p. 12-25.

[44] See Appendix I – Documents Listed by Grotius at the End of the Manuscript, I - A Proclamation, of the Lordes the generall States of the united Provinces, whereby the Spaniards and all their goods are declared to be lawfull prize. As also containing a strict defence or restraint of sending any goods, wares, or Merchandizes to the Spaniards or their adherents, enemies to the Netherlands. In: GROTIUS, H., *Commentary on the Law of Prize and Booty*, Edited and with an Introduction by ITTERSUM, M. J. van, Natural Law and Enlightenment Classics. Indianapolis, 2006, p. 503-510: "*So it is, that we uppon ripe and profound deliberation, and by the advise of the illustrious Prince and Lord Maurice, borne Prince of* Orange, *Counte of* Nassau, *Marquess of* der Vere, Flushing, *etc., Governor and Captaine Generall of* Gelderland, Holland, Zealand, Utrecht, Overysel, *etc. as Admirall generall, have declared, and declare by these presents, for good and lawfull prize, all persons and goods, under the dominion of the Spanish King…*". The Proclamation is signed by Johan van Oldenbarnevelt (1547-1619), Advocate-Fiscal of Holland. He was one of the most important leaders of the Dutch Republic in its struggle for independence from the Spanish Habsburgs. This document in the Appendix I is one of the eight documents affixed to the Manuscript of the *De Jure Praedae* by Hugo Grotius himself. See GROTIUS, H., *Commentary on the Law of Prize and Booty*, Edited and with an Introduction by ITTERSUM, M. J. van…, p. xxvi.

Dutch including diplomatic efforts aiming at the destruction of Dutch commercial facilities like the "Dutch House" in Patani.[45] The Portuguese were already dependent upon the protection of the Queen of Patani to avoid being molested by the Dutch. Further, the Johor Sultanate, which dominated the southern half of the Malay Peninsula, searched for the friendship of Van Heemskerck and urged him to attack Portuguese carracks sailing from Macao. Malacca itself was in danger. Reacting to the Portuguese control of the trade in textiles from the Coromandel Coast in India, the Queen of Patani expressed her willingness to help the Dutch to besiege the city of Malacca if they succeeded in supplying the Kingdom of Patani with these textiles. We can easily conclude that the Queen of Patani was unhappy with the Portuguese trade practices, namely their aggressive attitude towards the native rulers. Because of this, the native rulers increasingly began to show their preference for what we can call a Grotian notion of freedom of trade and navigation.[46] From a Legal Historian viewpoint, we can stress that for the Dutch the support of the Sultan of Johor to attacks upon the Portuguese carracks sailing from Macao to Malacca did not legitimate such attacks. Nor a possible much justifiable natural law argument by Van Heemskerck was enough to legitimate the seizure of the Portuguese carrack *Santa Catarina*. Grotius correctly points out that this case has to do with the Law of Prize and Booty, that is, with an important theme of positive law, namely the international law of the sea. Because of this, the *Santa Catarina*-case caused him to write an extensive legal counsel on the issue on behalf of the Dutch East India Company. Written in 1604-1605, his work *De Indis* (best known as *De Jure Praedae*) is to be read against the background of the verdict of the Amsterdam Admiralty Court which declared the *Santa Catarina* good prize on September 9, 1604.[47] The juridical controversy had without doubt to do with the fact that Van Heemskerck had no letter of marque at the time of the seizure of the *Santa Catarina*.[48] The United Amsterdam Company had sent a fleet to the East Indies under the command of Admiral Van Heemskerk "*… in order to trade with the inhabitants… and with the permission of the local authorities.*", not to prey on the Portuguese shipping. Admiral Van Heemskerk received a commission from His Princely Excellency Maurice of Nassau which obliged him "*to defend himself with all possible means against anyone who tried to attack or harm him on his voyage, while also authorizing him to obtain reparations for damages sustained*".[49] Therefore, he lacked authority under the instructions of the directors of the United Amsterdam Company and the commission of Prince Maurice, Lord High Admiral of Holland, to engage in offensive warfare. Further, according to the Law of Prize and Booty he could not engage in privateering against any vessel at all. The capture of the *Santa Catarina* was therefore unlawful unless it could be justified based on different legal reasonings. According to the above mentioned verdict of the Amsterdam Admiralty Court which declared the *Santa Catarina* good prize on September 9, 1604, Van Heemskerk made use of means permitted by natural law and *jus gentium* and enjoined the commission received from His Princely Excellency Maurice of Nassau, Lord High Admiral of Holland and Zeeland, when he decided to resist the Portuguese, that is, "*… not just to resist an enemy who had subjected the Dutch to so much harm, abuse, trouble, and tyranny, but to inflict the greatest possible damage in order to prevent any repetition thereof in the future*".[50] Significantly, a revised version of Chapter 12 of the *De Indis* (that is, *De Jure Praedae*) was published some years later, in 1609, under the suggestive title *Mare Liberum* (*The Free Sea*), Hugo Grotius' brilliant account of the Portuguese legal abuses[51]. Further, based upon notarized attestations of Dutch merchants and sailors on "*the cruel, treasonous and hostile procedures of the Portuguese in the East Indies*",[52] including scorched

[45] On the history of the Kingdom of Patani, which rose to its greatest power in the sixteenth and seventeenth centuries after the fall of the Sultanate of Malacca to the Portuguese in 1511, see TEEUW, A. / WYATT, D. K., *Hikayat Patani: The Story of Patani*, Bibliotheca Indonesica, 5. The Hague, 1970; SYUKRI, I., *History of the Malay Kingdom of Patani, Sejarah Kerajaan Melayu Patani*, Translated by BAILEY, C. and MIKSIC, J. N., Introduction by WYATT, D. K. Chiang Mai, 2005, p. 23-25, 29, 31-38. On page 31, we can read:
"*While Patani was governed by Raja Hijau its name became well-known and famous throughout the world, East and West. Its harbor was always full of the trading ships of several peoples. The Dutch also came to conduct their commerce in Patani and became the second European people after the Portuguese.*
The Dutch arrived in East Asia after they learned of the success of Portuguese commerce in Asia, which produced exceedingly good profits. Wishing to share in the profits of the Portuguese, the Dutch were inspired to form a trading company to carry out trade in Asia. The Dutch began to send trading ships to Asia, and the country of India became their first goal. From India the Dutch first came to Malaya. The arrival of the Dutch caused a feeling of dissatisfaction among the Portuguese, who felt that it would disturb the basis of their trade with the Asian peoples. With time, this feeling became increasingly strong, finally resulting in a dispute between the two peoples, each of whom endeavored to gain power in every aspect of trade. The Portuguese began to take steps to block all progress in trade by the Dutch."

[46] See ITTERSUM, M. J. van, *Profit and principle: Hugo Grotius, natural rights theories and the rise of Dutch power in the East Indies (1595-1615)*. Leiden / Boston, 2006, p. 1 ff.; *idem*, Hugo Grotius in Context: Van Heemskerck's Capture of the *Santa Catarina* and its Justification in *De Jure Praedae* (1604-1606). In: *Asian Journal of Social Science*, vol. 31, No. 3, 2003, p. 511-548.

[47] For the text of the verdict see Appendix I – Documents Listed by Grotius at the End of the Manuscript, II – Verdict of the Amsterdam Admiralty Board, September 9, 1604. In: GROTIUS, H., *Commentary on the Law of Prize and Booty*, Edited and with an Introduction by ITTERSUM, M. J. van…, p. 510-514. This document in the Appendix I is one of the eight documents affixed to the Manuscript of the *De Jure Praedae* by Hugo Grotius himself.

[48] See GROTIUS, H., *Commentary on the Law of Prize and Booty*, Edited and with an Introduction by ITTERSUM, M. J. van…, p. xiii. See also BORSCHBERG, P., *Grotius and the East Indies*. In: *The Cambridge Companion to Hugo Grotius…*, p. 66.

[49] See Appendix I – Documents Listed by Grotius at the End of the Manuscript, II – Verdict of the Amsterdam Admiralty Board, September 9, 1604. In: GROTIUS, H., *Commentary on the Law of Prize and Booty*, Edited and with an Introduction by ITTERSUM, M. J. van…, p. 511.

[50] See Appendix I – Documents Listed by Grotius at the End of the Manuscript, II – Verdict of the Amsterdam Admiralty Board, September 9, 1604. In: GROTIUS, H., *Commentary on the Law of Prize and Booty*, Edited and with an Introduction by ITTERSUM, M. J. van…, p. 513.

[51] See ITTERSUM, M. J. van, Preparing *Mare liberum* for the Press: Hugo Grotius' Rewriting of Chapter 12 of *De iure praedae* in November-December 1608. In: *Grotiana*, vol. 26-28, 2007, p. 246-280.

[52] See ITTERSUM, M. J. van, Hugo Grotius in Context: Van Heemskerck's Capture of the *Santa Catarina* and its Justification in *De Jure Praedae* (1604-1606)…, p. 512.

earth tactics, put together by the Amsterdam *VOC* directors, the Chapter 11 of Grotius' work *De Indis* (that is, *De Jure Praedae*) helps us to see the legal controversy over the seizure of the *Santa Catarina* from the viewpoint of a continuous and evident violation of natural law perpetrated by the Portuguese.[53] This violation of natural law justified Van Heemskerck's initiative of punishing the inhuman economic and trade practices of the Portuguese with the aim of restoring the much-needed freedom of trade and navigation in the region.[54]

4. Conclusion

In this article I give an analysis of the natural law and the defense of freedom of trade and navigation in Hugo Grotius' *Mare Liberum* (1609) with regard to the seizure of the Portuguese carrack *Santa Catarina* by the Dutch during the reign of Philip III of Spain (1603). In order to understand the background against which Hugo Grotius wrote the *Mare Liberum*, we must take under consideration the legal controversy over the seizure of the Portuguese carrack *Santa Catarina* off Singapore in 1603. The reign of Philip III of Spain (1598-1621) began with the prospect of a significant clash between the Hispanic Monarchy and its Dutch and English competitors. The Edict of the Estates General of the United Provinces of April 2, 1599 declared "*… for good and lawfull prize, all persons and goods, under the dominion of the Spanish King…*", making therefore possible the commissioning of privateers to attack the ships from Spain and Portugal. The juridical controversy had without doubt to do with the fact that the Dutch Admiral Van Heemskerck had no letter of marque at the time of the seizure of the *Santa Catarina*. According to the Law of Prize and Booty he could not engage in privateering against any vessel at all. The capture of the *Santa Catarina* was therefore unlawful unless it could be justified based on different legal reasonings. According to the verdict of the Amsterdam Admiralty Court which declared the *Santa Catarina* good prize on September 9, 1604, Van Heemskerk made use of means permitted by natural law and *jus gentium* and enjoined the commission received from His Princely Excellency Maurice of Nassau, Lord High Admiral of Holland and Zeeland, when he decided to resist the Portuguese. Based upon notarized attestations of Dutch merchants and sailors on "*the cruel, treasonous and hostile procedures of the Portuguese in the East Indies*", including scorched earth tactics, put together by the Amsterdam *VOC* directors, the Chapter 11 of Grotius' work *De Indis* (that is, *De Jure Praedae*) helps us to see the legal controversy over the seizure of the *Santa Catarina* from the viewpoint of a continuous and evident violation of natural law perpetrated by the Portuguese. This violation of natural law justified Van Heemskerck's initiative of punishing the inhuman economic and trade practices of the Portuguese with the aim of restoring the much-needed freedom of trade and navigation in the region.

[53] In contrast to the Portuguese, the Dutch trade practices respected both the Portuguese and the peoples of the East Indies. Grotius makes reference in the main text of *Mare Liberum* to a letter written by Dom João Ribeiro Gaio, the Bishop of Melaka, to Philip III of Spain dated April 30, 1600, confirming that the Dutch "*… had not inflicted any evil on the locals, let alone on the Portuguese, nor had they caused problems or difficulties with any other nation.* (…) *They were well respected and desired [clients] among the peoples of these lands, for they made honest purchases, without resorting to evil, disturbances, or force. They also brought many goods, merchandise and wares from their lands and they sold what was useful to the locals*". See Appendix 6, Portion of a letter by Dom João Ribeiro Gaio, the Bishop of Melaka, to Philip III/II, King of Spain and Portugal, dated 30 April 1600. In: BORSCHBERG P., *Hugo Grotius, the Portuguese and Free Trade in the East Indies*. Singapore, 2011, p. 184-194. The Bishop of Melaka, however, warns Philip III against the fact that the Dutch "*… forged great friendship and an alliance with the king and regents of Sunda…*", rousing "*… great hope to continue these dealings and friendship annually*". BORSCHBERG, P., *Hugo Grotius, the Portuguese and Free Trade in the East Indies…*, p. 190-191. In writing his *Mare Liberum* Grotius made use of several letters in matters relating to the Portuguese *Estado da Índia*. The best example is a packet of letters titled "Letters from the King of Spain" received by Hugo Grotius from Admiral Adriaen ten Haeff in 1607. The packet of letters contained letters written by the King of Spain and was originally seized by Admiral Paul van Caerden from a vessel captured off the coast of India and later passed to Admiral Cornelis Matelieff de Jonge. See BORSCHBERG, P., *Hugo Grotius, the Portuguese and Free Trade in the East Indies…*, p. 170ff.

[54] Chapter 12 and the other Chapters of the *De Indis* (that is, *De Jure Praedae*) were published in 1868 under the title *Hugonis Grotii de jure praedae commentarius, ex Auctoris Codice descripsit et vulgavit H. G. Hamaker*, Litt. Dr. Hagae Comitum, 1868. See Hugo Grotius, *Mare Liberum 1609-2009…*, p. XXXIX.

Historical and Philosophical Overview of the Law of Ancient Cyprus up to Roman Times

*Charalampos Stamelos**

Abstract

In the present study we examine historical and philosophical aspects of the law of ancient Cyprus from the foundation of the Kingdoms to their abolition and the transformation of Cyprus into a Roman province.

From this study, useful, timeless and timely conclusions emerge for the broader perception and understanding of the concepts of ethics, justice, good law-making and law in general.

The analysis includes public law, private law and criminal law of Ancient Cypriot Kingdoms. Moreover, there is an analysis of philosophical aspects of Ancient Cyprus which was similar to Ancient Greek philosophy influenced the respective laws.

Keywords: *Ancient Cypriot Kingdoms laws; Alassia; Paphos; Salamis; Powers of the King; Public Law; Private Law; Criminal Law; Tablet of Idalion; Zenon the Kitieus; Stoicism; Persians; Democracy; Alexander the Great; Roman law; Cicero; Bacchus Tryphonus; Marcus Aurelius.*

1. Introduction

In the present study we examine historical and philosophical aspects of the law of ancient Cyprus from the foundation of the Kingdoms to their abolition and the transformation of Cyprus into a Roman province. From this study, useful, timeless and timely conclusions emerge for the broader perception and understanding of the concepts of ethics, justice, good law-making and law in general. Before the 12th° century ancient Cyprus was the single Kingdom of Alassia.[1] After the Trojan War the Greeks divided Cyprus into kingdoms:[2]

- Salamis (*1,202 BC, founded by Tefkron Telamonius*)[3]
- Paphos (a *kingdom with an important history and which later became the centre of the whole of Cyprus*)
- Kourion (*Kingdom that later had elements of republicanism*)
- Kition (*dominated by the Phoenicians, the people of present-day Lebanon, the modern city of Cyprus located on the site of Kition is Larnaca*)
- Tamassos (*later part of Idalion*)
- Idalion (*later part of Kition, Ancient Idalion is located between Nicosia and Larnaca*)
- Amathous (*Kingdom founded by the legendary King Kinyras*)
- Marion (*Kingdom that later had elements of republicanism*)
- Solon or Soloi (*named after the Athenian legislator Solon, who wrote the laws of this kingdom*)
- Ledra (*1,050 BC to 330 AD, later Lefkousia ("city of the White Gods" during Byzantine times, in present-day Nicosia*)
- Lapithos (*founded by the Lacedaemonian Praxandros*)
- Chytroi (*later part of Salamina*).

Each Kingdom was based on the Mycenaean structure of government and Greek private law, and of course had its own capital, its own urban centre, its own large city with an identical name: e.g. Salamis was the name of the Kingdom, Salamis was also the name of the main city of the Kingdom, where the King, the royal family, the persons of the regime, the citizens, the majority of the slaves lived. In the province of each Kingdom lived the peasants and slaves who cultivated agricultural land. Alexander the Great respected the structure of the Kingdoms in Cyprus. Later, in Hellenistic times, Cyprus was part of the Kingdom of the Ptolemies. Ptolemy I in 312 BC abolished the Kingdoms.[4] Subsequently, after the conquest by the Romans, Cyprus became a Roman province, while from 22 BC it was transformed into a senatorial province, i.e. without the presence of occupying Roman troops.[5]

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1 STAMELOS, C., *History of Greek and Cypriot Law.* Athens, 2018, p. 6-7.

2 STAMELOS, C., p. 1-6.

3 HERODOTUS, *Histories,* par.7.90; STRABO, *Geographics.* 14. 6. 3; HADJIIOANNOU, K., *Ancient Cyprus in the Greek Sources,* Volumes A'-H'. Nicosia, 1990, E, p. 143. ISOCRATES, *Evagoras,* par.18.

4 STAMELOS, C., p. 17.

5 STAMELOS, C., p. 127-128.

2. Historical overview of the law of ancient Cyprus up to Roman times: from the Ancient Cypriot Kingdoms to the united Cyprus (Roman senatorial province)

2.1 Elements of public, criminal and private law of ancient Cyprus

The King of every Ancient Cypriot Kingdom was the absolute ruler. Just as the King of a Mycenaean kingdom concentrated the legislative,[6] the executive and the judicial (civil and criminal)[7] powers, in the same way the King of each Ancient Cypriot Kingdom concentrated all three of these powers.

Particularly in the Kingdom of Paphos, the King of Paphos was also the High Priest of the goddess Aphrodite. In other words, he was also the religious authority in that kingdom. Monopoly economic power was exercised by the King through the royal scribes or agoranomoi who had the duty to record on behalf of the King all the economic activities of the market and the city in order to ensure the imposition of taxes.[8]

Each King had a harem (a habit which was probably acquired after the Persian conquest), while the King was served by the Gergini (policemen, informers) and the Promalagges (investigators for the investigation of crimes).[9]

The King was the largest landowner in the kingdom. All the forests and mines (where they existed) belonged to him. So did most of the arable land, which he either cultivated himself using paid cultivators and mostly slaves, or he gave the right of exploitation to citizens of his choice, mostly of aristocratic origin, free of charge or for rent or other consideration. He also gave the ownership of land from his estate to his subjects or foreigners in exchange for their services to the throne.[10]

The kings of the Ancient Cypriot Kingdoms, taking advantage of the mineral wealth and the skill of the Cypriot metallurgists, financed the processing of metals for the manufacture of weapons, tools, utensils and jewellery for consumption and export. They themselves received the proceeds from these. Among other things, the kingdoms were also active in the construction of ships, both merchant and warships.

As a result of all the agricultural and commercial activities, the kings accumulated enormous wealth. This ensured the independence of the kingdoms and their power.[11] It could be said that this ownership of land and goods was 'public law' ownership, whereas the ownership of land or goods by citizens was 'private law'.

Taxation was necessary, especially because in many periods the kingdoms were taxed. Taxes were levied on the ownership or possession of land, on its exploitation and on the disposal of products. This was used to finance the construction of walls, the army, the fleet (where there was one), the tribute tax, and the luxurious life of the kings.

The functions or sponsorships were taxed on the richest and financed either the construction of warships or other equipment or ceremonies, theatre or sports competitions.[12]

Criminal offences included treason, murder, theft, fraud, slander, while the main penalties were death penalty, exile, confiscation of property, fine, corporal punishment (amputation) and imprisonment.[13]

2.2 The powers of the King in the Ancient Cypriot Kingdoms (legislative, executive, judicial)

The kingship was hereditary, as the sources testify that it applied to the cities of Salamis, Solus and Paphos. Indeed, King Nicocles, when addressing the Salamis, states…I hold this power not as a usurper or against the law but because of my ancient ancestors and my father.

The King was the personification of the state. His powers were unlimited, unlike in other regions of Hellenism where the same institution was maintained, which makes us turn to the eastern monarchies.

He was the Chief of the Army and personally participated in campaigns and war. He also administered justice, as again attested by Nicocles:[14]… Take my words as laws and try to keep them. Know that those of us who best carry out my wishes will be more able to live according to their desire. I summarize what I have said. The feelings which in your opinion rulers should have towards their subjects, the same you must recognize for my authority. In the kingdom of Paphos at least, the king was also the high priest of Aphrodite, as I have already mentioned.

In the field of foreign policy,[15] the King was also the only one in charge. We simply recall the relations of Evagoras I of Salamis with Athens, or with Akori, king of Egypt. He allowed the settlement of foreigners in his country, or rather in the territory of his kingdom. Those who had this privilege formed an integral part of his court. He granted them land for exploita-

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[6] The King made law and laws in the form of compulsory royal decrees. He himself amended the laws and could also amend customs. ISOCRATES, *Nicocles*, par. 56; ISOCRATES, *To Nicocles,* par. 17.

[7] KOLOTAS, F., Research into the constitutional and legal institutions of the Ancient Cypriot Kingdoms. In: *Review of Cypriot Law (in Greek: Epitheorisi Kypriakou Dikaiou)*, vol. 21, 1988, p. 3267, 1988, 3272, 3280. *«As far as procedural law is concerned, apart from the information that justice was administered by the king, assisted by associates under his absolute control), we have no details either of the legal remedies that existed or of the manner in which a trial was conducted or of the rights and obligations of the parties."* And he continues: "*We have no information about the existence of administrative law provisions."* However, the structure of each Kingdom resembled that of the Mycenaean Kingdom.

[8] KOLOTAS, F., p. 3274. It was a totally centralized, bureaucratic and invasive system. A reference to customs duties is found by Gjerstad without further information, KOLOTAS, F., p. 3275.

[9] KOLOTAS, F., p. 3272-3.

[10] KOLOTAS, F., p. 3273.

[11] KOLOTAS, F., p. 3274.

[12] KOLOTAS, F., p. 3275.

[13] STAMELOS, C., p. 27 with references to KOLOTAS, F., p. 3267 and to sources (ORLANDO, *Homer's Commentary Iliad,* par. E387).

[14] ISOCRATES, *Nicocles.*

[15] The kings pursued their own foreign policy, even when they were tax vassals to some extent, KOLOTAS, F., p. 3268.

tion on the basis of a system of donations. We cite the case of Evagoras as attested by Isocrates. But here is the greatest proof of his morality and respect for the gods. Many Greeks, excellent citizens, left their own countries to come and dwell in Cyprus, considering that the reign of Evagoras was more tolerable and more honourable than that of the states of their own country. To name them all would be a long effort. But who does not know of Conon, who excelled of all the Greeks in virtue, that when his city was defeated, he chose from all others and came to Evagoras. He believed that with him his personal safety was better secured, and that Evagoras would very soon become a support for his city… The King was also a great landowner, and most of the land in the area of his kingdom, as well as the forest and mineral wealth, was his property. This of course did not exclude the existence of private land. A text by Eratosthenes is characteristic, as delivered to us by Strabo: Eratosthenes says that in olden times the plains of Cyprus were covered with forests and could not be cultivated. The trees cut down for the burning of copper and silver in the mines were of little use. Nor did they help later, when they were used to build fleets, sailing fearlessly at sea and with powerful naval forces. Seeing that they were not exterminating them, they allowed those who wished and were able to cut down trees to own and own without taxes the land they cleared.

On the role of the aristocracy, we have a valuable testimony of the Cypriot writer of the Aristotelian school, Clearchus of Solus. The passage was preserved by Athenaeus and states the following: "All the monarchs of Cyprus have admitted as useful the order of collars of noble birth. For their acquisition is in accordance with the spirit of absolutism. As with some of the Aerialists, so with them no one knows either the faces or the actual number, except the most famous. The flatterers in Salamis, from whom those of the other Cyprus have their origin, are divided according to their affinity, into the Gergini and the Promalagges. Of these the Gergini, who mingle with the multitude in the city, in the shops and markets, obey, taking the place of spies. Whatever they hear every day they report to the so called "anarchists". Again, the Promalagges examine whether any of what the Gergini reported seems worthy of scrutiny - for they are a kind of interrogators. And their intercourse with all the rest of the world is done with such art and persuasiveness that it seems to me, as they claim, that it is from them that the seed of the famous collars has spread outside Cyprus. And for this profession they feel exceedingly proud because it gives them honours close to kings." [16]

2.3 Elements of democracy in kingdoms such as Idalion, Kourion and Marion

There were, however, elements of democracy in the Basilica of Idalion, especially in the classical period. Royal powers were limited because the city itself had some of the responsibilities, as can be seen from the famous brass tablet of Idalion (now in the National Library of Paris, *Cabinet des médailles,*[17] and a copy of it is in the Museum of Ancient Idalion in Cyprus):

"*King Stasikypros and the City had summoned the physician Onassilos… the King and the City agreed to give Onassilos and his brothers… from the King's House and from the City a talent of silver…*".

This important tablet, found around 1850 by a Cypriot farmer, was a text of an agreement, considered one of the oldest written contracts in the world, and was concluded on the one hand by the king and the city of Idalion and on the other hand by a doctor, Onassilos. The agreement had been made when the city of Idalion was besieged by the Phoenicians of Citius and their Persian allies. The physician Onassilos had taken responsibility for treating the wounded, while the king and the city of Idalion undertook to pay him not only money but also real estate.

It is important to note that this contract, which was concluded at a critical time of war, was concluded with the doctor Onassilos not only by the supreme ruler but also by the king and the city. The frequent reference throughout the text of the inscription to the king and the city as one of the contracting parties shows that in Idalio the king did not alone gather all the powers, not even in times of emergency. It was on this basis that the view was put forward that democratic element had penetrated the city of Idalion due to the influence of Athens.

Although we have no other similar reports, it is nevertheless possible to argue that a similar situation may have prevailed in some of the other Cypriot kingdoms, especially those that had particularly close ties with the Greek world (such as the kingdom of Solon, which took its name from the fact that Solon wrote its laws).

On the other hand, an inscription from Kourion refers to "representatives of the people", so we conclude that elements of democracy prevailed in Kourion, especially after the contact with Athens. The inscription states: 'the king orders that this property be reserved for the representatives of the people'. The people seem to have had some representation in power, perhaps there was a form of "constitutional monarchy".[18]

In Marion, coins have been found that read "Marion", and as in Idalion, it shows the participation of the people in power. The strong influence of Athens in the 5th° century BC (temple of Athena, Attic vases) suggest that the way power was exercised was strongly influenced by the democratic standards of Athens.[19]

On the other hand, Alexander the Great, who was generally tolerant of the local kings in Cyprus, according to Plutarch, was dissatisfied with the unjust king who ruled Paphos at the time. He removed the King and appointed Avdalonymos as King, to

[16] STAMELOS, C., p. 23-24.

[17] Exhibit Bronze 2297. It would be of particular importance if, at some point in the future, France and Cyprus were to agree to return this important find to the Museum of Ancient Idalion, even if only through a loan procedure. For further analysis of the Ancient Idalion tablet see STAMELOS, C., p. 28-33.

[18] MITFORD T. B., *The inscriptions of Kourion.* Philadelphia, Pennsylvania, p. 377-382; KOLOTAS, F., p. 3277. STAMELOS, C., p. 20.

[19] SPYRIDAKIS, C., *Cypriot Kings of 4th Century B.C.* Nicosia, 1963, p. 18, KOLOTAS, F., p. 3277-3278.

whom he gave purple royal robes.[20] This shows that the Ancient Cypriot Kingdoms were preserved at least in Alexandrian times, although obviously in this particular case Alexander the Great had the power to appoint another King. However, this incident must have been the exception. The rule would have been that each King retained his autonomy within his Kingdom. In Hellenistic times it is reported that Ptolemy I, one of Alexander the Great's successors and King of Egypt and Cyprus, abolished the Ancient Cypriot Kingdoms by incorporating the island into the whole of his kingdom. However, it is possible that pockets of the Ancient Cypriot Kingdoms remained alive and scattered on the island of Cyprus.[21]

2.4 Elements of private law in ancient Cyprus

Interesting from a legal point of view is the inscription found near Pyla and dating from the 5ο or 4ο century Bc. In modern Greek rendering the inscription states that: "Aristodemus used ("karputo") this place (field) here for himself, and dwelt in a house belonging to the place, without him paying. He must, therefore, pay for this residence and use of the premises in accordance with the law'".[22] The most likely[23] interpretation is that this is a court order directing that rent be paid for the accommodation and use of the premises. We assume that a contract may have been entered into, but in any event the judgment requires payment of rent "in accordance with the law". Therefore, the law provided for the conclusion of a lease, regardless of whether a lease had been concluded in this case.

No information is available in the family law sector. But we can speculate that marriage was an institution in the Ancient Cypriot Kingdoms. As far as the King was concerned, he had his own harem, but this does not allow us to conclude that polygamy was allowed. The opposite possibility, monogamy, seems more likely.

As far as inheritance law is concerned, there is not much information available. However, we could assume that a kind of customary succession would develop. This possibility is supported by the Idalian tablet. In the last few lines, it is written that "*the fields will be held forever by as many of Onassikypros' children and their children's children as will reside in the Idalion area*". Since this is clearly stated, it means that there would have been a legislative provision or custom of hereditary succession.

As regards the rules of maritime law, there is insufficient information. We do not know whether the institutions of the maritime loan or the maritime mortgage existed. As for the seafarer's contract, we can speculate that there would have been one, as there was the labour contract of Onassilos (Idalion tablet). We cannot know the terms of a maritime labour contract. Scyllax[24] states: "*Now in Cilicia is the island of Cyprus, and cities therein; Salamis Hellene, a port having a closed winter harbour, Karpasia, Kyrenia, Lapithos Phoenicia, Soloi (which also has a winter harbour), Marion Hellene, Amathous (indigenous people); all these ports have deserts*". It follows, therefore, that only in the kingdoms of Salamis and Solon there was maritime activity in principle, and possibly in Paphos. Otherwise, it is stated that the ports of Marion and Amathous were deserts. In any case, trade flourished, but there were also shipbuilders in certain kingdoms who built merchant and warships. Internal and external trade in goods was constant. Therefore, there must have been written or customary rules regulating commercial transactions, but nothing relevant has survived.[25]

As for the rules of sports law, there is sufficient information and many findings have been made. There have been found athletic seals, inscriptions referring to coronet athletes, to gymnasia, to gymnasia, in the sense of gymnasiums in Salamina, in Kition, in Amathous, in Kourion, in Lapithos, in Chytroi and in Karpasia, a whole gymnasium (scratch building) in Salamina, a whole stadium of Kourion of the 2ου century AD, iron and bronze sling, sports vases for chariot races, horse races, boxing, running (stadium), bullfighting, javelin, sword fighting, wrestling, discus throwing, shot put, as well as statues of crowned athletes). In Salamina, Kition and Paphos, athletic games were held, in Salamina and Kition ecumenical games, while in Paphos the Pancyprian Games were held every five years. Cypriot Olympians are Heraclides of Salamis (144α Olympia, 204 BC, stadium), Onisikritos (150th Olympia, 180 BC, stadium), Demetrius of Salamis (252nd Olympia, 229, stadium and pentathlon; 253rd Olympia, 233, stadium and pentathlon; 254th Olympia, 237, stadium).[26] The rules and regulations were similar to those of the Panhellenic games.[27]

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[20] PLUTARCH, *On Alexander's fortune or virtue,* B' VIII, par. 340 C-D. "*Again, in Paphos, of the reigning unjust and wicked fan, Alexander's ejecting him another one is seeking, of the Kinyradian genus already declining and failing to give up. Upon him they that fell down did rest, and there was found water in his hands: and the soldiers that took him were troubled, and marched upon him, and cried. And the king of the kingdom of Alexandre in a noble king of the Sidonians was angry, and took purple, and was offered to the partners; and he called himself Avdalonymos.*"

[21] STAMELOS, C., p. 19.

[22] BEATTIE, A.J., A Cyprian Contract Concerning the Use of Land. In: *Classical Quarterly*, Vol. 53, 1959, p. 169-172, rereads the last words as "the homonym" based on Mitford's style of writing. However, he interprets these words to mean "the same rent" (BEATTIE, A.J., p. 172). In the correct spelling {to vόμω} the last words mean "according to the law". On the other hand, he notes that "the silver" is the price/rent, which was either stated elsewhere or was predetermined (BEATTIE, ibid).

[23] KOLOTAS, F., p. 3282-3283 with further references to MASON, MITTFORD, BEATTIE AND PROBONAS. "*This short text confirms the view that the laws of this period also included some provisions that clarified the relations of citizens in the sphere of private (civil) law. In this particular case, it is not clear from the text whether a legal transaction preceded it from which the right to occupy and use the estate was derived, such as renting or establishing a servitude 'oikise', or whether the obligation to pay a payment resulted from unlawful interference with the estate (i.e., whether it is the result of a tort), in which case it can be characterised as a payment of compensation. The text is also too short and relatively incomplete to say to which legal category it belongs. Whether it is a court decision (which is most likely) or an arbitration award, or whether it is a legal opinion or whether it belongs to another legal category*. KOLOTAS, p. 3283.

[24] SCYLLAX CARIANDEUS, *Circumnavigation of the Sea of the World Europe and Asia and Libya*, par. 103.

[25] KOLOTAS, F., p. 3279.

[26] SAMARAS, P., The Cypriot participation in the Olympics and other Panhellenic games. In: *www.athlepen.com.cy/keimena10.htm*, with references to sources (ISOCRATES, *Evagoras*; PLUTARCH, *Alexander*; *Inscriptions on Nicocreon and Demetrius of Salamina the Olympic Champion*; PAUSANIAS), and to SPYRIDAKIS, C.; CHATZIIOANNOU, K.; MICHAILIDOU, N.

[27] STAMELOS, C., 27.

2.5 Elements of Roman law in ancient Cyprus and the role of Cicero

Ancient Cyprus, after its conquest by the Romans, was transformed into a single province, and from 22 BC onwards into a senatorial province.

This meant that occupying Roman troops did not remain on the island.

Each city had its Parliament (a kind of local council), all meetings were conducted in Greek throughout the Roman Empire, and local lords governed according to Greek legal traditions.[28]

Public law was influenced by Roman law, although it was based on the older Greek tradition of the basilies. "Private law in Cyprus was less influenced by Roman law: especially matters of family and inheritance law were regulated by virtue of the rules and customs of the Greeks, as they had developed from the 12th century up to Hellenistic times. Almost all the surviving inscriptions of the Roman period in Cyprus are in Greek (Latin was almost unknown)".[29]

Cicero played a special role in Cyprus, its governance and the enforcement of Roman law.

"The Roman Marcus Tullius Cicero, a philhellene orator and politician, who lived in the 1st century B.C., was associated with Cyprus in many ways. In the year 58 B.C. a powerful man in Rome was the patrician Poplius Claudius Pulcher, who had illegally occupied the office of mayor. His political rival was Cicero, whose strong supporter was Marcus Porcius Cato".[30]

Claudius Pulcher, in order to avenge an earlier insult to Ptolemy, king of Cyprus, on the one hand, and to weaken Cicero's political position in Rome on the other, planned to remove Cato from the capital of the Roman state. To this end, he forced him to undertake the enterprise of capturing Cyprus, but without providing him with any military or naval force. Cato, with the help of his friend Canidius, and with the suicide of Ptolemy, succeeded in taking Cyprus without a fight and sending to Rome the sum of 7,000 talents, the value of Ptolemy's treasures, which were sold at auction.

Cicero disagreed both with the occupation of Cyprus and with the way it was occupied. In his *Pro Sestio* and *De dome Sud* speeches he blames Claudius for the operation to seize Cyprus. Ptolemy of Cyprus, Cicero argued, was a peace-loving, peace-loving, peace-loving, a scion of the great Ptolemaic line and a friend of Rome. The conquest of Cyprus was not for reasons of justice but for economic reasons, at a time of great cash-flow difficulties for the Roman state. This was the reason why Ptolemy's property was confiscated, contrary to Roman tradition, which required that even kings defeated in war should have their property and kingdoms returned to them. Moreover, by his action, Claudius made the Roman people an accomplice to his crime, on whose behalf he sent Cato to Cyprus in order to remove him from Rome.

The political events that followed forced Cicero to temporarily leave Rome. When, after a short time, he returned, he gained great power and, taking advantage of the absence of Claudius, seized by force and destroyed the mayoral deltas in which Claudius recorded the events of his mayoralty, and declared his mayoralty illegal and all his acts null and void. Because of this, the legality of the annexation of Cyprus was also questioned. To this Cato himself reacted, arguing that nothing of Claudius' government was right, but that the annulment of all his decrees and acts would make the occupation of Cyprus, of which Cato felt very proud, illegal.

The first provisional governor of Cyprus was Gaius Sextilius Rufus, who was replaced early on by the Roman governor of Cilicia, which included Cyprus administratively. One of the first governors of Cyprus, as governor of Cilicia, Pontius Cornelius Lentulus Spinther (56 - 53 BC), also gave Cyprus its own *Lex Provinciae* ("provincial legislation"), which is praised by Cicero. But under the administration of Spinther and his successor Appius Claudius Pulcher, Cyprus suffered mainly from economic oppression.

Thus, when Cicero took over the administration of Cilicia - Cyprus in 51 BC, he showed particular sympathy for the Cypriot people.[31] He suspended the excesses in taxation and interest rates, abolished "protection" taxes to exempt Cyprus from the conscription of Roman legions, and forbade costly tributes to himself. Cicero ruled Cyprus with honesty, as far as objective circumstances allowed him, as the Salaminian loan episode shows.

His interest in Cyprus continued after his return to Rome. Addressing Gaius Sextilius Rufus, the first (58 BC) provisional governor of Cyprus, who shortly after 50 BC was returning to the island as its first quaestor, he wrote to him:

…I recommend all Cypriots, but especially Paphians. Any favour you do them will be most gratifying to me. This will also contribute to your own praise, that is, if as treasurer you establish such principles that your successors will follow them. And you will achieve this more easily if you also follow the legislation of Populus Lentulus and what I have established… (*Ad Familiares*, XIII, 48).

The Salaminian loan episode (50 BC) is indicative of the situation in Cyprus during this period, and of Cicero's interest in it. The Roman orator and politician sets out the events in three letters to Atticus (*Ad Atticum*), sent from Laodicea on 13 February, 24 February and May 50 Bc.

Brutus, who had participated in the management of Ptolemy's royal treasure during the occupation of Cyprus, sought to secure a permanent income from the island. Upon his return to Rome, he obtained approval from the Senate for the Salamis to borrow a large sum of money, from sources in Rome, at 48% interest! This act was illegal, since the Roman law *Lex Gabinia* ("Law of Gabinia") prohibited the provinces from borrowing funds from the capital of the state with interest of more than 12%.

The loan was granted by Brutus himself, but two of his friends, the Killikan banker Scaptius and Matinius, presented themselves as lenders. To secure the loan, Brutus persuaded the

[28] STAMELOS, C., p. 129-130.
[29] STAMELOS, C., ibid.
[30] POLYGNOSIS, *Cicero and Cyprus.* Bank of Cyprus, Politis, Nicosia, 2020.
[31] See also STAMELOS, C., p. 129.

then Cilician commander Cavalier Claudius Pulcher to appoint Scaptius prefect of Salamis, reinforced by a cavalry regiment. Because the city was delaying repayment, Scaptius' horsemen besieged the Salaminian Senate, resulting in the death by starvation of five of its members.

When Cicero took over the administration of Cyprus the issue was still pending. The citizens of Salamis asked for his intervention to remove Scaptius, while the latter demanded Cicero's intervention to collect the amount due.

Cicero took away his command of the cavalry, but promised to guarantee him his money. The Salaminian representatives and Scaptius arrived at Tarsus to meet Cicero. Cicero urged the citizens of Salamis to pay the loan and they gladly consented, adding that they would in fact repay it with Cicero's money, since he did not accept the monetary gift intended for him. However, in determining the total amount, Scaptius, calculating interest at 48%, put the debt at 200 talents, while the Salamis, calculating interest at 12%, acknowledged a debt of 106 talents.

Cicero supported the Salaminian position, which was in accordance with both the law of Gavinio and his own local decrees. But while the citizens of Salamis were about to pay the 106 talents and settle their debt once and for all, Scaptius asked for a postponement of the payment, hoping that Cicero's successor would be more favourable to his own views. And as the new governor was a friend of Brutus, it is very probable that the latter was satisfied to the full extent of his claims. Cicero was not the only governor who failed to carry out his decrees because of the representatives of the powerful interests of Rome".[32]

However, his honest attitude towards the Cypriots was based on the integrity of his character and his belief in values and ideals, such as the radiance of Hellenism, which he admired, justice, respect for man with a spirit of philosophical quest and integration. There was finally Cicero, who had declared that there is nothing more human and sacred than Greece,[33] a practical philosopher of law and a just governor of Cyprus.

3. Philosophical overview of the law of ancient Cyprus up to Roman times (Zenon of Kition, Cicero, Bacchus Tryphonus, Marcus Aurelius)

The most important Cypriot figure in philosophy in general and the philosophy of law in particular (School of Natural Law) was Zenon of Kitieus, who founded the Philosophical School of Stoicism, when after living in Kition (now Larnaca) for a number of years he found himself teaching in Athens.

Zenon of Kition distinguished philosophy into logical, physical and ethical.

He wrote many important texts, such as his discourses on morality, laws and duties.

He was born in Kition of Cyprus in 352 BC and was the son of the wealthy merchant Manaseus. His father travelled to Athens frequently. Each time he returned to Cyprus, Manaseus gave his son scrolls with philosophical texts by Socrates. Zenon was fascinated by philosophy. Later, he travelled to Athens (331 BC)[34], where he remained until his death (at the age of 98). In the Poikile Lodge he taught his philosophy, establishing the School of Stoics (a continuation of Cynicism; the Cynic philosopher Cratius[35] was Zenon's teacher).

Zenon Kitieus wrote, among other things, the "Politeia". The Politeia is not conceived of as a polis, but as a cosmopolis in which all[36] people are fellow citizens, truly wise, truly friends, free and therefore observing their duties ("On Duty").

According to Zenon of Kition, people should be free and equal, and he proclaimed that both women and slaves had the right to be citizens.

Therefore, he can rightly be considered a champion of human rights.

In fact, Zenon of Citius, as the proponent of natural law, believed that eventually natural laws could be enforced, so that then there would be no need for courts either, because people would be self-disciplined and comply with the rules. With wisdom man becomes truly free by respecting natural laws. Zenon sought to prove that people can live harmoniously by understanding the importance of the validity of natural laws and without the need for social institutions such as schools, gymnasiums, temples and courts. The virtuous man respects natural law.[37] The Natural Law School dominated legal scholarship for many centuries until it was replaced today by the dominant theory of legal philosophy, legal positivism.[38]

Zenon was honoured by Athens with a golden crown, was proud of his origin from Kition of Cyprus and insisted on the Athenians inscribing his name in a way that would emphasise and declare his origin at all times: "Zenon the Kitieus".

Moreover, as mentioned above for Cicero (106-43 BC), his honest attitude towards the Cypriots was based on the integrity of his character and his belief in values and ideals, such as the radiance of Hellenism, which he admired, justice, respect for man with a spirit of philosophical quest and integration, having studied and learned Stoicism and philosophy. There was finally Cicero, who had declared that there is nothing more humane and sacred than Greece,[39] a practical philosopher of law and

[32] POLYGNOSIS, *Cicero and Cyprus.* Bank of Cyprus, Politis, Nicosia, 2020.
[33] STAMELOS, C., p. 136.
[34] ANASTASIOS LEVENTIS FOUNDATION, *Ancient Cypriot Literature.* Nicosia, 1999, p. 15-16.
[35] DIOGENES LAERTIUS, par. 7.24.
[36] This is where the holistic approach, the holistic analysis of the law becomes apparent. For the holistic analysis of law see STAMELOS, C., *Philosophy of Law.* Athens, 2020, entry "holistic analysis of law" in the index, where there are further references to pages.
[37] Justice exists by nature, DIOGENES LAERTIUS, par.6-128. ISOCRATES in his speech *Nicocles* (par. 50) notes the words to be addressed by Nicocles, son of Evagoras, the new King of Salamis, to the citizens and officials: "show no greater zeal to enrich yourselves, but to acquire the reputation of honest men; those who are most renowned for their virtues possess the greatest goods. The in spite of just gains do not consider wealth."
[38] STAMELOS, C., p. 16-28.
[39] STAMELOS, C., p. 136.

a just governor of Cyprus. He accepted the ethics of the Stoics, admired Plato (whose works, like *Protagoras*, he translated into Latin) and wrote rhetorical speeches, letters on political and social life and thirteen philosophical treatises based on Greek sources.[40]

Many Greeks expressed positions on natural law (Plato, Aristotle, Zenon). However, a classic ancient formulation in favour of natural law belongs to Cicero. Cicero restated Stoic views and emphasized, with regard to natural law, the following:[41]

"True law is right reason in accord with nature. It is universal, unchangeable and eternal. By its precepts it incites us to duty, and by its prohibitions it prevents us from injustice. Nor does he set his precepts or prohibitions in vain for the good, although they do not move the vicious. It is a sin to try to change this law, and it is not permitted to try to annul any part of it, but it is also impossible to abolish it entirely. There is not one law in Rome and another in Athens, one law now and another in the future, but one eternal and unchangeable law will apply to every people and to every age, and there will be one common master and ruler for all, God, who is the author of this law, he who instituted it, and he who applies it as judge. Whoever violates it forsakes his own self and denies his human nature, and for this very reason he will suffer the worst punishments even if he escapes human penalties."[42]

These texts of the Greek philosophers and Cicero were much later, during the Middle Ages, the basis of Thomas Aquinas who founded what he called "Aristotelian Christianity", distinguishing natural law into four types: human law derived from natural law, natural law, eternal law and divine law.[43]

The Stoic philosopher Bacchus Tryphonus, who was the first teacher of the Emperor Marcus Aurelius, also lived in Paphos.

Marcus Aurelius was an Emperor and a philosopher. From 161 to 180 he ruled in a good way and was described as one of the five good Roman Emperors. At the same time, he was a student of Stoic philosophy.

During expeditions between 170 and 180, Marcus Aurelius wrote "The Into Himself" in Greek as a source for improving his character and spirit. Marcus Aurelius was ultimately a representative of Stoic philosophy and "Into Himself" is considered an excellent work, a classic example of this philosophy.[44] Even today it is regarded as a monumental work of good governance based on duty (as Zenon had analyzed it) and service to the whole.

4. Conclusions

From the historical and philosophical overview of the law of ancient Cyprus up to Roman times, useful conclusions emerge for the understanding and study of law.

(1) The law of ancient Cyprus was initially determined by communication with the Kingdoms and Princes of the Mycenaean Kingdoms,[45] later with the kingdoms of the Near and Middle East and Egypt (the kingdoms were influenced by the Phoenicians, who settled mainly in Kition with the parallel presence of the Greeks, they were tributary to the Assyrians from 709 to 669 BC, to the Persians from 546 BC until the liberation of Cyprus by Alexander the Great in 332 BC, and earlier for a limited period of time to the Egyptians from 565 to 547 BC[46]), while later it was significantly influenced by communication with Athens.

The united Cyprus (Alassia) was divided into kingdoms for many centuries (12ος century BC to the 1stº century BC), but became again a united Cyprus (from 22 BC, as a Roman senatorial province and later as a Byzantine or otherwise eastern Roman province). The history of division and unity goes in cycles, as does the presence of occupying armies that sometimes appeared and sometimes were removed (especially after 22 BC, when Cyprus was again unified as a Roman senatorial province). Historical cycles are constantly repeating themselves and no one can know which historical phase of the past they are in at any given time unless they carefully study the historical sources. Moreover, the study of historical sources is a useful guide both for the present and for the future.

(2) Elements of democracy and good administration appeared in certain Cypriot kingdoms, such as Idalion, Kourion and Marion, but also in Salamis.

Isocrates mentions Isocrates in his speech "Evagoras" praising the King of Salamis of Cyprus: "many worthy Greeks came to stay in Cyprus, because they believed that the reign of Evagoras was milder and fairer than their own polities".[47]

(3) Hellenistic law as well as Roman law enriched the legal tradition of the Cypriot kingdoms, which, however, seem to have retained their valuable institutional autonomy.

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[40] *De Republica (On Democracy), De Legibus (On Laws), Paradoxa Stoicorum, On Professions,* etc.

[41] BIX, B., *Philosophy of Law, Theory and Interpretative Framework.* Preface: Aristides Hatzis, Translation: Anastasia Karastathi, Scientific Editors: Xenophon Yataganas, Aristides Hatzis, Kritiki Publications. Athens, 2007, p. 112.

[42] CICERO, *De Republica*, III, xxii, par. 33.

[43] STAMELOS, C., *Philosophy of Law,* Nomiki Bibliothiki, Athens, 2020, 18, 20-21. Aristotelian Christianity or Christian Aristotelianism of Thomas Aquinas is summarized in his stated thought that theology can be based on logical deductions and convince of the correctness of its theses, for Christian ethics. Thomas Aquinas (1225-1274) was an Italian priest of the Roman Catholic Church, theologian and philosopher. He represented the theological and philosophical school of scholasticism, i.e., the reconciliation of the teachings of Plato and Aristotle with Christian doctrine. He studied in Paris and Cologne, taught theology in Paris until 1259 and later returned to Italy. His works were translated into Greek by Demetrius Cydonius and Gennadius Scholarios (before he became Patriarch).

[44] FORSTATER, M., *The Spiritual Teachings of Marcus Aurelius*, Translation: Irini-Daniel Doutsooli. Athens, 2007.

[45] Already from the time of the Trojan War, see Homer, *Iliad, L, v. 15-24*. STAMELOS, C., p. 1-2 n. 1-2.

[46] STAMELOS, C., p. 8-17.

[47] ISOCRATES, *Evagoras,* par. 51. Historically, this did indeed happen especially after the defeat of Athens in the Peloponnesian War and the establishment of the regime of the Thirty Tyrants. ISOCRATES (*Evagoras,* par. 71) also states that "Evagoras deserved to be King not only of Salamis, but of all Asia", expressing his view of uniting all Greeks under the leadership of one who would defeat the Persians. Later, this union was achieved by Philip, father of Alexander the Great. Isocrates' view had spread and formed the theoretical basis for the spread of Greek civilization in Asia. In Isocrates' estimation, the Greek who would unite all Greeks and conquer Asia was Evagoras.

The Greek language remained the language of ancient Cyprus during the Hellenistic, Roman and Byzantine periods and obviously also the language of law in ancient Cyprus, as is evident from the inscriptions and scrolls that have survived to this day.

(4) Communication with Athens and later Alexander the Great and the Ptolemies shaped the legal, cultural and institutional background of the Cypriot kingdoms and cities and allowed the emergence of important kings, orators, men of the spirit and philosophers who founded schools of thought that are of lasting value to this day.

(5) Evagoras and Nicocles, Kings of Salamis, had the opportunity to receive valuable advice from the Athenian Isocrates. In his three speeches Isocrates urges leaders to follow the moral path, to observe the principles of justice and good law-making.

Isocrates believed in the liberation of the Greeks from the Persians under the rule of a Greek. He urged the kingdoms of Salamis to rise up against the Persians.

These speeches of Isocrates to the Cypriot Kings of Salamis in Cyprus, Evagoras and Nicocles, are considered timeless and of particular value for the way of good governance.

(6) Zenon of Kition founded Stoicism. He lived initially in Kition (today's Larnaca) and later in Athens. He insisted on being called "Kitieus" always with pride in his origins. Athens (which honoured him with a golden wreath), Greece (his admirer and pupil was the Macedonian King Antigonus[48]) and the world were fortunate enough to be taught by an outstanding Cypriot philosopher the concepts of justice, morality, good law and duty in a unique and original way that was to influence important people.

Plutarch mentions that Zenon did not want to become an Athenian citizen, so as not to do injustice to his homeland, Kition of Cyprus.[49]

On the other hand, Zenon's views on law founded the theory of the philosophy of law for natural law, while what he argued for the right of women and slaves to be citizens later founded the protection of human rights in the spirit of a holistic analysis of law.

(7) Cicero, a Greek-lover and admirer of Zenon and the Stoic philosophers, ruled Cyprus, with its seat at Paphos, in a just and exemplary manner. His philosophical analyses of justice and laws as well as the good practices of his administration are considered timeless to this day.[50]

(8) Marcus Aurelius was perhaps the only Emperor-philosopher. His writings, such as "The Introspective", are still studied to this day by great people, such as former President of the United States Bill Clinton.

Marcus Aurelius was a stoic philosopher, an admirer of Epicurus and a student of Zenon, who came from Kition in Cyprus, and by whose teachings he was influenced.

The legal, intellectual and philosophical contribution of Cyprus and the people who lived in ancient Cyprus to the developments of the then important world from Athens to Rome was decisive, as is proven by the study of the sources, while it continues to occupy international literature at an increasing rate.

Therefore, the historical and philosophical overview of the law of ancient Cyprus up to Roman times and the relevant sources brings out interesting facts, encourages the researcher to delve further into the relevant issues by studying the sources and offers every legal scholar valuable information, the theory of natural law philosophy, cosmopolitanism, ethics, justice, good law-making, the general principles and values of duty and respect for the law and, in general, law and human rights in a holistic legal analysis.[51]

[48] DIOGENES LAERTIUS, par. 7.6-9.

[49] PLUTARCH, *Ethics,* par. 1034 (A) (3ª). For Zenon, reason was part of the soul, and for him it was reasonable to emphasize and defend his lineage to the end.

[50] Zenon influenced Epicurus and Epicurus influenced Torquatus, to whom Cicero refers in his work „On the final ends, good and bad", criticizing the views of Torquatus, who expressed the views of Epicurus and Zenon: „Those who have a strong nature are led by the voice of reason to justice and honesty". STAMELOS, C., *Philosophy of Law,* p. 20.

[51] ZENON, *On Everything.*

Approaching the Legal Regime of Consensual Abduction Through History

Adolfo A. Diaz-Bautista Cremades *

Abstract

Abduction was considered a way to access marriage in the ancient world. Even if it wasn't lawful, Mythology leaves us traces of this conduct, which was acceptable in Roman society when the kidnapped woman's consent was present. Constantine, for reasons that we can only suppose harshly prohibited this practice, punishing it with the death of all those involved (even the raped woman). Its regulation went back to the Middle Ages but it was modulated, accepting the remission of the sentence in case of agreement between the parties. This way, a private crime was established in modern times which allowed the woman to take action against the abductor unless they married, thus forcing him to fulfil his marriage promises.

Keywords: *Abduction; consent; marriage; women in Rome; Roman criminal law.*

1. Matrimonial consent and *auctoritas*

1.1 In Rome

In archaic Rome, marriage was arranged by the parents of the consorts, often without the consent of the spouses.[1] They -alieni *iuris* of their *patres familias*- lacked the necessary independence to determine their marriage, although in classical times the consent of both the *pater familias* and the spouses was required, as detailed by Paullus:

D. 23,2,2
Paulus book 35 ad Edictum
Nuptiae consistere non possunt nisi consentiant omnes, id est qui coeunt quorumque in potestate sunt.
Marriage cannot take place unless all agree, i.e. those who are joined and those in whose power they are.

Although over the centuries and depending on the social class of the families, the greater or lesser involvement of the bride and groom in the formation of the matrimonial consent may have varied, we know that the freedom of the parents to decide the marriage of their children was reduced as the relevance of the consent of the bride and groom was strengthened. The *leges Iulia et Papia*, it seems, allowed the *filii* to appeal to the praetor to substitute parental consent in case of unjustified refusal.[2] As a result of this evolution, the Emperor Diocletian configured the intervention of the *pater familias* as a right of veto over the free choice of the children, with certain limitations,[3] as stated in CJ. 5,4,12 and CJ. 5,4,14:

CJ. 5,4,12
Imperatores Diocletianus, Maximianus. Ne filium quidem familias invitum ad ducendam uxorem cogi legum disciplina permittit. Igitur, sicut desideras, observatis iuris praeceptis sociare coniugio tuo quam volueris non impediris, ita tamen, ut in contrahendis nuptiis patris tui consensus accedat * DIOCL. ET MAXIM. AA. SABINUS. *<A 285A. II ET ARISTOBULO CONSS.>
The discipline of the law does not permit a son of a family to be forced to take a wife against his will. Therefore, as you request, you will not be prevented from marrying whom you wish, provided your father consents.

CJ. 5,4,14
Imperatores Diocletianus, Maximianus. Neque ab initio matrimonium contrahere neque dissociatum reconciliare quisquam cogi potest. Unde intellegis liberam facultatem contrahendi atque distrahendi matrimonii transferri ad necessitatem non oportere * DIOCL. ET MAXIM. AA. ET CCJ. TIT. *< >
No one can be forced to enter marriage or to reconcile after dissolution. You will understand that it is not appropriate to make the free choice to enter and dissolve a marriage a necessity.

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1 ASTOLFI, R., *La lex Iulia et Pappia,* 2nd Ed., Padua, 1986, p. 140.

2 CORTÉS, VC, Alcance del consensus del paterfamilias en el matrimonio de su filia in potestate, in LÓPEZ ROSA R. and del PINO TOSCANO, F., *El Derecho de Familia. De Roma al Derecho actual,* Huelva, 2004, p. 91.

3 Vid. DÍAZ-BAUTISTA CREMADES, AA., La sociedad en los rescriptos de Diocleciano, in Lázaro Guillamón, C, *Administración, estado del bienestar y políticas socioeconómicas*, Castellón, 2019, pp. 71-96.

1.2 In the Middle Ages

The parental veto in marriage consent would not disappear in the course of history, as we can see in Law 49 of the Elizabethan Compilation:

Toro XLIX,

…e que esta sea justa causa para quel padre e la madre puedan desheredar si quisieren a sus fijas quel tal matrimonio contraxeren, lo qual otro ninguno no pueda acusar syno el padre, e la madre muerto el padre.

The Partidas seem to reinforce in the Wise King's definition of marriage the importance of the consent of the spouses:[4]

Partidas 4,2,5

Consentimiento solo, con voluntad de casar, faze matrimonio entre el varón, e la muger. E esto es por esta razón, porque maguer sean dichas las palabras, segund dicen, para el casamiento, si la voluntad de aquellos que las dizen non consienteron las palabras, non vale el matrimonio, quanto para ser verdadero, como quier que la Eglesia judgaria que valiesse, si fuessen las palabras prouadas, por razón, que fueran dichas, en la manera que se hizo, el casamiento por ellas; non se prouando, que las palabras fueran dichas en otra manera, que por voluntad de casar, assi como si fuessen dichas por juego, o por mostrar por que palabras se puede fazer el casamiento…

1.3 In the Modern and Contemporary Ages

The struggle against paternal intercession appears in the literature of the 18th[5] and 19th centuries[6] and even in the 20th century,[7] although this debate already appears in Don Quixote.[8]

We know of a famous example of the tension between the bride's consent and the parental veto through an event that took place in Seville in the 17th century. It is the so-called *abduction of the "roldana"* recorded by Montoto de Sedas.[9] Luisa Roldán de Villavicencio was the daughter of the Sevillian sculptor Pedro Roldán, whom she helped in the family workshop. It seems that in the family workshop, she had an affair with another apprentice, Luis Antonio Navarro de los Arcos, to whom she was betrothed, but her father was opposed to this. The groom sued Luisa in court to demand the fulfilment of the marriage promise, bringing witnesses to the promise. Before the judicial authority, the defendant declared "that she had never been married, that she was a young maiden, that she was not related to Luis Antonio, that she had no vow of chastity and that despite having given her promise of marriage to Luis Antonio, she could not fulfil it due to her father's refusal to marry her". Because of this, the judge ordered the custody of the bride by a third party (the master gilder Lorenzo de Ávila) authorising, without paternal authority, the celebration of the marriage. Although, as we can see, this was not a real abduction, the people of Seville coined the story as "the abduction of the roldana".

And there is still one case in our Constitution where the parental veto is maintained, albeit in a very particular case:

Article 57 Spanish Constitution

4. Aquellas personas que teniendo derecho a la sucesión en el trono contrajeren matrimonio contra la expresa prohibición del Rey y de las Cortes Generales, quedarán excluidas en la sucesión a la Corona por sí y sus descendientes

For its part, women's marital consent is a special case throughout history because it is framed within the particular consideration of the status of women, their reification by the male (father or husband) and their lack of contractual independence. This denial of women as subjects of law independent of men has, as we know, undergone multiple variations over time and social classes. As we have already explained elsewhere,[10] women reached certain levels of social and legal independence during the Republic, only to find themselves once again subjected to men (more or less effectively) at the beginning of the principality, and once again began the struggle for their independence during the second and third centuries, their emancipation being broken again with the reign of Constantine.[11]

2. The abduction of virgins

In the primitive context of the father's patrimony over his daughters, widespread conduct among the peoples of antiquity is framed, such as the abduction[12] of virgins which, as we shall see, is much more than an illegal detention for sexual purposes. The mechanism obeys a social rule with a very long tradition in the Western mentality: women could only marry in a state of virginity; therefore, the man who lay with a virgin woman made her undesirable for other men and contracted the duty to marry her (the only way to repair, in some way, the damage

[4] Regarding matrimonial consent in the Partidas, vid. GIMENO CASALDUERO, J, Alfonso el Sabio, el matrimonio y la composición de las partidas, in *Nueva Revista de Filología Hispánica,* vol, 36, 1988, pp. 203-218.

[5] Cf. ae. MARIVAUX, P. de, *Escuela de madres*, 1732.

[6] FERNÁNDEZ DE MORATÍN, L., *El sí de las niñas*, 1806.

[7] GARCÍA LORCA, F., *La casa de Bernarda Alba*, 1936.

[8] PERLADO, P. A., Casamientos, bodas y matrimonio en El Quijote, in Strosetzki, CJ., *Visiones y revisiones cervantinas, actas selectas del VII Congreso Internacional de la Asociación de Cervantistas*, Madrid, 2011, pp. 735-748.

[9] MONTOTO DE SEDAS, S., *El casamiento de La Roldana*, Seville, 1920, vol. IV, pp. 144-148

[10] DÍAZ-BAUTISTA CREMADES, A A. and BAELO ÁLVAREZ, M, Lenguaje inclusivo en Roma. Un apunte sobre la condición de la mujer en las fuentes jurídicas romanas. In: *Revista de Derecho Romano,* vol. 1, 2019.

[11] DÍAZ-BAUTISTA CREMADES, Adolfo A., La mujer en las constituciones de Constantino recogidas en el Código de Justiniano. In *RIDROM,* vol. 30, 2023.

[12] The word „raptus -a -um" is the participle of the verb „rapio" which comes from the Proto-Italic *rap-i-, a term related to the Ancient Greek ερέπτομαι meaning ("to devour", "to take away"). DE VAAN, M, *Etymological Dictionary of Latin and the other Italic Languages,* Leiden, 2008, v. *raptus*. Its first meaning refers to "to snatch, to take away, to steal" and only in the second meaning does it mean "to kidnap or abduct". In the legal field, the *actio vi bonorum raptorum* is well known, which typifies robbery committed with violence.

caused). In a world where a woman's consent was irrelevant, a man who wished to marry a virgin woman had only to lie with her, thereby acquiring the duty (and the right) to marry her.[13] This brutal practice appears in the Greco-Latin ideology through myths such as the abduction of Persephone by Hades[14] or the legend of the abduction of the Sabine women.[15] The casus belli of the mythical Trojan War is also the abduction of Helen by Paris. But if we analyse these mythical stories, we will see with perplexity that the abduction is not generally resolved with the punishment of the abductor and the restitution of the maiden to her father, but with the conformity of the victim with her aggressor and, in many cases, with the satisfaction of the father. This is so, under the primitive mentality of these peoples, firstly because the main offence is not the violation of the victim's sexual freedom or the forced removal of her virginity (which does not admit real reparation) but the violation of the family's honour, which can be satisfied by compensation. After all, if the abductor marries his victim, there is no longer any harm since the woman will not be unfit for marriage, as she will already be married.[16]

This execrable custom has survived over time and continues to be practised today in countries ranging from Central Asia, the Caucasus, parts of Africa, Pakistan, Kyrgyzstan and the Amazon jungle in South America. In our law, such an act constitutes the crime of illegal detention or aggravated kidnapping, which is punishable by between fifteen- and twenty-five-years' imprisonment (art. 166.2. b CP).

3. Consensual abduction

From very early on, the practice of virgin abduction coexisted with another variety in which the bride-to-be consented to and participated in the act. This consent of the bride would for us exclude unlawfulness (provided that the victim is of age and capable) but it was considered abduction precisely because the consent of the abducted woman was irrelevant. The unlawful element was precisely to lie with a maiden without the father's permission.[17]

3.1 Regulation in Roman Law

Despite being a common practice in the ancient world, the different legal systems did not consider consensual abduction a lawful practice,[18] being forbidden in texts from Exodus[19] and Deuteronomy.[20]

Being, as we suppose, a frequent practice throughout history, it is surprising that consensual abduction does not appear expressly regulated throughout the Roman experience[21] until very late times. Even Augustus, who regulated unconsented sexual relations or contrary to moral order through various laws[22] does not seem to have referred specifically to consented abduction.

In particular, the *Leges Iuliae de vi publica et privata*[23] would include the case of abduction, but without specifying the possible consent of the victim, according to the institutions of Marcian reproduced in the Digest:

D.48,6,5,2 (Marcian. 14 inst.)

Qui vacantem mulierem rapuit vel nuptam, ultimo supplicio punitur et, si pater iniuriam suam precibus exoratus remiserit, tamen extraneus sine quinquennii praescriptione reum postulare postulare poterit, cum raptus crimen legis Iuliae de adulteris potestatem excedit

He who abducts an unmarried or married woman is punished with capital punishment, and if the father had pardoned his wrong by supplication, yet a stranger can reclaim the culprit without the prescription of five years; for the offence of abduction exceeds the power of the law of Julia against adulterers.

The transcribed text does not mention the consent of the abductee. It could be interpreted that this was legally irrelevant, i.e., that the protected legal right was the paternal (or marital, as the case may be) authority and that therefore it mattered

[13] Although the cliché describes the male abductor, it is not impossible to find references in mythology to abductions perpetrated by women, as in the case of Eos, the Titan goddess of dawn, who abducted Orion, Cleitus, Cephalus and Titonius. Homosexual abductions are also mentioned, such as that of Chrysippus by Laius and that of Hyllas by Hercules.

[14] HESIOD, *Theogony,* 912.

[15] TITUS LIVIUS, *AUC,* 9-11.

[16] AVILA, A., El mito de Hylas y la tradición épica en la literatura latina, Una hipótesis de lectura de Juvenal I.162-7. *VII Jornadas de Estudios Clásicos y Medievales, 7-9 October 2015*, Ensenada, 2015, pp. 1-11.

[17] This possibility of abduction with the woman's consent is one of the elements that separate it from rape, since rape is an act that is always conducted by force and without the woman's consent. Vid., Rodríguez Ortiz, Victoria, *Historia de la violación. Su regulación jurídica hasta fines de la edad media*, (Madrid, 1997), pp. 126 et seq.

[18] THONISSEN, J. J., *Etudes sur L'histoire du Droit Criminel Des Peuples Anciens, Inde Brahmanique, Egypte, Judée*, vol. II, Paris, 1869, p. 202.

[19] Exodus 21.16, 22.15 and 22. 16. In this regulation, anyone who abducts a person is condemned to death, but if the victim is unmarried, he can escape the penalty by marrying her and paying the dowry.

[20] Deuteronomy 22.28-29 and 24. 7.

[21] QUESADA MOLINA, YM, *El delito de rapto en la Historia del Derecho castellano*, Madrid, 2017, p. 53.

[22] Lex Iulia de Maritandis Ordinibus, 18 BC, and the leges Iulia de Adulteriis Coercendis, de Iudiciis Privatis and de iudiciis publicis, 17 Bc. On these laws in general, see GIRARD, PF, Les leges Iuliae iudiciorum publicorum et privatorum, *ZSS*, vol 34, 1923; QUERZOLI, S, La puella rapta, paradigmi retorici e apprendimento del diritto nelle Istituzioni di Elio Marciano, *Annali Online Lettere*, vol. 2, n. 1, 2011, p. 157, p. 157, notes on the origin of the leges Iuliae iudiciorum publicorum et privatorum, *ZSS*, vol. 34, 1923, p. 157, points out the origin of the regulation of abduction, "It is *possible that at the origin of the treatment of the abduction of a woman - according to rules that are constantly repeated in the sources of the law, at least until the second century AD - there were normative provisions in the law of* abduction, which are not always in use, and that the law of abduction is not always in use. *were normative provisions of Greek law, but unfortunately, not all of them can be safely enforced. In Attic legislation, there remain traces of a rule that required the rapist to marry the woman who had been raped if she refused to pay the expected amendment*".

[23] Also from 17 Bc.

little whether the abductee consented or not; it could also be thought that in the description of the criminalised conduct, the lack of consent of the abductee is implicit and therefore that our consensual abduction was alien to this crime, but it seems to us a less coherent interpretation with the context. On the other hand, it is surprising that the agreement with the father (which would probably occur in the event of marriage) does not exclude the possibility of a third party denouncing even without being subject to the five-year limitation period.

Amunátegui[24] suggests that the acquisition of the *manus* by *usus* of one year could derive from a very ancient marriage by abduction that would have existed in the period before the Law of the XII Tables and that would remedy the abduction of the bride with the subsequent nuptials, but we do not know why such a regulation could have disappeared from the sources we know.

In this context, we can assume that custom coined a legal regime in which the *pater familias* of the abducted daughter could claim the abductor for the act unless an agreement satisfactory to all parties was reached, which would often include the conclusion of a marriage bond.

However, the Emperor Constantine[25] would break with this custom, punishing consensual abduction very harshly and preventing the father from reaching a nuptial agreement as a way of solving the abduction, as we will see in the following text from the Theodosian Code.

Th. 9,24,1 [=brev. 9,19,1].

Imp. Constantinus a. ad populum.

pr. Si quis nihil cum parentibus puellae ante depectus invitam eam rapuerit vel volentem abduxerit, patrocinium ex eius responsione sperans, quam propter vitium levitatis et sexus mobilitatem atque consilii a postulationibus et testimoniis omnibusque rebus iudiciariis antiqui penitus arcuerunt, nihil ei secundum ius vetus prosit puellae responsio, sed ipsa puella potius societate criminis obligetur.

1. Et quoniam parentum saepe custodiae nutricum fabulis et pravis suasionibus deluduntur, his primum, quarum detestabile ministerium fuisse arguitur redemptique* discursus, poena immineat, ut eis meatus oris et faucium, qui nefaria hortamenta protulerit, liquentis plumbi ingestione claudatur.

2. Et si voluntatis assensio detegitur in virgine, eadem, qua raptor, severitate plectatur, quum neque his impunitas praestanda sit, quae rapiuntur invitae, quum et domi se usque ad coniunctionis diem servare potuerint et, si fores raptoris frangerentur audacia, vicinorum opem clamoribus quaerere seque omnibus tueri conatibus. sed his poenam leviorem imponimus solamque eis parentum negari successionem praecipimus.

3. Raptor autem indubitate convictus si appellare voluerit, minime audiatur.

4. Si quis quis vero servus raptus raptus facinus dissimulatione praeteritum aut pactione transmissum detulerit in publicum, Latinitate donetur, aut, si Latinus sit, civis fiat Romanus, parentibus, quorum maxime vindicta interat, si patientiam praebuerint ac dolorem compresserint, deportatione plectendis.

5. Participes etiam et ministros raptoris citra discretionem sexus eadem poena praecipimus subiugari, et si quis inter haec ministeria servilis condicionis* fuerit deprehensus, citra sexus discretionem eum concremari iubemus.

Dat. kal. april. Aquileia, Constantine a. VI. et Constantine CJ. coss.

Interpretatio. Si cum parentibus puellae nihil quisquam ante definiat, ut eam suo debeat coniugio sociare, et eam vel invitam rapuerit vel volentem, si raptori puella consentiat, pariter puniantur. Si quis quis vero ex amicis aut familia aut fortasse nutrices puellae consilium raptus dederint aut opportunitatem praebuerint rapiendi, liquefactum plumbum in ore et in faucibus suscipiant, ut merito illa pars corporis concludatur, de qua hortamenta sceleris ministrata noscuntur. Illae vero, quae rapiuntur invitae, quae non vocibus suis de raptore clamaverint, ut vicinorum vel parentum solatio adiutae liberari possent, parentum suorum eis successio denegetur. Raptori convicto appellare non liceat, sed statim inter ipsa discussionis initia a iudice puniatur. Quod si fortasse raptor cum parentibus puellae paciscatur, et raptus ultio parentum silentio fuerit praetermissa, si servus ista detulerit, Latinam percipiat libertatem, si Latinus fuerit, civis fiat Romanus. Parentes vero, qui raptori in ea parte consenserint, exsilio deputentur. Qui vero raptori solatia praebuerint, sive viri sive feminae sint, ignibus concrementur.

If anyone, without prior agreement with the parents of the girl, should abduct her, either against her will, or with her consent, believing the answer of one who, because of her weak nature and fickle character peculiar to her sex, our ancestors excluded her from judicial affairs and from giving evidence, to be sufficient, let not the answer of the girl, under the ancient law, be protected, but rather let her be guilty of participation in the crime. And as the custody of the parents is often circumvented by the evil teachings and counsels of the nurses, whose odious influence on the young girl is proved, let the punishment fall on them first of all, that their mouth and throat from which evil counsels came to be closed by the ingestion of liquid lead. ***If it is found that there was consent on the part of the girl, let her receive the same punishment as her abductor****; and if she was abducted without her will, let her also not go unpunished, for she could have remained in her house until the wedding day. If the abductor had dared to break down the door, she could have cried out for help and defended herself with all her might. In this case, however, we impose a lighter punishment, and that is that she is only deprived of the legal succession of her parents. As for the convicted abductor, he shall be denied the right of appeal. And if the slave shall give public notice that the crime has not been denounced by the parents of the girl either through negligence or through an understanding between them and the abductor, let him be rewarded with the Latin right, and if he is a Latin, with Roman citizenship.* ***If the parents, to whom vengeance was especially due, have***

[24] AMUNATEGUI PERELLÓ, C, El origen de los poderes del „paterfamilias“, II El „Paterfamilias“ y la „manus“ in *REHJ,* vol. 29, 2007, pp. 58.

[25] Some authors suggest the possibility that this regulation does not belong to Constantine but to Constantius. Vid. FERNÁNDEZ UBIÑA, J., Privilegios episcopales y genealogía de la intolerancia cristiana en época de Constantino. In *PYRENAE*, vol. 40, n. 1, 2009, p. 90.

borne their grief with resignation, they shall be punished with exile*; the same punishment shall be inflicted on the accomplices*[26] *and companions of the abductor, without distinction of sex. If there are any slaves among them, they shall be, without distinction of sex, sent to the stake.*[27]

The doctrine has discussed with perplexity the reasons for this violent reaction that the emperor establishes not only against the one who violently abducts a woman but also against the one who consents to the act.[28] The first impression would lead us to think that Constantine intended to reinforce the power of the *pater familias* and to strengthen the daughter's submission to parental authority.

Bernard Segarra[29] points that this constitution is one more in the group of provisions enacted by Constantine aimed at the family and social spheres, to adapt them to the emperor's conception, and in which we can already see some ideas whose origin is to be found in the Christian ideology. In the same sense, reinforcing Constantine's eagerness to impose his conception of the family and marriage on Roman society, Lázaro Guillamón points out that the emperor prohibited concubinage, until then common in Rome, as is stated in CJ.5.26.1.[30]

CJ. 5,26,1

Imperator Constantinus A. ad populum. Nemini licentia concedatur constante matrimonio concubinam penes se habere

No one shall be allowed to have a concubine in a constant marriage.

However, the issue is more complex. On the one hand, Emperor Constantine himself issued rules restricting the power of the *pater familias* over descendants:

CJ. 8,46,10

Imperator Constantinus. Libertati a maioribus tantum impensum est, ut patribus, quibus ius vitae in liberos necisque potestas olim erat permissa, eripere libertatem non liceret. * CONST. A. AD MAXIMUM PU. *<A 323 D. XV K. IUN. THESSALONICAE SEVERO ET RUFINO CONSS.>

The Emperor CONSTANTINUS, Augustus, to Maximus, Prefect of the City -- So much was looked upon by the predecessors in favour of liberty, that it is not lawful for parents, who once had been allowed over their children the right of life and the power of death, to take away their liberty.

However, a different interpretation is possible. Pastor de Arozena,[31] after an exhaustive analysis of the language used in the constitution, which he compares with other later provisions (especially those of Theodosius) concludes that the rule was especially intended to proscribe marriages between Christians and Jews. In this sense, Fernández Ubiña[32] cites a law attributed to Constantine, but which could also have been issued by Constantius (CTh, 16, 8, 6, from 329 or 339), in which Jews are forbidden to unite with Christian women, and the latter are warned that if in the future they adhere to Jewish infamies (*flagitiis*) they will be condemned to death. It is certainly difficult to venture the deeper reasons for legislation whose practical application we may suspect.

Emperor Constantius reiterates the prohibition of validating abduction by the consent of the victim, although, according to the *interpretatio*, this could refer only to consecrated virgins.

Th. 9,25,1 [=brev. 9,20,1].

Imp. Constantius a. ad Orfitum…

Eadem utrumque raptorem severitas feriat, nec sit ulla discretio inter eum, qui pudorem virginum sacrosanctarum et castimoniam viduae labefactare scelerosa raptus acerbitate detegitur. Nec ullus sibi ex posteriore consensu valeat raptae blandiri.

Dat. XI. kal. sept. Constantio a. VII. et Constante CJ. coss.

Let the same severity strike the abductors, and let there be no discrimination between those who are exposed by the bitterness of a criminal abduction to undermine the modesty of the sacred virgins and the chastity of a widow. No one should be flattered to be abducted by subsequent consent.

Interpretatio. Quicumque* vel sacratam deo virginem vel *viduam* fortasse rapuerit, si postea eis de coniunctione convenerit, pariter puniantur.

Whosoever shall have abducted a virgin consecrated to God, or a widow, if he has afterwards consented with them to the union, shall be equally punished.

With regard, however, to the specific regulation of the abduction of consecrated widows, Wilkinson warns of the possible corruption of the texts, stating that the canonical and legal recognition of the widow's vow only begins to emerge in the 5th century.[33]

Thus, everything seems to point in the direction, according to Muñiz Pérez,[34] of the elevation of marriage to a sacrament

[26] PULIATTI, S., La dichotomía vir-mulier e la disciplina del ratto nelle fonti legislative tardoimperiali. In: *SDHI,* vol. 61, 1995, p. 473.

[27] Trad. NUÑEZ PAZ, MI, Agresiones sexuales en las fuentes jurídicas romanas. Violencia como arquetipo de la identidad femenina. In: FERNÁNDEZ TERUELO, J. G., FONSECA FORTES-FURTADO, R. H., *Violencia de género, retos pendientes y nuevos desafíos,* Cizur Menor, 2021, p. 15.

[28] EVANS-GRUBBS, J., Abduction Marriage in Antiquity, A law of Constantine (CJ. Th. 9. 24. 1) and its social context, *JRS*, vol. 79, 1989, 59-83. ARJAVA, A., *Women and Law in Late Antiquity*, Oxford, 1996.

[29] BERNARD SEGARRA, L., La posición jurídica de la mujer con relación a los delitos de rapto, estupro, violación y adulterio en el edicto de Teodorico, *Anuario da Facultade de Dereito da Universidade da Coruña*, vol. 22, 2018, pp. 21

[30] LÁZARO GUILLAMÓN, C., La monogamia como fundamento de las estructuras conyugales en los sistemas jurídicos occidentales, un aporte romanístico. In: *RIDROM,* vol. 28, 2022, p. 336.

[31] PASTOR DE AROZENA, B., Retórica imperial, el rapto en la legislación de Constantino. In: *Faventia* vol. 20, n. 1, 1998, p. 79.

[32] FERNÁNDEZ UBIÑA J, Privilegios episcopales y genealogía de la intolerancia cristiana en época de Constantino. In: *PYRENAE,* vol. 40, 2009, p. 90.

[33] WILKINSON K. W., Dedicated Widows in Codex Theodosianus 9.25? In: *Journal of Early Christian Studies,* vol. 20, n. 1, 2012, pp. 141-166.

[34] MUÑIZ PÉREZ, JC, *Los conceptos jurídico-políticos en la obra de San Agustín, problemas de creación teológica y jurídica,* Doctoral tesis, Murcia, 2015, p. 369 ff. URI, http://hdl.handle.net/10201/47796

as a reflection of the union of Christ and the Church and which determines multiple elements of marriage in the Church such as its indissolubility, monogamy, consent or the reference to marriage tablets. Theological elements that determine the juridical configuration of marriage and its contours[35] and that will determine the development of other juridical institutes in the future.[36]

Constantine's crude law in Th. 9.24.1 is not reiterated in the constitutions of Justinian's code. However, we find concordance in a fragment in which freedom is granted as a reward to the slave who denounces the abduction of a *forgotten or covenanted* virgin.

CJ. 7,13,3

Imperator Constantinus. Si quis quis servus servus raptus virginis facinus dissimulatione praeteritum aut pactione transmissum detulerit in publicum, libertate donetur. * CONST. A. AD POP. *<A 320 D. PRID. K. APRIL. AQUILEIA CONSTANTINO CJ. CONSS.>

If any slave has publicly denounced the crime of abduction of a virgin, forgotten or sent away by covenant, his freedom shall be given to him.

It is possible that this rule, complementary to that contained in the Theodosian code, is intended to make effective a prohibition (that of consensual abduction) which would be very difficult to enforce since if the bride and groom and the parents agree with the marriage following the abduction, no one will report the act, and if they are not, the report would carry its penalty. On the other hand, this provision encourages the slave to report the agreement to obtain freedom, thus establishing a possibility of prosecution.

Subsequently, a constitution of the emperors Valentinian I, Valens and Gratian in 374, established five years (already established by Augustus) for anyone to file a complaint for abduction. As a result, once the aforementioned period had elapsed, the offence was time-barred and the marriage celebrated as a result of the abduction was validated.

CTh 9,24,3. Imppp. Valens, Gratianus et Valentinianus aaa. ad Maximinum pf. p. Qui coniugium raptus scelere contractum voluerit accusare, sive propriae familiae dedecus eum moverit seu commune odium delictorum, inter ipsa statim exordia insignem recenti flagitio vexet audaciam. Sed si quo quo casu quis vel accusationem differat vel reatum, et opprimi e vestigio atrociter commissa nequiverint, ad persecutionem criminis ex die sceleris admissi quinquennii tribuimus facultatem. quo sine metu interpellationis et complemento accusationis exacto, nulli deinceps copia patebit arguendi, nec de coniugio aut sobole disputandi. Dat. XVIII. kal. deCJ. Gratiano a. III. et Equitio coss.

Whoever wishes to accuse the abducted spouse of the crime committed, whether moved by the dishonour of his own family or by the common hatred of the wrongdoers, among the same beginnings, will have a remarkable audacity with a recent crime. But if by chance anyone postpones the accusation or guilt, and is not suppressed from the track of those committed, we grant the possibility of five years for the prosecution of the offence from the date of the admission of guilt. So that, without fear of being interrupted, and the exact accusation completed, there will be no room for anyone to accuse, nor to argue about the spouse or the child.

For his part, the Ostrogothic King Theodoric (if we follow the traditional attribution of his authorship), included the prohibition of abduction in the *Lex Romana Ostrogothorum* following the tradition of Constantine, especially in the harshness of the penalties, but included some modifications typical of his time, such as the intervention of colonists in the abduction.[37]

17. De raptore ingenuae mulieris aut virginis.

Raptorem ingenuae mulieris aut virginis, cum suis complicibus vel ministris, rebus probatis iuxta legem iubemus extingui, et si consenserit rapta raptori, pariter occidatur.

We command that the abductor of an ingenuous woman or a virgin, together with his accomplices or servants, be put to death according to the facts proved according to law, and if the abductee consents to the abduction, that she also be put to death.

20. De raptu intra quae tempora concludatur.

Raptum intra quinquennium liceat omnibus accusare, post quinquennium vero nullus de hoc crimine faciat quaestionem, etiam si intra intra supra scriptum tempus egisse aliquid de legibus doceatur, maxime cum et filii de hoc matrimonio suscepti exacto quinquennio legitimorum et iure et privilegio muniantur.

Within five years everyone is allowed to accuse the abductor, but after five years no one can enquire this crime, because about this time the laws teach us something, that the children abducted from this marriage are protected by legitimate rights and privileges for exactly five years.

The emperor Justinian accepts the Constantinian regulation and reproduces it, clarifying why, in his opinion, the consent of the abductee should not be considered, making a marriage with the abductor impossible, *quia hoc ipsum velle mulieri ab insidiis nequissimi hominis qui meditatur rapinam inducitur. Nisi etenim eam sollicitaverit, nisi odiosis artibus circumvenerit, non facit eam velle in tantum dedecus sese prodere*

CJ. 9,13,1

Imperator Justinianus. Raptores virginum honestarum vel ingenuarum, sive iam desponsatae fuerint sive non, vel quarumlibet viduarum feminarum, licet libertinae vel servae alienae sint, pessima criminum peccantes capitis supplicio plectendos decernimus, et maxime si deo fuerint virgines vel viduae dedicatae (quod non solum ad iniuriam hominum, sed ad ipsius omnipotentis dei inreverentiam committitur,

[35] MUÑIZ PÉREZ, JC "Islamic and Christian Theology in Legal Hermeneutics, In search of a Theology of Law". In: MASUD, MH, JALLOUL MURO, H. (eds). *Sharia Law in the Twenty-Fist Century*, London, 2022.

[36] MUÑIZ PÉREZ, JC., *El trust, Herramienta de elusión fiscal internacional*, Cizur Menor, 2022.

[37] BERNARD SEGARRA, L, *op. cit.*, pp. 50.

maxime cum virginitas vel castitas corrupta restitui non potest), et merito mortis damnantur supplicio, cum nec ab homicidii crimine huiusmodi raptores sint vacui.
1. Ne igitur sine vindicta talis crescat insania, sancimus per hanc generalem constitutionem, ut hi, qui huiusmodi crimen commiserint et qui eis auxilium tempore invasionis praebuerint, ubi inventi fuerint in ipsa rapina et adhuc flagrante crimine comprehensi a parentibus virginum vel viduarum vel ingenuarum vel quarumlibet feminarum aut earum consanguineis aut tutoribus vel curatoribus vel patronis vel dominis, convicti interficiantur.
1a. Quae multo magis contra eos obtinere sancimus, qui nuptas mulieres ausi sunt rapere, quia duplici crimine tenentur tam adulterii quam rapinae et oportet acerbius adulterii crimen ex hac adiectione puniri.
1b. Quibus connumerabimus etiam eum, qui saltem sponsam suam per vim rapere ausus fuerit.
1c. Sin autem post commissum tam detestabile crimen aut potentatu raptor se defendere aut fuga evadere potuerit, in hac quidem regia urbe tam viri excelsi praefecti praetorio quam vir gloriosissimus praefectus urbis, in provinciis autem tam viri eminentissimi praefecti praetorio per Illyricum et Africam quam magistri militum per diversas nostri orbis regiones nec non viri spectabiles praefectus Aegypti vel comes Orientis et vicarii et proconsules et nihilo minus omnes viri spectabiles duces et viri clarissimi rectores provinciarum nec non non alii cuiuslibet ordinis iudices, qui in locis inventi fuerint, simile studium cum magna sollicitudine adhibeant, ut eos possint comprehendere et comprehensos in tali crimine post legitimas et iuri cognitas probationes sine fori praescriptione durissimis poenis adficiant et mortis condemnent supplicio.
1d. Quibus et, si appellare voluerint, nullam damus licentiam secundum antiquae constantinianae legis definitionem.
1e. Et si quidem ancillae vel libertinae sint quae rapinam passae sunt, raptores tantummodo supra dicta poena plectentur, substantiis eorum nullam deminutionem passuris.
1f. Sin autem in ingenuam personam tale facinus perpetretur, etiam omnes res mobiles seu immobiles et se moventes tam raptorum quam etiam eorum, qui eis auxilium praebuerint, ad dominium raptarum mulierum liberarum transferantur providentia iudicum et cura parentum earum vel maritorum vel tutorum seu curatorum.
1g. Et si non nuptae mulieres alii cuilibet praeter raptorem legitime coniungentur, in dotem liberarum mulierum easdem res vel quantas ex his voluerint procedere, sive maritum nolentes accipere in sua pudicitia remanere voluerint, pleno dominio eis sancimus applicari, nemine iudice vel alia quacumque persona haec audente contemnere.
2. Nec sit facultas raptae virgini vel viduae vel cuilibet mulieri raptorem suum sibi maritum exposcere, sed cui parentes voluerint excepto raptore, eam legitimo copulent matrimonio, quoniam nullo modo nullo tempore datur a nostra serenitate licentia eis consentire, qui hostili more in nostra re publica matrimonium student sibi coniungere. Oportet etenim, ut, quicumque uxorem ducere voluerit sive ingenuam sive libertinam, secundum nostras leges et antiquam consuetudinem parentes vel alios quos decet petat et cum eorum voluntate fiat legitium coniugium
3. Poenas autem quas praediximus, id est mortis et bonorum amissionis, non tantum adversus raptores, sed etiam contra eos qui hos comitati in ipsa invasione et rapina fuerint constituimus.
3a. Ceteros autem omnes, qui conscii et ministri huiusmodi criminis reperti et convicti fuerint vel eos susceperint vel quacumque opem eis intulerint, sive masculi sive feminae sunt, cuiuscumque condicionis vel gradus vel dignitatis, poenae tantummodo capitali subicimus, ut huic poenae omnes subiaceant, sive volentibus sive nolentibus virginibus seu aliis mulieribus tale facinus fuerit perpetratum.
3b. Si enim ipsi raptores metu atrocitatis poenae ab huiusmodi facinore temptaverint se, nulli mulieri sive volenti sive nolenti peccandi locus relinquetur, quia hoc ipsum velle mulieri ab insidiis nequissimi hominis qui meditatur rapinam inducitur. Nisi etenim eam sollicitaverit, nisi odiosis artibus circumvenerit, non facit eam velle in tantum dedecus sese prodere
3c. Parentibus, quorum maxime vindicta intererat, si patientiam praebuerint ac dolorem remiserint, deportatione plectendis.
4. Et si quis inter haec ministeria servilis condicionis fuerit deprehensus, citra sexus discretionem eum concremari iubemus, cum hoc etiam Constantiniana lege recte fuerat prospectum.
5. Omnibus legis Iuliae capitulis, quae de raptu virginum vel viduarum seu sanctimonialium sive antiquis legum libris sive in sacris constitutionibus posita sunt, de cetero abolitis, ut haec tantummodo lex in hoc capite pro omnibus sufficiat.
6. Quae de sanctimonialibus etiam virginibus et viduis locum habere sancimus. * IUST. A. HERMOGENI MAG. OFF. *<A 533 D.XV K.DECJ.CONSTANTINOPOLI DN.IUSTINIANO PP.A.III CONS.

We decree that for committing the most grievous crimes, the abductors of honest or ingenuous virgins, whether they have been previously married or not, or of any widowed women, even if they are freedwomen or slaves of others, are to be condemned to the last penalty; And a fortiori if they have been virgins or widows consecrated to God (which is not only committed to the injury of men, but also in irreverence to the omnipotent God himself, especially since virginity or chastity cannot be restored when defiled), and they are rightly condemned to the death penalty, since not even from the crime of murder are such abductors exempt. Therefore, that such insanity may not grow without punishment, We order by this general constitution, that those who have committed such a crime, and those who have aided them at the time of the invasion, shall be put to death, being convicted, as soon as they have been found in the same abduction and caught in flagrante delicto, by the parents of the virgins, or of the ingenuous, or the widows, or any women, or by their consanguine, or guardians, or curators, or patrons, or masters. Which much more reason We order to govern against those who have dared to steal married women, because they are subject to a double crime, that of adultery as well as that of abduction, and it is fitting that by this addition the crime of adultery should be more severely punished. Among these, we also count him who would at least have dared to

steal by force from his wife. But if, after committing such a detestable crime, the abductor has been able either to defend himself by his power or to escape by flight, let the same effort be made with great solicitude in this royal city, both the most eminent male prefects of the praetorium and the most glorious male prefect of the city, and in the provinces, both the most eminent male prefects of the praetorium of Illyria and Africa, and the military masters of the various regions of our orb, and also the respectable male prefect of Egypt, and the Count of the East, and the vicars, and the proconsuls, and all the respectable male dukes, and the most eminent male governors of the provinces, and the other judges of any order that may be found in those places, so that they may seize them, and subject those imprisoned for such a crime, without exception of jurisdiction, to the most severe penalties after the legitimate trials recognised by law, and condemn them to the torture of death. To whom, even if they had wished to appeal, We do not give them any permission to do so, according to the provision of the ancient law of Constantine.

1. And if the free slaves who have been abducted are indeed free slaves, the abductors shall be punished only with the aforesaid penalty and shall not suffer any diminution of their property. But if such a crime is perpetrated on a naive person, all the movable or immovable property of the abductors, as well as that of those who have assisted them, shall be transferred to the dominion of the stolen free women, by order of the judges and by the care of their parents, or their husbands, or of their guardians or curators. And if unmarried women should be lawfully united by anyone else, except the abductor, let the same property, or as much of it as they wish, go in dowry to the free women, and if, not wishing to accept a husband, they prefer to remain in their chastity, We order that it be awarded to them in full dominion, without any judge or any other person daring to disregard this.

2. and let not the abducted virgin, or the widow, or any other woman, have the power to ask her abductor for her husband, but let her parents join her in lawful wedlock to whom they will, except the abductor, because in no way and at no time is a licence given by our serenity to give consent to those in our republic who endeavour to be joined in marriage by hostile means. For it is expedient that whosoever would take a wife, whether naive or free, should, according to our laws and ancient custom, apply to the parents, or to those to whom it is due, and that with their consent the lawful union should be made.

3. Moreover, the penalties which we have said above, that is, death and forfeiture of property, we establish not only against the abductors but also against those who have accompanied them in the invasion itself and the abduction. But to all others, who have been found accomplices and assistants in such a crime, and have been convicted, or who have harboured them, or have given them any assistance, whether male or female, of whatever rank or rank or dignity, We subject them only to capital punishment, so that all are subject to this penalty, whether such a crime has been perpetrated willingly or unwillingly, whether the virgins or the other women. For if the abductors themselves refrain from such a crime for fear of the atrocity of the penalty, no woman, whether willing or unwilling, shall be left an occasion to sin, because this very thing, the willingness of the woman, is inspired by the wiles of the most wicked man, who meditates the abduction. For if he had not solicited her, if he had not deceived her with hateful arts, he would not make her want to give herself up to so much dishonour. The parents, who were chiefly interested in revenge, should be punished with deportation, if they had been patient, and had soothed her grief.

4. But if any of these auxiliaries should be slaves, We command that they be burned without distinction of sex, for this also had been rightly provided for in the law of Constantine. All the chapters of the Julian law concerning the abduction of virgins or widows or nuns, which were included either in the ancient law books or in the sacred constitutions, are henceforth abolished so that this law alone shall be sufficient for all in this chapter, for We order that it shall apply to nuns as well as to virgins and widows.

Given at Constantinople on the fifteenth of the Kalends of December, under the third Consulate of Justinian, Perpetual Augustus. [533]

3.2 Consensual abduction in the Middle Ages

The *Liber Iudiciorum* in 3,3,1 contains the same prohibition of marriage with the abductor, including the loss of all property in favour of the victim and the reduction of the abductor to the status of a servant of the parents or the abducted woman herself.

Liber 3,3,1

Si ingenuus ingenuam rapiat mullierem, licet illa virginitatem perdat, ste tamen illi coniungi non valeat. Si quis ingenuus rapuerit virginem vel viduam, si, antequam integritatem virginitatis aut castitatis amittat, puella vel vidua potuerit a raptore revocari, medietatem rerum suarum ille, qui rapuit, perdat, ei, quam rapuerit, consignandam. **Si vero ad inmunditiam, quam voluerit, raptor potuerit pervenire, in coniugium puelle vel vidue mulieris, quam rapuerat, per nullam conpositionem iungantur** sed omnibus traditis ei, cui violentus fiiit, et CC insuper in conspectu omnium publice hictus accipiat flagellorum et careat ingenuitatis sue statum, parentibus eiusdem, cui violentus extiterat, aut ipsi virgini vel vidue, quam rapuerat, in perpetuum serviturus.

If a man abducts an unmarried girl (virginem) or a widow (viduam), if they can be rescued from abduction before they have lost their virginity or chastity (virginitatis aut castitatis), he who has committed the abduction loses half of his property, which is assigned to the person who was abducted. ***But if the abductor can consummate the dishonesty (immunditiam) which he pursued, he shall not, using any indemnity (nullam compositionem), marry (iungatur) that girl (puella) or that widow,*** *but shall be given with all his goods to that person whom he violated (violenter fuit) and who, in addition, shall receive in public two hundred hundred and fifty dollars (**nullam compositionem**), and to receive two hundred lashes in public before all, to lose his status as a free man (ingenuitatis sue statum), and to be forever under the servitude (serviturus) of the parents of the one he raped or of the same girl or widow whom he abducted; so that he can never again unite (coniugium) with her whom he abducted.*

As can be deduced from the text highlighted in bold, the prohibition on redeeming the crime by marriage is limited to the case in which the rapist has consummated the rape. *A sensu contrario*, therefore, it would be possible to make a compromise if the rape had not taken place. This is probably why, after a lengthy regulation of abduction that goes beyond the scope

of this work, the text ends up admitting the possibility of an agreement between the abductor and the victim's parents to compensate, through marriage, for the dishonour:

Liber Iudiciorum 3,3,7
Raptorem virginis vel vidue infra XXX annos omnino liceat accusare 4 Quod si cum puclle parentibus sive cum eadem puella vel vidua de nuptiis fortasse convenerit, 20 inter se agendi licentiam negari non poterit. Transactis autem XXX annis, omnis accusatio sopita manebit.
The abductor of an unmarried girl (virginis) or of a widow can be fully charged within thirty years[38]*. But if he makes an agreement with the girl's parents or with the girl herself or with the widow to marry (de nupciis) her, they cannot be refused permission (licentiam) to deal with each other. However, after thirty years have elapsed, any accusation shall be without effect (accusatio sopita).*

The Wise King, in the Partidas, sanctions the possibility of the abductor marrying his victim, thus excluding the penalty of death and loss of property imposed on the aggressor (unless the woman was already married or religious).

Partidas IV,20,3
Ley 3, Raptando algún hombre mujer virgen o viuda de buena fama o casada o religiosa, o yaciendo con alguna de ellas por fuerza, si le fuere probado en juicio, debe morir por ello, y además deben ser todos sus bienes de la mujer que así hubiere robado o forzado, **fuera de si después de eso ella casase de su grado con aquel que la forzó o robó, no habiendo otro marido;** y entonces la mujer forzada, si ellos no consintieron en la fuerza ni en el casamiento; y si probado les fuere que habían consentido en ello, entonces los bienes del forzador deben ser del padre y de la madre de la mujer forzada, si ellos no consintieron en la fuerza ni en el casamiento; y si probado les fuere que habían consentido en ello, entonces deben ser todos los bienes del forzador de la cámara del rey; pero de estos bienes deben ser sacadas las arras y las dotes de la mujer del que hizo la fuerza y otrosí las deudas que había hecho hasta aquel día en que fue dado el juicio contra él. Y si la mujer que así hubiese forzado o robado fuese monja o religiosa, entonces todos los bienes del forzador deben ser del monasterio de donde la sacó.

The Partidas, with the didactic and exemplary tone that characterises Alfonso X, explains the legal right protected by the crime of abduction, especially in the variety of consensual abduction that we are analysing here:

Partidas IV,20,1
Ley 1, Forzar o robar mujer virgen, casada o religioso o viuda que viva honestamente en su casa, es yerro y maldad muy grande; y esto es por dos razones, la primera es porque la fuerza es hecha contra personas que viven honestamente a servicio de Dios y por bienestar del mundo; la otra es que **hacen muy gran deshonra a los parientes de la mujer forzada**, y además hacen muy gran atrevimiento contra el señorío, forzándola en menosprecio del señor de la tierra donde es hecho.

In the words of the Wise King, and following the regulation he establishes, inherited from previous sources, abduction is unlawful because of the force against free persons it contains, but, when it is consented to by the victim, it is still rejectable because of the violation of the father's right to decide on the daughter's nuptials. For this reason, the solution of marriage is possible when the abduction has been consented to and an agreement is reached with the relatives. This Alphonsine argumentation would coincide with the motivation that we suppose for the texts of Constantine and Justinian, although the latter denied the possibility of remission by marriage.

This development is probably due to social practice which, despite the very harsh legal prohibition, continued to practise consensual abduction and to agree on a marriage with the parents that would satisfy all parties and make recourse to the courts unnecessary. In such a case, despite the prohibition, if no one were dissatisfied, it would be unlikely that the crime could be prosecuted, unless some slave reported it to obtain freedom as a reward as prescribed by CJ.7.13.3 (vid. supra).

Although, as we have said, in Constantine's regulation we can think of the persecution of marriages between Christians and Jews, in the context of the Spanish Middle Ages the problem would arise, with great vehemence, in the case of marriages with Muslims, giving rise to many legends of Christian maidens abducted by Moors and vice versa, despite which (or precisely because of the frequency of the case) the regulation ended up admitting remission by marriage, which probably already occurred in the past and, as we shall see, was maintained until very recent times.

3.3 Modern legal regime

This practice of consensual abduction and subsequent nuptials, as we have already mentioned, has been maintained over time and continues almost to the present day. The legal mechanism, in recent times, in which consensual abduction operated is provided by the penal code of 1848:

Artículo 369
El rapto de una doncella menor de 23 años y mayor de 12, ejecutado con su anuencia, será castigado con la pena de prisión menor.

Artículo 371
No puede procederse por causa de estupro sino a instancia de la agraviada, o de su tutor, padres o abuelos[39] (…)

In all the cases of the present Article, the offender is released from the penalty by marrying the offended party, and the pro-

[38] Note how the limitation period, traditionally five years, has been extended here to thirty years.
[39] The crime of abduction, in contrast to the classical regulation, became a private crime that required the exercise of the action by the victim or his relatives to be prosecuted.

ceedings shall cease at any stage of the proceedings at which the offender marries her.

The regulation was maintained with slight differences in the Penal Codes of 1870 (Articles 461 and 463), 1928 (Articles 612 and 614), 1932 (Articles 442 and 443). The 1944 Penal Code maintained the legal concept of abduction with consent (Article 441), introducing an aggravated subtype for cases in which the woman was older than 12 and younger than 16, maintaining the possibility of remission by the forgiveness of the offended party, which is presumed in the case of marriage. This regulation was reiterated in the 1973 revised text, but was finally repealed with the entry into force of the 1995 Penal Code.[40]

Consensual abduction therefore consisted in the removal of the bride from the paternal home, with her consent, for sexual purposes. Once this had occurred, the bride had the (almost exclusive) power to initiate criminal proceedings against the groom, which would cease in the event of a marriage, which, in practice, served to force the groom to fulfil his promise of marriage.[41] This practice is very frequently reported in the 19th and 20th centuries.[42] When the bride's parents were against the marriage or when they did not have the necessary assets to celebrate the event, It was therefore in the interest of the spouses (and even their families) to use legal coercion of the marriage as a solution to the abduction.

One might ask, and this would take us much further away from the intention of this article, whether this mechanism by which the virginity of women in marriage is demanded and which ultimately legitimises abduction through the celebration of a marriage, is a whim of our ancestors born at the dawn of Western civilisation (Jewish world, Greece and Rome) and which remains throughout the centuries almost to the present day, extending across the width of the globe as a result of the expansion of Western civilisation.[43] In such a case, an anthropological study could be carried out to find out whether there are cultural alternatives to such a demand in the different civilisations. It is possible that the need for the woman to be a virgin at marriage, as well as the greater pressure on the wife to maintain chastity - to whom greater fidelity has been demanded over the centuries than to the man - is due not only to a consequence of the ancestral and universal patriarchy that has dominated male-female relations throughout history but also to the need to preserve the lineage of the father for inheritance purposes. The axiom *mater Semper certa est, pater est, quem nuptiae demonstrantant,*[44] in force until very recent times.[45]

4. Conclusions

In the ancient world, women's consent to marriage was strongly linked to paternal authority. Although the autonomy of the will of the contracting parties was probably strengthened over the centuries. This circumstance, together with the social necessity of the bride's virginity determined that -although it may seem paradoxical- the best solution in the case of the abduction of a nubile woman was a marriage between the abductor and the victim.

This probably led to a practice that has been very common in the West over the centuries and which has survived almost to the present day: consensual abduction. This means that the bride escapes from the paternal home together with the groom and of her own free will, thus forcing the *pater familias to* accept the marriage. Such an act constituted a crime in Spain until 1995 when the current penal code was approved. The configuration of this offence meant that it could only be prosecuted at the request of the victim or her relatives and that criminal liability was extinguished if the marriage took place, which was used by the bride and her family to demand that the abductor in love fulfil his promise of marriage.

Although abduction is very present in Greco-Roman mythology, we do not find a positive regulation until Augustus' *leges Iuliae de vi publica*, which, however, does not contemplate the case of consensual abduction that we are studying here. It was Constantine who, it seems, regulated this institution for the first time and, although it was frequent in his time, he punished the abductor and his accomplices, the bride who consented to the abduction and her parents, with a cruelty that attracted the attention of scholars, who offer different explanations.

Constantine's regulation on abduction would survive in subsequent legal systems, but the Liber Iudiciorum and above all the Partidas would introduce the possibility of the abductor redeeming his penalty by marrying the abductee, giving legal status to what we believe would be carried out, de facto, in practice, outside the legal prohibition.

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[40] The abduction of the bride was a popular institution in rural Spain in the 20th century and was more or less accepted by the society of the time. Vid. FRIGOLÉ REIXACH, J., Llevarse la novia y salirse con el novio, una interpretación antropológica. *Areas. Revista Internacional de Ciencias Sociales*, vol. 5, 1985, p. 51-67.

[41] It should be borne in mind that the current wording of Article 42 CC comes from 1981, *The promise of marriage does not produce an obligation to contract the marriage or to fulfil what has been stipulated in the event of its non-conclusion.*
An application for enforcement shall not be admissible.

[42] There are still those who say that the modern custom of the „honeymoon" suppress repetition is a reminder of the abduction of the bride in earlier times. Vid. LANGLE, E., *Should adultery constitute a crime?* Barcelona, 1922, p. 41.

[43] On the contrary, AMADOR BORRERO finds an institution of the bride „stealing" in the Nahua civilisation that responds, point by point, to our „consensual abduction". Vid. AMADOR BARRERO, M, *La migración interna en mujeres indígenas: un estudio cualitativo de la mujer náhuatl,* doctoral thesis, Sevilla, 2014, p. 109. https://rio.upo.es/xmlui/bitstream/handle/10433/1181/marina_amador_tesis.pdf

[44] D.2,4,5 (Paul. lib. IV ad Ed.)

[45] Vid. DUPLA MARÍN, MŞ T., El principio *mater semper certa est* "a debate" La nueva legislación sobre reproducción asistida y sus consecuencias. In: SÁNCHEZ, G. J, *Fundamentos romanísticos del derecho contemporáneo,* Madrid, 2022, pp. 883-894.

Legal Regulation of Elementary and Upper Elementary Schools during the Second Czecho-Slovak Republic and the Protectorate of Bohemia and Moravia*

*Tereza Kolumber***

Abstract

This paper offers an overview of the education law from 1760 s to late 1930s and then well-structured analysis of the legal framework for elementary and upper elementary (main) schools from 1938 to 1945, which is characterized by a focus on extensive secondary legislation, which is frequently not even of the Czech origin. The paper intends to illustrate the transformation of the school system from the era of the interwar democratic state through a local variation of fascism into a Nazi-occupied territory where education was mainly intended to serve the indoctrination of children and youth. The author of the paper combines the available laws and regulations with other sources to provide a comprehensive overview of this part of the Czech education system, which has so far been rather neglected in the academic world.

Keywords: *Education Law; Czechoslovakia; Protectorate Bohemia and Moravia; Elementary School; Upper Elementary school; Ministry of education; Kuratorium.*

1. Introduction

Education is a distinctive area mainly because its official regulation is usually neglected, as the State primarily focuses on didactics and constantly strives to reform the entire education system. The problem of this field is also the largely unclear legislation, which is related to the fact that during the monarchy, education was regulated not only at the national (imperial) level but also at the level of individual countries. This issue was also evident after the formation of Czechoslovakia, which wanted to consolidate several areas. However, the Second World War started before this could be achieved and further aggravated the already difficult situation. The communist government after 1948 was successful at simplification of the school system but focused on political indoctrination rather than legislation. Education as a means of influence on children was a concern of totalitarian authorities in authoritarian democracies even during the Nazi and Communist oppression.

This paper aims to reflect the development of elementary [1] and upper elementary schools [2] in the period from the Second Czechoslovak Republic to the end of the Protectorate and focuses on the changes made to elementary and upper elementary (main) schools. An indisputable basis for a better understanding of the matter is a concise introductory insight into the initial legislation (i.e. Austrian and interwar Czechoslovak legislation). A detailed description of the changes introduced by the Protectorate school system would be beyond the scope of this paper. These particular types of schools were selected as they were attended by a large number of children between the ages of six and fourteen, who were the most vulnerable group of students that could easily be indoctrinated due to their young age.

The text first discusses the general context and then focuses on the changes in teaching and the introduction of new subjects following the example of Nazi Germany. The next chapter describes the Nazi efforts to impede Czech students' education and teachers' new duties, including the German language examination. In terms of methodology, the text is based on textual analysis and descriptive, comparative and teleological methods.

As mentioned earlier, the extensive secondary legislation, which is often further developed and elaborated, is typical for education, making the substance of the issue largely complicated and unclear. Therefore, the aim of the present paper is not only to analyse a part of education that has not been given in-depth attention and has been only vaguely discussed but also to draw attention to the key secondary legislation used to modify

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[1] The term "*Elementary School*" means "*obecná škola*" in Czech (HOKEŠ, J., *Slovník česko-anglický*. Praha, 1946, p. 281.) and "*Volksschule*" in German (*Česko-německý slovník odborných výrazů z oboru veřejné správy*. Praha, 1940, p. 261.).

[2] The term "*Upper Elementary School*" means "*měšťanská škola*" in Czech (HOKEŠ, 1946, op. cit., p. 281.) and "*Bürgerschule*" in German (*Česko-německý slovník odborných výrazů z oboru veřejné správy*. Praha, 1940, p. 260.).

the school system taken over from Masaryk's democratic administration in the era of authoritarian democracy (the Second Republic) and Nazi terror (the Protectorate).

As a result of the adoption of the Enabling Constitutional Act in December 1938 (No. 330/1938 Sb. [Collection]),[3] secondary legislation became the primary means for regulation and the Parliament was merely a dysfunctional torso. Through the enabling constitutional act, the government gained the power to modify education according to its needs. Because of the dysfunctional nature of the Parliament, the focus of regulation from the end of 1938 onwards was therefore on secondary legislation, which was applied by German lawmakers after the establishment of the Protectorate.

Excerpts from the Czechoslovak and Protectorate government gazettes show that education was subject to several legal acts. Seventeen government regulations (out of 42 government regulations that addressed education in general) were devoted exclusively to the topic of this paper, i. e. elementary and upper elementary (main) schools, during the period of the unfreedom (30 September 1938[4] to 4 May 1945[5]). Fifteen of the seventeen government regulations were issued with reference to the enabling constitutional act, and two government regulations referred to other legislation.[6]

Considering the functioning of the legal system at the time, the fifteen government regulations were in essence statutory regulations (being a substitute under the enabling constitutional act, since the Parliament was de facto non-existent, and the Standing Committee was inactive). These regulations could not in themselves introduce significant changes in the educational system. The main vehicle for change was therefore secondary legislation, which, however, was not included in the Collection of Laws and Regulations, but in other government gazettes, notably the Gazette of the Ministry of Education [and National Enlightenment; *Věstník ministerstva školství (a národní osvěty)*]. The individual decrees contained therein were then applied in the real world, which was captured in the chronicles of the time. In this way, it was possible to present the social and legal climate change and provide a comprehensive overview of a portion of the education system that had been deformed by the totalitarian regime.

2. General background

2.1 The baseline of the legislation

It is possible to state that the beginnings of the modern regulation of education relate to the reign of Maria Theresa. She was interested in the elevation of education, which was seen as an area in which the state should take an active interest and have an influence.[7] For this reason, Maria Theresa established in June 1760 Court Academic and Book Censorship Commission (*Studien- und Büchercensur-Hofkommission*) to create the conditions for better education for young people.[8] Inspired by foreign approaches, the General School Code (*Allgemeine Schulordnung für die deutschen Normal-, Haupt- und Trivialschulen in sämmtlichen Kaiserl. Königl. Erbländern*) were adopted in December 1774.[9] It became the basis of the Austrian education for a century and helped to overcome the disunity and fragmentation of education typical of earlier periods. This so-called Theresian School Code recognized three types of schools. There were elementary/trivial schools in small villages, main schools in larger villages and normal/exemplary schools in the provincial capitals.[10] To implement the Theresian School Code, a provincial school commission was established in the provincial capitals under the provincial government. It took care of the establishment of new schools and administered the provincial school property. Further changes were made during the reign of Joseph II when it was made compulsory to establish a school if there were a certain number of children in the district and in 1785 a minimum remuneration for teachers was also introduced. The positive feature of the Theresian-Josephine reforms was the expansion of the school network, the negative feature was Germanisation.[11]

In 1805, a new School Code (*Politische Verfassung der Deutschen Schulen in den k. auch k.k. deutschen Erbstaaten* or *Schulkodex*) was adopted.[12] It denoted a return to the strong role of the church and negated the reformist tendencies contained in the Theresian School Code and the Josephine Amendments. Real schools were added to the trivial, main and normal schools. The revolutionary period of 1848 was associated with the creation of the Ministry of Education and Teaching (*Ministerium für Kultus und Unterricht*)[13] and, at the provincial level, the establishment of

[3] KOLUMBER, D., Česko-slovenský zmocňovací ústavní zákon. In: *Právo, ekonomie, management*, Vol. 3, No. 2, 2012, p. 7-13.

[4] Constitutional Decree of the President of the Republic No. 11/1944 Úř. věst. čsl. (Czechoslovak Legal Gazette), on the restoration of the rule of law,

[5] Government Regulation No. 31/1945 Sb. (Collection), establishing the end of the period of unfreedom in the field of regulations on the restoration of the rule of law.

[6] Government Regulations No. 167/1939 Sb., No. 176/1939 Sb., No. 260/1939 Sb., No. 271/1939 Sb., No. 284/1939 Sb., No. 87/1940 Sb., No. 103/1940 Sb., No. 242/1940 Sb., No. 257/1940 Sb., No. 394/1940 Sb., No. 71/1941 Sb., No. 222/1941 Sb., No. 300/1941 Sb., No. 358/1942 Sb. and No. 16/1944 Sb. were issued on the basis of the enabling constitutional act, while Government Regulation No. 9/1939 Sb. II [Collection II] was issued on the basis of Act No. 104/1926 Sb. z. a n. [Collection of Acts and Regulations] and Regulation No. 232/1940 Sb. on the basis of Act No. 226/1922 Sb. z. a n.

[7] KÁDNER, O., *Vývoj a dnešní soustava školství: Sv. 1*. Praha, 1929, p. 56-66.

[8] ELVERT, Ch., *Zur Oesterreichischen Verwaltungs-Geschichte, mit besonderer Rücksicht auf die böhmischen Länder*. Brünn, 1880, p. 625.

[9] PIRKHEIM, H., Die Entwicklung des mährischen Schulwesens unter Maria Theresia. In: *Zeitschrift des Vereines für die Geschichte Mährens und Schlesiens*, Vol. 21, No. 3-4, 1917, p. 369.

[10] PLACHT, O. – HAVELKA, F., *Příručka školské a osvětové správy*. Praha, 1934, p. 4.

[11] MORAVEC, F. V., Česká politika obecnoškolská. In: AUERHAN, J. – BĚLEHRÁDEK, F. – FOUSTKA, B. – TOBOLKA, V. (eds.), *Česká politika, Díl 5: Kulturní, zvláště školské úkoly české politiky*. Praha, 1913, p. 206.

[12] SKŘEJPKOVÁ, P., Příspěvek k dějinám práva na vzdělání v českých zemích. In: SOUKUP, L. – STANĚK, J. (eds.), *Pocta prof. JUDr. Karlu Malému, DrSc., k 65. narozeninám*. Praha, 1995, p. 253.

[13] WEYR, F. – DOMINIK, R., *Grundriss des čechoslovakischen Verwaltungsrechtes*. Brünn, 1922, p. 8.

provincial school authorities. This was followed (1852-1858) by the reorganisation of the main schools, which functioned as real or upper elementary schools (the German and Czech designations corresponded to the school's purpose of educating urban youth for trade and crafts).[14] The education sector was then influenced by the Concordat of 1855 (No. 195/1855 RGBl. [*Reichsgesetzblatt*, Imperial Law Gazette]), which stressed that education was a concern of both the state and the church.[15]

After the restoration of constitutionalism in the 1860s, the field of education became an agenda in which imperial regulations formed a framework that was complemented by provincial regulations. The focus of the imperial regulation was the December constitution (in particular the State Basic Law No. 142/1867 RGBl.),[16] which was followed by the definition of basic rules on the position of the school concerning the church (Act No. 48/1868 RGBl.[17]), the regulation of interconfessional relations (Act No. 49/1868 RGBl.[18]) and then the new Imperial Elementary School Act (*Reichsvolksschulgesetz*, "Hasner's School Act", No. 62/1869 RGBl.[19]), which was amended in 1883 (No. 53/1883 RGBl.)[20] and supplemented by a series of special imperial rules.[21] Hasner's School Act was then in force in Czechoslovakia until 1948.[22] The detailed regulation of education was provided mainly on the provincial level.[23]

After the establishment of the independent Czechoslovakia, the education system needed to be rebuilt, modernised and unified, since in Slovakia and Ruthenia there were completely different legal regulations. First, laws were adopted on the legal conditions of teachers (Acts No. 274/1919 Sb. z. a n., 455/1919 Sb. z. a n., 306/1920 Sb. z. a n., 251/1922 Sb. z. a n. and No. 104/1926 Sb. z. a n.) and then the regulation that was enacted to overcome the period until the adoption of the new 'Czechoslovak' school act (the so-called "Small Schools Act" – No. 226/1922 Sb. z. a n., the School Administration Act – No. 292/1920 Sb. z. a n., the Auxiliary Schools and Classes Act – No. 86/1929 Sb. z. a n.). Czechoslovakia's multi-ethnic character and the negative experiences from the past resulted in the adoption of special regulations for minority schools (No. 189/1919 Sb. z. a n., *lex Metelka* – No. 295/1920 Sb. z. a n.[24]). A new general school law was then eagerly awaited, but its adoption was interfered with by the turbulent events of 1938 leading to the dissolution of Czechoslovakia.

The main sources of Czechoslovak education law came from the monarchy period, and therefore the basis was the German language version of the legal regulation. Later, the practice was established that the German legislative term "*Volkschule*" was understood as a national school, "*allgemeine Volksschule*" as an elementary school and "*Bürgerschule*" as an upper elementary school.[25] With regard to the subject, it should be noted that the elementary schools were national schools intended for the education of school-age children from the 1st to the 5th progressive year, and above that from the 6th to the 8th year if they did not attend higher schools (secondary, upper elementary). Upper elementary schools were a higher level of national schools with the task of providing higher education than was provided by the elementary school to children in the 6th to 8th grades of schooling.[26]

2.2 From Munich to the Protectorate

The beginning of the era of the Second Czecho-Slovak Republic is framed by the Munich decision of the representatives of the four great powers (Germany, Italy, France and the United Kingdom),[27] whose negative consequences were reflected in several areas and which also resulted in the collapse of the foundations of Masaryk's democratic First Republic.[28] The Munich Agreement and its consequences also had a negative impact on

[14] PLACHT – HAVELKA, 1934, op. cit., p. 5.
[15] ADAMOVÁ, K. – LOJEK, A. – SCHELLE, K. – TAUCHEN, J., *Velké dějiny zemí Koruny české, Tematická řada: Stát.* Praha, 2015, p. 252.
[16] DESCHMANN, G., *Führer durch österreich's Schulen: eine systematische Darstellung der Unterrichts- und Erziehungsanstalten der Unter- und Mittelstufe für die männliche Jugend in den im Reichsrathe vertretenen Königreichen und Ländern*. Pilsen, 1892, p. 1.
[17] ADAMOVÁ – LOJEK – SCHELLE – TAUCHEN, 2015, op. cit., p. 290.
[18] Ibid.
[19] ALIPRANTIS, Ch., The afterlife of Enlightened Absolutism: commemoration of Maria Theresa and Joseph II and the politics of liberal reform in nineteenth-century imperial Austria. In: *European Review of History: Revue européenne d'histoire*, Vol. 26, No. 2, 2019, p. 314-317.
[20] PEŠKA, Z., *Československá ústava a zákony s ní souvislé, II. díl*. Praha, 1935, s. 1704.
[21] PLACHT – HAVELKA, 1934, op. cit., p. 6.
[22] Act No. 95/1948 Sb., on the unified education regulation (Education Act).
[23] In Bohemia, these were Acts No. 22/1870 z. z. č. [*zemský zákoník český*, Provincial Law Gazette of Bohemia] on the establishment, maintenance and attendance of public national schools in Bohemia, No. 16/1873 z. z. č. on the payment of school expenses, No. 86/1875 z. z. č. on the legal associations of teachers and No. 17/1870 z. z. č. (then No. 496/1890 z. z. č.) on the school supervision. In Moravia, act No. 3/1870 z. z. m. [*zemský zákoník moravský*, Provincial Law Gazette of of Moravia] on the national division of school authorities, No. 17/1870 z. z. m. on the establishment, maintenance and attendance of public national schools in Moravia (both revised by No. 4/1906 z. z. m.) and No. 18/1870 z. z. m. (later No. 1/1905 z. z. m. and then No. 48/1914 z. z. m.) on the legal relations of teachers. In Silesia, Law No. 41/1901 z. z. s. [*zemský zákoník slezský*, Provincial Law Gazette of Silesia] on the establishment, maintenance and attendance of public general schools, No. 18/1870 z. z. s. on the school supervision and No. 42/1901 z. z. s. on the legal relations of teachers.
[24] ŠUSTOVÁ, M. – POSPÍŠILOVÁ, M., Lex Metelka (1919). In: SCHELLE, K. – TAUCHEN, J. (eds.), *Encyklopedie českých právních dějin: III.* Plzeň, 2016, p. 439-440.
[25] BUZEK, K., Národní školství. In: HÁCHA, E. – HOETZEL, J. – WEYR, F. – LAŠTOVKA, K. (eds.), *Slovník veřejného práva československého: IV*. Brno, 1938, p. 806.
[26] Ibid, p. 807.
[27] TAUCHEN, J., A müncheni egyezmény érvénytelensége. In: *Jogtörténeti Szemle*, Vol. 22, No. 2, 2009, p. 36-40.
[28] KOLUMBER, D., Das Münchner Abkommen. In: *Beiträge zur Rechtsgeschichte Österreichs*, Vol. 12, No. 2, 2022, p. 364-367.

education, as many teachers had to leave their positions. First affected were the teachers from the borderlands, which were to be occupied by neighbouring countries,[29] but also, due to national developments, Czech teachers from Slovakia and Ruthenia.[30] The surplus of teachers was solved by pensioning off older teachers and laying off married female teachers.[31] The dismissal of married cantors became the subject of legitimate criticism, which drew attention to the intrusion by lawyers into the lives of people in the Second Republic: *„Is it conceivable that in a state governed by the rule of law, which is now headed by the first president of the Supreme Administrative Court and whose government includes several outstanding lawyers, such an injustice should happen to several thousand female citizens, whether by government regulation or by law*?*"* [32] The teachers themselves suggested that the criterion should not be age or gender but professional competence,[33] but their comments were dismissed. It was decided that no new teachers would be hired for two years, existing staff could not be promoted,[34] and no freshmen classes of teachers' institutes and pedagogical academies would be opened for elementary and upper elementary schools where Czech was the language of instruction.[35]

The requirement that teachers live in their place of work was also inherently arbitrary.[36] Nevertheless, in their totality, these measures were not very successful and did not resolve the situation of the surplus of teachers.

On 16 March 1939, the Protectorate of Bohemia and Moravia (the Protectorate) was established.[37] The plan was to gradually Germanize the Czech population, and changes in the education system were one of the methods for achieving this goal.[38] Hitler's decree formally guaranteed autonomy to the Protectorate, which was also supposed to apply to education, but it was clear that such guarantees and declarations were merely a means for the realization of other goals of the Reich's policy. Preliminarily, 50 % of the Czech nation was assessed as suitable for Germanization.[39]

This was fully manifested on 17 November 1939,[40] when the Czech universities in the Protectorate were closed, while German schools had been under the administration of the German Reich since August 1939.[41] The Czech universities were originally supposed to be closed for three years, but the Reich-German occupation administration had no intention of reopening them,[42] as university buildings were used by the occupiers,[43] and any inquiries about reopening were considered an anti-state crime.[44] University buildings and college dormitories used by the occupying forces became a symbol of the suffering and harassment which sought to annihilate the Czech ethnic group. Some students were executed, and others were lucky enough to return home.[45]

The Nazis considered the intelligentsia to be the most dangerous group of the population.[46] Therefore, they closed grammar schools and teachers' institutes in the Protectorate to reduce the quality of education of the Czech population.[47] They always found an arbitrary reason to close the schools, such as financial or organizational reasons, to conceal the fact that these measures were a political means against the Czech education system. The Nazis warned that high schools, and especially grammar schools, were not supposed to replace closed universities.[48]

The Nazi ideology that started to permeate the Protectorate education system was racist in nature[49] and accelerated the anti-Jewish tendencies that had been present since the Second Republic. The goal was clear, namely the gradual exclusion of

[29] CROWHURST, P., *Hitler and Czechoslovakia in World War II: Dominationand Retaliation*. London, 2013, p. 112.
[30] PROCHÁZKOVÁ, V., Ze školy na frontu. In: ČONDL, K. – PASÁK, T. (eds.), *Čeští učitelé v protifašistickém odboji 1939-1945: Sborník studií a vzpomínek*. Praha, 1978, p. 257-258. In the ceded Sudetenland, Czech children had to attend German schools or move with their families inland (SVOBODA, J., *Školství v období protektorátu*. České Budějovice, 2010, p. 28.).
[31] Government regulation No. 379/1938 Sb. z. a n., on the regulation of certain personnel relations in the public administration.
[32] SMOLÍK, F., Propouštění vdaných zaměstnankyň. In: *Škola měšťanská*, Vol. 41, No. 9, 1938, p. 151.
[33] ADAM, K., Nový nástup. In: *Škola měšťanská*, Vol. 41, No. 5, 1938, p. 80.
[34] Government Regulation No. 380/1938 Sb. z. a n., on cost-saving personnel measures.
[35] Decree of the Ministry of Education and National Enlightenment of 2 March 1939, No. 30.631-I, concerning the non-opening of the first year of Czech teacher training institutes, vocational teacher training institutes and pedagogical academies in the school year 1939/40. In: *Věstník ministerstva školství a národní osvěty,* Vol. 21, No. 52, 1939, p. 135.
[36] Government Regulation No. 9/1939 Coll. II, on the national schools teachers' residence.
[37] Decree of the Führer and Reich Chancellor No. 75/1939 Sb., on the Protectorate of Bohemia and Moravia.
[38] VÁŇOVÁ, R., Základní školy v českých zemích a na Slovensku v letech 1938-1948. In: ČORNEJOVÁ, I. – KASPER, T. – KASPEROVÁ, D. (eds.), *Velké dějiny zemí Koruny české. Tematická řada, Školství a vzdělanost.* Praha, 2020, p. 353.
[39] NĚMEC, P., Úloha školství při germanizaci českého národa v období okupace. In: DEYL, Z. (ed.), *Sborník k dějinám 19. a 20. století*. Praha, 1991, p. 67.
[40] Ibid., p. 70.
[41] Regulation on the Transfer of the German Universities in the Protectorate of Bohemia and Moravia to the Administration of the Reich of August 2, 1939, RGBl. I., p. 1371.
[42] BRANDES, D., *Češi pod německým protektorátem: okupační politika, kolaborace a odboj 1939–1945*. Praha, 2019, p. 161.
[43] VOJÁČEK, L. – TAUCHEN, J., *Veveří 70. Historie budovy Právnické fakulty Masarykovy univerzity*. Brno, 2022, p. 30-33.
[44] BURIÁNEK, F., *17. listopad: odboj československého studentstva.* Praha, 1945, p. 16.
[45] CAHA, Z. – MUSILOVÁ, H., Školství vysoké. In: SCHELLE, K. – TAUCHEN, J. (eds.), *Encyklopedie českých právních dějin: XVII.* Plzeň, 2019, p. 661-662.
[46] NĚMEC, 1991, op. cit., p. 68.
[47] BRANDES, 2019, op. cit., p. 531.
[48] BOSÁK, F., *Česká škola v době nacistického útlaku: příspěvek k dějinám českého školství od Mnichova do osvobození*. České Budějovice, 1969, p. 4.
[49] HENIG, R., *The Origins of the Second World War 1933-1941*. London, 2005, p. 12-13.

the Jewish population from public life.[50] The oppression and annihilation of the Jewish population also manifested itself within education, affecting both teachers and students.[51] From 7 August 1940, Jews were no longer allowed to attend Czech schools, the only exception being the Jewish schools established by the Jewish community.[52] In July 1942, Jewish schools were closed and the private teaching of Jews was banned.[53] Any teaching was provided in illegality. Similar measures also affected the so-called mixed Jews.[54] Jewish people of mixed blood of the first degree were not allowed to be admitted to main (formerly upper elementary) schools and secondary schools. The admission of Jewish mixed blood of the second degree to the above-mentioned schools was only possible if there was room in the class and if it was not detrimental to the students of German blood.[55] From 1940 onwards, teachers of Jewish origin were not allowed to teach in Czech schools,[56] and two years later Jewish mixed-bloods were not allowed to work in schools either. Teachers could not even marry a Jew or a Jewish mixed blood under the penalty of losing their jobs.[57]

3. The Illusion of Protectorate Autonomy Exemplified by Education

The Protectorate's education system was designed to approximate the German system in as many aspects as possible. The following laconic statement from one of the school chronicles speaks volumes in this regard: *„Far-reaching political changes were the cause of many changes within the school."* [58] For this reason, Czech teachers were not allowed to mention the idea of democracy to the students but were instructed to emphasize the education of the will, physical work, and being ideologically in line with Nazi Germany.[59]

The Nazis did not want Czechs to have national feelings, and therefore symbols of democratic Czechoslovakia and portraits of former Czechoslovak presidents were removed from all open schools. National holidays and important days associated with Czechoslovakia such as 28 October and 7 March were not allowed to be celebrated and were replaced by 15 March and 20 April.[60]

According to the ideas of Nazi pedagogy, education was not supposed to raise the cultural level of students, but to train them as the integral workforce of the state.[61] In the spirit of the militarization of society, boys' education focused on improving physical fitness,[62] while girls focused on their future role as mothers.[63] Nazi pedagogy was also influenced by Hitler's aversion to education and teachers (Leopold Pötsch, a teacher, to whom Hitler devoted a reference in *Mein Kampf*, being a possible exception [64]) and a disdain for intellectuals.[65] Hitler's views on education clearly concerned the creation of national identity and racial awareness. In his view, the entire way of teaching in high schools and universities was nonsense, because instead of basic education, students were engaged in useless learning and were not prepared for the ordeals of real life.[66]

The Nazi model of education could not be merely copied and then transferred to the Protectorate, as there were significant differences between the organization of German and Czech schools.[67] Nevertheless, during the Second World War, changes were made in the education system that targeted the youngest and most easily influenced generation, namely the students of elementary and upper elementary schools.[68]

The first thing the Nazis had to do was to adjust the language policy of the Protectorate and to strengthen the position of German in elementary and upper elementary schools.[69]

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[50] LÁNÍČEK, J., Antisemitismus v Protektorátu Čechy a Morava. In: VRZGULOVA, M. – KUBÁTOVÁ, H. (eds.), *Podoby Antisemitismu v Čechách a na Slovensku v 20. a 21. století*. Praha, 2016, p. 70.

[51] PETRŮV, H., *Zákonné bezpráví. Židé v Protektorátu Čechy a Moravy.* Praha, 2011, p. 403.

[52] PETRŮV, H., *Právní postavení židů v Protektorátu Čechy a Morava (1939-1941).* Praha, 2000, p. 111.

[53] PAŘÍK, A., Školství židovské. In: SCHELLE, K. – TAUCHEN, J. (eds.), *Encyklopedie českých právních dějin: XVII.* Plzeň, 2019, p. 720.

[54] Jewish mixed bloods were defined as: *"A person whose two grandparents were Jewish and who did not consider himself Jewish in addition to the above criteria was considered a first-degree half-blood. A person whose one grandparent was Jewish was a second-degree mixed blood." – Nové zákony a nařízení Protektorátu Čechy a Morava*, Vol. 4, No. 1, 1942, p. 136.

[55] Decree of the Ministry of Education of 8 September 1942, No. 92.269-II, on the admission of mixed-race Jews to attend schools. In: *Věstník ministerstva školství*, Vol. 24, No. 86, 1942, p. 306-307.

[56] Government Regulation No. 136/1940 Sb., on the legal status of Jews in public life.

[57] Government Regulation No. 137/1942 Sb., on Jewish mixed-bloods in the public service.

[58] State Regional Archive in Třeboň (hereinafter referred to as "SOA") - State District Archive (hereinafter referred to as "SOkA") České Budějovice, Collection I. národní škola České Budějovice, Signature („sign.") B93, Registration No. 882, Folder No. 4.

[59] NĚMEC, 1991, op. cit., p. 75.

[60] DOLEŽAL, J., *Česká kultura za protektorátu: školství, písemnictví, kinematografie*. Praha, 1996, p. 42-45.

[61] DE KWAASTENIET, M., Denominational Education and Contemporary Education Policy in the Netherlands. In: *European Journal of Education*, Vol. 20, No. 4, 1985, p. 371.

[62] Physical training of boys was defined as pre-military training in Nazi Germany (BLACKBURN, G. W., *Education in the Third Reich: Race and History in Nazi Textbooks*. Albany, 2012, p. 106-107.). The war itself was at the heart of Nazi ideology and the goal of the state was to turn young men into soldiers (PONZIO, A., *Shaping the New Man: Youth Training Regimes in Fascist Italy and Nazi Germany*. Madison, 2015, p. 199.).

[63] REESE, D., *Growing Up Female in Nazi Germany*. Ann Arbor, 2006, p. 41.

[64] LEVY, E., Ernst Kris, 'The Legend of the Artist' (1934), and 'Mein Kampf'. In: *Oxford Art Journal*, Vol. 36, No. 2, 2013, p. 223.

[65] BOSÁK, 1969, op. cit., p. 8.

[66] PINE, L., The Dissemination of Nazi Ideology and Family Values through School Textbooks. In: *History of Education*, Vol. 25, No. 1, 2010, p. 103.

[67] DOLEŽAL, 1996, op. cit., p. 41.

[68] SVOBODA, 2010, op. cit., p. 41.

[69] VELČOVSKÝ, V., *Čeština pod hákovým křížem*. Praha, 2016, p. 65.

Despite initial promises that there would be no German interference in education, as early as 7 November 1939, German was introduced as a compulsory subject in upper elementary schools.[70] In January 1940, German could be taught in elementary schools with Czech as the language of instruction in the third year, provided that at least 12 students enrolled.[71] From September 1940, however, German became a compulsory subject in elementary schools as well.[72] In German language classes, students were not only to learn to speak and write in German, but to acquire the necessary knowledge of the German nation and to become loyal to the Reich.[73] The public, however, correctly interpreted the compulsory teaching of German as an attempt at Germanization.[74] In 1941, students in the third to fifth year of upper elementary schools had three hours of German a week; upper grades had four hours a week.[75] The new curriculum for the school year 1942/43 introduced German lessons from the first year of elementary school (students in the first and second years had two hours of German per week, from the third to the fifth year it was seven hours per week, while in the remaining years of the elementary school, it was six hours per week), while the number of weekly German lessons in upper elementary schools was increased to seven.[76] More teaching hours were allocated to German at the expense of other subjects. This measure required changes to the scope of the curriculum of other subjects. From the second semester of 1941/42, the number of German classes increased, but the number of classes in religion, the language of instruction (Czech) and national history in elementary schools decreased.[77]

In addition to German, the Reich also focused on subjects that posed a threat to the Nazis, namely the Czech language, civics, history and geography. For this reason, the teaching of civics was abolished in schools as early as in the school year 1940/41.[78] The number of lessons for students was not reduced, because, from January 1941, physical education became a compulsory subject,[79] following the example of Nazi education.[80] The hasty introduction of physical education as a compulsory subject was not easy and smooth; schools lacked gymnasiums and equipment. Therefore, the Protectorate released instructions on how to practice in the classroom in the teachers' magazines of that time, but many writers pointed out the lack of equipment and preparedness of schools.[81] Some teachers claimed that it was not the duty of the Ministry but of the schools to construct an exercise ground on their property where physical education lessons could take place. Several avid teachers even marginalized theoretical knowledge, asking whether *„it is more important that the student knows some details of languages, arithmetic, culture and history, or that they are also a bit physically fit."*[82] Importantly, the promotion of physical education was not limited to formal education but was incorporated into the informal educational system of youth associations, which were eventually integrated under the supervision of the Board of Trustees (*Kuratorium*) for the Education of Youth. However, in the autumn of 1941, in response to the ban on heating gyms in winter, physical education was replaced by German language classes.[83]

The content of Czech language and literature lessons was changed. In literature, teachers had to avoid Jewish and anti-German authors.[84] Geography was, according to teachers, already greatly affected by the withdrawal of the Sudetenland from Germany, and teachers had to react quickly to this change. Teachers were therefore to treat geography *„as a system of ever-evolving phenomena"*.[85] Thus, in geography and history, before discussing the rest of Europe, teachers first focused on topics related to the Protectorate and the Reich.[86] Teaching theory was permeated by the thesis that the Protectorate belonged to the Reich.[87] In the 1943/44 school year, history classes were

[70] Government Regulation No. 260/1939 Sb., on the teaching of German in the Czech upper elementary schools. (An hour of German was counted as two hours. - SVOBODA, 2010, op. cit., p. 46.).
[71] Government Regulation No. 232/1940 Sb., on the teaching of German in the Czech elementary schools.
[72] Government Regulation No. 394/1940 Sb., on new regulation of compulsory subjects in elementary and upper elementary schools.
[73] Decree of the Ministry of Education and National Enlightenment of 1 August 1941, No. 96.305-I, announcing the German language curriculum for elementary schools with Czech as the teaching language. In: *Věstník ministerstva školství a národní osvěty*, Vol. 23, No. 83, 1941, p. 256-259.
[74] VELČOVSKÝ, 2016, op. cit., p. 196.
[75] Decree of the Ministry of Education and National Enlightenment of 15 April 1941, No 43.925/41-I, implementing the Government Regulation of 26 September 1940, No. 394 Sb., on new regulation of compulsory subjects in elementary and upper elementary schools, and supplementing the implementing Decree of 3 January 1940, No 152.530/39-I, to the Government Regulation of 5 October 1939, No. 260 Sb., on the teaching of German in the Czech upper elementary schools. In: *Věstník ministerstva školství a národní osvěty*, Vol. 23, No. 49, 1941, p. 169-170.
[76] Decree of the Ministry of Education of 29 July 1942, No 78.307-I, issuing guidelines for teaching in elementary and main schools with Czech as the teaching language in the school year 1942/43. In: *Věstník ministerstva školství*, Vol. 24, No. 75, 1942, p. 281-284.
[77] SOA - SOkA České Budějovice, Collection II. národní škola České Budějovice, sign. B96, Registration No. 886, Folder No. 5.
[78] Decree of the Ministry of Education and National Enlightenment of 8 January 1941, No. 1.968/41-I/1, issuing guidelines for teaching in elementary and upper elementary schools with Czech as the teaching language and one-year courses attached to them in the school year 1940/41. In: *Věstník ministerstva školství a národní osvěty*, Vol. 23, No. 15, 1941, p. 19-23.
[79] Government Regulation No. 3/1941 Sb., on the organisation of physical education in the Czech schools.
[80] PINE, 2010, op. cit., p. 96-97.
[81] OŽ., Průkopníci tělesné výchovy. In: *Škola měšťanská*, Vol. 42, No. 10, 1939, p. 152.
[82] SOTONA, B., Pro dokonalejší tělesnou výchovu. In: *Škola měšťanská*, Vol. 42, No. 21, 1940, p. 326-327.
[83] Moravian Land Archives (hereinafter "MZA") - SOkA Zlín, Collection 1. Střední škola, Folder No. 455.
[84] Decree of the Ministry of Education and National Enlightenment of 8 January 1941, No. 1.968/41-I/1, 1941, op. cit., p. 19-23.
[85] DRÁSTOVÁ, M., Zeměpis. In: *Škola měšťanská*, Vol. 41, No. 3, 1938, p. 80-81.
[86] Decree of the Ministry of Education and National Enlightenment of 1 August 1941, No. 96.415-I, promulgating the geography curriculum for elementary schools with the Czech teaching language. In: *Věstník ministerstva školství a národní osvěty*, Vol. 23, No. 84, 1941, p. 259-261.
[87] Decree of the Ministry of Education and National Enlightenment of 8 January 1941, No. 1.968/41-I/1, 1941, op. cit., p. 19-23.

replaced by German classes[88] and the number of geography classes was reduced from three to two per week.[89]

The so-called textbook revisions, which occurred during the Second Republic in December 1938, continued during the Protectorate period. A committee of the Ministry was to assess the suitability of individual teaching materials, and the criteria for assessment were further tightened during the Protectorate. References to the inter-war state and its value system and leaders were removed, and old textbooks were to be replaced by new ones.[90] In practice, individual schools received lists of books that were banned and therefore had to be removed from the libraries and placed in a sealed box. Books could not be lent out while the review was in progress.[91] Since no new textbooks were issued at the beginning of the 1940/41 school year, teachers had to prepare their own teaching notes (materials) for each lesson[92] and had to do so practically until the end of the Second World War.[93] In some schools, teachers even had to switch from paper to charts.[94] In Zlín, however, owing to the financial participation of the Bata company, printed teaching materials replaced textbooks with a circulation of 700,000 pages despite the general shortage of paper and the duty to save valuable resources imposed by the Reich.[95]

In addition to changes in the curriculum and textbook revisions, the grading of students also changed in 1943, following the example of the Reich, and a six-grade assessment was introduced: Very good (1; much better than good), good (2; considerably above average), satisfactory (3; quite worthy standard performances without limitations), sufficient (4; sufficient performances, though not without deficiencies), barely sufficient (5; insufficient performances, but with the possibility of early remediation thanks to some good foundations), insufficient (6; quite insufficient performances lacking solid foundations, remediation possible only with difficulty and only after a long time).[96]

As the war dragged on, the economic situation deteriorated and the students were required to work for the Reich to contribute to the German war effort. Schools with gardens grew crops intensively and schools without gardens had to ask the municipality for suitable land to grow crops.[97] This involved the issuing of several decrees for the collection of various raw materials and crops.[98] These measures created competition between schools, as the Ministry of Education scored schools and gave financial support to the most successful ones.[99] Materials were collected and crops were harvested during school hours. From 1 November 1943, the *Kuratorium* assisted schools during these activities to ensure they were successful.[100]

In addition to the collection of materials, schools organized charitable events for poor students. For example, schools cooked soup and bought milk for the students every day. However, this effort lasted only a few months due to the lack of food rations.[101]

4. Intervention in Education as a Form of Nazi Persecution

The Nazis wanted to degrade the education of the Czech population by denying the people the opportunity to educate themselves.[102] Originally a five-year school, the elementary school was transformed into an eight-year school, following the example of German schools, and the upper elementary school into a four-year school.[103] Soon after, on 15 August 1941, the *upper elementary school* was changed to the *main school*[104] and in May 1943 the main school was declared a selective school. In practice, this meant that only 35 % of the students of elementary schools could attend the main school and the rest had to complete their compulsory education at the elementary school.[105]

By 20 May 1943, the principals of the elementary schools reported the number of applicants for the main school to the district office, and the district school inspector then determined the number of students who were eligible for admission. At the end of the school year, the principal of the elementary school, in consultation with the class teacher of the fourth year, made

[88] SOA - SOkA České Budějovice, Collection I. národní škola České Budějovice, sign. B93, Registration No. 882, Folder No. 3.
[89] SOA - SOkA České Budějovice, Collection Národní škola Borovany, sign. B466, Registration No. 619, Folder No. 4.
[90] BOSÁK, 1969, op. cit., p. 23-24.
[91] SOA - SOkA České Budějovice, Collection Základní devítiletá škola 1.-5. ročník Česká Lhota, sign. B586, Registration No. 641, Folder No. 1.
[92] SOA - SOkA České Budějovice, Collection Základní devítiletá škola 1.-5. ročník Bílá Hůrka, sign. B997, Registration No. 699, Folder No. 8.
[93] SOA - SOkA České Budějovice, Collection Národní škola Borovany, sign. B466, Registration No. 619, Folder No. 4.
[94] Decree of the Ministry of Education of 20 November 1942, No 121.094-II, on the economical use of school notebooks. In: *Věstník ministerstva školství*, Vol. 24, No. 116, 1942, p. 389-390.
[95] MZA - SOkA Zlín, Collection 1. Střední škola, Folder No. 449a.
[96] Decree of the Ministry of Education of 28 May 1943, No 28.834-II, on classification of pupils in the Czech schools in Bohemia and Moravia. In: *Věstník ministerstva školství*, Vol. 1, No. 91, 1943, p. 209-210.
[97] SOA - SOkA České Budějovice, Collection I. národní škola České Budějovice, sign. B93, Registration No. 882, Folder No. 3.
[98] SOA - SOkA České Budějovice, Collection Národní škola Borovany, sign. B466, Registration No. 619, Folder No. 4.
[99] Decree of the Ministry of Education and National Enlightenment of 30 May 1942, No 51.320-II, on the collection of old materials and rubbish in schools. In: *Věstník ministerstva školství a národní osvěty*, Vol. 24, No. 107, 1942, p. 366-370.
[100] Decree of the Ministry of Education of 28 October 1943, No. 7711 pres., participation of the Czech school youth in a collection of textiles with the Kuratorium for the Education of Youth in Bohemia and Moravia. In: *Věstník ministerstva školství*, Vol. 1, No. 165, 1943, p. 332.
[101] MZA - SOkA Zlín, Collection Soukromá měšťanská škola Zlín, Registration No. 98, Folder No. 98.
[102] NĚMEC, 1991, op. cit., p. 86.
[103] DOLEŽAL, 1996, op. cit., p. 52.
[104] Decree of the Ministry of Education and National Enlightenment of 27 August 1941, No 105.179-I, on the designation change from "upper elementary school" to "main school". In: *Věstník ministerstva školství a národní osvěty*, Vol. 23, No. 97, 1942, p. 291.
[105] Government Regulation No. 300/1941 Sb., on the new regulation of elementary and upper elementary schools with Czech as the teaching language.

a preliminary selection of the students who applied for admission to the main school. Only students who had a grade of 1 or 2 in behaviour were eligible for admission to the main school. Students who had a grade of less than three in the language of instruction, German and mathematics could not be admitted to the main school.[106]

The district school inspector notified each main school of the number of students who could be admitted, but the actual decision was made by the principal of the main school depending on the results of the students' entrance examinations. The latter also set up an examination board consisting of a chairman (the principal), examiners (specialist teachers of the main school), observers (the district school inspector) and a counsellor (an appointed certified teacher of the fourth year of the elementary school). The entrance examination consisted of a written and an oral part, where students demonstrated their knowledge of mainly German, Czech and mathematics. A report was drawn up on the entrance examination, including the student's personal data, the grading at the elementary school (behaviour, German, Czech, mathematics, national history and geography) and the result of the entrance examination.[107]

Admission to the main school did not mean that study would be automatically successful, as the conditions for advancement to the next year were strict and were decided by the class teacher in consultation with all the teaching staff. Students who had either insufficient grades in a compulsory subject, or barely sufficient grades in two of the main compulsory subjects (German, mathematics and measurement, biology, physical education, Czech), or barely sufficient grades in one main compulsory subject and two or more other compulsory subjects, or barely sufficient grades in three or more compulsory subjects, were not admitted to the upper grade. If the student failed even after repeating a year, they were returned to the elementary school.[108] The dismissal was noted with a justification in the class report and notified to the appropriate district school committee.[109] The goal of these measures was to reduce the level of education of the general population. The increase in the number of students in a class was evident as early as 1 September 1939, when up to forty-five students were allowed in one class.[110] Later, the increase in the number of students in Czech schools to 50 (elementary school) and 60 (main school) also contributed to this.[111]

The Nazis also focused on Czech teachers.[112] The first mass arrests of teachers occurred in September 1939.[113] Teachers or principals were frequently taken into detention by the Gestapo, but their colleagues were not informed about the reason, not even the reason for the detention.[114] Other teachers (as well as all civil servants) had to take an oath of allegiance to Adolf Hitler. If they failed to do so, they were dismissed from their jobs.[115] Employees who had *„proved by actions their hostility to the Reich"* or who were politically unreliable could be transferred to another post or to temporary or permanent retirement, dismissed from service without disciplinary action, and their salary could be temporarily or permanently reduced.[116]

Czech teachers were also discriminated by the imposition of a requirement for compulsory knowledge of the German language.[117] Czech teachers had to learn German in compulsory courses finished by an examination. All teachers (except for German ones) had to take the test between 1 January 1942 and 31 March 1942.[118] The language examination was a general examination (all public servants in active service had to take it) and a special examination (all applicants for a post in the public service had to take it, as well as public servants if they were to be finally appointed, promoted or transferred to a higher category of employment, specifically persons who were to be appointed district school inspectors or finally appointed principals). The examination was oral and written. As part of the written examination, the examinee had to write a simple application, translate the text into German and write a dictation. The oral examination took place after the written part, lasted approximately ten to fifteen minutes and consisted of an interview with a member of the committee. Based on the results of the written and oral examinations, the chairman of the committee determined whether the individual passed or failed. A re-

[106] Implementing Decree of the Ministry of Education and National Enlightenment of 27 August 1941, No. 106.000-I to the Government Regulation of 14 August 1941, No. 300 Sb., on the new regulation of elementary and upper elementary schools with Czech as the teaching language. In: *Věstník ministerstva školství a národní osvěty*, Vol. 23, No. 96, 1941, p. 288-290.

[107] Decree of the Ministry of Education of 25 May 1943, No. 49.771-I, on selection, admission and evaluation of the Czech main schools' pupils. In: *Věstník ministerstva školství*, Vol. 1, No. 85, 1943, p. 193-198.

[108] Decree of the Ministry of Education of 24 April 1944, No. 23.551-I, on pupils' promotion to main schools. In: *Věstník ministerstva školství*, Vol. 2, No. 81, 1944, p. 122-123.

[109] Decree of the Ministry of Education of 5 September 1942, No 85.469-I, on the transfer of pupils from the main school to the elementary school. In: *Věstník ministerstva školství*, Vol. 24, No. 85, 1942, p. 306.

[110] Government Regulation No. 176/1939 Sb., on the maximum number of children in a class of an elementary or an upper elementary school.

[111] Decree of the Ministry of Education and National Enlightenment of 1 July 1941, No 81.882-I, on changes in the organisation of Czech elementary and upper elementary schools with regards to increasing the number of pupils in the classes of these schools. In: *Věstník ministerstva školství a národní osvěty*, Vol. 23, No. 75, 1941, p. 233-234.

[112] Nazis also wanted to change teachers' mindset from democratic to Nazi. Teachers had to attend specific lectures and made study visits to the Reich (NĚMEC, 1991, op. cit., p. 75.).

[113] Ibid.

[114] MZA - SOkA Zlín, Collection Soukromá měšťanská škola Zlín, Registration No. 92, Folder No. 92.

[115] Decree of the State President No 83/1940 Sb., on the oath of office for members of the Government, public servants and other public authorities.

[116] Government Regulation No. 397/1941 Sb., on disciplinary measures against politically unreliable employees, as amended by Government Regulation No. 296/1942 Coll.

[117] MZA - SOkA Zlín, Collection 1. Střední škola, Folder No. 449a.

[118] Absent teachers were required to produce an official medical certificate of illness. - BOSÁK, 1969, op. cit., p. 32.

cord of the examination was made, signed by all members of the committee, and filed in the employee's file.[119] Unsuccessful civil servants were allowed to retake the test and, if they failed the German language retest, could no longer receive pay raises. They could not take the next retest until six months later, and the examination committee could refuse the retest altogether, which meant that the employment was terminated.[120]

The examination committees were composed of three members and consisted of a chairman and two observers. The chairman of the committee was a Protectorate official of German nationality or a Reich-German official attached to the Protectorate administration. The other members of the examination committee were appointed from among the ranks of Protectorate officials of Protectorate nationality and had only an advisory vote since only the chairman of the committee had a say in the evaluation.[121] The requirement to master German was justified by the fact that German was a compulsory subject in schools and that the German language was used in official communication between the authorities of the Protectorate and the Reich.[122]

During the war, the persecution of teachers was also reflected in their involvement in work duties, especially during the summer months, starting at the end of the 1942/43 school year, when they were deployed to agriculture.[123] From September 1944, teachers were summoned by the labour office for forced labour,[124] which caused significant problems for schools. Other teachers substituted for the absent teachers, but this led to an overload of the remaining lectors.[125]

The education of Czech students and the work of teachers was hampered not only by legal acts but also by the lack of fuel, which meant that school buildings could not be heated. At first, teaching in some schools was suspended as early as the end of November 1939, when the temperature in the classrooms fell below eight degrees Celsius. As a result, students went to school only once a week to get their homework. These conditions lasted until the Christmas holidays and did not improve even in January 1940, when temperatures outside dropped below minus 25 degrees Celsius.[126] The schools tried to address this emergency in many ways. First, a coal holiday was declared for two weeks at the beginning of January and all teaching was suspended. Then, students took turns in one classroom, learning only the core subjects or just reviewing older materials.[127] Soon, the remaining fuel was used and students were forced to attend school once or twice a week for homework, but teaching did not continue until April 1940. In subsequent years, schools solved the fuel shortage by extending the Christmas and half-term holidays to the entire month of January. Apart from the fuel shortage, from the autumn of 1943 onwards, the schools also faced the shortening of afternoon classes by one hour, as artificial lighting was not allowed to be used during blackouts.[128]

The last wartime school year was marked by the occupation of school buildings by the German army or their allies (especially the Hungarian army) and German refugees.[129] As a result, some elementary and main schools were moved to other school buildings, and lessons had to be reduced by half to just eight hours a week.[130] Classes were interrupted because of air-raid alerts and students and teachers had to endure the imminent danger for several hours in air-raid shelters.[131] The approaching front and the associated risks forced teachers to stop teaching in certain areas and assign students homework once a week.[132] Since parents feared sending their children to school and the assembly ban was introduced, it was no longer possible for students and teachers to meet at school, so homework assignments were sent by post or, in smaller villages, teachers visited their students individually at home.[133] It should be noted that the situation did not improve even immediately after the war when school buildings were occupied by the Soviet forces, which cared little about foreign property. During the summer months, the buildings that had been damaged by the army were reconstructed and cleaned. Classes were therefore held in inns and other similar public places.[134]

[119] Decree of the Presidium of the Ministry of Education and National Enlightenment of 23 February 1942, No. 555 pres., issuing examination regulations for the German language examination of public employees. In: *Věstník ministerstva školství a národní osvěty*, Vol. 24, No. 31, 1942, p. 133-142.
[120] Ibid.
[121] Ibid.
[122] Decree of the Presidium of the Ministry of Education of 4 November 1942, No. 6431 pres., on the use of languages in official contacts between the authorities of the Protectorate and the authorities of the Reich. In: *Věstník ministerstva školství*, Vol. 24, No. 109, 1942, p. 375.
[123] SOA - SOkA České Budějovice, Collection Národní škola Borovany, sign. B 466, Registration No. 619, Folder No. 4.
[124] TAUCHEN, J., Die Arbeitsverwaltung im Protektorat Böhmen und Mähren (1939–1945). In: *Journal on European History of Law*, Vol. 10, No. 2, 2019, p. 2-14.
[125] SOA - SOkA České Budějovice, Collection Základní devítiletá škola 1.-5. ročník Bílá Hůrka, sign. B997, Registration No. 699, Folder No. 8.
[126] SOA - SOkA České Budějovice, Collection Základní devítiletá škola 1.-5. ročník Čejkovice, sign. B544, Registration No. 633, Folder No. 4.
[127] MZA - SOkA Zlín, Collection Soukromá měšťanská škola Zlín, Registration No. 92, Folder No. 92.
[128] SOA - SOkA České Budějovice, Collection I. národní škola České Budějovice, sign. B93, Registration No. 882, Folder No. 4.
[129] SOA - SOkA České Budějovice, Collection Základní devítiletá škola 1.-5. ročník Bílá Hůrka, sign. B997, Registration No. 699, Folder No. 8. Unfortunately, the chronicles and other school documents were destroyed during the war by German refugees who were housed in school buildings (SOA - SOkA České Budějovice, Collection Základní devítiletá škola 1.-5. ročník Čejkovice, sign. B544, Registration No. 633, Folder No. 4.).
[130] SOA - SOkA České Budějovice, Collection I. národní škola České Budějovice, sign. B93, Registration No. 882, Folder No. 4.
[131] MZA - SOkA Zlín, Collection Baťa, sign. II/5, Folder No. 20.
[132] SOA - SOkA České Budějovice, Collection I. národní škola České Budějovice, sign. B93, Registration No. 882, Folder No. 4.
[133] MZA - SOkA Zlín, Collection 1. Střední škola, Folder No. 449a.
[134] SOA - SOkA České Budějovice, Collection Národní škola Borovany, sign. B466, Registration No. 619, Folder No. 4.

5. Third Pillar of Indoctrination

The situation in the education system intensified in 1942 following the appointment of Emanuel Moravec as the minister,[135] who soon introduced the so-called Aryan salute in schools.[136] With the arrival of Moravec, Czech schools had to adapt even more to German terms.[137] In addition to the family and the school, a third institution was set up, following the example of the Hitler Youth (*Hitlejugend*), to take care of the (re) education of children and youth, the *Kuratorium for the Education of Youth in Bohemia and Moravia*,[138] which Moravec had been advocating for since 1941.[139] Its formation was justified by the need for a more penetrating education than that provided by the school.[140] The preparatory work for its establishment was already underway in the spring of 1942, but the organization was not officially operational until 13 March 1943.[141] The aim was to bring together youth organizations and to use them to participate in the re-education of Czech students. All young Protectorate members of Aryan descent between the ages of 10 and 18 were part of the *Kuratorium*, whose chairman was Minister Moravec.[142]

The legal basis was Government Regulation No. 187/1942 Sb., which entrusted the implementation of the „compulsory youth service" to the *Kuratorium*, which had the status of a central administrative authority and its chairman had the powers of a member of the Government. Six implementing regulations were then issued in addition to the government regulation, seeking to increase the pressure on the re-education of Czech youth.[143]

Jews and Jewish mixed-bloods, dishonest students, individuals whose moral or other behaviour caused public outrage or who were in official detention were excluded from compulsory youth service and membership in the *Kuratorium*. Application for compulsory youth service had to be made by the legal guardian of a minor.[144] The *Kuratorium* could entrust the administration and management of compulsory youth service to existing associations (sports, physical education, tourist, amateur),[145] and, where necessary, schools had to provide the *Kuratorium* with gymnasiums and classrooms,[146] since senior members of the *Kuratorium* and students could not spend time outdoors during cold months.[147] A piece of trivia is the fact, that teenagers were admitted to the association every year on 15 March, which was meant to evoke a certain memory of 15 March 1939, when German troops started the occupation of the Czech lands.[148]

The *Kuratorium* organized a wide range of extracurricular activities. Among the most important was the celebration of Hitler's birthday, the day of the establishment of the Protectorate of Bohemia and Moravia.[149] In addition, the students had to take part in Sunday morning exercises and ideological training; illness was the only excuse for absence.[150] In addition to sporting activities, the *Kuratorium* sought the cultural development of the students. As part of the cultural event Art for Youth, students attended film and theatre performances, which also took place on days previously important for the Czechoslovak Republic, such as 28 October.[151] Students regularly attended screenings of German propaganda films.[152]

The *Kuratorium* could not execute an effective educational program without creating its cadre,[153] and so it arranged training for association officers who performed compulsory youth service in the associations and, upon successful completion of the training, awarded them a badge and uniform.[154] One of the first training camps for leaders was held from 11 to 18 July 1942, and the trainees themselves were to converse among themselves in German. The most reliable members subsequently went on

[135] BOSÁK, 1969, op. cit., p. 5.
[136] DORAZIL, O. *Chtěl jsem být učitelem: škola v míru, ve válce a v revoluci*. Praha, 1945, p. 89.
[137] NĚMEC, 1991, op. cit., p. 73-74.
[138] REESE, D., *Growing Up Female in Nazi Germany*. Ann Arbor, 2006, p. 36. The *Kuratorium* sought to make the Czech youth identify with the Nazi regime and wanted to win the sympathy of Czech students by organizing Youth Days, i.e. sports festivals and competitions. In addition, the *Kuratorium* organized summer holidays for youth (PERNES, J., *Až na dno zrady: Emanuel Moravec*. Praha, 1997, p. 183.).
[139] PASÁK, T., *Český fašismus 1922-1945 a kolaborace 1939-1945*. Praha, 1999, p. 352.
[140] *Nové zákony a nařízení Protektorátu Čechy a Morava*, Vol. 4, No. 1-6, 1942, p. 717.
[141] MICHLOVÁ, M., *Protentokrát, aneb, Česká každodennost 1939-1945*. Řitka, 2012, p. 52.
[142] Government Regulation No. 187/1942 Sb., on compulsory youth service.
[143] Regulations of the Chairman of the *Kuratorium* for the Education of Youth in Bohemia and Moravia No. 188/1942 Sb., 189/1942 Sb., 276/1942 Sb., 19/1943 Sb., 62/1944 Coll. and 63/1944 Coll.
[144] Regulation of the Chairman of the Kuratorium for the Education of Youth in Bohemia and Moravia No. 189/1942 Sb., on the scope of compulsory youth service.
[145] Regulation of the Chairman of the Kuratorium for the Education of Youth in Bohemia and Moravia No. 188/1942 Sb., on principles for compulsory youth service.
[146] Decree of the Ministry of Education of 20 October 1943, No 7135 pres., on lending of school gymnasiums or classrooms to the Kuratorium for the Education of Youth in Bohemia and Moravia. In: *Věstník ministerstva školství*, Vol. 1, No. 163, 1943, p. 330-331.
[147] SOA - SOkA České Budějovice, Collection Národní škola Borovany, sign. B466, Registration No. 619, Folder No. 4.
[148] Regulation of the Chairman of the Kuratorium for the Education of Youth in Bohemia and Moravia No. 189/1942 Sb., on the scope of compulsory youth service.
[149] SOA - SOkA České Budějovice, Collection I. národní škola České Budějovice, sign. B93, Registration No. 882, Folder No. 3.
[150] SOA - SOkA České Budějovice, Collection Národní škola Borovany, sign. B466, Registration No. 619, Folder No. 4.
[151] SOA - SOkA České Budějovice, Collection I. národní škola České Budějovice, sign. B93, Registration No. 882, Folder No. 4.
[152] MZA - SOkA Zlín, Collection Soukromá měšťanská škola Zlín, Registration No. 98, Folder No. 98.
[153] PONZIO, A., *Shaping the New Man: Youth Training Regimes in Fascist Italy and Nazi Germany*. Madison, 2015, p. 99.
[154] Regulation of the Chairman of the Kuratorium for the Education of Youth in Bohemia and Moravia No. 188/1942 Sb., on principles for compulsory youth service.

a tour of the Reich as a reward.[155] In addition to the training, the *Kuratorium* officials read Nazi-oriented periodicals such as Zteč and informative brochures published in the Reich.[156]

However, the *Kuratorium* was unable to fully satisfy the demands of the Nazis and its activities were rather marginal from the end of 1943. In 1944, the *Kuratorium* was affected by the conscription of German advisors to the front[157] and some teachers and students were involved in forced labour.[158] Formally, the *Kuratorium* continued to operate until the end of the war and was abolished by Government Regulation No. 110/1946 Sb.

6. Conclusion

The short, several-month period of the gradual demise of pre-war democratic Czechoslovakia, defined by the Munich dictate of September 1938 and the German occupation of the Czech lands on 15 March, is commonly referred to as the so-called „Second Republic". This period marked significant changes in the ideological climate of the state under the emerging authoritarian regime when legislation allowed the Government to replace the Parliament. The adoption of the enabling constitutional act paved way for the transformation of the state into a local variation of fascism. The change in values was particularly reflected in education, where it was necessary to address personnel problems related to the surplus of teachers from the border areas (occupied by Germany, Poland and Hungary) and from the autonomous parts that were characterized by anti-Czech tendencies (Slovakia, Ruthenia), but also the indoctrination of students. The establishment of the Protectorate resulted in major changes, as the local variation of fascism was displaced by Nazism. Attention was paid to the elementary and upper elementary (main) schools, which had the greatest influence on children and youth.

The focal point of the regulation of schools did not lie in laws, nor government regulations, which were conceived not only as an implementing regulation of the law but also as its full-fledged substitute following the entry into force of the enabling constitutional act. Only about 2 per cent of law-making published in the Collection of Laws and Regulations during the period of non-freedom (30 September 1938 to 4 May 1945) was dedicated to education. It is therefore clear that the transformation of Protectorate education was brought about, particularly by further secondary legislation published mainly in the Gazette of the Ministry of Education (and National Enlightenment). In many respects, these completely changed the school climate and conditions.

Physical fitness as one of the basic pillars of German education required physical education as a compulsory subject in the Protectorate. Nazi racial theories introduced restrictions on access to education for Jewish students and Jewish teachers lost their jobs. The Reich education system, which was a model for Protectorate education, caused a change in the organization of the elementary school, which was now an eight-year school, and the upper elementary school, which was a four-year school. At the same time, the upper elementary school was renamed the main school and became a selective educational institution where only a limited number of students were admitted. Individual measures were adopted through a cascade of secondary legislation. In addition to the family and the school, children were influenced by a mass organization, the *Kuratorium* for the Education of Youth in Bohemia and Moravia, which strived to indoctrinate the youngest generation with National Socialism.

One of the key tasks of the occupiers was to strengthen the position of the German language. Therefore, German became a compulsory subject in upper elementary and later also elementary schools. Teachers found themselves in the awkward position of having to pass exams in German to keep their jobs. These language exams were justified as necessary since communication between the authorities was in German and German was also compulsory. The Nazis also focused on changing the content of subjects such as Czech, geography and history, which was abolished during the war, and the content of individual textbooks. All textbooks that were inappropriate for any reason, were removed as part of the so-called textbook revision and in many cases not even suitably replaced. The Protectorate's affiliation with the Reich was emphasized.

Near the end of the war, teaching in the winter period was almost impossible due to a shortage of fuel, and as the front was getting closer, schools were transformed into provisional warehouses and infirmaries, used by the Nazis and their allies, then by the incoming Soviet forces. The Soviet presence was associated with massive damage to the school infrastructure. Even though the end of the war brought euphoria thanks to the end of the Nazi regime, soon the Czechoslovak Republic found itself under the domination of the Soviet Union, which once again (negatively) influenced teaching and the everyday life of all people involved in education.

[155] MOULIS, M., *Mládež proti okupantům*. Praha, 1966, p. 141-142.
[156] PERNES, J., *Až na dno zrady: Emanuel Moravec*. Praha, 1997, p. 183.
[157] PASÁK, 1999, op. cit., p. 357-358.
[158] MICHLOVÁ, 2012, op. cit., p. 53.

Causes of Political Trials against Slovak Nationalists in Czechoslovakia

*Ján Štefanica**

Abstract

The study focuses attention on the legal and social factors affecting the formation of the group of so-called Slovak bourgeois nationalists, the fabricated allegations against them often based on real documents, and the overview of criminal procedure, together with its analysis. The author points out that issues pertaining to the constitutional position of Slovakia in the Czechoslovak Republic were addressed through repression of the Communist part of the Slovak intelligentsia. Further, the study demonstrates the existence of a power struggle among the political leaders of the Communist Party of Slovakia and points to the special dedication in the handling of the trials and the interpretation of laws.

Keywords: *Political trial; The Cold War; Communist Party; Husák; Nationalism; Czechoslovakia.*

1. Introduction

As early as in the 1970s, British journalist Stewart Steven argued that political processes in Soviet satellites, especially Bulgaria, Poland, Hungary, often forgotten Romania,[1] and Czechoslovakia constituted a deliberately provoked act instigated by the CIA, under the codename "Splinter factor". According to his information –which has not yet been possible to confirm or refute due to secret archives in the USA– the CIA intentionally focused on Vladimír Clementis' visit to the USA, where he attended the UN General Assembly in New York in 1949. According to Steven's interpretation, the secret service deliberately created a campaign around Clementis with the aim of discrediting him in the media as an enemy of the "growing Stalinist pressure on Czechoslovakia" and as an opponent of "men like Klement Gottwald".[2] Regardless of the final judgment concerning the validity of this claim once the archives are opened, the international political factor of initiating the trial with the Slovak bourgeois nationalists will remain indisputable. In this sense, when researching the trial documents, we were also interested in accusations of espionage, and cooperation with an external enemy and his agents, which are best demonstrated by the prosecution.

2. The catalysts of the trials

The process took place during the most heated period of the Cold War and polarization of world politics. The search for enemies within the respective power blocks was nothing unusual and occurred both in the USSR and its allies, as well as in the USA and the European states acting under their influence.[3] Cases of wiretapping and surveillance of the Communist parties of Italy, France, and others had become well known.[4] Within the Soviet bloc, the impacts of the Cold War were dealt with in a much more radical manner. While being based on real grounds, there were court trials that included elements of witness manipulation, fabricated indictments, and manipulation

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1 The trial against Lucretia Pătrăşcanu. He was a Romanian professor, one of the leading representatives of the Romanian Communist Party, and Minister of Justice since 1946. He reacted to the Hungarian - Romanian clashes and the efforts of the Hungarian post-war communist leadership for territorial revisionism in the northern part of Transylvania. With respect to the context of national tensions and the involvement of Hungarian Communists in his trial (e.g., their involvement of Stalin himself), his case was similar to that of the Slovak bourgeois nationalists. Pătrăşcanu was arrested on April 28, 1948. His pro-Romanian activities were investigated by the Communist Party's Central Committee. He was accused of nationalism and Titoism. Pătrăşcanu was held in custody until his execution in 1954. His rehabilitation took place in 1968. In preparation for his trial, the Romanian State Security called Securitate took direct inspiration from the Slánský et al. trial in Czechoslovakia (a group of Romanian secret service officers was sent to take notes of the trial progress). Cf.: TISMĂNEANU, V., *Stalinism for All Seasons: A Political History of Romanian Communism.* Berkeley, 2003, p. 105-106.

2 STEVEN, S., *Communist Crimes and the CIA*. Bratislava, 2001, p. 128.

3 See also at: MATIS, J., Elity v sfére bezpečnosti - bezpečnostné elity 2017. In: *Kultura Bezpieczeństwa: nauka - praktyka - refleksje*. Nr. 28, 2017, p. 158-174.

4 This eventually led to the expulsion of some Communist parties from the governments of Western European countries, e.g., Italy, France, Belgium, Greece, and later Portugal. Later on, the Communist parties in Western European countries managed to distance themselves from Stalinist practices and dogmatism and they played the role of major left-wing political force, often even gaining a share in power.

of the very court proceedings. Cases formally similar to the one constituting the subject matter of this article, i.e., indictments for "bourgeois nationalism" and the related proceedings used to occur also in the USSR (a case against Ukrainian bourgeois nationalists, etc.), or Bulgaria and Albania.

After the end of WWII, Czechoslovakia used to come into direct diplomatic conflicts with two of its neighbors (Poland and Hungary). This occurred despite the fact that at the time they all already belonged to the group of Soviet Union satellite states. Within Czechoslovakia, there was a difficult situation of a power struggle between social-communist parties and their various opposition parties. However, in foreign policy, there existed a rare unity in terms of stressing the need to resist Hungary in its aggressive revisionist policy concerning the status of Hungarian nationals living in our territory. With respect to Poland, there was a shared resistance to its claims on Tešín, Orava, and Spiš regions and its attitudes towards Slovaks living in the municipalities thereof. Slovak politicians were involved in both these foreign policy issues and most of them were members of the Communist Party of Slovakia. Later, they were labeled "the Slovak bourgeois nationalists" and some of them found themselves standing trial in a group with Gustav Husák.

In analyzing the catalysts of the process, we must first consider Rákosi's Hungary as the fundamental factor. Since the end of WWI, Slovak Communist intelligentsia permanently came into contact with Hungarian officials. The fundamental issue, here, was the peace treaty and the status of persons of Hungarian nationality in Slovakia. Vladimír Clementis was most preeminently engaged in these issues. He served as the State Secretary at the Ministry of Foreign Affairs and later its minister. In these capacities, he primarily defended Slovak interests against Hungarian revisionism and initially pushed for repatriation and later on population exchange.[5] Clementis' views on the "Hungarian" question had been known and published in the London exile file "Between Us and the Hungarians."[6] At the same time, in his speeches but also at mutual meetings and conferences, he sharply objected to the intrigues of Hungarian politicians, regardless of their shared Communist ideological orientation, their connections, and their direct links to the highest places in the Soviet Union.[7]

In the post-war period, Stalin's USSR shifted from the international political concept of anti-German to the concept of anti-bourgeois and anti-capitalist. In these concepts, the internationalization of the proletariat regardless of national questions and aspects played an important role. Hungary, in particular, became an object of Stalin's interest, following its unstable development when the Hungarian Communist Party was in the minority. Matyás Rákosi,[8] the long-time General Secretary of the Hungarian Communist Party, did not hide his power ties to Stalin and his radical core either. Rákosi commented on the attitudes of the Czechoslovak party very sharply and inconsiderately and often resorted to blackmail and deception. One can state without reservation that he was no stranger to any means. It was precisely the General Secretary of the Hungarian Communist Party, Matyás Rákosi, who, on September 3, 1949, two months after László Rajk's arrest, in his letter to Klement Gottwald announced that during the trial they would make "dozens of Czechoslovak names you know public."[9] The letter was accompanied by a list that included the names of Vladimír Clementis, his deputy Artur London, the interior minister Václav Nosek, the deputy minister Eugen Löbl, other secretaries of the Central Committee of the Communist Party of Czechoslovakia and Central Committee of the Communist Party of Slovakia, Gottwald's adviser Ludvík Frejka, and especially the pro-nationally oriented Slovak Communists: Gustáv Husák, Ladislav Novomeský, Edo Friš, Ivan Horváth, Samuel Falťan, Ladislav Holdoš, František Zupka, and others.

Together with Rákosi, other Hungarian Communist party officials were involved in the trial of the Slovak pro-national

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5 See also at: MATIS, J., Migrácia - významný faktor európskej integrácie. In: *Zadania jednostek administracyjnych samorzadu terytorialnego z wykorzystaniem potencjalu grup dyspozycyjnych w przezwyciezaniu zagrozen bezpieczenstwa publicznego*. Wroclaw, 2016, p. 243-265.

6 The content of this short book is sufficient for illustration. The chapter headings are as follows: *"Who was here earlier? The Hungarianization of geographical names. Falsify and twist - Hungarian lies. You will either be a Hungarian or die of hunger. Brutal Hungarianization and unbounded Hungarian chauvinism. Hungarian democracy? – for nobility only. Brutal ethnic oppression. How the Hungarians liberated the Hungarians in southern Slovakia."* This overview of the book's content is from CLEMENTIS, V., *Between Us and the Hungarians.* London, 1943.

7 On September 6, 1943, in a radio broadcast on Radio London: *"The propaganda of the Hungarian lords seeks to prove that they are not at fault for the participation in the war, that they are only performing self-defense, and that the annexation of parts of neighboring countries was not an act of conquering – thus wrote it and proclaimed it into the world minster Ghyszy. Concurrently, they do not fail to add –and this is a verbatim quote from the Budapest radio– it is clear, that there is no room for discussion in the matter of re-connecting the Hungarian parts to the thousand-years-old Hungary […] No, we will not enter a discussion with the murderers of Mária Kokešová from Šurany, or the member of parliament Olex Borkaňuk, or the thousands faithful citizens of Subcarpathia. There is no room for discussion with murderers – they are only to be tried."* CLEMENTIS, V., *Odkazy z Londýna.* Bratislava, 1947, p. 60-62.

8 MÁTYÁS RÁKOSI (1892-1971) real name Mátyás Rosenfeld, was born in Vojvodina into a Jewish family. Later in his life, he rejected Judaism and became an atheist. After the outbreak of WWI, he fell into Russian captivity. After the war, he returned to the then-Hungarian Democratic Republic and founded the Communist Magyarországi Pártja (Communist Party of Hungary). Noteworthy is his involvement in the establishment of the Slovak Soviet Republic (Slovak Republic of Councils). The support for the establishment of this regime from the Hungarian side had a clear revisionist context. After the fall of the Hungarian Soviet Republic, he moved to the Soviet Union, where he worked as a Secretary of the Comintern and came into contact with Stalin. At the beginning of WWII in 194é, after he had lived and worked back in Hungary for some time, he was transferred back to the USSR on the basis of the Hungarian-Soviet treaty. Until 1945 he worked there as a member of the Moscow émigré community Magyar Kommunista Pártja. After WWII during 1948-1956, Rákosi held the position of the First Secretary General of the Communist Party of Hungary. Cf.: IRMANOVÁ, E., *Hungary in the Soviet era.* Ústí nad Labem, 2008, p. 384.

9 Cf.: PEŠEK, J., Nepriateľ so stranickou legitimáciou: proces s tzv. slovenskými buržoáznymi nacionalistami. In: *Storočie procesov : súdy, politika a spoločnosť v moderných dejinách Slovenska.* Bratislava, 2013.

Communists[10] as well: Mihaly Farkaš[11] and Ernő Gerő,[12] accompanied by Jozsef Révai,[13] that is, at the time the whole quadrangle of the most important state and Communist officials in Hungary. No Slovak Communists pushing for Czechoslovak demands and the official party line against Hungarian nationals in Slovakia were able to avoid a conflict with them, including Okáli, Horváth, Clementis, or Husák. It was precisely Husák, who pointed to this connection in his application for his rehabilitation[14]. The efforts of Hungarian political circles to discredit Slovak Communist intelligentsia engaged in solving the "Hungarian question" were also evident on the international scene – in the communication between the Soviet satellite states. Already in 1947, at the first meeting of the Information Bureau, the Hungarian delegation accused the Czechoslovak Communists and their leaders of nationalism and chauvinism in their attitudes towards the status of Hungarian nationals in Slovakia.[15] This controversy and the intrigues of the Hungarian party continued in the public forum of the Information Bureau also in the subsequent years. It materialized in the form of official complaints to the Soviet leadership. The criticism was directed at measures to evict and punish the *anyaiás*,[16] the process of population exchange, the transfer to the border areas with Germany, the reluctance to accede to Hungarian requirements in drafting interstate agreements, and other matters. Hungarian leadership, led by Rákosi, made use of their knowledge gained in the revolutionary structures of the Hungarian Soviet Republic, as well as the experience and connections from its activities in Comintern.[17]

3. The primary Hungarian factor?

The article "On one of Rákosi's Speeches: The speech of the Chairman of the Communist Party of Hungary" that appeared

[10] As will become clear later on in the article, the term "*pro-national*" does not point only to the issues in the relations between post-war Slovakia and Hungary (the "Hungarian question"), but also to issues concerning the constitutional status of Slovakia within Czechoslovakia and the relations of Czech and Slovak nations in the common state (the "Slovak question"). The group of Slovak pro-national Communists stood trial and were convicted for defending the interest of the Slovak nation in both these questions.

[11] MIHÁLY FARKAS (1904-1965) was born Hermann Lőwy into a Jewish family. He had direct ties to Slovakia due to his birthplace near the Slovak border in Abaújszánto. He lived in Košice, where he became secretary of a group of young workers in 1919. Since 1921, he was a member of the Communist Party of Czechoslovakia. In 1925, he was sentenced to six and a half years in prison for his activities. After his release, he took part in the Spanish Civil War during 1936 – 1937. During WWII, he worked on the front where he was charged to undertake propaganda tasks. In 1944 in Szeged, he helped to form the new Central Committee of the Communist Party of Hungary together with Ger, Revai, and Nagy. In 1945, Farkas became the Minister of the Interior and later the Minister of Defense. M. Farkas was also in charge of state security in Hungary, and his son was one of the most prominent state security officials in Hungary. Cf.: ROMSICS, I.: *History of Hungary in XX. century*. (Osiris, 2005). According to Husák, Široký, and Slánsky maintained extraordinarily good relations with Farkaš. Compare: NA ČR, ÚV KSČ, f. 03/10, vol. 33, a.j. 385, Husák: Application for complete party rehabilitation, p. 58.

[12] ERNŐ GERŐ (1989-1980), like Farkas, had direct ties to Slovakia as well. He was born in Trebušovce in the District of Veľký Krtíš to Jewish parents. His birth name was Ernő Singer. Like Rákosi, he rejected the Jewish religion as a young man. After the failure of Kún's Bolshevik Hungary, he fled to the USSR, where he became an agent of the secret service. In this capacity, he became involved in the Comintern. He fought in the Spanish Civil War. After WWII, Gerő was a member of the temporary government. Once the Communists took over the government in 1948, he and Farkas became Rákosi's right-hand men. In 1956, for three months, he became secretary general of the Communist Party of Hungary. Cf.: ROMSICS, I.: *History of Hungary in XX. century*. Budapest, 1999.

[13] JÓZSEF RÉVAI (1898-1959) originally called Josef Lederer, like Rákosi, Farkas, and Gerő, was of Jewish descent. He worked as a bank clerk and attended the inaugural meeting of the Hungarian Communist Party in 1918. During the short period of the Hungarian Soviet Republic, a member of the Central Workers' Council. After the Republic's defeat, he left for Vienna, where he was elected the Head of the Secretariat of the Communist Party of Hungary. He visited Hungary illegally. In 1930 in Budapest, he was arrested and sentenced to three years in prison. After his release, he went to Prague and from there to the USSR, where he worked in the structures of the Comintern. Since 1937, he participated in the work of the Central Committee of the Hungarian Communist Party in Czechoslovakia, but after the German occupation of Czechoslovakia, he fled through Poland and Sweden to the USSR. After WWII, he became a close collaborator of Rákosi, Farkas, and Gerő.

[14] In his application for rehabilitation, G. Husák mentions: "I had an older personal experience with both Farkaš and Rákosi. Farkaš visited Bratislava several times after the liberation, he insisted that we do nothing with the Hungarian question, that it is non-Marxist and that it is detrimental to the party in Hungary. In a similar fashion, Rákosi urged me in 1946 in Budapest […]. Rákosi and Farkaš later blamed the „nationalist" solution to the Hungarian question in Slovakia on the party's leaders, especially Husák, Novomeský, and Šmidke. As a result of various behind-the-scene „information", in the eyes of Rákosi – Farkas, we had become the main culprits of this issue, and therefore also nationalists." Cf.: *NA ČR*, ÚV KSČ, f. 03/10, vol. 33, a.j. 385, Husák: Application for complete party rehabilitation, p. 59.

[15] Cf.: ŠTEFANSKÝ, M., Tragédia Dr. Vladimíra Clementisa. In: *Vladimír Clementis 1902 – 1952.* Bratislava, 2002, p. 22.

[16] The term *anyaiás* was the designation of Hungarian nationals who immigrated to the territory of southern Slovakia after November 2, 1938 (after the first Vienna arbitration). It was a socially diverse stratum of the Hungarian population, primarily civil servants, gendarmes and other civil servants of the Hungarian occupying power.

[17] The utilization of adherents based on the principle of nationality became a part of the revolutionary strategy in the interwar period. The Comintern used them to spread the revolutionary idea on the territory of the still non-stable states of Central Europe during the period after the Versailles and Trianon treaties. FICO, M. Files separation between the Czechoslovak republic and Hungary in the interwar period. In: *70 Studia in honorem István Stipta*. Budapest, 2022, p. 167-173. It was especially them, who perceived or had reasons to perceive the new states based on the "national" principle as an undesirable obstacle to the progress of the world socialist revolution. (Apart from Rákosi, Béla Kún, Varga and Bokányi, etc. also worked in the Comintern apparatus. The Hungarian emigration group was advising Zinoviev, the President of the Comintern.) Formal talks of Július Verčík with Hungarian Comintern workers confirmed his suspicion that "they are working here in favor of Great Hungary, of course in a socialist packaging." According to their projections, in the future federalized, socialist, and communist Europe, Slovakia, together with Hungary, should belong to one political and economic group, just as the territory of "former Hungary" formed a "natural unit", where "everything passes to Pest". Compare ŠUCHOVÁ, X., "Heslo autonómie alebo právo na odtrhnutie?" In: *Ľudáci a komunisti: Súperi? Spojenci? Protivníci?* Prešov, 2006, p. 24.

in Lettrich's *Nové Prúdy* on October 25, 1946, points to three fundamental issues emphasized by Rákosi:

- *"The displacement of Hungarians is harmful to the peoples of the Danube Basin,"*[18] Rákosi added that *"the Communist Party of Hungary will do everything possible to prevent the forced displacement of Hungarians and*
- *that it pays even more attention to the interests of Hungarian minorities remaining outside their borders […]*
- *[…] we are unconditional supporters of friendly coexistence of the Danube peoples and we consider a democratic Danube federation not only possible but also desirable." […]*

Elsewhere Rákosi calls this federation "the Association of the Danube Nations."[19]

The negative presentation of a part of the Slovak Communist intelligentsia to the Stalinist leadership of the USSR and Stalin himself is also emphasized by the compilers of the archive documents mainly consisting of the materials from the Archives of the President of the Russian Federation.[20] The communication between Stalin and Rákosi makes evident that there were deliberate attempts to seed distrust of the Soviet leadership towards the Slovak Communists. Ladislav Clementis was the primary target of these attempts, but Gustav Husák, Ladislav Novomeský, and others –all belonging to one of the main groups in the Communist Party of Slovakia and characterized by pro-nationalist, antisemitic, and anti-Czech attitudes– were not far behind. Rákosi's letter to Stalin, dated September 27, 1948, with this contention is also preserved in the archives of the President of the Russian Federation, in the collection of archive documents of Russian historians focused on Eastern Europe.[21] There is a relatively large volume of direct and indirect indications of the Hungarian initiation of the trial with G. Husák et al., who were included in the group of Slovak bourgeois nationalists led by V. Clementis, even without counting other archival materials in Moscow and Budapest, which we have been either unable to visit or their files have not yet been declassified.

Among the final documents presented here for illustration and in support of our hypothesis about Hungarian communists being the primary factor counts the "Report on the interviews with Comrade Rákosi and other Hungarian Comrades on the occasion of the visit to the Merger Congress in Budapest during June 11-13, 1948."[22] This report was written on June 14, 1948, in Prague by Vilém Nový,[23] one of the congress participants on behalf of the Czechoslovak party.[24] In his report, Nový drew attention to a Hungarian note from June 4, 1948, which was *„startingly imperative in character and includes demands that have no real basis"*[25] for the Hungarian party's complaints. Czechoslovak delegates noted that they, too, were able to make a number of complaints in cases where *"the Hungarian officials are forcing Slovaks in Hungary not to return, expelling people interested in relocation from their work and flats, confiscate their land, and do not let them enter Czechoslovakia[…]."*[26] They expressed astonishment at the fact that in its note Hungarian government had threatened reprisals and that the Hungarian newspaper Szabad Nép[27] had been still attacking the Czechoslovak Government. Révai replied: *„Indeed, we will not linger and we will continue to attack. It is not a matter of the editorial board, but a resolution of our Politburo."*[28] Rákosi continued, complaining bitterly that he received no answer to a letter he had sent to Gottwald. After a lively exchange of views, he surprisingly informed the Czechoslovak side:

"When I talked to Comrade Stalin and told him about the situation of Hungarians in Slovakia, Comrade Stalin told me: How can you remain silent? What kind of national party are you if you allow it?"[29] Rákosi further expressed he had been bewildered by the Czechoslovak comrades for pursuing a such national policy that *"has nothing in common with Marxism – Leninism."*[30] At the end of the report, Nový notes that in between these negotiations, the Hungarian government stopped two planned resettlement transports from Hungary and dismissed the Hungarian resettlement mission. That means that the Hungarian Communist leaders must have been aware of this already during the ongoing negotiations, but did not say

[18] Nové Prúdy, II. Year, 1946, No. 21. p. 467.
[19] Nové Prúdy, II. Year, 1946, No.21. p. 467.
[20] MURAŠKO (ed.), G. P. et al., *Vostočnaja Jevropa v dokumentach rossijskich* archivov *1944-1953 gg.* Tom II. 1949-1953 gg. Moscow, 2002.
[21] MURAŠKO (ed.), G. P. et al., *Vostočnaja Jevropa v dokumentach rossijskich* archivov *1944-1953 gg.* Tom II. 1949-1953 gg. Moscow, 2002.
[22] *NA ČR,* ÚV KSČ, f. 100/24, vol. 96, a. j. 1126/2.
[23] Vilém Nový was also affected by the political reprisals of the 1950 s. In November 1949, he was arrested and imprisoned until 1954. He also testified against the group of Slovak bourgeois nationalists, especially against G. Husák. Since during his imprisonment, he was forced to become a confidant of the State Security, he was also planted in Husák's prison cell.
[24] The talks were held between M. Rákosi, M. Farkas, and J. Révai for the Hungarian side and V. Nový with Š. Bašťovanský for Czechoslovakia.
[25] *NA ČR,* ÚV KSČ, f. 100/24, vol. 96, a. j. 1126/2.
[26] *NA ČR,* ÚV KSČ, f. 100/24, vol. 96, a. j. 1126/2.
[27] The official periodical of the Communist Party of Hungary was published in the years 1945 – 1956. In this period of the so-called counterrevolution, Hungary stood on the anti-Soviet side.
[28] *NA ČR,* ÚV KSČ, f. 100/24, vol. 96, a. j. 1126/2.
[29] *NA ČR,* ÚV KSČ, f. 100/24, vol. 96, a. j. 1126/2.
[30] When Rákosi talked with Beneš in Prague, he found out that Beneš's position towards the Hungarians was identical to the position of the comrades from the Czechoslovak Republic. This was hardly surprising for him about Beneš. He's an old fox and an English agent. But he considers the attitude of Czech comrades to be naive nationalism… Rákosi does not understand –Nový continues his report– why we insist on the exchange of population. It will not help us anyway; he emphasizes stating that the Hungarians will not be in a hurry to pay for reparations. The USSR should be our example, according to Rákosi. It has cut the reparations for Hungary in half and will further reduce the. When the Czechoslovak side expressed their concern about this report, Révai became irritated: "Other commitments than the peace treaty should hold among us Communists. Namely the commitments of Marxism - Leninism. "*NA ČR*, ÚV KSČ, f. 100/24, vol. 96, a. j. 1126/2.

anything.[31] Moreover, in the very last sentence of the report, Nový notes that at the Merger Congress, Rákosi had emphasized that the Hungarian party will strive for a solution to the situation of Hungarians in Czechoslovakia in terms of Marxism – Leninism. This attests to the fact the Hungarian side quickly adapted to the international situation that had emerged and that it was able to very productively use in its favor not only its direct contacts with Moscow but also the ideological foundations of Marxism-Leninism pertaining to national and ethnic issues in "the states ruled by the proletariat." This was, however, nothing new from the historical perspective, since the activities of the Hungarian political elites can be assessed as equally utilitarian and revisionist in each and every regime.[32] It was just a failure in the statesmanship of the pro-nationally oriented Slovak Communists such as V. Clementis, G. Husák, L. Novomeský, D. Okáli, and others that they had not paid enough attention to this ideological factor and that they allowed for further weakening of their position in Moscow precisely due to their underestimation of the charges of their neglect to pursue Marxist-Leninist national policy.

The accused in the Husák et. al trial had been engaged in the "Hungarian question" both politically and legally.[33] The engagement of G. Husák and L. Novomeský is relatively well known and we will return to it in the analysis of the individual counts of their indictment.

Daniel Okáli had been directly engaged in the "Hungarian question"[34] since the end of WWII when he held the position of the Chairman of the Czechoslovak Resettlement Commission based in Budapest. This Commission managed the population exchange between Hungary and Czechoslovakia. Once the population exchange concluded he replaced Gustáv Husák as the Commissioner of the Interior at the Slovak National Council.[35]

Since 1945, Ladislav Holdoš had been working as a Communist official in various positions. Since 1948, he was the Chairman of the Communist Party Defense Commission, the Secretary-General of the Slovak National Front, as well as the Vice-chairman of the Slovak National Council. Since April 1950, Holdoš held the position of the Commissioner of the Slovak Office for Ecclesiastical Affairs, a position in which he was preceded by Gustav Husák. The stance and engagement of Holdoš in the "Hungarian question" is best illustrated by his position on the proposal to dissolve the Hungarian Commission at the Presidency of the Central Committee of the Communist Party of Slovakia and replace it with a position of a Clerk for the Hungarian Question. In response to this proposal, L. Holdoš concurred that the dissolution of the Hungarian Commission was correct since its members inform M. Rákosi on all matters. He verbatim stated: *"M. Farkas knows sooner than we do."*[36] G. Husák expressed his agreement with Holdoš stating: *"Since the beginning, the Hungarian consulate is closer to them than the Party headquarters."*[37]

Ivan Horváth worked as a member of the Slovak National Council and its vice-chairman, he was an ambassador in Budapest, the chairman of the Czechoslovak part of the Czechoslovak-Hungarian delimitation commission that dealt with the adjustment of Czechoslovak-Hungarian state borders and the so-called Bratislava bridgehead (a part of which became Jarovce, Rusovce, and Čunovo after WWII).

4. The Slovak question

Media "preparation" was a necessary part of every trial. Ordinary political confrontations are common on the political scene. This applies to every state and in every period. However, in the case of the Slovak pro-national Communists, we can observe the onset of the preparations for their "media discredit-

[31] Nový notes here: "It is interesting that in both negotiations the Hungarian comrades emphasized the negotiations between the two parties – the Communist Party of Czechoslovakia and the Communist Party of Hungary. Moreover, they were always irritated when we reminded them of their obligations under the Treaties. This was done in particular by Comrade Révai, who was the most aggressive and who probably directly makes the decisions on foreign affairs. "*NA ČR*, ÚV KSČ, f. 100/24, vol. 96, a. j. 1126/2.

[32] MEDVECKÝ, K. A., *Slovenský prevrat*. Trnava, 1930, p. 223 *"The whole Communist romance of the Hungarians had almost a single goal: the annexation of the territories seized by the new nation-states from Hungary and especially the recapture of Slovakia."* Or see VIETOR, M., *Slovenská sovietska republika 1919.* Bratislava, 1955, p. 94 – On April 1, 1919, Robotnícke noviny no. 25 wrote: *"The Slovak people are aware that their needs are not only social but also national."* – it is in this sense that Robotnícke noviny tried to *"disarm the revolutionary rise of the proletariat, deceive the workers, turn their attention from the most immediate task of the class struggle."*

[33] In his request for party rehabilitation, Husák considers the „Hungarian question" to be an important factor in their persecution and states: "Based on the Party decision, V. Clementis was quite involved in the "Hungarian question" (at the peace conference, during resettlements). Similarly, L. Novomeský (in education). All these moments played their role in the behind-the-scene talks of political and security officials of the Czechoslovak Republic and Hungary. "*NA ČR*, ÚV KSČ, f. 03/10, vol. 33, a.j. 385, Husák: Application for complete party rehabilitation, p. 59.

[34] On May 31, 1948, the presidency of the Communist Party of Slovakia appointed a commission to prepare and submit proposals to resolve the Hungarian issue in Slovakia. The commission consisted of Okáli, Husák, and Friš. Husák commissioned an elaboration on national conditions in southern Slovakia with regard to historical developments and recent measures after the liberation, such as (re-Slovakization, colonization, etc.), as well as a report on the Slovak minority. Compare: *NA ČR*, ÚV KSČ, f. 03/10, vol. 33, a.j. 385, Husák, application for complete party rehabilitation, p. 44.

[35] One of Okáli's most important political decisions as Commissioner is the adoption of Decree No. A-311/16-II / 3-1948 of the Slovak Interior Commission, issued on June 11, 1948 (Official Government Bulletin No. 55 Art. 946/1948). The decree changed the names of 710 towns, villages, and settlements in Slovakia. Šafárikovo, Kolárovo, Kalinčiakovo, Palárikovo, or Hurbanovo are among the many towns that owe their current name to Daniel Okáli.

[36] BOBÁK, J., *Maďarská otázka v Česko – Slovensku (1944 – 1948).* Martin, 1996, p. 145.

[37] On October 21, 1949, at the meeting of the Presidency of the Central Committee of the Communist Party of Slovakia, Š. Bašťovanský complained that he was personally visited by the Hungarian consul in Bratislava. The consul, Bašťovanský lamented, received the minutes of the Hungarian Commission meeting even before the Central Committee. He reproached Bašťovanský for the fact that what is being done in the Slovak south is not of class (eviction of "kulaks"), but national and anti-Hungarian character.

ing" relatively early. As early as the first anniversary of the end of WWII, we can find articles of such character in domestic periodicals. The domestic political factors provided the last fragment into the mosaic of the conviction of the Slovak pro-national Communists later on. Conflicts and misunderstandings between the Slovak Communist party illegal leadership and the Moscow leadership, represented mainly by the Czech Communists, had arisen since the outbreak of the Slovak National Uprising. The Slovak pro-national Communists were reproached for their cooperation with the circles associated with the Democratic Party, especially Ursíny, Lettrich, Karvaš, and others. Their relations on the political level were marked by competition, however, they were finding common ground on the issue of Slovakia's position in the restored common state. This is evident both from the press of the time and their mutual communication. The Czech Communist Party presented this cooperation of the Slovak pro-national Communists with the competing parties as nationalism and denial of proletarian internationalism. Undoubtedly, the autonomous position of the Slovak National Council and certain legislative independence of Slovakia from the Czech part of the state played a role as well. These conflicts escalated during the drafting of the Košice Government Program and eased only after the arrests of the uncomfortable Slovak bourgeois nationalists.

Thus, the existence of a group of Czech nationalist Communists, whose attitudes toward the Slovak question can even be described as chauvinistic, was another factor that contributed to the selection and inclusion of Husák, Novomeský, Okáli, Horváth, and Holdoš (but also Clementis and others) into the role of Slovak bourgeois nationalist. In following the development of the case of the Slovak bourgeois nationalist, we came across a contribution, or rather an open letter to the editorial board of Nové Prúdy, full of observations from Slovakia. It was published in the periodical of the Democratic Party as early as 1946 and its author was Antonín Baitler. It describes his impressions of the prevailing socio-political climate in Slovakia. Baitler refutes the fears of general anti-Czech sentiments or nationalism among the Slovak citizens. However, he argues, one can observe these phenomena among some Slovak Communists.[38] The comparison of this article with the accusations against Slovak pro-national Communists points to three general areas that largely coincide with the later formal accusations of the Communist political structures and in virtue of them also with the indictment charges of the prosecutor:

1. deliberate covering up for and failure to punish the so-called "ľudáci",[39]
2. the efforts aimed at the secession of Slovakia and breaking up of Czechoslovakia,
3. unrealized or poorly implemented reorganization of the National Committees.

We can only guess whether these accusations of the author were only of a private character (in addition, published in the newspaper of the Democratic Party). Taking into consideration the fact that the allusions to the nationalism of the Communist party leadership date back already to the Slovak National Uprising period,[40] this certainly was also one of the reasons for the secret police's interest in and investigation of this group of pro-nationally oriented Slovak Communists. The research aimed at the author of this article led us to an interesting discovery. In 1954, he was listed as an operative of military counterintelligence in the first paper records of the State Security. Despite his file being shredded in the 1960 s, it is possible to confirm, that direct attempts to discredit some of the pro-nationally oriented officials of the Slovak Communist party were being made already in the post-war period.

Last but not least, the tense relationship between the different centers of power within the Communist Party of Slovakia and the Communist Party of Czechoslovakia – both sides verbally denied the existence of such competing power centers, but they indeed existed– has to be deemed the final contributing factor for the trial. Viliam Široký, in particular, together with Július Ďuriš, and later Karol Bacílek, Štefan Baštovanský, and others were in opposition to Gustav Husák's group.[41] This "Prague" part of Slovak Communists tried to depose the Slovak pro-national group of Communists, who were giving preference to the question of the status of the Slovak nation over the party dogmatism and centralism. However, in these efforts, the Gott-

[38] *"As for the so-called "ľudáci," I did indeed find them here. After examining the material, which I have carefully studied, I am surprised that, no action has been taken against under the authority of the Interior, despite the fact that these cases have been reported more than once. If this is because these men are under the protection of the Communist Party of Slovakia, then it proves the exact opposite of what is being written in the Czech Republic, namely that the Hlinka family is not in the Democratic Party but in the Communist Party of Slovakia. I am thinking in particular of those Hlinka party and Guard members, who have a very dubious past and have not come before a people's or national court […] I have read a lot of promotional material and various articles from all political parties in Slovakia and the only signs of dualism or secession I found in the leaflets, press, and speeches of the Communist party representatives… I was surprised that the reorganization of the National Committees has not yet been commenced in almost any municipality. "* BAITLER, A., *Je problém Čechu a Slováků?* In: Nové Prúdy, II. Year, No.18 dated 15. 9. 1946. p. 406.

[39] Members or followers of (Hlinka's) Slovak People's Party during the war-era Slovak Republic.

[40] Cf. PEŠEK, J., Nepriateľ so straníckou legitimáciou: proces s tzv. slovenskými buržoáznymi nacionalistami. In: *Storočie procesov : súdy, politika a spoločnosť v moderných dejinách Slovenska.* Bratislava, 2013.

[41] According to J. Ursíny, V. Široký was not even a Slovak. He was a Hungarian candidate of the Communist Party; in 1919 he took part in a strike of Hungarian railway workers organized against the Czechoslovak government. In the government, Široký never voted in favor of Slovak demands. URSÍNY, J: *From my life. Contribution to the development of the Slovak national idea*. p. 109 - 110. A record in the indictments of Slovak bourgeois nationalists can be used to confirm the contentions of Ursiný. The record mentions that Široký's two sisters should have been expelled from Slovakia as part of the population exchange, but D. Okáli prevented it at the last moment. In his application for party rehabilitation, G. Husák commented on Široky as follows: "Even though he later declared himself to be of Slovak nationality and acquired the language, Široký never grew together with the Slovak environment, nor did he acquire any internal relationship with the Slovak nation. National Traditions of national progress, national culture, literature, and other elements that created the national specificity of Slovakia remained foreign to him. ". *NA ČR*, ÚV KSČ, f. 03/10, vol. 33, a.j. 385, Husák: Application for complete party rehabilitation, p. 44.

wald-oriented Slovak Communists did not stop at influencing the leadership of the Communist Party of Czechoslovakia, but they did not hesitate to address their objections to Moscow and Stalin himself. In this context, it is necessary to mention a copy of Duriš's personal letter to Stalin (together with a copy of his request for safe delivery of the letter into Stalin's hands addressed to the Soviet ambassador).[42]

Gustáv Husák judged Široký's position on the constitutional status of Slovakia within Czechoslovakia as follows: "Široký's stance on the Slovak national question was formal, one might even say practically nihilistic. He formally recognized „the right of the nation to self-determination," however, when it came to the tangible expressions of this right within constitutional order and in particular acts, he virtually always maintained administrative-centralist position contrary to the position of the Slovak national bodies, and this not only before February 1948."[43] Široký considered the "Slovak question" to be an obstacle, an impediment, and an unnecessary complication on the path to socialism.

Slánsky, Kopecký, Novotný, and Zápotocký were the most ardent opponents of any stronger constitutional and legal position of Slovakia in the Communist Party of Czechoslovakia, the de facto Communist party of the Czech part of the republic. Even the opposition hints at such an arrangement. It is clear, that K. Gottwald shared a similar attitude, however, his openly expressed views were less radical. This was due to the office he held, which did not allow him to divide communists in the common state on a national basis.

In his application for rehabilitation, Husák also mentions Slánský, whom he also blamed for the situation that occurred: *"Slánský, as I was able to observe in the conversations with him during the Uprising […] and verify in further practice, had a similar formal even nihilistic attitude to the solution of our national question. Later on, this attitude transformed into animosity and an arrogant and contemptuous position on the "Slovak question".*[44]

Kopecký's attitude and conflict that gradually escalated can be demonstrated by the following example. In a party discussion, Kopecký expanded a theory about the Russian nation's leading role in the USSR. The Russian nation purportedly unites all nations of the USSR, it is the *"backbone of the whole state, of the whole Party"*[45] and other nations do in fact recognize this. According to Kopecký, in Czechoslovakia the arrangement is to be similar. *"In our country, the leading nation is the Czech nation; it unites the whole state as well as the Party […]."*[46] Husák raised an objection to that when he asked him "whether he wanted this theory of the "leading" and the "led" nation to substitute the Košice Government Program that defines the relation of our nations as *"an equal with an equal"*.[47] Finally, according to Husák's recollections, Gottwald halted the whole discussion.

5. Conclusion

It is possible to agree with F. Ďurčanský, who stated in the "White Book" that "people of Slovak origin such as Husák, Clementis, Novomeský, Okáli, people of purely Slovak origin had been removed and –with certain exceptions– only people that previously claimed other than Slovak nationality enjoyed the trust of Moscow and Prague."[48]

In conclusion, it is necessary to state the generally known fact that all strings and reports converged in Moscow, which had its own interests. According to the information preserved untill now, they were opposed to the pro-national activities of Clementis and his "group" on behalf of Slovakia. Moscow was evidently well –and in great detail– informed about this attitude not only from the Czech or Hungarian side, but also from Poland, and their competition in the Communist Party of Slovakia.[49] Thus, despite the undeniable interest and recommendations of the Soviet advisors, there also existed someone else, who "proposed" these Slovak pro-national Communists be deemed hostile or dangerous, in order to get rid of competitors or opponents.

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[42] „As I remember even after 20 years, in this letter from November (or December?) 1947, Duriš described the dangerous development in the domestic political situation in the Czechoslovak Republic in the last half of 1947 with indignation. At the same time, he critically pointed out the inability or unwillingness of leading comrades to solve this situation. In the end, he asked Stalin to intervene personally as decisively as possible and to help prevent the catastrophe of the threatening socialism in the Czechoslovak Republic." ŠIMOVIČ, L., *Z nepublikovaných vzpomínek.* LETTERS. Bimonthly for culture and dialogue.
http://www.listy.cz/archiv.php?cislo=072&clanek=020715 cited on 5. 1. 2023.

[43] *NA ČR*, ÚV KSČ, f. 03/10, vol. 33, a.j. 385, Husák, application for complete party rehabilitation, p. 47.

[44] *NA ČR*, ÚV KSČ, f. 03/10, vol. 33, a.j. 385, Husák, application for complete party rehabilitation, p. 47.

[45] Ibid., p. 47.

[46] Ibid.

[47] Ibid.

[48] „Široký is the chairman of the Communist Party of Slovakia, and Široký is also the representative of Slovakia in the Prague government. Until recently, Bašťovanský was the General Secretary of the Communist Party of Slovakia." Further, he mentions Bacílek as the former chairman of the Board of Commissioners and the Central Secretary of the Communist Party of Slovakia. „Štefan Rais was the Minister of Justice for the Communist Party of Slovakia… F. Zupka was the chairman of the Slovak Trade Union Council, Vice-Chairman and Chairman of the Central Trade Union Council, and the Commissioner of Labor and Social Affairs […]." ĎURČANSKÝ, F., *Biela kniha.* Bratislava, 1991, p. 817.

[49] Cf. J. Ursíny's recollections*: "Clementis was a truly national man, it was not an obstacle for him that a proposed person [for a position] was not a Communist."* According to Ursíny, Moscow accepted Husák's and Novomeský's proposal that Clementis become the State Secretary at the Ministry of Foreign Affairs only very reluctantly. URSÍNY, J., *Z môjho života. Príspevok k vývoju slovenskej národnej myšlienky.* Martin, 2000, p. 110.

Strafrecht in Ungarn (1920–1944)

(Criminal Law in Hungary /1920–1944/)

*Veronika Lehotay**

Abstract

The study deals with criminal law between the two world wars. The first codified Hungarian Penal Code was completed in 1878. The Criminal Code became known as the Csemegi Code. After 1920, there were also a number of changes in criminal law. The main questions of this paper are: How did the economic crisis, the war, and the increasing discrimination from 1938 onward affect criminal law? In the context of the period between 1920 and 1944, the question arises how and whether the representatives of (criminal) jurisprudence took a stand on equality, war and restriction of rights. How has the relationship between the state and the individual changed with regard to public law / criminal law? How did the criminal law tendency appear in Hungarian jurisprudence and how did it influence legislation? How did racial protection appear in Hungarian criminal law thought and practice? How did criminal law develop in practice in Hungary between 1920 and 1944? How did the law of criminal procedure change? The main sources for the research are the legislation and the literature of the time.

Keywords: *Legal history; Horthy-era; war; economic crisis; discrimination; Hungary; criminal law.*

1. Einführung

Im Laufe der Jahrhunderte haben sich die Faktoren, die bestimmt haben, was eine Straftat darstellt und wer strafrechtlich verfolgt werden kann und sollte, ständig verändert. Aber die Basis dafür waren immer und überall die für die Gemeinschaft charakteristische Gesellschaftsordnung und die weltlichen und moralischen Regeln der Gemeinschaft. Von Anfang an hat das Strafrecht auch in Ungarn eine entscheidende Rolle gegenüber anderen Rechtszweigen gespielt: Ein bedeutender Teil der Gesetze der ersten ungarischen Herrscher enthielt strafrechtliche Vorschriften.[1] In der Epoche der Könige der Árpáden-Dynastie war das Ziel des Strafrechts die Errichtung der feudalen Staatsmacht, und der Bedarf des Staates an Strafgewalt entstand. Im 14. Jahrhundert traten jedoch die Konsolidierung des europäischen Ansehens des Staates und die Festigung der staatlichen Positionen in den Vordergrund.[2] Im 16. Jahrhundert entstand der Bedarf an der Entwicklung der transparenten gesetzlichen Regelungen im Bereich des Strafrechts. Auch das Strafrecht wurde langsam vom Privatrecht unabhängig. Seine formale Trennung vom Privatrecht fand jedoch erst im 18. und 19. Jahrhundert statt.

Die Abgrenzung zwischen öffentlichem und privatem Recht war jedoch in der Zeit zwischen den beiden Weltkriegen noch immer nicht eindeutig. Im Jahr 1938 schrieb Vilmos Szontágh in seiner Abhandlung *„Közjog és magánjog elválasztása“* (*„Die Trennung von öffentlichem und privatem Recht“)*: Der Umfang des öffentlichen Rechts und des Privatrechts variiert je nach dem Ausmaß, inwieweit sich die Gesetzgebung zur Konkretisierung der Rechtspersönlichkeit des Staates durch die Anerkennung des öffentlichen Interesses an den Lebensbeziehungen ausbreitet.[3]... Dieser Gedanke verdeutlicht auch die Schwierigkeit, die Grenze zwischen öffentlichem und privatem Recht fetzustellen. Es stellte sich auch die Frage, ob es ein *staatenloses Privatrecht* gibt, d.h. in das der Staat nicht eingreift. Die wichtigste Rolle hat dieses Thema im Bereich der Landesverteidigung gespielt, denn im Bereich der Landesverteidigung ist der Eingriff des Staates in das Leben des Einzelnen am umfangreichsten.[4] Der Umfang der Straftaten und die Veränderung der Strafverfolgungsbedingungen werden durch die politischen Rahmenbedingungen, die Weltanschauung, die vorherrschende Ideologie und die wirtschaftliche Notwendigkeit beeinflusst.

Nach dem Ersten Weltkrieg war in Ungarn *das Prinzip der Rechtskontinuität* entscheidend, d.h. es wurde angestrebt, das Verfassungssystem der Vorkriegszeit möglichst vollständig wiederherzustellen und die Gesetze aus dem Jahr 1848 und die nach 1867 erlassenen Gesetze in Kraft zu halten. Universitäts-

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1 Die Dekrete des Heiligen Stephans, des Heiligen Laszlo und des Koloman.

2 MEZEY, B., *Magyar jogtörténet.* (*Ungarische Rechtsgeschichte*). Budapest, 2007.

3 SZONTÁGH, V., Közjog és magánjog elválasztása. (Die Trennung von öffentlichem und privatem Recht.) In: *Jogállam: jog-és államtudományi szemle*, vol. 37, Nr. 5, 1938, S. 172-181.

4 Gazdasági Jog, (*Wirtschaftrecht),* Vol. I. évfolyam, Nr. 5, 1940, S. 209-210.

professor Kálmán Molnár[5] hat diese Bestrebungen folgendermaße zusammengefasst: *Das Wesen der Rechtskontinuität besteht darin, dass die Schaffung, die Änderung und die Außerkraftsetzung von Gesetzen nur durch im Sinne der Verfassung erforderliche Faktoren bewirkt werden können*.[6] Dies ist jedoch in der Praxis auf Hindernisse gestoßen. Ungarn hatte in dieser Epoche eine historische Verfassung, die durch mehrere Gesetze ergänzt wurde. Im Jahr 1920 wurde die Einkammer-Nationalversammlung mit der Aufgabe betraut, die Verfassungsmäßigkeit wiederherzustellen. Anstelle des Königs wurde ein Reichsverweser in der Person von Konteradmiral Miklós Horthy, dem Anführer der Nationalarmee gewählt.[7] Das Amt war als vorübergehend gedacht, aber die durch Horthys Namen gekennzeichnete Epoche dauerte bis Oktober 1944.

In dieser Zeit waren die Ansichten der Auliker, die die Horthy-Regierung unterstützten, und der Legitimisten, die die Anhänger des Hauses Habsburg waren, und die Debatten zwischen ihnen die grundlegenden Bestimmungsfaktoren des öffentlichen Rechts. Der Gesetzesartikel Nr. 1 aus dem Jahr 1920 hob die während der Volksrepublik[8] und der Räterepublik[9] erlassenen Gesetze auf. Die Grundlage des Strafrechts war somit der Gesetzesartikel Nr. 5 aus dem Jahr 1878, der Csemegi-Kodex, der auf liberalen Grundsätzen und den Lehren der klassischen Strafrechtsschule geschaffen wurde.

Die Hauptfragen dieser Abhandlung sind: Wie wirkten sich die Wirtschaftskrise, der Krieg und die zunehmende Diskriminierung ab 1938 auf das Strafrecht aus? Im Kontext des Zeitraums zwischen 1920 und 1944 stellt sich die Frage, wie und ob die Vertreter der (Straf-)Rechtswissenschaft über Gleichberechtigung, Krieg und Einschränkung von Rechten Stellung bezogen haben. Wie hat sich das Verhältnis zwischen Staat und Individuum im Hinblick auf das öffentliche Recht / das Strafrecht verändert? Wie erschien die täterstrafrechtliche Tendenz in der ungarischen Rechtswissenschaft und wie hat sie die Gesetzgebung beeinflusst? Wie erschien der Rassenschutz im ungarischen strafrechtlichen Denken und in der Rechtspraxis? Wie entwickelte sich das Strafrecht in der Praxis in Ungarn zwischen 1920 und 1944? Wie änderte sich das Strafprozessrecht?

2. Quellen des Strafrechts in Ungarn

Im 18. Jahrhundert begann die akademische Entwicklung des Strafrechts mit der Veröffentlichung der ersten Fachwerke zum Strafrecht. Das erste wichtige Werk von wissenschaftlichem Wert zum Strafrecht ist das Handbuch von Mátyás Vuchetich im 19. Jahrhundert.[10] Eine der wichtigen Bestrebungen des Absolutismus war die entsprechende Entwicklung der Rechtsordnung, insbesondere im Bereich des Strafrechts. Dementsprechend hat Leopold I. schon auf dem Ständetag von 1687 die Arbeit am Strafrecht angesprochen und vorangetrieben, was aber auf Hindernisse stieß. So ließ die Regierung das 1656 für Niederösterreich erlassene Strafgesetzbuch *Praxis Criminalis* ins Lateinische übersetzen und an die Mitglieder des ungarischen Ständetages verteilen. Somit konnten die ungarischen Gerichte diese Rechtsnorm anwenden. Unter den Quellen des Strafrechts finden wir Urkunden, Dekrete (königliche Gesetze), Verordnungen und das Gewohnheitsrecht. In der wichtigsten Sammlung des Gewohnheitsrechts, dem *„Tripartitum"* von István Werbőczy, erschien das Strafrecht als Ergänzung zum Privatrecht. Diejenigen Teile des Strafrechts, die privatrechtlich relevant waren, wurden in diese Rechtsquelle aufgenommen.

In Ungarn fehlten lange Zeit die Voraussetzungen für eine Kodifikation,[11] daher fand sie im Vergleich zu westeuropäischen Ländern eher verspätet statt. Im Zuge der Aufklärung erschienen *die ersten Strafgesetzentwürfe*, und 1843 wurde unter der Mitwirkung von Ferenc Deák *eine Strafgesetzesvorlage* erarbeitet, die bereits auf dem Prinzip der Gleichheit vor dem Gesetz beruhte und die Todesstrafe, die körperliche Züchtigung und die entehrenden Strafen, einschließlich der Prügelstrafe, abzuschaffen beabsichtigte. Der Entwurf basiert auf den Prinzipien des Liberalismus und wurde von den Zeitgenossen gelobt. Carl Joseph Anton Mittermaier, ein renommierter Professor und Experte für Kodifikation, bewertete den Deák-Entwurf wie folgt: *Das originellste und mutigste gesetzgeberische Experiment in Europa.*[12] Der Entwurf scheiterte grundsätzlich wegen der Frage der Todesstrafe in der Debatte der Nationalversammlung. Diese Entwürfe blieben jedoch auf dem Papier, und das erste ungarische Strafgesetzbuch, der Csemegi-Kodex, wurde erst in den späten 1870er Jahren verfasst.

Nach der Niederschlagung des Freiheitskampfes 1848/49 wurde in Ungarn 1852 das österreichische Strafgesetzbuch mit einem kaiserlichen Patent eingeführt, das bis 1861 in Kraft blieb. Zu dieser Zeit wurde die Landesrichterkonferenz einberufen, die die Provisorischen Vorschriften geschaffen hat. Sie stellten darin die Strafgesetze und die Rechtsprechung von vor

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[5] Kálmán Molnár (1881-1961): Universitätsprofessor, einer der bedeutendsten Vertreter des Staatsrechts seiner Zeit.

[6] SAMU, M. – BARABÁS, A. – TAKÁCS, I. – NAGY, L., *Tanulmányok a Horthy-korszak államáról és jogáról*. (*Studien zu Staat und Recht der Horthy-Ära*), Budapest, 1958, S. 10.

[7] November 1918 wurde die Abdankung des deutschen Kaisers Wilhelms II. bekanntgegeben; am selben Tag wurde in Berlin die Republik ausgerufen. Nun schien auch das Ausscheiden Karls I. aus seinem kaiserlichen Amt unausweichlich. Mit einem ähnlichen Vorgehen wie in Österreich erzwangen am 13. November für die ungarische Reichshälfte Fürst Nikolaus Esterházy und Graf Emil Széchenyi auf Schloss Eckartsau von Karl eine Erklärung des Verzichts auf die Ausübung seiner Staatsgeschäfte im Königreich Ungarn. Wenngleich er nicht formell abdankte, war damit auch der gekrönte König von Ungarn und Kroatien, Karl IV., Geschichte. Dennoch unternahm er im Oktober 1921 einen Restaurationsversuch in Ungarn. BRAUNEDER, W., „Ein Kaiser abdiziert doch nicht bloß zum Scheine!" – Der Verzicht Kaiser Karls am 11. November 1918. In: RICHTER, S. – DIRBACH, D. (Hrsg.), *Thronverzicht: die Abdankung in Monarchien vom Mittelalter bis in die Neuzeit.* Böhlau, Köln/Weimar/Wien, 2010, S. 123-140.

[8] Volksrepublik: Nach der Niederlage 1918 wurde Ungarn wieder als gänzlich unabhängiger Staat errichtet, zunächst als demokratische Republik unter Mihály Károlyi.

[9] Räterepublik: Zwischen dem 21. März und dem 1. August 1919, der Zeit der proletarischen Diktatur in der Geschichte Ungarns.

[10] *Institutiones juris criminalis hungariae*, 1819.: MEZEY, B., *Magyar jogtörténet. (Ungarische Rechtsgeschichte*). Budapest, 2007, S. 276.

[11] Es fehlte der staatliche Wille, und auch die verspätete Entwicklung der Rechtswissenschaft hat der Kodifikation nicht geholfen.

[12] MEZEY, B., *Magyar jogtörténet. (Ungarische Rechtsgeschichte*). Budapest, 2007, S. 318.

1848 wieder her, legten aber auch fest, dass hinsichtlich der Form und des Maßes der Strafe kein Unterschied zwischen Adligen und Unadligen gemacht werden kann. Unter den Strafrechtlern der Horthy-Ära können wir die Arbeiten von Pál Angyal,[13] Ferenc Finkey,[14] Erik Heller,[15] Albert Irk,[16] Rusztem Vámbéry[17] erwähnen. Darüber hinaus sind die folgenden Zeitschriften die Quelle der Studien der Strafrechtswissenschaftler: *„A Jog" („Das Recht"), „Jogtudományi Közlöny" („Rechtswissenschaftliches Mitteilungsblatt"), „Magyar Jogász Újság" („Ungarische Zeitschrift für Juristen"), „Jogállam" („Der Rechtsstaat"), „Bűnügyi Szemle" („Revue für Kriminologie"), „Miskolci Jogászélet" („Miskolcer Juristenleben"), „Bírák és Ügyészek Lapja" („Fachzeitschrift für Richter und Staatsanwälte"), „Jogászegyleti Értekezések" (Studien des Juristenvereins"), „Magyar Jogi Szemle" („Ungarisches Mitteilungsblatt zum Recht").* Strafrechtliche Gerichtsentscheidungen und Gesetzgebung waren in einer zwischen 1880 und 1944 erschienenen Publikation, der *„Büntetőjog Tára" („Mitteilungsblatt für Strafrecht")* enthalten.[18]

3. Der Csemegi-Kodex

Das erste kodifizierte ungarische Strafgesetzbuch wurde im Jahr 1878 fertiggestellt. Das Strafgesetzbuch wurde als Csemegi-Kodex bekannt, nach dem Namen des Kurienrichters Károly Csemegi, des Verfassers vom Strafkodex Gesetzesartikel Nr. 5 aus dem Jahr 1878 *über die Straftaten und die Vergehen* (im Folgenden: Strafgesetzbuch). Das Gesetz wurde durch den Gesetzesartikel Nr. 40 aus dem Jahr 1879 *über die Übertretungen* ergänzt. Die Bestimmungen des Strafgesetzbuches zielten auf die Abschaffung des ständischen Strafrechts aufgrund der Lehren der klassischen Schule des Strafrechts.

Der Allgemeine Teil der Rechtsnorm folgte dem trichotomischen System, so unterschied es je nach Schwere der Straftaten zwischen Verbrechen, Vergehen und Übertretungen. Es beinhaltete die Grundsätze nullum crimen sine lege[19] und nulla poena sine lege.[20] Der Gesetzgeber bevorzugte die tatstrafrechtliche Sichtweise, so dass im Mittelpunkt des Systems des Strafgesetzbuches die Tat stand. Die Handlung sei nicht nur die Tat, sondern auch das Ergebnis davon, hieß es in der Begründung der Rechtsnorm.[21] Eine Kritik am Kodex im frühen 20. Jahrhundert war, dass er nicht genug Wert auf die Persönlichkeit des Täters lege. Jugendliche und Wiederholungstäter wurden darin nicht berücksichtigt. Die strafrechtliche Verantwortlichkeit wurde nur einer Person auferlegt, die zum Zeitpunkt der Begehung der Tat 12 Jahre alt und zurechnungsfähig war. Im Alter zwischen 12 und 16 Jahren war der Täter nur dann strafbar, wenn er das erforderliche Einsichtsvermögen besaß, um die Strafbarkeit seiner Tat zu erkennen, andernfalls musste er in eine Justizvollzugsanstalt eingewiesen werden. Die Regeln des Allgemeinen Teils umfassen auch die Kategorien von Tätern und Beteiligten, die Strafenmehrheit, die Stadien der Straftat und auch die strafmildernden oder strafausschließenden Faktoren.

Der Besondere Teil des Kodex teilte die Straftaten in mehrere Kategorien ein: Dazu gehörten *Starftaten, die den Herrscher und den Staat verletzten* (z. B. Majestätsbeleidigung, tätlicher Angriff gegen den König oder die Mitglieder des Königshauses, Aufstand gegen Behörden, die Mitglieder des Parlaments oder behördliche Organe, Anreizung, Verrat, Aufstand), *Straftaten gegen die gesellschaftliche Ordnung* (z. B. falsche Anschuldigung, falsche Zeugenaussage, Ehrenbeleidigung, Verleumdung), *An-*

[13] *Pál Angyal* (12. Juli 1873 in Pécs - 18. Januar 1949 in Budapest) war einer der berühmtesten Strafrechtler seiner Zeit, der 1898 an der Bischöflichen Rechtshochschule in Pécs begann, wo er auch Strafrecht und Rechtstheorie lehrte. Ab 1900 war er Privatdozent für Strafrecht und Strafverfahren an der Universität Budapest, vom 7. März 1912 bis 1944 war er ordentlicher Professor für Strafrecht und ab 1914 befugter Professor für Rechtstheorie. Er hat mehrere Länder besucht, um Jugendgerichte und Gefängnisverhältnisse zu studieren. Seine Hauptwerke: *Fajvédelem és büntetőjog*, (*Rassenschutz und Strafrecht*). Budapest, 1939; *A magyar büntetőjog tankönyve. (Lehrbuch des ungarischen Strafrechts)*. Budapest, 1943; *A család büntetőjogi védelme. (Strafrechtlicher Schutz der Familie)* Budapest, 1943.

[14] *Finkey Ferenc* (30. Januar 1870. in Sárospatak - 23. Januar 1949. in Sárospatak): Jurist, Universitätsprofessor. Neben Pál Angyal war er der zweite herausragende Strafrechtler der damaligen Zeit. Er legte die Grundlagen der ungarischen Strafrechtswissenschaft. Finkey war ein Verfechter eines liberalen Strafverfahrens. Seine Hauptwerke: Büntetéstani problémák. (*Strafrechtliche Probleme)*, Budapest, 1933; *Az 1843-i büntetőjogi javaslatok száz év távlatából*. (*Die Strafrechtsvorschläge von 1843, hundert Jahre später.*) Budapest, 1942.

[15] *Erik Heller* (15. Mai 1880 in Győr - 15. Oktober 1958 in Budapest): war zwischen 1916 und 1925 im Justizministerium angestellt, und inzwischen wurde er Privatdozent für Strafrecht an der Budapester Universität. Seit 1925 war er Professor für Strafprozessrecht in Szeged, seit 1940 in Kolozsvár und zwischen 1944 und 1949 in Budapest. Seine Hauptwerke: *Büntetőjogunk haladásának útja. (Der Weg in die Zukunft für unser Strafrecht.)* 1941; *Ungarischer Vorentwurf zu einem Gesetz über das Verfahren in Strafsachen von Jugendlichen.* Budapest, 1912.

[16] *Irk Albert* (18. August 1884 in Csernátfalu, - 21. Oktober 1952 in Pécs) Universitätsprofessor, Juraprofessor. Er hat sich mit Strafrecht, Kriminologie und internationalem Recht beschäftigt. Seine Hauptwerke: *A büntetőjogi alapfogalmak módszertani kritikája. (Eine methodologische Kritik an den Grundbegriffen des Strafrechts.)* Pécs, 1926., A magyar büntető perjog vezérfonala*. (Die Leitprinzipien des ungarischen Strafprozessrechts).* Pécs, 1931.

[17] *Rusztem Vámbéry* (29. Februar 1872 in Pest - 24. Oktober 1948 in New York,) studierte Jura und Soziologie an drei Universitäten. Sein Leben und Wirken waren stark von seiner hohen Sensibilität für gesellschaftliche Probleme geprägt. Er begann seine Karriere als Rechtsanwalt, war von 1915 bis 1918 außerordentlicher Professor, ab 1918 ordentlicher Professor für Strafrecht und dann 1919 Dekan der juristischen Fakultät in Budapest. Er verließ Ungarn 1938, lebte in England und ließ sich dann in den Vereinigten Staaten nieder. In seiner Emigration lehrte er Soziologie und gründete eine Zeitschrift mit der Zielsetzung des Kampfes gegen die nationalsozialistische Ideologie. 1945 kehrte er nach Ungarn zurück und wurde Mitglied der Provisorischen Nationalversammlung. Er war 1947 Ungarns Botschafter in Washington, trat aber vor seinem Tod zurück. Seine Hauptwerke: *A fiatalkorúak bírósága a háború alatt és a háború után. (Das Jugendgericht während und nach dem Krieg)* Budapest, 1917; A *fiatalkorúak büntetőjoga az újabb külföldi törvényhozásban. (Jugendstrafrecht in der neueren ausländischen Gesetzgebung.)* Budapest, 1918; *Háború és jog. (Krieg und Recht.* Budapest, 1933.

[18] Die Redakteure der Zeitschrift waren in dieser Zeit Pál Angyal, Miklós Degré und Lajos Zehery.

[19] Ein Verbrechen oder eine Ordnungswidrigkeit ist nur eine Handlung, die durch das Gesetz zu einer solchen erklärt wird. 1.§.

[20] Niemand darf wegen eines Verbrechens oder Vergehens mit einer anderen als der vor der Tat gesetzlich vorgesehenen Strafe bestraft werden. 1§.

[21] MEZEY, B., *Magyar jogtörténet. (Ungarische Rechtsgeschichte*). Budapest, 2007, S. 331.

griffe auf die Person oder das Vermögen eines Einzelnen, (gemeingefährliche) Verbrechen gegen die öffentliche Sicherheit, und *Verbrechen gegen die Staatsordnung, Verbrechen im Amt* und *Verbrechen und Vergehen durch Rechtsanwälte.* Der moderne Ansatz des Gesetzbuches zeigte sich darin, dass es die Tötung auf Verlangen und die Beihilfe zum Selbstmord bereits ausdrücklich zu den Verbrechen gegen das Leben zählte und diese mit milderen Strafen belegte. Der Csemegi-Kodex basierte also auf den Lehren der klassischen oder dogmatischen Strafrechtsschule. So wurden der tatstrafrechtliche Ansatz, das Prinzip der Verantwortlichkeit aufgrund der Schuld, das Prinzip der individuellen moralischen Verantwortung, die Idee der gerechten Vergeltungsstrafe und die genaue Definition der Begriffe des Strafrechts in den Vordergrund gestellt.

Trotz seiner Vorzüge (es wurde nicht aus ideologischen, sondern aus fachlichen Gründen verfasst; es nutzte die Ergebnisse der europäischen Kodifizierungen; es schützte viele staatsbürgerliche Rechte durch das Strafrecht)[22] wurde das Gesetzbuch jedoch in vielen Fällen unbegründeter und übertriebener Kritik ausgesetzt. Kritisiert wurden sein zu komplexes Strafsystem, die unzureichenden Regelungen für Jugendliche und Wiederholungstäter. Diese Kritik führte zu den Novellen des Gesetzbuches und anderen Nebenbestimmungen in der ersten Hälfte des 20. Jahrhunderts.

Es gab auch viele Änderungen in den Rechtsgrundsätzen, die die Notwendigkeit mit sich brachten, das Strafrecht bereits am Anfang der Epoche zu ändern. 1912 kam eine Rechtsnorm aus, die außergewöhnliche Maßnahmen im Kriegsfall vorsah und welche den Csemegi-Kodex in einer retrograden Richtung ergänzte. Außerdem sah es eine Gefängnisstrafe von bis zu fünf Jahren wegen Streiks, Streikaufrufs und Verstoßes gegen die Pressezensur vor.[23] Der Gesetzesartikel Nr. 14 aus dem Jahr 1914 legte Handlungen, die durch die Presse begangen wurden, und die Verantwortlichmachung wegen dieser fest. Die Rechtsnorm brachte das Prinzip der stufenweisen Verantwortlichkeit zur Geltung. Demnach sollte zunächst der Autor zur Rechenschaft gezogen werden, wenn dies nicht möglich war, dann der Redakteur, dann der Verleger und schließlich, wenn diese ohne Erfolg blieben, war ein Verfahren gegen den Eigentümer der Druckerei einzuleiten.

Die Gesetzgebung wurde maßgeblich von den Ansichten der Rechtswissenschaft beeinflusst. Dies wird im nächsten Teil der Abhandlung untersucht.

4. Wandlungen in der Strafrechtswissenschaft und ihre Auswirkungen auf das Strafrecht

Die Entwicklung des ungarischen Strafrechts zwischen den beiden Weltkriegen wurde also durch eine Kombination von inneren[24] und äußeren Faktoren beeinflusst und war durch die Stärkung der Doktrinen der täterstrafrechtlichen Tendenz gekennzeichnet.[25] In der ersten Hälfte des 20. Jahrhunderts wurde, wie bereits erwähnt, das Strafgesetzbuch aus dem Jahr 1878 mehrmals modifiziert. Einer der Gründe dafür war, dass sich auch in Ungarn die vorherrschenden Rechtsauffassungen von Straftaten und Strafe unter dem Einfluss der modernen Sozialwissenschaften verändert hatten. Die neuen Tendenzen führten die Sozial- und Naturwissenschaften in das Strafrecht ein, die dann das gesamte Strafrecht durchdrangen.[26] In Ungarn hatten jedoch weder die kriminell soziologischen noch die kriminell-anthropologischen Tendenzen wirkliche Anhänger. Die *vermittelnde oder neue klassische Schule*, die nach Überschneidungen und Leitlinien zwischen den Schulen sucht, ist wichtig geworden. Diese Tendenz zielte auf die Entwicklung des klassischen Strafrechts. Man vertrat die Meinung, dass die Begehung von Straftaten nicht auf eine einzige Ursache zurückgeführt werden könne, sondern auf eine Kombination von verschiedenen Faktoren.[27] In der Horthy-Ära wurde diese Tendenz von Pál Angyal, Jenő Balogh, László Fayer, Rusztem Vámbéry, Ervin Hacker vertreten. Ab den 1930er Jahren war die Epoche auch durch die Einschränkung von Rechten gekennzeichnet, was die Rechtsgleichheit und die Freiheiten beeinträchtigte.

In seinem 1938 erschienenen Werk *„Bűnözés és büntetőjog" („Kriminalität und Strafrecht")* vertrat Pál Angyal im Zusammenhang mit den Freiheiten die Meinung, dass *es keinen Grund zur Angst um unsere Freiheiten zu haben gebe, weil sie in unserem Land von einer Kraft, nämlich dem Gefühl der Freiheit in unseren Seelen, geschützt werden, die mächtiger sei als Gesetze.*[28] Allerdings definierte er Strafrecht und Freiheit als miteinander verwobene Begriffe, und so sind für ihn die beiden Grundbegriffe des Strafrechts, Straftat und Strafe, mit Freiheit zusammenhängend.

Ervin Hacker formulierte in einer 1932 veröffentlichten Studie als Ziele der Strafrechtswissenschaft die Eindämmung der Kriminalität und die Verringerung ihrer Schwere, die Ausarbeitung von strafrechtlichen Grundbegriffen und die Überwachung der Kriminalstatistik. Er kam zu dem Schluss, dass es notwendig sei, Straftäter zu klassifizieren, die Probleme des

[22] Zu diesen Rechten gehören unter anderem: Religionsfreiheit, freie Ausübung des Wahlrechts, persönliche Freiheit.

[23] Gesetzartikel Nr. 63 aus dem Jahr 1912 über Sonderbestimmungen im Kriegsfall.

[24] KOCSIS, ZS. L., A magyar állam büntetőjogi védelmének törvényi szabályozása 1878 és 1944 között. (Die gesetzliche Strafverteidigung des ungarischen Staates zwischen 1878 und 1944.) In: *Közjogtörténeti tanulmányok*, Budapest, 2006, S. 72-115.; TÓTH, J. Z., A halálbüntetés szabályozása a Horthy-korszakban és a II. világháború éveiben. (Die Regelung der Todesstrafe in der Ära Horthy und in den Jahren des Zweiten Weltkriegs.) In: *Jogtörténeti Szemle*, vol. 12, Nr. 2, szám, 2010, S. 52-60.; SAMU, M. – BARABÁS, A. – TAKÁCS, I. – NAGY, L., *Tanulmányok a Horthy-korszak államáról és jogáról*. (*Studien zu Staat und Recht der Horthy-Ära*). Budapest, 1958, S. 10. S. 158-172.

[25] Mehr zum Strafrecht der Horthy-Ära siehe: HACKER, E., *Bevezetés a büntetőjogba*. *(Einführung in das Strafrecht.)* Budapest, 1924.; IRK A., *A magyar anyagi büntetőjog*. (*Das ungarische materielle Strafrecht*). Pécs, 1933.

[26] Kálmán Gerőcz. MEZEY, B., *Magyar jogtörténet. (Ungarische Rechtsgeschichte).* Budapest, 2007, S. 350.

[27] CSIZMADIA, A., *Magyar jogtörténet*. *(Ungarische Rechtsgeschichte).* Budapest, 1998, S. 448.

[28] ANGYAL, P., *Bűnözés és büntetőjog*. *(Kriminalität und Strafrecht).* Budapest, 1938.

Gefängniswesens zu lösen, und dass *die Ziele der Strafrechtswissenschaft daher in erster Linie auf praktischen Aspekten beruhen sollten*. In einer weiteren Studie untersuchte Hacker den Einfluss von Staatsidealen auf das Strafrecht. In seiner Arbeit *„Az állameszmék hatása a büntetőjogra" („Der Einfluss der Staatsidealen auf das Strafrecht")* definierte er den Begriff der Staatsidealen als Leitprinzipien, welche die Staatsmacht und das individuelle und gesellschaftliche Leben prägen.[29] Er hob zwei Hauptprinzipien hervor: Individualismus und Universalismus. Der Individualismus sei *eine Denkströmung, der das Individuum berücksichtige und das Individuum in den Mittelpunkt und in den Vordergrund der staatlichen Rechtsgestaltung stelle, das Individuum… sei der einzige Wert*.[30] Im Gegensatz dazu sei nach dem Universalismus *das Öffentliche das einzig Wichtige und Wertvolle, das Individuum habe nur insofern eine Existenzberechtigung, als es ein organischer Teil des Öffentlichen sei; der Einzelne könne über Rechte nur insoweit verfügen, als die Öffentlichkeit solche zulasse*. Anhand dieser beiden Konzepte untersuchte Hakker die Aufgabe des Strafrechts, die nach seinem Standpunkt darin bestehe, die Idee der Gerechtigkeit umzusetzen und die Rechts- und Gesellschaftsordnung zu wahren. Aus der Perspektive des Individualismus sei das Ziel des Strafrechts, herauszufinden, wie sehr die Straftat dem Einzelnen geschadet habe, während es im Fall des Universalismus darum gehe, wie sehr die gegebene Straftat der Gemeinschaft geschadet habe. Hacker sah in den Prinzipien nullum crimen sine lege und nulla poena sine lege eine Kodifizierung, die eine Art Handlungsfreiheit biete, eine Magna Charta für Kriminelle. Die „Rechtsgemeinschaft" hingegen, die auf dem Universalismus basiere, bewerte das Verbrechen als Verletzung der Interessen der Gemeinschaft und konzentriere sich auf die Verfolgung von Verbrechen von Amts wegen, ohne Ausnahme. Dies könne seiner Ansicht nach aber auch extreme Formen annehmen, *die sich nicht scheuen, Handlungen, die zwar nicht strafbar, aber dennoch gemeinschaftsschädlich seien, analog oder anderweitig zu bestrafen; dem Richter werde damit ein weiter Beurteilungsspielraum für die Handlungen eingeräumt*.[31] Das sei jedoch alles Theorie, sagt Hacker, und in der Praxis könne es noch mehr Probleme geben.

Ein zentrales Element der Ideen der Vertreter der vermittelnden Schule war die Individualisierung. Der im Csemegi-Kodex favorisierte tatstrafrechtliche Ansatz wurde zunehmend durch den täterstrafrechtlichen Ansatz verdrängt. Vertreter des modernen Strafrechts waren daher eher der Meinung, dass der Täter nicht für das von ihm begangene Verbrechen bestraft werden sollte, sondern wegen seiner persönlichen Eigenschaften, die für die Gesellschaft gefährlich seien. Zum Beispiel, weil der Täter ein Gauner, gemeingefährlich oder ein Landstreicher ist.[32] Auf dieser Grundlage haben Rechtswissenschaftler eine Änderung des Strafgesetzbuches gefordert. Der Gesetzgeber musste also eine Lösung für die Problematik der Gelegenheitstäter, der Wiederholungstäter und der Jugendlichen finden.

Ferenc Finkey definierte bereits 1925 in seiner in *„Miskolci Jogászélet" („Miskolcer Juristenleben")* veröffentlichten Studie *„Társadalmi védekezés és büntetőjog" („Gesellschaftliche Prävention und Strafrecht")* den Begriff der sozialen Prävention als praktisches Leitkonzept der staatlichen Bestrafung. Er stellte fest, dass *der Staat die Strafe aus praktischer Notwendigkeit ausüben sollte, um die Ausbreitung von Straftaten zu verhindern und als besondere Verteidigung gegen die Kriminellen*.[33] Die neue Tendenz gegen die klassische Schule, so Finkey, lehnte die Vorstellung des normalen, des sogenannten Durchschnittsmenschen ab. Er bezog sich dabei auf Adolf Prins, einen Professor an der Universität Brüssel, der zu jener Zeit einer der führenden Vertreter der strafrechtlichen Bestrebungen war. Prins benutzte den Begriff des außergewöhnlichen oder abnormalen Menschen, weil er den Täter immer als ein abormales Wesen sah. Und der *abnormale Mensch* sei eine ständige Gefahr für die Gesellschaft, für den Staat, weil er dessen Gesetze breche, nicht arbeite und eine Gefahr für andere friedliche Menschen bedeute. Darum sei der Schutz der Gesellschaft vor solchen Personen entstanden.[34] Nach Finkey gebe es einen Platz für das Primat der gerechten Vergeltung im Strafrecht, aber er glaubte, dass dies allein nicht ausreichend sei. Er war der Meinung, dass der Richter neben der Strafe auch Maßnahmen verhängen können sollte, die der Prävention dienen. *Die Strafe sei nicht nur Vergeltung, sie solle nicht nur eine Strafe für ein Unrecht sein, sondern der Staat wolle den Verurteilten erheben, ihn zu einem besseren Menschen machen und von neuen Verbrechen abhalten*.[35]

Der Gesetzgeber wollte in erster Linie einen größreren Schutz der Gesellschaft gegenüber der Achtung der bürgerlichen Freiheit gewährleisten. Diese Idee führte zu der Institution der Internierung. Die *Internierung* galt als eine die persönliche Freiheit einschränkende und in erster Linie keine strafrechtliche, sondern eine administrative Maßnahme, und sie war eine der grundlegenden Institutionen der gesamten Horthy-Ära. In der Gesetzgebung der damaligen Epoche wurde das Recht auf persönliche Freiheit aus Gründen des öffentlichen Interesses eingeschränkt. Grundlage hierfür waren die Gesetze über die Ausnahmsgewalt, auf deren Grundlage die Regierung den Innenminister ermächtigen konnte, Personen, deren Anwesenheit im Land als bedenklich für die Interessen des Staates, die öffentliche Ordnung oder die öffentliche Sicherheit angesehen wurde, unter polizeilicher Aufsicht oder in Gewahrsam zu nehmen, aus dem Gebiet einer bestimmten Region auszuweisen, wobei die kriegerischen Aspekte berücksichtigt wurden. Die andere Form der Einschränkung der persönlichen Freiheit neben dem Standrecht war die Internierung.[36] Die Internierung nahm

[29] HACKER, E., *Az állameszmék hatása a büntetőjogra*. (*Der Einfluss staatlicher Ideen auf das Strafrecht*). Budapest, 1942, S. 3-12.
[30] HACKER, E., *Az állameszmék hatása a büntetőjogra*. (*Der Einfluss staatlicher Ideen auf das Strafrecht*). Budapest, 1942, S. 3-12.
[31] HACKER, E., *Az állameszmék hatása a büntetőjogra*. (*Der Einfluss staatlicher Ideen auf das Strafrecht*). Budapest, 1942, S. 3-12.
[32] In Deutschland wurde es 1937 durch Gesetz verankert, so ist *die Konzeption des Verbrechers ohne Verbrechen* offiziell geworden. KOTEK, J. – RIGOULOT, P., *A táborok évszázada*. *(Ein Jahrhundert der Lager).* Budapest, 2000. S. 250.
[33] FINKEY, F., *Társadalmi védekezés és büntetőjog*. (*Sozialschutz und Strafrecht*). Miskolc, 1925, S. 5.
[34] FINKEY, F., *Társadalmi védekezés és büntetőjog*. (*Sozialschutz und Strafrecht*). Miskolc, 1925, S. 6.
[35] FINKEY, F., *Társadalmi védekezés és büntetőjog*. (*Sozialschutz und Strafrecht*). Miskolc, 1925, S. 8.
[36] Jogtudományi Közlöny, Nr. 9, 1921, S. 71.

einen besonderen Platz im Bereich der rechtlichen Einschränkungen ein. Sie verletzte neben dem Recht auf persönliche Freiheit auch die Unschuldsvermutung, die Verteidigungsfreiheit, das Recht auf Verteidigung und den Grundsatz des Verfahrens als prozessuales und materielles Grundrecht.[37] Die Internierung galt nicht als Gefängnis, aber sie war eine freiheitsbeschränkende Maßnahme,[38] die darauf abzielte, die Macht zu erhalten und zu stärken, indem man die im Lande bekannten Personen neutralisierte und jegliche feindlichen Handlungen von Ausländern im Lande verhinderte. Rechtlich gesehen gab es hier keine vorstrafliche Zusammenhänge.[39] Internierung bedeutete die Unterbringung einer Person unter polizeilicher Aufsicht in einer Zwangsunterkunft. Ihr offizieller Zweck war der Schutz des Staates und der gesellschaftlichen Ordnung, die Gewährleistung der öffentlichen Ordnung und Sicherheit.

Im Kriegsfall definierten das Gesetz über die Ausnahmsgewalt aus dem Jahr 1914 und die ausführende Verordnung des Innenministeriums Nr. 10962/1915 BM die Gründe für die Inhaftierung und die Internierung, den Beamten, der die Entscheidung traf, die Beschwerde als Rechtsmittel, die Rechte und Pflichten des Internierten. Zu den außergewöhnlichen Maßnahmen[40] gehörten die Unterstellung unter polizeiliche Aufsicht und die Inhaftierung von Personen, die für die Sicherheit des Staates oder die öffentliche Ordnung und Sicherheit gefährlich waren, von Personen, die bedenklich und verdächtig waren, und von Personen, die für die Wirtschaft *schädlich* waren, sowie Bestimmungen über die Kontrolle von Ausländern. Der Gesetzesartikel Nr. 2 aus dem Jahr 1939 enthielt keine neuen Bestimmungen über die Bedingungen der Internierung.[41] Das Gesetz und seine Durchführungsbestimmungen legten fest, wer unter Polizeiaufsicht gestellt und von den Behörden interniert werden konnte.[42] Gemäß dem Gesetz war die zuständige Polizeibehörde für die Überwachung, die Ausweisung und die Inhaftierung durch die Polizei die Hauptinspektion Budapest, während die Zentralbehörde für Ausländerkontrolle die Zuständigkeit für Ausländer hatte. Personen, die in Polizeigewahrsam genommen wurden, durften den für sie bestimmten Bereich nicht ohne Genehmigung verlassen, d.h. ihre persönliche Freiheit und ihr Recht auf Freizügigkeit wurden durch diese Bestimmung eingeschränkt. Sie mussten sich zu einem festgelegten Zeitpunkt melden und waren verpflichtet, den Wohnsitzwechsel zu melden. Die Gesetzgebung ermöglichte auch weitere Einschränkungen für Personen, die unter Polizeiaufsicht gestellt wurden. So konnte ihnen z. B. verboten werden, öffentliche Orte zu besuchen, Telegramme zu senden oder einen Fernsprecher zu benutzen. Ihre Post konnte überprüft werden. So wurden bereits 1920 Ausländer und ihre im gleichen Haushalt lebenden Verwandten, die als gefährlich, bedenklich oder verdächtig für die öffentliche Ordnung und Sicherheit galten, und deren Aktivitäten als bedenklich für das Wirtschaftsleben und die öffentlichen Beziehungen des Landes angesehen wurden, interniert und ausgewiesen.[43] Das Gesetz regelte auch, in welchen Fällen Nicht-Ausländer unter Polizeiaufsicht gestellt, d.h. interniert werden mussten. Nach der Verordnung galt eine Person als gefährlich, wenn sie die nach dem Strafgesetzbuch verhängte Strafe bezahlte und verbüßte, das Verbrechen aber während der Räterepublik begangen hatte. Der Gesetzgeber betrachtete jeden, der aufgrund seines Verhaltens während oder nach der Räterepublik eine Gefahr für die Gesellschaft darstellte, als bedenklich. Jede Person, die eine Handlung oder Tat der Agitation für die Wiederherstellung der Räterepublik beging, und jede Person, die als gewalttätiger Subversiver angesehen wurde, galt als verdächtig. Der Hamsterer, der Kettenhändler, der Preisbrecher, der Währungsspekulant galten als schädlich.[44] Mit dieser Verordnung wurde auch der Rechtsbehelf eingeführt, gegen die Internierung Widerspruch einzulegen: Eine Überprüfung erfolgte sechs Monate vor dem Ende der Internierung auf Antrag und nach dem Ablauf von sechs Monaten von Amts wegen.[45] Internierte sollten mit Arbeiten beschäftigt werden, die ihrer körperlichen Unversehrtheit nicht schadete, entsprechend ihren Fähigkeiten. Eine Entschädigung für den Schaden, der durch die behördlichen Maßnahmen während des Polizeigewahrsams, der Abschiebung oder der Inhaftierung entstanden war, wurde nicht erstattet. Der Standpunkt der Regierungen der Horthy-Ära zur Internierung war, dass das Internierungsverfahren, das die persönliche Freiheit einschränkte, so lange wie nötig beibehalten werden sollte.[46]

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[37] SZENDREI, G., *Magyar internálások. (Ungarische Internierungen)*. Budapest, 2007, S. 7.

[38] Pál Angyal schrieb in der Nationalen Zeitung vom 9. Januar 1923 über die Illegalität der Internierung. In seinem Artikel vertrat er die Auffassung, dass der Staat kein moralisches Recht hat, von Rechtsstaatlichkeit zu sprechen, solange er Internierungslager betreibt. SAMU, M. – BARABÁS, A. – TAKÁCS, I. – NAGY, L., *Tanulmányok a Horthy-korszak államáról és jogáról*. (*Studien zu Staat und Recht der Horthy-Ära*). Budapest, 1958, S. 160.

[39] SZENDREI, G., *Magyar internálások. (Ungarische Internierungen)*. Budapest, 2007, S. 7.

[40] Die Notwendigkeit der außergewöhnlichen Maßnahmen wurde mit der außergewöhnlichen Kriegssituation und den Interessen des Staates begründet. HUBERT, G., *Internálás, rendőri felügyelet alá helyezés, kitiltás és a külföldiek ellenőrzése. (Internierung, Polizeigewahrsam, Ausweisung und Kontrolle von Ausländern)*. Budapest, 1942, S. 7.

[41] Nach dem Erlass zur Durchführung des Gesetzes, dem Erlass 760/1939 des Innenministers, bedeutete die Unterbringung in Polizeigewahrsam eine Internierung. In Nazi-Deutschland wurde 1934 die Verordnung zum Schutz von Volk und Staat erlassen. Diese Gesetzgebung war die Rechtsgrundlage für die Internierung. Wer als gefährlich galt, konnte ohne Gerichtsverfahren verhaftet und in ein Konzentrationslager gesteckt werden.

[42] Gesetzartikel Nr. 2 aus dem Jahr 1939 über Verteidigung.

[43] LEHOTAY, V., *A jogszűkítés útján. A Horthy-korszak szabadságjogmegvonó intézkedéseinek jogtörténeti háttere.* (*Durch Einschränkung der Rechte. Der rechtsgeschichtliche Hintergrund der freiheitsentziehenden Maßnahmen der Horthy-Ära*). Miskolc, 2020, S. 161.

[44] Verordnung des Innenministers Nr. 13920/1921.

[45] Verordnung des Innenministers Nr. 13920/1921.
Der Gesetzgeber hat die Rechtsbehelfe für die Internierung vereinfacht und gelockert.

[46] KOVÁCS, K., *A jogalkotás és a jogalkalmazás egyes kérdései Magyarországon. 19-20. század*. (*Einige Fragen der Gesetzgebung und Strafverfolgung in Ungarn. 19-20. Jahrhundert.)* Budapest, 1986, S. 46.

Welche Faktoren hat der Gesetzgeber herangezogen, um eine bestimmte Handlung als Straftat zu beurteilen? Ferenc Finkey formulierte 1941 in seiner Studie *„Bűnösség fogalom a világi jogban" („Der Begriff der Schuld im weltlichen Recht")* in allgemeiner Form die Elemente, die notwendig sind, damit eine bestimmte Handlung zur Straftat erklärt werden kann. Er argumentierte, dass die allgemeine Bewertung der verschiedenen Straftatbestände bereits vom Gesetzgeber vorgenommen werde, indem er die betreffende Tätigkeit poenisiere und den Strafrahmen bestimme, der gegen die Täter verhängt werden könne. Aufgabe des Gesetzgebers bei der Ausarbeitung eines Strafgesetzbuches bzw. bei der Festlegung der Tatbestandsmerkmale eines neuen Straftatbestandes und des dafür möglichen Strafrahmens sei es nach der Ansicht von Finkey, die Erfordernisse des praktischen Lebens, der öffentlichen Sicherheit, der Strafverfolgung, der Verbrechensverhütung, soweit möglich, d.h. die schädlichen Auswirkungen der Straftat, die wirtschaftlichen Nachteile und den Grad der vom Täter ausgehenden öffentlichen Gefahr zu berücksichtigen. Nach Pál Angyal solle sowohl der praktische Anwender als auch der Theoretiker des Strafrechts mit der sozialen und wirtschaftlichen Bedeutung der vorliegenden Straftat und den Faktoren, die bei seiner Entstehung eine wechselseitige Rolle spielen, vertraut sein.[47] Auch die Ansichten der Rechtsgelehrten haben zu den Änderungen des Csemegi-Kodex beigetragen.

5. Änderungen des Csemegi-Kodex zu Beginn des Jahrhunderts

Die erste strafrechtliche Novelle des Csemegi-Kodex (Gesetzesartikel Nr. 36 aus dem Jahr 1908)[48] betonte stärker die präventive und erzieherische Rolle des Strafrechts. Es sah für Erwachsene eine 3-jährige Aussetzung der Strafe zur Bewährung vor (bedingte Verurteilung), während es für jugendliche Straftäter (12-18 Jahre) präventive Maßnahmen (Haus- oder Schuldisziplin, Unterbringung in einem Kinderheim) und, je nach intellektueller und moralischer Entwicklung des Täters, präventive Sanktionen (Verweis, Isolationshaft) vorsah und auch in ihrem Fall die Möglichkeit der Bewährung einräumte. Statt auf Verallgemeinerung zielte die Rechtsnorm auf Individualisierung ab und forderte eine Auseinandersetzung mit den Lebensbedingungen, der Person und den Lebensverhältnissen der Jugendlichen. An dieser Stelle ist es wichtig zu erwähnen, dass im Jahr 1913 ein Jugendgericht errichtet wurde.[49]

Der Gesetzesartikel Nr. 21 aus dem Jahr 1913 über gemeingefährliche Arbeutsscheu führte auch die Institution des Arbeitshauses wieder ein, die im 18. Jahrhundert kurzzeitig bestanden hatte, als Ort der Inhaftierung in qualifizierten Fällen von Landstreicherei und Arbeitsscheu sowie für andere geringfügige Straftaten. Fachleute haben aus der Kriminalitätsstatistik gefolgert, dass der Anstieg der Kriminalität nicht auf einen allgemeinen moralischen Verfall zurückzuführen sei, sondern hauptsächlich auf Wiederholungstaten. Sie haben daher vorgeschlagen, dass der Schwerpunkt, wie bei Jugendlichen, auf präventiven Maßnahmen für Gelegenheitstäter liegen sollte, da die Schwere ihrer Straftaten im Allgemeinen gering sei und sie wahrscheinlich nicht wieder straffällig werden.[50] Jedenfalls sollten die gefährlicheren Straftäter strenger behandelt werden, aber auf erzieherische Weise. Das Gesetz führte daher die Überweisung von erwachsenen, arbeitscheuen Personen, die arbeitsfähig waren, in ein Arbeitshaus ein. Grundsätzlich konnte es auf dreierlei Weisen erfolgen: anstelle der Verhängung einer Gefängsnisstrafe, ohne Verhängung einer Freiheitsstrafe und Freiheitsstrafe nach Vollstreckung. Jugendliche unter 18 Jahren und Personen, die nicht zurechnungsfähig waren, konnten nicht in ein Arbeitshaus eingewiesen werden. Die Einweisung in das Arbeitshaus erfolgte auf unbestimmte Zeit, die Dauer durfte jedoch nicht weniger als 1 Jahr und nicht länger als 5 Jahre betragen.

Der Gesetzesartikel Nr. 10 aus dem Jahr 1928 definierte den Begriff des Gewohnheitsverbrechers – *derjenige, der gewerbsmäßig Straftaten begeht oder eine dauerhafte Neigung zur Begehung von Straftaten zeigt* – und führte für ihn eine strengere Arbeitshausstrafe ein, mit einem Minimum von 3 Jahren. Das Gesetz sah vor, dass solche Häftlinge *an ein arbeitendes und geregeltes Leben gewöhnt werden sollen*; *sie sollen mit Arbeit so beschäftigt werden, dass sie einen Beruf so weit erlernen, dass sie nach der Wiedererlangung ihrer Freiheit ihren Lebensunterhalt verdienen können*. Das verschärfte Arbeitshaus war ein unbestimmtes Strafmaß, mit einer Untergrenze von 3 Jahren und einer Obergrenze von lebenslänglicher Freiheitsstrafe. Im Falle des beschränkten Arbeitshauses war die Strafe nicht verhältnismäßig zur Straftat, d.h. sie war eine auf der öffentlichen Gefährlichkeit des Täters basierende Maßnahme. Die Rechtsfolgen waren die gleichen wie bei einer Zuchthaustrafe.[51]

6. Die Verteidigung der Staatsordnung und die Ausnahmsgewalt zwischen 1920 und 1939

Nach dem Zusammenbruch des historischen Ungarns und den darauffolgenden Regimewechseln wurde die Notwendigkeit einer politischen Konsolidierung zunehmend spürbar. Das Ergebnis war das sogenannte *„Ordnungsgesetz"* (Gesetzesartikel Nr. 3 aus dem Jahr 1921), das – im Bruch mit der liberalen Konzeption des Csemegi-Kodex – eine Rechtsgrundlage für die Sanktionierung der neu definierten politischen Straftaten schuf.[52] Diese Rechtsnorm wurde ein zusätzlicher Teil des Kapitels 6 des Csemegi-Kodex. Die Rechtsnorm trat am 6. April 1921 in Kraft. In vielen Ländern in Europa wurden ähnliche Gesetze verabschiedet oder das bestehende Strafgesetzbuch wurde um neue Regeln zum Schutz derjenigen ergänzt, die die

[47] ANGYAL, P., *A magyar büntetőjog tankönyve*. (*Lehrbuch des ungarischen Strafrechts).* Nr. 1. Budapest, 1920.
[48] Gesetzartikel Nr. 36 aus dem Jahr 1908 über die Ergänzung und Änderung des Strafgesetzbuches und der Strafprozessordnung.
[49] Gesetzartikel Nr. 7 aus dem Jahr 1913 über das Jugendgericht.
[50] Dies wurde durch die Strafrechtsnovelle von 1908 erreicht, mit der die Einführung von bedingten Verurteilungen eingeführt wurde.
[51] NAGY, F., *Magyar büntetőjog. (Ungarisches Strafrecht).* Budapest, 2001, S. 47.
[52] DRÓCSA, I., Egy büntetőjogi centenárium margójára: 100 éves a Horthy-korszak rendtörvénye. (Am Rande eines strafrechtlichen Jubiläums: der 100. Jahrestag des Gesetzes über Recht und Ordnung aus der Horthy-Ära) In: *Jogtörténet,* Budapest, 2021.

staatliche Macht ausüben.[53] Die theoretische Begründung für das Ordnungsgesetz war, dass bei einer Störung der staatlichen und gesellschaftlichen Ordnung Leib, Leben und Eigentum nicht sicher seien. Während der Debatte über den Gesetzentwurf in der Nationalversammlung wurde viel über menschliche Freiheiten und Gleichberechtigung gesprochen. Die Teilnahme an der kommunistischen Bewegung wurde vom Gesetzgeber als eine Straftat eingestuft, weil diese Tätigkeit darauf abziele, die rechtmäßige Ordnung des Staates und der Gesellschaft zu untergraben. Das Gesetz drohte die Organisation, Führung und Teilnahme an revolutionären Bewegungen mit Strafe an. Es kriminalisierte speziell die Aufwiegelung gegen die Streitkräfte, die Gendarmerie und die Staatspolizei. Es regelte auch die Kategorien der Straftaten gegen den ungarischen Staat und die ungarische Nation und bedrohte mit schwerer Strafe jeden, *der unwahre Tatsachen* gegen die Ehre des ungarischen Staates und der ungarischen Nation *behauptete oder verbreitete*.[54] Das Gesetz führte damit die Kategorie der Volksverhetzung ein und kriminalisierte *jede Bewegung oder Verschwörung zur gewaltsamen Untergrabung […] oder Zerstörung der rechtmäßigen Ordnung des Staates und der Gesellschaft.* Das Gesetz hat daher die strafrechtliche Verantwortlichkeit erheblich erweitert und damit die Befugnisse der Strafverfolgungsbehörden ausgeweitet. Pál Angyal bestritt die Notwendigkeit dieser Rechtsvorschrift und merkte an, dass es in Ungarn, seit die Bestimmungen des Ordnungsgesetzes *in Kraft seien, keine persönliche Freiheit im Sinne unserer alten Verfassung mehr gebe*.[55] Es ist wichtig anzumerken, dass in vielen Ländern Europas ähnliche Gesetze erlassen oder neue Gesetze in das bestehende Strafgesetzbuch aufgenommen wurden, um diejenigen zu schützen, die die staatliche Macht ausüben.

Ebenfalls 1920 wurde mit dem *Gesetz über Presitreiberei* die Prügelstrafe für Erwachsene und die Rohrstockstrafe für Jugendliche (erneut) eingeführt. Obwohl die Sanktion nicht angewendet wurde, löste sie einen starken öffentlichen Aufschrei aus. Auch der Autor des Artikels im „Magyar Jogi Szemle" („Ungarisches Rechtsblatt") bewertete die Einführung der Prügelstrafe als Rückschritt.

Um die staatliche und öffentliche Ordnung zu gewährleisten, entstand der *Gesetzesartikel Nr. 15 aus dem Jahr 1924 über Straftaten, die durch die Herstellung, den Besitz und die Verwendung von Sprengstoffen und Explosivstoffen begangen werden*, der ein härteres Vorgehen gegen Verbrechen gegen den Staat vorsah.

Zum Schutz des Staatshaushalts wurden mehrere Gesetze erlassen: der Gesetzesartikel Nr. 32 aus dem Jahr 1920 über Verbrechen und Vergehen (Steuerhinterziehung), die auf die Hinterziehung der Staatskasse abzielen; der Gesetzesartikel Nr. 34 aus dem Jahr 1920 über die Gebühren der Vermögensübertragung; der Gesetzesartikel aus dem Jahr 1922 über die Genossenschaftssteuer; der Gesetzesartikel Nr. IV aus dem Jahr 1921 über das staatliche Schankmonopol; der Gesetzesartikel Nr. 19 aus dem Jahr 1924 über die Sanktionen für Schmuggel.

Das neue *Militärstrafgesetzbuch*[56] wurde 1930 geschaffen. Der Grund dafür war, dass der alte Militärstrafkodex veraltet war und seine Regeln nicht mit dem Csemegi-Kodex übereinstimmten. Dies hat der Gesetzgeber dadurch verwirklicht, dass Soldaten im Allgemeinen auch unter die Bestimmungen des Strafgesetzbuches fielen, aber das Gesetz legte auch besondere Militärstraftaten fest. Die Rechtsvorschrift erkannte die besondere Offiziersehre durch eine Bestimmung an, die einem Offizier(anwärter) in Militäruniform Straffreiheit gewährt, *wenn er sofort seine Waffe einsetzt, um die Ausübung eines rechtswidrigen Angriffs auf seine Ehre in Gegenwart einer anderen Person zu verhindern*.[57] Der Gesetzesartikel Nr. 10 aus dem Jahr 1937 definierte als „Verbreitung von Schreckensnachrichten" jedes Verhalten, das *unwahre Nachrichten erfindet oder verbreitet, die die öffentliche Ordnung oder die öffentliche Ruhe stören oder die Interessen der Außenpolitik des Landes gefährden können*.

Darüber hinaus wurden in dieser Epoche mehrere Gesetze erlassen – *der Gesetzesartikel Nr. 2 aus dem Jahr 1939*, *der Gesetzesartikel Nr. 18 aus dem Jahr 1940* –, die dem Staat solche besonderen Befugnisse einräumten, dass die Rechte der Bürger unter Bezugnahme auf ihren Schutz immer wieder eingeschränkt wurden. Als die Nationalversammlung den Aufstieg rechtsextremer Bewegungen bemerkte, verabschiedete es 1938 zwei Gesetze, die zur Wahrung der staatlichen Ordnung strengere Regeln für die Ausübung der politischen Rechte (Pressefreiheit, Versammlungsfreiheit) vorsahen. Die zur gleichen Zeit erlassene Regierungsverordnung Nr. 3400/1938 verbot den Beamten die Teilnahme an politischen Bewegungen.

Der Gesetzesartikel Nr. 14 über die Presse aus dem Jahr 1938 führte detailliert die Straftaten auf, die durch die Presse begangen werden konnten: Anstiftung zum Hochverrat, Landesverrat, Anstiftung zu einem Verbrechen oder Vergehen, Aufwiegelung und Aufforderung, Angriff auf die Institution des Königreichs, Verbrechen und Lobpreisung eines Verbrechens und eines Verbrechers, Anstiftung zur Gefährdung des Staates. Diese Straftatbestände wurden in der bisherigen Gesetzgebung durch die Straftatbestände der Unanständigkeit und Blasphemie ergänzt. Der Begriff der Aufwiegelung war auch nicht genau definiert, wir finden in einigen Schriftsätzen z. B. Aufwiegelung gegen eine Klasse, Aufwiegelung gegen die besitzende Klasse oder Aufwiegelung gegen die klerikale Klasse.[58]

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[53] In Deutschland („Gesetz zum Schutze der Republik") und der Schweiz „(Verbrechen gegen die Verfassungsmässige Ordnung und die innere Sicherheit") wurde 1922 ein „Gesetz zur Ordnung" erlassen. magyar Das ungarische Gesetz trägt den Titel „Im Interesse der verfassungsmäßigen Ordnung und der inneren Sicherheit".

[54] In den 1930er Jahren wurden diese Bestimmungen des Gesetzes genutzt, um diese populären Schriftsteller wegen Verleumdung und übler Nachrede zu verfolgen. Die Schriftsteller schilderten die Armut und die unmenschlichen Lebensbedingungen der Armen auf realistische Art und Weise.

[55] Nemzeti Újság, 09. 01. 1923. In*:* SAMU, M. – BARABÁS, A. – TAKÁCS, I. – NAGY, L., *Tanulmányok a Horthy-korszak államáról és jogáról*. (*Studien zu Staat und Recht der Horthy-Ära*). Budapest, 1958, S. 26.

[56] Gesetzartikel Nr. 2 aus dem Jahr 1930 zum Militärstrafgesetzbuch.

[57] KOÁCS, K., *A magyar büntetőjog es büntetőeljárási jog története 1848-tol 1944-ig. (Die Geschichte des ungarischen Strafrechts und Strafverfahrens von 1848 bis 1944),* Budapest, 1971, S. 33.

[58] LEHOTAY, V., „…ha ügyész fizet verseimért". („…wenn ein Anwalt für meine Gedichte bezahlt") In: *Híres történelmi perek,* Miskolc, 2018, S. 185.

Im Sinne der Kriegsvorbereitung gab das Verteidigungsgesetz (der Gesetzesartikel Nr. 2 aus dem Jahr 1939) der Regierung außergewöhnliche Befugnisse, die ihr das Recht einräumten, im Interesse der Landesverteidigung andere Regeln als die der bestehenden Gesetze aufzustellen. Die Begründung des aus 235 Artikeln bestehenden Gesetzes über die Landesverteidigung aus dem Jahr 1939, das erhebliche Einschränkungen und eine Reihe von Maßnahmen enthielt, die die Bürger vieler ihrer Freiheiten beraubten, betonte die Bedeutung der Verteidigung des Vaterlandes, für dessen Umsetzung es den persönlichen Dienst und den Vermögensbeitrag von Bürger vorschrieb. Der Gesetzgeber verwies auf die italienischen, französischen, rumänischen, tschechischen und polnischen Landesverteidigungsgesetze, die das Prinzip des Anspruchs auf das gesamte Vermögen geltend machten. Im letzten Kapitel des Gesetzes wurden materiellstrafrechtliche Vorschriften festgelegt, in denen die Amtsverbrechen und andere Straftaten gegen die Pflicht zur Landesverteidigung spezifiziert wurden. Geregelt wurden unter anderem auch die Umgehung des Wehrdienstes durch List, die verbotene Eheschließung, die Ausweitung der strafrechtlichen Verantwortlichkeit von Amtsträgern und auch eine Sanktion für die Verletzung von Maßnahmen zur Einschränkung des Versammlungsrechts. Es setzte den Kreis von Straftaten im Zusammenhang mit der Wehrpflicht, dem Wehrdienst, dem Zivildienst und der Luftverteidigung fest. Für einige Straftatbestände wurde der versuchte Verstoß mit Strafe angedroht und die erfolglose Anstiftung als Versuch eingestuft.[59] Dieses Gesetz regelte auch die Standgerichtsbarkeit, wobei es dem Ministerium allgemeine Befugnisse zur Feststellung der Straftaten einräumte.[60] Nach diesem Gesetz konnte die Regierung für jedes Verbrechen sowohl vor Zivil- als auch vor Militärgerichten das Standrecht anordnen. Das Verteidigungsgesetz hat den Umfang des Gebiets des staatsfreien Rechts für die Bürger erheblich eingeschränkt.

Darüber hinaus wurde 1940 das erste ungarische Rehabilitierungsgesetz verabschiedet, der Gesetzesartikel 37 aus dem Jahr 1940 über die Begrenzung und Aufhebung der nachteiligen Folgen strafrechtlicher Verurteilungen.

7. Rechtsschöpfung während des Zweiten Weltkriegs

Während des Weltkrieges wurden eine Reihe von Gesetzen erlassen, die zum Schutz der öffentlichen Ordnung, der Kriegsinteressen und des Versorgungswesens weitere Einschränkungen einführten und die eine Reihe von Handlungen, die in Friedenszeiten nicht sanktioniert waren, kriminalisierten und unter Strafe stellten.

Die ministerielle Verordnung Nr. 2730/1941 ME verkündete die Anwendung der kriegsstrafrechtlichen Bestimmungen auf das ganze Land, und die ministerielle Verordnung Nr. 2740 ME unterstellte Zivilisten der Militärgerichtsbarkeit für Verbrechen, die die Landesverteidigung betrafen. *Der Gesetzesartikel Nr. 18 Artikel 10 aus dem Jahr 1940* über die Bestrafung bestimmter, die Sicherheit und die internationalen Interessen des ungarischen Staates gefährdender Handlungen enthielt Vorschriften über die Verwendung verbotener Pässe und den illegalen Grenzübertritt. Laut der Begründung des Gesetzesartikels liegt der Grund für die Gesetzgebung darin, dass die Änderungen das Strafgesetzbuch in den letzten Jahrzehnten deutlich überholt haben und es mehrere Regelungslücken gab. Darüber hinaus hat der Gesetzgeber die Militärspionage, die Preistreiberei und die Gefährdung des Land-, Wasser- oder Luftverkehrs zu den Bedrohungen der internationalen Interessen des Staates gezählt. Die Bestrafung von Handlungen, die die Interessen des öffentlichen Dienstes gefährden, wurde im Gesetzesartikel Nr. 10 aus dem Jahr 1941 geregelt.

Die Nationalversammlung verabschiedete ein aus lediglich zwei Artikeln bestehendes Gesetz auch *über den Schutz des Nationalgefühls* nach den territorialen Wiederbesetzungen, den Gesetzesartikel Nr. 5 aus dem Jahr 1941. Zum Schutz der gestiegenen Anzahl von nationalen Minderheiten in Ungarn drohte er mit einer Freiheitsstrafe bis zu einem Jahr jedem, der *das Nationlitätsgefühl eines anderen beleidigt, indem er eine im Land lebende Nationalität abwertet oder eine sie abwertende Tat begeht.* Der Gesetzgeber hat die Straftat auf öffentliche Weise oder durch die Presse als schwerwiegenderen Fall des Tatbestandes definiert. In der Gesetzesbegründung begründete Justizminister László Radocsay die Notwendigkeit des Gesetzes mit der vollen Rechtsgleichheit und dem strafrechtlichen Schutz, die den Bürgern, die *der staatsbildenden ungarischen Rasse angehören,* garantiert werden.[61] Bei der Zugehörigkeit zum Staat legte er Wert nicht nur auf rechtliche, sondern auch auf emotionale Faktoren, die einen moralischen Inhalt haben. Der Gesetzgeber bezeichnete den starfrechtlichen Schutz als eine einzigartige Regelung, weil kein anderes Strafrecht in irgendeinem Land eine solche Regelung enthalte.

Das letzte Strafgesetz dieser Zeit war der Gesetzesartikel Nr. 6 aus dem Jahr 1944, der die Bestrafung bestimmter Handlungen regelte, die die nationale Bewirtschaftung störten. Die 21 Judengesetze, die das ungarische Parlament zwischen 1938 und 1942 verabschiedete, waren während des Weltkrieges auch Teil der Gesetzgebung. Diese Zeit war die Epoche der Judengesetze in Ungarn, denn danach kam die Regelung auf Verordnungsebene auch in diesem Bereich.[62]

8. Rassenschutz und Strafrecht

In den meisten Fällen gab es nur Hinweise auf die strafrechtlichen Kontexte der Judengesetze in der damaligen Literatur. So zum Beispiel in den Büchern von Pál Angyal, Ágost Miskolczy-Zoltán Pinczés und Gyula Térfy.[63] Pál Angyal hielt am 22. Februar 1938 einen Vortrag vor dem Nationalverband der Ungarischen Ärzte mit dem Titel *„Fajvédelem és büntetőjog"* (*„Ras-*

[59] ANGYAL, P., *A magyar büntetőjog tankönyve, (Lehrbuch für ungarisches Strafrecht)*, Vol. 9, Nr. 2, 1943, S. 168.

[60] KOVÁCS, K., *A magyar büntetőjog es büntetőeljárási jog története 1848-tol 1944-ig*. (*Die Geschichte des ungarischen Strafrechts und Strafverfahrens von 1848 bis 1944*). Budapest, 1971, S. 34.

[61] Képviselőházi Irományok. (*Dokumente des Repräsentantenhauses*). 1939, Vol. 5, Nr. 348, S. 20-22.

[62] LEHOTAY, V., *A jogszűkítés útján. A Horthy-korszak szabadságjogmegvonó intézkedéseinek jogtörténeti háttere.* (*Durch Einschränkung der Rechte. Der rechtsgeschichtliche Hintergrund der freiheitsentziehenden Maßnahmen der Horthy-Ära*.), Miskolc, 2020.

[63] ANGYAL, P., *A magyar büntetőjog tankönyve, (Lehrbuch für ungarisches Strafrecht)*, Vol. 9, Nr. 2, 1943, S. 166-169.

senschutz und Strafrecht"), der auch in der Form einer Studie erschien.[64] Die Hauptfrage der Studie war, ob das Strafrecht eine Rolle im Bereich des Rassenschutzes spielen kann. Zu Beginn seiner Studie stellte er fest, dass das Thema nicht einfach sei und warnte vor Vorsicht.

Kann das Strafrecht als Instrument des Rassenschutzes dienen? Er wies darauf hin, dass Deutschland 1933 das einzige Land war, das die Kriminalisierung bestimmter Handlungen, die die arische Rasse beleidigen und gefährden, in sein offizielles Programm aufnahm. 1933 veröffentlichte der preußische Justizminister eine Denkschrift mit dem Titel *Nationalsozialistisches Strafrecht*, in der er das Instrumentarium des Strafrechts zur Verhinderung der Rassenmischung für anwendbar hielt. Darin wurden 3 Kategorien des Strafrechts aufgelistet und dargestellt. Der *Rassenverrat*, auf dessen Grundlage jede Vermischung der Geschlechter zwischen Deutschen und Fremdrassigen kriminalisiert wurde. Aus privatrechtlicher Sicht betrachtete er die Mischehe als Nichtigkeitsgrund. Die andere Kategorie ist die *Verletzung der Rassenehre*, unter der auch die Verletzung der Rassenehre als Straftatbestand gilt. Eine grobe Verletzung der Öffentlichkeit und des Volksgefühls war eine notwendige Bedingung für die Feststellung der Straftat. Schließlich die *Rassengefährdung*: Um die Verschlechterung der Rasse zu verhindern, hielt das Memorandum die Schaffung eines Rahmengesetzes für notwendig.[65] Pál Angyal untersuchte diesen Gedankengang, diese Thesen, und stellte seine Fragen zu diesen. Er argumentiert, dass im Falle des Strafrechts der Schutz von Rechtsobjekten gut definiert sei, und daher sei es die Frage, ob Rassenreinheit oder Rasse als Rechtsobjekt betrachtet werden können. Kann das deutsche Denken als Vorbild für das ungarische Recht dienen? Er verwies auch auf István Bethlen, dessen Rede vor dem Ausschuss für öffentliches Recht des Abgeordnetenhauses am 9. Februar lautete: *…eine Lösung der Judenfrage nach deutschem Vorbild würde hierzulande sofort die Wirtschafts- und Finanzordnung über Nacht umwerfen – und das hätte ganz andere Folgen als in Deutschland*.[66]

Er definierte als Aufgabe des Strafrechts, zur Herstellung und Erhaltung der Ruhe des individuellen und gemeinschaftlichen Lebens, die Eindämmung von Taten und die Zurückhaltung ihrer Täter, die diese Ruhe gestört haben. Und es sei die Aufgabe und gleichzeitig die Pflicht des Staates, den Gewohnheitstäter aus der Gesellschaft auszuschließen, die Jugendlichen zu verbessern, den kranken Straftäter zu heilen und den Gelegenheitsverbrecher zur Vernunft zu bringen. Er war der Meinung, dass eine gegen die Rassenreinheit vergehende Person in keine der oben genannten Kategorien falle. Um diese Frage zu beantworten, untersuchte Angyal auch die Geschichte der Rassentheorien und kam zu dem Schluss, dass es noch keine Entscheidung darüber gebe, ob Rassenreinheit oder Rassenmischung vorteilhafter wäre. Er war jedoch der Ansicht, dass, wenn der Gegenstand der strafrechtlichen Verteidigung nicht genau definiert werden könne, könne die Verteidigung nicht auf ihn ausgedehnt werden: *Der Rassenschutz könne in seiner heutigen festen Form kein strafrechtliches Eingreifen erfordern, es sei denn, man beugt das Strafrecht.*[67] Er begründete seine Schlussfolgerung ausführlich und stützte sie mit zwei weiteren Argumenten: Die Aufgabe des Strafrechts könne als begründet angesehen werden, wenn der Schaden oder die Gefahr ein im Gesetz festgelegtes, abgrenzbares Interesse beeinträchtige; andererseits, wenn dieser Schaden oder diese Gefahr durch eine Handlung verursacht worden sei, die tatbestandsmäßig eingegrenzt werden könne und deren Feststellung keine Beweisschwierigkeiten mit sich bringe.[68] In Bezug auf die erste Bedingung erörterte er die Herangehensweise einiger ausländischer und nationaler Autoren an den Begriff der Rasse. Hier sei ein weiterer ungarischer Autor erwähnt: Pál Angyal verwies auch auf die Studie von Ferenc Orsós mit dem Titel *„Fajunk sorskérdései" („Schicksalsfragen unserer Rasse")*, die 1938 in der Zeitschrift Nemzeti Figyelő (Nationaer Anzeiger) veröffentlicht wurde und die er für äußerst wertvoll hielt. Dies beinhaltete die folgende Aussage: *Gene können im Allgemeinen durch Überanstrengung gleichmäßig geschwächt werden, so dass sie, selbst wenn sie sich in irgendeiner Weise kombinieren, in den nachfolgenden Generationen keine herausragenden neuen Kombinationen oder Individuen hervorbringen.*[69] Angyal vertrat daher die Ansicht, dass die Rasse nicht als ein streng definiertes Rechtsobjekt eingestuft werden könne und daher auch nicht durch das Strafrecht geschützt werden könne. Er schloss jedoch nicht die Möglichkeit aus, auf andere Instrumente des Rechtsschutzes zurückzugreifen. Seiner Meinung nach seien die ungarischen Verhältnisse anders als die deutschen, so dass nicht die gleichen strafrechtlichen Instrumente wie in Deutschland verwendet werden könnten.

In seiner Studie aus dem Jahr 1943 mit dem Titel *„A család büntetőjogi védelme" („Der strafrechtliche Schutz der Familie")* beschrieb er das Gesetz zum Schutz der Rasse, den Gesetzesartikel Nr. 15 aus dem Jahr 1941, als einer, der den gesundheitlichen Interessen der Familie und der Kinder und dem Schutz der Rassenreinheit diene.[70] Er verwies kurz auf die wichtigsten Bestimmungen des Gesetzes: auf die obligatorische ärztliche Untersuchung vor der Eheschließung, das Ehestandsdarlehen, die Anfechtung und Auflösung der Ehe und das Verbot von jüdischen und nichtjüdischen Eheschließungen. Er zitierte wortwörtlich Artikel 15 des Gesetzes: *Ein Jude, der mit einer in Ungarn geborenen anständigen nichtjüdischen Frau außerehelichen Geschlechtsverkehr hat, oder der eine in Ungarn geborene anständige nichtjüdische Frau zum Zwecke des außerehelichen Geschlechtsverkehrs für sich selbst oder für einen anderen Juden beschafft oder zu beschaffen versucht, hat ein Vergehen oder, unter qualifizierten Umständen, ein Verbrechen begangen*. Darüber hinaus hat sich der Rechtswissenschaftler aber nicht zu diesem Gesetz geäußert. Er bewertete die strafrechtlichen Bestimmungen und

[64] ANGYAL, P., *Fajvédelem és büntetőjog. (Rassenschutz und Strafrecht).* Budapest, 1939.
[65] ANGYAL, P., *Fajvédelem és büntetőjog. (Rassenschutz und Strafrecht).* Budapest, 1939, S. 4.
[66] ANGYAL, P., *Fajvédelem és büntetőjog. (Rassenschutz und Strafrecht).* Budapest, 1939, S. 6.
[67] ANGYAL, P., *Fajvédelem és büntetőjog. (Rassenschutz und Strafrecht).* Budapest, 1939, S. 9.
[68] ANGYAL, P., *Fajvédelem és büntetőjog. (Rassenschutz und Strafrecht).* Budapest, 1939, S.13.
[69] ANGYAL, P., *Fajvédelem és büntetőjog. (Rassenschutz und Strafrecht*). Budapest, 1939, S. 13.
[70] ANGYAL, P., *A család büntetőjogi védelme. (Strafrechtlicher Schutz der Familie). Budapest, 1943, S. 9.*

Rechtsvorschriften zum Schutz der Familie sowohl einzeln als auch insgesamt als äußerst wertvolle Werke. Er war der Meinung, dass diese Normen des Strafrechts eine Reihe von kriminellen Verhaltensweisen wirksam eindämmen konnten, die die moralischen, gesundheitlichen, sozialen, wirtschaftlichen, existenziellen und sonstigen Interessen der Familie schädigten oder gefährdeten. Angyal hielt es für notwendig und drängte darauf, die strafrechtlichen Regelungen zum strafrechtlichen Schutz der Familie in einer neuen Strafrechtsnovelle niederzulegen. Im ersten Band seines ebenfalls 1943 erschienenen zweibändigen Lehrbuchs zum Strafrecht nennt er unter den Quellen des Strafrechts eines der 186 Nebengesetze (die die Bestmmungen der Grundgesetze ergänzen bzw. ändern), den Gesetzesartikel 15 aus dem Jahr 1941 als Beispiel für ein Nebengesetz. Im zweiten Band desselben Buches geht er nochmals kurz auf die Regeln des Rassenschutzgesetzes und des Zweiten Judengesetzes ein – ohne Kommentar. Sein erster Artikel zu diesem Thema wurde 1938 veröffentlicht, in dem er die Frage eindeutig verneinte: *Bei der gesetzlichen Regelung der Rasse und der strafrechtlichen Begründung des Rassenschutzes sei äußerste Vorsicht geboten, da der Erlass und die Umsetzung eines übereilten Gesetzes ohne Abwägung der Folgen dem Staat und sogar der zu schützenden Rasse mehr Schaden zufügen könne als der Nutzen eines solchen Schutzes sei.* Er schloss jedoch die Möglichkeit einer privatrechtlichen und administrativen Gesetzgebung auf dem Gebiet des Rassenschutzes im Jahr 1938 nicht aus. Damit schob er qasi diese Verantwortung vom Strafrecht weg. Wenn wir uns jedoch die erlassenen ungarischen Gesetze ansehen, kommen wir zu dem Schluss, dass der Gesetzgeber der Theorie des Professors nicht gefolgt ist und vermutlich auch nicht damit einverstanden war.

In seiner Studie über die Vorschläge zum Strafrecht aus dem Jahr1843 glaubte Finkey 1942, dass nach dem Krieg ein neues Europa entstehen würde, in dem die totale Staatsansicht, der Rassenschutz und ein stärkerer Schutz religiöser und moralischer Interessen eine wichtige Rolle spielen würden. Er schrieb über den *richtig verstandenen Rassenschutz*, womit er die größere Pflege der nationalen Traditionen und die Stärkung des Ungarentums meinte. Diese *gesunden Ideen und Bestrebungen*, wie er es ausdrückt, werden auch eine radikale Überarbeitung des Strafgesetzbuches bedeuten, so Finkey.[71]

Zusammenfassend lässt sich feststellen, dass die Schaffung der RS. echtseinschränkung auf gesetzlicher Ebene, sowohl im Bereich des Privatrechts als auch des öffentlichen Rechts, im Wesentlichen das „Ergebnis" des Zeitraums zwischen 1938 und 1942 ist. Braham definierte die antisemitische Gesetzgebung in den Jahren 1938 und 1939 als einen symbolischen Tribut an das Dritte Reich.[72]

Verstöße gegen die rechtseinschränkenden Bestimmungen der Judengesetze wurden vom Gesetzgeber durch das Instrumentarium des Strafrechts sanktioniert. Das Spektrum der Straftaten wurde dementsprechend erheblich um gegen die Judengesetze verstoßende Straftaten erweitert. Artikel 10 des Ersten Judengesetzes ermächtigte das Ministerium, eine Verletzung oder eine Umgehung der gesetzlich vorgeschriebenen Auskunftspflicht als Straftat einzustufen. In Übereinstimmung mit der Anweisung im Gesetzesartikel Nr. 15 aus dem Jahr 1938 wurden die strafrechtlichen Bestimmungen durch § 23 der ME-Verordnung Nr. 4350/1938 ergänzt. Er ordnete auch die Verhängung einer zweimonatigen Freiheitsstrafe oder einer Geldstrafe wegen Verstoßes gegen einen Arbeitgeber und einen Arbeitnehmer an, der gegen die gesetzliche Auskunftspflicht verstoßen oder die Bestimmungen umgangen hat. Dieselbe Verordnung enthielt umfangreiche Anweisungen zur Umsetzung der gesetzlichen Auskunftspflicht, wobei auf jedem Blatt ausdrücklich vor „strafrechtlichen Vergeltungsmaßnahmen" im Zusammenhang mit unrichtigen Auskunftserteilungen gewarnt wurde. Weitere Tatbestände wurden dem Gesetz durch die ministerielle Verordnung Nr. 4960/1938 ME hinzugefügt, die die strafrechtlichen Bestimmungen der oben genannten Norm niederen Ranges auf den Herausgeber einer Zeitschrift, einen ihrer ständigen Mitarbeiter, ein Mitglied der Redaktion oder ein Hilfspersonal und den Eigentümer des Zeitungsunternehmens ausweitete. Das Inkrafttreten der durch das Landesverteidigungsgesetz gewährten Ausnahmegewalt wurde durch eine Sonderverordnung bestimmt, in der festgelegt wurde, dass die Ausnahmegewalt ab dem 2. September 1939 ausgeübt werden konnte. Ebenfalls im Rahmen der Umsetzung der Rechtsvorschrift wurde eine Reihe von Verordnungen erlassen, die den Kreis von Straftaten im Zusammenhang mit dem öffentlichen Arbeitsdienst, Bestimmungen zur Luftverteidigung[73] und der Registrierung von persönlichen Anmeldungen und Landesverteidigungspflichten[74] festlegte.[75]

Die Paragraphen 25-29 des Zweiten Judengesetzes enthielten Strafbestimmungen, die sowohl für Personen, die Juden waren, als auch für Personen, die keine Juden waren, galten. Die verbotene Anstellung von Personen, die Juden waren, stellte eine Straftat dar. Es galt als ein Vergehen, bei einer Zeitschrift trotz offizieller Warnung arglstig zu täuschen, sowie die Anstellung bei einem Theater. Das Gesetz bestrafte einen 'Nicht-Juden', der eine jüdische Person als Mitarbeiter einer Zeitschrift anstellte, und auch eine jüdische Person, wenn sie diese Stelle annahm. Das Gesetz machte es zu einem Vergehen, das mit bis zu einem Jahr Gefängnis bestraft wurde, wenn eine Person ihrer Auskunftspflicht trotz einer Warnung der Behörden nicht nachkam. Eine neue Kategorie von Straftaten war das Strohmann-Geschäft, d.h. der Erwerb eines von der Genehmigung einer Behörde abhängigen Berechtigungsscheins unter eigenem Namen für eine jüdische Person durch eine nichtjüdische Person unter Umgehung der Vorschriften. Das Gesetz sah außerdem vor, dass im Falle einer Verurteilung wegen der oben genannten Straftaten die Veröffentlichung des Urteils in einer Zeitung angeordnet werden musste, deren Kosten der Verurteilte zu tragen

[71] FINKEY, F., *A XX. század büntetési rendszerének reformkérdései. (Fragen der Reform des Strafvollzugssystems im 20. Jahrhundert).* Budapest, 1935, S. 28.
[72] BRAHAM, L. R., *The Politics of Genocide. The Holocaust in Hungary*. 1994, S. 200.
[73] Erlass des Ministerpräsidenten Nr. 4350/1938. Informationen zum Ausfüllen der Fragebögen.
[74] Erlass des Ministerpräsidenten Nr. 380000/1941.
[75] Erlass des Ministerpräsidenten Nr. 5070/1939, § 10.

hatte. Auch die Grundverordnung zur Ergänzung des Zweiten Judengesetzes, die ministerielle Verordnung Nr. 7720/1939 ME, formulierte die strafrechtlichen Rechtsfolgen für die Verletzung der Auskunftspflicht. Im Bereich des Strafrechts ordnete der Justizminister die Ausstellung eines Strafblattes für die unter das Zweite Judengesetz fallenden Straftaten an, und zwar auf der Grundlage der Frage, ob die begangene Handlung kein Vergehen darstellt. Das Nationale Strafregisteramt war befugt, das Strafblatt auszustellen.

Der Gesetzesartikel Nr. 6 aus dem Jahr 1940, der vor dem Inkrafttreten des Rassenschutzgesetzes verabschiedet wurde, stufte die Ansteckung mit Geschlechtskrankheiten als Körperverletzung ein, die, wenn sie gegen den Ehepartner begangen wurde, eine schwere Körperverletzung darstellte. Der Gesetzgeber sah es auch als Vergehen an, wenn die Person, die an einer sexuell übertragbaren Krankheit leidet, keine medizinische Behandlung in Anspruch nahm.

Das Rassenschutzgesetz[76] verbot die Ehe zwischen Juden und Nicht-Juden, betrachtete aber Ehen, die trotz des Verbots geschlossen wurden, als gültig, aber strafbar. Es verbot auch außereheliche sexuelle Beziehungen zwischen Juden und Nicht-Juden, wobei der Grundfall als ein Vergehen angesehen wurde. Als Straftaten wurden die qualifizierten Fälle der Straftat eingestuft: Begehung durch Gewalt, Drohung, Betrügerei, und wenn die Handlung gegen einen Verwandten oder eine Frau unter 24 Jahren oder bei Rückfälligkeit begangen wurde. Verstöße gegen die privat- und verwaltungsrechtlichen Bestimmungen zum Rassenschutz in Bezug auf sexuelle Beziehungen wurden daher vom Gesetzgeber unter Strafe gestellt und mit einer Reihe von strafrechtlichen Rechtsfolgen belegt. In Ungarn wurde dies durch die strafrechtlichen Bestimmungen des Rassenschutzgesetzes umgesetzt, deren strafrechtlichen Rechtsfolgen vorsahen, dass eine Person, die sich nicht als ungarischer Jude qualifizierte, eine jüdische Person heiratete, sowie ein ungarischer Jude, der eine Nicht-Jüdin heiratete – trotz des Verbots –, für das Verbrechen mit einer Freiheitsstrafe von bis zu fünf Jahren, dem Verlust des Amtes und der Suspendierung der politischen Rechte bestraft werden konnten. Die gleichen Sanktionen wurden durch das Gesetz auch gegen einen Beamten vorgesehen, der vorsätzlich beim Bestehen des Ehehindernisses bei der Eheschließung mitwirkte. Wurde diese Handlung von einem Beamten fahrlässig begangen, konnte er wegen des Vergehens zu drei Monaten Gefängnis verurteilt werden. Verstöße gegen das Verbot des außerehelichen Geschlechtsverkehrs zwischen „Juden“ und „Nichtjuden“ wurden wegen eines Vergehens mit einer Freiheitsstrafe bis zu drei Jahren bestraft.

Die Rechtsvorschrift zur Ergänzung des Nationalen Landesverteidigungsgesetzes, der Gesetzesartikel Nr. 14 aus dem Jahr 1942, enthielt bereits eindeutig diskriminierende Bestimmungen. Es erweiterte den Umfang der Straftaten, so stellte beispielsweise Ungehorsam gegen die Vorladung ein Vergehen dar, und das Gesetz ordnete auch die Veranlassung zum Ungehorsam zu bestrafen an. Im Zusammenhang mit den land- und forstwirtschaftlichen Grundstücken enthielt auch der Gesetzesartikel Nr. 15 aus dem Jahr 1942, also das Vierte Judengesetz, strafrechtliche Bestimmungen. Der Verstoß gegen die gesetzliche Auskunftspflicht stellte somit ein Vergehen dar. Die Verletzung der Verwaltungs- und Instandhaltungspflicht wurde jedoch als Vergehen angesehen. Auf dieser Grundlage hat der Eigentümer, der Nießbraucher oder der Pächter des Grundstücks, wenn er die vorgenannte Verpflichtung nicht erfüllte und eine Produktionsminderung oder einen anderen Schaden verursachte, den Straftatbestand der Veruntreuung erfüllt. In einem solchen Fall wurde das Strafverfahren gemäß dem Gesetz von Amts wegen eingeleitet. Die in den Judengesetzen aufgeführten Tatbestände stellten im erheblichem Maße Übertretungen oder Vergehen dar. Die strafrechtlichen Bestimmungen dieser Rechtsvorschriften sahen vor, dass nicht nur Personen, die als Juden galten, sondern auch ein Arzt, ein Arbeitgeber oder ein Beamter, der als kein Jude galt, zu bestrafen waren. Die häufigsten Straftaten im Zusammenhang mit den Judengesetzen waren die Straftatbestände der Strohmann-Geschäfte im Sinne des Zweiten Judengesetzes und der Rassenverunglimpfung gemäß der Rassenschutzvorschrift. Hinsichtlich gegen die Judengesetze verstoßenden Straftaten verzichteten die Verfasser des Handbuchs für die Gendarmerie auf eine detaillierte Beschreibung der unter die Judengesetze fallenden Straftaten und wiesen die Gendarmerie an, bei Verdacht auf eine solche Straftat „alle auf der Wache eingehenden Informationen oder Beschwerden“ ohne jegliche Ermittlung an die Staatsanwaltschaft weiterzuleiten.[77] Das wurde mit der Tatsache begründet, dass die Aufklärung dieser Straftaten *äußerst komplex* sei und die Kompetenz der Gendarmerie übersteige.[78] Im Zusammenhang mit den Judengesetzen sei es erwähnent, dass in der Berliner Liste vom Oktober 1942 Folgendes stand: *Ungarn… ist noch sehr weit davon entfernt, mit den in Deutschland und anderen Ländern erzielten Ergebnissen Schritt halten zu können… Die Reichsregierung hofft, dass die ungarische Regierung in dieser Zeit Verständnis für das große Interesse Deutschlands hat, wovon es die Ergreifung von den notwendigen Maßnahmen erwartet.*[79] Die deutsche Besetzung Ungarns änderte dann über Nacht die Situation der ungarischen Juden, deren Leben bis dahin nicht in unmittelbarer Gefahr gewesen war, obwohl ihr

[76] Gesetzeartikel Nr. 15 aus dem Jahr 1941 zur Ergänzung und Änderung von Gesetzartikel Nr. 31 aus dem Jahr 1894 über das Eherecht sowie die in diesem Zusammenhang erforderlichen Bestimmungen zum Schutz der Rassen.

[77] In Nazi-Deutschland konnte die Polizei nach der Abschaffung der Grundfreiheiten zweifelhafte Elemente ohne strafrechtliche Verfolgung in Schutzgewahrsam nehmen. Die Schutzhaft galt offiziell nicht als Strafe, sondern wurde als Präventivmaßnahme zur Ausschaltung von Staatsfeinden erklärt. Die Arbeit der Polizei wird durch die Tatsache belegt, dass nach sechs Monaten mehr als sechsundzwanzigtausend politische Gegner in „Schutzhaft“ genommen wurden. Diese Präventivmaßnahme wurde zunächst in Gefängnissen und Zuchthäusern angewandt, und im Frühjahr 1933 richtete Himmler in Dachau das erste Konzentrationslager ein. KISZELY, G., *Mondd el fiaidnak…! A holokauszt es Magyarország.* (*Sag deinen Söhnen…! Der Holocaust und Ungarn).* Budapest, 2005, S. 7.

[78] MISKOLCZY, Á. – PINCZÉS, Z., *A magyar büntetőjog gyakorlati kézikönyvé a m. kir. csendőrség számára. (Ein praktisches Handbuch des ungarischen Strafrechts für die königliche ungarische Gendarmerie).* Budapest, 1940, S. 1139.

[79] KISZELY, G., *Mondd el fiaidnak…! A holokauszt es Magyarország.* (*Sag deinen Söhnen…! Der Holocaust und Ungarn).* Budapest, 2005, S. 97.

Leben durch die Judengesetze und die ständigen Angriffe der extremen Rechten bitter gemacht worden war.[80]

9. Tendenzen im Strafprozessrecht

In der Reformära verfügte der Deák-Vorschlag aus dem Jahr 1843 auch über den Strafprozess und das Gefängniswesen. Im Jahr 1848 gab es noch keine umfassende Kodifizierung des Prozessrechts, aber das Pressegesetz führte die Schwurgerichtsbarkeit ein. Zur Zeit des Neoabsolutismus war auch in Ungarn die österreichische Strafprozessordnung in Kraft. 1872 wurde die provisorische Prozesssordnung, das sogenannte Gelbe Buch, durch einen Runderlass herausgegeben. Auch dieses Gesetzesgebungsprodukt wird Csemegi zugeschrieben und trug zur Modernisierung und Vereinheitlichung des Strafverfahrens bei. Das erste ungarische Gesetz über das Strafverfahren wurde 1896 verfasst. Die Rechtsprinzipien und Institutionen der modernen Justiz blieben auch in der Horthy-Ära vorherrschend: Die Tätigkeit der Gerichte und der Staatsanwaltschaften kehrte nach der proletarischen Diktatur, abgesehen von ein paar kleineren Änderungen, zur Praxis der dualistischen Periode zurück.[81] Die drei Hauptbereiche der Justiz – Strafrecht, Zivilrecht und Verwaltungsrecht - bleiben weiterhin getrennt. Die richterliche Hierarchie war in zwei Teile gegliedert: in ordentliche und Sondergerichte. Die ordentlichen Gerichte übten ihre richterliche Funktion in Straf- und Zivilsachen mit allgemeiner Zuständigkeit aus, unabhängig von dem Typ der Sachen. Sie unterstanden der Aufsicht des Justizministers. Ihr Organisationssystem in der Horthy-Ära war vierstufig: Die Kreisgerichte waren die erste Instanz, darüber standen die Gerichtshöfe, die dritte Instanz waren die Tafelgerichte, und das höchste richterliche Forum war die Kurie.

Die im 14. Jahrhundert gegründete Institution des *ritterlichen Ehrengerichts* bestand auch in der Horthy-Ära im Verwaltungsapparat und im militärischen Organisationssystem fort. Die militärischen Ehrengerichte beurteilten die Handlungen eines Offiziers (Feigheit, mit der Offiziersehre unvereinbares Schuldenmachen, lesterhafter Lebensweise, Verrat von Militärgeheimnissen, Trunkenheit, Spielsucht usw.) und konnten Verweise, Entlassung aus dem Dienst oder Ausschluss aus dem Offizierskorps verhängen.

Die Regierung wurde durch den Gesetzesartikel Nr. 63 aus dem Jahr 1912 über außergewöhnliche Maßnahmen im Kriegsfall ermächtigt, das Standrecht einzuführen. Im Falle des Standrechts wurden bestimmte Straftaten nicht nach den Regeln des ordentlichen Gerichtsverfahrens verhandelt: Das Standgericht fällte in einer einzigen mündlichen Verhandlung das Urteil, es gab keine Möglichkeit der Berufung, und das Gericht verhängte im Allgemeinen entweder die Todesstrafe oder sprach den Beschuldigten frei. Der Gesetzesartikel Nr. 38 aus dem Jahr 1920 erweiterte den Umfang der Handlungen, die Gegenstand eines standrechtlichen Verfahrens sein konnten, erheblich. Allerdings war die Zuständigkeit der Standgerichte typischerweise auf Aufruhr, Brandstiftung und Mord mit Sprengstoff beschränkt. Mehr als ein Jahr lang nach dem Attentat in Biatorbágy, ab September 1931, unterlag auch die gesamte Palette der 1920 festgelegten Straftaten sowie Verbrechen, die auf Umsturz oder Zerstörung der Staats- und Gesellschaftsordnung gerichtet waren, der Zuständigkeit der Standgerichtsbarkeit. Im Oktober 1932 wurde die Standgerichtsbarkeit im ganzen Land abgeschafft. Das Landesverteidigungsgesetz gab der Regierung die Möglichkeit, per Dekret die Standgerichtsbarkeit für das ganze Land und für jede Straftat zu verhängen, *wenn ein abschreckendes Beispiel nötig war, um die Integrität des Landes oder seine innere Ordnung zu schützen*. Die Regierung nutzte diese Möglichkeit im April 1941, und der Kreis der Sachen, die an die Standgerichte verwiesen wurden, wurde bis zum Ende des Zweiten Weltkriegs schrittweise erweitert.

Zwischen den beiden Weltkriegen wurde die Amnestie durch die Gesetze geregelt, die die Befugnisse des Reichsverwesers festlegten. Der Gesetzesrtikel Nr. 1 aus dem Jahr 1920 gewährte dem Reichsverweser noch nicht das ausschließlich dem Herrscher zustehende Recht der öffentlichen Begnadigung, aber sechs Monate später erweiterte der Gesetzesartikel Nr. 17 aus dem Jahr 1920 die Befugnisse des Recihsverwesers dazu.

Der Gesetzesartikel Nr. 36 aus dem Jahr 1920 – das sogenannte Nagyatádi-Bodengesetz – sah die Errichtung des Nationalen Gerichts für Grundbesitzregelung vor, das die Durchführung der Landreform überwachte.

Im Jahr 1930 vereinfachte der Gesetzgeber die Rechtsprechung durch den Gesetzesartikel Nr. 34 dadurch, dass er den Staatsanwalt ermächtigte, wenn er der Meinung war, dass die Sache nicht zu einer Freiheitsstrafe von mehr als einem Jahr führen würde, die Sache vor das zuständige Kreisgericht des Wohnorts des Angeklagten zu bringen, anstatt eine Anklageschrift beim Gerichtshof einzureichen.

Es gab eine beträchtliche Anzahl von *Rechtsstreitigkeiten bezüglich der Judengesetze* sowohl vor den ordentlichen Gerichten als auch vor dem Verwaltungsgericht.[82]

Die *Strafvollstreckung* war eng mit der Justiz verbunden.[83] Ihr System in der Zwischenkriegszeit basierte ebenfalls auf den Bestimmungen des alten Csemegi-Kodex, der unter den Strafarten die Todesstrafe, die Freiheitsstrafe und die Geldstrafe vorsah. Als Nebenstrafe kannte es den Verlust des Amtes, die Geldstrafe und die vorübergehende Aussetzung der Ausübung der politischen Rechte. Es ermöglichte die Todesstrafe nur für zwei Straftaten, aber nicht zwingend: bei schwereren Fällen des Hochverrats und Mord, wenn der Täter zur Tatzeit sein zwanzigstes Lebensjahr vollendet hat. Die Formen der Freiheitsstrafe und die Benennungen der Verurteilten waren die Folgenden: Zuchthaus (Zuchthaussträfling), Gefängnis (Gefangene(r)), Haftanstalt (Häftling), Staatsgefängnis (Staatsgefangener). Freiheitsstrafen zwischen 2 und 15 Jahren oder lebenslange Freiheitsstrafe für

[80] GYURGYÁK, J., *A zsidókérdés Magyarországon. (Die Judenfrage in Ungarn).* Budapest, 2001, S. 173.
[81] Gesetzartikel 33 aus dem Jahr 1896. (Die Strafprozessordnung.)
[82] SCHWEITZER, G., A zsidótörvények a Közigazgatási Bíróság gyakorlatában. (Die jüdischen Gesetze in der Praxis des Verwaltungsgerichts.) In: MOLNÁR, J., *A holokauszt Magyarországon európai perspektívában*. (*Der Holocaust in Ungarn in einer europäischen Perspektive*). Budapest, 2005, S. 164-175.
[83] MEZEY, B., *A magyar polgári börtönügy kezdetei*. (*Die Anfänge des ungarischen Zivilgefängnissystems)* Budapest, 1995.

schwerere Verbrechen wurden in einer Haftanstalt verbüßt, in dem die Häftlinge Zwangsarbeit leisten mussten. In den Bezirksgefängnissen wurden Freiheitsstrafen zwischen 6 Monaten und 10 Jahren für kleinere und mittlere Straftaten vollstreckt. Auch hier gab es einen Arbeitszwang, aber der Verurteilte konnte von mehreren Arbeiten wählen. Freheitsstrafen von 1 Tag bis zu 5 Jahren für Vergehen mussten in den Gefängnissen der Gerichtshöfe und der Kreisgerichte verbüßt werden. Hier wurde der Arbeitszwang zusätzlich zur Wahlmöglichkeit durch die Möglichkeit der Freistellung von der Arbeit gemildert. Das Staatsgefängnis war das Gefängnis für weniger schwerwiegende Verbrechen politischer Natur und war in der Regel das Gefängnis zum Beispiel auch für Täter von Duellen.

Das Strafgesetzbuch für Übertretungen fügte zu all diesen Strafen die Verhängung einer Zivilhaft von drei Tagen bis zu zwei Monaten hinzu. Die Entwürfe zur Vollstreckung des Csemegi-Kodex beinhalteten den Aufbau eines nationalen Gefängnisnetzes. Im Frühjahr 1920 überstieg die Zahl der Häftlinge auf dem Gebiet des auf ein Drittel seines Territoriums reduzierten Landes 14.000, die bei weitem mehr als die Gesamtkapazität der Strafvollstreckungsanstalten war. Während der Horthy-Ära wurden keine neuen Gefängnisse gebaut, nur einige neue Besserungs-Erziehungsanstalten für Jugendliche wurden zusätzlich zu den bestehenden errichtet.

10. Tendenzen im Strafrecht – Strafverfolgung zwischen 1920 und 1944

Unter den *Verbrechen gegen das Leben und die körperliche Unversehrtheit* können wir die wegen mit der Abtreibung der Leibesfrucht und Selbstmord zusammenhängenden Straftaten eingeletete Verfahren hervorheben.[84] Bei der Zahl der Straftaten gegen das Leben und die körperliche Unversehrtheit trat eine Verbesserung ein, was die Staatsanwaltschaft als Folge der Einberufungen zum öffentlichen Arbeitsdienst sah, weil dadurch… *die Menschen von den Streitereien und Kneipen ferngehalten wurden, denn diese führen zu solchen Taten*.[85]

Unter den *Wirtschaftsdelikten* hatte die zunehmende Zahl von Preistreiberei und die Interessen der öffentlichen Versorgung betreffenden Straftaten einen erheblichen Einfluss auf den Geschäftsverkehr auf Landesebene. Der Gesetzgeber hat mehrere Bestimmungen erlassen… um *gegen Spekulationen vorzugehen, die das öffentliche Interesse missachten*, mit der Begründung, dass diese Handlungen der Sicherheit des Staates schaden und den Kaufwert des Pengő beeinträchtigen.[86] Daher war es wichtig, für diese Vergehen abschreckende Strafen zu verhängen, so dass neben Geld- und Freiheitsstrafen auch die Beschlagnahme des gesamten Vermögens des Angeschuldigten und die Untersagung des Gewerbescheines, der Gewerbegenehmigung oder -tätigkeit zur Anwendung kamen. Die Preistreiberei wurde 1920 per Gesetz geregelt. Das Gesetz legte acht Formen der Preistreiberei fest, darunter Preisüberhöhung, Preistreiberei, Warenentziehung, Warenschmuggel und die Verweigerung des Verkaufs von Bedarfsartikeln. Der Begriff von Bedarfsartikel wurde gesetzlich nicht definiert, sondern entwickelte sich in der Gerichtspraxis.

Ausgangspunkt für *Vermögensdelikte* ist ebenfalls der Csemegi-Kodex, dessen Paragraphen 333-390 sich mit Vermögensdelikten befassen. Der Gesetzgeber hat auch Diebstahl, Raub, Erpressung, Unterschlagung, Gewahrsamsbruch, Untreue, Unterschlagung, Hehlerei, Begünstigung und Betrug hier eingeordnet. Diese Straftaten waren bereits durch das sogenannte Qualifizierungssystem mit zwei Alternativen gekennzeichnet. Zum einen war die Strafe härter, wenn der Begehungswert und der verursachte Schaden höher waren. Die Grenze lag bei 50 Forint für Diebstahl und Betrug, denn unter 50 Forint handelte es sich um ein Vergehen und über 50 Forint um ein Verbrechen. Andererseits wurde eine Handlung unter bestimmten Umständen als Verbrechen angesehen, unabhängig vom Schaden oder Wert.[87] Im Jahr 1908 enthielt die Novelle I des Csemegi-Kodex *mehrere Änderungen* zu den Vermögensdelikten. Infolge des Krieges stieg die Zahl der Vermögensdelikte deutlich an. Zwischen 1938 und 1944 war Diebstahl die häufigste unter solchen Straftaten, gefolgt von Unterschlagung, Gewahrsamsbruch und Veruntreuung.

Fachliteratur zur forensischen Wissenschaft wurde von wenigen Autoren geschrieben. Die bedutendesten Studien stammen aus der Feder von Ervin Hacker, einem Professor an der Rechtsakademie Miskolc, und aus den Händen der Mitglieder seines Seminars in den 1920er und 1930er Jahren und analysierten hauptsächlich in- und ausländische Kriminalitätsstatistiken. Die repräsentative Publikation der Epoche war das zweibändige *„A modern bűnözés" („Die moderne Kriminalität")*, dessen Kapitel überwiegend von Strafrechtlern, Detektiven und Fachjournalisten geschrieben wurden.[88] Ein Großteil des Werkes befasste sich mit (Serien-) Morden, Einbrüchen und intellektuellen Verbrechen, die weltweit Aufmerksamkeit erregt haben, aber auch mit den Risikofaktoren, die zu Kriminalität und Viktimisierung beitragen, sowie mit modernen Strafverfolgungsmethoden und Experimenten.

Die zeitgenössische inländische statistische Datenerhebung umfasste auch die Funktionsweise der Strafverfolgungs- und Justizbehörden. Es stehen also reichlich Daten über die Ermittlungsarbeit der Budapester Polizei sowie über die Rechtsprechung der Gerichte unterer Instanzen zur Verfügung. Diese geben jedoch leider kein vollständiges Bild der Kriminalität wieder, da zum einen eine gewisse Anzahl von Straftaten - die schwer abzuschätzen sind - unbekannt blieb und daher nicht in der Statistik erschien, und zum anderen die Daten der Verfahren der Tafelgerichte und der Kurie mit den schwersten Straftaten – und in der Regel die mit den schwersten Strafen – nicht in den statistischen Veröffentlichungen enthalten waren.

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[84] SIPOS, N., A Horthy-kori Budapest öngyilkosságainak kontextusai (1929-1941). (Die Großstadt ist eine Brutstätte des Selbstmords Der Kontext von Selbstmorden im Budapest der Horthy-Ära (1929-1941)). In: *Clio Műhelytanulmányok*, Nr. 6, 2020.

[85] VERESS, E., *Erdély jogtörténete*. (*Rechtsgeschichte Transsilvaniens*), 2018, S. 442.

[86] Zum Beispiel Artikel 10 des Gesetzes Nr. 1941 über die Bestrafung von Handlungen, die die Interessen des öffentlichen Dienstes gefährden.

[87] MADAI, S., *A vagyon elleni bűncselekmények – „Valami régi-valami Új?"* (*Straftaten gegen das Eigentum - „Etwas Altes - etwas Neues"?*) https://jog.tk.mta.hu/uploads/files/13_MadaiS.pdf, S. 152.

[88] TURCSÁNYI, GY., *A modern bűnözés*. (*Die moderne Kriminalität*). I-II. Budapest, 1929.

Trotz dieser Vorbehalte lässt sich feststellen, dass es in Ungarn, wie auch in anderen Ländern der Welt, spezifische Unterschiede bei den begangenen Straftaten in Bezug auf Geschlecht, Alter, Familienstand, sozialen Status, Wohnort und Tatzeitpunkt gab. Etwa drei Viertel der Täter waren männlich, und die Mehrheit von ihnen waren jüngere, unverheiratete Personen. Während der beiden Weltkriege jedoch, als ein großer Teil der Männer in der Armee diente, stieg der Anteil der von Frauen begangenen Straftaten an. Während der Krise nach dem Ersten Weltkrieg mit ihrer galoppierenden Inflation und dann in den Jahren der Weltwirtschaftskrise erhöhte sich der Anteil der Vermögensdelikte beträchtlich,[89] während im Laufe des Zweiten Weltkriegs der Anteil der Straftaten gegen den Staat dramatisch anstieg.[90]

Während der Horthy-Ära erregten einige spezielle Strafverfahren große Aufmerksamkeit und waren lange Zeit ein Thema. Im Dezember 1925 brach der sogenannte *Frankenfälschungsskandal* aus, bei dem die Hauptakteure - mehrere Männer von hohem gesellschaftlichem Rang - die von ihnen gedruckten französischen Tausend-Franken-Scheine zur Deckung der Herstellung ihrer irredentistischen Propagandapublikationen verwenden wollten.[91] Obwohl der Skandal internationale Ausmaße annahm – auch französische Detektive ermittelten zeitweise in Ungarn – und auch die Verantwortung des Reichsverwesers, sowie von Pál Teleki und István Bethlen zur Debatte stand, verhängte das Gericht letztlich nur gegen die unmittelbaren Täter eine auffallend milde Strafe – angesichts der „patriotischen" Motive der Täter. Berüchtigt wurden 1929 die so genannten *Arsenmorde*,[92] bei denen hunderte von zur Last gewordenen – kriegsinvaliden, alten, verhassten – Ehemännern in den kleinen Dörfern der Theißregion von Tiszazug zum Opfer fielen und bei denen die Täterinnen in fast allen Fällen ihre Ehefrauen und deren Gehilfinnen waren.[93] In mehreren Komitaten[94] gab es ähnliche Fälle, bei denen die Mörder ihre Opfer mit aus Fliegenpapier gewonnenem Arsen umgebracht haben: ungewollte Säuglinge, verkrüppelte Kinder, hilflose, kranke Erwachsene, Kriegsinvaliden. Der gesellschaftliche „Konsens" ist schuld daran, dass die Täter von massenhaft vorkommenden Abtreibungen[95] und die Täter der langsam zurückgehenden Praxis des Duells nur selten zur Rechenschaft gezogen wurden, obwohl das Strafrecht den Tätern und Mittätern beider Taten mit Haftstrafen drohte.[96] *Die von den Dichtern begangenen Straftaten* fanden vor allem unter den Intellektuellen Widerhall, und die Autoren wurden wegen Verleumdung der Religion, Unanständigkeit, Aufwiegelung gegen die Klasse, Aufwiegelung gegen das Privateigentum, Aufwiegelung gegen die ungarischen Streitkräfte, Straftaten gegen den ungarischen Staat und das Ansehen der ungarischen Nation und sogar wegen Verschwörung zum Umsturz der bestehenden Gesellschaftsordnung verfolgt. So wurden beispielsweise Verfahren gegen die großen Dichter der Epoche wie Attila József[97] oder Miklós Radnóti eingeleitet. Zwischen 1919 und 1944 wurden etwa siebzig Gedichtbände verboten, beschlagnahmt oder sie waren vom Entzug des Rechts auf Beförderung per Post betroffen.[98]

Unter den Straftaten gegen den Staat war die Straftat *Beleidigung des Reichsverwesers* häufig (Verunglimpfung des Reichsverwesers, ihn in ein schlechtes Licht rücken, seine Autorität in Frage stellen). Gemäß dem Gesetz war der Reichsverweser unverletzlich, er hatte also den gleichen strafrechtlichen Schutz wie der König.[99] Zur Abschreckung wurde in der zeitgenössischen Presse ständig über Fälle von der Beleidigung des Reichsverwesers berichtet. Der berühmteste war der *Beniczky-Fall*.[100]

Weniger häufig, aber mit größerer Tragweite – und mehr öffentlichem Interesse – waren Prozesse, an denen *Vertreter einer oppositionellen politischen Bewegung* die Angeklagten waren. Im Fall des Attentats auf *István Tisza*[101] am 31. Oktober 1918 untersuchte das Gericht nicht in erster Linie die Umstände des Mordes, sondern suchte die Anstifter des Mordes unter den Führern und Protagonisten der Asternrevolution.[102] Neben den Attentätern, die von einem Militärgericht verurteilt wurden, standen später auch László Fényes und der Journalist Pál Kéri vor einem Zivilgericht. Am Ende des Prozesses stellte das Gericht fest, dass Mihály Károlyi nicht für den Mord verantwortlich war.

[89] GYÁNI, G., *Hétköznapi élet Horthy Miklós korában. (Das Alltagsleben unter Miklós).* Budapest, 2006.

[90] TIMKÓ, Z., Az állami és társadalmi rend védelme és a magyar büntető törvények. (Der Schutz der staatlichen und sozialen Ordnung und das ungarische Strafrecht). In: *Az állami és társadalmi rend védelme és a büntető jogszolgáltatás*, Budapest, 1937, S. 55.

[91] GÁBOR, A., *A frankhamisítási botrány*. (*Die Fälschungsaffäre*). Szeged, 1990.

[92] BODÓ, B., *Tiszazug: A Social History of a Murder Epidemic*. Columbia, 2003.

[93] Die Verzögerung wurde durch das Schweigen der örtlichen Bevölkerung verursacht, die den Behörden die Verbrechen lange Zeit vorenthielt. Später - aus Angst vor dem zu erwartenden Skandal - versuchten sie zunächst, sie geheim zu halten.

[94] Komitate Békés, Csongrád und Zala.

[95] KOLOH, G., Magzat a méhből. Magzatelhajtás a két világháború közötti Magyarországon. (Fötus aus dem Mutterleib. Schwangerschaftsabbruch in Ungarn zwischen den beiden Weltkriegen). In: *Test és társadalom*, Budapest, 2015, S. 267-28.; LEHOTAY, V., Büntetőjogi joggyakorlat a Miskolci Törvényszéken 1944-ben. (Strafrechtsprechung am Gericht in Miskolc im Jahr 1944.) In: *Diké,* 2019, S. 75-85.

[96] Schätzungen zufolge endete eine von drei Schwangerschaften zwischen den beiden Weltkriegen mit einem Schwangerschaftsabbruch

[97] JÓZSEF, A., *Lázadó Krisztus"* Gedicht, 1923; *„Döntsd a tőkét"* Gedichtband, 1931; *Pamphlet mit Kritik an der Hinrichtung von Kommunisten*, 1932.

[98] LEHOTAY, V., „...ha ügyész fizet verseimért". ("...wenn ein Anwalt für meine Gedichte bezahlt".) In: Híres történelmi perek, (*Berühmte historische Gerichtsverfahren*). Miskolc, 2018.

[99] Gesetzesartikel Nr. 1 § 14 aus dem Jahr 1920.

[100] TURBUCZ, D., *A Horthy-kultusz 1919-1944*. (*Der Kult um Horthy 1919-1944*.) Budapest, 2015.

[101] István Tisza: (22. April 1861 in Budapest- 31. Oktober 1918 ebenda) war als Ministerpräsident Ungarns von 1903 bis 1905 und von 1913 bis 1917 ein führender Politiker Österreich-Ungarns. Er spielte eine wichtige Rolle in der Julikrise, die zum Ausbruch des Ersten Weltkrieges führte.

[102] BERTÉNYI, I., *Tisza István*; *(István Tisza)*. Budapest, 2019.

Der gegen *Mihály Károlyi*[103] wegen seiner revolutionären Aktivitäten – in seiner Abwesenheit – geführte Prozess beinhaltete Anklagen wegen Hochverrats, Illoyalität und Majestätsbeleidigung. Ein weiterer Faktor, der zu der Verzögerung des Prozesses beitrug, war die Verabschiedung eines Gesetzes, das es ermöglichte, das Fideikommiss in Fällen von Hochverrat oder Verrat zu konfiszieren.[104] Im Jahr 1924 erging in der Sache ein rechtskräftiges Gerichtsurteil der Kurie, wonach das gesamte bewegliche und unbewegliche Vermögen des Grafen an den Staat überging, der musste Staat aber 40 % davon in Geld von dem neuen Herrn des Fideikommisses, József Károlyi, ablösen.[105]

Das gegen Mátyás Rákosi eingeleitete Verfahren war nicht gewöhnlich.[106] Die Ermittlungen in seiner Sache begannen nach dem Fall der Räterepublik, aber erst 1925 begann ein ordentliches Gerichtsverfahren, in dem er und 52 andere Genossen wegen illegaler kommunistischer Aktivitäten angeklagt wurden. Rákosi wurde 1926 vom Budapester Gerichtshof zu achteinhalb Jahren Zuchthausstrafe verurteilt. In seinem zweiten Prozess, der 1935 stattfand, untersuchte man seine Aktivitäten während der Kommune, und er wurde wegen der bereits aufgeführten Verbrechen gegen die Volkskommissare verurteilt. Im Jahr 1936 bildeten die beiden Urteile eine Gesamtstrafe und er wurde zu lebenslanger Freiheitsstrafe verurteilt. 1940 wurde Rákosi jedoch im Austausch gegen mehrere ungarischen Kriegsflaggen, die 1849 von der russischen Zarenarmee erbeutet worden waren, an die Sowjetunion übergeben.[107]

Auch *der Bombenanschlag auf die Eisenbahn* am 13. September 1931, bei dem ein Personenzug, der das Biatorbágy-Viadukt passierte, in den Abgrund stürzte und 22 Passagiere ums Leben gekommen waren, erhielt eine politische Dimension.[108] Die Regierung schrie kommunistisches Attentat und verhängte sofort das Standrecht. Der Verdacht erwies sich als unbegründet, und die Ermittlungen, die gleichzeitig in Österreich und Ungarn geführt wurden, führten schließlich zu dem in Wien lebenden Szilveszter Matuska, der zwei Bombenanschläge in Österreich gestand. In Österreich wurde er für unzurechnungsfähig gefunden und zu nur 6 Jahren Zuhthaustrafe verurteilt, aber in Ungarn wurde er zum Tode verurteilt. Dies konnte jedoch nicht vollstreckt werden, da es in Österreich keine Todesstrafe gab, so dass Matuska seine Haft im Zuchthaus von Vác fortsetzte. Doch als Folge der ein Jahr lang bestehenden ungarischen Standgerichte – deren Errichtung durch das Matuska-Attentat inspiriert wurde – wurden mehrere Personen tatsächlich hingerichtet.

Ab 1937 wurden mehrere Strafverfahren *gegen Ferenc Szálasi*, den Anführer der ungaristischen Bewegung, eingeleitet. 1938 wurde er wegen Aufwiegelung gegen eine Konfession und Verstoßes gegen das Ordnungsgesetz zu 3 Jahren Gefängnis verurteilt, aber dank der Amnestie, die nach der Wiedervereinigung Nordsiebenbürgens verkündet wurde, wurde er 1940 entlassen.[109]

Im Zusammenhang mit den *Judengesetzen* haben die Justizbehörden, insbesondere die Kurie, den durch die Gesetze festgelegten Prozess der Diskriminierung im Strafrecht verlangsamt, indem sie in mehreren Prozessen Personen freigesprochen haben, die des Strohmannn-Geschäfts, der Umgehung der Bestimmungen des Zweiten Judengesetzes oder der rassistischen Verunglimpfung nach dem Dritten Judengesetz beschuldigt wurden. In der Praxis haben die Kurie und die unteren Gerichte in diesen Fällen die von der Rechtsbeschränkung betroffenen Personen geschützt. Andererseits haben die Gerichte diesen diskriminierenden Prozess sicherlich beschleunigt, indem es möglich wurde, jemandem sein Eigentum zu entziehen, ihn möglicherweise zu einer Gefängnisstrafe zu verurteilen, mit der Begründung, dass er ein Jude nach jüdischem Recht war, und diese gesetzlich eingeräumte Möglichkeit wurde von der Kurie in ihren Urteilen bestätigt.[110]

11. Die Entwicklung des Strafrechts nach 1945

Nach dem Zweiten Weltkrieg gehörten zu den strafrechtlichen Aufgaben der Auftritt gegen Kriegsverbrecher, der Schutz des politischen Systems und das Erreichen der gesetzten wirtschaftlichen Ziele. Die Reform des Strafrechts begann immer noch auf der Grundlage des mehrfach geänderten Csemegi-Kodex. Aber die Grundsätze nullum crimen sine lege, nulla poena sine lege und auch das Prinzip der Gleichheit vor dem Gesetz wurden aus dem System des Strafrechts entfernt. Zu den in einer Verordnung *geregelten Kriegsverbrechen* gehörten Gräueltaten gegen die Bevölkerung der besetzten Gebiete und Kriegsgefangene und Aktivitäten, die den Eintritt Ungarns in den Zweiten Weltkrieg förderten.[111] Auch die Initiierung von Gesetzen durch die Presse oder im Druck, die die Interessen des Volkes ernsthaft verletzten, und auch die Denunziation gegen gesellschaftliche Organisationen wurden als *Verbrechen gegen das*

[103] Mihály Károlyi: (4. März 1875 in Budapest – 20. März 1955. in Vence, Frankreich): war ein ungarischer Politiker, der als Ministerpräsident 1918 die Republik Ungarn ausrief.

[104] Ursprünglich konnte über Familieneigentum feudalen Ursprungs nicht ohne die Zustimmung der Familienmitglieder verfügt werden. Die Rechtsgrundlage dafür wurde durch das Gesetz 43 von 1921 geschaffen. (Lex Károlyi).

[105] SEREG, A., *Birtokon kívül. A Károlyi-per -Egy híres ügy a magyar jogtörténetből.* (*Außerhalb des Grundstücks. Der Károlyi-Prozess - Ein berühmter Fall der ungarischen Rechtsgeschichte*.) 2019.

[106] *A Rákosi-per, (Der Prozess gegen Rákosi).* Budapest, 1950.

[107] RÉV, E., *A népbiztosok pere*, (*Das Verfahren gegen die Volkskommissare*). Budapest, 1969; NAGY, SZ., A Tanácsköztársaság szereplői ellen lefolytatott perek. (Prozesse gegen Mitglieder der Räterepublik). In: *Újkor,* 2017.

[108] Gericht im Schnellverfahren. VARGYAI, GY., *A biatorbágyi merénylet*. (*Die Ermordung von Biatorbágy*). Budapest, 2002.

[109] KARSAI, E., *A Szálasi-per*, (*Der Szálasi-Prozess*). Budapest, 1988.

[110] LEHOTAY, V., *A jogszűkítés útján. A Horthy-korszak szabadságjogmegvonó intézkedéseinek jogtörténeti háttere.* (*Durch Einschränkung der Rechte. Der rechtsgeschichtliche Hintergrund der freiheitsentziehenden Maßnahmen der Horthy-Ära*). Miskolc, S. 243.

[111] Dekret 81/1945 ME, erlassen durch Gesetz Nr. 7 aus dem Jahr 1945 und den Erlass des Ministerpräsidenten Nr. 1440/1945 über Kriegsverbrechen und Verbrechen gegen das Volk.

Volk betrachtet. Das Gesetz führte auch die Strafen an, die vom Volksgerichtshof verhängt werden konnten: Tod, Zuchthaus, Gefängnis, Haft, Internierung, Geldstrafen bis hin zur Konfiszierung des Eigentums, Verlust des Arbeitsplatzes oder Berufsverbot, Ausschluss von der Ausübung der politischen Rechte. Der Gesetzesartikel Nr. 15 aus dem Jahr 1946 definierte den Schutz der demokratischen Ordnung des Staates als Ziel, aber tatsächlich wollte der Gesetzgeber das Strafrecht politischen Typs verwirklichen.[112] Dem Schutz des Wirtschafts- und Finanzsystems und der Ordnung der öffentlichen Versorgung diente die ministerielle Verordnung Nr. 8800/1946 ME über Straftaten gegen Preistreiberei und die öffentliche Versorgung.

Die dritte Novelle des Csemegi-Kodex ordnete die Sicherheitsverwahrung von psychisch kranken Straftätern an, regelte Straftaten, die in betrunkenem oder Rauschzustand begangen wurden, den illegalen Grenzübertritt und die Gefährdung der Person bei der Berufsausübung.[113] Im Jahr 1950 wurde der Allgemeine Teil des Csemegi-Kodex außer Kraft gesetzt und durch die strafrechtliche Vorschrift vom sowjetischen Typ, Gesetz 2 aus dem Jahr 1950 ersetzt.[114] Der Begriff der gesellschaftsgefährdenden Straftat wurde in das Gesetz eingeführt, und das Ziel des Strafrechts wurde der Schutz der Interessen des arbeitenden Volkes und des gesellschaftlichen Eigentums. Anstelle des dreigliedrigen Systems des Csemegi-Kodex (Verbrechen, Vergehen, Übertretung) wurden die Straftaten in Verbrechen und Übertretung unterteilt. Die neue Gesetzgebung brachte Änderungen auch im Strafvollzug mit sich: Der Kreis der mit dem Tode zu bestrafenden Straftaten wurde erweitert, und es wurde eine einheitliche Freiheitsstrafe eingeführt. Strafrechtliche Bestimmungen wurden zunehmend in Verordnungen und Verordnungen mit Gesetzeskraft anstelle von Gesetzen enthalten.[115] Im Jahr 1961 wurde auch der Besondere Teil des Csemegi-Kodex aufgehoben und das neue Strafgesetzbuch wurde geschaffen.[116]

Als abschließender Gedanke lässt sich feststellen, dass das erste ungarische Strafgesetzbuch auf der Grundlage liberaler strafrechtlicher Prinzipien verfasst wurde und sich seine Bestimmungen als zeitlos erwiesen, da die darin enthaltenen Vorschriften während der gesamten Horthy-Ära in Kraft waren. Infolge der Ereignisse des 20. Jahrhunderts wurde es jedoch in vielen Fällen – oft durch Beeinträchtigung und Verdrängung der Rechtsgrundsätze – den Bedürfnissen und gesellschaftlichen Verhältnissen der gegebenen Epoche entsprechend modifiziert und ergänzt. Die Bestimmungen des Csemegi-Kodex haben als Grundlage für die Ausarbeitung auch des aktuell geltenden Strafgesetzbuches gedient.

[112] MEZEY, B., *Magyar jogtörténet. (Ungarisches Rechtsgeschichte).* Budapest, 2007, S. 379.
[113] Gesetz Nr. 48 aus dem Jahr 1948 über die Beseitigung und Ersetzung bestimmter Mängel im Strafgesetzbuch.
[114] Im Jahr 1955 wurde auch die Kategorie der Ordnungswidrigkeit abgeschafft. Gesetzesdekret Nr. 17 aus dem Jahr 1955.
[115] Zum Beispiel das Gesetzesdekret Nr. 4 aus dem Jahr 1950 über den strafrechtlichen Schutz des Fünfjahresplans.
[116] Gesetz Nr. 5 aus dem Jahr 1961. (Das Strafgesetzbuch der Ungarischen Volksrepublik.)

Iurisprudentia in Medieval Ecclesiastical Jurisdiction (The Role of the *iurisperitorum* in the German and Hungarian Case Law)*

*Elemér Balogh***

Abstract

The Council of Lateran IV (1215) was a landmark in the history of European law, when it required ecclesiastical courts to entrust the jurisdiction of the diocese to a person learned in canon law, among other things. This provision was the corollary of the rule that medieval canon law judges were, as a rule, persons who were well versed in the law and who had typically acquired their knowledge at universities. The situation was somewhat different in Hungary, where there was no university in the Middle Ages, but the extensive jurisdiction of the Holy See meant that the institutions of domestic law had to be applied, and the use of lawyers who knew Hungarian law was therefore indispensable.

An important feature of medieval ecclesiastical jurisprudence was that, because of the high level of canon law knowledge required, judges were happy and often called upon the assistance of learned canon lawyers (iurisperiti) in complex cases. These lawyers, with their outstanding knowledge, were typically specialists in Roman canon law (ius novum) in the western countries of Europe, but in Hungary they were more likely to be specialists in the customary law of the nobility. Both groups of persons included the most qualified jurists of their time, and the institutional background for the acquisition of knowledge was provided by the universities. It was in these universities that learned law was taught, and not only substantive law but also a new model of procedural law (inquisitio) was created, based on the late Roman investigative trial.

Keywords: *Iurisperiti; Holy See; Germany; Hungary; Roman law; canon law; Ivo de Chartre; Ivo de Hélory; Juristenstand; formularia.*

1. Staff of the legal scholars

What does *iurisperitus* actually mean? Who have been the *iurisperiti*? Concepts that do a content of today's historical legal university education,[1] the roots go back deeply into the institutional history of the medieval ecclesiastical canonical procedural law. It is worth to deal with it also because it allows to better understand why the continental legal development had taken a distinctive learned direction.

The *iurisperiti* in the Middle Ages were first and foremost those jurists who had an excellent knowledge of law, and generally acquired this knowledge at a university. The most diligent and clever ones also managed to obtain a scientific degree. They had the greatest prestige, the doctores. It was possible to obtain a doctorate in two fields of law: Roman law (*doctor legum*[2]) and canon law (*doctor decretorum*[3]), or both (*doctor iuris utriusque*[4]). The academic cultivation and teaching of canon law took place mainly in universities. The professors of the canonist school, which developed alongside the glossators, worked in the same scholastic manner as the legists, but, not being themselves bound by the Justinian legal material, they were free to shape the legal institutions they adopted in the spirit of theological teaching. It can be seen that the scholars of these two schools collaborated academically, which was also evident because the exegetes had heard both schools of law (*ius utrumque*). The Eu-

* This paper is based on a reference („Die Rolle der iurisperitorum in der mittelalterlichen ungarischen kirchlichen Gerichtsbarkeit im Hinblick auf die bayerische Entwicklung"), I presented at the Canon Law Conference – De Processibus Matrimonialibus – in Augsburg, 18–19 November 2018.

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1 Cf. Ruszoly, J., *Európai jog- és alkotmánytörténelem* [European Legal and Constitutional History], Szeged, 2011 (hereafter: Ruszoly 2011), p. 44-48.

2 In a letter (4 October 1402), Archbishop Andreas *doctor legum* of Calcutta, adviser to the Roman Emperor Sigismund, asked him to remind Pope Gregory XII of his duty to help restore the unity of the Church, for which he had done little, and to come to the synod. Mályusz, E. – Borsa, I., (eds.) *Zsigmondkori Oklevéltár* [Archives of the Sigismund Era] vol. 4. (1413–1414), Budapest, 1994, p. 574. Nr. 2529.

3 Thomas Mocenigo writes (6 November 1414) to Pope John XXIII that the emperor Sigismund's envoy, *doctor decretorum* Johannes Ambundi, was only authorised to discuss the affairs of the empire. Ibidem, p. 597, Nr. 2647.

4 The *doctor iuris utriusque* de Malavoltis Contes Naddi, Archdeacon of Sienna, Vicar Bishop of Pécs, asks the Pope to grant him other benefices besides the canonry of Esztergom and Pécs (26 June 1419). Ibidem, vol. 7. (1419–1420), p. 202. Nr. 704; In a letter (1 January 1419) from *doctor iuris utriusque* Mattheus de Vicedominis (Piacenza), the reading canon and vicar of the chapter of Esztergom, he calls on parish priests to ask the authorities to pay the monastery of Garamszentbenedek the confiscated customs revenues, to return the occupied lands and to pay the census of the hereditary tenancy, and in case of their reluctance to do so to excommunity them. Ibidem, p. 39. Nr. 2.

ropean common law, the *ius commune,*[5] was the fruit of their joint work.[6]

There was often a tension between Justinian Roman law and canon law, which required legal scholarship to resolve. An eminent practitioner of this was the famous *iurisperitus* Ivo de Chartre (1040–1115), who repeatedly took a stand in cases disputing the validity of marriage. One such case was the question of whether the marriage of free and slave persons could be dissolved. Under ancient Roman law, a slave could not enter into a valid marriage with a free man. But canon law says that all men are equal before God. Ivo wanted to give priority to the sanctity of marriage over positive human rights, but he also wanted to avoid the degradation of the free man (which was the normal consequence of such marriages). Therefore, he held in his *responsum* that such a marriage was sacramentally valid, but that the parties could not be obliged to cohabit. And if deception on the part of the slave could be proved, he considered the marriage invalid, saying that human evil intent could not be sanctioned by divine law, and the marriage could therefore be dissolved.[7]

They were very few in Hungary in the Middle Ages and the majority were foreign jurists, mainly Italians. Italian jurists played an outstanding role at that time, especially in the 15th century.[8] Many of them were even judges at the most important ecclesiastical see, in Esztergom; judges as vicars of the hereditary bishop of Esztergom (he is called Primate-Archbishop even today, until the Second World War he also bore the title of Duke-Primate, who in the monarchical centuries was considered the first personality after the king, as a result of the prerogative that a valid coronation according to the Hungarian historical constitution could usually take place exclusively through him, and of course with the sacred crown).

It is an important legal historical fact that the Roman Church committed itself to Roman law as early as the early medieval centuries: *ecclesia vivit lege Romana*,[9] thus taking two major steps: on the one hand, it expressed its institutional intention not to be subject to any Germanic tribal law, either in person or in subject matter, and on the other hand, it declared its intention to adapt the entire ancient Roman legal culture, including the most important legal institutions. This proved to be a lasting decision that determined the direction of the further development of the legal history of Western Europe. This decision fundamentally shaped the whole image, mentality and institutional system of so-called Latin Europe, and in the chaotic centuries of the time it served not only to preserve the ancient Roman imperial ideal but also to create a lasting consolidation.[10]

1.1 *Advocatus pauperum:* Saint Ivo, patron saint of jurisprudence

An important segment of the spiritual approach of the medieval church was the reverence for outstanding legal literacy and knowledge. A good example of this was the patron saint of jurisprudence, St Ivo. Yves Hélory de Kermartin (1253[11]–1303) was a French cleric and parish priest among the poor people of Louannec. From 1267, he studied theology under St Bonaventure in Paris, where he graduated in civil law, and from 1277, he studied canon low in Orléans.

After returning to Brittany, he defended poor people and he protected widows and orphans in Tréguier. He pleaded for them free of charge, and continued his appeals until he had won their cases. His verdicts were fair and impartial and it is said even those who were on the losing side respected his decisions. His forum became famous for its steadfast defence of the cause of the poor and unfortunate, a veritable refuge. He represented helpless people in other courts as well, he paid their expenses and also visited them in prison. He was given the title of "Advocate of the Poor".

The Bishop of Tréguier invited him to become his official, and he accepted the offer. Like all saints, Yves was afraid to take the final step in the sacred hierarchy, but out of obedience to his bishop, he consented to receive orders in the cathedral of Tréguier, and then the priesthood. Ivo was ordained a priest in 1284, but he continued to practice law as well. The poor were always the object of his tenderest care and of his most delicate attention.[12] From 1292 to 1298 he held the office of parish

[5] Susanne LEPSIUS approaches the concept from the sources: „*Ius commune* lässt sich weder als eine bestimmte Rechtsquelle noch als eindeutig bestimmbare Summe von Normen einschließlich ihrer Auslegung durch Juristen erfassen. (…) Der Begriff *ius commune* ist daher von seiner Verbindlichkeit her zu bestimmen und stets im Kontrast auf das jeweilige Partikularrecht zu beziehen. (…) In der frühen Neuzeit wurde *ius commune* zumeist als das römische Recht in seiner jeweiligen wissenschaftlichen Auslegung verstanden, weshalb man in problematischer Verkürzung der Entwicklung diesen Vorgang für Deutschland in der älteren Historiographie als Rezeption des römischen Rechts bezeichnet hat." [*Ius commune* can neither be grasped as a specific source of law nor as a clearly determinable sum of norms including their interpretation by jurists. (…) The term *ius commune* is therefore to be determined by its binding nature and always to be contrasted with the respective particular law. […] In the early modern period, *ius commune* was mostly understood as Roman law in its respective scholarly interpretation, which is why, in a problematic shortening of the development, this process for Germany was called the reception of Roman law in older historiography.], in: [2]HRG II, 1333-1336.

[6] Cf. RUSZOLY 2011, p. 45.

[7] Cf. LANDAU, P., Ehetrennung als Strafe, in: ZRG KA 1995, p. 148-188.

[8] Cf. BÓNIS, Gy., Vicari italiani in Ungheria durante il Rinascimento. In: *Rapporti veneto-ungheresi all'epoca del Rinascimento*. A cura di Tibor Klaniczay. Budapest, 1975, p. 181-193.

[9] FEINE, H. E., Vom Fortleben des römischen Rechts in der Kirche, in: ZRG KA 73 (1956), p. 1-24; ERLER, A., Ecclesia vivit lege Romana, in: [1]HRG I, 798–799; THIER, A., Ecclesia vivit lege Romana, in: [2]HRG I, 1176–1177.

[10] As the distinguished Hungarian legal historian writes in his university textbook: „As the Church was the bearer and the saviour of the Roman imperial idea, it was the depository of European community and unity in the turbulent world of the collapse. If it did not want to be itself immersed or dissolved in the struggles of the successive Germanic tribal empires, it could only fulfil its historic mission of maintaining and then restoring European unity by adhering to the uniform law." RUSZOLY 2011, p. 44.

[11] This is the most commonly given date of birth, but 1247 is more likely. Cf. SCHOTT, C., Ivo Hélory (um 1247–1303), in: [2]HRG II, 1337–1338.

[12] FRANCE, P., Saint Yves: Étude sur sa vie et son temps, Saint-Brieuc, 1893, p. 43-121; CASSARD, J.-Ch., Yves de Tréguier: un saint du xiii[e] siècle, Paris, 1992; CASSARD, J.-Ch. – DERVILLY, J. – GIRAUDON, D., Les Chemins de saint Yves, Morlaix, 1994.

priest in Louannec, but after six years of service he resigned and retired to his paternal estate, and from then on devoted all his intellectual capacity to the perfecting of his legal knowledge.[13]

He was canonised in 1347 (Saint Yves de Vérité) and was particularly well known and loved in Brittany, his home region. He was the patron saint of lawyers and, more narrowly, of law facultys in universities,[14] of those seeking justice in court, especially orphans and wards, and of the lower classes of priests.[15]

His veneration reached Hungary through Jesuit mediation, although it did not become more widely known. He was patron of the Faculty of Law of the first Hungarian University of Sciences, the University of Nagyszombat (now Trnava/Slovakia), which later moved to the new location. From 1695, the faculty celebrated its feast regularly and solemnly. It is customary for one of the teachers or a prominent student to make a commemorative or eulogy of the Breton religious leader, who stood out as a defender of widows and orphans. This celebration was probably very spectacular and must have required considerable expenditure, because the faculty was unable to hold it for some time at the end of the 18th century due to lack of funds; the university then complained to the government (*Consilium Regium Locumtenentiale Hungaricum*), saying that the citizens of the city (Nagyszombat) were already saying that the faculty's respect for Saint Ivo had diminished. The *Consilium Locumtenentiale* granted the request in the affirmative and immediately allocated the requested funds. We learn of the events from the surviving minutes of the faculty council meeting, but unfortunately no more detailed information has been preserved in the documents, so we do not know the amount of money awarded by the government, which would give us an idea of the scale of the celebration. Also, a later minute of the Faculty Council (23 November 1777) lists the dean's duties as including the organisation of the annual celebrations in honour of Saint Ivo.[16] In Trencsén (now Trenčín/Slovakia), a play was performed about him on one occasion in 1729. A typical motif is depicted on the altarpiece of the parish church of Saints Peter and Paul in Óbuda (today part of Budapest), which shows the poor presenting their written petitions to an angel for heavenly disposition. There was also an altar in the Church of the Assumption in Buda.

1.2 The creators of an autonomous legal order

The European jurists developed into an independent legal profession shortly after the first Bologna studies began. It is a strange phenomenon how an intellectual profession could have become suverent. „Die Frage, warum es zur Entstehung eines Berufes kam, dessen Gegenstand und Nahrungsgrundlage die wissenschaftliche Behandlung des Rechts ist, warum an die Stelle der traditionellen Laienrechtspflege die Arbeit der Rechtsgelehrten treten konnte, wird niemals eindeutig beantwortet werden können. Antworten gibt es zwar genug, doch werden sie alle ihrerseits in Frage gestellt durch die Rätsel der sogenannten 'Renaissance des XII. Jahrhunderts', jenes kulturellen Neuaufbruchs des Abendlandes, der bis heute das geistige Gesicht Europas geprägt hat. Was war Ursache, was Wirkung? Was wurde als Wirkung wiederum Ursache?" [The question of why it came to the emergence of a profession whose object and nourishment is the scientific treatment of law, why the work of legal scholars could take the place of traditional lay jurisprudence, will never be answered unequivocally. There are enough answers, but they are all in turn questioned by the enigmas of the so-called 'Renaissance of the XIIth century', that cultural re-emergence of the XIXth century. Century', that new cultural awakening of the Occident, which has shaped the intellectual face of Europe until today. What was cause, what effect? What became cause in turn as effect?] [17]

The need for jurisprudence can also be observed in the development of the German legal order: „Ein utopischer Realist muss der anonyme Verfasser der »Reformatio Sigismundi« daher wohl gewesen sein, als er forderte: es sol einer, der zü einem konig erwelt solt werden, gelert sein; *er solt von recht ein doctor legum sein und iuris peritus*. Die Rechtswissenschaft, nicht die Philosophie war also das Fach in einem noch jungen Spektrum kanonischer Wissenschaftsdisziplinen geworden, dessen Vertreter in eine solche Nähe zur Macht geraten waren, dass einer der ihren sogar der Königswürde für wert gehalten wurde. Mit dieser Entscheidung kam dem Juristenstand innerhalb weniger Jahrhunderte eine Geltung zu, die prägend war für seine Rolle, sein Selbstverständnis und seine Wahrnehmung durch die Zeitgenossen."[18] [The anonymous author of the 'Reformatio Sigismundi' must therefore have been a utopian realist when he demanded: one who is to be elected king should be gelert; he should be a *doctor legum and iuris peritus* by right. Thus, jurisprudence, not philosophy, had become the subject in a still young spectrum of canonical scientific disciplines, whose representatives had come so close to power that one of their own was even considered worthy of the royal dignity. With this decision, within a few centuries the legal profession acquired a status that was formative for its role, its self-image, and its perception by contemporaries.] – states in the introductory thoughts of his study Wetzstein. An important motivating factor was the ex-

[13] Cf. Schott, C. – Erler, A., Ivo Helori, in: [1]HRG II, 511–512; Moeller, E.v., Der heilige Ivo als Schutzpatron der Juristen und die Ivo-Bruderschaften, in: Historische Vierteljahresschrift, 20 (1909), p. 321 ff; Jobbé-Duval, E., L'adjuration ŕ saint Ives de Vérité, Paris, 1920, p. 19 ff.

[14] Cf. Krause, P., Der heilige Ivo als Patron der Juristenfakultät in Trier und anderswo, In: *ZRG KA* 2004, p. 286–341; Schott, C., Der heilige Ivo als Patron der Juristenfakultät Freriburg i. Br., In: *SIGNA IVRIS* 7, 2011, p. 25–68.

[15] Magyar Katolikus Lexikon [Hungarian Catholic Lexicon], Budapest, 2000, vol. 5, p. 517-518.

[16] Eckhart, F., *A Jog- és Államtudományi Kar története* 1667–1935 [History of the Faculty of Law and Political Sciences 1667–1935], Budapest, 1936, p. 28, 91, 123.

[17] Hattenhauer, H., *Die geistesgeschichtlichen Grundlagen des deutschen Rechts. 3., überarbeitete und erweiterte Auflage*. Heidelberg, 1983, p. 328-331.

[18] Wetzstein, Th., Der Jurist. Bemerkungen zu den distinktiven Merkmalen eines mittelalterlichen Gelehrtenstandes, In: Rexroth, F., (Hrsg.): *Beiträge zur Kulturgeschichte der Gelehrten im späten Mittelalter* (Vorträge und Forschungen 73), Ostfildern, 2010 (hereafter: Wetzstein 2010), p. 243-296. A fundamental study on the subject: Kantorowicz, E. H., Kingship under the Impact of Scientific Jurisprudence, in: Clagett, M. – Post, G. – Reynolds, R. (eds.), Twelfth-Century Europe and the Foundations of Modern Society, Madison, 1961, p. 89-111.

ample of the cities of northern Italy and their universities, all of which were striving for political autonomy, for which the dynamic economic development provided a good basis.[19]

I can add to it the point of view that in the jurist's career the social descent played little role, so here an intensive social mobility could be constantly effective. The feudal and urban unity was much less significant in this structure. It was only the intellectual capacity that counted, without which one could not hold any high office in the scientifically influenced legal profession. It should be added, however, that against the learned jurists developed in this canonical-legal circle, a negative judgment was also formed, as a result of the enormously delaying negotiating practices and the often experienced greediness. Already before the Reformation, the speech about the jurists spread on German soil: „Juristen, böse Christen" [Jurists, evil Christians].[20]

Universities were constantly churning out increasingly well-educated legal scholars, who became practically indispensable in both secular and ecclesiastical jurisdictions. „Mit der im 12. Jahrhundert zunächst noch vereinzelt, später ubiquitär gefällten Entscheidung, eine immer komplexer werdende Gesellschaft mit Hilfe des Rechts als wandelbares und auf menschliches Handeln zurückgehendes Normensystem zu organisieren, wurden Juristen als akademisch ausgebildete Fachleute im Umgang mit diesem Normensystem unverzichtbar. Juristen dürften unter den mittelalterlichen Gelehrten diejenigen dargestellt haben, welche die intensivste Auseinandersetzung mit der Gesellschaft in ihrer ganzen Breite pflegten und am weitesten in sie hineinwirkten." [With the decision made in the 12th century, at first sporadically, later ubiquitously, to organise an increasingly complex society with the help of law as a changeable system of norms based on human action, lawyers became indispensable as academically trained experts in dealing with this system of norms. Among medieval scholars, jurists probably represented those who cultivated the most intensive engagement with society in all its breadth and had the most far-reaching impact on it.][21]

1.3 Specialists in Roman-Canonical law

Iurisperiti were therefore specialists in Roman canon law. As it is known, the juridical education of scientific standard began at the first European universities,[22] where Roman law (*ius civile*) and canon law (*ius canonum*)[23] were taught on the basis of the *artes liberales* (retoric, grammar, dialectics). Due to the newly discovered Roman law, a new legal culture, *ius novum*,[24] was developed at the universities from the 12th century. In the beginning, the title of *doctor* was more a professional sign (like still today in Hungary, where lawyers and doctors of all kinds practically automatically acquire the title of doctor after the absolutorium. (Grammatically, however, there is a difference between these and the actual scientific degree – PhD – that, the professional mark 'Dr. ' with a small initial letter is to be used). The learned lawyers, that is, those who have usually made university studies, were initially active in the church structure, in two areas: political-administrative and judicial. As far as the first one is concerned, these jurists performed more the practical aims of the church politics, but the second one showed a picture where these jurists have been as progressive and often indispensable figures of a demanding legal culture.

György Bónis (1914–1985)[25] gave this definition of legal scholars: „I consider as intellectuals of law […] that stratum which, in addition to the knowledge of artes, has acquired at university or in practice the science of Roman, canonical or domestic law; having acquired this knowledge, it has worked in politics, diplomacy, the legal service, legal transactions or in the administration of the state, and has earned its bread or possibly acquired wealth by legal or official work […]"[26] Bónis was deeply involved in the professional history of medieval European jurisprudence. He proved that this product of the division of labour, which also occurred in the intellectual field, this new, rising order of jurisprudence, which almost bore the hallmarks of European orderliness: the German *Juristenstand*, the French *gens de justice*, the English 'legal profession',[27] also appeared in

[19] Cf. Fried, J., *Die Entstehung des Juristenstandes im 12. Jahrhundert. Zur sozialen Stellung und politischen Bedeutung gelehrter Juristen in Bologna und Modena* (Forschungen zur neueren Privatrechtsgeschichte 21), Köln–Wien, 1974; Walther, H. G., Die Anfänge des Rechtsstudiums und die kommunale Welt Italiens im Hochmittelalter, in: Fried, J. (ed.), Schulen und Studium im sozialen Wandel des hohen und späten Mittelalters (VuF 30), Sigmaringen, 1986, p. 121-162.

[20] Cf. Herberger, M., „Juristen, böse Christen", In: *HRG* II (1978), 482–484; Stolleis, M., Juristenbeschimpfung, oder: Juristen böse Christen, In: Stammen, Th. *et al*. (eds.), *Politik-Bildung-Religion. Hans Maier zum 65. Geburtstag*, Paderborn, 1996, p. 163-170.

[21] Wetzstein 2010, p. 295. Cf. Uelmen, A. J., A View of the Legal Profession from a Mid-Twelfth-Century Monastery, In: *Fordham Law Review*, vol. 71, no. 4, March 2003, p. 1517-1542.

[22] Cf. Szuromi, Sz., A középkori egyetemek létrejötte és az egyetemi oktatás megszületése [The Creation of Medieval Universities and the Birth of University Education], In: Tóth, P. (ed.), *Az Egyetemi Könyvtár* évkönyvei XIII, Budapest, 2007, p. 303-311; A középkori egyetemek létrejöttének és az egyetemi oktatás megszületésének sajátosságai [Characteristics of the Creation of Medieval Universities and the Birth of University Education], In: Körmendy, K., Studentes extra regnum. Egyetemjárás és könyvhasználat az Esztergomi Székeskáptalanban 1183–1543 (Bibliotheca Instituti Postgradualis Iuris Canonici Universitatis Catholicae de Petro Pázmány nominatae III/9), Budapest, 2007, p. 41-53.

[23] Cf. Szuromi, Sz., Kánonjogtudomány és kodifikáció. Megjegyzések a latin egyházjog kodifikációjához [Canon Law and Codification. Notes on the Codification of Latin Canon Law], In: Iustum Aequum Salutare, Budapest, IV/2 (2008), p. 83-92.

[24] On the subject of *ius novum*, the eminent canonist gives a systematic overview: Landau, P., Rechtsfortbildung im Dekretalenrecht. Typen und Funktionen der Dekretalen des 12. Jahrhunderts, In: *ZRG KA* 2000, p. 86-131.

[25] His detailed professional biography can be found: Balogh, E., György Bónis (1914–1985), In: Professors of Law at the University of Szeged, In *FORVM* Szeged, vol 9, Nr. 2, 2021, p. 41-61.

[26] Bónis, Gy., *A jogtudó értelmiség a középkori Nyugat- és Közép-Európában* [The Legal Intelligentsia in Medieval Western and Central Europe], Budapest, 1972 (hereafter: Bónis 1972a), p. 174-175.

[27] Cf. Rose, J., The Legal Profession in Medieval England: History of Regulation, In: *Syracuse Law Review*, vol. 48 Nr. 1, 1998, p. 1-138; Antal, T., The Legal Status of Judges in the German 'Spiegels' and in the Medieval English Common Law, In: Balogh, E. (Hrsg.): *Schwabenspiegel-Forschung im Donaugebiet* (Ius Saxonico-Maideburgense in Oriente 4), Berlin, 2015, p. 80-83; Antal, T., *Az angol esküdtszék története* [History of the English Jury] (Fundamenta Fontium Iuris Historici 2), Szeged, 2019, p. 48-49.

Hungary. Without a thorough knowledge of this legal intelligentsia, neither the development of feudal customary law, nor the history of the Hungarian court system, nor the pace and extent of the penetration of Roman law, nor the genesis of the late blossoming Hungarian jurisprudence can be understood.[28]

The academic degree, the doctorate, could be obtained at universities. In addition to the universities of northern Italy, one of the favourite study destinations for Hungarian students was the University of Prague,[29] where the register of the law faculty also preserved the records of Hungarian students from the *natio*-Czech.[30] An interesting piece of financial history is that the University of Vienna set the enrolment and initiation fees for law students in Hungarian currency (forint) in a resolution of 1401 and 1402.[31] The registry of the Faculty of Law at the University of Vienna also preserves the names of students from Hungary (1402).[32]

The *doctores* were in Hungary partly judges (in Esztergom and other important ecclesiastical courts as vicars) partly *iurisperiti*, who thus helped with their outstanding canonical-legal knowledge the good judgment. This second group of *iurisperiti* in Hungary had played a very important role, due to the wide field of competence of the local ecclesiastical courts, in that they also had the right to conduct lawsuits, where the subject matter was the matrimonial property, also noble real estate, but where also the holy chairs had to handle the Hungarian noble customary law! In these processes the 'simple' canonists were practically incompetent, especially if they were foreigners, therefore legal experts were absolutely indispensable. In the Middle Ages in Hungary there were a lot of these trials, and because there was a lot of money involved, the prestige of these trials was also very high. Ecclesiastical courts, of course, had no privilege for such lawsuits, and if a royal court, by a judicial order (*mandatum transmissionale*), brought the lawsuit to itself, the causa proceeded from the Holy See. In such cases, the mandatum simply stated that the royal judge (*iudex curialis*) would examine whether the case did not belong to the competence of a royal court; if he found no competence of his own, he would send the case back to the holy see. I do not know such a case: the king was always competent… By the way, in the cases where the subject of the lawsuit was (even if partly) noble immobility, the king had the so-called *ius regium*, as a result of which the legal heir of such property was actually the king (about like the state today), a 'root right' he had, however.

2. *Iurisperiti* as specialists in domestic law

Secondly, there was also another meaning of this profession: they were those jurists who did not acquire their knowledge at a university, therefore they had only a superficial knowledge of Roman or canon law, but they were real legal experts of the local law, especially of the customary law (common law) of their country. Those who were little or barely learned in Roman, or canon law, were considered 'half-scholars and half-knowers' from the point of view of *ius novum*.[33]

2.1 Types of legal practitioners

Bónis György, the most famous Hungarian legal historian of the twentieth century,[34] who dealt especially with the Middle Ages, defined in his monographs the two groups of the legal intelligentsia: *doctores* and *practitioners.*[35] Bónis divides the clerical status, intellectual occupations and legal knowledge of the population into two broad classes, depending on whether they had attended university. The university graduates (*doctores*) were often politicians, diplomats and, especially in the holy courts, judges and prosecutors (*officiales, procuratores*). The other group was made up of practitioners (practicarios), who were typically not scholars of Roman and canon law, but were scholars of national or at least local or provincial law.

One of the most important characteristics of medieval Hungarian legal culture was that in Hungary no Roman law was adopted in the national law (*consuetudo iudiciara*),[36] and canon law was only applied in the practice of ecclesiastical courts. Hungarian law was shaped and developed by those with legal literacy. The lawyers of the royal curia and the chancellery are the main ones to be referred to. If we look at Western Euro-

[28] Bónis, Gy., *A jogtudó értelmiség a Mohács előtti Magyarországon* [The Legal Intelligentsia in pre-Mohács Hungary], Budapest, 1971 (hereafter: Bónis 1971), p. 7.

[29] The archives of the University of Prague have several records of Hungarian jurats who obtained their degrees there, some examples are given below. The rector of the University of Prague inducts Imre of Esztergom into the ranks of the amber-clad in law. Mályusz, E., (ed.) Zsigmondkori Oklevéltár [Archives of the Sigismund Era] vol. II/1. (1400–1406), Budapest, 1958, p. 424, Nr. 3586; The rector of the University of Prague inducts Péter of Esztergom into the ranks of the amber-clad in law. Ibidem, p. 659, Nr. 5205; The rector of the University of Prague includes Imre Csik (Czicz) of Esztergom, a law licenciate, among the doctors of law; Ibidem, vol. II/2. (1407–1410), p. 103, Nr. 5882; The rector of the University of Prague includes Péter of Esztergom, among the doctors of law. Ibidem, Vol. II/2. (1407–1410), p. 196, Nr. 6514.

[30] Ibidem, Vol. II/1, p. 90, Nr. 779.

[31] Ibidem, Vol. II/1, p. 163, Nr. 1374, 2162.

[32] Ibidem, Vol. II/1, 260, Nr. 2170.

[33] On the subject of *ius novum*, the eminent canonist gives a systematic overview: Landau, P., Rechtsfortbildung im Dekretalenrecht. Typen und Funktionen der Dekretalen des 12. Jahrhunderts, In: *ZRG KA* 86 (2000), p. 86-131. Cf. Stintzing, R., *Geschichte der populaeren Literatur des römisch-kanonischen Rechts in Deutschland am Ende des 15. und am Anfange des 16. Jahrhunderts*. Leipzig, 1867. p XXI.; Hageneder, O., *Die geistliche Gerichtsbarkeit in Ober- und Niederösterreich. Von den Anfängen bis zum Beginn des 15. Jahrhunderts* (Forschungen zur Geschichte Oberösterreichs 10), Graz – Wien – Köln, 1967.

[34] A complete work of Bónis' German-language writings was published a few years ago: Balogh, E. (ed.): *György Bónis: Beiträge zur ungarischen Rechtsgeschichte 1000–1848*, Budapest, 2018.

[35] Bónis 1997, p. 174.

[36] „To summarise the impact of Roman and canon law before Mohács, we must first note the lack of any reception of Roman law, even its so-called 'theoretical' adoption […] civil law, as a kind of 'natural law', was highly regarded but not considered as a valid system." Bónis, Gy., *Középkori jogunk elemei. Római jog, kánonjog, szokásjog* [Elements of our Medieval Law. Roman Law, Canon Law, Common Law], Budapest, 1972 (hereafter: Bónis 1972b), p. 107.

pean examples, the criteria for the independence of the French and English legal professions (and the judiciary) as a profession: separate rights, duties and knowledge were fully developed,[37] but they could not be developed in Hungary.[38]

In a royal court, when the subject of the dispute was not specifically ecclesiastical in nature, the legal scholars were certainly drawn from the 'practitioners', to use the term of Bónis's thermilogy. The charter specifically mentions the *iurisperiti* as fellow judges in the royal court. King Sigismund (1387–1437) in an estate trial: *„unacum baronibus et regni nostri proceribus ac magistris iudicibus curie nostre, necnon aliis iurisperitis pro tribunali sedentibus Sigismundus dictus Hanchuhar comes comitatus Crisiensis nomine et in persona ipsius domini bani quandam pixidem certis sigillis confirmatam presente prelibato Matheo nostro conspectui presentavit."*[39]

2.2 Sources of medieval Hungarian law: the *formularia*

In medieval Hungary, too, the recording of customary law was often the fruit of the diligence of private individuals, and among these, the formulary books (*formularia*) were of particular importance, especially for the purposes of practical law teaching. These sources of law were both textbooks of substantive law and, even more so, of procedures, embodied in concrete examples, which are neglected works of Hungarian jurisprudence. The outstandingly important sources of medieval Hungarian legal life, the formularia „[…] are not enjoyable reading, and the uninitiated would be willing to underestimate them, to put them aside as 'curiosities'. But if more fortunate nations, which have preserved hundreds of court records, dozens of medieval law books and treatises, consider them worthy of study, the Hungarian researcher should delve into them even more. Our small number of formularies are an indispensable source for the development of feudal Hungarian law and jurisprudence and for the history of culture." – writes György Bónis in his study of the first significant Hungarian formularium (*Ars Notaria*), a collection of early 14th century documents.[40]

The formularies (*formularia*) were textbooks of substantive law, but even more so of procedure, with concrete examples. They mixed elements of Hungarian customary law (*consuetudo*), canon law (*ius canonum*) and Roman law (*ius civile*). From a scholarly point of view, Roman law was the primary source: „Without being one-sided, it can be said that the measure of the development of the law of any country is the extent to which it has been able to adopt Roman law, whether through Bologna or Byzantium. And since it was canon law that most directly transmitted the principles and theorems of Roman law to the states of Latin culture that joined Latin Christianity, transforming them to suit their own purposes and interests, we can take the relationship with canon law as a further measure of their value. The place of medieval Hungarian law in the development of Europe is also determined by these contemporary norms […] The 'chemical composition' of the Hungarian medieval legal system is also a mixture of these elements, which can never be precisely defined."[41]

Recently, a modern edition of the most important medieval Hungarian *formularium*, made in Esztergom, has been published in a sophisticated edition.[42] The 'Formulary Book of the Church of Esztergom' is the publication of two formularies, the first being the so-called Beneéthy Formation Book (Máté Beneéthy was the clerk of the Esztergom Holy See court), the second being an expanded and somewhat revised version of the former, which was prepared in the office of Demeter Nyási, the Archbishop's deputy of Esztergom, and which supplements the previous work with about seventy documents from 1511–1521.[43] This formularium is particularly significant because the only chronological protocol book or register of the operation of medieval ecclesiastical courts in Hungary survives only from the end of the period, from the early 1500 s, from the vicarial court of Esztergom.[44]

The structure of the *formularium* is thematic. The chapters are made up of formulas relating to the types of cases and the typical litigation acts or files. The chapters are headed by separate headings indicating the legal nature of the document and its main content. These headings can also be regarded as the table of contents of the volume. An informative index supplements the publication: *Appendix. Tituli, qui solum in codice B continentur, codex autem N caret iisdem, Concordantia manuscriptorum, Bibliographia, Index personarum, geographicus, titulorum.*

Among the many valuable and interesting legal documents, I would like to highlight one case that documents the covert circumvention of the medieval Church's prohibition on interest collection. In Formula 258, Ferenc Várday, the elected bishop of Vác, sued Benedict Batthyány as a creditor, who had granted

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[37] Varga, E., *A hivatásos ügyvédi osztály kialakulása* [The Emergence of the Professional Legal Profession], in: Domanovszky Emlékkönyv, Budapest, 1936, p. 625-642.

[38] Cf. Bónis 1971, p. 11-15.

[39] Neumann, T. – C. Tóth, N. (eds.), Zsigmondkori Oklevéltár [Archives of the Sigismund Era], Budapest, 2009, vol. 11. 25 June 1424, p. 304-305, Nr. 743.

[40] Bónis, Gy., Uzsai János Ars Notariája [Ars Notaria of János Uzsai], in: Budapest, Filológiai Közlöny, vol. 1961/3-4, p. 229.

[41] Bónis 1972 b, p. 7-8.

[42] Erdő, P. – Szovák, K. – Tusor, P. – Sarbak, G. (eds.), *Formularium ecclesiae Strigoniensis* (Collectanea Studiorum et Textuum, vol. I/4), Budapest, 2020. Second, revised edition.

[43] Cf. Erdő, P., *Középkori egyházi bíráskodás és a Nyási-formulárium* [Medieval Ecclesiastical Jurisprudence and the Nyási Formulary], ibidem, p. LXXI–LXXVII (hereafter: Erdő 2020); Szovák, K., *Formuláskönyvek a középkori Magyarországon* [Formulary Books in Medieval Hungary], ibidem, p. LXXI–LXXVII; Sarbak, G., *Kodikológiai megjegyzések Beneéthy Máté és Nyási Demeter formuláskönyveihez* [Codicological Notes to the Formulary of Máté Beneéthy and Demeter Nyási], ibidem, p. LXXIX–LXXXIV; Süttő, Sz., Formularium ecclesiae Strigoniensis etc. (Book Review), In: *Magyar Könyvszemle* [Hungarian Book Review], 2019. 2. , p. 247-250; Solymosi, L., Az esztergomi egyház formuláskönyve [The Formation Book of the Esztergom Church] (Book Review), In: *Magyar Sion* 13 [55], 2019, p. 133-139.

[44] Cf. Erdő, P., Das älteste Protokollbuch des Vikariatsgericht von Esztergom (Ungarn), In: Landau, P. – Petzoldt, M. (eds.), *De Iure Canonico Medii Aevi: Festschrift für Rudolf Weigand* (Studia Gratiana 27), Bologna, 1996, p. 71-84.

him a loan of 1,000 gold forints free of interest and lent him fifty vessels (*vas*) of wine worth 350 gold forints, so that the two debts became due at the same time. The defendant refused to pay the claim of forints 1350. It should be stressed that the parties were aware of the prohibition on charging interest, since the plaintiff expressly mentions the exemption from interest (*ex causa veri et gratuiti mutui*). The 'secret' is in the details; it is not known, for example, what the value of the wine was, or even the value of the fifty vessels. Here, then, we are probably looking at an example of money-lending combined with commodity credit as a disguised form of interest collection.[45]

3. *Iurisperiti* at the service of the Church

Most of the legal experts were in the service of the ecclesiastical jurisdiction.[46] The recipient, at the same time the user and enthusiastic developer of the learned law was therefore the medieval church, not only in the abstract, scientific sense, but also in the practical, general administration of justice. The first characteristic form of permanent jurisdiction in Europe developed in the ecclesiastical institutional system, where this new, sensybile, intellectual layer found a stable, protected home. As is known, on this way a milestone was the IV Lateran Council (1215) and its decrees. It is to be singled out from it, which prescribe that every Ordinary should/must assign jurisdiction in his diocese to a person learned in canon law. Thus the foundation of a legal development is created, which overtook the secular courts with centuries. In Hungary, for example, only since the end of the 19th century the expectation appeared that at the royal (= state, secular) courts only those jurists could be appointed as judges who had completed law studies at a university. This legal development was mainly related to the substantive law (as a result of the applied Roman canon law), but equally important was the handled inquisition, i.e. a procedural law, which meant a much higher level compared to the accusatory law of evidence of the Middle Ages.

3.1 The relationship between ecclesiastical judges and *iurisperiti*

The widespread spread of canon law based on Roman law was linked to the establishment of permanent ecclesiastical courts.[47] The beginnings of this process are to be found in France[48] and its institutional antecedents are to be found in the activities of the papal delegated judges. From the 12th century onwards, there was a huge increase in the demand for the judicial activity of the papal tribunal, which was, so to speak, flattering to Rome and did not shy away from the claimants. However, unlike the secular, feudal rulers and grand magistrates of the time, the popes did not travel personally, but entrusted clerics with specific powers to act on their behalf: to adjudicate and decide on complaints. These were the delegated judges (*iudices delegati*), who usually lived geographically close to the litigants involved in the dispute, and were therefore considered to be well acquainted with local conditions and, with papal authority, enjoyed great prestige.

According to the general opinion, the first permanent ecclesiastical judges started their activity at the end of the 12th century – in Rheims. This was actually a further development of the institution of pontifical delegate judges, since the archbishop of Rheims was at the same time a pontifical *iudex delegatus.*[49] Since that time the activity of these delegated judges has increased attractively, and it is noticeable that more and more of them were learned jurists. From the middle of the 13th century, the rule of appointing one judge per diocese was strengthened. There was a well-known exception just the mentioned Rheims, where at the same time for a long time even two officiates were made. The formal reason was that one judge represented the episcopal instance, the other the archiepiscopal, i.e. the appellate instance.

The main substantive feature that distinguished ecclesiastical from secular judicature was that judges, especially those in courts with permanent seats and permanent jurisdiction, had to be trained in canon law. It is important to stress this because it is in this light that it is particularly significant that even these learned canon lawyers often turned for legal advice to jurists (*iurisperiti*) who were more knowledgeable than themselves. This humility towards a high level of legal knowledge is remarkable: the canon law judges, already well versed in canon law, did not seek to answer questions of fact, but usually sought the help of their more learned legal colleagues in order to decide complex cases, most often in search of convincing new arguments.

So first of all, the judges of the Holy See themselves had to meet relatively well-defined professional prerequisites. There have also developed the criteria of what skills the candidates must have. The *officialis* should be an impeccable cleric (but not necessarily an ordained priest),[50] to be chosen by the learned jurists, who were well versed in law. In the beginning, the Ger-

[45] Cf. Erdő 2020, p. LIII–LIV.

[46] Trusen, W., Die gelehrte Gerichtsbarkeit der Kirche, In: Helmut Coing (Hrsg.): *Handbuch der Quellen und Literatur der Privatrechtsgeschichte*, I, München, 1973; Nörr, K. W., Über die mittelalterliche Rota Romana, In: *ZRG KA* 2007, p. 220–245; Szuromi, Sz., *Az érett középkori egyházi bíráskodás és hírósági szervezet történetének vázlata* [A Sketch of the History of the Mature Medieval Ecclesiastical Judiciary and Court Organisation], In: *Az igazságszolgáltatás kihívásai a XXI. században. Tanulmánykötet Gáspárdy László professzor emlékére*, Budapest, 2007, p. 379-388. Kéry, L., Geistliche Gerichtsbarkeit, In: *HRG* II, 1-7.

[47] It gives a comprehensive overview of the medieval ecclesiastical courts, with an extensive bibliography of sources: Donahue, Ch. Jr., *The Records of the Medieval Ecclesiastical Courts* (Comparative Studies in Continental and Anglo-American Legal Hiostory 6), Berlin, 1989; The Ecclesiastical Courts: Introduction. The History of Courts and Procedures in Medieval Canon Law, Washington DC, 2016.

[48] Cf. Fournier, P., *Les officialités au moyen âge*, Paris, 1880.

[49] A specific institutional form of the delegated judge (*iudex delegatus*) was the office of *conservatores*, of which there were several examples in Hungary: cf. Kiss, G., A conservatores hivatala, mint a pápai küldöttbíráskodás sajátos megjelenése az érett középkorban [The Office of the *conservatores* as a Specific Manifestation of Papal Envoy Jurisdiction in the Mature Middle Ages], In: *FONS*. Forráskutatás és történeti segédtudományok 2015, p. 91-102.

[50] According to the ordo iudiciarius spirensis (13th century): *„Tria sunt, quae impediunt aliquem esse iudicem: natura, lex et mores. Natura prohibet surdum, mutum et furiosum esse iudicem. Lex prohibet excommunicatum, irregularem, hereticum, paganum esse iudicem. Mores prohibent mulierem esse iudicem."* (§ 4) Riedner, O. (ed.), *Ordo iudiciarius anteaquam sive spirensis*, F. Schöningh, 1915, p. 15.

man ecclesiastical judges studied at the universities of northern Italy.[51] The Council of Tours (1236) even demanded that the candidate judge should have had at least 5 years of law study, but this was still a long way from being excessive.

Although also the judges in the ecclesiastical courts should be persons knowledgeable in law, in principle not, in fact nevertheless the help of jurists (*iurisperiti*) was very often taken up. The official had the power of judgment (*iurisdictio*) alone, but this did not mean that he should pass as a single judge (in the modern sense, for instance). He even had the duty, especially in complicated cases, to ask for advice from real jurists. They are mentioned by the sources as *assessores* or *consiliarii*, and could also participate in the hearings, but it happened much more often that they only took the trial records to hand. In these cases, the ecclesiastical courts actually expected a legal opinion from them. These persons were practically considered as co-judges, who were also offered by the parties, not infrequently a former officiant, who of course could not be interested in the specific trial. Their activity – especially in the Hungarian ecclesiastical court practice – was unfortunately often merely oral, even their names were not preserved, but the protocol fortunately refers to their cooperation with the formula: *de iurisperitorum consilio*. These *iurisperiti* did not have their own *iurisdictio*, and the judge was not bound to their opinion. The parties had the right to exclude not only the suspect judge (*iudex suspectus*) but also such *iurisperiti* from the conduct of the case.

3.2 Examples from the practice of ecclesiastical jurisdiction in Germany

In the dioceses of medieval Germany, institutionalised, professional ecclesiastical magistracy in all its essential elements spread rapidly. Qualified judges, increasingly university-educated and with a high level of knowledge of canon law, presided over the courts, but very often they also turned to specialists in canon law for professional confirmation. Canonists with a university degree (typically from Bologna) represented about 90% of the episcopal chapter of Constance. Lawyers were also the most important group of parish priests in the same diocese in the late Middle Ages (1275–1508).[52]

Also at the ecclesiastical court of Salzburg *assessores* were called those learned lawyers who helped the work of the official. Formally, they were not considered to be real co-judges, because they did not form a common panel with the ordinary judge, and during the trial they did not participate in the judgment. However, there were several examples that when the official left the courtroom, the *assessor* took his place, and when in such cases a verdict was reached, he always acted as *commissarius surrogatus*, and never as *assessor* or *iurisperitus*. The high intellectual level of the ecclesiastical court of Salzburg shows that in the Middle Ages,[53] as a rule, only persons with scientific degrees (*doctores*) could apply for assessor.

As in the old times (*Sendgerichtsbarkeit*) the bishop of Passau has traveled a lot in his diocese also after the IV Lateran Council, and in the meantime has performed a jurisdiction. During this activity he has also taken the help of *iurisperiti* who have been his advisors: *communicato proborum consilio* or *habito virorum consilio discretorum*. A very important role has also the jurists in the work of the ecclesiastical court of Augsburg, who have done university studies. With the advance of canon law, these jurists took the place of the former assessors of the episcopal see, the ecclesiastical ministerials.

3.3 Establishing the status of jurists in judicial legislative sources

The need and confidence in the *iurisperiti* was so general and elementary that we find this institution, these persons, in the judicial orders of many Holy See. Their role has not diminished over the centuries, but has, it may be said, grown steadily in proportion to the rise in the prestige of legal expertise.

It is also worth mentioning a case when the jurists participated in the formulation of the court books. This happened at the time of issuing the new ecclesiastical court book by Bishop of Bamberg Heinrich III (1487–1501), for which, besides the cathedral dean and the episcopal chapter, the consent of legal scholars was obtained. According to Art. 1. of this court constitution the officers of the court are appointed by the dean of the cathedral, in the course of the judgment the advice of legal scholars (*consilium iurisperitorum*) is to be requested, especially in matrimonial matters.[54] According to the article 7. the dean/official in the particularly complicated case can find a verdict only after he had heard the *advocates/procurators* of both parties and opinions of the legal scholars of Bamberg. The participation of legal scholars was generally mentioned in abstracto, but sometimes the trial records also preserved their names.[55] In the court practice of Bamberg we find many iurisperiti, but their independent role as assessors was still relatively low, because here also among the judges, advocates and procurators many highly educated legal (*magister, doctor*) court personnel were active.

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[51] „An den bischöflichen Höfen Deutschlands werden Offiziale bestellt, in deutschen Landen die ersten Berufsrichter – es sind dies Juristen, die vielfach an den italienischen Universitäten ausgebildet worden waren, etwa an der Rechtsschule von Bologna, der *'nutrix legum'* des Mittelalters." [Officials were appointed at the episcopal courts in Germany, the first professional judges in the German lands – these were jurists who had often been trained at Italian universities, for example at the law school of Bologna, the *'nutrix legum'* of the Middle Ages.] ELSENER, F., Die Exkommunikation als prozessuales Vollstreckungsmittel. Zur Geschichte des Kirchenbanns im Spätmittelalter. In: *Tübinger Festschrift für Eduard Kern*, Tübingen, 1968, p. 71.

[52] Cf. WETZSTEIN 2010, p. 269.

[53] Interesting and revealing is the contact of the archbishop's judicial activity with the judicial claim of the bourgeoisie of the city of Salzburg; Cf. DOPSCH, H. – HOFFMANN, R. (eds.): *Geschichte der Stadt Salzburg*, Salzburg – München, 1996, p. 171.

[54] An example of the participation of *iurisperiti* in matrimonial proceedings: *„[…] lite contestata et recepto a partibus calumpnie iuramento visisque dictis testium per actricem inductorum necnon dictis testium reprobatorium per reum inductorum, quia invenimus intentionem actricis sufficienter esse probatum, de iurisperitorum consilio ipsum ei adiudicamus legitimum in maritum […]"*.

[55] In a judgement of Bamberg Cathedral Dean Anton von Rotenhahn (later bishop there), Heinrich von Gulpen and Matthias Sengler, both *doctores decretorum*, provided assistance. They are mentioned in the document as *consiliarii et testes*.

It can be inferred from a trial before the Augsburg ecclesiastical court that the *consensus* required for legitimate marriage could be considered conditional, consequently the marriage had come into effect only after the condition had been realized. Nevertheless, even in such a case there was an exception, namely the *copula carnalis*, which replaced the missing condition. *Iurisperiti* have also participated in the legal finding of this judgment.[56]

When an ecclesiastical court had rejected the claim of a plaintiff (in general), had never failed to appeal to the woman that she has to practice the conjugal duty of love, and in this argumentation the jurists are always mentioned with emphasis: *„[…] de iurisperitorum consilio ipsum absolvimus ab inquietatione actricis, pronuntiantes verum et legitimum matrimonium fore inter ipsos, iniungimus etiam ipsi actrici, ut ipsi reo cohabitet sibique uxorali affectione deserviat […]"* It can be said that in the Middle Ages these representatives of the learned Roman canon law were not only simple members of the ecclesiastical jurisdiction, but they were often also considered as a cover for the ordinary ecclesiastical judges, who had become deeply rooted in the society of their time, and had to apply such a new law (*ius novum*), which in several respects was in contrast with the traditional customary law. It is enough to mention the difference between the old Germanic law and the Roman marriage, in that the archaic custom did not yet require the *consensus* between bride and groom, but the Church did, and the power of iurisdiction in matrimonial matters was given in the Middle Ages into the hands of the ecclesiastical courts. This new law was taught mainly at the universities, consequently this law was considered as a learned law, which was hardly known in the circle of the people. The time, however, since about the 13th century was enough, thanks not least to the iurisperiti, to root this 'untimely' law in the European (first ecclesiastical) administration of justice, then to give a new perspective to the continental legal culture. The *iurisperiti* of the ecclesiastical jurisdiction in the Middle Ages were actual pioneers and professional representatives of this grandiose legal-historical enterprise.

4. Examples from the medieval jurisprudence of the Holy See in Hungary

The jurisdiction of the medieval Hungarian ecclesiastical *iurisdictio* was very extensive, which explains the role of both professional segments of the iurisperiti (doctors and practitioners) mentioned above. In ordinary litigation, such as matrimonial cases, the underlying substantive and procedural law was canon law, but in cases involving specific Hungarian private law institutions (such as, in particular, the special rights of women), the domestic customary law of the nobility (*consuetudo*) was also applicable. However, judges who were educated in canon law often had no understanding of it, so experts in domestic law were indispensable.

The ecclesiastical judiciary in medieval Hungary belonged to the Southern European model, so the diocesan court was not headed by the *officialis* but by the bishop's deputy, the vicar, and therefore this forum is called the vicar's chair. Here, too, judgments were handed down in a peer-judicial system, and the authority of the courts was enhanced by the presence of jurisconsult judges. The court was typically made up of members of the chancery, and its judgments were delivered in the form of a formula *de iurisperitorum consilio*. Sometimes the participation of the doctors[57] and or the whole chapter was particularly emphasised, which is why the seat of the vicar was called *sedes consistorialis*[58] in Hungary in the 15th century.

One notable legal dispute was also decided by scholars of canon law. The case raised a complaint against the jurisdiction of the judge presiding in the main case, whereupon the vicar of Esztergom *„esset iudex delegatus ab alio quam a principe et ideo subdelegare vobis causam minime potuisset*." However, the objection was rejected, *„quia vicarium Strigoniensem manifestum est iudicem ordinarium esse, cum idem consistorium sit eius et archiepiscopi et sit specialis decisio doctorum*."[59]

The increasing autonomy and prestige of ecclesiastical jurisdiction required persons skilled in canon law. In Esztergom, the country's most important ecclesiastical centre, from the 1380 s onwards the general vicar's chair was almost without exception occupied by *doctores decretorum*. In addition, Italians were often among them, such as Leonardus de Pensauro, Antonius de Ponto, and Mattheus de Vicedominis during the reign of King Sigismund. Simon de Treviso (Archbishop of Antivari), Ludovicus Borsi (Bishop of Aquileia), Donatus Marmelli of Arezzo, Thomas Amadeus of Ferrara, Antonius Cheregoni of Montefiore and Andreas Chesius under King Matthias Corvinus (1458–1490) and his successors. It should be noted, however, that foreign judges who were not familiar with the Hungarian language and Hungarian customary law (*consuetudo*) did not become popular in the Hungarian public mind.[60]

Thus, the term *iurisperiti* also meant in the medieval Hungarian ecclesiastical administration of justice those legal experts who excellently mastered especially the *ius novum*. May I present in the following some typical examples of the involvement of *iurisperiti* in legal practice.

4.1 Mandata

In medieval Hungarian legal terminology, judges always issued an order (*mandatum*), they never 'asked' for something. First of all, it is necessary to introduce a procedural institution,

[56] *„[…] quia reus confitebatur se cum actrice cum conditione adiecta matrimonium contraxisse et ante conditionis adiecte eventum ipsum carnaliter cognovisse, de iurisperitorum consilio ipsum ei adiudicamus legitimum in maritum […]"*

[57] For example, in a judgment: "*cum doctoribus de capitulo*", In: Bónis, Gy., Die Entwicklung der geistlichen Gerichtsbarkeit in Ungarn vor 1526, In: *ZRG KA* 1963 (hereafter: Bónis 1963), p. 219.

[58] For example: *„sedes et consistorium Striogoniensis; curia sive consistorium Strigoniensis*". The wider sources of resources: ibidem, Bónis 1963, p. 219.

[59] Ibidem, p. 220.

[60] Article 32 of 1495 banned foreign judges from the country, and another law (Act 35 of 1500) explains that foreign vicars had caused unnecessary translation costs, often even outright annoyance, to litigants. These laws did not, of course, affect the useful work of canon lawyers in ecclesiastical courts.

the *mandatum transmissionale*, which played a decisive function in the medieval Hungarian ecclesiastical judiciary and the contemporary royal central courts.

Particularly important and interesting cases were those in which a trial began before a ecclesiastical court, but as a result of a royal order (*mandatum transmissionale*) the files had to be diverted to a royal court. The question of competence, whether a matter was secular or ecclesiastical, and therefore came before a secular or ecclesiastical court, was always decided by the king (i.e. a royal court: *presentia regia*). However, in such a case this judgment was questionable, and the ecclesiastical court could also form its own opinion. It was not uncommon that the ecclesiastical judge disputed this royal order and did not immediately forward the causa.

In our case,[61] the vicar and lector John of Csázma[62] delayed the execution of the first royal order in 1496 in a dispute between Duke (*dux*) Újlaky Lőrinc and his subjects, and sent the case files to the court only after the second order. The king admonished him for his disobedience. The vicar in his 'letter of defense' disputed the contents of the first royal letter, and held a council with his legal experts (*consilium cum doctoribus et aliis iurisperitis atque audientie nostre advocatis procuratoribus et practicis quesivi*), and the clear opinion of those became that the case is an ecclesiastical one (*nam agitur hic de fide prestita et non observata, ac certa fideiussoria per homines ipsius ducis prestitis factis et habitis*). The most important argument of the *iurisperiti* was that it is about fidelity (*fides*), in the spiritual and not in the feudal sense. The cornerstone of the legal argument is therefore the interpretation of the term fides. It is necessary to know (especially from today's point of view) that in Hungary in the Middle Ages there was no explicit feudal system, and of course the contemporaries knew that. So when the Hungarian (?) *iurisperiti* had expressed themselves in the sense that in this case the problem of fides is a spiritual and not royal competence, have actually thought in good faith that here about a feudal concept can not be at all, but only a spiritual.

Another example is the *mandatum* of *magister* Miklós, canon of Bishop of Gyulafehérvár (Alba Iulia/Romania), vicar of Tasnád (Tăşnad/Romania),[63] ordering the payment of a total fine of 54 marks, in which he allows a postponement. Then, after the debtors had failed to appear for summons on the legal days, he pronounced judgment: *„unacum nostris assessoribus et ceteris iuris peritis, videlicet viribus nobilibus nobiscum in sede nostra iudiciaria existentibus."*[64]

4.2 Claims actions

There were many lawsuits before the ecclesiastical courts for the enforcement of various material claims, most often monetary. These often included cases concerning ecclesiastical revenues (*decima*), but also disputes of a purely secular nature, typically between secular persons, were brought before the ecclesiastical forums.

Thomas, archbishop of Kalocsa, royal chancellor, *conservator* appointed by the Holy See for the Poor Clares of Óbuda decided with legal experts (*unacum nostris assessoribus et iurisperitis*) in 1362 that for an authentic interpretation of a privilege in question (*ut et eius est interpretari, cuius fuit et condere, secundum canonicas sanctiones*) to turn to Rome. There was a tithe dispute between the nuns and the chapter of Cheb concerning three villages (Sáp, Borsod, Edelény). The advocate of the nuns submitted that according to a decree issued by Pope XI. Benedict (strengthened by VI Innocent) his commissioners do not have to pay tithes according to their possessions. The vicar of Eger, however, claimed that while the nuns and their estates were indeed exempt from paying tithes, their people (*coloni, populi seu rustici*) were not. The judge, even with the help of legal experts of his cathedral chapter, reassuringly could not decide this question.

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[61] BÓNIS, Gy., *Szentszéki regeszták. Iratok az egyházi bíráskodás történetéhez a középkori Magyarországon* [The Holy See Regests. Papers on the History of Ecclesiastical Jurisdiction in Medieval Hungary], ed. by BALOGH, E., Budapest, 1997 (hereafter: BÓNIS 1997), p. 491, Nr. 3700. The publication is an edited collection of the author's legacy of thematic manuscripts, collected over some 50 years. The original aim of using it as a basis for a medieval history of ecclesiastical jurisdiction in Hungary was not fulfilled. In order not to lose the legacy, the manuscript was typed in the twilight of his life with the help of Professor Péter Erdő, but the arduous task of putting it into print was waiting for me. Ten years of work resulted in the publication of 4377 numbered extracts. However, Gy. Bónis has succeeded in writing the most comprehensive study on the subject and making it available to a wide professional readership: Die Entwicklung der geistlichen Gerichtsbarkeit in Ungarn vor 1526, In: *ZRG KA* 49 (1963), p. 174-235.

[62] Csázma (*Chasma, Chezmicze* today *Čazma* in Croatia) was one of the oldest settlements in the medieval Hungarian kingdom. Its first written mention dates back to 1094, when I (Saint) Ladislaus gave this property – among others – to the newly founded bishopric of Zagreb. Stephan Babonics chancellor of King II. Andreas founded the new Csázma (*Chasma novus*) in 1226 and made it the seat of a new archdeaconry, and a little later (1229) called Dominicans here, for which the Bishop of Zagreb (the same Stephan Babonics) endowed a collegiate chapter (*capitulum ecclesiae collegiatae*) in 1232 with 12 canons. At that time, 56 parishes belonged to the archdeaconry. In Csázma there was a church, a monastery, a collegiate house and even a bishop's palace, because the bishop of Zagreb liked to stay there. The Dominicans left the town in 1537 because of the fear of the Turks, the chapter in 1548. After the Turkish period, towards the end of the 17th century, life began to return to the town, but it never regained its former importance. Cf. Csázma, In: *Magyar Katolikus Lexikon* [Hungarian Catholic Lexicon], vol. II, Budapest, 1993, p. 394.

[63] Throughout the Middle Ages, the life of Tasnád and its parish was dominated by its lord, the Bishop of Transylvania. From the end of the 13th century onwards, the conditions were gradually created for the settlement and its church to become perhaps the most important base of the church outside Transylvania. From the 15th century onwards, the parish priest of Tasnád held the post of deputy of the Transylvanian bishop of ultra Meszes (Meszes: the western border mountains of Transylvania), which can be dated from 1301. For a long period in the Middle Ages, Tasnád was the place of the vicar's jurisdiction for the northern and north-western regions far from the bishop's court in Gyulafehervár. There is also evidence that the vicar's chair was held in the vestry of the parish church of St Michael in Tasnád. Cf. VĂTĂŞIANU, V., Istoria artei feudale în Ţările Române, Bucureşti, 1959, p. 549; EMŐDI, T., Tasnád, református templom [Tasnád, Reformed Church], In: Kollár, T. (ed.): *Középkori építészet Szatmár vármegyében*, Budapest, 2011, p. 311–319.

[64] BORSA, I. – C. TÓTH, N. (eds.), Zsigmondkori Oklevéltár [Archives of the Sigismund Era] Budapest, 2003, vol. VIII, 3 Apr 1421, p. 121, Nr. 364; BÓNIS 1997, p. 254, 255, Nr. 2159, 2166.

The question of how this can be inferred from the records is the interpretation of the privilege, or more precisely its subjective circle, to which the exemption refers. It is difficult to believe that a privilege concerning the payment of tithes would have referred exclusively to the concrete persons (the nuns), or to their personal activity – and not to the villages belonging to them. Tithes in the Middle Ages were generally paid by the inhabitants of the villages, not by the monks and nuns: Economic production (surplus value) was rather produced by them and not by the clergy. The problem was all the more serious because the serfs (*coloni*) of the affected villages were severely punished (*excommunication et interdictum*) by the Chapter of Cheb for failure to pay the tithe. In order to pay the tithes in all cases, the judge ordered a cantor, vicar of Bács Nicholaus (in whose person both parties were acquainted) to collect the tithes for himself. How the Holy See decided in this case, we do not know.[65]

Matheus de Vicedominis, a learned judge of the Archbishop of Esztergom, *doctor iuris utriusque*, records the details of a lawsuit for a claim in a notarial deed. Plaintiff: between the Prepost George of Spiš and the lay defendants *„de et super rebus et bonis quondam domini Nicolai plebani ecclesie Sancti Jacobi eadem Leucza derelictis et per ipsos Jacobum et Anthonium de facto receptis et ablatis ac deductis eorumque occasione"*. After the taking of evidence, the judgment was handed down: *„unacum venerabilibus et egregiis viris dominis decretorum doctoribus ac iurisperitis de capitulo alme ecclesie Strigoniensis nobiscum tunc in iudicio consedentibus invenimus"*.[66]

It is generally known that the costs of litigation in medieval proceedings were quite high. But how the sum could be determined in the specific case was not at all simple. The vicar of Esztergom, Antonius issued a call for execution by an interlocutory judgment (*narratio executorialium sententiae interlocutoriae*), and determined the legal costs with the help of legal experts (*una cum nonnullis iurisperitis*).[67]

[65] Cf. Bónis 1997, p. 141, Nr. 1300.
[66] Borsa, I. – C. Tóth, N. (eds.), Zsigmondkori Oklevéltár [Archives of the Sigismund Era], Budapest, 2004, vol. IX. 15 May 1423, p. 259–262, Nr. 605.
[67] Cf. Bónis 1997, p. 559, Nr. 4087.

Strafrechtliche Kommissionstätigkeiten im Lande und im Komitat (1791–1832)

(Criminal Law Commission Activities in the Country and the County /1791–1832/)

*Kristóf Mihály Heil**

Abstract

The codification attempts of Criminal Law in the time of the Enlightenment of the 1790 s and the liberalism of the 1830 s and 1840 s are the focal points of the study. In order to draft bills to reform the feudal state based on customary law and privileges without changing the basic public law framework, nine so-called national regular committees were set up by Article 67 of Act 1791. The committees completed their work and sent their drafts, known as operatives, to the king between 1792 and 1795. After all, the completed operatives were not put on the agenda of the Parliament due to changes in the domestic and foreign policy status quo. They could find a way out from the archives of the Chancellery only thanks to the committees set up by Article 8 of Act 1827. These committees were responsible for reviewing the „forgotten" operatives, which were finally printed and sent to the counties for comments. The Hungarian liberal noble opposition was organised first as a movement and then as a party during these county debates (1831–1832) in order to replace the feudal system by manifesting the basic principles of the civil transition in the so-called laws of April.

Keywords: *Civil Transition; Regular Committee Works; Draft Bills; Reform, Criminal Law; Commission Activities.*

1. Im Vorzimmer der Epoche der ungarischen Kodifikation

In Ungarn war die Zeit der Kodifikation im Vergleich zu Westeuropa eine verspätete Erscheinung. Vor dem 18. Jahrhundert wurde von Wien aus von der Dynastie der Habsburger immer wieder versucht, das Ungarische Königreich bzw. das ungarische feudale auf Gewohnheitsrecht beruhende Strafrecht teils durch Verordnungen, teils durch Inkrafttreten der österreichischen Rechtsmaterialien zu modernisieren. Die ersten „nationalen" strafrechtlichen Kodifikationsarbeiten entstanden nach dem Freiheitskrieg von 1703-1713, nach den ersten Parlamentssitzungen nach dem Rákóczi Freiheitskampf. Als die wichtigsten Arbeiten sollen hier erwähnt werden: die Vorschläge von den Jahren *1712, 1795*, *1829 sowie aus dem Jahr 1843*. Der gemeinsame Zug in diesen Werken ist, dass aus keinem dieser Vorschläge ein Gesetz entstand, und obwohl alle nur Vorschläge blieben, haben sie unausweichlich zur Entwicklung der ungarischen strafrechtlichen Kodifikation und zur ungarischen Rechtskultur einen Beitrag geleistet. Sie haben ohne Zweifel zur Entwicklung des modernen ungarischen Rechtssystems beigetragen.

Die Entstehung und Umänderung des traditionellen ungarischen gesetzgebenden Organs, das ständische Parlament mit zwei Kammern (*Dieta*) war ein jahrhundertelanger Prozess. Vom 18. zum 19. Jahrhundert haben neben den Parlamentssitzungen – mit einem heutigen Wort ausgedrückt – auch die neben den Plenarsitzungen funktionierenden Kommissionen unterschiedlicher Zusammensetzung und mit unterschiedlichem Wirkungsbereich eine immer größere Rolle bekommen.[1] Solche sog. *deputationen,* die anschließend zu den Parlamentssitzungen ihre Tätigkeit aufnahmen, d.h. im Auftrag des Parlaments, in der Durchführung einer Verordnung sowie in der Festlegung der inneren und äußeren Grenzen mitgewirkt haben und darüber hinaus wurden ihnen auch bestimmte protokollarische Aufgaben von der Dieta aufgetragen (zum Beispiel haben Sie den Herrscher an der Dieta empfangen).[2] Die Kreissitzungen der Unteren Tafel des Parlaments in der Reformzeit (1825–1848)[3] waren nicht nach Aufgaben-und Wirkungsbereichen, sondern auf der Grundlage einer gebietsmäßigen Zuständigkeit organi-

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1 Dazu siehe Weiteres: Völgyesi, L., A magyar országgyűlés bizottsági rendszerének gyökerei. In: *Jogtörténeti Szemle,* Nr. 1, 2003, S. 29-34; Dobszay, T., Az országgyűlés bizottsági rendszerének előzményei a reformkorban. In: Manhercz, O. (Hrsg.), *Historia Critica*, Budapest, 2014, S. 199-212; Dobszay T., *A rendi országgyűlés utolsó évtizedei (1790–1848).* Budapest, 2019, S. 186-209.

2 Völgyesi, L., A magyar országgyűlés bizottsági rendszerének gyökerei. In: *Jogtörténeti Szemle,* Nr. 1, 2003, S. 29-34.

3 Über die Parlamentssitzungen im Reformzeitalter sieh: Über die Problematik der Etappierung siehe Pajkossy G., Reformkor. In: Gergely, A. (Hrsg.), *Magyarország története a 19. században*. Budapest, 2005, S. 191-192; Dobszay, T., *A rendi országgyűlés utolsó évtizedei (1790–1848).* Budapest, 2019; Kecskeméti, K., *A magyar liberalizmus 1790–1848*. Budapest, 2008; Bérenger, J. – Kecskeméti K., *Országgyűlés és parlamenti élet Magyarországon 1608–1918*. Budapest, 2008

siert. Aus dem Aspekt der Kodifikation war für uns in diesem Fall jene Form von Kommissionen die wichtigste, die von den Parlamenten in der ersten Hälfte des 18. Jahrhunderts einberufene *systematica commissionen*, dann die im 19. Jahrhundert als *regniolare deputationen* bezeichneten sog. *regelmäßige Landeskommissionen*. Ihre Aufgabe war, dass sie die vom aussendenden Parlament für die nächste Parlamentssitzung in festgelegten Fachgebieten Gesetzesvorschläge formulieren, und diese Vorschläge wurden *operatum* genannt.

In der vorliegenden Studie werde ich nach der Vorstellung der Vorläufer aus den Jahren 1795 und 1829 die Arbeit der zwischen 1831 und 1832 funktionierenden Komitatskommissionen vorstellen, mit besonderem Hinblick auf ihre strafrechtliche Kodifikationstätigkeit.

* * *

In der Geschichte des Ungarischen Königreichs ist es nicht beispiellos, dass der Herrscher – seine verfassungsmäßige Verpflichtung verleugnet – sogar über Jahrzehnte das Parlament nicht einberufen hatte, auf diese Weise die Stände des Landes ausgeschlossen hat, und statt mit Gesetzen auf dem Wege von Verordnungen das Land regierte. Das war die Lage vor der Krönung von Leopold II (1790–1792).[4] So ist es auch nicht überraschend, dass nach dreieinhalb Jahrzehnten die ungarischen Stände mit großer Erregung die Krönung von Leopold II Anfang Juni 1790 die endlich einberufene Dieta erwarteten. Charakteristisch für die anfängliche Zeit im Parlament war das Übergewicht der Adelsbewegung. Schließlich wurden neben vielen öffentlich-rechtlichen Ergebnissen vom Parlament neun Landeskommissionen (*regnicolaris deputacio*) mit der Aufgabe und mit dem Ziel ernannt, dass sie in den noch nicht abgeschlossenen Angelegenheiten Gesetzesentwürfe erarbeiten sollen, die dann auf die Tagesordnung der nächsten Parlamentssitzung aufgenommen werden (Gesetzesartikel von Jahre 1791:67).[5]

Die regelmäßigen Landeskommissionen begannen im August 1791 ihre Tätigkeit in Buda bzw. in Pest, doch bald darauf fand diese Tätigkeit an der Wende von 1792 zu 1793 ein Ende, bis auf die juristische Kommission, die erst 1795 ihre Arbeit beendete. Die Liste der Kommissionen wurde von der Dieta zusammengestellt, und zwar nach dem Ordnungsprinzip, dass alle Schichten des Parlaments proportional gleichmäßig vertreten sind. Als Vorsitzender der einzelnen Kommissionen wurde in jedem Fall ein Landesfähnrich oder ein Würdenträger (ein Durchlaucht) ernannt, während die Mitglieder in der Regel von der Untertafel kamen, und zwar so, dass die vier großen Bezirke der Landes von je einem Komitat vertreten wurden. Die Arbeit der Notare der Kommssionen wurden von je einem Richter der königlichen Tafel versehen bzw. auch die Städte haben je einen Abgeordneten entsandt. Das ist auch deshalb interessant, weil es sehr gut zeigt, dass bei der Auswah der Mitglieder nicht die Fachkenntnis der primäre Gesichtspunkt war, denn es wurde vielmehr auf das ständische Übergewicht geachtet. Es fehlten zum Beispiel von den Kommissionen die Professoren der Pester und auvh die der vier königlichen Akademien oder zahlreiche gut ausgebildete Fachleute von hohem Ansehen. Auch die Aufteilung der Aufgaben geschah in zahlreichen Fällen auf mechanische Weise.[6]

Obwohl Leopold II moderne Reformen erwartete, doch nach seinem plötzlichen Tod und nach der Thronübernahme durch Franz I (1792–1835) erfolgte eine wesentliche Änderung: Franz wünschte sich – im Gegensatz zu seinem Vater – keine Reformen. So haben die vielen aufgeklärten adeligen Mitglieder der Kommissionen umsonst für notwendige und wichtige Ziele und Veränderungen gearbeitet, schließlich nahm diese Arbeit eine Form von mehreren hundert Gesetzesvorschlägen an, in denen man sich zwar mit zahlreichen Schlüsselfragen nicht beschäftigte, doch in der Gesamtheit wurde eine umfassende Arbeit auf den Tisch gelegt. Mit dem kompromissbereiten Charakter der Texte sollte weder der Herrscher, noch die Interessen der Stände angegriffen werden. Die Dieta waren bestrebt, die kompromissbereiten Vereinbarungen – mit kleineren Korrektionen – in Vorschläge zu fassen, mit Rücksicht auf das Institutionensystem der ständischen Verfassung, auf die Gesetze der Ahnen, auf ihre Bräuche und selbstverständlich mit Rücksicht auf das System der königlichen Verordnungen.[7]

Schließlich wurden dank der Veränderung des heimischen und internationalen Status quo die Vorschläge (Operata) nicht auf die Tagesordnung der nächsten Parlementssitzung genommen, sie kamen dann für mehrere Jahrzehnte in das Archiv der Kanzleramtes. Und obwohl zu Beginn der 1800-er Jahre auch mehrmal die Möglichkeit der Verhandlung über die Vorschläge auftauchte, wurde dies letzetendlich erst in den Jahren 1825–1827 von der Dieta verordnet. Doch da hat man wahrgenommen, dass die Vorschläge von vor drei Jahrzehnten schon veraltet sind, deshalb wurden zu ihrer Überprüfung neuere Landeskommissionen aufgestellt. (Gesetzesartikel 1827:8.), die dann zwischen Januar 1828 und dem Sommer 1830 erneut in neuen Unterkommissionen organisiert, in ihrem Aufbau sehr ähnlich zu den früheren, ihre Sitzungen hielten. Die 81 Mitglieder zählende Kommission wurde in Teilkommissionen aufgeteilt (in *Unter- oder Fachkommssionen*), in der sie die Arbeiten aus dem Jahre 1795 und auch andere zum Thema gehörende Amtsdokumente bearbeiteten. Nach der Vollendung der Teilarbeiten tagte die Unterkommission, dann wurden die dort angenommenen Vorschläge im Januar 1829 der 81 Mitglieder zählenden Kommssion unterbreitet, die dann bis Sommer 1830 mit all den dem Parlament vorzulegenden endgültigen Dokumenten fertig wurden.[8]

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[4] Maria Theresia (1740–1780) nach 1764 hat sie das Parlament nicht einberufen, unter der zehnjährigen Herrschaft ihres Sohnes, Josef II (1780–1790) wurde in keinem einzigen Falle die Diät zur Tagung einberufen. Siehe: Szijártó M. I., *A 18. századi Magyarország rendi országgyűlései*. Budapest, 2016.

[5] Gesetzesartikel Nr. 1790/91: 67. über allgemeinpolitische Angelegenheiten und sonstiger Angelegenheiten, die am Parlament nicht hatten besprochen werden können, zur regelmäßigen Ausarbeitung dieser Angelegenheiten wurden Komissionen ins Leben gerufen und Gesandtes ernannt.

[6] Benda, K., A polgári forradalom előfutárai. In: Mérei, Gy. (Hrsg.), *Magyarország története tíz kötetben.* Budapest, 1980, S. 164-169.

[7] Benda, K., A polgári forradalom előfutárai. In: Mérei, Gy. (Hrsg.), *Magyarország története tíz kötetben.* Budapest, 1980, S. 164-165.

[8] Kecskeméti, K., *A magyar liberalizmus 1790–1848*. Budapest, 2008, S. 185-186.

Homoki-Nagy Márai erkannte sehr gut den grundlegenden Unterschied zwischen den zwei Gesetzesvorschlags-Paketen: „Welch ein Unterschied zwischen der Tätigkeit der zwei Kommissionen! Während man zu Beginn der 1790-er Jahre die Verwirklichung der früher nicht durchgeführten Vorschläge plante, so bekam im Jahre 1827 die Kommission die Aufgabe, die früheren Pläne hinsichtlich ihrer Durchführbarkeit zu überprüfen".[9] Letztendlich haben die neueren Kommissionen richtig erkannt, dass die früheren Operata (Vorschläge) bereits veraltet sind. Die neuen Vorschläge entsprachen jedoch noch weniger den Herausforderungen ihrer Zeit als die aus dem Jahre 1795 ihrer Zeit.

An der kurzen Parlamentssitzung im Jahre 1830 haben die Gesandten der Komitate dank der guten Organisationsarbeit von Baron Miklós Wesselényi den Entschluss gefasst, dass sie beim Herrscher erreichen werden, dass auch die Komitatssitzungen ihre Meinug über die Vorschläge (Operata) äußern können, und diese Öffentlichkeit sollte auch dazu genutzt werden, dass sie sich in Ermangelung einer Pressefreiheit und der freien Beratung sich selbst als Partei organisieren. Schließlich wurde dieser Plan zum Erfolg geführt, und zwischen Beginn des Jahres 1831 und Herbst 1832 hat jedes Komitat seine eigenen Unterkommissionen aufgestellt, die nach den Diskussionen zu den Themen, die getroffenen Vorschläge dem höchsten Entscheidungsorgan des Komitats, der Komitatsversammlung unterbreiteten.[10] An diesen Komitatsdiskussionen erwuchs dann jene mitteladelige Schicht, die in der Reformzeit und in der ersten unabhängigen Regierung (1848) eine Schlüsselrolle übernahm. (Siehe: Deák Ferenc, Kossuth Lajos, Kölcsey Ferenc etc.)

2. Die juristischen Vorschläge (Operata) (1790–1832). Mit besonderer Rücksicht auf den Entwurf zum Strafgesetzbuch

2.1 Der Entwurf vom Jahre 1795

Die Parlamentssitzung vom Jahre 1790–1791 hat das Strafgesetz von Josef II außer Kraft gesetzt, dass Josef II eigentlich durch eine – verfassungswidrige – Verordnung eingeführt hatte (*Sanctio Criminalis Josephina*) und die mit dem Gesetzesartikel 1791: 67. an die Kommissionen verschickt, im Sinne des Aufgaben-und Wirkungsbereiches die juristische Kommission VI. (*Deputatio Juridica*) - unter anderem mit der Vorbereitung des Strafgesetzbuches beauftragt hatte[11]. Die von Graf Károly Zichy geleitete Unterkommission hat die letzten Modifizierungen ihrer Arbeit „Über die Straftaten und deren Bestrafung. Gesetzbuch" (*Codex de delictis eorumque poenis*) beendet, die am 5. Februar 1795 auch angenommen wurde, welche Arbeit eine der hervorragendsten Arbeiten des Landesausschusses wurde. „Dieser Vorschlag wollte den ersten Schritt zur Gesetzverabschiedung des Prinzips der *Rechtsgleichheit* tun, indem das Strafsystem gleichsam für Adelige und nicht Adelige gelten soll, und damit im Begriff war, den ersten Schlag auf die ständische Sonderstellung der Adeligen zu versetzen."[12] Dieser Vorschlag machte unter den Straftätern keinen Unterschied zwischen Adeligen und Nicht-Adeligen.

Im Ungarischen Königreich begann Ende des 18. Jahrhunderts jene Entwicklung, als anstelle der kurzen Gesetzesartikel die längeren, detaillierteren Gesetze, sogar Kodexe getreten sind. Obwohl die Arbeit der juristischen Kommission von der Regierung – in Angst vor der französischen Revolution – niemals behandelt wurde, trotzdem ist der im Sinne der Aufklärung konzipierte Entwurf des Strafgesetzesbuches und dessen Wirkung auf die Entwicklung des Strafrechtes ist unterhinterfraglich.

Die Struktur des in lateinischer Sprache geschriebenen Strafkodex-Entwurfs ist noch nicht identisch mit der Struktur und Einteilung der späteren Strafgesetzbücher.[13] Statt eines allgemeinen Teils beginnt das Werk mit einer Einleitung mit den die Grundprinzipien beinhaltenden „Grundsätzen" (*Principia*), bestehend aus 23 Artikeln, dem ein aus zwei Teilen bestehender Kodex folgte. Im ersten Teil geht es um das Verfahren, während der zweite Teil die materielle juristische Regelung beinhaltete.[14]

Es lassen sich zwischen den Zeilen der Principia zahlreiche die Ideen der Aufklärung verkündende Grundsätze finden. Der Entwurf hielt an erster Stelle die schüchterne Version des Prinzips der *nullum crimen sine lege*, als ausgesagt wird, dass „die Straftat die Verletzung des Strafgesetzbuches aus freiem Willen ist".[15] Gleichfalls wird die Gebundenheit des Richters an das Gesetz als Grundsatz ausgesagt: „*In regula quidem iudex lege nec mitior nec severior esse potest* […]", darüber hiaus beschaftigte sich der Entwurf auch mit der Frage der Zurechnungsfähigkeit, mit der Rückfälligkeit, mit der Frage der Vorsätzlichkeit und Fahrlässigkeit, als jenen Erscheinungsformen der Schuld bzw. mit der Frge der gesetzlichen Mittäterschaft.[16]

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[9] Homoki-Nagy M., *Az 1795. évi magánjogi tervezetek*. Szeged, 2004, S. 15.

[10] Barta, I., *A fiatal Kossuth*. Budapest, 1966; Gergely A., A „rendszeres bizottsági munkálatok" szerepe a magyar reformmozgalom kibontakozásában. In: *Tiszatáj*, vol. 28, Nr. 6, 1974, S. 37-41.

[11] Die juristische Kommission musste in meherern Bereichen gesetzvorbereitende Arbeit leisten. Im Sinne des Gesetzesartikels 67. musste die Organisierung des Landgerichts und die Verbesserung Prozessverfahren auch der Entwurf des Bürgerlichen Gesetzbuches wie auch des Strafgesetzbuches vorbereitet werden

[12] Finkey F., *Az 1792. évi büntetőtörvényjavaslat 150. évfordulója*. Debrecen, 1842, S. 5; Hajdu L., *Az első (1795-ös) magyar büntetőkódex-tervezet*. Budapest, 1971, S. 25-29; Képessy, I., Az osztrák büntetőjog hatása a magyar büntetőjogi kodifikációra. In: Fazekas, M. (Hrsg.), *Jogi tanulmányok,* Budapest, 2018, S. 260-271; Képessy, I., Der Einfluss der österreichischen Gesetze auf die Schaffung des ersten ungarischen Strafgesetzbuches. In: Markus, H. – Arnd, K. – Mezey, B. (Hrsg.), *Wendepunkte der Strafrechtsgeschichte.* Giessen, 2020, S. 135-144.

[13] Hajdu L., *Az első (1795-ös) magyar büntetőkódex-tervezet*. Budapest, 1971, S. 387-512.

[14] Béli G., *Magyar jogtörténet. A tradicionális jog*. Budapest, 2009, S. 150.

[15] Balogh E., Büntetőjog-történeti dogmatikai alapkérdések. Rendszertani kísérletek a korai magyar büntetőjogi kodifikációban. In: *Jogtörténeti Szemle,* Nr. 3, 2016, S. 6–7.

[16] Balogh E., Büntetőjog-történeti dogmatikai alapkérdések. Rendszertani kísérletek a korai magyar büntetőjogi kodifikációban. In: *Jogtörténeti Szemle,* Nr. 3, 2016, S. 7; Hajdu L., *Az első (1795-ös) magyar büntetőkódex-tervezet*. Budapest, 1971, S. 168-203.

Im Entwurf wurde bereits als Ziel der Strafe die Abschrekkung formuliert, über die generelle Prävention hinaus erscheint auch der Anspruch des Gesetzgebers zur Verbesserung des Straftäters. Die Strafe musste immer sofortig, bestimmt und zur Erreichung der Ziele der Strafe geeignet sein. Im Entwurf wird auch unterstrichen, dass als Strafe kein Nachteil hätte verursacht werden können, dass gegensätzlich mit seinem Ziel ist und es musste auch darauf geachtet werden, dass die Strafe nicht als Quelle einer neueren Straftat diene.[17]

Im Zusammenhang mit der Anwendung der Strafmethoden wurde im Vorschlag (Operatum) von 1795 lediglich soviel ausbedungen, dass er zum Schutz der öffentlichen Sicherheit geeignet sei. Der Entwurf kannte zwar die Institution der die Todesstrafe, doch wurde deren Einsatz in der Regel praktisch abgeschafft. So wurden die Möglichkeiten zum Verhängen der Todesstrafe eingeschränkt: diese konnte nur in Fällen einer beabsichtigten Straftat verhängt werden, wenn die öffentliche Sicherheit in Gefahr war oder wenn die Abschreckung auf keine andere Weise erreicht werden konnte.[18]

Im Zusammenhang mit dem Freiheitsentzug wurde bemerkt, dass im Gefängnis die Verrichtung von Arbeit vorgeschrieben werden muss. Für Jugendliche Straftäter wurde vom Gesetz das Arbeitshaus eingeführt.[19] Das Operatum kannte auch die Strafe, die Züchtigung. so wurde im Vorschlag auch bestimmt, bei welchen konkreten Tatbeständen die Geldstrafe hätte angewendet werden können, obwohl – die Rechtsgleichheit missachtend – wurde für die Honoratioren eine davon abweichende Regelung verordnet.[20]

Das Operatum von 1795 hat in seinen Vorschägen in Bezug auf das Verfahrensrecht die Regeln der Inhaftnahme verschärft. In diesem Sinne hätte nur jene Person verhaftet werden können, die an frischer Tat ertappt wurde oder die ein Geständnis abgelegt hat, gegen die es im Zusammenhang mit der verübten Tat eine nachweisbare und glaubwürdige Anzeige gibt. Im Entwurf wurde auch in allen Details auf die vorschriftsmäßige Inhaftnahme eingegangen.[21]

Der Entwurf geht auf die Frage der Beweisführung in dem diesebzüglichen Artikel zehn ein, indem vier mögliche Weisen der Beweisführung anerkannt werden: das Geständnis, die Zeugenaussage, die mittelbare Beweisführung mit Hilfe von Verdachtszeichen, sowie die Beweisführung durch Urkunden, Dokumenten.[22]

A Deputacio Juridica hatte bis 1795 alle die vom Parlament aufgetragenen Aufgaben geleistet. Ihre Vorschläge wurden in 12 Bänden zusammengefasst und im Frühjahr an das Kanzleramt weitergeleitet. Schließlich gelangte keine Unterbreitung auf die Tagesordnung der Dieta, trotz mehrerer Versuche in den Jahren 1802, dann erneut im Jahr 1807[23] (da wurde das Werk gedruckt).[24] Es ist anzunehmen, dass auf Antrag des Kanzleramtes das von János Németh erstellte Fachgutachten endgültig das Schicksal des juristischen Vorschlags (operatum) vom Jahre 1795 besiegelt hat, da Németh die Aufstellung von neuen Kommissionen vorgeschlagen hatte, als deren Aufgaben er nicht eine neue Kodifikationsarbeit in Auftrag gegeben hatte, sondern vor dem Hintergrund der früheren strafrechtlichen Rechtsquellen und bauend auf die richterliche Praxis wollte er die strafrechtliche Rechtssprechung erneuern.[25]

2.2 Der Entwurf vom Jahre 1829

Das Schicksal der Vorschläge (Operatum) vom Jahre 1795-es teilte auch die zu dessen Modernisierung einberufene nächste Kommission, die ihre Arbeit 1829 beendet hatte. Die nach dem Gesetzesartikel 1827: 8. beauftragte Deputation hat ihrem Vorgänger in zahlreichen Fragen gefolgt, doch gerade in den Punkten, in denen die vorgehende Arbeit eine Entwicklung zeigte, konnte diese Arbeit nicht Schritt halten und versagte. Der Vorschlag ging nicht von der Arbeit aus dem Jahre 1795 aus, sondern aus dem österreichischen Strafgesetzbuch aus dem Jahre 1803. In diesem wurde die Gleichstellung zwischen Adligen und Nicht-Adligen zurückgewiesen, und es wurde das System der Privilegisierung der ständischen Vorrechte zurück gefordert.[26] Der Vorschlag von 1829 (*elaborátum*)[27] verließ die Kapitel mit den Grundsätzen der Principia und der Kodifikator arbeitete die allgemeinen Prinzipien bei den einzelnen Verodrnungen.[28]

Es ist allbekannt, dass die französische Revolution und die Napoleonische Gesetzgebung auf die neuzeitliche Strafrechts-

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[17] Balogh E., A magyar büntetőjogi dogmatika kezdetei. In: *Jogtörténeti Szemle*, Nr. 4, 2008, S. 3; Balogh E., Büntetőjog-történeti dogmatikai alapkérdések. Rendszertani kísérletek a korai magyar büntetőjogi kodifikációban. In: *Jogtörténeti Szemle,* Nr. 3, 2016, S. 7, sowie etwas ausführlicher, siehe bei Hajdu L., *Az első (1795-ös) magyar büntetőkódex-tervezet*. Budapest, 1971, S. 184-200.

[18] Hajdu L., *Az első (1795-ös) magyar büntetőkódex-tervezet*. Budapest, 1971, S. 318-332, 387-512; Balogh E., Büntetőjog-történeti dogmatikai alapkérdések. Rendszertani kísérletek a korai magyar büntetőjogi kodifikációban. In: *Jogtörténeti Szemle,* Nr. 3, 2016, S. 7.

[19] Balogh E., Büntetőjog-történeti dogmatikai alapkérdések. Rendszertani kísérletek a korai magyar büntetőjogi kodifikációban. In: *Jogtörténeti Szemle,* Nr. 3, 2016, S. 7.

[20] Balogh E., Büntetőjog-történeti dogmatikai alapkérdések. Rendszertani kísérletek a korai magyar büntetőjogi kodifikációban. In: *Jogtörténeti Szemle,* Nr. 3, 2016, S. 7.

[21] Hajdu L., *Az első (1795-ös) magyar büntetőkódex-tervezet*. Budapest, 1971, S. 238-248, 401-413.

[22] Hajdu L., *Az első (1795-ös) magyar büntetőkódex-tervezet*. Budapest, 1971, S. 416; Balogh E., Büntetőjog-történeti dogmatikai alapkérdések. Rendszertani kísérletek a korai magyar büntetőjogi kodifikációban. In: *Jogtörténeti Szemle,* Nr. 3, 2016, S. 8.

[23] Siehe das Gesetz vom Jahre 1807. Gesetzesartikel IX. über die Beschleunigung der Überprüfung der Strafprozesse, und über die Reduzierung der Zahl der unter die königliche Gerichtstafel gehörenden Prozesse.

[24] Mezey, B. (Hrsg.), *Magyar jogtörténet*. Budapest, 2004, S. 289.

[25] Mezey, B. (Hrsg.), *Magyar jogtörténet*. Budapest, 2004, S. 289.

[26] So wurde zum Beispiel die Körperstrafe der Adligen und Honoratioren verboten.

[27] Das Wort Elaboratum stammt aus dem lateinischen Verb elaborare, elaboratum ausarbeiten und bedeutet eine wissenschaftliche Abhandlung oder einen Entwurf.

[28] Béli G., *Magyar jogtörténet. A tradicionális jog*. Budapest, 2009, S. 150; Mezey, B. (Hrsg.), *Magyar jogtörténet*. Budapest, 2004, S. 290-291.

kodifikation einen sehr großen Einfluss übte, und das war auch in Ungarn nicht anders. Im napoleonischen Strafgesetzbuch, im *Code pénal* (1810) ist eine wesentliche dogmatische Neuerung der Dreieraufteilung der Straftaten enthalten (*Trichotomie*), in der nach dem Schwierigkeitsgrad der Straftaten unterschieden und die Straftaten in Kategorien eingeordnet wurden: in (*crimes*), in Delikte (*délits*) und in die Kategorie der Vergehen (*contraventions*).[29] Die Bedeutung der Neuerung war in der unterschiedlichen Verhängung der Rechtsfolgen zu suchen. Mit der Veränderung des Sanktionensystems wurde der Schwerpunkt von der Todesstrafe auf den Freiheitsentzug verlegt, doch zu einer effektiven Bestrafung durch Freiheitsentzug wäre auch die Entwicklung des Systems dieser Institution notwendig gewesen.[30]

Das Elaboratum von Jahre 1829 brachte als wichtigste Neuerung, dass die Vergehen in einem selbstständigen Kapitel behandelt wurden. Diese Arbeit betrachtete als Vergehen „alle jene Rechtsverletzung, die nicht unter den Wirkunsgbereich des Strafrechts fiel ".[31] Als solche wurden zum Beispiel die Landstreicherei, die Schlägerei mit Angestellten der Gesetzesbehörde, mit der Rechtssprechung sowie die Störung der Arbeit des Gerichts gerechnet, etc. [32]

Die Ergebnisse der Arbeit der Kommission zwischen 1828 und 1829 wurde von der früheren Fachliteratur eindeutig verurteilt, doch in der neuesten Fachliteratur (vor allem von Balogh Elemér) wird diese schon in Schutz genommen.[33]

2.3 Vorschläge der Komitate (1831–1832)

Die durch das Gesetz vom Jahre 1827, Gesetzesartikel 8. verordnete und in der Zeit zwischen 1828 und 1830 erstellten Arbeiten der Kommissionen wurden schließlich ausgedruckt und an die Komitate beziehungsweise an andere Körperschaften, die über das Recht eines Parlamentsgesandten verfügten, zur Begutachtung weitergeleitet.[34]

Die Komitate machten sich mit großer Begeisterung an die Bearbeitung der neun großen Themenbereiche.[35] Die Komitatsgesandten erkannten in der kurzen Parlamentssitzung von 1830 die Möglichkeit der Diskussionen an den regelmäßigen Komissionenarbeiten und haben gemeinsam mit Baron Miklós Wesselényi daran gearbeitet, die Debatten der Komitate – in Ermangelung der Pressefreiheit – vor die Öffentlichkeit zu bringen. „Es ist bekannt, dass die Erwartungen gegenüber den Vorschlägen (Operata) landesweit mit einer elemanteren Kraft zum Vorschein kamen, als es offensichtlich wurde, dass in den nächsten Parlamentssitzungen endlich die vier Jahre lang vernachlässigten, verschobenen Reformarbeiten den Gegenstandsbereich der Parlamentsdebatten bilden werden. Die großen Erwartungen wurden auch durch jene undichten Nachrichten nicht gebremst, in denen es darum ging, dass die zur Modernisierung der Vorschläge (Operata) gesandte Landeskommission entsprechend den Absichten der Regierung ihr Augenmerk nicht auf die Reformen richten wird, sondern ihre Bestrebungen auf die Stärkung der feudalen Macht richten wird." [36]

Ich erachte es für wichtig zu bemerken, dass von der Historiker- und der Juristengesellschaft eine Zusammenfassung der zwischen 1830 und 1832 erfolgten Debatten der Landesvorschläge bis heute noch keine vollständige Bearbeitung vorgelegt wurde.[37] Im Folgenden möchte ich die Struktur der Vorschläge zum Strafrecht der Komitate skizzieren sowie auch jene, in den Schlüsselfragen erscheinende konservativere Meinung, die von den Landesvorschlägen abweicht. Im vorliegenden Falle konzentriere ich mich in erster Linie auf das mir am meisten bekannte

[29] Rigó, B., A büntetőjog történetéből. II. Kora újkor – újkor. In: Földi, A. (Hrsg.), *Összehasonlító jogtörténet*. Budapest, 2022, S. 321-350.

[30] Sieh dazu ausführlicher Mezey, B., *A börtönügy a 17–19. században. A börtön európai útja*. Budapest, 2018, S. 444-449.

[31] Mezey, B., *A börtönügy a 17–19. században. A börtön európai útja*. Budapest, 2018, S. 445.

[32] Mezey, B., *A börtönügy a 17–19. században. A börtön európai útja*. Budapest, 2018, S. 445.

[33] Über die Bewertung der Fachliteratur siehe: Mezey, B., *A börtönügy a 17–19. században. A börtön európai útja*. Budapest, 2018, S. 445. oder Mezey, B. (Hrsg.), *Magyar jogtörténet*. Budapest, 2004, S. 291.

[34] Béli, G., Zala vármegye Deák Ferenc által megfogalmazott észrevételei a jogügyi munkálatokról. In: Molnár A. (Hrsg.), *„Javítva változtatni". Deák Ferenc és Zala megye 1832. évi reformjavaslatai*. Zalaegerszeg, 2000

[35] Es ist wichtig anzumerken, dass nicht jede Versammlung der Komitate eine Kommission in allen neuen Themenkreisen einberufen hatte. Das einige Fragen nicht thematisiert wurden, konnte mehrere Ursachen haben. Es erweist sich als logsich, in einigen Fragen eine passive Einstellung mit einem Desinteresse am Thema zu erklären. (Zum Beispiel wurde in einigen Komitaten der Tiefebene nicht wegen Desinteresse die Frage des Bergbauwesens nicht thematisiert.) Auch der Mangel an Fachkenntnissen konnte eine Zurückhaltung auslösen, doch höchstwahrscheinlich war es in den meisten Fällen der Zeitmangel, der die Arbeit der Adeligen erschwert hatte. Die Bemerkungen von einzelnen Komitaten werden von Völgyesi Orsolya in ihrer Monografie im Anhang Nr. zwei aufgelistet. Völgyesi, O., *Politikai-közélei gondolkodás Békés megyében a reformkor elején. A rendszeres bizottsági munkálatok megyei vitái 1830–1832*. Gyula, 2002, S. 227-235.

[36] Die Relevanz der debatten über die zwischen 1828 und 1830 erstellten konservativen Landesvorschlägen (Operata), die in den einzelnen Komitaten geführt wurden, wurd als erstes vom Historiker Barta István erkannt in seiner im Jahre 1964 geschriebenen, bisheute noch nicht veröffentlichetn Diseertation (DSc). Das Zitat siehe bei Barta, I., *A fiatal Kossuth*. Budapest, 1966, S. 151.

[37] Zusammenfassungen wurden zu folgenden Komitaten erstellt: Über das Komitat Zemplén bei Barta István (Barta, I., *A fiatal Kossuth*. Budapest, 1966) und Erdmann Gyula (Erdmann, Gy., *Zemplén Vármegye reformellenzéke 1830–1836*. Miskolc, 1989), Über Szatmár bei Barta István [Barta I., Kölcsey politikai pályakezdete. In: *Századok,* vol. 93, Nr. 1-4, 1959, S. 252-302.] Über das Komitat Zala Molnár András [Molnár, A., Deák Ferenc és a rendszeres munkálatokra tett zalai észrevételek. In: *Századok,* vol. 129, Nr. 2, 1995, S. 381-406; Molnár, A., (Hrsg.): *„Javítva változtatni" Deák Ferenc és Zala megye 1832. évi reformjavaslatai*. Zalaegerszeg, 2000] Über das Komitat Békés Völgyesi Orsolya (Vögyesi, O., *Politikai-közéleti gondolkodás Békés megyében a reformkor elején. A rendszeres bizottsági munkálatok megyei vitái 1830–1832*. Gyula, 2002), Über das Komitat Somogy Jutai Péter [Jutai, P., Somogy megye észrevételei a rendszeres munkálatokra 1831–1832. In: *Századok,* vol. 140, Nr. 3, 2006, S. 591-608.], und über das Komitat Tolna Csapó Mária (Csapó, M., *Tolna megye a reformkori politikai küzdelmekben*. Budapest, 1989) Ausgesprochen rechtshistorische Zusammenfassungen sind in dem eng gefassten Thema noch keine entstanden.

Komitat, auf das Komitat Nógrád.[38] Hier muss ich erwähnen, das nicht angenommen werden darf, dass Anfang der 1830-er Jahre die immer größere Zahl der liberalen Mitteladeligen bereits eine absolute Mehrheit in dem wichtigsten Entscheidungsorgan der Komitate, in der Komitatsversammlung, innehatte. In vielen Fällen entfachte sich auch eine lebhafte Diskussion unter den „Fortgeschrittenen" und den „Konservativen".[39]

In den Komitaten folgte man der organisatorischen Struktur der Landeskommissionen, die Komitatsversammlung ernannte sog. Fachkommissionen, denen sich typischerweise jedermann anschließen konnte, danach wurden die Vorschläge der Unterkommission der Komitatsversammlung unterbreitet, die in vollem Umfang ausführlich besprochen wurde und darüber abgestimmt wurde. Die Vorschläge (Operata) haben auch hinsichtlich ihres Aufbaus die den Ausgangspunkt bedeutenden Landesvorschläge nicht zurückgewiesen. Diese Punkte wurden der Reihe nach besprochen, bei den annehmbaren Paragrafen wurde im Allgemeinen nur das Einverständnis (oder nicht einmal das) angedeutet. Es wurde auf die diskutablen Punkte eingegangen, im gegebenen Falle auch auf die Sondermeinungen.

Die mehrheitlich liberalen Komitate versuchten in den Diskussionen der juristischen Themen zu den auf der Tagesordnung der Geschichte stehenden wichtigsten gesellschaftlichen Herausforderungen eine Lösung zu finden. Solche waren die Verwirklichung der Selbstbestimmung, der Abbau des Feudalismus und das Zustandebringen eines bürgerlichen Institutionensystems.[40]

Im vierten Kapitel, das sich mit dem Strafgesetzbuch beschäftigte, hat sich Nógrád – zurückkehrend auf den Vorschlag von 1795 – für eine gesetzliche Gleichstellung und gleiche Beurteilung der Leibeigenen und der Adeligen ausgesprochen. „In den Hauptprozessen und dern höheren Gercihtsinstanzen, ist es notwendig, den Unterschied zwischen Adeligen und Nicht- Adeligen aufzuheben, das sowohl den Zielen des gesellschaftlichen Zustandes als auch zum Ansehen der Menschheit notwendig ist, dass das Gut der Bevölkerung das Landes den gleichen Schutz des Gesetzes genießen kann" – formulierte der Beschluss aus dem Komitat Nógrád.[41] „Eines der schönsten Ergebnisse der Beratungen über das Strafgesetzbuch war der Wunsch, dass das Recht zum Berufungsgericht gleichmäßig bei Adeligen und Nicht-Adeligen zugelassen werde." – bewertete den obigen Vorschlag der zweite Notar des Komitates Nógrád in seinen Erinnerungen, János Sréter, der den Vorschlag in Text gefasst und gegenzeichnet hat.[42] Das Komitat Békés forderte – im Gegensatz zum Elaboratum von 1829 – die Rechtsgleichheit noch eindeutiger. In ihrem Beschluss wurde die Befreiung der Leibeigenschaft von den ewigen Lasten der jetzigen Lage unterstrichen und darauf hingewiesen, dass die große Aufgabe der Zeit es ist, auch die unteren gesellschaftlichen Schichten zu einem Eigentum zu verhelfen, und daraus folgend, dass der Grundbesitzer über die Person des Leibeigenen nicht mehr verfügen darf (höchstens auf einen Teil seiner Steuerabgabe). „Der Leibeigene ist also genauso ein Mensch, genauso ein Bürger, wie der Adelige das ist, daher ist es unvorstellbar, dass über sein Leben und seinen Tod nicht eine gesetzliche und ständige Rechtsprechung zu entscheiden hat."[43]

Im Komitat Nógrád wünschte man die Todesstrafe und die Körperstrafe abzuschaffen und man argumentierte für die Möglichkeit, dass sich die Leibeigenen auf freiem Fuß verteidigen können. Der Ausschuss der Reformaprtei war – gemeinsam mit anderen Komitaten wie zum Beispiel Somogy, Győr oder Tolna – mit dem Landesvorschlag nicht einverstanden, dass die Macht der über ein Privilegium verfügenden Großgrundbesitze und Oppidume, die sog. Hauptmacht erhalten bliebe. Die Meinung des Komitates betonte, dass zwar der Grundbesitzer über die bestimmte Arbeit und über die Steuerabgabe des Leibeigenen zweifelsohne verfügt, doch verfügt er nicht über seine Person.[44] Das Komitat Győr – ähnlich zum Komitat Békés –

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[38] Siehe noch: Heil, K. M., A nemesi vármegye és a rendszeres bizottsági munkálatok. A kereskedelmi- és az adóügyi operátumok Esztergom, Győr és Nógrád vármegyékben. In: Megyeri-Pálffi Z. (Hrsg.), *Szuverenitáskutatás*. Budapest, 2020, S. 72-92; Heil, K. M., „Embernek születtünk, polgárnak neveltetünk." Nógrád vármegye észrevételei a közoktatás és a magyar nyelv ügyében (1831–1832). In: Nagy, N. (Hrsg.), *Nemzetiségi-nyelvi szuverenitás a hosszú 19. században*. Budapest, 2020, S. 99-116; Heil, K. M., A jogügyi rendszeres bizottsági munkálat szerkezeti vázlata. In: *Jogtörténeti Szemle,* Nr. 3-4, 2019, S. 75-81; Heil, K. M., „A nép is nemzetté tökéletesíttetik." A magyar büntető törvénykönyv tervezetének vármegyei észrevételei, különös tekintettel Nógrád 1831–1832-es munkájára. In: Kovács-Szépvölgyi, E. (Hrsg.), *Kihívások a büntetőjog-alkotás terrénumában a 19–21. században*. Budapest, 2022, S. 53-60.

[39] Aufgrund der Abstimmungen der Komitate stufte Barta István die Komitate in drei Gruppen ein: die Fortgeschrittenen, die Konservativen und die sog. dritte Gruppe des „Sumpfes", die abhängig von der Angelegenheit, sich mal hier, mal dorthin anschlossen. Siehe: Barta, I., *A fiatal Kossuth*. Budapest, 1966, S. 172-273.

[40] Barta, I., *A fiatal Kossuth*. Budapest, 1966, S. 172-173.

[41] *Az 1827. esztendei 8-dik törvény czikkely következésében készült országos rendszeres munkák megvizsgálására tekintetes nemes Nógrád vármegye által az Igazság Kiszolgáltatása Tárgyában rendelt bizottságnak észrevételei s ezek folytában közölt végzések. 1832. Archivum palatinale secretum archiducis Josephi (1795–1847).* Magyar Nemzeti Levéltár Országos Levéltár S. 119.
Zur Überprüfung der regelmäßigen landesweiten Arbeiten, die infolge des Gesetzes vom Jahre 1827 im Gesetzesartikel 8 erstellt wurden, sind hier die vom adeligen Komitat Nógrád und der in Betreff der Rechtspflege einberufenen Kommission erstellten Bemerkungen und die daraus folgenden Beschlüsse zu lesen. 1832. Magyar Nemzeti Levéltár Országos Levéltár Archivum palatinale secretum archiducis Josephi (1795–1847). S. 119. (im Weiteren: *Nógrád megye igazságügyi munkálata*)

[42] Sréter, J., *Visszaemlékezések*. Buda, 1842, S. 182.

[43] Völgyesi, O., *Politikai-közélei gondolkodás Békés megyében a reformkor elején. A rendszeres bizottsági munkálatok megyei vitái 1830–1832.* Gyula, 2002, S. 140.

[44] *Az 1827. esztendei 8-dik törvény czikkely következésében készült országos rendszeres munkák megvizsgálására tekintetes nemes Nógrád vármegye által az Igazság Kiszolgáltatása Tárgyában rendelt bizottságnak észrevételei s ezek folytában közölt végzések. 1832. Archivum palatinale secretum archiducis Josephi (1795–1847).* Magyar Nemzeti Levéltár Országos Levéltár

sind basierend auf der Abschaffung der Institution der ewigen Leibeigenschaft, und die großen Aufgaben der Zukunft berücksichtigend, wonach dem Leibeigenen das Recht des Eigentumserwerbs garantiert werden muss, – gemeinsam mit anderen Kommitaten – zum Entschluss gelangt, dass sie die Aufmerksamkeit auf den Schutz der Person des Leibeigenen gelenkt haben. In diesem Beitrag ist der Paradigmenwechsel bezüglich der Person des Leibeigenen sehr gut nachvollzuziehen, wonach der Bauer gleich ist mit dem Adeligen, so kann er neben seinen Pflichten auch Rechte besitzen. Man wollte die aus dem Urbarium entstandenen materiellen und sachlichen Verpflichtungen beziehungsweise die sonstigen Verpflichtungen sowie die persönlichen Rechte des Leibeigenen trennen. Man hielt es als unvorstellbar, dass über Leben und Tod eines Menschen nicht die gesetzliche und ständige Rechtsprechung entscheide.[45] Des Weiteren wurde in den Vorschlägen des Strafgesetzbuches in Győr die Aufstellung von Arbeitshäusern „für die auf eine längere Haft verurteilten Straftäter" verlangt.[46]

[45] *Az 1827. esztendei 8-dik törvény czikkely következésében készült országos rendszeres munkák megvizsgálására tekintetes nemes Nógrád vármegye által az Igazság Kiszolgáltatása Tárgyában rendelt bizottságnak észrevételei s ezek folytában közölt végzések. 1832. Archivum palatinale secretum archiducis Josephi (1795–1847).* Magyar Nemzeti Levéltár Országos Levéltár; VÖLGYESI, O., *Politikai-közélei gondolkodás Békés megyében a reformkor elején. A rendszeres bizottsági munkálatok megyei vitái 1830–1832.* Gyula, 2002, S. 140.

[46] *Az 1827. esztendei 8-dik törvény czikkely következésében készült országos rendszeres munkák megvizsgálására tekintetes nemes Győr vármegye által az Igazság Kiszolgáltatása Tárgyában rendelt bizottságnak észrevételei s ezek folytában közölt végzések. 1832. Archivum palatinale secretum archiducis Josephi (1795–1847).* Magyar Nemzeti Levéltár Országos Levéltár

The Legal History of the Order of the Holy Spirit in Hungary. Facts and Doubts

*Orsolya Falus**

Abstract

The settlement of the Order of the Holy Spirit in Hungary is unknown. The first Hungarian source remained about the order was found in Nagyszeben (Sibiu) in 1292. This source explains that on 24th June 1292 the city council of Nagyszeben handed over a house with all of its belongings to the order. This house had been used earlier as a hospital with the purpose of holding church services and of taking care of poor and sick people. The order used to own several hospitals in the territory of the Hungarian Kingdom. The cessation of the operation of the order is connected to the development of the embourgeoisement, in the course of which the infirmaries and pharmacies of the order gradually ended up under the supervision of the city councils by the 15-16th centuries. The non-consistent use of the terms cruciferi, hospitalis and Spiritus Sanctus in medieval Latin documents makes it difficult to identify the houses and hospitals operated by the order unambiguously.

Keywords: *Order of the Holy Spirit; hospitals; city councils; ambiguous, Hungary.*

Motto: „As they prayed, the house where they were assembled rocked. From this time they were all filled with the Holy Spirit and began to proclaim the word of God fearlessly". /Acts 4:31/

1. Introduction. The Foundation of the Order of the Holy Spirit

The Order of the Hospitallers of the Holy Spirit (Ordo Hospitalarius ss. Spirit; OSSp) was initiated at the end of the 12th century, precisely in 1190, by Guido of Montpellier, a wealthy nobleman, in the originally secular hospital operating in the city of Montpellier in southern France. The brotherhood was raised to order by Pope Innocent III by allowing it to follow St. Augustine's rules, and even participated in the formulation of their rules.[1]

As a sign of his trust, on June 19, 1204, the Pope donated the pilgrimage house previously operated by the Anglo-Saxons, S. Maria in Sassia, in the Roman Borgo, not far from St. Peter's Basilica, to them with the aim of building a hospital there. For this purpose, the Pope also authorized the institution's supporters and benefactors to receive pardons in the letter of donation.[2]

From then on, the Hospitale St. Spiritus in Sassia in Rome became the main house of the order, and the mother house in Montpellier was subordinated to it. However, the relationship between the two houses could not be said to be completely clarified even later, therefore, in order to avoid conflicts, Pope Innocent III divided the territory of the Christian community into two parts from the point of view of collecting alms. Based on this, Italy, Sicily, England and Hungary belonged to the main house in Rome, while the donation collected in other areas enriched the mother house in Montpellier.[3]

The members later supplemented the Augustinian rule with the Johannite rule. In addition to the usual three monastic vows - poverty, virginity and obedience - the entrants also undertook the service of the poor and the sick as a fourth. The text of their vow is given by the Piarist monk Zoltán Somogyi,[4] following Lucas Holstenius and Marianus Brockie:[5]

„Ego N. offero, et trado meipsum Deo, et B. Mariae, et s. Spiritui et Dominis nostris infirmis, út omnibus diebus vitae meae sim servus illorum. Promitto castitatem, cum Dei auxilio servare; et sine proprio vivere, et tibi N. Successoribusque tuis obedientiam tenere, et bona ipsorum pauperum fideliter custodire."[6]

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1 DIÓS, I. - VICZIÁN, J. (eds.), *Magyar Katolikus Lexikon.* [Hungarian Catholic Encyclopedia] Budapest, 2007.

2 BORSA, G, A Szentlélekről elnevezett ispotályosrend búcsúlevele Esztergomban. [The Indulgence Letter of the Order of the Holy Spirit in Esztergom] In: KOVÁCS, I. (ed.), *Az Országos Széchenyi Könyvtár Évkönyve*. [Yearbook of the National Széchenyi Library]. Budapest, 1982-1983, p. 207.

3 HOLSTENIUS, L. - BROCKIE, M. (eds.), *Codex Regularum.* Augsburg, 1759, V. p. 497.

4 SOMOGYI, Z., *A középkori Magyarország szegényügye*. [Poorcare of the Medieval Hungary]. Budapest, 1941, p. 37.

5 HOLSTENIUS - BROCKIE, M., *Codex Regularum*, cit. p. 504.

6 Translation from Latin: *I offer N. and give myself to God, and B. (Blessed) Mary, and to our feeble Holy Spirit and Lord, that I may be their servant all the days of my life. I promise to keep my chastity, with the help of God; and to live without one's own, and to keep obedience to you N. and to your successors, and to faithfully guard the goods of the poor themselves.*

Picture 1. The „Cross of Lorraine", the coat of arms of the Order of the Holy Spirit[7]

The purpose of the order was therefore fundamentally charitable. Similar to the Antonite order, they continued their activities outside their convents, visiting, helping and caring for the needy, poor, sick and elderly in their homes on a weekly basis if necessary.[8] Their houses were led by the *magister*, *rector*, or *preceptor*, while the spiritual director was the ordained priest, the *prior*. The smaller convents did not have their own prior, so they were visited by the priors of the larger convents. The members and superiors of the order - with the exception of consecrated priests - were both considered laymen. Sisters were also active among them, whose task was to serve women and children. For the consecrated priests, the regulation strictly forbade meddling in the financial affairs of the house. Their activity aimed at only satisfying spiritual needs.[9]

As a rule, they settled along rivers, near bridges and gates, so that they could help travellers as well as those in need nearby.[10] The order was so popular throughout Europe that according to the bull of Pope Nicholas IV bull dated 1291, they already had nearly 100 houses in different European countries,[11] thus, the order had strong Italian, French, Spanish, German and Portuguese branches, and also maintained hospitals in Denmark, Norway, Sweden, Poland and Hungary.[12] By the end of the 13th century, 180 hospitals were treating people in France alone, while a hundred years later, 400 hospitals were operating. Sources mention 130 hospitals in German-speaking areas in the 14th century, which were maintained by the Order of the Holy Spirit.[13]

By the second quarter of the 16th century, the vast majority of the houses were dissolved, and their hospitals were transferred to the direct management of the cities. The longest-running branch of the knighthood in France was definitively swept away by the French Revolution. The Hospitaller Order of the Holy Spirit was officially dissolved by the bull of Pope Pius IX, issued on July 1, 1847.[14]

The international history of the Order of the Holy Spirit has been studied by few. There is no summary literature on this order of knights anywhere. Valuable data are, however, sporadically contained in some works summarizing the activities of the Crusader orders.[15]

2. The Operation of the Order of the Holy Spirit in Hungary

Works summarizing the activity of the knight order in Hungary can only be found from 2015 onwards.[16] The time of the settlement of the Order of the Holy Spirit in Hungary is unknown. Our first surviving source from Hungary about the knight order comes from Nagyszeben (Sibiu) in 1292. This reports that on June 24, 1292, the city council of Sibiu handed over to the order, together with its accessories, a house that had already been used as a hospital for the purpose of holding religious services and nursing the poor and sick. The certificate briefly summarizes the entire work program of the order and

[7] Unknown author - histoire de l'Ordre Hospitalier du Saint-Esprit; Auteur: Paul Brune; Éditeur: C. Martin, 1892. https://upload.wikimedia.org/wikipedia/commons/9/96/Sceau_d%27un_vicaire_g%C3%A9n%C3%A9ral_de_l%27Ordre%3B_SIGILLVM_%E2%80%A2_F.VIC_%E2%80%A2_OR_%E2%80%A2_S_%E2%80%A2_S._%E2%80%94_Croix_de_l%27Ordre_patt%C3%A9e._%E2%80%94_XVI%C2%BB_si%C3%A8cle._Coll._S%C3%A9guier%2C_n%C2%B0_31._Matrice.png (Accessed: January 23, 2023)

[8] HUNYADI, ZS. - PÓSÁN, L., *Krisztus katonái. A középkori lovagrendek*. [The Soldiers of Christ. Medieval Chivalric Orders]. Debrecen, 2011, p. 123.

[9] SOMOGYI, *A középkori Magyarország szegényügye*, cit. p. 38.

[10] BALANYI, GY., *A szerzetesség története*. [The History of Monasticism]. Budapest, 1923, p. 154-155.

[11] SOMOGYI, *A középkori Magyarország szegényügye,* cit. p. 38.

[12] BORSA, *A Szentlélekről elnevezett ispotályosrend búcsúlevele Esztergomban,* cit. p. 208.

[13] HUNYADI-PÓSÁN, *Krisztus katonái. A középkori lovagrendek*, cit. p. 123.

[14] PELLICCIA, G. – ROCCA, G. (eds.), *Dizionario degli istituti di perfezione*. Rome, 1974, VI. p. 1013.

[15] FOREY, A., *Military Orders and Crusades*. Michigan, 1994. and RILEY-SMITH, J., A Note on Confraternities in the Latin Kingdom of Jerusalem. In: *Bulletin of the Institute of Historical Resarch.* vol. 44, 1971, p. 301-308. https://doi.org/10.1111/j.1468-2281.1971.tb02073.x1991.

[16] FALUS, O., *Ispotályos keresztes lovagrendek az Árpád-kori Magyarországon*. [Hospitaller crusader orders in Arpad-era Hungary]. Pécs, 2015., FALUS, O., *Szpitalne zakony rycerskie w czasach Arpadow na Wegrzech.* Zabrze–Tarnowskie Gory, 2019., FALUS, O., Szentlélek ispotályok Magyarországon: Járvány idején, pünkösdre készülve. [Hospitals of the Holy Spirit in Hungary: During the epidemic, preparing for Pentecost] In: *Vigilia*, vol. 85, Nr. 5, 2020, p. 392-394.

presents us with an image of an order hospital free from any external influence.[17]

2.1 The Hungarian Center of the Order of the Holy Spirit: Budafelhévíz (Aqua Calida)

The house was founded in 1294.[18] In 1330, a *preceptor generalis per Hungariam* was already at the head of the organization of the Hungarian knights in Budafelhévíz (*Superioribus Calidis Aquis Budensibus*).[19] We know this from the fact that a document from this year survived[20] which reported that the master of the house, Ortoflus, who is also the *preceptor generalis* of the Hungarian house of the order (*Ortoflus magister domus hospitalis S. Spiritus in suburbio prefati castri* […] *novi montis Pestiensis, et preceptor per Hungariam generalis)* with the consent of the brothers, sold the village land of *Nandur* (Nádor) of the order's hospital,[21] and then he transferred the received purchase price, 100 silver marks, to the building of the church of the Holy Spirit (*instructuram et edificium ecclesiae Sancti Spiritus)*.[22] In 1294, the order's first hospital called *Holy Spirit* was also established here, next to today's Malom Lake, opposite the Lukacs Bath.[23] Other hospitaller crusader orders also settled in the area, including the Hungarian-founded Stephanites.[24]

This hospital also had its own bath. The healing power of thermal waters was also known to medieval people, which is why baths were created next to thermal springs. The water from the thermal springs was also used with preference to drive mills, since they did not freeze even in winter. In Buda, as early as the middle of the 13th century, the yield of the hot water springs was artificially increased for this purpose. Malom Lake was also created by damming the water of two hot springs.

In the first half of the 14th century, the members of the Budafelhévíz house could still live in cramped conditions. This is indicated by the deed created in 1346, according to which the knights pledged half of their mill on Szentendre to a noble soldier named Tötös.[26] We have no information on the assets of the hospital beyond the documents of 1330 and 1346 cited above. It is certain that he fulfilled his vocation in Buda until the Turkish invasion. This can be inferred from the content of a document that survived from 1500, in which Prince Sigismund of Poland gives an account of the amount of a donation to the Buda hospital.[27]

Picture 2. The spa building with Malom Lake on a postcard from the 1900s[25]

According to the testimony of the contemporary charters, in the 14th century the lay members of the order still managed the hospital with the title of *magister*. In addition to the hospital, he probably maintained a monastery for the members of the knightly order. Even in 1417, a *crucian*, i.e. member of the order, represented the hospital. However, starting from the 15th century, the head of the hospital was always a city commissioner named *rector hospitalis*, while the church superior was still a member of the order, the *prior*.[28] The building was later donated to the Poor Clares, as their convent was located on the banks of the Danube, close to the mill. They received their castle much earlier, around 1355, from Queen Elizabeth's sister, Princess Kunda, and previously it was also the property of the Order of the Holy Spirit.[29] From the above, we can draw the conclusion that the legal successors of the order in their properties became the Poor Clares, who, however, did not continue the operation of their hospitals, since they were everywhere taken over by the city councils. This

[17] ZIMMERMANN, F. - WERNER, C., *Urkundenbuch zur Gesichte der Deutschen in Siebenbürgen Hermannstadt 1892-1902.* vol I, Köln, 2007, p. 191.
[18] HINTSCH, E., *A középkori orvostudomány*. [Medieval medicine]. Budapest, 1930, p. 185.
[19] SOMOGYI, *A középkori Magyarország szegényügye,* cit. p. 38.
[20] DEDEK, L. C. (ed.), *Monumenta Ecclesiae Strigoniensis*. Esztergom. vol III, 1924, p. 157.
[21] CZAGÁNY, I., A budai orvosok és gyógyszerészek a feudalizmus korában. [Doctors and pharmacists in Buda in the age of feudalism] In: *Orvostörténeti Közlemények*, vol. 71-72, 1974, p. 57.
[22] SOMOGYI, *A középkori Magyarország szegényügye,* cit. p. 39.
[23] More: DIÓS - VICZIÁN, *Magyar Katolikus Lexikon.* op. cit.
[24] FALUS, O., The "Hungaricum" of the Crusader Orders: the Order of St Stephen. In: *Journal on European History of Law*, vol. 13, Nr. 2, 2022, p. 129-137.
[25] Source: *EGYKOR:HU*, https://24.hu/kultura/2021/01/22/ismeretlen-budapest-nepgozfurdo-frankel-leo-ut-furdo-duna-ipoly-nemzeti-park-felujitas/ (Accessed: January 23, 2023)
[26] MAGYAR NEMZETI LEVÉLTÁR, *Diplomatikai Levéltár (Mohács Előtti Gyűjtemény)*. [Hungarian National Archives: Diplomatic Archives (Pre-Mohács Collection)]. 3865.
[27] SOMOGYI, *A középkori Magyarország szegényügye,* cit. p. 41.
[28] KUBINYI, A., Orvoslás, gyógyszerészek, fürdők és ispotályok a késő középkori Magyarországon. [Medicine, Pharmacists, Spas and Hospitals in Hungary During the Late Middle Ages]. In: *Főpapok, egyházi intézmények és vallásosság a középkori Magyarországon*. [Prelates, Church Institutions and Religion in the Medieval Hungary], Budapest, 1999, p. 27.
[29] ERNYEY, J., Szerzetesrendjeink gyógyszertárai. [The Pharmacies of Our Monks' Orders]. In: *A Magyar Gyógyszerésztudományi Társaság Értesítője*, vol. 8, Nr. 3, 1932, p. 182-215.

assumption is also supported by the certificates preserved in the *Kaprinay - collection*[30] of the University Library.[31]

The order also had several hospitals in Hungary, so in addition to Nagyszeben (Sibiu) and Budafelhévíz (Aqua Calida), the literature lists Beszterce (Bistriţa), Földvár (Feldioara), Királynémeti (Crainimăt), Segesvár (Sighişoara), Székelyvásárhely (Târgu Mureş), Pécs and an unidentifiable settlement called *Azra* as cities in which the order operated hospitals.[32] In all cases, the origin of the list is the work of Lajos Pásztor.[33] Zoltán Somogyi takes over the list, but with reference to his own and Dudik's research[34] he comes to the conclusion that, based on the available data, we can exclusively connect the operation of the hospitals in Budafelhévíz and Nagyszeben to the activities of the Order of the Holy Spirit in Hungary without any doubt. The memory of the order's other domestic hospitals is preserved by mere names, or not even those.[35] József Török goes so far in narrowing down the data based on the data that he declares: the Szentlélek hospital order only had a hospital in Nagyszeben in Hungary.[36] It warns against drawing more cautious conclusions that the Stephanite Order definitely had a royal donation estate in Budafelhévíz during the same period,[37] and since it seems inconceivable that two knight orders could operate hospitals side by side with the infrastructure of the time, the more likely solution is that in the contemporary charters due to the use of the terms *hospitalis* and *cruciferi* in this case too, it causes difficulty in separating the institutions.[38] The excellent researcher of the Budafelhévíz, András Kubinyi, also identifies the Stephanites in Budafelhévíz with the Johannite order,[39] probably in view of the *hospitalis* adjective used in their certificates. It is a fact however, confirmed by the documents, that the Budafelhévíz house changed owners often compared to the conditions of the time.[40] The acquisition of this property by the Order of the Holy Spirit, due to the content of the documents survived, probably took place between 1330 and 1348.

The most accurate data on the Hungarian houses of the Hospitaller Order of the Holy Spirit can be found from the results of Beda Dudik, who visited the order's central house in Rome in the 19th century, researching the Moravian and Monarchy memories of the order. In addition to the register of the confraternitas already mentioned above, he also studied the manuscripts registering the houses of the order between 1431 and 1600, as well as the *liber expenditureum* containing the drafts of the letters issued. This is where he recorded the data for Hungary in 1503, according to which the Order of the Holy Spirit in Hungary was divided into three organizational units. They were headed by the Buda house, which belonged to the Vienna house. Two additional houses operated subordinate to the Buda house in Szeben and Földvár in Barcaság (Barcovia).[41]

Hospitals of the Holy Spirit established in the later period were thus far from certainly under the authority of the order without exception. The reason for the uncertainty is the poor source material, as well as the use of the terms *hospitalis* and *cruciferi* for all nursing crusaders in the documents of the time, but also the fact that the name *Holy Spirit* could not only refer to the person who maintained it, but also the *patronage*[42] of the hospital.

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30 Kaprinai, István (1714–1785) – Jesuit teacher, historian. He was mainly concerned with collecting sources: he compiled 102 volumes of compilation of manuscripts copied by himself and others. More: DIÓS - VICZIÁN, *Magyar Katolikus Lexikon*. op. cit.

31 CAPRINAI – COLLECTION, *Vol. XXX.1357-1376. lev*

32 The list in details: HUNYADI-PÓSÁN, *Krisztus katonái. A középkori lovagrendek*, cit. p. 123., PÁSZTOR, L., *A magyarság vallásos élete a Jagellók korában*. [Religious Life of Hungarians in the Jagello-Era]. Budapest, 1940, p. 53., DE CEVINS, M-M., A szegények és a betegek gondozása a középkor végi magyar városokban. [Caring for the poor and the sick in late medieval Hungarian cities]. In: *Korall*, Nr. 11-12, 2003, p. 54., KUBINYI, *Orvoslás, gyógyszerészek, fürdők és ispotályok a késő középkori Magyarországon*, cit. p. 27.

33 PÁSZTOR, *A magyarság vallásos élete a Jagellók korában,* op. cit.

34 DUDIK, B. (ed.), *Iter Romanum.* Wien, 1855, vol. I, p. 89–90.

35 SOMOGYI, *A középkori Magyarország szegényügye,* cit. p. 45.

36 TÖRÖK, J., *Szerzetes- és lovagrendek Magyarországon*. [Monks' and knights' orders in Hungary]. Budapest, 1990. p. 131.

37 FALUS, *The "Hungaricum" of the Crusader Orders: the Order of St Stephen,* cit. p. 133.

38 FALUS, *Ispotályos keresztes lovagrendek az Árpád-kori Magyarországon*, cit. p. 12.

39 KUBINYI, A., Budafelhévíz topográfiája és gazdasági fejlődése. [Topography and economic development of Budafelhévíz]. In: TARJÁNYI, S. (ed.), Tanulmányok Budapest múltjából [Essays on the past of Budapest] XVI, Budapest, 1964, p. 85-180.

40 One of the names used in the Middle Ages for Budafelhévíz was *Gézavására (Forum Geysa).* The locality was originally a market place, probably founded by King Géza I (1074-1077). After the founding of the monastery of the Stephanites, it was already registered as an independent parish under the name *Calida aquae* in 1245. Its existence can be demonstrated on the basis of certificates until 1439. The Stephanite convent in Budafelhévíz also maintained an elementary school and a *locus credibilis authenticus* (authentication site). Its oldest authenticated document preserved in the Hungarian National Archives, dates from 1278, and the last known one from 1348. See also: BOROVICZÉNYI, K-GY., Cruciferi Sancti Regis Stefani. Tanulmányok a stefaniták, egy középkori magyar ispotályos rend történetéről. [Studies on the history of the Stephanites, a medieval Hungarian hospitaller order.] In: *Orvostörténeti Közlemények*, vol. 26, Nr. 133-140, 1991-92, p. 133-140.; FALUS, *Ispotályos keresztes lovagrendek az Árpád-kori Magyarországon*, cit. p. p. 108-109. Details on the history of Budafelhévíz: KUBINYI, *Budafelhévíz topográfiája és gazdasági fejlődése*, op. cit.

41 DUDIK, *Iter Romanum,* cit. p. 89–90.

42 The term *patrocinium* means the protection of churches and other ecclesiastical institutions. The most common is the inclusion of the names of the patron saints, but in the practice of the patricinium, some divine persons - such as the *Christ the King*, the *Vir Dolorum* -, and some mysteries of faith - such as the *Blessed Sacrament* - have developed, or a recommendation for the protection of certain religiously revered objects - such as the *Holy Cross.* This is also the reason why it is wrong to simply talk about a patron or a patron saint in connection with the naming of individual church institutions. In ecclesiastical terminology, the names *church title* (titulus ecclesiae) and *altar title* (titulus altaris) are used to avoid this. However, since the patronage of the *Holy Spirit* enjoyed great popularity in all eras, if we do not have any specific documentary evidence indicating this, we cannot be sure whether the hospital under such protection was operated by the Hospitaller order of the Holy Spirit. More on this topic: TÍMÁR, GY., A szenttisztelet Pécsett, a középkorban (patrocinium, titulus ecclesiae). [Honor of the saints in Pécs, in the Middle Ages (patrocinium, titulus ecclesiae)]. In: FONT, M. (ed.), *Tanulmányok Pécs történetéből 9. Pécs szerepe a Mohács előtti Magyarországon*. [Lessons from the history of Pécs 9. The role of Pécs in Hungary before Mohács]. Pécs, 2011, p. 69.

In his book on urban customary law based on *Ars Notaria* Gábor Béli[43] provides, for example, a city certificate, according to which, on February 9, 1330, Ortolf, the master of the Holy Spirit Hospital, as the head of the order in Hungary, sold a vineyard located in Nádudvar in Pestújhegy suburb to Kunclin, son of János, for a purchase price of 100 silver marks.[44] Here, too, the editor of the certificate only uses the epithet *cruciferi* (crusader) from which we cannot draw a clear conclusion as to which crusader order the seller was. However, since we do not have any information that the Order of the Holy Spirit maintained a monastery in Pestújhegy at the time the certificate was issued, it is likely that the designation *Holy Spirit* could have been the patron of the said hospital in this case as well.

2.2 Pécs

The aforementioned doubts also arise in connection with the Holy Spirit hospital in Pécs mentioned by several researchers. The history of the hospital was elaborated in detail by Tamás Fedeles.[45] Based on the data of Ede Petrovich's study describing the functioning of the medieval hospital in Pécs,[46] Fedeles identifies the Holy Spirit Hospital with the former St. Bartholomew's Hospital. The Saint Bartholomew hospital belonged to the parish church of the same name, which was founded by the French bishop Bartholomew of Pécs (1219-1251) and which was completed around the Mongol invasion.[47] The charter first mentions the hospital's patron saint in 1348, which was still Saint Bartholomew at that time. While András Kubinyi believes that this hospital, later referred to as *Holy Spirit,* can be associated with the Holy Spirit Hospitaller Order,[48] professor Tamás Fedeles from the University of Pécs categorically denies this possibility. The latter point of view seems likely if we take into account the fact that during its existence the head of the institution was in the majority of cases always a prebendary in Pécs,[49] and we have absolutely no data regarding the Order of the Holy Spirit as a sustaining organization.

Picture 3. St. Bartholomew statue in Pécs by sculptor Sándor Rétfalvi (2004)[50]

Dudik also reports that the female branch of the Order of the Holy Spirit had a house in Pécs,[51] however, this is contradicted by Jakab Rupp's statement, according to which the Holy Spirit nunnery was of the Dominican order, and its prioress, Dorothea, entered the Holy Spirit Society as a supporter with her companions during a pilgrimage to Rome in 1497. This is also supported by the society's register.[52]

2.3 Kolozsvár (Cluj-Napoca, Klausenburg)

Due to similar doubts, the presence of the order in the Holy Spirit Hospital in Cluj can be ruled out with great certainty. In the fall of 1990, during the foundation of a block of flats in the new housing estate that demolished the Hungarian street suburb

[43] BÉLI, G., *Városi szokásjog az Ars Notaria alapján*. [Urban customary law based on Ars Notaria]. Pécs, 2014, p. 27.

[44] DEDEK, *Monumenta Ecclesiae Strigoniensis*, vol. III, cit. p. 157.

[45] For details see also: FEDELES, T., A pécsi ispotály igazgatói a 14-16. században. [The directors of the Pécs hospital during the 14-16th centuries]. In: *Orvostörténeti Közlemények. Communicationes de Historia Artis Medicinae*, vol. XLVIII, Nr. 182-185, 2003, p. 117-126.; FEDELES, T., Gilbertus ispotályos mester, az ispotályosok középkori pécsi rendházának kérdése. [Gilebertus Hospital Master. The Question of the Medieval Pécs Friary of the Hospitallers]. In: *Pécsi Szemle*, vol. VI, Nr. 3, 2013, p. 10-17.

[46] PETROVICH, E., Pécs középkori kórháza. [The Medieval Hospital of Pécs]. In*:* DANKÓ, I. (ed.), *A Janus Pannonius Múzeum Évkönyve* [The Yearbook of the Janus Pannonius Museum of Pécs], Pécs, 1960, p. 271-274.

[47] KOSZTA, L., *Egy francia származású főpap Magyarországon. Bertalan pécsi püspök (1219-1251).* [A Prelate of French Origin in Hungary. Bertalan Bishop of Pécs (1219-1251)]. In: *Aetas,* vol. 9, Nr. 1, 1994, p. 64-87.

[48] KUBINYI, A., A pásztói Szentlélek-ispotály a középkorban. [The Holy Spirit Hospital in Pásztó in the Middle Ages]. In: *Főpapok, egyházi intézmények és vallásosság a középkori Magyarországon* [Prelates, Church Institutions and Religion in the Medieval Hungary], Budapest, 1999, p. 264.

[49] FEDELES, *Gilbertus ispotályos mester, az ispotályosok középkori pécsi rendházának kérdése,* cit. p. 10-17.

[50] On September 11, 2004, bishop Mihály Mayer blessed the metal belfry and the statue of St. Bartholomew on the northeast side of the Belvárosi Church. The triple bell tower organically connected to the displayed apse of the medieval St. Bartholomew's Church, designed by Zoltán Bachman, architect is 5 meters high in its default position, but rises 13 meters high when the bell is rung. The mechanics were designed by János Gulácsy. In front of him stands the bronze statue of Saint Bertalan, the work of sculptor Sándor Rétfalvi. More: DIOCESE OF PÉCS, *„Egyetlen játékszabályra ügyelek fiatal korom óta: tisztességes szakmai munkát csinálni." - Rétfalvi Sándor szobrászművész emlékezete.* ["I have followed one rule of the game since I was young: to do decent professional work." - The memory of sculptor Sándor Rétfalvi]. Available: https://pecsiegyhazmegye.hu/hirarchivum/4490-egyetlen-jatekszabalyra-ugyelek-fiatal-korom-ota-tisztesseges-szakmai-munkat-csinalni-retfalvi-sandor-szobraszmuvesz-emlekezete (Accessed: January 23, 2023)

[51] DUDIK, *Iter Romanum,* cit. p. 237–239.

[52] RUPP, J., *Magyarország helyrajzi története*. [The Topographical History of Hungary]. vol. I, Budapest, 1870, p. 366.

of Cluj, the *Hóstát*,[53] medieval finds were unearthed near Church of Szentpéter. The significance of the findings lies in the fact that, while in the Middle Ages Cluj was largely German-speaking, *Szentpéter* may have been a suburban settlement of Hungarian nationality at that time, which, however, was integrated into Cluj during the Árpád-era, and its inhabitants, who were presumably previously *castrenses* (populi castri), received the the privilege of foreign-speaking guests. In the Middle Ages, the Holy Spirit Hospital stood in this part of the settlement, in the part bordering Szamosfalu (Someşeni) village.[54] It is mentioned in written form for the first time in 1430, when Pope Martin V (1417-1431) issued an indulgence letter to the *hospitale Sancti Spiritus pauperum leprosorum extra muros oppidi Clawsenborg*.[55] However, since the indulgence letter itself does not mention the order, *Holy Spirit* is without a doubt a simple patron in this case as well.

2.4 Földvár (Feldioara, Sancta Mariae Castrum, Marienburg)

The existence of the order's Földvár hospital is also questionable. György Győrffy describes Földvár in detail in volume I of *Historical Geography of Árpád-era Hungary*.[56] The Hungarian name *Földvár*[57] may come from before 1211, after the Teutonic Knights built a stone castle here after 1211 and named it Marienburg after the order's patron saint. However, the Teutonic Knights' nursing activities in Hungary were not extensive as they stayed in Barcovia for an ingloriously short time, where they usurped royal monopoliums (regale) and earned the wrath of the Hungarian ruler, Andrew II. After their expulsion, the Cistercians received their estates in Földvár from 1240.[58]

We have the first information about the Földvár hospital from the 15th century, precisely from 1455, when a source mentions the person *„Iacobus magister domus domus de Marienburg"*.[59] From this, however, it does not yet appear to be a clear fact that Master Iacobus is a member of the Order of the Holy Spirit, nor that the mentioned hospital was maintained by this order.

2.5 Beszterce (Bistriţa), Székelyvásárhely (Târgu Mureş) and Királynémeti (Crainimăt, Bayerdorf)

It is a fact that Beszterce had a convent for hospital residents. Its suburb, Aldorf (Walldorf, Latin Villa), was a village with Walloon settlers, which was still separated from Beszterce in the 13th century. A charter from 1295 first reports on its inhabitants, who previously killed two of their priests, so the bishop handed over their church to the *Hospitallers* of Beszterce. Between 1332 and 1336, its priests were among the Hospitallers, another fact we know from the papal tithe payment data. In 1602, this part of the settlement merged into the city of Beszterce and continues to exist in the southwest part of the city under the name of the Niederwallendorfpart of the city.[60] However, since the epithet *hospitaller* (hospitalis) can also apply to other nursing crusaders, it cannot be said with absolute certainty that these hospitallers were members of the Order of the Holy Spirit.

Dudik also recorded data in the order's Roman archives regarding the hospital in Székelyvásárhely (for him: *"Zeckel und Vasarhely"*), i.e. Marosvásárhely.[61] He also wrote about the order's house in *Baiersdorf* in Transylvania.[62] Since, according to Győrffy, Baiersdorf can be identified with Németi, or more precisely Királynémeti[63] located 12 kilometers south of Beszterce, if the Order of the Holy Spirit had a house in the city of Székelyvásárhely or its surroundings, it might be the same as the one mentioned in Királynémeti.

2.6 Segesvár (Sighişoara)

The existence of the hospital of the Order of the Holy Spirit in Segesvár is also doubtful. According to the available data, at the beginning of the 16th century only one hospital operated here, but it was maintained by the Antonite order.[64] Prince István Báthori's charter dated May 2, 1575[65] is also known, in which the *xenodochium* (hospital) named after the Holy Spirit is also mentioned, however, in the absence of specific data, it is more likely that the Holy Spirit, as the patron is mentioned in this case as well.

2.7 "Azra"

Several researchers have tried to identify the settlement of *Azra* in Csanád county, which was first referred to by Lajos Pásztor.[66] András Kubinyi considered the problem unsolvable.[67] Despite the fact that even today there are those who list Azra among the houses of the Order of the Holy Spirit, Gedeon Bor-

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[53] *Hóstát* is a term of German origin, derived from the word *Hofstadt*, used to name the suburbs since the 16th century.

[54] BENKŐ, E., *Kolozsvár magyar külvárosa a középkorban. A Kolozsvárba olvadt Szentpéter falu emlékei*. [The Hungarian Suburb of Kolozsvár in the Middle Ages. The relics of Szentpéter village which merged into Kolozsvár]. In: *Erdélyi Tudományos Füzetek*, Nr. 248, 2004, p. 49.

[55] Hospital of the Holy Spirit of the poor lepers outside the walls of the town of Cluj. More on this topic: ENTZ, G., *Erdély építészete a 14-16. században*. [The Architecture of Transsylvania during the 14-16th centuries]. Kolozsvár, 1996, p. 349.

[56] GYŐRFFY, GY., *Az Árpád-kori Magyarország történeti földrajza*. [The Historical Geography of Hungary in the Árpád-era]. vol. I, Budapest, 1963, p. 830-831.

[57] *Föld* in Hungarian means *earth*, and *vár* means *fortress*. Together in Hungarian means *earthfortress* – in English: *hillfort.*

[58] FALUS, *Ispotályos keresztes lovagrendek az Árpád-kori Magyarországon*, cit. p. 121.

[59] SOMOGYI, *A középkori Magyarország szegényügye,* cit. p. 45-46.

[60] GYŐRFFY, *Az Árpád-kori Magyarország történeti földrajza,* cit. p. 557-560.

[61] DUDIK, *Iter Romanum,* cit. p. 93.

[62] Ibid.

[63] GYŐRFFY, *Az Árpád-kori Magyarország történeti földrajza,* cit. p. 562.

[64] BORSA, G., A Szent Antalról nevezett ispotályos rend Magyarországon terjesztett nyomtatványai (1505-1506). [Prints of the Hospitaller order named after Saint Anthony distributed in Hungary (1505-1506)]. In: BELLEY, P. – HAJDU, H. – KERESZTURY, D. (eds.), *Az Országos Széchenyi Könyvtár Évkönyve 1961-62.* [The Yearbook of the National Széchelyi Library 1961-62]. Budapest, 1963, p. 223-231.

[65] VÁRADY, M., A nagyszebeni és segesvári ispotályok történetéből a XV. században. [From the History of the Hospitals of Nagyszeben and Segesvár in the 15th Century]. In: *Új Magyar Muzeum, egyszersmind a Magyar académia közlönye,* vol. VI, Nr. 2, 1856, p. 540-553.

[66] PÁSZTOR, *A magyarság vallásos élete a Jagellók korában,* cit. p. 53.

[67] KUBINYI, A., Ispotályok és a városfejlődés a késő középkori Magyarországon. [Hospitals and Rural Development in Hungary during the Late Middle Ages]. In: NEMUMANN, T. (ed.), *Várak, templomok, ispotályok. Tanulmányok a magyar középkorról. Analecta mediaevalia II.* [Castles, Churches, Hospitals. Studies about the Middle Ages of Hungary. Analecta mediaevalia II.]. Budapest, 2004, p. 190.

sa managed to unravel the mystery of this settlement's name already in the early 1980s.[68] The key to the mystery was a fragmentary surviving printed indulgence letter, the hard-to-read Latin text of which was probably misread by Lajos Pásztor, when he mistakenly interpreted the word *area* in the passage *in area capitulari Chanadiensis* as *"Azra",* a supposed local name. In fact, the hospital building could have stood in the episcopal seat itself, in the city of Csanád, more precisely in the area of the Csanád chapter, i.e. directly near the cathedral.[69] According to the sources, there were two parish churches here during this period. One of them, whose patron saint was St. Elizabeth, also included a hospital, which was mentioned in a document by Pope Miklós V (1447-1455) on January 31, 1455.[70] According to them, however, Gedeon Borsa's claim that there was no mention of the Csanád hospital until 1517 is not valid.[71]

However, this Csanád hospital, already built and operating, was transferred to the Order of the Holy Spirit after the Árpád-era[72] during the time of the Jagiellonians, which by this time had grown into one of the most important nursing communities in Hungary.[73] Canon *Illyei Tiborc* of Csanád played a major role in the handover, who personally visited Rome in the spring of 1517 for this purpose, and according to the register of the Holy Spirit Society, he himself joined the brotherhood supporting the order.[74]

Of course, György Győrffy does not mention *Azra* in his description of Csanád county either,[75] moreover, in the data of the city of Csanád, which was destroyed during the Turkish occupation, it does not mention either the Order of the Holy Spirit or the Hospital of St. Elizabeth.[76] András Kubinyi's list of hospitals includes the Szent Erzsébet Hospital in Csanád,[77] which is certainly the same as described by Borsa Gedeon, since most of the settlements with a hospital usually had only one such institution in this period. We know of only fifteen cities with two, and another eight where even more *domus hospitalis* (hospital) functioned.[78] János Szulovszky provides additional information about the *mystery of Azra*.[79]

2.8 Nagyszeben (Sibiu)

Most of the data about the Hospital of the Order of the Holy Spirit in Nagyszeben have survived, so the process during which the city councils gradually intervened more and more in the management of the hospital, until they finally took it over completely, can be seen most clearly here. The hospital was founded by the last king of the Árpád-house, Andrew III (1290-1301). After the first mention in the founding certificate in 1292, no further relevant data about this house survived for about a hundred years. Zoltán Somogyi describes a legal case from 1309, in which the then Walter, the master of the hospital appears: „*Walter magister hospitalis S. Spiritus civitatis Cibiniensis*."[80]

According to the following data, which was created a century later, the order was no longer the full-fledged manager of the hospital. The city council and its representatives were already entitled to decide on the financial implications of the operation. This is indicated by a charter dated in 1386, according to which the city council did not directly hand over to the order, but to one of the city councillors, the sum intended for the hospital from the legacy of the Provost Márton of Nagyszeben, given to him by the Bishop of Transylvania, with the order to deliver the for the caretaker of the Hospital of the Holy Spirit, should it be necessary. Based on the contents of the document, the respective councillor did this.[81]

According to the testimony of the surviving documents, the direct management of the hospital was still under the jurisdiction of the Knights. In 1414, when a charter was issued for the hospital, for example, hospital director Michael and brother Clemens de Cotwiz were also present on behalf of the order: *„frater Michael cucifer ordinis s. spiritus et magister hospitalis Cybiniensis, frater Clemens de Cotwiz eiusdem ordinis."*[82]

In the middle of the 15th century, the city council removed Péter Kempf, the prior of the hospital, from his post and appointed another person in his place. The deposed prior appealed to the general preceptor of the order in Rome, asking for legal redress in the case. As a result, in 1456 the Bishop of

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[68] BORSA, G., Újabb adatok a Szentlélekről nevezett ispotályosrenddel kapcsolatos nyomtatványokról. [More information about the forms related to the hospital order called the Holy Spirit]. In: KOVÁCS, I. (ed.), *Az Országos Széchényi Könyvtár Évkönyve 1984-1985.* [The Yearbook of the National Széchelyi Library 1984-85]. Budapest, 1992, p. 237-250.

[69] Ibid. p. 248.

[70] LUKCSICS, P. (ed.), *XV. századi pápák oklevelei*. [The Diplomas of Popes of the 15th Century]. Budapest, 1938, p. 322-323.

[71] BORSA, *Újabb adatok a Szentlélekről nevezett ispotályosrenddel kapcsolatos nyomtatványokról*, cit. p. 248.

[72] The first ruling dynasty of Hungary from 1000 to 1301, named after their ancestor, Árpád, head of the confederation of the Hungarian tribes at the turn of the 9th and 10th centuries.

[73] SZULOVSZKY, J., Azra" ispotálya, avagy egy „azonosíthatatlan helység" azonosítása. [The Hospital of „Azra" otherwise the Identification of a „Unidentifiable Locality"]. In: *Aetas*, vol. 3, 2011, p. 141-144.

[74] BORSA, *Újabb adatok a Szentlélekről nevezett ispotályosrenddel kapcsolatos nyomtatványokról*, cit. p. 247.

[75] GYŐRFFY, *Az Árpád-kori Magyarország történeti földrajza*. cit. p. 835-878.

[76] Ibid. p. 850-853.

[77] KUBINYI, *Orvoslás, gyógyszerészek, fürdők és ispotályok a késő középkori Magyarországon*, cit. p. 264.

[78] SZENDE, K., „Mindennapi kenyerünket add meg nekünk ma…". [Give us this day our daily bread…"]. In: *Aetas,* vol. 4, 2006, p. 217.

[79] SZULOVSZKY, *Azra" ispotálya, avagy egy „azonosíthatatlan helység" azonosítása*, cit. p. 141-144.

[80] SOMOGYI, *A középkori Magyarország szegényügye,* cit. p. 42.; The text of the charter can be found among the reports of the papal envoys in: FRAKNÓI, V. - LUKCSICS, J. (eds.), *Monumenta Romana episcopatus Vesprimiensis.* vol. I, Budapest, 1896, p. 191.

[81] SOMOGYI, *A középkori Magyarország szegényügye,* cit. p. 42.

[82] Ibid. cit. p. 42-43.; ZIMMERMANN, F. – WERNER, C., *Urkundenbuch zur Gesichte der Deutschen in Siebenbürgen Hermannstadt 1892-1902*. Köln, 2007, p. 607.

Transylvania, who was the protector of the Nagyszeben hospital *("iudex et commissarius ac protector hospitalis sancti spiritus in Cibinio per prefatum preceptorem et totum ordinem generaliter electus et deputatus"*),[83] requested the city council that Péter Kempf should be reinstated to his office as hospital director, and remove Miklós, who was placed there in violation of the law.[84] From the content of the certificate, we can conclude that the position of hospital director was exercised by the city council at that time, even in the event that it exceeded its powers by replacing the prior.

Additional information about Péter Kempf has survived from the beginning of the 16th century, from which we can learn that he later became the head of the order's hospital in Vienna, and died in this position.[85] The charter of king Matthias I (Matthias Corvinus, 1458-1490) dated 1484 also shows the growing influence of the city council in the management of the hospital. Based on its content, the king forbade Gáspár, the rector of the Nagyszeben Hospital, from introducing any kind of innovation contrary to the customs of the country. At the same time, the king instructed the city council that if the rector does not withdraw from the initiated lawsuit, and also does not promise to refrain from similar behaviour, according to custom to appoint another suitable person in his place, but from among the members of the same order.[86]

In the 15th century, the city council removed a hospital director from the Order of the Holy Spirit from his office and tried to appoint a secular priest in his place on the grounds that he had stayed in Rome for too long. However, this experiment was failed by decree of king Vladislaus II (1490-1516), and the city was forced to restore the old rector to his rights. In 1495, Lajos Drepperk, a member of the Order of the Holy Spirit, became the prior of the House of Nagyszeben.[87] The operation of the order in Nagyszeben may have completely ceased during the age of the Reformation. The town's account book of 1497 reveals that the town's mayor paid 18 Forints to the trustee of the order in return for unpaid contributions.[88]

3. Conclusion. Reasons leading to the termination of the Order of the Holy Spirit

We do not know what led to the withdrawal of the once very popular knight order from Hungary, since in 1487 Péter the Croatian Ban joined the ranks of the external members of the order, and in 1519 István Werbőczy followed him. We also know that the order's other hospital in Buda still existed during the archbishopric of Miklós Oláh (1553-1568), the nephew of János Hunyadi.[89]

The cessation of the operation of the order is connected with the development of urbanization, during which the 15-16th century, most of the order's hospitals and pharmacies gradually came under the supervision of the cities. Eventually, the city council took ownership everywhere, so their institutions were removed from the authority of the knight order.

The Roman motherhouse of the order in the 16th century, during the captivity of the popes in Avignon, understandably began to decay. After that, the hospital was re-founded Pope Eugene IV (1431-1447), and he also reorganized the Society of the Holy Spirit, which promotes the support of the order. After the decades of *captivity in Avignon*, the popes recognized the importance of the Order of the Holy Spirit, as well as the social role of their Roman hospital in the care of the city's inhabitants, and therefore consistently supported the order. A particularly effective form of this was the full pardon, which Pope Eugene IV announced to the members and supporters of the Society of Spirit in his bull dated March 25, 1446.[90] According to the pope's order, those who pay three gold forints upon enrollment and one mite (copper) each year to the hospital can receive a pardon at the hour of their death, free from all suffering in the afterlife, and they can request absolution once in their life in the form of a confession, even in the case of mortal sins under the pope's power to absolve also from sin.

However, few were able to meet the conditions, as the entrance fee was considered exceptionally high under the conditions of the time on the other hand, and the requirement to appear in person for the enrolling was not easily in addition to the contemporary road conditions, on the other. These two obstacles were finally overcome by Pope Sixtus IV (1471-1484). With his bull issued on March 21, 1478,[91] he left it up to everyone to decide how much they wanted to support the association upon joining, and also allowed those who could not make the pilgrimage to Rome to enroll through their proxy.

The number of Hungarian members enrolled on the occasion of the 1500th jubilee year exceeded 500, presumably also thanks to this facilitation. This was the highest of all that year. After that, the number of new members decreased again, but even in 1520 the number of Hungarian-related entries in the register of the Roman Society of the Holy Spirit was 42.[92] In 1523, however, we find only two entries, and none after that.[93]

[83] FEJÉR, G. (ed.), *Codex diplomaticus Hungariae ecclesiasticus ac civilis*, vol. X, Budae, 1834, p. 322.
[84] SOMOGYI, *A középkori Magyarország szegényügye,* cit. p. 43.
[85] DUDIK, *Iter Romanum,* cit. p. 91-92.
[86] SOMOGYI, *A középkori Magyarország szegényügye,* cit. p. 43.
[87] Ibid.
[88] Ibid. cit. p. 44.
[89] ERNYEY, J., A Magyarországon letelepedett bencések, ciszterciták, johanniták, dominikánusok, jezsuiták és más szerzetesrendek gyógyszertárairól. [About the Pharmacies of the Benedictians, Cistercians, Hospitallers, Dominicans, Jesuitics and Other Religious Orders' Settled Down in Hungary]. In: V. MOLNÁR, L. (ed.), *Ernyey József életműve*. [The Oeuvre of József Ernyey]. Budapest, 2008, p. 182.
[90] BORSA, *A Szentlélekről elnevezett ispotályosrend búcsúlevele Esztergomban,* cit. p. 207.
[91] Ibid. cit. p. 208.
[92] FRAKNÓI - LUKCSICS, *Monumenta Romana episcopatus Vesprimiensis,* cit. p. 5.
[93] DUDIK, *Iter Romanum,* cit. p. 83.

This could obviously be due to the plague epidemic that broke out in Rome this year.

The decrease in the interest of supporters was, of course, primarily caused by the lack of money, since in the 16th century, in addition to the Crusades, Christian Europe also faced other adversaries. With his bull dated 15 July 1513 and promulgated on 3 September, Pope Leo X (1513-1521) from the Florentine Medici family entrusted Archbishop Tamás Bakócz of Esztergom with announcing a new crusade, which soon led to the bloody Peasants' War associated with the name of György Dózsa. For the sake of the success of the crusade, the church tried to centralize the financial contributions of the faithful exclusively for this purpose, therefore the papal bull prohibited the advertising of pardons for any other purpose in Hungary for the duration of the campaign. The ban was so detailed that it listed and excluded all such activities practiced in the country at the time. From this we can learn about four concretely identifiable pardons.[94] Among the four, the forms of indulgence letters distributed in Hungary for the purpose of the construction of St. Peter's Basilica in Rome and for the benefit of the Hospitaller Order of St. Anthony have already become known.[95]

The Yearbook of the National Széchenyi Library for 1982-1983 presents documents of a similar nature for the benefit of the Order of the Holy Spirit.[96] Arnold Ipolyi played a significant role in the scientific life of the second half of the 19th century, not only through his historical writings,[97] but also through his collections. Among them, the collection containing medieval charters is kept by the Primate's Archives in Esztergom. Among the hundreds of documents are two printed indulgence letters. One was issued for the Hospitaller Order named after Saint Anthony, and the other, form Nr. 104 was issued for the Hospitaller Order of the Holy Spirit.[98] The form was issued in handwriting without indicating the name of the place on 21 March 1492 to *"nobis in Christo Nicolaus Zachs (?) cum coniuge sua Barbara."* Since the pieces in Ipolyi's collection are almost exclusively of Hungarian origin, this certificate was also presumably issued to the wife of a citizen of one of the Hungarian cities with the surname *Sachs*. It is also conceivable that he came from the *Zaz*[99] family, one of whose members, Johannes, was the clerk of the city of Nagyszeben during 1496-1497.[100]

As a sign of decline and decay, Zoltán Somogyi also observed that from the 16th century, the consecrated members of the Order of the Holy Spirit limited their work area to the detriment of their original vocation of nursing, gradually more to the performance of clerical duties. As a typical example, a document found in the Capital Archives gives an example of this, which in 1515 mentions *János*, a member of the Buda house and master of the Hospital of the Holy Spirit in Buda, simply as a *priest*.[101] As a result, it is natural that few of the houses of the Order of the Holy Spirit survived the Reformation.

[94] BORSA, *A Szentlélekről elnevezett ispotályosrend búcsúlevele Esztergomban,* cit. p. 207.
[95] Ibid. cit. p. 207-220.
[96] Ibid.
[97] IPOLYI, A., *Ungarische Mythologic*. Budae, 1854.
[98] BORSA, *A Szentlélekről elnevezett ispotályosrend búcsúlevele Esztergomban,* cit. p. 207.
[99] In English: *Saxon*, in German: *Sächsisch,* in Hungarian: *Szász.*
[100] Ibid.
[101] SOMOGYI, *A középkori Magyarország szegényügye,* cit. p. 48.

Under Duress or Coercion. Special Land Registry Cancellation Lawsuits after the Second Vienna Award*

*László Ádám Joó***

Abstract

Following the Second Vienna Award, in possession of the general authorisation of the Parliament, the Hungarian Royal Government adopted several decrees in order to extend the scope of Hungarian private law to the regions concerned. At first the scope of the law of real estate was extended by Decree No. 1440/1941. In Section 6 the legislator provided the right for those who alienated their immovable properties during the period of the Romanian supremacy to request in integrum restitutio, in a measure through the deletion of the current owner's right of ownership. The court could also uphold the application if the transaction concluded under a compulsive action of a Romanian authority threatening with damage and serving the interests of the party that acquired the right or other official direct or indirect coercion or the threat of procuring it. After the analysis of the available judgments found in the Hungarian National Archives, it is ascertainable that the courts did not interpret the above-mentioned conditions consistently, therefore they could not always choose the appropriate one of them. Despite that, cancellation from land registry was ordered in most cases in which the owner was forced to alienate his/her immovable property under some kind of duress or coercion of an authority. Although the Decree was in force until the Romanian reoccupation and the system of private property was altered extremely in the communist regime, the lessons of the judicial practice of the discussed decree should get attention.

Keywords: *Hungary; Transylvania; Romania; Second Vienna Award; Land Registry Regulations; Cancellation Lawsuits; Duress; Coercion; Private Law; ABGB; Auction; Sales Contract.*

1. Introduction

Under the terms of the Second Vienna Award, announced on August 30, 1940, Hungary (re)annexed the northern part of Transylvania, as well as Romanian territories to the west and north of it, a total of more than 43,000 km^2. The Hungarian Parliament approved Act XXVI of 1940 on the return of the eastern and Transylvanian parts of the country freed from Romanian rule to the Hungarian Holy Crown and their unification with the country, and authorized the government to take all measures necessary to integrate the entire legal system of the annexed territory into the existing legal system of Hungary. One of the more significant decrees that brought private law into force, and in this regard it was considered to be the first, Decree No. 1440/1941 of the Hungarian Royal Government (hereinafter: Basic Decree) extended the private law legislation on real estate to the eastern and Transylvanian parts of the country freed from Romanian rule, thus including the scope of laws and regulations relating to undivided common grazing land and condominium ownership.[1]

The government's aim was not only to extend the legislation, but also to partially remedy the results of the real estate policy that had been applied during the previous twenty-two years, primarily to the detriment of the Hungarians. Thus, Section 6 of the Basic Decree allowed for the initiation of civil proceedings in cases where between 1918 and 1940, the ownership of real estate had been transferred with the involvement of a Romanian state body.[2] In one case, the respondent argued that

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[1] It should be emphasized that in 1926, the fideicomissiums were abolished in the Romanian territories that previously belonged to Hungary, although they were covered by the Act XI of 1936 at the time of the return. The scope of this law and other relevant legislation was also extended to the Eastern and Transylvanian territories with the Basic Decree. UJLAKI, M., *A magyar magánjog módosulásai Romániában*. Budapest, 1934, p. 103. Due to the fact that Hungary did not have a civil code in force at that time, the legislator could only extend the scope of several laws, regulations and customary law. Cf. BALOGH, J., How to Make a Civil Code: Plans and Drafts of General Rules in 19th Century Hungarian Private Law. In: *Journal on European History of Law,* vol. 11, Nr. 2, 2020, p. 95-103.

[2] I do not agree with András Tóth-Bartos that Section 6 (and Section 7, that is not discussed in this study) of the Basic Decree would have been intended by the Hungarian government to remedy the expropriations carried out during the Romanian land reform (agrarian reform). According to the text of the law, only a legal transaction concluded regarding the alienation or encumbrance of real estate could be challenged, in the event that the party concluded the legal transaction as a result of one of the specified reasons for contesting it. It follows that the expropriations that served as the basis for the land reform, that were materialized in unilateral official decisions, could not be contested on the basis of this section. The government wanted to carry out the review of the land reform after careful preparation, that also had political reasons. TÓTH-BARTOS, A., Birtokpolitika Észak-Erdélyben, 1940–1944. In: *Korall Társadalomtörténeti Folyóirat,* vol. 13, Nr. 47, 2012, p. 101–125. BENKŐ, L., Magyar nemzetiségi politika Észak-Erdélyben (1940-1944). In: *Pro Minoritate,* Autumn, 2002, p. 27–30.

the government had exceeded its statutory mandate. The Royal Curia[3] found that "in the eastern and Transylvanian parts of the country, in other respects as well, but in particular, in order to transfer their real property under the ownership of persons of other nationalities, there had been a series of constant official measures, direct and indirect official coercion, direct and indirect threats of such coercion especially against people of Hungarian ethnic origin, which are contrary to the principles of Hungarian private law, and the general rules of Hungarian private law consistently deny legal validity to legal transactions concluded under the influence of such measures."[4] Paragraph 2 of Decree No. 3730/1939, in force in the southern part of the Felvidék (Upper Hungary),[5] and Paragraph 3 of Decree No. 6050/1939, issued in respect of Kárpátalja (Transcarpathia),[6] that contained similar provisions, served as a model, and the following year Decree No. 2810/1942 (Paragraph 24) was issued, with the same purpose, effective in the Délvidék.[7]

The Basic Decree not only led to the initiation of numerous proceedings, but also to a heated debate among legal experts, that can be traced in the legal journals of the time. Many of the detailed rules that were not contained in the Decree were crystallized in court decisions, even before the Royal Curia.[8] Although according to the Romanian archives concerned, the documents of the reorganized courts of the territories returned in 1940 were partially preserved they are not searchable for a period of ninety years from their creation, as is the case with other court documents. A notable exception is the Royal Court of Máramarossziget, that from 1 April 1941 belonged to the district of the Royal Court of Appeals of Debrecen, therefore, a small portion of its documents can be found in the Hajdú-Bihar County Archives of the Hungarian National Archives. As a result, the primary sources of my study were mainly found in the National Archives of the Hungarian National Archives, among the land registry case files of the Royal Curia. I focused primarily on the circumstances that led the plaintiffs to be disposed of their properties, how the courts interpreted the relevant sources of law, and the extent to which judicial practice contributed to the supplementation of the decrees. I have attempted to distinguish the reasons for contest described below, after comparing the various judgments, and to determine their content, with respect to the legislative purpose. In the present study, in addition to the legal sources and court decisions that are considered as primary sources, I have sought to rely on the literature to provide a true picture of the specific land registry cancellation proceedings, from the perspective of eight decades. This work forms an integral part of a larger study on the evolution of private law as a whole.

2. Provisions of Section 6

Land registry cancellation lawsuits could be initiated already since the introduction of the Land Registry Regulations in Hungary in 1855 and in Transylvania in 1870,[9] as Section 148 also allowed it for entries suffering from original invalidity. However, the reasons for invalidity regarding the legal transactions on which the registrations are based (coercion, threats, deception, etc.) provided in the ABGB[10] and Hungarian private law could not be applied in their original form to certain rights violations that were intended to be remedied after the Second Vienna Award, therefore it became necessary to provide the regulations detailed in Section 6 of the Basic Decree.

This provided the aggrieved party the opportunity to contest the legal transaction concluded between October 28, 1918 and September 15, 1940[11] (i.e. between the beginning of the Frost-

[3] The forum of Hungarian supreme jurisdiction.

[4] "Maintaining the effect of these transactions would be therefore contrary not only to certain provisions of Hungarian private law, but also to its entire spirit." NIZSALOVSZKY, E. et al. (Ed.), *Grill-féle Uj Döntvénytár.* vol. XXXV, Budapest, 1943, p. 149–150.

[5] A Hungarian term for the area that was historically the northern part of Hungary, now mostly present-day Slovakia. According to the terms of the First Vienna Award in 1938, Hungary regained 12,012 km^2 of this territory from Czechoslovakia.

[6] A Hungarian term for a region that was historically the northeastern part of Hungary, now mostly coterminous with the region Zakarpattia Oblast of Ukraine. After the dissolution of Czechoslovakia in 1939, Carpatho-Ukraine announced its independence, which turned out to be short-lived, as the Royal Hungarian Army occupied it, gaining an additional 10,700 km^2.

[7] Délvidék is a historical political term referring to varying areas in the southern part of what was the Kingdom of Hungary. In present-day usage, it refers to the Vojvodina region of Serbia. After Yugoslavia disintegrated in 1941, the Royal Hungarian Army occupied a portion of it, approximately 11,601 km^2.

[8] JOÓ, L. Á., Egy rendelet – több ezer eljárás. In: KARLOVITZ, J. T. (Ed.), *Jogok és lehetőségek a társadalomban.* Komárno, 2020, p. 48–56.

[9] HOMOKI-NAGY, M., Adalékok a telekkönyvi jog történetéhez. In: GELLÉN, K. (Ed.), *HONORI ET VIRTUTI, Ünnepi tanulmányok Bobvos Pál 65. születésnapjára*. Szeged, 2017, p. 144; HOMOKI-NAGY, M., Private Law in Transylvania as Part of the Habsburg Monarchy. In: *Acta Universitatis Sapientiae, Legal Studies,* vol. 9, Nr. 2, 2020, p. 324; BALOGH, J., A magánjog átalakításának 1848-as kísérlete és az osztrák jog uralma. In: *Jogtudományi Közlöny*, vol. 54, Nr. 10, 1999, p. 412; BALOGH, J., Österreichisches Recht in Ungarn und in Siebenbürgen – Westeuropäische Einflüsse auf die ungarische Zivilrechtskodifikation im 19. Jahrhundert. In: POLASCHEK, M. F. – ZIEGERHOFER, A. (Ed.), *Recht ohne Grenzen, Grenzen des Rechts*. Frankfurt/M., 1998, p. 127.

[10] There were no previous examples of cases where the body of the state influenced the expropriator even indirectly, without the knowledge of the party acquiring the rights. Relating parts of the ABGB had to be applied in the returned Transylvanian territory until 1941, while in Bihar, Szatmár and Máramaros Hungarian private law prevailed since 1861. Cf. VERESS, E., Integration of Transylvania into Romania from the Perspective of Private Law (1918–1945). In: *Acta Universitatis Sapientiae, Legal Studies*, vol. 9, Nr. 2, 2020, p. 358-359. KÉPES, Gy., The Birth and Youth of the Modern Hungarian Private Law. In: *Journal on European History of Law,* vol. 7, Nr. 2, 2016, p. 106-108. This legal dualism prevailed among the Czech and Slovakian – Carpathian Ruthenian parts of Czechoslovakia during the inter-war period. LACLAVÍKOVÁ, M. – ŠVECOVÁ, A., Attempts to Unify and Codify Private Law during the Period of the Inter-war Czechoslovak Republic. In: *Journal on European History of Law,* vol. 6, Nr. 2, 2015, p. 72-77.

[11] The alienator could also file a lawsuit if he acquired the property during the specified period and not before. Joggyakorlat. In: *Erdélyi Jogélet*. vol. 3, Nr. 3, 1944, p. 39. In one of its judgments, the Royal Court of Zilah referred to judicial practice contrary to this, that is in line with the interpretation of Dezső Fekete, who was a lawyer from Budapest. Magyar Nemzeti Levéltár Országos Levéltára [National Archives of the Hungarian National Archives] (hereinafter: MNL OL), Igazságügyminisztériumi Levéltár [Archives of the Ministry of Justice], K 583 Egyesített Királyi Kúria Általános iratai (1882-1944) [General Documents of the United Royal Curia (1882-1944)] (hereinafter: K 583), 214. cs. 5. t., P. VII. 1970/1944/36. FEKETE, D., *Az erdélyi ingatlan és kártalanítási perek magyarázata*. Nagyvárad, 1941, p. 20.

flower Revolution[12] and the founding of Czechoslovakia[13] and the reannexation of the aforementioned territories) regarding the alienation or encumbrance of the property located in the annexed part of the country, and to file a request for the cancellation of a land register entry based on such a legal transaction to a competent court, having regards that the party concluded the transaction as a result of a) an official measure that threatened with serious financial or other damage and served the interests of the party that acquired the right, b) other official direct or indirect coercion or c) of a threat of taking coercive official measures. This provision was interpreted as such by the Royal Court of Marosvásárhely, that the condition "threatened with serious financial or other damage and served the interests of the party that acquired the right" shall be applied not only to paragraph a), but also to b) and c).[14] In contrast, the Royal Court of Appeals of Marosvásárhely emphasized, that "[the] first paragraph of Section 6 obviously aims to provide an opportunity to claim it back for all who alienated their real estate during the specified period of time without sound judgment and contrary to their own free will, without any secondary consideration, obviously, with the refund of the purchase price. This goal would not be achievable if, for example, the alienating party was evicted, but he received the real value for his property, and no damage could be shown otherwise. In such a case, the party alienating his property would be left without a legal remedy, even though there might be a universal national interest in returning the ancestral property from the ownership of the possibly undesirable owner to the ownership of the person entitled to it." This latter interpretation was also upheld by the Royal Curia.[15]

The coercion did not necessarily have to be unlawful, which the Royal Curia also pointed out: "[…] in most cases, it was understandable that we had to deal with such examples of official coercion, that, on the basis of Romanian legal measures, served to transfer the property of the Hungarian native population into Romanian hands […]",[16] such as tying the ownership of agricultural land to Romanian citizenship. In my opinion, an official measure that threatened with serious financial or other damages could also have a legal basis, but the fact that it directly served the interests of the party acquired the right excluded the absence of the unlawfulness. Furthermore, the threat to impose coercive official measures would not have been fundamentally illegal if it could have resulted in a measure defined by law. However, considering that in all cases the threat had to be aimed at the alienation of real estate, the unlawfulness necessarily accompanied by it. Bad faith on the part of the acquiring party could also only be ruled out in the case of direct or indirect official coercion.[17]

Although it was not specified in the Basic Decree, according to the judicial practice, the former owner, his universal successor and the owner outside of the land register were also entitled to file a lawsuit.[18] (Thus, instead of the deceased wife of Mihály Várady (Brenner) to be mentioned below, their children were listed as plaintiffs together with the father.) It was clear that the actual owner had to be the respondent, but the need to include the parties who acquired the right in the proceeding as plaintiffs was a matter of debate. In one of the cases discussed below, the Royal Court of Máramarossziget did not consider to the involvement of the parties who acquired the right in the proceeding mandatory, saying that compared to the Land Registry Regulation, the Basic Decree contains special rules, so the registration of filing for a legal action is sufficient. On the other hand, the Royal Court of Appeals of Debrecen was of the position that the involvement of the persons acquired the right was not dispensable, and emphasized the background legislation nature of the Regulation. "Among the parties that acquire rights in the land registry that are involved in a lawsuit in this way, of course, the focus of the lawsuit is on the legal position of the person who appears to acquire the right as the result of the annulled legal transaction, because the cancellation of the legal transaction occurs as a result of the invalidation of the legal relationship concluded with this party, and the cancellation of the land registry rights of the subsequent land registry rights holders depends on the invalidity of this first acquisition of the rights."[19] The government issued Decree No. 1780/1944 that provided favorable provisions to the plaintiffs; it made possible to extend the claim to the land registry rights holders who were not part of the lawsuit, regardless of the original deadline for filing the lawsuit, until the lawsuit was concluded with a final judgment.

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[12] Also referred to as "Aster Revolution".

[13] In the aforementioned four decrees with a similar subject, October 28, 1918 is mentioned as the starting date, presumably because this is when the actual efforts to divide the territory of historical Hungary began.

[14] This is also how the Basic Decree was interpreted by the Royal Court of Máramarossziget. MNL OL, K 583, 144. cs. 5. t., P. V. 1298/1943/34. Imre Harsányi, a judge of the Court of Appeals of Nagyvárad, also took the same position, just as Dezső Fekete. HARSÁNYI, I., Az erdélyi ingatlanperekről. In: *Gazdasági Jog*, vol. 4, Nr. 5, 1943, p. 264. FEKETE, D., *Az erdélyi ingatlan és kártalanítási perek magyarázata*. Nagyvárad, 1941, p. 14.

[15] MNL OL, K 583, 144. cs. 5. t., P. V. 1261/1943/27.

[16] MNL OL, K 583, 144. cs. 5. t., P. V. 1298/1943/34.

[17] Lajos Borbély, a judge of the Royal Court of Appeals of Nagyvárad considered all acquirers were in bad faith against whom a lawsuit could be initiated based on one of the three reasons to contest. Opposite to him, Gábor Medvigy, a chief judge at the Royal Court of Appeals of Nagyvárad did not consider this to be deducible from the text of the decree. BORBÉLY, L., A kártalanítási eljárás. Az 1440/1941. M. E. sz. rendelet 7-9. szakaszainak magyarázata. In: *Magyar Jogi Szemle*, vol. 23, Nr. 7, 1942, p. 126. MEDVIGY, G., A telekkönyvi törlési perek és a kárenyhítési kérelmek a felszabadult keleti és erdélyrészi bíróságok gyakorlatában. I. rész. In: *Magyar Jogi Szemle*, vol. 23, Nr. 13, 1942, p. 270.

[18] HARSÁNYI, I., Az erdélyi ingatlanperekről. In: *Gazdasági Jog*, vol. 4, Nr. 5, 1943, p. 274. See also: A Kúria határozatai. In: *Jogi Hírlap*, vol. 17, Nr. 31, 1943, p. 242. Joggyakorlat az 1440-1941. M. E. sz. r.-hez. In: *Erdélyi Jogélet*, vol. 1, Nr. 1-2, 1942, p. 25.

[19] MNL OL, K 583, 144. cs. 5. t., P. V. 1261/1943/27. Cf. DRÁGFFY, M. – VILLÁNYI, P., *Az erdélyi ingatlanelidegenítések jóvátétele.* Budapest, 1942, p. 81–82.

Since, based on Section 3 of the Basic Decree, the ownership of the Hungarian Royal Treasury had to be registered for all the properties that were previously owned by the Romanian state or one of its bodies, the question arose whether it was possible to file a lawsuit against the Hungarian Royal Treasury for a land registry entry cancellation. The legal representatives of the latter body based their negative answer, among other things, on the fact that the Treasury did not acquire the ownership of the relevant properties through private law, but through international public law through the Second Vienna Award.[20] However, according to the view of the government published in Decree No. 4780/1943, there was no obstacle to such lawsuits, unless the property served as a hospital, school, barracks, or some other public interest purpose, and it was still needed for this reason, according to the statement of the competent minister.

Section 11 of the Basic Decree made the consent of the Minister of Agriculture mandatory for the initiation of the procedure. The declarations issued by the ministry's Transylvanian Land Policy Department contained, in a favorable case, that "there is no obstacle to the initiation of the lawsuit from the perspective of land policy."[21] In all cases that were decided on the merits by the courts, they referred to the existence of a positive declaration. Based on this, the lawsuit of the plaintiff was dismissed by the Royal Court of Sepsiszentgyörgy, as he did not submit a declaration with such content to the court, nor did he prove that he submitted a request in this regard.[22]

The lawsuit for the cancellation of a land register entry – both on the basis of Section 6 and on the Hungarian legislation existing or coming into force in the reannexed area on August 30, 1940 – could be initiated within one year from the entry into force of the Basic Decree (February 23, 1941), even if the deadline for filing the lawsuit or the notification of the intention to initiate a lawsuit had already expired before the Basic Decree entered into force or if the remaining time limit for filing a lawsuit was otherwise less than one year from the date of its entry into force. However, this provision only extended the deadline for actions that could be brought against further (i.e. the second and subsequent) bona fide right holders, since, based on other existing and coming into force legislation, there was a way to assert claims against the direct right holder (the first, new owner of the property) and the additional bad faith or free acquirers without this opportunity.[23] Despite the fact, that the Decree No. 6340/1941 already indicated that the one-year substantive law deadline would expire on February 23, 1942, several claims were rejected by the courts because February 22 was considered the last day of the deadline. With the Decree No. 3000/1942, the government confirmed its previous intention, as Section 2 stated that a claim submitted on February 23, 1942 cannot be considered late, and Section 5 prescribed this rule to be applied to ongoing cases as well. The Royal Curia ruled in its judicial uniformity decision No. 107 that this provision had to be applied also in those cases where the lawsuit was legally dismissed or rejected due to delay.[24]

Pursuant to Section 6, legal proceedings could only be instituted against persons who had acquired registry rights in the meantime if the land registry authority was notified of the intention to initiate a lawsuit within sixty days from the entry into force of the Basic Decree. This deadline was then extended by further decrees[25] until February 23, 1942.

If the court approved the lawsuit, in its judgment it obliged the buyer to return the property, and the seller to repay the purchase price. In a case before the Royal Court of Szatmárnémeti, the court ordered the plaintiffs to pay not only the purchase price and the value of the investments, but also the real estate acquisition tax and the transcription costs. On the other hand, the Royal Court of Appeals of Nagyvárad interpreted the Basic Decree restrictively, and considered only the value of the purchase price and the investments to be reimbursed. Finally, the Royal Curia reconsidered the judgment of the Court of Appeals, as the Decree did not exhaustively list the claims that could be asserted with a restitution claim, and consequently did not affect the general rules of material law regarding restoration of the original state. According to the ruling, on the basis of *in integrum restitutio*, each party was obliged to return what was acquired as a result of the invalid transaction or what meant an (unjust) enrichment. Thus, the plaintiffs were entitled to the value of the forfeited benefits at the time of the adjudication of the lawsuit, to the amount needed to make up for the repairs that had not been carried out, and the respondent was also entitled to the purchase value of the property at the time of the adjudication of the lawsuit. At the same time, it ruled that the respondent should not claim the reimbursement of dues and attorney's fees because they did not enrich the plaintiffs. It also pointed out that, contrary to the view of the court of first instance, the foregone profits and the interest on the purchase price were not mutually compensable without an accounting

[20] HATFALUDY, P., A m. kir. Államkincstár felelőssége az 1440-1941. M. E. sz. rendelet 6. és 7. §-ainak alapján. In: *Erdélyi Jogélet*, vol. 2, Nr. 2, 1943, p. 37–38.

[21] Magyar Nemzeti Levéltár Hajdú-Bihar Vármegyei Levéltára [Hajdú-Bihar County Archives of the Hungarian National Archives] (hereinafter: MNL HBML), VII. 2/d Elsőfolyamodású bíróságoktól fellebbezés folytán a Debreceni kir. Ítélőtáblához került perek gyűjteménye (1940–1944) [Collection of lawsuits come to the Royal Court of Appeals of Debrecen from courts of first instance through appeal (1940-1944)], (hereinafter: VII. 2/d), 6. d., P. I. 923/1944.

[22] Section 3 of Decree No. 3000/1942 contained this addition in favor of the plaintiffs.

[23] According to Sections 149–150 of the Land Registry Regulations, the right to file a lawsuit for cancellation is expired according to the general rules of private law (that was 30 years in the ABGB, 32 years in the Hungarian private law) against direct acquirers and additional (second and further) acquirers that acted in bad faith. Lawsuit could be filed against further bona fide acquirers within three years, or according to Section 8 of the Decree 947/1888 of the Minister of Justice, in certain cases, within six months. RUSZTHI, K., Az 1440/1941. M.E. sz. rendelet 6. §-a alapján indítható perek határideje és joghatálya. In: *Erdélyi Jogélet*, vol. 2, Nr. 5, 1943, p. 98–99.

[24] Jogalkotás. In: *Gazdasági Jog*, vol. 5, Nr. 1, 1944, p. 58.

[25] Decrees No. 2780/1941, No. 4730/1941 and No. 6340/1941 of the Hungarian Royal Government.

and therefore remanded the case back to the Court of Appeals for further proceedings.[26]

In order to reimburse the value of the purchase price received and the value of possible investments, the court could grant deferment to the payment obligation or allow to pay in installments according to the living conditions of the parties. In such a case, the party obliged to transmit the real estate could not refuse the transmission, but the court could tie the application of a deferment or the possibility to pay in instalments to guarantees.[27] The Royal Court of Kolozsvár granted the plaintiff to pay in 20 installments half-yearly, on the condition that he pay nearly 2,000 pengős[28] every six months in advance, with 5% interest per year in case of delay. At the same time, it entitled the defendant to apply for the registration of a lien on the property that is the subject of the lawsuit to secure his claim.[29] In contrast, the Royal Court of Szatmárnémeti provided the plaintiffs to pay 13,700 pengős in monthly installments of 1,000 pengős, with the provision that in the event of delay the possibility of paying in instalments would be lost. The court took measures ex officio to register the defendant's lien. The Court of Appeals of Nagyvárad that acted as the court of second instance increased the amount by nearly 3,000 pengős, and ordered a smaller part to be paid upon the registration of the cancellation in the land register, and the larger part to be paid in another 90 days. The court justified its decision by saying that the plaintiffs had enough time to arrange for coverage in the nearly half a year that had passed since the announcement of the first verdict. Moreover, in the case of the original payment in installments, taking into account the increase in price, the respondents could have been damaged. The Royal Curia went even further by allowing the registration of the cancellation only after the full payment of the sum, which was raised to nearly twenty thousand pengős, within 90 days.[30] The difference between the judgments handed down in these two different cases is less significant if the identity of the plaintiffs and defendants is known, because the Royal Court of Kolozsvár awarded the relief to Dr. Balázs Biró, who was a chief judge of the Hungarian Royal Public Administration Court, being the only plaintiff against a bank, while the courts in the second case ordered six plaintiffs in favor of a widow mother and two minor children, although the financial situation of the parties is unknown.

2.1 Reasons for a Contest

In the following subchapters, I will review the application of each of the reasons to contest, with which I would like to point out not only the different interpretations of the courts, but also the serious damages suffered by the plaintiffs, that directly or indirectly contributed to the formation of their intention to alienate real estate. As it can be seen from the cases examined, the courts did not always place sufficient emphasis on the selection of the appropriate grounds for a contest, but generally referred to the existence of coercing circumstances. Knowing the historical facts, there can be no doubt that the judgments declaring the cancellation of the land register were not well-founded, however, even then, a precise reference to the provisions of the legislation appeared as a fundamental expectation. The reason why this is not found in all judgments can be traced back not only to the superficiality of the judges, but also to the difficulty of distinguishing between the first two reasons for contest.

As I mentioned above, according to the interpretation of some courts, the condition "threatened with serious financial or other damage and served the interests of the other party that acquired the right" applied to all three reasons. Based on this, there was less difference between official measures and direct or indirect official coercion, in relation to which no uniform practice developed. The condition "serving the interest of the party that acquired the right" became irrelevant with a decision of the Royal Court of Appeals of Debrecen (and other courts), that was also upheld by the Curia: "[…] according to the meaning of the law, the harmful official measure or coercion does not have to directly serve the interest of the acquiring party; it is sufficient if the official action initiated the transferring party to alienate his real estate and thereby the official pressure leading to the alienation indirectly served the interest of the authorizing party."[31] I believe that this is a *contra legem* interpretation, since the legislator would certainly not have considered it necessary to include this part of the sentence in the Basic Decree, if it had wanted to apply it to every single official measure. In my opinion, only those cases can be classified here, where the official measure was specifically aimed that the specific buyer and no one else would buy the property. The fact that the government did not include such a condition in the relevant sections of the above decrees created with effect covering the other three areas also indicates that it imposed additional requirements on the returned eastern and Transylvanian parts of the country, although it did not stick to its original goal by allowing judicial practice to flow freely, and accepted an interpretation more favorable to alienators.

In my opinion, direct official coercion could be established if at least one of the above two conditions was not accompanied

[26] MNL OL, K 583, 145. cs. 5. t., P. VII. 4102/1943/53. Imre Harsányi, who was a member of the panel that acted in the case, justified his position by saying that the legislator "created a special legislation that is territorially demarcated and temporally limited, different from the rules of private law, that must therefore be interpreted closely and thus [the court] did not find the general rules of private law necessarily applicable in the event of original invalidity." HARSÁNYI, I., Az erdélyi ingatlanperekről. In: *Gazdasági Jog*, vol. 4, Nr. 5, 1943, p. 273.

[27] On the basis to this provision, the Royal Curia found the respondent's argument unfounded, according to which the Nagyvárad court, in violation of material legislation, obliged him to tolerate the immediate cancellation of his ownership without the simultaneous reciprocal service of the plaintiff. In fact, he provided the plaintiff with a six-month payment deadline, but at the same time tied the transfer of possession to the fulfillment of the payment. MNL OL, K 583, 78. cs. 5a. t., P. V. 3652/1942/38.

[28] Hungarian currency from January 1, 1927 until July 31, 1946.

[29] MNL OL, K 583, 78. cs. 5a. t., P. V. 4843/1942/20.

[30] MNL OL, K 583, 144. cs. 5. t., P. V. 2377/1943/29.

[31] MNL OL, K 583, 214. cs. 5. t., P. VII. 1038/1944/21. This position has also become predominant in the literature. Cf. DRÁGFFY, M. – VILLÁNYI, P., *Az erdélyi ingatlanelidegenítések jóvátétele.* Budapest, 1942, p. 65.

by the action of the authority, while indirect official coercion existed if the authority's action was not (primarily) aimed at the transfer of the property, but put the sellers in a situation where from which alienation followed. Although I have grouped the cases based on the reasons of the contest in the most recent judgments I know of, I have annotated those that I would classify elsewhere.

2.1.1 An Official Measure that Threatened with Serious Financial or other Damage and Served the Interests of the Party that Acquired the Right

Serious financial or other damage did not necessarily have to take place; it was sufficient if there was a chance.[32] Thus, the Royal Curia found that the applicants' fear of a higher tax burden was well founded, even though it had not been imposed under the law at the time of the disposal.[33] The financial loss could also have been caused by the owners' failure to maintain the property properly from abroad, or by the low value of the consideration received in the expropriation

This latter circumstance prompted Baron Ferenc Schell-Bauschlott and his wife to sell around 600 cadastral acres[34] of their arable land and vineyard in Érsemjén in 1924. The couple classified as absentee (see below) was able to partially avoid expropriation with the help of two influential Romanian lawyers; however, they had to alienate the exempted area – of uncertain size at the time – in lawyers' favor first. The legal transaction was favorable for both parties, since the consideration for the expropriation would have been 1/30-1/50 of the real value of the real estate (or less), and the buyers could get them by offering little more than that. In addition, the Royal Court of Appeals of Nagyvárad (just as the Royal Curia) declared the contract invalid based on the conditions of the first reason of contest.[35]

On March 1, 1919, the occupying Romanian military authorities arrested Dr. Géza Benkő, the deputy mayor and chief prosecutor of Zilah, physically assaulted him, and detained him for six weeks without reason. On July 29, 1919, he was stripped of his position as chief prosecutor and the accompanying allowances, and in August he was also removed from the electoral roll of members of the parliament and the bar association of lawyers. In September, he was expelled from Zilah under the threat of coercion, and at the beginning of 1920 he was arrested again and detained for a day for no reason. As a result of these continuing official measures, he sold his property and moved to the territory of Hungary. The Royal Curia concurring with the Court of Appeals of Nagyvárad, classified the events as official measures that threatened with serious financial damage and served the interests of the party that acquired the right.[36]

Dr. Aurél Faur was the chief city clerk of Máramarossziget. In 1919, he refused to take the oath of loyalty[37] to the Romanian state and the king, so he was removed from his job without a pension, and for the same reason, he could not become an attorney. Together with his fellow officials, he tried to rent the cinema of the city, but after he rejected the state job (where it was also an important factor that he was considered to be of Romanian origin), he was placed under police supervision, he had to report to the police daily, he was not allowed to leave the city, he was added to the list of internees, harassed with house searches and then expelled from the territory of the state. As a result of all this, he sold his property on August 1, 1920. and left for Hungary. According to the Royal Court of Máramarossziget "even if the concept of express coercion would not be recognizable in these official measures [except expulsion], these, as official measures threatening the plaintiffs with serious financial damage, would undoubtedly stand as grounds for a contest."[38]

According to the findings of the Royal Court of Szatmárnémeti, the husband of one of the plaintiffs and the father of the others, was employed by the state at the Reformed High School in Szatmárnémeti until his death in 1923. After his death, the Romanian state was supposed to pay the widow's pension and education contribution, but it did not. In the beginning, they rented out most of their four-room family house, and then due to their financial situation, they were forced to sell it all to the first applicant and her husband in 1926. "From all of this, it is clear that the plaintiffs concluded the legal transaction under the influence of the Romanian state's unlawful refusal to pay the widow's pension and education allowance as an indirect official coercion that resulting serious financial damages and that served the interests of the acquiring party […]" The respondents argued that these circumstances had led to the sale. According to their point of view, the property had to be sold it in order to pay off the loans of the plaintiffs. The court established that they had to get a loan because they had no other source of income, so it was also the result of indirect official coercion. I have to point out the difference between the interpretations of the Court and the Court of Appeals, because the latter court classified the denial of the pension and contribution as an official measure, which resulted in serious financial damage. It explained that the official measure was not in the interest of

[32] MEDVIGY, G., A telekkönyvi törlési perek és a kárenyhítési kérelmek a felszabadult keleti és erdélyrészi bíróságok gyakorlatában. I. rész. In: *Magyar Jogi Szemle*, vol. 23, Nr. 13, 1942, p. 275-276. FEKETE, D., *Az erdélyi ingatlan és kártalanítási perek magyarázata*. Nagyvárad, 1941, p. 15.

[33] MNL OL, K 583, 214. cs. 5. t., P. VII. 1038/1944/21.

[34] Cadastral acre (hereinafter referred to as: "cad. acre") is an archaic term of measurement, equal to 5755 m^2.

[35] MNL OL, K 583, 157. cs. 27. t., P. V. 30/1943/54.

[36] Joggyakorlat. In: *Erdélyi Jogélet*, vol. 2, Nr. 4, 1943, p. 93-94.

[37] According to Article 45 of the Regulations annexed to the 1907 Hague Convention on the Laws and Customs of War on Land, ratified (earlier) by both Hungary and Romania, it was forbidden to force the population of the occupied territory to swear allegiance to the enemy power. Since the Romanian army was present as an occupier in the territories later annexed to Romania until the signing of the Peace Treaty of Trianon, it could not have demanded an oath of allegiance in 1919. However, *in fraudem legis*, the above provision was applied only to the civilian population, not to public servants, judicial employees and lawyers. Cf. NÁNÁSI, L., Az I. világháború hatása és következményei a magyar igazságügyi impériumra. In: *Jogtörténeti Szemle*, vol. 9, Nr. 1, 2011, p. 29–31.

[38] MNL OL, K 583, 144. cs. 5. t., P. V. 1261/1943/27.

the respondents, but as a result, it served the interest of the respondents by the fact that the official measure that led to a coercing situation put the defendants in a position where they could acquire the plaintiffs' real estate below its real value.[39] The Court certainly agreed with the opinion that the direct or indirect official coercion must be accompanied by serious financial or other damage and the condition serving the interests of the acquiring party in order for the legal transaction to be contested based on what was explained in the first chapter, this was not a condition, but it could even be established. However, it is not known why the Court of Appeal reconsidered the position of the tribunal based on the same background, without attributing importance to the difference.

Emil Leitner, judge of the Royal Court of Appeals of Budapest (as a first plaintiff) was a judge of the Royal Court of Szatmárnémeti until the summer of 1919. At that time, he refused to take the oath, so he was fired without severance pay or pension. In 1920, he left for Budapest, where he worked as a judge, while his family stayed. Later the husband of the first respondent, János Barbul, as a Romanian official, demanded their house from the housing office, which he received without determining the payment of a purchase price. He wanted to move in in September, so Leitner's belongings were dislodged to the yard with the cooperation of the authorities. Given that the family was still living in the house, they could move in only two weeks later. Emil Leitner's wife and children soon sold the house to János Barbul's wife and moved to Budapest. The Royal Court of Szatmárnémeti constituted all this as official coercion. The judgment of the Royal Court of Appeals of Nagyvárad gave a more precise definition by considering the unlawful demand for the oath of allegiance and the loss of job, as well as the demand for the apartment and the eviction, as coercive official measures. The Court of Appeals also stated that direct official coercion was repeatedly manifested in the mentioned measures. They threatened with serious financial damages and were in the interest of the acquiring party. The Royal Curia included the same in its upholding judgment, but with the exact citation of the first reason for contest according to the Basic Decree.[40]

Similar conditions can be found in the case of Tivadar Hollósy (Szongott), who was a district court judge in Felsővisó, and also refused to take the oath in 1919. Then he was discharged, placed under the supervision of the police, excluded from public catering, and finally expelled from Romania. In 1920, he transferred to the Royal District Court of Eger (Hungary), then returned to Felsővisó and moved to Eger with his family and their chattels. The alienation of their former residence took place only in 1921. The buyer's husband was the clerk of the village; her brother was the chief clerk of the district. Although the Royal Court of Máramarossziget and the Royal Court of Appeals of Debrecen acknowledged the existence of a coercing situation, the Royal Curia found that in 1921 no coercing circumstances had to be reckoned with. The expulsion was not carried out, the property was owned by the father-in-law (sham purchase) who was a citizen of Romania, so there was no need to expect confiscation or expropriation. Furthermore, anyone could (in principle) have bought the apartment building, not just the buyer, who lived there as a tenant with his family.[41] The Court of Appeals regarded the above as official measures that threatened with serious financial damages and serve the interests of the acquiring party, but I, on the other hand, consider the discharge, police supervision and exclusion from public service as indirect official coercion, while I find the expulsion (that was not implemented, but was not withdrawn either) as a direct official coercion. The father-in-law was not listed on the property sheet of the plot, the buyers did not sign the sales contract with him, so Tivadar Hollósy (Szongott) and his wife could have continued to be the owners of the property as Hungarian citizens living in Eger, thus in an unfavorable situation. Due to the forced repatriation, they needed the purchase price. In 1921, they decided in favor of the alienation of the property without having their own free will.

The late father of the plaintiffs Mária Mihálka and Dr. György Mihálka, was the official chief prosecutor of Máramaros County until the Romanian occupation, who did not take the oath despite his Romanian ethnic origin, so they wanted to intern him in Moldavia. Later, he only gave in to the pressure of his family, but continued to be viewed unfavorably. He died shortly after. The president of the Romanian Court at the time informed them that they should not expect any equitable treatment. Mária Mihálka lived in Őrmező, which was annexed to Czechoslovakia, and her brother studied in Hungary, thereby exempting himself from military service in Romania. The plaintiffs owned a residential building in Máramarossziget, that they were forced to sell in 1923, for several reasons: on the one hand, because they were restricted from crossing the border (Dr. György Mihálka would have been subject to criminal sanctions), which made managing their property difficult. On the other hand, the housing tax for foreigners and citizens residing abroad was 20% instead of 10%. Furthermore, they could not rent out the house freely, but only through the housing office. The Royal Court of Máramarossziget considered the high tax burden as an official measure threatening with serious financial damage, but also recognized the significant constraint that arose from the difficulties of border crossing. The Royal Court of Appeals of Nagyvárad upheld the judgment of the first court by evaluating the circumstances resulting from the difficulty of crossing the border as indirect official coercion.[42]

[39] MNL OL, K 583, 144. cs. 5. t., P. V. 2377/1943/29.

[40] MNL OL, K 583, 145. cs. 5. t., P. VII. 4102/1943/53.

[41] MNL HBML, VII. 2/d, 6. d., P. II. 1848/1943.

[42] MNL OL, K 583, 214. cs. 5. t., P. VII. 1038/1944/21. In another case, the Royal Court of Appeals of Nagyvárad deemed the lawsuit based on Section 6 of the Basic Decree to be well-founded, especially because the fact asserted by the plaintiffs was that they were in a situation where they were forcefully obstructed "cultivate their lands in the occupied territory due to the harmful restrictions on crossing the border by the authorities", the established on the basis of public knowledge. Joggyakorlat. In: *Erdélyi Jogélet,* vol. 1, Nr. 7, 1942, p. 137. The restriction manifested itself in the fact that the Romanian authorities delayed issuing border crossing cards, ordered border closures for longer or shorter periods during summer work, and border guards prevented the crossing in other ways. Joggyakorlat. In: *Erdélyi Jogélet*, vol. 2, Nr. 2, 1943, p. 40–41.

In my opinion, the interests of the acquiring parties were only served by the official measure directly in the case of the judge of the Royal Court of Appeals, and the finding of indirectness in the other cases – as I wrote above – led to a *contra legem* interpretation. Thus, I see that the motivation to alienate the real estate of the baron and his wife, the deputy mayor, the city clerk, the high school teacher's family and the Mihálka siblings instead, was affected only by indirect official coercion.

2.1.2 Direct or Indirect Official Coercion

On November 12, 1920, the above-mentioned administrative judge plaintiff sold his apartment in Kolozsvár, because the occupying Romanian authorities prohibited him from practicing law, expelled him from Kolozsvár, and ordered him to vacate his apartment within 48 hours. In addition, he had to pay 30,000 of the 900,000 crowns[43] levied on the citizens of Kolozsvár as retribution. Although the plaintiff requested the restoration of the original state due to "a whole series of Romanian official measures threatening with serious financial damages and serving the interests of the acquiring party", the Royal Court of Kolozsvár characterized the plaintiff's motivation as "the result of the coercive, ruthless treatment and harassment shown to him by the Romanian authorities".[44]

The real estate sale of the Máramarossziget chief city clerk was declared invalid by the Royal Court of Máramarossziget not only because it classified the acts of the authorities as official measures threatening with financial damage, but also because it considered the expulsion from the territory of the state as direct official coercion.[45]

Mihály Várady (Brenner) was also forced by the Romanian state power from several directions: after he, as the judge of the Royal Court of Máramarossziget, refused to take the oath of allegiance in 1919, he was discharged from his position without pension or severance pay, and was then subjected to a series of harassments, that manifested itself in house searches, night curfews, arrests, and threats of internment. After the chief of the secret police (*Siguranţa*) informed him through his father-in-law that it was highly recommended that he and his family move out of Romania urgently, he and his wife sold their joint property and left for Hungary. Based on the finding of (indirect official) coercion, the Royal Court of Máramarossziget declared the sales contract invalid.[46]

The Royal Court of Szatmárnémeti found that the plaintiff, Count Gyuláné Károlyi, entered into a sham sales contract with the defendant in 1925, because the latter's husband (state-commissioned land surveyor, János Barbul) was only willing to measure the exempted land areas from expropriation in exchange for the free transfer of 50 cad. acre of property (out of 4,116 cat. acres, 880 acres and 222 square fathoms[47] remained). Thus, the action of the defendant's husband took place as the consequence of indirect official coercion. The Royal Court of Appeals of Nagyvárad upheld the decision of the first court despite the fact that János Barbul did not identify himself as a civil servant. On the basis of his powers, he acted as an official agent, albeit in a legal relationship of a personal services contract. The Royal Curia also adopted this position.[48] In this case, the first reason of contest could perhaps have been stood if the court had not taken expropriation but János Barbul's official action refusing to measure as a basis. Because the failure to conclude the contract could have resulted in the further postponement of the land surveying, possibly resulting in the review and therefore the enlarging the effects of the expropriation, and the refusal of the survey served the defendant's land acquisition.

The first plaintiff, Dr. Sándor Kálnoki Bedő, was the chairman of the Bar Association of Marosvásárhely, as well as the curator of the Reformed College of Marosvásárhely, the co-chairman of the Transylvanian Association, the vice-chairman of the Party of Independence and '48 in Marosvásárhely, the legal director of a savings bank, the Marosvásárhelyi Takarékpénztár Inc. In 1919, the president of the local Romanian court called fall practicing lawyers to take an oath to the Romanian state and King Ferdinand I within 48 hours. This was refused by the committee of the Bar, so the Governing Council of Nagyszeben dissolved it, and the lawyers who did not take the oath were disqualified. The plaintiff did not reapply for membership, although he did not have a significant chance to do it anyway. Interrogations, house searches, restrictions on free movement followed, and *Siguranţa* put him on the blacklist as a hostage candidate to be captured first and foremost. Romanian officers were moved into a part of their apartment, who went to the restroom through the plaintiffs' room, and often entertained prostitutes. Their son, who fought as a volunteer against the Romanians in 1918, was not allowed to go from Budapest to Marosvásárhely, and his parents were not given permission to travel, even though the young man was hospitalized twice. As a result of all this, they decided to sell their house and left for Hungary in 1922. They were afraid that they would not be able to properly manage the property, that as foreigners, their financial burden would be large, and that its condition would deteriorate. Furthermore, money was needed to move to Budapest and to get established as a lawyer there. The Royal Court of Marosvásárhely declared an indirect official coercion, that was upheld by the Royal Curia. The plaintiffs also referred to mental coercion, but Sections 870-875 of the ABGB – that was in force at the time of the sale in Transylvania – could only have been invoked successfully if the customer, or a third

[43] Hungarian currency from August 11, 1892 until December 31, 1926.
[44] MNL OL, K 583, 78. cs. 5a. t., P. V. 4843/1942/20.
[45] MNL OL, K 583, 144. cs. 5. t., P. V. 1261/1943/27. After the annexation of the territory to Romania, beginning in 1923, only Romanian citizens could own agricultural land, so those who wanted to keep their Hungarian citizenship were quickly forced to part with their property. If they had acquired it through succession, they had to alienate it during the inheritance process. GLÓSZ, M., Az 1440/1941. M. E. számú rendelet 6-11. §-ainak és az ezek alkalmazása körül kialakult nézeteknek és bírói gyakorlatnak ismertetése. I. rész. In: *Erdélyi Jogélet*, vol. 1, Nr. 3, 1942, p. 2.
[46] MNL HBML, VII. 2/d, 6. d., P. I. 923/1944.
[47] A square fathom (négyszögöl) was a measurement unit of area with equal to 3.596651 m^2.
[48] MNL OL, K 583, 77. cs. 5. t., P. V. 2401/1942/33.

party with their knowledge, had forced them to enter into the contract.[49]

According to one of the judgments of the Royal Curia in a land registry cancellation lawsuit initiated in the reclaimed area of Felvidék (on the basis of the above-mentioned legislation largely identical to the Basic Decree), the official coercion or threat could not be taken into account if there was also the complicity of other internal or external factors that significantly influenced the will to conclude a transaction, so the seller would have alienated his property just for this reason. In addition to the alienator's personal circumstances, a particularly favorable sales opportunity, the potential of beneficial use of the received purchase price, and the goal of alleviating debt burden were considered such factors.[50] In a previous lawsuit of Mihály Várady (Brenner) and his children, also concerning cancellation a land registry entry, the respondents claimed that the plaintiffs invested the purchase price received from them in another property, thus using it advantageously. In addition, they also claimed that the plaintiffs had a debt of 300,000 lei, which was also deducted from the purchase price. The Royal Court of Máramarossziget declared however, that the mentioned property was purchased two and a half months before the purchase contract concluded with the defendants, and the alleged debt was not proven, so the lawsuit was decided in favor of the plaintiffs based on indirect official coercion.[51]

2.1.3 A Threat of Taking Coercive Official Measures

The Royal Court of Szatmárnémeti also discovered signs of a threat in the activities of János Barbul, as he knew that the plaintiff had already opted for Hungarian citizenship, and he could have accepted the 50 acres of real estate in order not to bring this fact to the attention of the authorities. The consequence of that would have been further expropriation, not only at the time of the conclusion of the temporary, but also the final sales contract, years later.[52]

The plaintiff, Count Rafael Zichy, had a total of nearly 19,000 acres of arable land and forest within the boundaries of several villages. As part of the Romanian agrarian reform in the early 1920s, all this was expropriated together with 100 hectares of vineyards and orchards. The decision was justified by the fact that the plaintiff did not reside in Romania,[53] even though the opposite was confirmed by another authority. He appealed to the Supreme Agrarian Council for the review of the second instance body, but his case was not scheduled for a trial. A year passed when the first respondent, Dr. János Jacob, the county clerk of the Agrarian Council, summoned the plaintiff's lawyer and informed him that a favorable result could only be achieved through him. The first respondent requested a water mill in Alsólugos and 40 acres of real estate, for which the "purchase" (gift) contract was concluded in 1923. Another year passed, but no decision was made. Then the first respondent declared that the Count had to make a greater sacrifice. He asked for the exchange the mill and the 40 acres of real estate for the 1,500 acres of beech forest in Középes, that was worth more than 1 million pengős (30 million lei); the plaintiff also agreed to this. Soon, the Supreme Agrarian Council found that the plaintiff was not absent, and therefore exempted his vineyard from expropriation as well as 200 acres of arable land, and expropriated 'only' 8,258 acres and 785 square fathoms from the forest. The plaintiff then alienated additional real estate to the respondents in 1927, because the respondent prevented the execution of the decision all the time, including by filing an appeal under a false name. For these, the plaintiff did receive consideration, but less than the contractual amount. The plaintiff asked for this to be included in the compensation for the damage caused to his forest, which the court granted. According to the Royal Court of Nagyvárad, the count alienated his real estate with a (sham) sale and exchange contract in order to be at least partially exempt from the harmful consequences of the expropriation. Because he received approximately 1/60[54] of the value of his real estate, so he suffered serious financial damage due to the expropriation of non-exempt areas. In view of all these, the court established the existence of the threat of taking coercive official measures.[55]

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[49] MNL OL, K 583, 144. cs. 5. t., P. V. 1298/1943/34. As a committee member of the Bar Association, Andor Fekete vehemently opposed the oath, saying that the supreme authority had not passed to Romania yet. Later, his life was threatened, and he was harassed several times. VERESS E., Erdélyi sorsfordulók Fekete Andor marosvásárhelyi ügyvéd emlékirataiban. In: FEKETE, B. – MOLNÁR, A. (Ed.), *Iustitia emlékezik, Tanulmányok a „jog és irodalom" köréből.* Budapest, 2020, p. 194–195.

[50] GLÓSZ, M., Az 1440/1941. M. E. számú rendelet 6-11. §-ainak és az ezek alkalmazása körül kialakult nézeteknek és bírói gyakorlatnak ismertetése. I. rész. In: *Erdélyi Jogélet*, vol. 1, Nr. 3, 1942, p. 5. NIZSALOVSZKY, E. et al. (Ed.), *Grill-féle Uj Döntvénytár.* vol. XXXV, Budapest, 1943, p. 294.

[51] MNL HBML, VII. 2/d, 6. d., P. I. 1335/1944.

[52] MNL OL, K 583, 77. cs. 5. t., P. V. 2401/1942/33.

[53] Pursuant to Section 6, point c) of the Act on Agrarian Reform, the village properties of the absentees exceeding 50 acres were expropriated. The absentee was a person who stayed outside the territory of Romania without an official assignment between December 1, 1918 (the date of the Gyulafehérvár declaration stating the unification of Hungarian territories with Romania) and March 23, 1921 (the submission of the bill). Temporary absence and temporary interruption of absence could not be taken into account. The executive decrees issued from 1922 classified foreign citizens and those who stayed outside of Romania for a single day as absentees. VENCZEL, J., Az erdélyi román földbirtokreform. In: TAMÁS, L., (Ed.), *Az Erdélyi Tudományos Intézet Évkönyve 1940–41.* Kolozsvár, 1942, p. 313–314. See also: *Az erdélyi agrártörvény.* Kovászna, 1921, p. 6–7. *Az agrár-reform törvény végrehajtási rendelete*. Nagyvárad, 1921, p. 34.

[54] The law considered 1 lei to be equal to 1 crown, although the real ratio was 30:1. The market value of the government securities given as compensation was half of the face value. MNL OL, K 583, 145. cs. 5. t., P. V. 5265/1943/24. The annual profit rent could also be used as a basis for determining the compensation amount, but in the Old Kingdom (that is, the territory that already belonged to Romania before the Peace Treaty of Trianon) it was counted forty times, while in the new parts of the country it was only twenty times. VERESS, E., Integration of Transylvania into Romania from the Perspective of Private Law (1918–1945). In: *Acta Universitatis Sapientiae, Legal Studies*, vol. 9, Nr. 2, 2020, p. 351.

[55] MNL OL, K 583, 145. cs. 5. t., P. V. 5265/1943/24.

Plaintiff Ödön Fábos, a resident of Sepsiszentgyörgy, wanted to sell his coffee house in the town, so in March 1919 he concluded a sales contract with János Axente, but the buyer was reluctant to pay the purchase price. The plaintiff therefore withdrew from the contract, that he also communicated to the buyer. As a response to this, János Axente requested the intervention of the Háromszék County sub-prefect. In the summer of 1919, the administrative official summoned the plaintiff and his lawyer and threatened them with arrest. He said that he, as a factor of the Romanian administration, had a duty to serve the Romanian racial interests. And it is in the Romanian national interest that Romanians acquire real estate in Székely cities. He stated that they could not leave until the deed of alienation of the property was issued. The plaintiff feared torture, which was confirmed by the fact that several Hungarian leaders were arrested at that time. At his request, the lawyer drew up the temporary sales contract on the spot, signed by János Axente's agent, and witnessed by the sub-prefect and his deputy. The contract also contained that the plaintiff agrees that the person to be designated by the agent will be the buyer in the final contract. In November 1919, János Axente named the fourth respondent as a business company. The plaintiff was reluctant, then the sub-prefect called him again, at which point he signed the contract on the advice of the lawyer. According to the judgment of the Royal Court of Appeals of Marosvásárhely, the latter two contracts were concluded under the influence of the threat of taking an official measure that also threatened material damage and served the interests of the acquiring party. But in addition to the reason for a contest contained in the Basic Decree, reference to general private law rules would also have led to success: the Section 1479 of the ABGB provided 30 years, Hungarian private law provided a 32-year period, while only 23 years passed until the lawsuit was filed.[56]

2.2 Auction Law Infringement

The previous owner could also contest the acquisition of real estate by means of an official auction held in the above time interval (1918-1940) and file an action for the cancellation of the ownership right registered on the basis of the auction purchase, 1) if the auction was ordered or held in violation of procedural or other legislation, 2) the auction buyer knew about the violation of the law (therefore he was in bad faith), 3) and the real estate was still his property. Among the listed conjunctive conditions is illegality, in the absence of which it was not possible to contest the acquisition of real estate that was obtained through an official auction (at least on the basis of this section).

The Royal Court of Appeals of Marosvásárhely found a violation of procedural rules, when the plaintiff, Dr. Elemér Mán, the former owner, was not notified of the date of the auction, so he could not be present. However, it was not proven that the auction buyer knew about this, so the court did not order the restoration of the original state.[57]

In another case, the opinion of the Royal Court of Appeals of Kolozsvár was upheld by the Royal Curia, that the payment of the auction purchase price is a legal act after the auction has been held, so the plaintiff cannot refer to this Decree as a legal basis due to its failure to do so.[58]

The Royal Court of Appeals of Nagyvárad modified the judgment of the Royal Court of Szatmárnémeti and declared the property acquisition invalid, and that it was based on a forged auction record. The buyers registered in the land register were not present at the auction, but later the 'agents' changed the content of the deed by wrongly indicating the quality of the buyers present as agents, as well as the names of the principals. On the basis of the forged record, the buyers who were introduced afterwards could acquire ownership rights, so they were the direct acquirers, so the opposite position of the first court was wrong. The forgery – although it happened later – had an effect on the date of the auction and appeared as a violation of the law, because it presented the auction and its result differently from reality. The Court of Appeals also found that the purchasers who were subsequently registered knew about the infringement, as they were aware that they had not concluded a sales contract with the original purchasers, but had signed the forged record afterwards.[59]

The Royal Court of Appeals of Nagyvárad also did not find the plaintiffs' claim justified, where the plaintiff stated the auction was irregular because the head of the Romanian tax office (the defendant's husband, who was known to harbor animosity towards Hungarians) also participated in the auction, and therefore no one dared to offer a higher price. It was proven that him and another bidder were in competition, but the latter could no longer offer a higher amount based on his order, so he withdrew from the bidding at one point.[60]

3. Summary

The adoption of the Basic Decree in 1941 was not without precedent, as on the returned Felvidék and Subcarpathian territories, the government tried to 'redress' the grievances resulting from the alienation of real estate in the time between the Frostflower Revolution and the return of the territories with legislation of similar content in 1939. Land registry cancellation lawsuits could be initiated since the Land Registry Regulations were introduced in Hungary in 1855 and in Transylvania in 1870, so this legislation did not create a new type of lawsuit, it only temporarily broadened the scope of an existing case and extended the deadline. Looking at the available archival and literary sources, it can be concluded that it was necessary to create it, since the harms caused by politically motivated official measures could not remain unremedied, and by accepting the interpretation of the Royal Curia, it can be stated that the

[56] MNL OL, K 583, 145. cs. 5. t., P. V. 5283/1943/39.
[57] MNL OL, K 583, 144. cs. 5. t., P. V. 1635/1943/21.
[58] MNL OL, K 583, 145. cs. 5. t., P. VII. 3371/1943/22.
[59] MNL OL, K 583, 214. cs. 5. t., P. VII. 707/1944/47.
[60] MNL OL, K 583, 214. cs. 5. t., P. VII. 1970/1944/36.

legal mandate was provided. According to Imre Harsányi, the result of Section 6 was nothing more than "[reparation] for the injustice suffered, for the financial and moral damage to the Hungarians who were expelled from their narrower homeland, as well as those who remained in their place, but were deprived of their possessions."[61]

At the same time, the fact that lawsuits could also be filed against bona fide third parties even after a significantly longer period of time compared to the general rules, could raise concerns about the security of property transactions. Although it served its purpose, the Basic Decree cannot be considered a thorough legislative product, as it required several essential additions within a short period of time, and it left the task of delimiting individual grounds of challenge to judicial practice. Legal practitioners may be displeased with this legislative attitude, given the developments that the courts followed quite different interpretations during their judgments. In particular, the nature of the official measure and the direct or indirect coercion of the authorities formed the basis of the deviations.

In spite of this, neither a decree was enacted nor a judicial uniformity decision was rendered in this regard in order to harmonize the practice, the reason for which is perhaps to be found in the fact that the legislative goal was realized even with the separation: whoever did not alienate their real estate in good faith, but as a result of the act of a Romanian state body, was able to successfully request the restoration of the original state. The plaintiffs obviously did not appeal the judgment favorable to them with a legal remedy on the basis that the court did not accept the reasons for the contest originally included in their claim – perhaps not even precisely defined – and the respondents, requesting the rejection of the claim, did not consider either of them to be established. The legislator bound the contest of real estate acquisitions by auction to much stricter conjunctive conditions, since in the case of normal alienations, neither a violation of the law (according to my understanding) nor bad faith on the part of the buyer had to exist, and the real estate could also be owned by a third party.

The above, I believe, give an authentic picture of the application of Section 6 of the Basic Decree, taking into account the available sources. As a result of the known historical events, the effect of the Decree was terminated after just four years, and the property relations underwent a much greater change than before. Nevertheless, it is worth dealing with such forgotten, but once important legislation, since the issue of decree-making within the scope of legislation, as well as the problem of legislation with retroactive effect and the public interest intervention of the state in private legal relations, is far from being forgotten.

[61] HARSÁNYI, I., Az erdélyi ingatlanperekről. In: *Gazdasági Jog*, vol. 4, Nr. 5, 1943, p. 263-264.

The Legal History of Informed Consent

Máté Julesz *

Abstract

Human experiments during the national socialist and communist eras remind us that medical research involving human subjects should have legal limitations. Nowadays, in medical malpractice cases, instead of simple medical consent, the informed consent of the patient or a proxy is required to exculpate the health care provider sub judice. The origin of these types of medical consent is discussed with special regard to their development before and during the twentieth century. Simple medical consent appeared in England in the Slater v. Baker and Stapleton case of 1767. The legal history of medical consent dates back to at least the eighteenth century, although informed consent arose as late as in the Nuremberg Code and was literally called "informed consent" in the Salgo v. Leland Stanford Jr University Board of Trustees case of 1957 in the US. Despite the international rules of informed consent in effect in medical research involving human subjects and in health care provision, we still find countries with medico-legal cultures differing from Western norms. For example, the Confucian style of informed consent in China, involving the family's role in granting or declining informed consent, sometimes collides with the expectations of the Food and Drug Administration in the US or those of the European Medicines Agency in the EU. Moving different medico-legal cultures closer to each other should be an important objective of both international lawmakers and national legislators.

Keywords: *Simple medical consent; informed consent; human medical research; medical malpractice; family informed consent in China; national socialist and communist abuses.*

1. The early years with special reference to the national socialist and communist eras

In Ancient Greece, a freeborn physician had to explain the details of treatment to a freeborn patient *ex ante*, while a slave physician did not have to do the same for a slave patient. We do not know whether the original version of the Hippocratic Oath actually contained something similar to present-day informed consent.[1] We have historical texts available, although these texts have been modified over the centuries. It is easy to see the institution of simple medical consent or that of informed consent in these texts; however, it is complicated to prove them beyond question. Patient consent has always been a form of proof for the doctor. Defensive medicine prevailed, for instance, when the physician had to perform a surgical operation with a doubtful outcome. It was in the best interests of the physician to obtain prior consent from the patient in an overt way, so that the patient (e.g., a noble man or his family) could not take revenge on the doctor afterwards.

The legal history of the institution of informed consent is often thought to date back to the mid-twentieth century, i.e., to the Nuremberg Code of 1947. According to Weindling, "Informed consent has been an axiom of post-World War II clinical research and practice."[2] Ajlouni came up with a treatment contract from the time of the Ottoman Empire, in the seventeenth century, as the first documented informed consent.[3] However, authors like Vollmann et al. maintain that this treatment contract did not include a modern type of informed consent. It merely excluded the physician's liability for the death of the patient.[4] Beauchamp argues that "Physician ethics was traditionally a nondisclosure ethics with virtually no appreciation of a patient's right to consent."[5] As early as 1972, Jay Katz published his book on *Experimentation with Human Beings: The Authority of the Investigator, Subject, Professions, and State in the*

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1 KUMAR, N.K., Informed consent: Past and present. In: *Perspectives in Clinical Research*, vol. 4, no. 1, 2013, pp. 21–25.

2 WEINDLING, P., The origins of informed consent: The international Scientific Commission on Medical War Crimes, and the Nuremberg Code. In: *Bulletin of the History of Medicine*, vol. 75, no. 1, 2001, pp. 37-71, quotation on p. 37.

3 AJLOUNI, K.M., History of informed medical consent. In: *Lancet*, vol. 346, no. 8980, 1995, p. 980.

4 VOLLMANN, J., WINAU, R., and BARON, J.H., History of informed medical consent. In: *Lancet*, vol. 347, no. 8998, 1996, p. 410.

5 BEAUCHAMP, T.L., Informed Consent: Its History, Meaning, and Present Challenges. In: *Cambridge Quarterly of Healthcare Ethics*, vol. 20, no. 4, 2011, pp. 515–523, quotation on p. 515.

Human Experimentation Process,[6] and, in 1986, Faden and Beauchamp put out their book on *A History and Theory of Informed Consent*.[7] These monographs are generally regarded as the main sources of the history of informed consent; however, when they were published, the medico-legal institution of informed consent was in its infancy. Much has happened since then in the domain of informed consent. Both medical research on human subjects and health care provision looked different from today's research and health care practices.

The professional literature on informed consent is huge; however, it is difficult to find a starting point in history. Such a point in time differs in legal history from that in medical history. Medical history considers the concept of informed consent in a broader sense than legal history. Simple medical consent, implied consent, and informed consent are all related to the doctor-patient relationship; nevertheless, the institution of simple medical consent preceded the emergence of informed consent. In a narrow sense, the history of medico-legal institutions contemplates positive law, including both statutory law and binding case law, while the history of medicine does not necessarily take into account the existence of written medico-legal rules.

The legal history of informed consent has been analyzed by legal historians in depth, although there is no consensus on how, when, and why it came into existence. There is no generally accepted agreement on the details of the legal practice of informed consent – sometimes even within the borders of the very same state. Practically speaking, the international rules on informed consent do not bind every country, thus leading to conflicts, for example, in cross-border medical research involving human subjects.

In Nuremberg in 1947, in the case of *USA v. Karl Brandt et al.*, US military judges, among others, emphasized that the research subjects should be informed of the risks and that they should be free to consent or decline; however, the term *informed consent* was not mentioned.[8] The first point of the Nuremberg Code declares that "before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment."

In Prussia in 1898, Professor Neisser tested a vaccine against syphilis on prostitutes without their consent. As a consequence, he was fined by the Royal Disciplinary Court.[9] This case highlights the importance of patient autonomy as early as the nineteenth century. A directive issued by the Prussian minister of the interior in 1891 had already stipulated that no prisoner should be treated with tuberculin against their will. Today, this late nineteenth-century ministerial directive is seen by many as the first documented patient consent rule;[10] however, it is important to note that the term "informed consent" was not used at that time. Only a sort of simple medical consent was required as a result of humanistic lawmaking, but we should not call it informed consent. The relevance of patient consent, even if it was not literally called "patient consent," dates back to the nineteenth century or maybe before. In other countries, the history of patient consent dates back to even earlier centuries, as we shall see below.

Patients' right to be asked whether they really want to be treated or to become a research subject derives from natural law. Therapeutic misconception and similar problems arose in the second half of the twentieth century.

Before the second half of the twentieth century, the personal rights of the patients were mostly neglected or only taken into consideration by the court if the infringement induced material damage. In court practice, diagnostic failure only arose in the mid-twentieth century. Immaterial damage and diagnostic failure became part of medical law not earlier than the second half of the twentieth century. Court practice in continental European countries copied each other. For instance, Hungarian practice followed that of Germany. The main differences were to be found between French and German court practice. In France, the patient could be indemnified for immaterial damage long before the German courts acknowledged this patient right. Wallace argued in 1986 that "It may be extremely difficult to prove a patient was psychologically damaged by a failure to disclose risk information about the surgery, sufficient that if given that information, the patient would not have consented."[11]

It is true that the starting steps may be traced back to a century or even more centuries before, although informed consent, as it is used by human rights documents and constitutional texts today, came about not earlier than approximately 60–70 years ago. Its development is still underway. The degree of democracy and the rule of law shows the level of patient rights in a specific country. Authors from Romania argued even in 2018 that in their country, the concept of informed consent in research is quite new, and it has not been grounded in the scientific community, much less in the greater society.[12]

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[6] KATZ, J., *Experimentation with human beings. The Authority of the Investigator, Subject, Professions, and State in the Human Experimentation Process* (New York: Russell Sage Foundation, 1972).

[7] FADEN, R.F. and BEAUCHAMP, T.L., *A History and Theory of Informed Consent*. (New York: Oxford University Press, 1986).

[8] CZECH, H., DRUML, C., and WEINDLING, P., Medical Ethics in the 70 Years after the Nuremberg Code, 1947 to the Present. In: *Wiener Klinische Wochenschrift*, vol. 130, Supplement 3, 2018, pp. 159–253.

[9] VOLLMANN, J. and WINAU, R., Informed consent in human experimentation before the Nuremberg code. In: *British Medical Journal*, vol. 313, no. 7070, 1996, pp. 1445–1447.

[10] VOLLMANN, WINAU, and BARON, History of informed medical consent, (n. 4), p. 410.

[11] WALLACE, L.M., Informed consent to elective surgery: The 'therapeutic' value? In: *Social Science & Medicine*, vol. 22, no. 1, 1986, pp. 29–33, quotation on p. 29.

[12] ALEXA-STRATULAT, T., NEAGU, M., NEAGU, A-I., et al., Consent for participating in clinical trials - Is it really informed? In: *Developing World Bioethics*, vol. 18, no. 3, 2018, pp. 299–306.

In Eastern Europe, patients' right to a truly "informed" consent developed after the fall of communism at the end of the 1980s. Under communism, the paternalistic health care system did not really allow for the institution of informed consent. The physician decided how to treat the patient, and the patient was not adequately informed of the details – although they could refuse treatment and remain without hope. In other words, the patient was neither informed nor offered alternative treatments. The main rule was that the patient could not choose a doctor: there were no options in the state health care system. Even in private health care practice, which was permitted as an exception to a few doctors who also held a post in the state health care system, patients were not informed in detail and thus could not grant real informed consent.

Authors from Romania reason that the need for consent for surgical procedures became stipulated in the 1930 s in the law regulating the Romanian College Board and its deontological norms.[13] However, the authors differentiate between informed consent and simple medical consent and refer here to the latter.

In communist Hungary,[14] the patient's right to consent to or refuse medical treatment was based on Ordinance No. 8 on medical practice of 1959 issued by the Presidential Council of the People's Republic of Hungary. Section 6 declared that a patient's written consent was needed before in-patient surgery. In the case of a patient's incapacity, written proxy consent was accepted. If the life of the patient was in imminent danger or if, during surgery, it was necessary to extend the operation, further consent by the patient or by proxy was not needed. Blasszauer reasoned in 1986, that, in Hungary, "The great majority of patients are dissatisfied with the amount of information they receive from physicians… Because information is insufficient, obtaining consent becomes a formal and superficial procedure."[15] In addition, at that time in Hungary, written consent was only required before a surgical intervention. The legal institution of informed consent seemed to be a false imitation of the Western medico-legal rules enshrined in international documents. The facts differed from the laws, and the laws on informed consent also suffered from defects. The case of Hungary was just one example from the Eastern Bloc. The communist practice of informed consent – as borne out by Blasszauer's statement – did not fully respect international patient rights. A true intention of both the lawmakers and the society to change this situation arose somewhat later in the post-communist countries.

The right to grant or refuse consent to medical treatment or medical research has found its place among the personal rights included in the Hungarian Civil Code of 1959 amended in 1977. Since then, personal rights have become more accentuated. Nonetheless, the right to informed consent as a personal right has been developed by court practice over a considerable period of time. However, it has never been formulated by the Hungarian Civil Code *expressis verbis*. It has functioned as a derivative of other personal rights, such as the right to dignity and the right to health and life (Section 76 of the communist Civil Code of 1959, as amended in 1977). Today, it is also part of constitutional private law. In the 1970s and 1980s, the amount of medical malpractice litigation was low. We had to wait until the fall of communism to see the rise of such lawsuits from the 1990s onward. With time, the procedural position of patients improved; however, there has never been an equality of arms.

The right to patient self-determination is a human right. This right dates back to the birth of social human rights at the end of the nineteenth century. Nevertheless, this patient right has only been rigorously applied since the second half of the twentieth century. Previously, the patient right to self-determination could be overruled by the principle of the so-called "greater good." According to Section 9 of the Declaration of Helsinki – Ethical Principles for Medical Research Involving Human Subjects (World Medical Association, 1964), "It is the duty of physicians who are involved in medical research to protect the… right to self-determination… of research subjects."

The Council for International Organizations of Medical Sciences (CIOMS), in conjunction with the World Health Organization, started to develop biomedical research guidelines in the 1970s. The first version was issued in 1982, with several modifications having been adopted since then. In 1986, Blasszauer noted that, in Hungary, "Ethics committees have been formed at the local and national level, and medical schools are beginning to take seriously the systematic teaching of medical ethics. In some quarters, however, old attitudes persist. Among older doctors paternalism reigns supreme, and lawmakers continue to ignore international ethical guidelines."[16] Nevertheless, at that time, approval by the Hungarian National Research Ethical Committee was already required to conduct medical research on human subjects.

On the other hand, the patient's right to refuse medical treatment was not fully respected before the twentieth century. According to Section 3(a) of the Declaration of Lisbon on the rights of the patient (World Medical Association, 1981), "The patient has the right to self-determination, to make free decisions regarding himself/herself. The physician will inform the patient of the consequences of his/her decisions."

The patient's refusal is disregarded if it poses a danger to their health or life or that of others, for example, in the case of a psychiatric patient or if a pandemic[17] necessitates it. Psychiatric patients' rights may be legally and necessarily restricted.

[13] HOSTIUC, S., BUDA, O., and CURCA, G.C., Medical consent in interwar Romania. In: *Proceedings of the Romanian Academy, Series B*, vol. 17, no. 2, 2015, pp. 191–196.

[14] JULESZ, M., The legal history of gratitude payments to physicians in Hungary. In: *Journal on European History of Law*, vol. 9, no. 1, 2018, pp. 149–157.

[15] BLASSZAUER, B., In Hungary, the Old Medical Ethics Meets the New. In: *Hastings Center Report*, vol. 16, no. 3, 1986, pp. 25–27, quotation on p. 27.

[16] Ibid., p. 25.

[17] JULESZ, M., Health equity and health data protection related to telemedicine amid the COVID-19 pandemic. In: *Információs Társadalom*, vol. 22, no. 2, 2022, pp. 27–38. See also JULESZ, M., Telemedicine and COVID-19 pandemic. In: *Információs Társadalom*, vol. 20, no. 3, 2020, pp. 27–38.

Nevertheless, so-called political psychiatry was well-known during the Soviet era and was antithetical to the principles of *beneficere* and non-maleficence. In the Soviet Union and its satellite countries, those who criticized the governing power were treated as insane against their will. Further, it was not only Eastern European communist countries that followed the Soviet practice of political psychiatry. This practice survived until the 1980s.

For instance, in Bulgaria, in 1961, the Stalinist Code of Penal Procedure of 1952 was amended to preventively detain and treat the mentally ill against their will because a mentally ill person "may perpetrate a crime of significant community danger or constitutes a danger for oneself or for one's relatives" (Article 124 Section 2). This criminal regulation applied to the mentally ill who had not committed any crimes.[18]

Another example was communist Hungary, where psychiatrists were not employed by the Ministry of Health like their medical colleagues but by the Ministry of the Interior. Character assassination and incarceration in asylums were important tools used by such regimes.

In 1938, Italians Cerletti and Bini introduced electroconvulsive therapy, and no informed consent from the patient or a proxy was necessitated for many years. This method was widely used for all sorts of psychiatric diseases.

Czech et al. argue that "The association of ECT [electroconvulsive therapy] with the National Socialist 'euthanasia' program is indeed one of the reasons why this method of therapy is to this day perceived as tainted in the public perception of many countries. Another element of the early history of electroshock therapy (as it was also known) in Nazi-occupied Europe was its introduction in Auschwitz by prisoner physician Zenon Drohocki and its adoption by SS physicians for their own purposes."[19] According to oral history, electroconvulsive therapy was administered to concentration camp prisoners with the aim of testing how much the human body could tolerate. Those who survived the series of electroshocks were finally sent to the gas chamber to cover up the research being conducted. As a result, many died. It was also a sort of punishment for breaking concentration camp rules. Survivors reported that electroconvulsive therapy was a method of torture, since it was applied without anesthesia and muscle relaxants.

Experiments with electroconvulsive therapy were performed in the Soviet Union in the 1950s, and, from the late 1950s, the results were broadly applied in the satellite countries as well.[20] Today, in countries with the rule of law, electroconvulsive therapy may only be applied with patient consent or proxy consent. However, if the patient is against it, regardless of being legally capable or not, it should not be administered.

In Hungary and elsewhere, legally unchecked experiments on psychiatric patients as human subjects were common not just during World War II but also during the decades of communism. Section 30 of the Declaration of Helsinki declares that "Research involving subjects who are physically or mentally incapable of giving consent, for example, unconscious patients, may be done only if the physical or mental condition that prevents giving informed consent is a necessary characteristic of the research group. In such circumstances the physician must seek informed consent from the legally authorized representative. If no such representative is available and if the research cannot be delayed, the study may proceed without informed consent provided that the specific reasons for involving subjects with a condition that renders them unable to give informed consent have been stated in the research protocol and the study has been approved by a research ethics committee."

As early as 1944, Hastings and Shimkin traveled to Moscow under the auspices of a medical research project between the United States and the Soviet Union. The scientists reported in *Science* in 1946 that medical research was conducted in more than two hundred institutes in the Soviet Union, with approximately 19,000 researchers working there. These institutes came under the administration of the Commissariat of Public Health and the Academy of Medical Sciences.[21] In the Soviet Union, pharmaceutical clinical trial results were evaluated by the Commissariat of Public Health from the early 1920 s, and, in 1923, the newly set up Pharmacological Committee was charged with overseeing the domestic production of pharmaceuticals and the import of pharmaceuticals from abroad.[22]

Vasilyev et al. contended that the concept of informed consent was alien to the paternalistic communist regime in the Soviet Union. According to the authors, "The importance of personal and other informal connections in the Soviet model should not be underestimated. Researchers of Soviet and post-Soviet healthcare repeatedly noted how this system depends on informality and negotiation… such personal connections and the generally informal nature of the Pharmacological Committee as an 'independent' group of Moscow-based experts (and in many ways an old boys' club) arguably made many decisions about drug registration and testing rather arbitrary and prone to manipulation."[23]

Vasilyev et al. thus show how the institution of informed consent actually worked in the Soviet Union. This was also true

[18] BOYADJIEV, B. and ONCHEV, G., Legal and cultural aspects of involuntary psychiatric treatment regulation in post-totalitarian milieu: the Bulgarian perspective. In: *European Journal of Psychiatry*, vol. 21, no. 3, 2007, pp. 179–188.

[19] CZECH, H., UNGVARI, G.S., UZARCZYK, K., et al., Electroconvulsive Therapy in the Shadow of the Gas Chambers: Medical Innovation and Human Experimentation in Auschwitz. In: *Bulletin of the History of Medicine*, vol. 94, no. 2, 2020, pp. 244–266, quotation on p. 245.

[20] GAZDAG, G., TAKÁCS, R., UNGVARI, G.S., et al., The Practice of Consenting to Electroconvulsive Therapy in the European Union. In: *Journal of ECT*, vol. 28, no. 1, 2012, pp. 4–6. See also KALISOVA, L., MADLOVA, K., ALBRECHT, J., et al., Electroconvulsive Therapy in the Czech Republic. In: *Journal of ECT*, vol. 34, no. 2, 2018, pp. 108–112.

[21] HASTINGS, A.B. and SHIMKIN, M.B., Medical Research Mission to the Soviet Union. In: *Science*, vol. 103, no. 2681, 1946, pp. 605–608.

[22] VASILYEV, P., PETRENKO, A, and TAYUKINA, V., Soviet pharmaceutical regulation (1918–1990). In: *Canadian Medical Association Journal*, vol. 193, no. 49, 2021, pp. E1893–E1895.

[23] VASILYEV, P., PETRENKO, A, and TAYUKINA, V., Dealing with Ethical Issues in Clinical Trials: The USSR in the Global Context. In: *European Journal for the History of Medicine and Health*, vol. 78, no. 2, 2021, pp. 377–391, quotation on pp. 388-389.

for the Eastern Bloc; however, we have little information from the satellite countries, except for oral history. Many authors from post-communist countries still do not acknowledge the abuse of the communist administrative authority in relation to drug testing. In the Soviet Union, it was officially claimed that the international rules for clinical trials were followed. Indeed, Leonid Brezhnev had signed the Helsinki Declaration of 1964 for the USSR and thus adopted the international rules for medical research on human subjects. Nonetheless, Soviet medical research practice largely differed from that of the political West.

The human experiments at the hands of the Nazis and Unit 731 as well as the political psychiatry in the Soviet Union and the Eastern Bloc are stark examples from the medical history of mankind. All those cases later served to develop the patients' right to self-determination and the concept of informed consent. Capron argues that "Prior to the war, Germany had on its statute books a set of prohibitions on unethical research – particularly research conducted on people whose ability to provide informed consent was compromised – that failed to prevent the human rights abuses in the concentration camps."[24] According to Dickinson, it was only in 1997 that the Japanese Supreme Court admitted that human experiments had been conducted by Unit 731 of the Japanese Army in 1937–1945.[25] It is difficult to take responsibility for the deeds of one's ancestors. Germany has done it, while Japan is hesitant to indemnify the victims or their descendants. In Nazi concentration camps and under the auspices of Unit 731, many prisoners were infected with serious diseases and suffered vivisection to examine the effects of those diseases on the human body. Some of those human experiments furthered the development of medicine and pharmacology, while others were tortures with no medical purpose. Regardless of their aims, both the Nazi and Unit 731 human experiments constituted crimes against humanity.

A crime against humanity never expires. It should be prosecuted with no statute of limitations, however, in time, the victimizers vanish, and their crimes beget their homeland's ethical responsibility. Even if many victimizers escaped criminal liability, acknowledgement of those crimes by the states concerned may represent a kind of apology. Instead of indemnifying the victims, mere political gestures could suffice. In this way, crimes against humanity become integrated into the history of mankind.

Informed consent may be perceived as a legal institution in medical law, especially in medical malpractice cases and in the field of medical research. There is another way to understand the term *informed consent*: that is the lay perception. One may consider informed consent as consent to anything concerning bodily integrity and, in a broader sense, the person of the patient. In this latter interpretation, not only health care workers but also any other professionals need to obtain prior consent to intervene in another person's privacy and other personal rights. While, according to the first understanding, informed consent is a medico-legal institution, the second understanding is not restricted to health care. Everyone has personal rights until death. Everyone is entitled to refuse consent, unless thus endangering other people's life and health.

2. The history of informed consent in the United States

The American Medical Association released its first *Code of Medical Ethics* in 1847. The *Code* was in favor of *pia fraus* over giving "gloomy prognostications" to the patient. "But he [the physician] should not fail, on proper occasions, to give to the friends of the patient timely notice of danger, when it really occurs; and even to the patient himself, if absolutely necessary" (Chapter 1, Sec. 4). The very same section of the *Code* also declared that "The life of a sick person can be shortened not only by the acts, but also by the words or the manner of a physician. It is, therefore, a sacred duty to guard himself carefully in this respect, and to avoid all things which have a tendency to discourage the patient and to depress his spirits." Nevertheless, the introduction to the *Code* generally regarded "veracity" as being of great importance.[26] Interestingly, the *Code* was a key source in developing medical law and ethics in communist Hungary.

In the United States, there were court rulings as early as the beginning of the twentieth century requiring the consent of the patient; however, the term *informed consent* was not used there with its present-day meaning. For instance, in 1905, in the *Mohr v. Williams*[27] medical malpractice case, the patient, Mrs. Mohr, was awarded damages because Dr. Williams had operated on her left ear without her prior consent.[28] Justice Brown of the Minnesota Supreme Court cited the principle of every person's right to complete immunity of their person from physical interference by others. Justice Brown also stated that, even if there had been no negligence, the doctor's act would have been wrongful and unlawful.[29]

In 1906, in the *Pratt v. Davis* case,[30] the Illinois Supreme Court found that Dr. Pratt should not have removed Mrs. Davis's uterus and ovaries without her consent. Dr. Pratt proceeded with the surgical intervention to treat her epilepsy and noted that, in his opinion, if a patient, in general, accepts treatment from a doctor, then they implicitly consent to all of the

[24] CAPRON, A.M., Where Did Informed Consent for Research Come From? In: *Journal of Law, Medicine & Ethics*, vol. 46, no. 1, 2018, pp. 12–29, quotation on p. 21.
[25] DICKINSON, F.R., Biohazard: Unit 731 in Postwar Japanese Politics of National 'Forgetfulness'. In: *The Asia-Pacific Journal – Japan Focus*, vol. 5, no. 10, 2007, Article ID 2543.
[26] https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/public/ethics/1847code_0.pdf (Accessed on October 4, 2022.)
[27] *Mohr v. Williams,* 104 N.W. 12 (Minn. 1905)
[28] BAZZANO, L.A., DURANT, J., and BRANTLEY, P. R., A Modern History of Informed Consent and the Role of Key Information. In: *Ochsner Journal*, vol. 21, no. 1, 2021, pp. 81–85.
[29] https://cite.case.law/minn/95/261/ (Accessed on August 26, 2022)
[30] *Pratt v. Davis*, 224 Ill. 300 (1906)

doctor's professional decisions. The court did not side with Dr. Pratt.[31]

In 1912, in the *Luka v. Lowrie* case[32] heard before the Supreme Court of Michigan, the surgeon's lawyer reasoned that a 15-year-old boy's mangled and crushed left foot had to be amputated to save the boy's health and life. This happened without the consent of the parents because they were not available. The court accepted this argumentation because they found that, if the parents had been there, they would have consented. In addition, four other physicians were consulted before the medical intervention, and all of them supported the emergency amputation. At any rate, the child's interests supersede the parents' will. We had to wait until 1944, when, in the *Prince v. Massachusetts* case,[33] the Supreme Court of the United States declared the following binding rule: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[34] This case is still often cited, for example, when parents refuse mandatory vaccination for their child.

In 1913, in the *Rolater v. Strain* case[35], the Supreme Court of Oklahoma maintained that the "Consent of the patient, either expressed or implied, is necessary to authorize a physician to perform a surgical operation upon the body of the patient. An operation without such consent is wrongful and unlawful, and renders the surgeon liable in damages."[36] The patient agreed to the draining of her inflamed foot but did not consent to the removal of a sesamoid bone in her foot; the surgeon did so, nevertheless. The surgeon was therefore found liable.

In 1914, in the *Schloendorff v. Society of the New York Hospital* case,[37] a patient, Mary Schloendorff, suffered from neoplasia and was recommended surgery, but she refused. However, when she was examined under ether anesthesia, the doctor removed the tumor anyway. This surgical intervention led to serious complications, and, finally, some of her fingers had to be amputated. The New York Court of Appeals declared that "Every human being of adult years and sound mind has the right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages; except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained"[38] (Justice Cardozo's words).

According to both Bazzano et al.[39] and Dankar et al.,[40] the term *informed consent* was first mentioned in the United States in the 1957 medical malpractice case of *Salgo v. Leland Stanford Jr University Board of Trustees*.[41] The court declared that the physician should have told the patient "all the facts which mutually affect his rights and interests and of the surgical risk, hazard and danger, if any..."[42] Plante, a professor at the University of Michigan Law School, stated in 1968 that, in the US, the concept of "informed consent" had spread in the 1960 s and had been "used most frequently in discussion of the liability of a physician to his patient."[43]

In the US (and also in the United Kingdom), according to court practice, the *ex ante* nondisclosure of the risks of a surgical operation constitutes battery both in criminal law and tort law. See, for example, the *Berkey v. Anderson*[44] case in 1969. In 1972, in the *Canterbury v. Spence*, *Cobbs v. Grant*, and *Wilkinson v. Vesey* cases,[45] the importance of the patient's informed consent was further stressed. The legal institution of informed consent became widely applied in medical malpractice cases.[46] These three cases from 1972 boosted the application of informed consent as a patient right in the US. The Minnesota Law Review Editorial Board contended in 1979 that, according to the Supreme Court of Minnesota in the *Cornfeldt v. Tongen* case,[47] "battery will be the appropriate theory of liability when the issue is whether consent was in fact ever given; negligence will be applied when the issue is whether the consent given was informed."[48]

Interestingly, Canada followed US legal practice of informed consent almost from the beginning, thus contrasting with UK practice. In 1979, the Law Reform Commission of Canada conceived that all information that could influence a patient's con-

31 https://cite.case.law/ill/224/300/ (Accessed on September 13, 2022)
32 *Luka v. Lowrie*, 136 N.W. 1106, Michigan 1912
33 *Prince v. Massachusetts*, 321 U.S. 158 (1944)
34 https://supreme.justia.com/cases/federal/us/321/158/ (Accessed on September 28, 2022)
35 *Rolater v. Strain*, 137 PP. 96 (Okla. 1913)
36 https://law.justia.com/cases/oklahoma/supreme-court/1913/14030.html (Accessed on September 19, 2022)
37 *Schloendorff v. Society of the New York Hospital*, 211 N.Y. 125 (1914) (Accessed on September 13, 2022)
38 https://cite.case.law/ny/211/125/ (Accessed on September 13, 2022)
39 BAZZANO, DURANT, and BRANTLEY, A Modern History of Informed Consent and the Role of Key Information, (n. 28).
40 DANKAR, F.K., GERGELY, M., and DANKAR, S.K., Informed Consent in Biomedical Research. In: *Computational and Structural Biotechnology Journal*, vol. 17, 2019, pp. 463–474.
41 *Salgo v. Leland Stanford Junior University Board of Trustees*, 154 Cal. App. 2d 560, 317 P. 2d 170 (1957)
42 https://law.justia.com/cases/california/court-of-appeal/2d/154/560.html (Accessed on August 25, 2022)
43 PLANTE, M.L., Some Legal Problems in Medical Treatment and Research, An analysis of 'informed consent'. In: *Fordham Law Review*, vol. 36, no. 4, 1968, pp. 639–672, quotation on p. 639.
44 *Berkey v. Anderson* (1969) 1 Cal.App.3d 790, 803 [82 Cal.Rptr. 67]
45 *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972); *Cobbs v. Grant*, 104 Cal. Rptr. 505, 502 P. 2d 1 (1972); *Wilkinson v. Vesey*, 295 A.2d 676 (R.I. 1972)
46 BEAUCHAMP, Informed Consent: Its History, Meaning, and Present Challenges, (n. 5).
47 *Cornfeldt v. Tongen*, 262 N.W.2d 684 (Minn. 1977)
48 MINNESOTA LAW REVIEW EDITORIAL BOARD, Medical Malpractice: Expert Opinion Unnecessary to Establish Claim Based on Doctrine of Informed Consent. In: *Minnesota Law Review*, vol. 63, no. 4, 1979, pp. 695–706, quotation on p. 701.

sent should be imparted and that it was the health care provider's liability to insure that the patient understands it.[49]

As to medical research on human subjects in the US, the National Research Act of 1974 was signed into law by President Nixon. Section 202 contained the term *informed consent*. The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research should consider "The nature and definition of informed consent in various research settings" [Section 202(a)(1)(B)(iv)].[50] It is also the Commission's task to "identify the requirements for informed consent to participation in biomedical and behavioral research by children, prisoners, and the institutionalized mentally infirm" [Section 202(a)(2)].[51] The Commission issued the Belmont Report, which was published in the Federal Register in 1979 and is often considered one of the first documents to require informed consent from human subjects.[52] It was an outcome of the problematic Tuskegee Syphilis Study on Afro-Americans. The human subjects with syphilis were not informed of their disease and received placebos, which resulted in many death cases.[53] According to the Belmont Report, human subjects should be informed of the procedure and purposes of the research, the risk/benefit ratio, and possible alternative treatments. In addition, they should be allowed to request information and to quit the research at any time. The information provided must be comprehensible for them, and informed consent must be granted voluntarily, never under duress.[54]

Gray, from the Institute of Medicine at the US National Academy of Sciences, argued in 1978 that there was a "tendency of human subjects review committees [in the US] to confine their attention to consent forms rather than to the process by which consent is sought."[55] Gray found that there was a "limited commitment of professionals to the concept of informed consent."[56] At that time, the legal institution of informed consent was in its infancy in the US. The country had a long way to go before attaining the present quality of the institution of informed consent. Today, the US practice of obtaining informed consent is emulated by many other countries, including young democracies in Eastern Europe as well.

Professor Bhutta from Pakistan argued in 2004 that "The emphasis in most externally sponsored research projects in developing countries is on laborious documentation of several mechanical aspects of the research process rather than on assuring true comprehension and voluntary participation. The onus for the oversight of this process is often left to overworked and ill-equipped local ethics review committees."[57] This problem has still survived, although in decreasing measure. It is not only Pakistan but also Eastern European and other countries that face this negative outcome of being receptive to Western pharmaceutical companies.

In the US, Freedman concluded in 1975 that proxy consent may be granted in the case of medical research on a child. The author highlights that no consent by proxy is acceptable in the case of dangerous or harmful experiments, believing that, if there is no such danger, since a child has no autonomy, proxy consent is an acceptable *modus vivendi* and it is therefore not a matter of "wrongful touching."[58] Section 29 of the Declaration of Helsinki stipulates as follows: "When a potential research subject who is deemed incapable of giving informed consent is able to give assent to decisions about participation in research, the physician must seek that assent in addition to the consent of the legally authorised representative. The potential subject's dissent should be respected."

If an institutionalized, incapacitated person does not have a proxy or guardian, administrative informed consent may be granted by the authorities, although only in the interests of the patient. In my opinion, as regards the dark side of the history of medicine, this administrative informed consent is acceptable for the purposes of medical treatment of a patient's disease, though impermissible for medical research.

3. The history of informed consent in the United Kingdom

The rule of *parens patriae* means that the state may act for those incapacitated. In the United Kingdom, the rule dates back to the sixteenth century, when the King's Bench applied it to mentally ill adults. Later, it was extended to minors as well. The rule is also used in the United States.

In English law, the *Slater v. Baker and Stapleton* case of 1767[59] is usually considered the first medical malpractice case based on the lack of patient consent. The doctors were only mandated to change the bandages on a broken leg, but they rather rebroke the leg to improve the alignment of the bones. The surgeons were found negligent by the court because they had operated on the patient's leg without previously seeking their consent. At that time, English law had already required physicians to obtain a patient's simple medical consent to a surgical operation. This early case was certainly not the first, albeit it was the first such

[49] WALLACE, Informed consent to elective surgery: The 'therapeutic' value? (n. 11).
[50] https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg342.pdf (Accessed on August 30, 2022)
[51] Ibid.
[52] WILLIAMS, K. and COLOMB, P., Important Considerations for the Institutional Review Board When Granting Health Insurance Portability and Accountability Act Authorization Waivers. In: *Ochsner Journal*, vol. 20, no. 1, 2020, pp. 95–97.
[53] HELLER, J., U.S. Testers let many die of syphilis: syphilis killed many untreated in U.S. test. In: *Washington Post*, July 26, 1972; A1.
[54] https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/read-the-belmont-report/index.html#xinform (Accessed on August 28, 2022)
[55] GRAY, B.H., Complexities of Informed Consent. In: *Annals of the American Academy of Political and Social Science*, vol. 437, no. 1, 1978, pp. 37–48, quotation on p. 37.
[56] Ibid.
[57] BHUTTA, Z.A., Beyond informed consent. In: *Bulletin of the World Health Organization*, vol. 82, no. 10, 2004, pp. 771–777, quotation on p. 771.
[58] FREEDMAN, B., Moral Theory of Informed Consent. In: *Hastings Center Report*, vol. 5, no. 4, 1975, pp. 32–39, quotation on p. 38.
[59] *Slater v. Baker & Stapleton* 95 Eng. 860, 2 Wils. KB 359 (1767)

case that was documented.[60] Wilde argues that, in Britain, the consent to surgery of the nineteenth-century patients was given in an autonomous way, and the patients and their friends were told much information in order to stimulate them because surgery was a very expensive medical intervention.[61]

In contrast with the Soviet Union and the Eastern Bloc, Shokrollahi states that the "doctor knows best" paternalistic model vanished in the United Kingdom as early as the second half of the twentieth century.[62] In Habiba's opinion, "The upsurge of anti-paternalism has indicated the enforcement of the notion that consent should be 'informed'."[63] Paternalism in the doctor-patient relationship is still present in many countries. If the patient relies on the physician, the "apostolic function" of the physician also comes to the fore. The "doctor = drug" effect, as described by Michael Balint,[64] an English psychoanalyst, may be advantageous for the patient. Nevertheless, paternalism is mostly understood as a notion with a negative connotation.

During the legal development of the institution of informed consent, medical treatment without informed consent has been regarded as battery in the United Kingdom and by and large throughout the Commonwealth, quite similarly to US court practice. Skegg, a fellow at New College, Oxford, argued in 1975 that "Civil actions for battery are often referred to as instances of assault, or trespass to the person."[65] Selinger asserted in 2009 that "A medical intervention without valid informed consent is a criminal offence and the physician can be charged with battery. Examples of such situations include treatment against the patient's will, different treatment than the one consented for and treatment after consenting deliberately with wrong information."[66]

In the United Kingdom, in 1985, in the *Sidaway v. Board of Governors of the Bethlem Royal Hospital* case,[67] the House of Lords declared that consent is informed even if the patient is not told about remote side-effects with a less than 1% chance. The decompression of the cervical cord led to paraplegia of the patient, and the patient had not been informed of this possible outcome because the surgeon had not found it relevant. Schwartz and Grubb find that "More than ten years after active legal discussion of informed consent began in the US, the first case based firmly in that doctrine came to England's highest court only to reject the importation of the 'American' doctrine."[68] Schwartz and Grubb argue that, in the US, patient rights, originating from written law (the Constitution and Bill of Rights), orient the courts, while UK court practice respects the duties of the physicians based on precedent.[69]

In 2015, in the *Montgomery v. Lanarkshire Health Board*[70] medical malpractice case, the Supreme Court changed its earlier position and found that the patient should be informed of all risks that "a reasonable person in the patient's position would be likely to attach significance to" (Lord Scarman's words).[71] It was a long time before UK court practice finally adopted that of the US in this regard, with the latter focusing more on the patient's will.

The US legal interpretation of informed consent has only been applied in the United Kingdom after several decades of rejection of the US approach. All that demonstrates that differences can be found not only between continental European law and common law but also between legal cultures that are only similar at first glance. The interaction of different legal systems and legal practices best serves the development of universal values and human rights. It is also interesting to see that the US legal practice of informed consent has been more influential on other North American bodies of law (e.g., Canada) than on UK or continental European law. The doctor-patient relationship in the US fairly differs from that in Europe; however, continental European legislators have turned to some elements of US medical law for guidance. The continental European practice of informed consent is largely based on statutes, and, after a delay of many years, these statutes also reflect US rules today.

The correlation of medical and legal practice of informed consent can be found in medical practice. Experiencing medical malpractice litigation, health care workers have adopted defensive medicine. It is better to avoid legal complications if possible, so, today, a patient's informed consent is more important than ever before. Not only do US and UK physicians take informed consent increasingly seriously but also doctors in the new democracies. The history of informed consent is a tangible example of how to abstract legal rules from historical immoralities. It is true that *historia est magistra vitae*.

4. The history of informed consent in the People's Republic of China

The development of the institution of informed consent is still in an early stage in many countries. The fall of communism has opened the door for an imitation of US and EU types of

[60] SHOKROLLAHI, K., Request for Treatment: the evolution of consent. In: *Annals of The Royal College of Surgeons of England*, vol. 92, no. 2, 2010, pp. 93–100.
[61] WILDE, S., Truth, Trust, and Confidence in Surgery, 1890-1910: Patient Autonomy, Communication, and Consent. In: *Bulletin of the History of Medicine*, vol. 83, no. 2, 2009, pp. 302-330.
[62] SHOKROLLAHI, Request for Treatment: The evolution of consent, (n. 60), p. 94.
[63] HABIBA, M.A., Examining consent within the patient-doctor relationship. In: *Journal of Medical Ethics*, vol. 26, no. 3, 2000, pp. 183–187, quotation on p. 187.
[64] BALINT, M., The doctor, his patient, and the illness. In: *Lancet*, vol. 265, no. 6866, 1955, pp. 683–688.
[65] SKEGG, P. D.G., Informed Consent to Medical Procedures. In: *Medicine, Science and the Law*, vol. 15, no. 2, 1975, pp. 124–132, quotation on p. 124.
[66] SELINGER, C.P., The right to consent: Is it absolute? In: *British Journal of Medical Practitioners*, vol. 2, no. 2, 2009, pp. 50–54, quotation on p. 51.
[67] *Sidaway v. Board of Governors of the Bethlem Royal Hospital* [1985] AC 871
[68] SCHWARTZ, R. and GRUBB, A., Why Britain Can't Afford Informed Consent. In: *Hastings Center Report*, vol. 15, no. 4, 1985, pp. 19–25, quotation on p. 19.
[69] Ibid.
[70] *Montgomery v. Lanarkshire Health Board* [2015] UKSC 11
[71] https://www.supremecourt.uk/cases/docs/uksc-2013-0136-judgment.pdf (Accessed on August 28, 2022)

legal institutions. This is evident in Hungary: the regime change there was a landmark in medical history. In contrast, the example of the People's Republic of China differs greatly.

The legal institution of informed consent dates back to the beginning of the transition to a free market economy in China. Since the mid-1990s, Chinese legislators envisioned regulating informed consent in medicine. Informed consent first appeared in 1994 in an Ordinance of the State Council of China on the administration of medical facilities. The Act of 1999 on medical practice stipulated that the patient or their family member should be informed of the risks of medical research and that the patient's or their family member's consent was needed.[72] Raposo argues that, in China, "The family plays an important role in health care decisions, even substituting their decisions for the patient's. Accordingly, instead of personal informed consent, what actually exists is family informed consent."[73] In 2011, Qun highlighted that "Even when patients are fully able to give consent and sign consent forms, relatives are often required to sign the forms with them."[74]

The patient's right to informed consent was introduced to Chinese tort law in 2010. It is a more or less Western type of informed consent, and the law stipulates that the health care provider must indemnify the patient if they did not supply proper information on the risks of the medical treatment and any alternative therapies beforehand and the patient suffered health damage. According to Chinese law, the patient must sign the informed consent form.[75] This change in 2010 led Bian to argue that "The Norms [Basic Norms of the Documentation of the Medical Record] require that the patient himself, rather than a member of his family, sign each informed consent form. This change in clinical practice indicates a shift toward medical individualism in Chinese healthcare legislation. Such individualism, however, is incompatible with the character of Chinese familism that is deeply rooted in the Chinese ethical tradition."[76]

The family's decision replacing the individual patient's decision has had a long tradition in all legal cultures. Nonetheless, the modern institution of informed consent views family members as surrogates and considers the surrogate's decision as an exception. If we regard the history of medicine, it is usually the family members that have decided instead of the patient. In China, there have been death cases due to a family member's decision being at odds with a patient's will. For instance, in 2007, a wife and her child died because the husband declined to grant his consent to a Caesarean section, and thus the health care provider, even though they were in favor of this life-saving medical intervention, did not perform it.[77]

It was important for Chinese lawmakers that measures should be taken against similar outcomes. I believe that the legal development of informed consent is an ongoing process. Traditional institutions such as familism in China may be coupled with Western types of legal institutions. However, these combinations should remain within the bounds of reason. In Cong's opinion, "the model of DFPR [the doctor-family-patient relationship] should be neither the purely traditional style nor the purely Western style, but a special Confucian style with its roots in historical China. The DFPR model may become the following: a family member will still act for the patient, medical decisions may still be made by the whole family, but the voice of the patient himself will be more prominent."[78]

I share Cong's opinion, although it is important to note that the Confucian style might not apply to all US and EU standards. For instance, when it comes to a multicenter clinical trial with both Chinese and European participants, the European Medicines Agency prioritizes the human subjects' informed consent simply because of the international regulations on clinical trials in effect. This practice might confront the Chinese participants' families with rules alien to them. Certainly, recruiting Chinese participants is more difficult under such medico-legal circumstances. Often, at the beginning of a cross-border multicenter clinical trial, a Chinese site may initially be involved, only to be excluded later by the European Medicines Agency or the US Food and Drug Administration.

Lynöe et al. conclude that, in China, "the general public perceives the medical profession as focused on clinical diagnosis and treatment and not research."[79] China has adhered to the Declaration of Helsinki, although the linguistic barriers between ethnic groups speaking various Chinese dialects, illiteracy, and frequent misconceptions of the questions limit the applicability of Western standards of medical research.

There is still much to elaborate on the coupling of Western with Eastern values. Western values are not superior to others, and the Eastern legal cultures have furnished the Western world with many valuable legal and ethical institutions. In Europe, we can learn a lot both from the US and from China. In addition, we have a long history of European medical law and ethics with European specificities.

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[72] HE, T., *Das Prinzip der informierten Einwilligung des Patienten und Rechtswidrigkeit. Entwicklung und Rechtsprechung in China* (Munich: Grin, 2016)

[73] RAPOSO, V.L., Lost in 'Culturation': medical informed consent in China (from a Western perspective). In: *Medicine, Health Care and Philosophy*, vol. 22, no. 1, 2019, pp. 17–30, quotation on p. 17.

[74] QUN, G., The Right to Informed Consent and Its Implementation in China. In: *Journal of Value Inquiry*, vol. 45, no. 4, 2011, pp. 443–449, quotation on p. 446.

[75] HE, *Das Prinzip der informierten Einwilligung des Patienten und Rechtswidrigkeit. Entwicklung und Rechtsprechung in China*, (n. 72).

[76] BIAN, L., Medical Individualism or Medical Familism? A Critical Analysis of China's New Guidelines for Informed Consent: The Basic Norms of the Documentation of the Medical Record. In: *Journal of Medicine and Philosophy*, vol. 40, no. 4, 2015, pp. 371–386, quotation on p. 371.

[77] QUN, The Right to Informed Consent and Its Implementation in China, (n. 74).

[78] CONG, Y., Doctor-family-patient relationship: The Chinese paradigm of informed consent. In: *Journal of Medicine and Philosophy*, vol. 29, no. 2, 2004, pp. 149–178, quotation on p. 176.

[79] LYNÖE, N., SANDLUND, M., JACOBSSON, L., et al., Informed consent in China: quality of information provided to participants in a research project. In: *Scandinavian Journal of Public Health*, vol. 32, no. 6, 2004, pp. 472–475, quotation on p. 474.

5. Conclusions

The legal history of the concept of informed consent may be approached in two different ways. The first is a broader aspect which considers informed consent as being part of the legal system because this or something similar has been cited before or by the court. The historical proof of this is court practice that formulates a legal doctrine close to that of today's informed consent, even if it does not use the term *informed consent*. The other is a narrower aspect which regards the date the term first emerged in a legislative product. Naturally, the first approach dates back a number of decades and perhaps centuries before the narrower one.

A legal historian finds both approaches plausible because both add information to the general concept of informed consent. As usual in law, legislation has followed court practice. It is judicial activity that fosters the development of legal practice, legal scholarship, and legislation. Judges and the lawyers that represent the plaintiffs' justifiable interests have been the promoters of the concept of informed consent.

The concept of informed consent has two different meanings. The first is the patient's informed consent to medical treatment; the other is the human subject's informed consent to medical research. While medical treatment serves the interests of the patient first and foremost, medical research aims to examine a health care product before it is authorized generally and only serves the human subject's interests in a secondary way. This difference between the two types of informed consent is made explicit in the text of the informed consent forms. In both cases, the accent is on comprehensible information and voluntariness.

As concerns informed consent in the context of Turkey, Aydin concluded in 1997 that "It is difficult for a Turkish patient to comprehend information in which a foreign language predominates. No matter how hard a physician tries to inform the patient by using Turkish words, eventually he will have, by necessity, to use a medical term."[80] This problem arises in many countries. This is why it is the health care provider's responsibility to make patient information understandable. The burden of proof of whether the patient's consent was really informed falls on the health care provider. Health care documentation is the best proof for the provider's lawyers *sub judice*. This documentation should include the informed consent signed by the patient. The information needs to be communicated in plain language, adapted to the level of education of the patient or a surrogate. Since the institution of informed consent was first applied, the matter of comprehension has been a crucial problem. In doctor-patient communication, everyday descriptors have been substituted for medical Latin. Thus, the patient is supposed to be able to understand the technical terms in their native language. Of course, patients are more or less unable to decipher medical terms even in their mother tongue.

The patient's rights and obligations and those of the health care provider towards each other generate a treatment contract. When it comes to medical research on human subjects, the human subject and researcher may also enter into a contract. Many elements of these two types of contract are fairly similar. For example, there must be liability insurance both for health care provision and medical research. Bodily harm and other related damage might come about, and both the patient and the human subject should be indemnified. The treatment contract is neither necessarily a civil law contract nor a written contract. However, the obtaining of informed consent must be properly documented. According to Guideline No. 9 of the International Ethical Guidelines for Health-related Research Involving Humans (CIOMS Guidelines, 2016), "Researchers have a duty to… as a general rule, obtain from each potential participant a signed form as evidence of informed consent. Researchers must justify any exceptions to this general rule and seek the approval of the research ethics committee."

The main elements of informed consent are as follows:

- the patient should be provided with all the relevant information on medical treatment or medical research;
- the patient should be free to refuse consent;
- no medical research is allowed on prisoners or soldiers;
- the patient may refuse consent even if deprived of personal liberty;
- a surrogate might grant informed consent instead of the incapacitated patient only if it is legally permitted and serves the best interests of the patient; and
- informed consent may be obtained *ex post* in an emergency, although the physician should respect the patient's interests above all.

The legal history of the concept of informed consent varies from country to country. However, the legal doctrine of informed consent evolved concurrently in continental European countries, and similarities can be detected in common law countries. The living will represents an example *inter alia*. In Hungary, as in many other countries, according to Sections 20–23 of the Act on Health, the patient may refuse treatment in advance in a case of incapacitation, when dying and being incurable in the future. The legal institution of a living will has been imported from Western legal cultures.[81]

The legal cultures of the world differ, and this difference provides us with slightly different conceptions of informed consent. The core of the notion is practically identical everywhere. This is why the notion of informed consent can be used in international declarations and agreements without risk of misconception. The concept of informed consent is a universal value, and it should be part of the rule of law in all countries. There is still much to do, therefore. We can see countries with a deficient rule of law and legal certainty. In some countries, geopolitical and military conflicts suppress the rule of law, and patient rights are not wholly respected, among other concerns.

All in all, informed consent granted by the patient or human subject appeared earlier than one would think. War times were definitely detrimental to the institution of informed consent

[80] AYDIN, E., Informed consent in Turkey. In: *Journal of Medical Ethics*, vol. 23, no. 3, 1997, p. 192, quotation on p. 192.
[81] JULESZ, M., Passive euthanasia and living will. In: *Orvosi Hetilap*, vol. 155, no. 27, 2014, pp. 1057–1062.

in medical research. The patient's right to informed consent to medical treatment was curtailed in periods when the rule of law was lacking. War situations still arise from time to time, although I hope human experiments will never return. Informed consent to medical treatment has become a key factor in medical malpractice cases. Its development is ensured by the continuity of court practice. The independent judiciary, as a safeguard of the rule of law, is ethically responsible for the legal application of the institution of informed consent. This ethical responsibility fortifies legal certainty in each and every country.

The principle of the plurality of legal cultures results in various patient rights and duties; however, there is a minimum standard, defined at the level of inter- and supranational laws, that should be upheld. Member States are authorized to create a better quality of law on informed consent than required by the minimum standard, while a poorer quality is not acceptable and should be sanctioned by the inter- or supranational organization concerned.

The history of informed consent parallels the modern history of medicine. It is not the first *expressis verbis* appearance of the notion that counts but the real change in people's minds. This change of thinking put an end to a long history of an unequal doctor-patient relationship and represented the beginning of patient autonomy.

Today, many books and articles refer to the period before the legalization of the institution of informed consent with descriptors such as *medieval*, *despicable*, *contemptible* – indeed, negative. Even so, no medico-legal institution came about without a preceding history during which reasonable doubts were raised. Informed consent is not the result of one or two historic events. In fact, a long tradition of medico-legal practice that contradicted the modern concept of informed consent arrived at a turning point in history. After that, many physicians still questioned the viability of informed consent in medical practice. Nowadays, too, we find physicians that do not adequately inform their patients of the possible negative outcomes of a medical intervention, and there are those who do not seek a patient's consent to treatment. The main difference is that, today, those health care providers might face justice for their misdeeds.

The mere knowledge of the relevant passages of the national Criminal Code is a factor that deters physicians from infringing upon patient rights. However, there are patient rights not protected by criminal law. The right of the patient to damages is also a preventive factor. The patient may likewise turn to the local medical or nursing ethics committee when experiencing improper treatment by a doctor or nurse. Some cases end up before those ethics committees. Lacking informed consent to treatment does not necessarily result in violation of the Criminal Code or in health damage. Indeed, patients and health care workers are supposed to cooperate. Ultimately, legal proceedings should be avoided inasmuch as conflicts can be resolved through extrajudicial dialogue.

Informed consent may be conceived as a medico-legal act before medical treatment is begun. Nonetheless, informing the patient is usually not simply one act at one point in time. The health care provider should inform the patient during the process of treatment whenever necessary to obtain the patient's consent. As medical treatment is a process, the provider needs to supply information throughout the treatment. When it comes to medical research on human subjects, the patient information sheet should be amended if necessary during the research procedure. Then, the ethics review committee needs to revise its first decision and grant or refuse permission to continue with the research. The accent is on continuity. Informed consent is a key factor in legalizing any medical treatment or research in the long run.

The First Hungarian Competition Act in the Judicial Practice*

*Bence Krusóczki***

Abstract

This entry will deal with the history of competition law, including the first substantive competition law of Hungary, i.e Article V of 1923, which contained provisions regarding unfair competition. Currently, unfair competition is the subject of competition law, one of the branches of economic law, which contains regulations regarding the protection of economic competition and the prevention of consumer detriment. The purpose of Article V of 1923 was to offer general protection against any form of unfair competition.

However, the description of each provision of the Article and the detailed demonstration and investigation of their practical implementation is not the topic of this entry. The present paper will specifically focus on the arbitral tribunals of the Chamber and the practice of the jury since the fact that the duty and practice of these two bodies were highly significant for the application of the law in that era can be clearly concluded from the summary of research results.

Keywords: *Unfair competition; specific act; Arbitration Institute of the Budapest Chamber of Commerce; Hungary; court.*

1. Introduction

In this paper, I will exclusively focus on the general clause expressed in section 1 of the article. Investigating the practice of Arbitral Tribunal of the Chamber of Commerce and Industry of Budapest and the Jury of the Chamber, my goal is to find out how they defined moral standards, based on which they could decide whether a certain commercial conduct was considered unfair or not. The reason I chose the practice of the Arbitral Tribunal of Budapest Chamber of Commerce and Industry is that they were the enforcing body that made its best endeavour to standardize the practice of law regarding commercial competition with their policies in the era.

I selected the 22 legal precedents in this paper based on the fact that they contain statements and explanations in connection with section 1 of the article on unfair competition, thus endeavouring to fill the category of honest commercial practice with the widest range of available content.

As sources, I mostly used the documents of the Arbitral Tribunal and the Jury of the Budapest Chamber of Commerce and Industry from 1923 - the year the article came into effect - until 1933, the first amendment of the article. In addition, I used the decisions of the Curia (the Supreme Court of Hungary) and the verdicts of the Budapest Royal Court. As secondary sources, I used literature on unfair competition and literature on private law.

2. The general rules of honest commercial practice and accepted principles of morality in the article on unfair competition

Norms always stem from a socially accepted moral principle. We can even say that law and morals are inseparable concepts. This standpoint is supported by Károly Szaladits, according to whom "with the voluntary conformity of citizens and the disapproval of unlawful procedure, morals largely provide the rule of law as well" [1] The Hungarian legal literature attributes primarily gap filling functions to the clause on accepted principles of morality and regards it to be "applicable when and insofar where legal regulation is not applied." [2]

In most cases, morality as a private law concept arises in connection with contracts, the invalidity of contracts, In the legal literature of the 19th and 20th century, it was typical to discuss the breach of accepted principles of morality within the impossibility of the service.[3] As early as in the 1800s, Ignácz Frank declared contracts not conflicting with the law void because

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1 SZALADITS, K., *Magyar magánjog I.* [Hungarian Private Law I.] Általános rész. (General Part.) Budapest, 1941, p. 7.

2 MENYHÁRD, A., *A jóerkölcsbe ütköző szerződések.* [Contracts Conflicting with Accepted Principles of Morality.] Budapest, 2004, p. 286.

3 MENYHÁRD, 2004, p. 145.

"they were not compatible with honour."[4] The legal literature of the interwar period made an attempt to distinguish contracts which were contrary to public polices and accepted principles of morality. In the latter, not only the agreements concerning individuals and families were included, but also transactions - usurious and exploitative contracts - concerning public polices and economic order.[5]

Before World War II, due to the lack of a firm distinction between public polices and accepted principles of morality, every contract that "limited individual freedom to the extent that it deprives the individual of the practice of such freedoms" were declared void.[6] This includes the limitation of industrial and economic freedom with non-compete, unlawful wage competition or anticompetitive cartel agreements,[7] but we can also find references to the accepted principles of morality in connection with unlawful pyramid schemes. We can see the phenomenon of accepted principles of morality in connection with the increased economic free competition and widespread unfair competition as the principle that provides a general starting point for the protection against unfair competition.

According to judicial practice, the accepted principles of morality expressed the general value judgement of society, the limits determined by private autonomies and common consent, the general moral norms and the standard of generally expected conduct. While the origin of accepted principles of morality as a private law category should be sought in the general value judgement of society, the starting point related to unfair competition can be found in a more limited circle, i.e. the moral judgement of the commercial and industrial world. In the following, my aim is to find out the differences between the contents of interpreting accepted principles of morality - regarding unfair commercial conduct – and the general interpretation of accepted principles of morality.

3. Honest commercial practice and accepted principles of morality as the standards of unfair competition

The central elements of Article V of 1923 on unfair competition (AUC) were obviously honest commercial practices which served as the starting point for judging each commercial act. Here, the concepts of honest commercial practice and unfair competition are worth talking about briefly.

"Any business conduct regarded as unfair competition by the commercial and industrial world is unfair competition."[8] This statement is supported by the standpoint of the Jury of the Budapest Chamber of Commerce and Industry (Jury) according to which "by causing his competitors harm or heavy losses by his success, or commercial or industrial activity with licit means, one is not engaged in unfair competition."[9] When talking about honest commercial practice and accepted principles of morality in an everyday sense, a narrower category of private law appearing in commerce, one should always mean the moral judgement of the business world.

On the one hand, a distinction was made between the proper judgement of good taste and unaccepted principles of morality. On the other, the competitors' endangered, legitimate interests were also respected in the context of honest commercial practice. From the standpoint quoted above, it can also be deduced that the harsh, ruthless battle unfolding in the commercial world, which could aim at destroying another person, the competitor or conflict with any other law provisions, did not, in itself, constitute as unfair conduct. This presupposed that the competitive intent and the applied means were not immoral.[10]

The quoted standpoint of the Jury raises several questions when the competition law categories of accepted principles of morality and honest commercial practice are analysed. On the one hand, it is clear that the standpoint according to which the concept of accepted principles of morality must be interpreted with different contents in relation to unfair competition was correct. While it can be stated that in general, the value judgements in connection with morality originated from the general judgement of society, we could only rely on the traders and manufacturers' moral judgements as far as commercial competition is concerned. In my opinion, it resulted from the fact that the society of that era would have regarded any commercial act that aimed at destroying and harming competitors or was illegal as unethical, despite the fact that these acts were not automatically constituted as unfair practices. The emphasis was on the circumstances and if the competitive intent and the applied means were not immoral, competition remained free. In my opinion, based on these, we could say that the boundaries established by the commercial and industrial world of the era proved wider than what was accepted by the general moral judgement of society. However, this is not necessarily true. During the examination of the practice, some of the cases demonstrated the opposite. It might be more accurate to state that the moral standard which had to be used when judging competitive acts could not be set accurately in a general manner. As I will seek to emphasize in my paper, whether a commercial proce-

[4] FRANK, I., *A közigazság törvénye Magyarhonban*. [The Law of Public Justice in Hungary.] Buda, 1845, p. 589.

[5] DELI, G., *A generális klauzulák dogmatikai, történeti, és összehasonlító elemzése, különös tekintettel a jóerkölcsbe ütköző szerződések tilalmára. Doktori értekezés* [The Dogmatic, Historical and Comparative Analysis of General Clauses in Particular with Respect to the Prohibition of Contracts Conflicting with Accepted Principles of Morality. Doctoral thesis] Budapest, 2009, p. 188.

[6] SZALADITS, K., *A magánjogi tényállások*. [Situations of Private Law.] In: *Magyar magánjog I.* [Hungarian Private Law I.] Budapest, 1941, p. 340.

[7] For further information see: Homoki-Nagy, M., Megjegyzések a kartellmagánjog történetéhez. [Comments on the History of Cartel Law.] In: *Versenytükör*, vol. 12, special issue II., p. 39-40, VARGA, N., Kartelljog a gyakorlatban: a bemutatási kötelezettség elmulasztása miatt indított eljárás. (Cartel Law in Practice: The Proceedings Initiated due to Presentation Omission] In: Gosztonyi, G.; Révész, T. M. (eds.) *Jogtörténeti parerga II. Ünnepi tanulmányok Mezey Barna 65. születésnapja tiszteletére.* [Legal History Addendum II. Celebratory Studies in Honour of Barna Mezey's 65th Birthday.] Budapest, 2018, p. 283-289.

[8] BÁNYÁSZ, J., *A tisztességtelen verseny legújabb joggyakorlata.* [The Latest Practice of Unfair Competition] Budapest, 1933, p. 3.

[9] Bp. Cham. Jury: Z 195. J. 473-1926.

[10] Bp. Cham. Arbitral Tribunal Z 202. Vb. 55.368-1927.

dure was legal or not always depended on the judgement of the circumstances of the particular case.[11] The category and interpretation of accepted principles of morality with the content described here is what we can summarize as honest commercial practice.

There is one more issue regarding the analysis of accepted principles of morality and honest commercial practice I would like to clarify. A conduct could automatically constitute as unfair if a commercial procedure was carried out in a way that conflicted with the law. According to Attila Menyhárd, the prohibition of conflicting with the law could be considered *lex specialis* compared to the prohibition of conflicting with accepted principles of morality.[12] Does the violation of law mean the violation of accepted principles of morality at the same time?[13] However, when we examine this question through the category of honest commercial practice, we can come to different conclusions.

The spice merchant plaintiff based his lawsuit on the defendant selling milk without a permit. The Royal Court of Budapest decided that unfair competition took place. This decision was later upheld by the Budapest Royal Court of Appeal. However, the standpoints regarding the issue[14] found the judicial practice which, based on other laws, decided that it was unfair competition resulting from punishable acts, doubtable.[15] "The purpose of the competition law was to persecute those acts and conducts that could not be persecuted based on any other law." So it is clear that an act that violates the law cannot be persecuted based on the law on unfair competition."[16] The Curia agreed with this standpoint as in its verdict, it rejected the plaintiff with the following justification. "Even if the defendant violated the regulations of milk selling permit, it does not necessarily mean that this conduct violates the AUC as in itself not every act prohibited by the law is unfair or immoral."[17] In this case the expression "in itself" had to be emphasized as, in my opinion, aforementioned standpoint, according to which an act that violates the law cannot be one to be persecuted based on the law on unfair competition, is not correct. In my opinion, the interpretation of the verdict of the Curia in this context would be misleading and would conflict with the moral content of competitive fairness. The first competition law of Hungary wanted to provide protection against any manifestation of unfair competition and provided special legal consequences – prohibitory injunction, interdiction, publication in newspapers, etc. – for competitors, since only with these means could the conducts violating commerce get back on track.[18] It would have been incorrect to deprive the competitors, against whom unfair procedures – realizing acts conflicting with other laws as well – had been carried out, of these means. As far as I am concerned, I find the approach, according to which even if a commercial act conflicted with the law, it did not automatically lose its feature of being contradictory to honest commercial practice, more accurate. According to my interpretation, what the expression "in itself" highlighted in the verdict of the Curia exactly tried to express was that in such cases, the circumstances of an act have to be investigated as well, since only in hindsight and based on the moral judgement of the commercial and industrial world could it be decided whether the act violated the requirements of honest commercial practice.[19]

Both legislation and jurisprudence have agreed that the contents of accepted principles of morality cannot be determined

[11] The right guidance has always been provided by the circumstances of the particular case, the experiences of everyday life and the phenomena of commercial life. Bp. Cham. Jury: Z 195. J. 1489/1926.

[12] MENYHÁRD, 2004, p. 252; According to his line of thoughts, the particular legal order and the value system that it conveys are also parts of the contents of accepted principles of morality.

[13] DELI, 2009, p. 169.

[14] For further information see: MESZLÉNYI, A., *A tisztességtelen versenyről szóló törvény magyarázata.* [The Explanation of the Law on Unfair Competition.] Budapest, 1936. p. 76-89.

[15] *Közigazgatási értesítő*, vol. 32, Nr. 3, XXXII. 1937, p. 4.

[16] Ibid p. 8.

[17] From verdict P. IV. 3596/1935. Of the Curia; *Közigazgatási értesítő,* vol. 31, Nr. 16, 1936, p. 5.

[18] The chapter on the transgression of the limits laid down by honest commercial practice is not exhaustive. It only provides a non-exhaustive list of the most significant cases of unfair competition. Thus, the arbitral tribunal is not barred from deciding that unfair competition took place even if they find that none of the cases of Chapter II are present. This is what the rule stated in Section 1 of the law provided a procedure for. According to the rule, commercial competition must not take place in a way that it conflicts with honest commercial practices or accepted principles of morality in general and the person whose conduct conflicts with these can be ordered to put an end to such conduct by the party so entitled. Bp. Cham. Arbitral Tribunal Z 202. Vb. 3495-1925.

[19] In verdict P. IV. 3596/1935. the Curia considered that: "Although the violation of statutory or contractual obligations does not imply that a certain conduct conflicts with the AUC as well because not every act prohibited by the law or contract is unfair or immoral in itself, but it can be so due to the nature of the act or the circumstances, namely, when the purpose, manner or means of violation is incompatible with the requirements of honest commercial practice or accepted principles of morality." The point of the following case is that the defendant was selling razor blades after closing time. According to the plaintiff, this act conflicted with Section 1 of the AUC since the plaintiff was trying to circumvent the general non-compete, which conflicted with honest commercial practice. According to the standpoint of the Curia, if the defendant had been engaged in this act in a planned, regular manner, he would have, indeed, committed an unlawful act. Here, I would like to point out that the reason the defendant's conduct constituted as conflicting with honest commercial practice might not have been that it was unlawful regarding the closing time, but because of the circumstances, namely its planned and regular manner. However, according to the judgement of the Curia, the fact that the defendant sold only one razor blade at a time and did it three times after closing time, cannot be regarded as planned conduct in that particular case. *Közigazgatási értesítő,* vo. 31, Nr. 13, 1937, p. 4.; In several similar cases, too – when a competitive action also conflicted with the law –, the Arbitral Tribunal of the Budapest Chamber of Commerce and Industry concluded that even though a certain commercial conduct conflicts with the law, it does not automatically constitute as unfair competition. Bp. Cham. Arbitral Tribunal Z 202. Vb. 32.260 – 1925., 25.277 – 1925, 13.617 – 1924.)

by law. Both leave the specification of the content in the hands of judicial practice.[20] So it was regarding the determination of the content of honest commercial practice in connection with unfair competition. At this point though, there was a substantive difference between the judicial specification of accepted principles of morality and the judicial consideration of honest commercial practices. In the latter case, enforcement had to be based on the moral judgements of the contemporary commercial and industrial world, which, in many cases, was not a simple matter for judges with no commercial expertise. This is what the legislature recognized and created opportunities to ask the chambers of commerce and industry for help and advice regarding particular cases.

4. The guidelines of the Arbitral Tribunal of the Budapest Chamber of Commerce and Industry regarding each act of competition

The arbitral tribunal procedures were not actually civil proceedings, but rather their substitutions. The state set up its own institutions of judicial protection, but did not oblige the parties to use them in case of a dispute. Rather, the parties involved were allowed to deal with their disputes between themselves, without the assistance of the state's body of judicial protection.[21] Overall, we can say that the proceedings and decision of the arbitral tribunal were based on private-law relationships and they fell under private law as they could only proceed on the basis of the contracts concluded by the parties.[22] However, if the executive power endowed the verdict of the arbitral tribunal with qualities of a public document or other qualities of a final judgement, the legislative power had an obligation to guarantee that the public interest and the legitimate private interest could not violated by the arbitral tribunal proceedings.[23] In connection to the foregoing, Article I of 1911 on the Code of Civil Procedure (hereinafter: CCP) had already contained that the effects of an arbitral tribunal verdict and the agreement are the same as that of the final judgement of a court and it sought to regulate the entire proceedings with guarantee elements.[24]

As I explained earlier, regarding specific acts of unfair competition, the aggrieved competitor had more opportunities to resort to the protection provided by the competition law. One form of enforcing rights was to initiate arbitration before the arbitral tribunals working within the organisation of the chambers of commerce and industry. Before examining the practice of the Arbitral Tribunal regarding acts of unfair competition, I would like to briefly summarise the points where essential differences occur between the arbitral tribunals of the chambers and thee arbitrations regulated in Title XVII of the CCP.

With respect to the cases described in the AUC, the arbitral tribunals are regarded as ordinary courts, while the arbitration regulated in the CCP was always exceptional. The power of the arbitral tribunals of the chambers was determined by the unilateral declaration of the plaintiff, according to which they filed the lawsuit before them, while according to the rules of the CCP, the arbitration clause was only valid if the parties stipulate it in a joint, bilateral legal act. The members of the arbitral tribunals could only be selected from the register of the jury members. Its president was always one of the judges of a High Court designated by the Minister of Justice, while, according to the regulation of the CCP, anyone could be a member of the arbitral tribunal, except for those who could be excluded on the basis of Section 774 of the CCP, and it was not mandatory to appoint a president. Nevertheless, one of the main differences was that the arbitral tribunals carried out judicial activities, they could hear witnesses and perform proofs of concept, while, according to the rules of the CCP, if an arbitral tribunal wished to carry out such activities, they had to turn to the competent District Court.[25] It was possible to appeal against the decisions of the arbitral tribunals to the competent High Court, while, according to the rules of the CCP, the decisions of the arbitral tribunals could only be challenged with lawsuits of annulment.[26]

Thus, the main difference between the chamber jury and the arbitral tribunals was the fact that while the jury provided opinions, assessments regarding specific commercial conducts, the arbitral tribunals gave irrevocable judgements in case a lawsuit was brought before them by the aggrieved party.[27] In the following, I will provide some insight, with a focus on honest commercial practice and accepted principles of morality, into the practice of the Arbitral Tribunal working within the Budapest Chamber of Commerce and Industry.

After the arguments presented by the parties, the Arbitral Tribunal determined the following facts: in their shop, the defendant served their customers asking for Franck coffee another brand of coffee. They did so without drawing their attention to the fact that they were serving another brand instead of the one the customers asked for. According to the judgement of

[20] Bálint Kolosváry emphasized that determining what the accepted principles of morality has to be sought in the current social perceptions, so he did not categorise it as a legal issue. Yet according to his opinion, the relationship of business intent and public morality was a legal matter. KOLOSVÁRY, B., *A magyar magánjog tankönyve.* [The Textbook of Hungarian Private Law.], Budapest, p. 102.; Its examination will be essential with regard to the judgement of unfair competition.

[21] GAÁR, V., *A magyar Polgári Perrendtartás magyarázata. 2. kötet.* [The Explanation of the Code of Civil Procedure. Volume 2.] Budapest, 1911, p. 385.

[22] MAGYARY, G., *Magyar polgári perjog*. [Hungarian Civil Procedure.] Budapest, 1924, p. 729.

[23] MESZLÉNYI, A., *Bevezető a Polgári perrendtartáshoz.* [An Introduction to the Code of Civil Procedure.] Budapest, 1911, p. 396.

[24] In relation to the arbitral proceedings, the Code of Civil Procedure of 1911 also determined the subject of arbitral contract and its means of validity, its discontinuation, the selection and exclusion of the members of the arbitral tribunal, as well as the judicial procedure and the actions for annulment of a decision.

[25] Bp. Cham. Arbitral Tribunal: Z 202. Vb. 3495. – 1925.

[26] Section 784 of the CCP: „The decision of the arbitral tribunal can be annulled with action before a regular court."

[27] JULOW, J., *A választott bíróságokról*. [On the Arbitral Tribunals.] Miskolc, 1926, p. 8-9. See more about this topic: VARGA, N., Introduction to the Hungarian Cartel Regulation in the Interwar Period. In:, *Krakowskie Studia Historii Panstwa I Prawa,* vol. 15, 2022, p. 215-226; VARGA, N., Lawsuits on Cartel Presentation Omission after the 20th Act of 1931 Came into Effect. In: *Journal on European History of Law*, vol. 13, Nr. 1, 2022, p. 149-155.

the Arbitral Tribunal, this procedure was, on the one hand, capable of deceiving the customers and on the other, it could put the manufacturer of the product requested by the customers at a particular disadvantage. Finally, the Arbitral Tribunal drew attention to the fact that the defendant's commercial conduct "clearly destroyed the tradesmen's respectability as the with their procedure, the defendant undermined the most important basis of commerce, namely the faith and trust in tradesmen which should have existed towards them from the manufacturer of the product and the other tradesmen as well."[28] Therefore, the conduct determined by the facts, clearly conflicted with the law and the defendant had to be made subject to an injunction prohibiting provision under Section 1 of Article V of 1923.

In the abovementioned decision by the Arbitral Tribunal, their moral judgement is made ever clearer. Their decision was not only based on whether the defendant was engaged in a commercial practice that was prohibited by the existing law, but going far beyond that, by representing every honest tradesmen and craftsmen, the Arbitral Tribunal tried to express their morality as well. They did this by laying down in judgement and detailing why the defendant's commercial practice conflicted with honest commercial conducts and what adverse consequences could it have on commercial life, which, ultimately, justified the injunction.

The Jury could not stress enough that regarding cases of competitive acts, it is always the circumstances of the case one has to focus on. This resolution by the Jury was expressed to the full in every arbitration.[29]

In a case that started in 1933, the plaintiff complained that the defendant, a charcoal vendor, put charcoal packages labelled as "white impregnated charcoal" on the market, advertising them as odourless. The plaintiff attached the results of the examination carried out by the Royal Joseph University to the lawsuit. The examination determined that the examined charcoal "had an unpleasant odour and the effects of examined charcoal wares not different from that of the ones without the white coating."[30] Based on the arguments, referring to Section 1 of the AUC, the plaintiff requested the Arbitral Tribunal to ban the defendant from such means of advertisement and also requested the decision to be published in the specialist magazine titled Fűszerkereskedők Lapja and the newspaper titled Ujság at the defendant's expense. In their decision, the Arbitral Tribunal stated that the defendant admitted that the package of the charcoal said that it was smokeless and odourless but according to their defence, it meant that the charcoal was smokeless and odourless when it was not used, but it gave off a slight smoke and coal odour when used. According to the discretion of the Arbitral Tribunal, "the customer who was offered smokeless and odourless charcoal by the vendor, did not put the emphasis on the fact that the charcoal they purchased had these qualities when not used, but clearly interpreted the advertisement as meaning that the charcoal did not give off an unpleasant smell and smoke when used."[31] According to the resolution of the Arbitral Tribunal, the defendant's act deceived the public, which ultimately constituted as unfair competition, thus they had to be banned from continuing this activity. "The Arbitral Tribunal banned the defendant, under the penalty of a 50-pengo per package fine, from selling charcoal in packages stating that the coal is smokeless and odourless, and also obliged the defendant to pay the plaintiff a 250-pengo litigation cost within 15 days."[32] As the Arbitral Tribunal did not find the defendant's procedure such a serious offence to be punished with the burden of being published in a newspaper, they gave the plaintiff permission to publish the decision without giving away the defendant's name and address in a newspaper at their own cost.

Based on the decision of the Arbitral Tribunal, the successful party had three more possibilities. In case the defendant did not comply with the decision, they could institute enforcement proceedings and pursue their claim by a lawsuit before the competent royal court. Finally, if the defendant was still engaged in their unlawful conduct after the decision took effect or after the deadline for compliance with the decision – with regard to the fact that they obviously acted despite their better knowledge –, they could initiate prosecution.[33]

As I have pointed out multiple times when discussing the practice of the Jury, regarding their specific resolutions, the Jury increasingly tried to avoid their decisions to be regarded as fundamental statements. However, contrary to this, the Arbitral Tribunal also expressed fundamental decisions in their judgements, contributing to the even clearer assessment of competitive acts.

In the following case, it was not the exactly the non-compliance with honest commercial practice of a specific commercial

[28] Budapesti Kereskedelmi és Iparkamara. In: *Kamara évkönyve*. Budapest, 1925, p. 132.

[29] Bp. Cham. Arbitral Tribunal: Z 202. Vb. 15.326. – 1925.

[30] Bp. Cham. Arbitral Tribunal: Z 202. Vb. 14.215. – 1933

[31] Bp. Cham. Arbitral Tribunal: Z 202. Vb. 14.215. – 1933

[32] Bp. Cham. Arbitral Tribunal: Z 202. Vb. 14.215. – 1933.; *The decision of injunction imposed a fine in case the defendant did not comply with the decision by adding that the imposed fine can be collected as many times as the defendant violates the provisions of the decision."* In cases permitted by the law, the decision could also order publications in newspapers and made arrangements regarding the matters of paying the litigation cost and its amount. BÁNYÁSZ, 1927, p. 139-140.

[33] KOVÁCS, M., *A polgári perrendtartás magyarázata.* [The Explanation of the Code of Civil Procedure] Budapest, 1933, p. 1598. Based on the decision of the arbitral tribunal, the execution petitions always had to be submitted to the arbitral tribunal itself, which forwarded the documents to the competent royal district courts. I will summarise the possibilities that could be considered during the enforcement proceedings as follows. Based on the conviction of the arbitral tribunal, the purpose of the execution petition would be that the court banned the defendant from continuing their conduct and repeating their act with imposing a fine. However, in case the arbitral had already imposed the fine in their decision – see the case above –, it was only the repetition of the banned activity that the plaintiff had to prove in order for the court that enforced the measures to collect the fine. These, however, were only applied to cases in which the measures expressed in the decisions were physically unenforceable – e.g. spreading false information, touch customers –since in case the measure proved enforceable, the court, beyond collecting the fine, banned the forbidden activity by enforcing the measures via its delegate.

conduct that the Arbitral Tribunal had to assess, but they had to decide whether an idea, a unique advertising method, a commercial notion could be defended on the basis of the law on unfair competition. In their lawsuit, the plaintiff presented that they had been using a unique propaganda instrument for marketing their lozenges for almost a year. It consisted of an advertising character depicting a chimney sweeper holding a sign advertising the lozenge "Negro", placed in front of lozenge shops or in their shop windows. According to the plaintiff, "the defendant violated the intangible rights implicit in this propaganda instrument by their practice of placing a child's figure standing next to a snow pile, holding their hand in front of their mouth with a sign advertising the Kaiser toffee on s sign attached to a pole."[34] The de facto basis of the plaintiff's lawsuit was laid down on the second page of the lawsuit. According to it, "the use of such advertising characters was their idea, they acquired the right to this idea and made it renowned at great effort and cost. The defendant's committed their actions violated honest commercial practice by copying this idea."[35] The defendant requested the rejection of the lawsuit as according to their opinion, the way they used the advertisement was widespread. Moreover according to their view, he had started this method of advertisement earlier than the plaintiff.

The Arbitral Tribunal considered that the plaintiff's idea was neither ne, nor unique. It was, indeed, well-known that the advertisement method used by both the defendant and the plaintiff had been common, widely used for years and the use of suspended, free-standing boards or ones that could be placed in shop windows and depicted human characters could not be considered as an idea that would create monopoly for someone."[36] We can see that in this, but not only this case, the Arbitral Tribunal proceeded on the basis of the moral judgement of the business world and concluded that nobody could consider an existing commercial practice their own, thus that could not be defended. Beyond what has been mentioned above, though, a more important decision of principle is evident from the arbitration, which could be regarded as guidance in the assessment of competitive acts with a comparable situation. On the basis of the decision, we can say that in this case, the specificity of the idea – the application of advertisements on the human figures – might not refer to the general usage placement of the figures, but exclusively in the application of a particularly shaped figure. Solely because somebody used a particularly shaped figure as an advertising instrument, others still had the right to apply other figures, i.e. the use of figures depicting humans could not be appropriated.[37]

5. Conclusion

In my article, I sought to choose legal cases which are specifically related to Section 1 of the article on unfair competition, as in these cases, the particular moral standard, the content of which I was focusing on, had to be applied. Due to the limited length the length limit, I could not present all the 22 chosen cases in detail in my paper, so in many cases, I elaborate using footnotes.

Summarising my results, I assume that the foundations of the chamber work were obviously professionalism, moral reliability and promptness. In the course of their work, the endeavour of the acknowledged experts gathering in the arbitral tribunals of the chamber and juries was always for their moral resolutions and decisions to comply with the public perception of the commercial and industrial world of the era. Despite the fact that the resolutions provided by the jury were not binding on the accountable competitors, it was, of course, permitted to refer to them. In my opinion, Sections 44-45 of the Article on unfair competition have definitely fulfilled their purpose as our courts preferred to turn to the chambers of commerce and industry if they had doubts on the assessment of specific business conducts. The arbitral tribunals before which disputes regarding unfair competition were brought, were often criticised for applying excessively strict standards. At the same time, though, we could see that they sought to bear the decade-long business habits and procedures in mind and they tried to break them down step by step, gradually.[38]

As the primary objective of my paper, I set out the examination of the standard of honest commercial practice and demonstrating how the practice of the chambers tried to fill it with content. according to my point of view based on the practice of the Jury and the Arbitral Tribunal of the Budapest Chamber of Commerce and Industry, we can clearly state that the content of the conception of honest commercial practice is slightly different from the well-known private law categories of accepted principles of morality and honesty. On the basis of the cases presented in my entry, we can say that the content of honest commercial practice sometimes showed a stricter and in some other cases, a more lenient standard compared to the general moral judgement of society.[39] For this reason, it would be right to say that in general a stricter standard always had to be applied against commercial conducts that were classified on the basis of honest commercial practice. In this case, I accept the investigation method expressed by the Jury so many times as right, according to which, all the circumstances of business conducts had to be assessed. There is no doubt that it was not an easy task to classify the commercial conducts and to determine whether they conflicted with the article on unfair competition. Nevertheless, the benefit of variety and diversity of the cases, makes this topic interesting and special.

[34] Bp. Cham. Arbitral Tribunal: Z 202. Vb. 19.349. – 1933.
[35] Bp. Cham. Arbitral Tribunal: Z 202. Vb. 19.349. – 1933.
[36] Bp. Cham. Arbitral Tribunal: Z 202. Vb. 19.349. – 1933.
[37] Moreover, in their lawsuit, the plaintiff pointed out the fact that for them, trademark was registered for the "chimney sweeper" figure. In relation to this, the Arbitral Tribunal pointed out that in this regard, the fact that the plaintiff got the trademark and set up human figures in front of shops in the lozenge business makes no difference as it was merely a matter of detail. The advertising character depicting a human figure had been generally used for years, thus the idea could not be regarded as the plaintiff's exclusive right and a right to be protected.
[38] Bp. Cham. Arbitral Tribunal: Z 202. Vb. 31.885.-1925.
[39] Constituted more severe including: Bp. Cham. Arbitral Tribunal: Z 202. Vb. 15.326. – 1925.; Constituted less severe, for example: Bp. Cham. Arbitral Tribunal: Z 202. Vb. 55.368-1927.

Copyright Aspects of Promise of Reward in Hungary*

*Dénes Legeza***

Abstract

The promise of reward (Auslobung) is a unique legal institution of copyright and civil law, accepted and widely used in different areas of life for centuries. The promise of reward differs from traditional contracts, because it is defined as a unilateral legal relationship and it affects uses of copyright protected works. This paper analyses how the promise of reward appeared in Roman and Medieval Law, how it was used in practice in Hungarian cultural life in the 19th century and how Hungarian jurisprudence accepted it as a valid matter of fact that generates obligations. The study finally presents how regulations on promise of reward was drafted and regulated in Hungarian legal regulations in the 20th century.

Keywords: *Copyright law; promise of reward; licensing contract; book publishing; theatre play; creative works; intellectual property; intellectual creations; law of obligation; Hungarian Academy of Science; National Theatre; Hungary.*

1. Introduction

The promise of reward (*Auslobung*) is a unique legal institution of copyright and at the same time, civil law, accepted and widely used in different areas of life for centuries. When a hero was needed to save a country, the old king offered the beautiful princess and half his kingdom as a reward. Similarly, valuable financial reward was offered to those helping to find hiding bandits or for finding lost items. In their purpose, those competitions where exceptional sports achievements are rewarded or the creation of some work of art is initiated do not differ from such announcements. However, from the perspective of obligation and copyright alike the relationship established between the awarding authority and the creator is questionable. The matter of ownership of the copyright of the completed work is also debatable.

In copyright usually licensing contracts, publishing agreements and employment contracts, or illegally caused damages (namely the unlicensed use of a work) generate existing and valid obligations. From this perspective it is not necessary to review the legal nature of these. However, the promise of reward differs from traditional contracts, because it qualifies as a unilateral legal relationship. In Hungary the promise of reward was used in practice before it was accepted by jurisprudence as a valid matter of fact that generates obligations.

To understand the problem, it is necessary to provide a short presentation on Hungarian Copyright laws. According to Article 3 of Act 16/1884 "the rights of the author […] can be transferred […] by *contract*" and according to Article 3 of Act 54/1921 on copyright "*inter vivos* the copyright […] can be transferred." Consequently, copyright was transferable in the period primarily reviewed in the study – as opposed to the presently effective concept which only allows the assignment of economic rights of copyright – on the other hand, until 1922 the legal regulation required a *contractual* legal relationship for transferring copyright *inter vivos*.[1]

After analysing the general legal nature of the promise of reward the study presents the role and function of the legal institution in 19th century Hungarian cultural life. I present the copyright aspects of the promise of reward through the regulations of the Magyar Tudományos Akadémia (Hungarian Academy of Sciences), the internal regulations of the Nemzeti Színház (National Theatre) and an actual case, the Peleskei nótárius (Notary of Peleske) case. The study closes with a short presentation of the effective Hungarian legal regulations.

2. Legal nature of the promise of reward

The unilateral legal statement, namely that the promise of a specific reward for a person who satisfies the conditions specified in the announcement is a common element of the prom-

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[1] See on Hungarian Copyright Legislation in the 19th century MEZEI, P., The Development of Hungarian Copyright Law until the Creation of the First Copyright Act (1793–1884). In: SUNDARA RAJAN, M. T., Cambridge Handbook of Intellectual Property in Central and Eastern Europe. Cambridge, 2019. p. 37-50. HOMOKI-NAGY, M., „Az ész szüleményeinek védelme" a magyar jogtörténetben: Szerzői és szabadalmi jog, elsőség és etika a tudományban. In: ÚJSZÁSZI, I. (szerk.): Szent-Györgyi Albert szellemi öröksége. Szeged, 2014, p. 72–88.

ises of reward. To understand the legal nature of the promise of reward it is necessary briefly review the development of the relevant provisions.

Promise was known in Roman law as well, which had a great effect on the development of Hungarian law. In this regard vol. 50 of Digesta had a separate title on promises (*pollicitatio*). Digesta had a clear view on the nature of promises. It stated that "A pact is an agreement [*pactum*] and convention of two people, but an undertaking is the promise [*pollicitatio*] only of the person who makes it; and so it is established that if an undertaking has been made on account of an office. it is to be fulfilled, as if it were a debt."[2] As a consequence of all this it follows that in Rome the party making the promise was bound by his declaration, that is, even without any acceptance the promise was a matter of fact that generated obligation and the promise was recoverable as debt. However, the person making the offer could not be sued in all cases for failing to deliver the promise.

Roman law – with regards to litigation – basically knows two types of promises. In the first case the person made a promise in return for something, for example, if he wins an office then he will do something for it. The person making the promise could be sued for failing to do so. In the other case if a rich citizen promised that he would build a public building or erect a statue he could only be sued in order to keep his promise if work has already begun.[3]

We find similar reasoning at the writers of the age of natural law. In his work *On the Law of War and Peace* Hugo Grotius writes an entire chapter on promises. Grotius discusses not only the matter of acceptance and revocation, but promises of different types.

Grotius first establishes that laws originate from the common understanding of the people. Thus it is incomprehensible for him "why laws […] should be able to give the force of obligation to compacts, and why the will of an individual, doing everything to bind himself, should not have the same power; especially where the civil law creates no impediment to it."[4] Therefore, from this perspective Grotius also studied the validity of unilateral statements. However, at a later point of his writing he disputes the aforementioned part of Digesta, stating that from the irrevocable nature of a promise made for the community it does not follow that it is also effective. According to the standpoint of Grotius the party is bound by the unilateral promise. The promise cannot be revoked so that it can become effective by acceptance at any time.[5] Thus, if someone is worthy of the promised reward or the person making the promise wins the office, he shall fulfil his promise.

After the precedents it is worth reviewing what the old Hungarian private law stated about the generation of obligations. The sources clearly say that obligation is not generated without acceptance. According to Ignác Frank[6] no obligation can be established without agreement, that is, the common intent of the contracting parties, indeed their expressed and determined will is a precondition in the case of bilateral - "mutual" – and unilateral – simple – obligations alike.[7] Based on all this the promise could not have been a matter of fact that generated obligations in the Hungarian private law of the first half of the 19th century.

We would expect that in the second half of the 19th century the country living in the Austro-Hungarian Monarchy would follow foreign patterns when regulating the promise of reward in Hungary, just like in the case of copyright and publication transactions. It would be self-evident, because we could expect that the ABGB[8] also includes regulation concerning this matter. However, provisions concerning the promise of reward only became parts of Austrian private law at the time of the great supplementary law expansion of 1917. The French Code Civil did not include provisions concerning the promise of reward in either the 19th or the 20th century, which can be the result of different legal concepts on the law of obligations in France. However, in the Prussian ALR[9] the subheading serving as the basis of the later Hungarian drafts can be found. The ALR had specific provisions – among others – on the revocation of promises, the changeability of competition goals and the ownership of the work created by the applicants as the result of the promise of reward. It stated that the author keeps the ownership of the work.[10] This rule lived on in the German Civil Code (BGB) as well, which became effective in 1900, however, it turned around the assumption of the transfer of ownership. According to the BGB if it was stipulated in the announcement, then the ownership of the work shall be transferred to the person making the promise.[11] As we can see, only Prussian legislators deemed

[2] D. 50.12.3 (translated by Alan Watson)

[3] "And, indeed, even if he has not begun himself, but if he had promised a certain sum for a building and the community in expectation of this sum had begun to build, he is bound on the grounds that the work is as it were begun." D. 50. 12. 1

[4] GROTIUS, H., *On the Law of War and Peace.* Oxford, 1925, p. 115. (translated by Francis W. Kelsey)

[5] GROTIUS, H., *On the Law of War and Peace.* Oxford, OUP, 1925, p. 334. (translated by Francis W. Kelsey)

[6] Frank, Ignác (1788–1850) jurist, professor of private law at the Pest university (1827–1850). Representative of the school of historical law.

[7] FRANK, I., *A' közigazság törvénye Magyarhonban. Első rész*. Buda, 1845, p. 549. Similarly, SZLEMENITS, I., *Magyar polgári törvény III*. Pozsony, 1845, p. 1.

[8] The Austrian Civil Code of 1812 *(Allgemeines Bürgerliches Gesetzbuch)*. VARGA, N., Az állampolgárság és a községi illetőség szabályozása a neoabszolutizmus időszakában, különös tekintettel az OPTK vonatkozó rendelkezéseire. *Jogtörténeti Szemle* 2012/3, p. 28.

[9] *Allgemeines Landrecht für die Preussischen Staaten* (ALR), the Prussian General Civil Code of 1794. Its private law parts were effective until the effective date of the German Civil Code, that is, the Bürgerliches Gesetzbuch (BGB), 1 January 1900.

[10] ALR I. 11. Prämien §. 995. Das Eigenthum der von einem jeden Mitwerber gelieferten Arbeit bleibt ihrem Urheber; und der Aussetzer des Preises kann sich darüber keiner andern Verfügung anmaßen, als die er sich bey der Bekanntmachung ausdrücklich vorbehalten hat, oder die aus dem erklärten Zwecke der Aufgabe von selbst folgt.

[11] BGB Title 11 Promise of a reward, Section 661 Prize competition (4) The person promising the reward may only transfer ownership of the work if he has stipulated in the promise of a reward that the transfer is to occur. http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2899

it to settle the ownership of (proprietary) works prepared in the course of competitions on a statutory level.

That being said, it is worth checking whether the concept of Hungarian private law changed by the end of the 19th century. From the jurists, for example Imre Zlinszky lists unilateral promises among the matters of fact that generated obligations in certain cases.[12] Mór Kiss,[13] who wrote the chapter on the promise of reward in the work of Ármin Fodor titled Hungarian Private Law, explicitly states that a unilateral promise can be a source of obligation even without acceptance. He considered the promise of reward and securities to be such promises for example. The person making the promise obliges himself to fulfill the promise towards the person meeting the requirements. The promise can be a reward, moral acknowledgement or even a prize. The intention of the one making the promise may be irrelevant, but the conditions shall be physically possible and legally and morally allowed. Kiss emphasizes that publicity makes the promise of reward obligatory and enforceable. Publicity can be ensured through advertisements, posters or the town crier (or bellman).[14]

Later practice considered "on posters, school or other announcement boards, theatre curtains, advertisement lighting equipment, radiograms or any other form of publication addressed to the public that can be checked by professionals and perceptible and accessible for everyone"[15] to be also forms suitable for publication.

Besides works of legal theory, a couple contemporary court decisions present further aspects of the promise of reward. For example, pursuant to a decision in 1905, if the person who can win the reward is not specified, then "he became indebted with the reward towards all those who reached the desired result with their contribution from the date when the reward set for it was announced publicly."[16] And according to a decision in 1906 the result is not due only after an act performed because of the promise of reward.[17]

The legal theory statements of Mór Kiss are directly reflected in the 1906 decision of the Royal Curia[18] most visibly. According to the decision "the promise of reward is not a contract for the obligatory power where acceptance would be required on the part of the one performing the specified act, but a public promise which becomes obligatory by publication, regardless of whether the act set as condition was performed beforehand or will be performed only after the reward is set."[19] Therefore, according to this, the promise of reward is a potential source of obligation.

This view was also accepted by Antal Almási,[20] according to whom the promise of reward does not generate onerous obligation. Consequently, the obligation of the awarding person is to deliver the prize or the reward; however, "the beneficiary – in the absence of a stipulation providing otherwise – does not lose his standing rights to the object generated by the specified act or to another legal interest of legal importance and that the awarding person neither gains that right by paying the reward, nor can he demand its transfer in part or in full."[21] Copyright therefore can only be passed on to the person offering the reward in part or in full, if it was already specified so in the original announcement. The prizes in the 19th century to be presented indeed met this condition.

Besides the legal practice it is also necessary to review the codification processes of private law. Codification of the private law in Hungary already started at the end of the 18th century,[22] but the first civil code was only accepted in 1959. The recommendation of 1882 does not mention the promise of reward but the 1900 and later versions adopted the already presented Prussian and German provisions.[23] The new bills also included the matter of copyright ownership. Thus, according to Section 1615 of the Hungarian Private Law Bill of 1928 the applicant shall only be obliged to transfer the ownership of the submitted work or the copyright to the awarding person if it was stipulated in the competition announcement. The promise of reward was a matter of fact that required obligation to be specified. The special character of this was stated by the Royal Curia as well following the bills: "from [u]nilateral promises generally no obligation is generated besides the special legal relationships provided for in separate legal provisions."[24]

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[12] Imre Zlinszky (1834-1880), judge at the Budapest Court of Appeal ZLINSZKY, I., *A magyar magánjog mai érvényében különös tekintettel a gyakorlat igényeire.* Budapest, 1902, p. 600.

[13] Mór Kiss (1857–192?) jurist, university teacher of Roman law.

[14] KISS, M., A jogügyletekből származó kötelmek. In: FODOR, Á. (szerk.), *Magyar magánjog. Kötelmi jog.* Budapest, 1898, p. 319-324.

[15] ALMÁSI, A., *A kötelmi jog kézikönyve*. Budapest, 1926, p. 464.

[16] Budapesti Királyi Törvényszék (Budapest Royal Court) 141/1905. In: SZLADITS, K. – FÜRST, L. (szerk.), *A magyar bírói gyakorlat. Magánjog II.* Budapest, 1935, p. 597.

[17] "[the] reward shall be given in the case of a successful investigation even if the success resulted from an act performed before the reward was set." C. 20 June 1907 20.P. IV.613/1906. judgement. In: SZLADITS, K. – FÜRST, L. (szerk.), *A magyar bírói gyakorlat. Magánjog II.* Budapest, 1935, p. 597.

[18] The Royal Curia (Royal Curia of Hungary, Hungarian Curia, Curia) operated as the high court of Hungary between 1723 and 1949.

[19] C. 20 June 1907 20.P. IV.613/1906. judgement. In: SZLADITS, K. – FÜRST, L. (szerk.), *A magyar bírói gyakorlat. Magánjog II.* Budapest, Grill, 1935, p. 597.

[20] Antal Almási (1873–1941) jurist, university teacher, curia judge.

[21] ALMÁSI, A., *A kötelmi jog kézikönyve.* Budapest, 1926, p. 466-467.

[22] HOMOKI-NAGY, M., Magánjogi kodifikációnk kérdései. In: MÁTHÉ, G. et al. (szerk.), *A kettős monarchia. Die Doppelmonarchie.* Budapest, 2018, p. 181.

[23] HOMOKI-NAGY, M., A magyar magánjog fejlődését befolyásoló jogforrások a neoabszolutizmus idején. In: HOMOKI-NAGY, M. (ed.), *Ünnepi kötet Dr. Nagy Ferenc egyetemi tanár 70. születésnapjára.* Szeged, 2018, p. 434-435. PÉTERVÁRI, M., One Empire and Two Ways of Public Administration: The Second Level Administrative Division in Austria-Hungary. In: *Journal on European History of Law,* vol. 9, Nr. 2, 2018, p. 133-134.

[24] Curia 26 April 1934. P. IV.4075/1933. In: SZLADITS, K., (edit.), *Magánjogi Döntvénytár XXVII.* Budapest, 1935, p. 97-98. VARGA, N., A Kúria döntvényalkotási joga 1912 és 1930 között. In: SCHWEITZER, G. – SZABÓ, I. (szerk.), *A közjogi provizórium (1920-1944) időszakának alkotmányos berendezkedése.* Budapest, 2016, p. 171-190.

The copyright provisions of the promise of reward in private law were in the end not included among the rules of codified Hungarian civil law.

3. Prizes of the Academy[25] and the treatment of manuscripts

Besides reviewing the development of copyright in 19th century Hungary it is worth investigating how the promise of reward increased the number of intellectual works.

In the Age of Reforms in Hungary[26] only a minimum level of copyright protection existed. No legal regulation provided for the rights of authors besides ordinances banning unauthorized reprints, censorship and press ordinances. The source of copyrights was based on natural law and it greatly depended on the benevolence of publishers. The awakening of Hungarian culture can be tied to the period of the age of reforms. The desire of citizens for intellectual nourishment in Hungarian language was difficult to sate. Many realized that if there is not enough quality literature at home then prizes could encourage the creation of new works. Two characteristic large groups of prizes existed in this age. One included awards, which one could apply for with already published works, the other included questions to answer in the competition. In the case of the latter the announcers wanted answers from the applicants to a specific current problem.[27]

The first award was promised by István Marczibányi a court advisor, patron of arts and sciences. In his will Marczibányi established a fund with 70 thousand forints, in part "for competitions aimed at the promotion of doing sciences in Hungarian language."[28] The first results were announced in 1817. In the subsequent years several problems arose in connection to the operation of the fund. For this reason, it was merged with the prizes offered by the Academy in 1845 and survived as Marczibányi-award. At that time the Marczibányi grand prize was rivalled by the Academy grand prize created in 1831 and then the so-called department prize questions, announced by the single scientific departments of the Academy.[29]

The new prize announced by the Academy in 1832 for the creation of theatrical plays was a landmark event. According to the competition announcement "a prize of a hundred gold shall rouse poets of the theatrics profession, awarded for an original sad or sensitive play in one year, and for a comedy in the other, taking turns."[30] The prize for the first tragedy was awarded to Vérnász (Bloody Union) by Mihály Vörösmarty;[31] however, hardly any quality works were found in the subsequent years so in 1844 the competition was cancelled. József Teleki, chairman of the Academy, did not approve of this resolution so in his 1854 will he established a fund of 12 thousand forints with the same original purpose. According to the announcement "the play winning the award shall be owned by the national theatre for playing but the printing shall be the right of the author."[32]

Guidó Karátsonyi – landowner, politician, member of parliament who established a fund – also supported the announcement of a competition with a literary subject. It was clearly shown in the case of both the Teleki and the Karátsonyi competitions that high quality dramas cannot be written with the regularity required by the invitation. Therefore, winners of the Teleki competition were often booed, although the winners took the money. The Karátsonyi prize could be awarded only six times until 1890, thirteen times they found no worthy applicant.[33] This promise of reward also had a copyright provision, stating that "the winning work shall be owned by the author. However, should he not print his work in three months, the right of publication shall belong to the Academy for ten years."[34]

Without reviewing every prize in the 19th century, in general it can be stated that it was widespread among aristocrats, wealthy citizens and their widows, and also contemporary financial institutions and companies to "allocate literary funds". The purpose of literary funds was to support the creation of

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[25] Magyar Tudományos Akadémia (Hungarian Academy of Sciences, Tudós Társaság between 1825 and 1835, Magyar Tudós Társaság between 1835 and 1840 and Magyar Tudományos Akadémia from 1840, abbreviated as Akadémia, MTA). The original purpose of Tudós Társaság (Science Association) was „to improve, spread and cultivate nationality and language", since at this time science, law, politics and literature were primarily characterized by the Latin language. In 1831 six departments were organized (linguistics, liberal arts, history, mathematics, natural sciences, legal sciences). Between 1869 and 1946 three departments were formed from the six (1. linguistics and arts, 2. history, liberal arts and social sciences, 3. mathematics and natural sciences). From 1870 the Academy was the centre of national scientific life. In 1946 the number of natural science departments was increased to two. Presently it has fourteen scientific departments, of which eight are natural sciences and three are social sciences.

[26] The period between 1825/1830 and 1848 is named the 'Age of Reforms' or 'Reform Era' in the history of Hungary.

[27] FEKETE G., *Az Akadémia 1831–1858 között alapított jutalomtételei és előzményei*. Budapest, 1988, p. 7.

[28] FEKETE G., *Az Akadémia 1831–1858 között alapított jutalomtételei és előzményei*. Budapest, 1988, p. 13.

[29] The famous monography of Bertalan Szemere Büntetésekről, különösen a halálbüntetésről ("On Punishment and Especially Capital Punishment") was created following this award question: "The reason for and purpose of punishment shall be determined, its certain principles and the respective applicable forms shall be presented. It shall be revealed whether death penalty may have its place among them and in which cases and how and with what success it was practiced in nations old and new and especially in our country."

[30] A Teleki-jutalom. *Akadémiai Értesítő*. (3) 1890, p. 129.

[31] Mihály Vörösmarty (1800–1855) is one of the most prominent figures of romantic Hungarian literature. Besides lyric and epic poems he was a significant playwright, translator of the works of Shakespeare, magazine editor. Tenured member of Magyar Tudományos Akadémia from 1830. Founder and member of the Kisfaludy Társaság (1837). After liberal arts and legal studies – although he also graduated as a lawyer – he was one of the first to want to live off of his literary works, free from official commitments. From 1830 one of the organizers of Hungarian literary life, one of the most respected critics.

[32] A Teleki-jutalom. *Akadémiai Értesítő.* (3) 1890, p. 131.

[33] A Karátsonyi-jutalom. *Akadémiai Értesítő*. (3) 1890, p. 136.

[34] A Magy. Tudom. Akadémia jutalomtételei. *Akadémiai Értesítő*. (3) 1890, p. 308.

some work of artistic or professional literature. In time the regulations of the funds became part of the Charter of the Academy until the middle of the 20th century. The invitations for the specific prizes almost all provided for copyright in some way. The prizes can be categorized in five groups, the characteristics of which are shown in the following table.

Copyright provisions of rewards promised by the Academy

Awarding persons, funds of organizations	Obligation of the author	Right of the Academy (in the case of the failure of the author to publish the work)
Karátsonyi	publication	free publication for 10 years
	within 3 months	
Nádasdy, Péczely	publication	free publication for 10 years
	within 1 year	
Bézsán / Egyesült Budapesti Fővárosi Takarékpénztár	publication	right of first publication /transfer of copyright
	within 1 year	
Forster, Gorove, Lévay, Marczibányi, Lukács, Sztrokay, Tomori, Ipolyi, Ulmann, Farkas-Raskó (3 month)	publication	transfer of ownership
	within 1 year	
Fáy, Bródy Zsigmond, Bük, Berzeviczy	Own property	-

It is typical that if the winner did not publish his work within three months or one year, the academy could publish the work for 10 years without the obligation to pay royalties or had the right to the first publication. Most regulations also stipulated that if the author did not publish the work within one year, then the publication rights or the ownership of the work passed on to the Academy.

The funds did not only encourage the writing of literary works, they had a significant effect in specific areas of science as well. It is not irrelevant that they also provided financial and moral acknowledgement for the authors.

The Royal Curia reviewed the promise of reward system in one case. According to the matters of fact in the case a non-winning applicant objected claimed that only one member of the three-member jury read his submission and even he did not read it in its entirety, proven by the pages being stuck together. His claim was dismissed by the authorities for the reason that the jury was formed properly and pursuant to the claim of the plaintiff the Academy expressly reviewed the operation of the jury, finding it regular in all regards. After all these precedents the Curia approved the decision of the Court of Appeal.[35] In its declaration of principle, it explained that by setting the prize a legal relationship was established between the Academy and the applicant with a nature in which the Academy alone was entitled to decide. "For the same reason its decision shall be considered final and consequently non-contestable, from which it naturally follows that the applicant shall not be entitled to demand payment of the prize not awarded to him or to demand any other compensation."[36]

The activity of the Academy was not only related to copyright through the winning applications, the manuscripts submitted as competition submissions but ultimately not published also meant a serious management and legal problem.[37] For example the writer Ferenc Kozma competed for a prize with 12 works in 1838, but none of his works won. Kozma would have liked to get back his writings, which supposedly had only one copy, however, the Academy did not want to return the manuscripts with reference to the ownership of the manuscript.[38] Since they saw that the uncomfortable situation needs to be settled, they asked Mihály Vörösmarty and András Fáy[39] to jointly create a plan to regulate "when and how the retained manuscripts may be utilized".[40]

The plan of Vörösmarty in 1839 begins with a short copyright introduction, intending to give full rights of disposal to the writer over his copyright, recommending a protection period of 40 years *pma (post mortem auctoris, following the death of the author)*. The second part of the plan provides for the delivered manuscripts. The Academy has publication rights for 15 years over winning works, that is, the ones the author of which is known but that were not published for some reason; after the end of the 15 years' period the right shall pass back to the author. However, in the absence of publication by the author the Academy has no right to give the work to any person during the entire protection period. Ownership of works with unknown authors belongs to the authors; however, the Academy is not entitled to publish the work for 70 years (considering 30 years of the life of the author and 40 years of protection period).

[35] The Hungarian court system typically consists of three levels. The court of first instance is the district court, in more serious cases (including copyright lawsuits) the Regional (or County) Court acts, the court of appeal is the Regional Court or the Court of Appeal, and the Royal Curia acts on third instance.

[36] Curia 17 June 1913. P. VIII.4878/1912. [459. EH]. In: *Polgárijogi Határozatok Tára 3.* Budapest, 1925, p. 114.

[37] VISZOTA, Gy., Vörösmarty véleménye az írói tulajdonjogról és a titkos szavazásról. *Akadémia Értesítő.* (6–7) 1912, p. 400.

[38] BRISITS, F., Vörösmarty Mihály és az Akadémia. *Irodalomtörténeti Közlemények*. (3) 1936, p. 265.

[39] András Fáy (1786–1864) writer, politician.

[40] BRISITS, F., Vörösmarty Mihály és az Akadémia. *Irodalomtörténeti Közlemények.* (3) 1936, p. 265.

Since the general meeting did not like this plan, in 1840 they involved Ferenc Kállay[41] in the reworking of its contents. First part of the second recommendation already considered 50 years of protection period *pma*. The new recommendation expands upon the 1839 version in the sense that it makes internal documentation of the Academy – for example criticisms – accessible for members only. It reserves copyright of winning but unpublished works for the Academy during the entire protection period. The recommendation extended the ban on the publication of the works to a protection period of 50 years *pma*; however, it provided an opportunity for the rightsholder of winning works with known author to copy and publish their works.[42] The general meeting of the Academy accepted the regulation, however, the method of application of the regulation is not known.[43]

Based on reviewing the internal regulations of the Academy it can be established that copyright provisions were already included in the internal rules of the Academy far before the acceptance of the Copyright Act in 1884. The concerned parties provided for copyright on common law basis.

The 1835 order of the Academy provided for the so-called "manuscript ownership right", prepared for publications of the Academy. This order reserved the exclusive rights to published writings for the Academy for one year. Copyright of works submitted on demand or willingly but not for publication and of winning works not authorized by censorship was reserved by the authors.[44] The Vörösmarty recommendation concerning non-winning manuscripts can be found among the internal orders of 1845 within the Manuscript ownership right.[45] Accordingly, the Academy reserved the copyright of works written for the Almanac for itself for one year, and for 15 years in cases of works published with royalties, provided that besides the royalties one third of the net profit of the publication was also paid to the authors. Ownership of documents intended for internal use belonged to the Academy, but the right to every other writing, including the manuscripts of non-winning applicants belonged to the authors, they had the rights of disposal. These rules lived on in the agendas of the Academic 1860 and, 1869 as well. Then they also appeared in a somewhat shorter extent – one and ten years, respectively – in the agendas of 1912 and 1936.[46]

Based on all this it can be seen that the Academy settled the matter of the ownership of authors far before the acceptance of the Copyright Act of 1884, on an internal regulation level. Through the promises of reward, and with the conditions specified in the invitations the Academy became the limited or unlimited beneficiary of the copyrights. The necessity of regulation was shown by the fact that through different competitions the Manuscript Archive of the Academy kept and registered about two thousand unnamed, non-winning, themed "competition works" until 1949.[47]

4. Theatrical play prize

Besides the rewards offered by the Academy the theatrical play award competitions of the National Theatre[48] also deserve mentioning. Previously we primarily discussed awards offered for works of artistic and professional literature and the publication of the received works. However, the promise of reward had an old tradition in the field of Hungarian acting as well. As opposed to the banned, unauthorized reprints, public displays of theatrical plays were not regulated at all in the first half of the 19th century. Therefore, the ownership of manuscripts could provide a basis for the bargaining s of the authors and the amounts of remuneration was often at the discretion of the management of the theatre.

The first steps of regulating the copyright matters concerning theatrical plays are connected to the promise of reward. Rewards for theatrical plays generated three copyright-related problems. The first was the issue of remuneration, the other was the extent of the transferred rights. Finally, the third was the matter of how contract conclusions, promises of reward and other authorizations enacted *before* the effective date of the Copyright Act of 1884 could be effective in the period following the effective date of the act, within the copyright protection period.

4.1 Remuneration of the authors

The theatre – in the case of promise of reward – had not only the right, but an obligation to perform the play within one year. This is because the author was entitled to a share from the ticket revenue besides a fixed amount of financial reward. The amount of the reward at that time was "one whole share after three performances", which meant that the author received

[41] Ferenc Kállay (1790–1861) jurist, cultural historian, linguistic historian. Tenured member of Magyar Tudományos Akadémia. Researched the culture, language, traditional lifestyle, religious concepts of the Hungarian people. Hungarian cultural history and ethnography both consider him to be a pioneer of those fields.

[42] BRISITS, F., Vörösmarty Mihály és az Akadémia. *Irodalomtörténeti Közlemények.* (3) 1936, p. 267.

[43] BRISITS, F., Vörösmarty Mihály és az Akadémia. *Irodalomtörténeti Közlemények.* (3) 1936, p. 267.

[44] A' M. T. Társaság' utasító határozatai tagokra, munkálkodásokra 's némelly egyebekre nézve, 1835' végéig. 27-30. pontok. In: KÓNYA, S., *„…Magyar Akadémia állíttassék fel…" Akadémiai törvények, alapszabályok, ügyrendek 1827–1990*. Budapest, 1994, p. 87.

[45] A' M. T. T. Utasító Határozatai Belső dolgaira nézve a' XVI-dik nagy gyűlésig bezárólag /1845/. In: KÓNYA, S., *„…Magyar Akadémia állíttassék fel…" Akadémiai törvények, alapszabályok, ügyrendek 1827–1990*. Budapest, 1994, p. 100.

[46] 74. §. Works published against remuneration in the Dissertations and in the Gazette of Department III shall be exclusively owned by the Academy for one year from publication. 75. §. Every other work published separately against remuneration from the Academy shall belong to the Academy for ten years. 78. §. Manuscripts not winning prizes shall remain in the archives of the chief secretariat for five years and can only be copied with authorization; then shall be handed over to the library. But the author retains ownership. Agenda year 1936. KÓNYA, S., *„…Magyar Akadémia állíttassék fel…" Akadémiai törvények, alapszabályok, ügyrendek 1827–1990*. Budapest, 1994, p. 268.

[47] FEKETE, G., *A Magyar Tudományos Akadémia jutalomdíjai. 2. 1859–1900.* Budapest, 2000, p. 8.

[48] The first permanent Hungarian language theatre opened in 1837 under the name Pesti Magyar Színház (Hungarian Theatre of Pest). In 1840 it became a national institution and took the name National Theatre.

a certain share of the net ticket revenue, the revenue of a whole night in total[49], but was not entitled to more royalties after further performances.

In his announcement made for the sake of Pesti Magyar Színház József Bajza[50] argued that the author should receive 1/5 share after the first performance and 2/5 share after the second and third performances. He only considered the possibility of further remuneration in special cases: "if with the passing of time the works of some writer would gain much preference and would be watched in theatre, the directorate may establish a special agreement with said writer; but the mode and need for that would only be revealed in time."[51] The option for such an agreement already promised a kind of better future for writers. However, the writing of Bajza was disputed from several perspectives. For example, his former protégé, Pál Csató,[52] in his writing published under a pseudonym, suggested in order to avoid potential misuse concerning the competition, the committee system and ticket sales for the management of the theatre to reach individual agreements with the authors and stipulate a fee or tantiem they can agree on.[53]

The next remuneration calculation method came from Mihály Vörösmarty in his writing published in 1842. He thought that the whole share of the author after the first three performances should remain but as long as he lives, he should receive a tantiem 5-6% of from the net profit of every additional performance since "because the one who helped the theatre with a couple meaningful plays shall be worthy of help in consideration, even if he ceased writing or even became unable to."[54]

Vörösmarty illustrated the financial vulnerability of authors with the situation of writer József Gaál,[55] author of the comedy Peleskei nótárius (The Notary of Peleske) (see Section 3.3). Gaál, after receiving his first reward from the theatre, was not entitled to more shares, although the theatre gained serious profit from the play.[56] The suggestion of Vörösmarty specifically discussed whether remuneration was payable to the author regardless of him having published the play or not.

The mode of remuneration changed several times afterwards. For example in the 1850s no share was paid after the first performance while a quarter was paid as remuneration for four performances afterwards so that amounts paid for season-tickets could not be included in the revenue.[57] This generated strong contemporary criticism. According to a writer of Budapesti Hírlap it would be proportionate if the playwright received one quarter of the first performance after the last third, five percent after 80 performances, ten percent over 100 performances and fifteen percent over 150 performances. It was thought that "without original playwriting there is no national theatre and we should ensure the survival of both."[58]

It got generally accepted by the end of the 1860s that the author is paid 3-500 forints when the manuscript was accepted and then 15 percent from the gross revenue of every performance, then a third of the acceptance fee after every twentieth performance.[59]

4.2 Extent of the transferred rights

The promise of reward for plays concerned the extent of the transferred rights of authors besides the matter of remuneration, but partly in close correlation with it.

Pesti Magyar Színház – Nemzeti Színház from 1840 – announced its public competitions from 1837. According to the invitations the winning play chosen by the committee was even performed. According to the invitation published by director József Bajza in December 1837 the ownership of "the performed plays" is retained by the writer at all times, that is: the writer can print or sell it freely at his discretion, but only after the period of the 'reward performances' is over."[60] So therefore if the author published the work before the performances, then the author received no reward at all. This rule can potentially be traced back to public performances not being protected by copyright even on the basis of common law in those times, so another theatre could have performed the play from the same printed text without license.

In certain cases, the theatre also received publication rights besides the right to freely perform the play. So, after the performance of the play, it could distribute the work or kept the manuscript for itself in order to exclude competitors and so the work could only be accessed through their performance.

Since certain prizes of the Academy were announced so that domestic theatrical plays could be created, the fund rules included provisions in this regard as well. Announcements for academic promises of reward for dramatic plays present the inseparable connection between the remuneration of authors and the transfer of copyrights well. According to the Teleki promise of reward for dramatic plays for example "the winning work shall be owned by Nemzeti Színház for performance purposes and by the writer for publication purposes".[61] What does this clause actually mean? According to contemporaries it could not have been the will of the founder that the author waives any fur-

[49] This is only theoretically total, since different ticket revenues could be expected each night.
[50] József Bajza (1804–1858) poet, journal editor, literary and dramatic critic, promoter of French romantics in Hungary. Director of Pesti Magyar Színház in 1837–1838 and of National Theatre in 1847–1848.
[51] BAJZA, J., *Szózat a' pesti Magyar Színház' ügyében*. Buda, 1839. p. 71.
[52] Pál Csató (1804–1841) writer, translator, turned on his former mentor after a while. There is a reference to the pseudonym in the 29 November 1839 diary entry of László Bártfay. KALLA, Zs. (edit.), *Bártfay László naplói*. Budapest, 2010, p. 283.
[53] SZÉPLAKI, V., [Csató Pál] Szózat a' pesti magyar színház' ügyében. (Vége). *Századunk*. (95) 1839, p. 757.
[54] VÖRÖSMARTY, M., A színházi drámajutalomról (vége). *Athenaeum*. (II.2) 1842, p. 11.
[55] József Gaál (1811–1866) jurist, writer, poet.
[56] VÖRÖSMARTY, M., A színházi drámajutalomról (vége). *Athenaeum.* (II.2) 1842, p. 12.
[57] BULYOVSZKY, Gy., Nemzeti Színház. *Budapesti Hírlap*. (432) 1854, p. 2426.
[58] M. J.: Nemzeti Színház. *Budapesti Hírlap*. (459) 1854, p. 2584.
[59] A színházi enquete. *Vasárnapi Újság*. (52) 1869, p. 717.
[60] BAJZA, J., Jelentés a' Pesti magyar színház' igazgatóságától. *Tudományos Gyűjtemény*. (12) 1837, p. 105.
[61] KÓNYA, S., *„…Magyar Akadémia állíttassék fel…" Akadémiai törvények, alapszabályok, ügyrendek 1827–1990*. Budapest, 1994, p. 128.

ther remuneration in return for the reward of 100 gold, because this way he would be better off organizing the theatrical performance himself. Therefore, the writer also had to be entitled to *tantiem*, that is, a share of the theatre revenues, "which is very equitable, indeed only fair this way, if this reward intends to be real encouragement, and in this the higher goals of the founder are considered." The reservation of publication rights was not considered enough compensation for the theatre royalties of the author in itself, since not as many people read plays as many went to see performances in the theatre. Besides the goal of the founder was that the invitation for the competition also had to be understood so that writers did not wave their tantiem, since "authors awarded by the academy always received a share after the performance of their plays beside the reward."[62] From this perspective the regulation of the founder and the invitation for competition was shaped by everyday customs.

The Karátsonyi-prize also announced by the Academy specifically considered the loss of royalties after published theatrical plays as presented above. According to the invitation the author was only obliged to print his work "if the Copyright Act gains the desired amendment according to which the theatrical ownership of plays will be granted for the authors of printed plays."[63] Three things follow from this rule. First, despite the financial reward, the author remained entitled to a share from theatre ticket revenues. Second, in 1860 the concept that refused the payment of royalties after the theatrical performances of published plays by the theatre was still around. Third, in the internal regulations of the Academy there was a reference to the provision of the Austrian Copyright Act of 1846,[64] since it states that the violation of the right of authors of musical or theatrical works to public performance is only considered infringement as long as "the work has not been published by printing or engraving"[65] with the approval of the author. However, it did not count as publication if the play was published as a manuscript. The second and third conclusion also refers to the factthat even before the acceptance of the Austrian regulation it was a specific Hungarian practice that no royalties were paid after published works. This rule of the Karátsonyi-prize stayed in the Academy's agenda of 1869, when the Austrian provision concerning copyright was not effective in Hungary.[66]

The promise of reward for a theatrical play poses a third question as well. It was debated how provisions on rights before the effective date of the Hungarian copyright of 1884 would influence future circulation of works, potentially even in the 20th century.

In this regard the 100th anniversary of the birth of Friedrich Schiller[67] brought an interesting turn in the history of theatre tantiems. In connection with the anniversary emperor Franz Joseph[68] ordered the payment of the 10% theatre share of the living Austrian poets in the future for the entire protection period with retroactive effect, in a single sentence transcript. The effect of the order published in Budapesti Hírlap[69] only extended to Austrian poets – despite at that time ABGB and the Austrian Copyright Act of 1846 were also in effect in Hungary. Pursuant to the order of Emperor Franz Joseph dated Vienna, 8 November 1859:

> "At the centennial celebration of the playwright Schiller I feel the motivation to allow ten percent of tantiéme salary from the gross revenue of every single performance ex-post, however only without claim for future post-payment, for all those still living Austrian poets, whose older plays are still kept in the theatrical program; and all that as of now, entirely in a manner and with all the usual legal claims concerning their heirs as if such older plays in the time before the introduction of *tantičme* were originally accepted with a claim attached to the latter ones."[70]

4.3 The Peleskei nótárius case

The way the system of the promise of reward of the 19th century affected the 20th century or maybe even the present is well presented in the case of the play titled A Peleskei nótárius (The Notary of Peleske).

A Peleskei nótárius was a really popular story written down first in 1790 by József Gvadányi.[71] Later, in 1837–1838 József Gaál used the topic as a comedy, the music for it was composed by Károly Thern.[72] The play was performed for a long time throughout the country. However, the legal dispute before the Royal Curia began sixty (!) years after the premiere and thirty years after the death of Gaál.

According to the facts of the case the National Theatre in Pest included the play in its program again, at the turn of 1897-1898, without a prior permission. For this reason, the Gaál family objected to the performance of the play, first in a letter of demand then after the second performance they requested the prohibition of the play and forbade keeping the play in the program claiming copyright infringement.[73] The claim also included the payment of

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[62] Napihírek és események. *Budapesti Hírlap*. (48) 1856, p. 3.
[63] KÓNYA, S., *„…Magyar Akadémia állíttassék fel…" Akadémiai törvények, alapszabályok, ügyrendek 1827–1990*. Budapest, 1994, p. 128.
[64] The Austrian Copyright Act of 1846 was published on 19 October 1846 in the form of a patent by the Austrian emperor with the title *Act for the Protection of Literary and Artistic Protection Against Unauthorized Publication, Reprinting and Recreation*.
[65] 8. §. WENZEL, G., *Az ausztriai általános polgári törvénykönyv magyarázata; Magyar-, Horvát-, Tótország, a Szerbvajdaság és a Temesi Bánság viszonyaira alkalmazva.* Pest, 1854, p. 732.
[66] KÓNYA, S., *„…Magyar Akadémia állíttassék fel…" Akadémiai törvények, alapszabályok, ügyrendek 1827–1990*. Budapest, 1994, p. 163. – The Austrian Copyright Act of 1846 was effective in Hungary until 1860.
[67] Johann Christoph Friedrich von Schiller (1759–1805) is the most significant figure of 18th century German literature together with Johann Wolfgang von Goethe, a representative of the Weimar classics.
[68] Franz Joseph I (1830–1916), Austrian emperor, Hungarian and Czech king – ruled between 1848–1916.
[69] Budapesti Hírlap (1853–1860) as a semi-official newspaper published orders as well.
[70] Transcript from Franz Joseph to the Lord Chamberlain. *Budapesti Hírlap*. (269) 1859, p. 1.
[71] József Gvadányi (1725–1801) imperial cavalry general, poet, writer who recorded the spoken language if his age with his verse narratives written in rustic style.
[72] Károly Thern (1817–1886) composer, pianist, conductor.
[73] C. 12 May 190.32744/1903. judgement [150.] In: *Döntvénytár III. folyam XXIV.* Budapest, 1903, p. 243.

compensation in the amount of 10000 and 3000 forints.[74] The plaintiffs certified their entitlement, and that due to the protection period of 50 years *pma* the work is in their exclusive ownership until 27 February 1916, with a grant of probate.[75] In its defence the defendant presented that the play had been on demand for decades throughout the country and at the time when the work was created there was no copyright protection in Hungary. The Regional Court approved the claim. In the course of the procedure of the first instance the court first reviewed whether it is a protected proprietary work then whether the defendant proved that it obtained the right to it. The Copyright Expert Committee assigned in the lawsuit[76] determined that the play is not the same as the work of József Gvadányi, but is an independent, still protected work.[77] However, the defendant did not prove that it obtained the right to play the comedy. The entitlement of the plaintiffs did not require further proof based on the assumption of authorship. According to the court the failure of the heirs to enforce claims could not be construed as a waiver of the rights concerned.

The Court of Appeal basing its actions up on the appeal of the defendant rejected the claim of the plaintiff entirely. The court established that the premiere of A Peleskei nótárius was in 1838 and afterwards it was played throughout the country without any permission without the author or his heirs enforcing any claims for tantiem or any other copyright as an undisputed fact. As opposed to the procedure of the first instance the court of appeal turned around the burden of proof. Despite the fact that the archives of the National Theatre burned down and so the evidences were also destroyed it was accepted as a publicly known fact that in the 1830s only the Academy and the National Theatre promised reward for authors.[78] As proof for this statement the court of appeal accepted the obituary of Ede Szigligeti[79] written about József Gaál and even made it part of the final verdict. In this Szigligeti explained that "it was only later, after the opening of Pesti Magyar Színház, on 28 December 1837 that the famous and in its kind first document was published in which the management of the theatre grants one whole performance's worth of revenue for the original play and opera writers from the first three performances; however, the author did not receive *tantiém* from the other performances. This system of rewards did not change even in 1840 when the theatre became national."[80] The court also stressed that since the revenue share system of 5% and 10% was only introduced after 1843, the play A Peleskei nótárius was remunerated according to the previous system.

The court of appeal therefore expected the plaintiffs to prove that as opposed to this assumption József Gaál did not assign these rights to the theatre or only assigned these rights with limitations. Since the plaintiffs could not prove this, the Royal Curia also upheld the decision of the Court of Appeal.

It can be seen how it can affect the financial situation of the authors and their heirs if the copyright or even the professional customs only acknowledge the protection of a type of work or utilization method (property right) late.

In 1842, four years after the premiere of the comedy A Peleskei nótárius, Mihály Vörösmarty wrote the following about the financial losses of the author. Gaál "after receiving his first reward from the theatre received no part of the revenues ever since, though his work earned six thousand pengős in pure profit for the theatre if not more. If the author received just five percent per koruna from this amount, wouldn't it have reminded him, encouraged him all the time to write something similar or even better, profitable for him too and mostly for the theatre? Such a play could have earned thousands more since for the spent hundreds."[81] With a more regulated copyright and contractual background the Gaál family could have certainly received a nice revenue from royalties until the end of the protection period of the play.

5. Promise of reward today

Provisions concerning the promise of reward were finally included in the Hungarian Civil Code of 1959 behind commitment of public interest, as a relatively short provision. These – in the absence of legal disputes – were adopted by the presently effective Civil Code word for word.[82] No reference is made to

[74] Pör a Peleskei nótárius miatt. *Budapesti Hírlap.* (37) 1902, p. 10.

[75] At that time the protection period of 50 years *pma* was typically calculated from the day of death.

[76] The first Copyright Expert Committee in Hungary was appointed in 1884. Its name from 1970: Szerzői Jogi Szakértő Testület (Copyright Expert Body). About the precedents of the creation of the Committee see LEGEZA, D., The role of experts in Hungarian copyright disputes. In: POGÁCSÁS, A. (ed.), „Szellemi alkotások az ember szolgálatában" Professzor Dr. Tattay Levente tiszteletére szervezett emlékkonferencia tanulmánykötete. Budapest, 2022, p. 263-278.

[77] Irodalmi pör. *Corvina.* (3) 1899, p. 14.

[78] C. 12 May 1903 judgement 2744/1903. In: *Döntvénytár III. folyam XXIV.* Budapest, 1903, p. 243.

[79] Ede Szigligeti (1814–1878) playwright, theatre director. Szigligeti won the award of the Academy for plays thirteen times and won the award of the National Theatre for plays three times.

[80] SZIGLIGETI, E., Gaál József emlékezete. *Kisfaludy-Társaság évlapjai, Új Folyam 3. (1865–1867).* 1869, p. 264.

[81] VÖRÖSMARTY, M., A színházi drámajutalomról (vége). *Athenaeum.* (II.2) 1842, p. 12.

[82] Hungarian Civil Code [1959. 592. §] 2013. 6:588. § [Offering rewards]
(1) If a person publicly offers a reward to anyone who achieves a certain performance or accomplishment, he shall be obligated to give the reward to the person who first achieved the performance or accomplishment. This person shall be bound by this obligation even if the performance or accomplishment is achieved irrespective of the reward offer. (2) If the performance or accomplishment was achieved by two or more persons jointly, the reward shall be divided among these persons proportionately to their participation. If the proportion of participation cannot be determined or if the performance or accomplishment was achieved by two or more persons independently, the reward shall be divided in equal shares. (3) Withdrawal of a reward offer shall be considered valid only if the person making the offer has expressly reserved the right to do so and withdrawal is affected by at least the same degree of publicity that accompanied the reward offer. Withdrawal of a reward offer shall be inoperative in respect of the person who achieved the performance or accomplishment, if it takes place after the time the performance or accomplishment had in fact been implemented.
See GRAD-GYENGE, A., Díjkitűzés, kötelezettségvállalás közérdekű célra. In: SÁNDOR, I. (szerk.), Előadásvázlatok a kötelmi jog különös részéből. Budapest, 2012, p. 233-237. TŐKEY, B., A díjkitűzés. In: CSEHI, Z. et al. (szerk.), 2013. évi V. törvény a Polgári Törvénykönyvről kommentárja. Budapest, 2021, p. 2314-2316. TŐKEY, B., Hatodik Rész: Egyéb kötelemkeletkeztető tények, XXXV. Cím: A díjkitűzés. In: ÓSZTOVITS, A. (szerk.), A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja. IV. kötet. Budapest, 2014, p. 388-390.

copyright among the codified private law provisions, the legislator reserved providing for it for the parties. Can this perspective be considered right? The assumption of the legislator to regulate the promise of reward and possessing copyrights separately can be accepted. One shall be regulated in the Civil Code and the other in the Copyright Act. Those who announce competitions for the creation of proprietary works shall draft the text of the competition carefully or the person offering the reward shall conclude a separate license contract with the winning applicant. Due to the large number of submissions and the deficiencies in their wording it might be necessary to provide at least supplementary copyright rules in areas where the reward promised is in the billions.[83] It is irrelevant if the parties know what they intend to conclude a contract about if they cannot properly include it in a contract and thus it does not have the desired legal effect. But naturally it would be the right premise if the contracting authority would be prepared to word the invitation correctly.

Is it possible nowadays to provide for copyright in the form of a promise of reward? To answer this, I have to refer back to the Copyright Act of 1884 cited at the beginning of the study, which stated that the copyright can be transferred *by contract*. Although in Hungary the (monist) concept has been applied since 1970 that neither the personal nor the property right of the author can be transferred, the effective Copyright Act similarly implies contract concerning the authorization of usage. According to Section 16. § (1) of the Copyright Act based on the copyright protection the author has exclusive rights to use the whole work or any identifiable part of it in any form in material and non-material form and to authorize any and all such forms of use. In the case of the absence of provisions of this act providing otherwise permission to use the work *can be obtained by a license contract*.

The pillars of the bridge between the Civil Code and the Copyright Act can be found in both acts. This way pursuant to Article 2:55 of the Civil Code, the Civil Code shall be applied in matters in its competence not regulated by laws providing for the copyright and industrial right protection. Section 3 (1) of the Copyright Act states that in matters not provided for in this act the provisions of the Civil Code shall be applied to the *transfer, assignment*, encumbrance of copyrights and copyright related rights and in other personal and financial legal relationships related to works and other achievements subject to this act.

If we narrowly interpret the provisions of Section 3 (1) and Section 16 (1) of the Copyright Act then we can say that the copyright provides for contract, that is, a bilateral obligation for licensing the utilization of the work concerned for the benefit of the author, and only the Copyright Act can determine other ways of licensing. Since the copyright act provides for it, indeed it regulates the license contract in a separate chapter, so the copyright cannot be provided for with a promise of reward, that is, a unilateral obligation. Especially in cases where the awarding person is the user itself and if the author does not agree with the competition conditions. The author can only object by stating he does not intend to win the reward. The wider interpretation of the same provisions makes it possible for the proprietary works or achievements under related rights to be subject of the promise of reward – as an obligation also acknowledged by the Civil Code – and the promise of reward itself can include conditions providing for copyright.

6. Closing thoughts

The study intended to nuance the history of the movements of copyrights. The presented Peleskei nótárius curia case accepted a transfer of copyright based on the promise of reward subsequently from an age when copyright was not acknowledged on a legal level. Indeed, not even jurisprudence acknowledged the promise of reward as a matter of fact that generated obligations. The Royal Curia considered the custom law of the Magyar Tudományos Akadémia and the National Theatre applied throughout the 19th century as an obligation. Therefore, if the awarding person stipulated the transfer of copyright in the announcement or determined the payment method – that is, *it does not pay* after three performances – then it permanently obtained certain rights of the winning work.

The decision of the Royal Curia passed in the case of the Peleskei nótárius confirms the concept according to which the effective regulation shall be applied to the subject of the copyright, the protection period and the infringements. However, the provisions or *customs* effective at the time of the establishment of the legal relationship shall be applicable to the transfer of rights or the license contract. The internal regulations of the Academy and the management of the National Theatre determined the consideration for the proprietary works and the extent of the assigned publication or copyrights in the promise of reward which the court subsequently accepted as an obligation.

The study also intended to underline to the fact that contemporary tender announcements also should include conditions of remuneration and the usage of the proprietary work as significant elements. Although based on the effective provisions as a general rule the license contract is only valid in writing, still, with the submission of the tender obligations are established between the parties the content of which may be determined by the invitation to tender. Tenderers often acknowledge the content of the invitation to tender as binding with a written statement. Conclusion of the license contract with the successful tenderers, winners may not happen because the legal institution of the promise of reward has been with us for centuries.

[83] Section 27 (4) of Government decree 310/2015. (X. 28.) on design contest procedures: In the contract concluded with the tenderer concerned the contracting authority determined in accordance with the Copyright Act which rights of use it obtains concerning the awarded and bought submissions and the tenderer makes a statement about assigning such rights of use. The contracting authority may use the submission in part or in full without any further consideration in compliance with the provisions concerning copyright protection.

The Right of 'Manifestacion' in the Kingdom of Aragon: Origins and Legal Heritage

David Manuel Rodríguez Ferro *

Abstract

This article aims to expose a characteristic procedural figure of the Kingdom of Aragón (Spain), a peculiarity within the strict medieval legal codes whose foundation was extended to other territories almost a century after its creation, with close links to Habeas Corpus Act. Its use produced controversial situations at certain times that led to reprisals and legal and political reforms in Aragon and in the judicial institution of 'Justicia de Aragón'. This work aims to make known the peculiarities of this procedural figure, as well as those of the institution of 'Justicia', one of the oldest legal institutions in force today around the world, also mentioning to the nuances between 'Derecho de Manifestación' and the Habeas Corpus Act. A deductive and descriptive method is employed in order to show a general overview prior to discuss each particular topic.

Keywords: *Justicia de Aragón; Manifestación de Personas; Habeas Corpus; Aragonese Foral Law; Comparative Law.*

1. Introduction

The decision to choose a subject of Aragonese Foral Law, had for me the incentive of working on a relatively familiar issue, because, without denying the field of legal philosophy in which I develop the nucleus of my research work, I am interested in doing present the originality and singularity of the foral law, its procedural tools and its institutions; with undisputed preeminence of the Justicia of Aragon.

The chosen theme aims to fulfill several objectives; The first is to influence the background of an essential and inalienable right of any democratic legal system such as habeas corpus, the second objective is to publicize and disseminate and arouse interest in the process and right of the 'Manifestación' in the 'Aragonese Foral Law' a procedural figure of strong roots with influence in other legal systems.

I would like to make special mention that the right to demonstrate encompassed - in the words of Professor Fairén - action, claim and appeal and in it the power of the Justicia of Aragon and his Lieutenants was glimpsed, to issue an order or mandate, addressed to any Judge, authority or person who had in his power another detained or imprisoned person, so that they hand him over so that violence is not done against him, before that, in the procedure directed by those people, a decision was issued.

The outline and format in which this article is structured is showed as follows: the first section deals with the background and sources of the law or process of 'Manifestación' - terms used interchangeably - from a historiographical perspective and mentioning the conceptualization of the Justicia of Aragon as a characteristic institution and in a biunivocal relationship with the aforementioned legal process. There is a classification of the different types of 'Manifestación' below, as well as the cases in which they were used. In the fourth section, the procedure for procedural initiation is explained together with its deadlines. The fifth section deals with a brief comparison between the 'Manifestación' process and the Habeas Corpus Act, with its particularities and specifications. The sixth section focuses on the historical and legal turning point that led to the decline and abolition of the right to demonstrate. Finally, a series of conclusions are offered as a corollary.

2. 'Derecho de manifestación'. Sources and foundations

The freedom of the individual person as a meaning of fundamental right, has its origin in the recognition and defense in the West of the philosophical and legal guidelines of Greece in the s. V BC from Solon, Pericles and Aristotle. In counterpoint, slavery, justified from Plato to Thomas Aquinas, was present in a wide number of societies; according to a census of the year 309 a. C. in Athens there were about four hundred thousand people who lived under the legal and social regime of slavery [1].

Later, under the light of Roman law, freedom was gradually guaranteed according to the legal status that the individual held. The full-fledged citizen possessed virtually all of the rights contemplated in Roman society without counting those particular to political, military, and religious positions. However, as the

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[1] GARCÍA BELAUNDE, D., Origins of habeas corpus [Los orígenes del habeas corpus]. In: *Revista Derecho*, PUCP, vol. 31, 1973, p. 3.

link and integration with the condition of citizen decreased, the guarantee of individual and collective rights was reduced. Given the conflicts due to abuses due to the class difference between patricians and plebeians, in 494B.C. the collegiate figure of the Tribune of the Plebs to exercise the *ius auxilii* and avoid the abuses of the patricians on the plebeians, as well as the ius intercessionis; with power of veto before the decisions of the magistrates. This institution was unique in Rome since they were not technically magistrates, therefore they lacked major powers and claimed their attribute of inviolability and sacrosanct to intercede to ensure the interests of the common people. In that same proto-republican era, the consul Publius Valerio Poplicola promulgated two important laws regarding the freedom and integrity of the person; the first prohibits corporal punishment against citizens who have appealed the ruling of the people and the second is free custody that excludes all pretrial detention. Subsequently, in the time of Justinian (535 AD) the Interdict of *Homine Libero Exhibendo* arises as the culmination of the Roman legal protection of individual freedom through the following; "The Praetor says: Exhibit the free man that you retain with malicious intent" (Law I).

This injunction acted before the praetor through a very summary procedure, which, under the conditions and limitations of the Lex Favia, should not be extended even for the crime involved in this attack, since neque hoc interdictum aufert legis Favia executionem in favor of free people who were arbitrarily detained by individuals. The Digest included other similar injunctions such as the "*De Liberis Exhibendis item ducendis*" or the "*De Utrubi*".

In Visigothic Spain times, the oldest references to freedom as a right appear in an important text, in the VIII Council of Toledo (year 683) and in its cannon 2, when it is established that no one can be deprived of their honors, detained, tormented or sentenced to death by any State institution without having clear and evident evidence, a norm that was later found in the old Bavarian law, in the *Lex Baiuvariorum*, in which the Spanish Visigothic influence is so strong.

It is important to review the particular meaning and concept that the definition of *'Fuero'* has in the Spanish historical and legal field. The *fueros* were originally agreed, that is, the result of a common contribution from the Councils to which the king gave his approval. The 'Diccionario panhispánico del español jurídico' (Panhispanic juridical Spanish dictionary) expose some relevant meanings, like: 'General designation of customary law, often attached to terms such as usage or custom', or 'Law in force in a locality, which can be set in a specific document called municipal law, a term that together with the generic law is the most widespread; in both cases, the setting in writing is not a requirement that characterizes early medieval law, which usually exceeds that which is set in a municipal jurisdiction'.

The Fuero de León (1188 AD), which proclaims it as a recognized right of the individual as a result of a civil pact between the kingdom and the King. In this document, freedom appears in a negative way, as a limitation to rulers, constituting a prerogative that should be observed by the authorities in their favor[2].

If we look at protection against imprisonment, in the Fueros de Nájera, Jaca (year 1064), Tudela, Zaragoza and Daroca (year 1142) there are provisions on freedom on bail. And advancing further, in search of judicial protection as a guarantee of the right to freedom, we find that in the aforementioned Fuero *De officio Justitiae Aragonum*, (Ejea, 1265) the Justicia appears as the median Judge between the nobility and the King, which was expanded in 1283 with the Fuero del *Privilegium generale Aragonum* where it did not distinguish between nobility and common status, since it was extended to "citizens and good men of the towns, according to the Fuero, and second in the past it was customary", that is to say, the same vicissitudes and with the same motivations as the Fuero De testamentis civium in relation to the Fuero *De testamentis nobilium* in terms of testamentary freedom in Aragón to distribute the inheritance among descendants unequally and discretionally; in reference to the legal institution *quantum eis placuerit* that is still used in Aragonese Foral Civil Law.

The Fuero *De privilegio generale aragonum* of 1283, was completed by King Jaime the Second in the Courts of Zaragoza in 1325 (*Declaratio Privilegii generalis*) which strengthened the authority of the institution of Justicia; and later, in the 'Cortes' (Courts) also held in Zaragoza in 1348, after a conflict between the aristocracy and the King resolved by arms in favor of the monarch in the battle of Epila, another Fuero was approved whose text in the Romance language is located in the Manuscript no. 207 of the University Library of Zaragoza referring to the transcript where "As it suits our real dignity that those things that were granted by us and our predecessors remain uncreated as *fueros*, privileges, liberties, uses and customs of the Kingdom of Aragon to our subjects at all times that we and our successors are observed: We establish and we order all of us and our successors to be held in real good faith to promise and swear to God in the manner in which we hereby swear, which follows as follows: We Don Pedro by the grace of God, king above, we promise in royal good faith and we swear on the cross of Our Lord Jesus Christ and his Saints four Gospels before us and by us manually touched, in good faith and less than all deceit and imagination than any that we in our own person we will guard, we will observe and by our officers and any others we will guard and observe we will command, and we will at all times observe and guard the writen fueros, especially this rubric overdites contents. On this way, the other jurisdictions, privileges, liberties, zones and customs of that Kingdom and of its places and that against those or some or some of them in whole or in part we will not come, nor will we come, nor will we consent for any way or reason, publicly or hidden. And that we in our own person or by another interposed person or another or others by our commandment or name, not confirming it by firm less recognition of jurisdiction and duly, according to law, we will not kill or exile, or outcast, we will not command, or we will fare, neither a prisoner or prisoners any or some against jurisdiction,

[2] Cf. *Sánchez Viamonte*, C., Freedom and its issues [La Libertad y sus problemas]. In: *Enciclopedia Jurídica Omeba*, Buenos Aires, 1961, p. 136-140.

privileges, liberties, uses and customs of Aragón, on bail of law presented we will not withhold, now or at any time"[3].

In successive Cortes that took place in Zaragoza during the year 1371, summoned by King Pedro the Fourth the Ceremonious; in Fuero de 1390, by Monzón (by Juan the First); and in the Courts of Zaragoza, in 1398, the authority of the Justiciazgo institution was reinforced more and more.

This leads to the Jurisdiction *De Manifestaciónibus personarum* granted in the Courts of Teruel in 1428 by King Alfonso the Fifth, in which we could say that there is the codification of the regulatory norms of the 'Manifestación' as a procedural instrument, with express reference to the existence of this Privilege. This charter reads as follows: «Near the 'Manifestación's of the prisoners, willing to provide. We want and order, that incontinent as the 'apellido' (apealling) given will be, the 'Justicia de Aragón' has to provide the call, if it will be in case of provision according to Jurisdiction, or deny, if it was not in case of provision. And giving to the abuse of the performers the provision of the said 'manifestación'. We want that the officer who manifested the prisoner, cannot that loose walk through any city, villa or place; before, if taken from the mainland, without any delay, and without diverting from some other places, take the manifested prisoner directly via the power of the Aragon Justicia system, and that without delay present, and this God, the penalties of the *Fuero* imposed against the officials criminals in their trades. And that the aforementioned 'Justicia de Aragón' cannot the manifested dita give 'capileuta' (bail); before that one has to be held, or has a prisoner in the common jail, or in any house, it will be seen in the city, villa, or place of the Court of the aforementioned 'Justicia', it will be, according to the quality of the person, and of the cause. And that the officers or any other, that the prisoner or prisoners have, or have been arrested, or have ordered to be arrested, cannot separate them, in such a way that the. 'manifestación' fills up, or dilates.

Before the official that the 'Manifestación' will go to make, if they have had, that or those to show, shown to deliver, he will take it without any delay, give the above penalties. And not least can the 'Justicia' compel the official sentences, or any other arrestants, or detainees, or orders to arrest, to give the prisoner who is ordered to 'manifestar' (shown in front of the judge). And for giving expedition to the signature of the facts, which will be given by the stated decree. We order that the prorogation made after the fifteen day already by *Fuero* or doing of those against *Fueros*, cannot exceed a term of another fifteen days within which there is to publish what has been produced haura. But that it was filled due to fault, or negligence of the Judge, of power of which manifested will be, or of the Notary who the process, or other acts activated, or testified haura, or detain; which Notary within eight days before required, or demanded will be, at the expense of the 'manifestación', if he had to give the signed copies, and attests to the said processes, and acts, given the said penalties. And that you finish them, so to contradict, and faith to do, and publish to one part, and to the other, each one cannot exceed ultra thirty continuous days. And in the other things the *Fueros* of the 'manifestación'. And signatures of facts, staying in their firmness, and value»[4].

The "Manifestation of persons" —action, claim and appeal— was the power of the 'Justicia' and his 'Lugartenientes' (Lieu-

[3] "Como a nuestra real dignidat convienga que aquellas cosas que por nos et nuestros predecesores fueron otorgadas finquen no crebantadas como fueros, privilegios, libertades, usos et costumbres del Regno d'Aragon a nuestros subditos a todos tienpos que nos et nuestros sucesores son observados: Stablimos et ordenamos a todos tienpos que nos et nuestros sucesores siamos et sian tenidos en buena fe real prometer et jurar dius la forma la qual nos en continent juramos, la cual se sigue en aquesta manera: Nos Don Pedro por la gracia de Dios, rey sobredito, prometemos en buena fe real et juramos sobre la cruz de Nuestro Senyor Jhesu Christo et sus Santos quatro Evangelios davant nos puestos et por nos manualment tocados, en buena fe et menos de todo enganyo et maginacion que qualquier que nos en nuestra propria persona custodiremos, observaremos et por nuestros oficiales et cualquier otros custodir et observar mandaremos, et faremos a todos tiempos observar et custodiar los fueros diuso scriptos, specialment dius aquesta rubrica sobredita contenidos. Hoc et encara los otros fueros, privilegios, libertades, husos et costumbres del dito regno et de sus lugares et que contra aquellos o alguno o algunos dellos en todo o en partida no veniremos, ni venir faremos, ni consentiremos por alguna manera o razón, publicament o scondida. Et que nos en nuestra propria persona o por otra interposita persona o otro o otros por nuestro mandamiento o nombre, no aviendolo por firme menos resconoximiento de iudicio et devidament, segunt fuero, no mataremos ni exiliaremos, ni matar extemar ni exiliar mandaremos, ni faremos, ni preso o presos alguno o algunos contra fueros, privilegios, libert ades, husos et costumbres d'Aragon, sobre fiança de dreyto presentaba reteneremos ni retener faremos, agora ni en algun tempo» (BERGUA CAMÓN, J. In: *Anuario de Derecho Aragonés*, 1949-1950).

[4] «Cerca las manifestaciones de los presos fazederas, querientes devidamente proveyr. Queremos y ordenamos, que encontinent como el apellido (llamamiento) dado será, el Iusticia de Aragon haya de proveyr el apellido, si será en caso de provisión segun Fuero, o denegar, si no era en caso de provisión. Et providentes al abuso de los executantes la provision de la dita manifestación. Queremos que el ofi cial que al preso manifestara, no pued aquel suelto lexar andar por alguna Ciudad, Villa o lugar; antes sia tenido de continent, sin dilacion algun, á sin divertir de otros lugares algunos, levar al dito manifestado preso recta via a poder del dit Justicia de Aragón, e aquel sin dilacion presentar, é aquesto dius las penas del Fuero impuestas contra los oficiales delinquientes en sus oficios. E que el dito Justicia de Aragon no pueda la dita manifestado dar a caplieuta; antes aquel haya á tener, é tenga preso en el carcel común, o en cualquier casa, de visto le sera en la Ciudad, Villa, O Lugar de la Cort del dito Justicia sera, segun la qualidad de la persona, é de la causa. E que los oficiales ó otros cualesquiere, que el preso o los presos tenran, o preso hauran, ó hauran mandado prender, no puedan aquellos apartar, por manera que la. manifestación se empache, ó dilate. Antes al oficial que la manifestación yrá á fazer, sian tenidos, aquel o aquellos mostrar, d mostrados librar, é lexar prender sin dilación alguna, dius las penas sobreditas. E no resmenos pueda el dicho Justicia compelir los ditos oficiales, ó otros cualesquiera prendientes, o detenientes, o mandantes prender, á dar el preso que se manda manifestar. E por dar breu expedicion a la firma de los greuges feytos, que por el dito manifestado se dará. Ordenamos que la prorogación fazedera apres de los XV ya por Fuero statuydos o fazerfe de los contra Fueros, no pueda excedir termino de otros XV dias dentro de los cuales haya á publicar lo que produzido haura. Sino que fuesse empachado por culpa, o negligencia del Iud ge, de poder del qual manifestado sera, o del Notario qui el proceso, ó otros actos acti ado, o testificado haura, ó detenra; el cual Notario dentro ocho dtas apres que requerido, ó demandado le sera, a expensas del manifestado, sia tenido dar las copias signadas, é fe fazientes de los ditos procesos, é actos, dius las ditas penas. E que los terminas, assi del contradezir, e fe fazer, e publicar a la una part, é á la otra, no pueda excedir cada uno ultra trenta dia continuos. E en las otras cosas los Fueros de la manifestacion e firmas de greuges feytos fablantes, finquen en su firmeza, é valor».

tenants) to issue an order or mandate, directed, to any judge, authority or person that he had in his power another person, arrested or imprisoned, so that he handed over, so that no violence was done against the people —remember the Aragonese prohibition of torture[5] —- before in the procedure directed by said persons, a decision is issued. Examined the aforementioned process by the 'Justicia', if he found that it was adjusted to jurisdiction, the authority would eventually return the prisoner for the sentence to be carried out[6]; but if the act or process were vitiated by illegality – 'contrafuero' –, the 'Justicia' shall not return the prisoner, but set him free for good[7].

Under a procedural view, if the sentence of the ordinary court had to be reformed, the same Justice did[8]. If it was illegal, he revoked it[9]. And there was no appeal against the judgment of Justice[10]. The execution of the sentences of the ordinary judges, as well as by the Justice, could not be hindered by a Firm or by another Manifestation[11]. The Manifestation had a particularly strong legal support ('Via privilegiada") in certain cases; the procedure, very fast, was very favorable to the 'manifestado'.

Torture disappeared in fact even before it in did in law[12] (cfr. GIMÉNEZ SOLER: The Judiciary, cit., p. 51, thirteenth century). Indeed, from the *Declaratio Privilegii generali* of 1325, bail was admitted in criminal matters, and in 1348, as seen above, the principle of the "legal process" appeared with the Jurisdiction *De iis quae Domimus Rex*[13].

But like the 'Manifestación', after all, it was nothing more than a specification of the Signing Process. In the same Jurisdiction "*De Manifestationibus personarum*" it expressly speaks of "Signatures of greuges", and we want to clarify now, for the proper understanding, that 'greuges', in the ancient Aragonese language meant lien or grievance, and that 'Signature' was a order or decree of 'Justicia' against individuals, officials, judges, and even the King when they proceeded against Fueros, the guarantee that with the 'Manifestación' was attempted and achieved had to appear long before the Fuero that has been transcribed[14].

The 'Justicia de Aragón' in charge Joan Ximénez Cerdan - son of his predecessor in office Domingo Cerdán- left a relevant document consisting of a letter that he addressed on February 25th, 1435 to 'Justicia' Don Martín Diez D'aux, which appears attached to the Corps of Observances of the Kingdom of Aragon with the denomination «*Litera intimata* per loan Ximénez Cerdán a Don Martín Diez D'aux» (personal letter by Joan Ximénez Cerdán to Mr. Martín Diez D'aux).

Domingo Cerdán himself dispatched a Signature against the King, which his son also relates: «and before that Justicia King Don Juan signed a right on the primogeniture, his father (Pedro the Fourth, the Ceremonious) being the firstborn; which he wanted to throw away at the instigation of his stepmother Doña Forciana; And for all his lordship of him, he publicly ordered that they not honor him as Firstborn, nor obey him in nothing. The mentioned 'Justicia' granted him customary letters for him, and to the Kingdom».

Although, Joan Ximénez Cerdán already occupying the position was forced to use the 'Manifestación' against King Don Juan the First, and he exposes it in the said *Litera intimata*: «And before I was 'Justicia', the said King Don Juan came to Zaragoza; and he put the largest party of the citizens of Zaragoza prisoners; which signed lawfully before me; and by legal account they were sent to 'manifestar".

On the occasion of this Manifestation, the 'Justicia' had to suffer all kinds of coercion from the Royal Vice Chancellor and some of his Advisors who made him go, by order of the King, to the Aljafería Palace and later to Zuera (where the King stayed overnight) and They tried to place one of their officers as Deputy, which he refused. And 'Justicia', remembering the King: «as he had helped himself from the office, when he had signed a right on the primogeniture»[15]. He resisted all the pressures with great satisfaction from the Deputies -representatives of the people of Zaragoza-; a laudable lesson in judicial independence.

We also see in the same *Litera intimata* the account of Justicia Ximénez Cerdán of another act of independence from his father and predecessor Domingo Cerdán: «This Justicia was very hard towards my planting, that one time Mr. Lurdan Perez Durries, Deputy Governor, was summoned personally before him, and he was given a criminal complaint as a breaker of the Jurisdiction; And because they gave him his Rightful Signature by public letter, he withdrew him as a prisoner». And in the times of Ximénez Cerdán, he had to proceed against the disobedient

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[5] In the Kingdom of Aragon, the torture of registered persons was prohibited in 1325 by the *Declaratio Privilegii generalis* approved by King Jaime the 2nd in the Courts of Aragon meeting in Zaragoza, with the sole exception of the crime of counterfeiting, provided it was committed by foreigners or Aragonese criminals.

[6] Cfr. FAIRÉN GUILLEN, V., *Aragonese precedents of the protection trials [Antecedentes aragoneses de los juicios de, amparo]*. UNAM, 1971, pp. 77-79.

[7] Cfr. *Fairén Guillen*, V., Considerations on the Aragonese process of 'Demostración de personas' in relation to the British Habeas Corpus Act [Consideraciones sobre el proceso aragonés de Manifestación de personas en relación con el Habeas Corpus británico]. In: *Revista Derecho Procesal*, vol. 1, 1963, p. 9.

[8] Cf. Jurisdiction V. „De manifestationibus personarum", cit.; BARDAXI: Comentarii, cit., fol. 122. This Jurisdiction was promulgated to fill the gap caused by the previous silence („either prove or annul"). Cf. jurisprudence in MOLINO: Repertorium, cit., fol. 20 vto.

[9] Cfr. Fuero V, „De manifestationibus", cit.

[10] Cfr. Ramírez: De legt regia, cit., § 20, n. 148.

[11] Cfr. Fuero V. „De manifestationibus", cit.: I, *„De modo & forma procedendi in criminali"*. cit.: applied to civil procedural legislation, cfr. Fuero "*De manifestationibus & inventariationibus bonorum*", 1436.

[12] Cfr. DUQUE BARRAGUES, Á., The Privilege of Manifestation [El Privilegio de la Manifestación]. In: *Cuadernos de Aragón*, num. 5-6, 1974, p. 25-50.

[13] Book I. Cf. also the Fuero *„De manifestationibus personarum"*, of 1467, book III.

[14] Cfr. FAIRÉN GUILLEN, V., Aragonese medieval procedures and Human Rights [Los procesos aragoneses medievales y los Derechos del Hombre]. In: *Anuario de Derecho aragonés*, Zaragoza, 1971, p. 371.

[15] «como se havia ayudado del oficio, cuando habia firmado de dreyto sobre la primogenitura».

authorities of the city of Valencia due to a matter that arose between the Viscount of Villanueva, Lord of Chelva, and the Governor and Juries of that City, and when they came to Zaragoza on the occasion of the coronation of King Don Martín. 'Justicia' Ximénez de Cerdán himself really imposed his authority in the case of the Royal Governor Ruiz de Llori who disobeyed a 'Manifestación' and hid the prisoner. The 'Justicia' summoned the arms of the Cortes; the Cortes agreed with the 'Justicia' to maintain the Fuero and threatened the Royal Governor nothing less than to march with troops against him hoisting the Banner of the Kingdom; whereupon the Governor relents, and obeys the order of the 'Manifestación'. This breadth of functions and powers, even political, of the 'Justicia' can be easily explained if we take into account that the King of Aragon was obliged to take an oath to respect the Fueros, Privileges, freedoms, uses and customs of the Kingdom before his coronation, as it was expressly established in the Fuero given by Pedro the Fourth in the Courts of Zaragoza in 1348 shortly after the aforementioned battle of Epila between the nobility and the King to which we have referred before; later recalled by Juan II in the Cortes de Calatayud in 1461, who proclaimed the need for the prior oath of the Kings "before we can use any Jurisdiction". Among the functions of the 'Justicia' as a royal magistrate and, in turn, a public magistrate, presiding over the Courts of the Kingdom in the absence of the monarch and taking the oath of office for the King stand out. The oath had to be taken in Zaragoza, in the church of La Seo (Cathedral of San Salvador, Zaragoza city), before the main altar and the presence of the 'Justicia de Aragón' inpersoned was required, "and in his power" in this very oath, The Justicia officiated the ceremony stressing the *sine qua non* condition of respect for the law by the candidate for monarch with the ceremony of: *"Nos, que somos tanto como vos y todos juntos más que vos, os hacemos rey de Aragón, si juráis los fueros y si no, non" (We, who are as much as you and all together more than you, make you King of Aragon, if you swear the privileges and if not, do not)*. This phrase, deeply rooted and weighty, operated as a bulwark against the excessive royal power that could incur in contravention of the Fueros.

The 'Justicia de Aragón' acquires a relevant role as guarantor and supervisor of the observance of the Royal Privilege granted by Pedro the Third in 1283, in which it confirms a mediating character, expanding its jurisdiction to lawsuits and causes between the nobles themselves, in which, among other rights and prerogatives, it stands out; "(the) prohibition of vexation of the Aragonese, neither civilly or criminally agreed, if not at the request of the one who has a main interest, nor can the truth be inquired by inquisition or by torture, so since these Aragonese or their causes cannot be taken out of the Kingdom, if not they have to be dealt with in the Kingdom and by Judges and officials of the Kingdom, who are its ordinary and local Judges, deciding the processes and sentencing according to the foral and public regulations".

3. Types of 'Manifestación'

We can distinguish three different classes of 'Manifestación', depending on whether it refers to people or goods; and within the former one would have to consider separately, with current terminology, those that had a criminal nature, from the strictly civil ones, and distinguish within the Manifestation of assets a subspecies: the 'Manifestación'of documents and files.

3.1 'Manifestación' of people in the criminal sphere

When the manifested person was in the power of Judges or royal officials, the competence to decree the 'Manifestación' corresponded exclusively to the 'Justicia' and his Court; while it was also granted to any ordinary judge, if the declared was in the power of private persons.

The charter of *manifestationibus personarum* of 1428 (Teruel), those promulgated with the same title in 1436 (Alcañiz) and 1461 (Calatayud), and the Charter of *manifestations personarum* of 1510 (Alcañiz) must be taken into account.

Consequence of the prohibition of torment that governed in Aragon from the Fueros de Ejea (in that of Calatayud, of 1461, cited above, the penalty of deprivation of all position was reached for those who killed, wounded, whipped, tormented, etc.), the 'Manifestación de personas' sought to avoid the use of violence or coercion against the accused or prisoners, and lasted until the 'Manifestación' was rejected, or a valid sentence was passed on the merits of the matter.

But at the same time, the 'Manifestación' could not serve to free the person favored by it from the results of a legal process against him. For this reason, in the Fuero de Teruel of 1428 (the most important regarding the procedural aspects of the 'Manifestación') it was provided that the 'Justicia' would keep the 'Manifestación' in prison, although under his jurisdiction. For this, in successive Fueros, the 'Justicia' was granted three alternatives that we see below:

a) The Zaragoza Manifestados Prison, which was a preventive custody establishment, which in no way resembled penitentiary jails. It was created by the Fuero De Manifestación ibus personarum, of Calatayud, in 1461, and was carefully regulated in the Fuero De la Cárcel de Manifestados, in 1564.

This Prison for 'Manifestados' was exclusively under the jurisdiction of the 'Justicia', and with it the purpose was achieved that the prisoners favored by the 'Manifestación' were separated from the others, preventing them from being taken to another Prison. The Jurisdiction of the 'Justicia' in it was absolute and neither the King nor any other official was allowed to enter it or exercise any power in it, even ordering the death penalty for the jailer who allowed, due to malice or negligence, the entry of officials: "to carry out any execution of death, or mutilation of a limb, or other abuse or torture, or unbridled jurisdiction, against the 'manifestados' people". And the interrogations that the Judge who heard the main matter had to carry out, had to be done in the Manifestados Prison, with which they sought to guarantee a legal process without torment or violence. The person favored by the 'Manifestación' had to remain in this Jail while the entire 'Manifestación' process lasted.

Regarding the location of the Manifestados de Zaragoza Prison, we have data that allow us to affirm that it was located in the Arco de Toledo; "Where the prisoners who occupied the call of the 'Manifestación' were transferred." We believe that in 1842 the Zaragoza Manifestados Prison that was in the Arco de Toledo was being used as a common prison since by then, the

Criminal Manifestation had disappeared almost a century and a half ago and that the Manifestados Prison kept only the name and not the fate.

b) Give house for jail. - That is, what today we would call house arrest. It was already established in the Fuero *De manifestationibus personarum* of Teruel (1428), and was ratified in the Fuero de Calatayud of 1461 With the same purpose pursued for those who were in the Manifested Prison, the interrogations had to be carried out in the House given by the 'Justicia' as a prison, that is, under the jurisdiction of the 'Justicia' and not of the Judge who heard the process major.

e) Release on bail As already mentioned, the Fueros de Nájera, Jaca (1064), Tudela, Zaragoza and Daroca (1142) already contain provisions on release on bail. But it is curious that in the Fuero de Teruel, of 1428, which we could say codified the precepts on the Manifestation, it was expressly stated, as we have seen, that the manifesto would have to be taken "(the) prisoner straight forward the power of the Justicia de Aragón" and was added below: "that the said Justicia de Aragón cannot transfer the 'manifestado' under capileuta (bail)" [16].

This prohibition of the Jurisdiction of 1428 was attenuated in the Courts of Alcañiz in 1436 (King Don Juan II, as Lieutenant of King Don Alfonso the Fifth) which admitted that the 'Justicia', at its discretion, could grant freedom on bail to the protesters, even that with the exception of those who were accused of very serious crimes as enshrined in the Jurisdiction in which cases the manifested, currently cannot be transferred by means of bail, from 1528. And this possibility lasted only until 1592 when the Courts of Tarazona, At the instigation of Felipe the Second after the 'Manifestación' of Antonio Pérez (event of the 'Alteraciones de Aragón'), he prohibited the freedom on bail to the protesters.

3.2 'Manifestación' of people in the civil sphere

The 'Manifestación' process was also aimed at simply civil purposes to put an end to the threat suffered by people who were unjustly retained by their parents or relatives, neither more nor less than what we would call today "deposit of persons", or with legal language more recent 'provisional measures in relation to persons'.

This type or subspecies of Manifestation was not affected by the unfortunate agreements of the Courts of Tarazona of 1592 nor by the Decree of Nueva Planta (1707), to which I will refer later; and for this reason it has had a long survival in the Spanish legal system.

3.3 Manifestation of documents

The 'Manifestación' in civil matters could have as its object assets of all kinds, as a special precautionary measure, through exhibition and inventory for insurance purposes to guarantee the subsistence of the manifested assets. It was first regulated in the Fuero *De Manifestationibus et inventariationibus bonroum*, of 1436. Precisely the Justicia Ximénez de Cerdán in the aforementioned *Litera intimada*, he recounts how he himself decreed a Declaration of goods belonging to a merchant from Zaragoza, which had been unjustly seized by order of the King, and later ordered the imprisonment of the royal official who refused to comply with the Declaration.

This type of Manifestación also included documents, and the Fuero *De Manifestatione scripturarum,* of Calatayud in 1461, attributed its knowledge to the 'Justicia de Aragón', although jurisdiction was later extended to other Judges in the Fueros De Manifestación ibus scripturarum, of Monzón, of 1510 and 1515.

This Manifestación consisted in that the Justicia (and later the other Judges), extracted the deeds, at the request of a party, from the Notary who had them, to examine them and obtain a copy of the individuals designated by the petitioner or the opposing party, being later obliged the 'Justicia' or the corresponding Judge to return the deed to the Notary; and from the Jurisdiction of 1510 the applicant was obliged to provide security or bond.

It should be noted that when it came to the exhibition of a process, the 'Manifestación' could have extraordinary importance. Surely, due to the existence of several jurisdictions, it must have been common for the processes to disappear or to be claimed by some interested superior official in their hindrance and delay, or that the same Judges and their Notaries refused to show them to the litigants themselves, with a notorious violation of their rights. But since the Manifestation of processes, especially in criminal proceedings, could mean a delaying obstacle to its final resolution, in the year 1512 the extraction of processes was replaced by obtaining a copy of them, thus consecrating what we now call the principle advertising for the disputing parties.

In the aforementioned Courts of Tarazona of 1592, the Jurisdiction of manifestation of processes was given, granting jurisdiction to the Royal Court and thus giving it the ordinary character of simple *actio ad iexhibendum*.

4. Procedures of the 'Manifestación'

The process began at the request of the interested party himself, his wife, or women who were relatives within the third degree, swearing on the truth of the relationship and presenting a witness, and also of any other person on his behalf if he swore that the facts that alleged to request the 'Manifestación' were true, although the oath disappeared by virtue of the Fuero De iure iurando of 1461. This possibility of requesting the 'Manifestación' through third parties is explained because many times the interested party would not be in a position to formulate his request directly to the 'Justicia' precisely because of the situation that with the 'Manifestación' tried to remedy.

Presented a document in these or similar terms, a first phase began, which we could call summary and without contradiction, in which the 'Justicia' or one of his Lieutenants was obliged to proceed "without warning other acts, and without any delay", and without hearing the person or authority that had the interested party in their power, making him release from prison. But since the guarantee did not mean impunity, the 'Justicia' assured that the protester would not evade possible judicial ac-

[16] «el preso recta via a poder del Justicia de Aragón» and «que el dito Justicia de Aragón no pueda el dito manifestado dar a capileuta (bail)»

tion by means of one of the three means that the Fueros put in his hands: place him in the Prison for Protesters, send him to jail, or give him a capileuta (bond), unless the interested party alleges -and proves- that he had been detained against what was ordered in a previous "Signature", in which case the 'Justicia' had to release him, without further ado, within the following two days.

Once this urgent, summary and precautionary measure was adopted, with which it was possible to avoid that violence could be exercised against the protester, and since he was already under the jurisdiction of the 'Justicia', the process entered a second contradictory and summary phase in which intervention was granted to the person or authority that until then had been holding the prisoner.

It began with what we could now call a written demand from the manifesto stating the greuges feytos (arrest, violence, torture). This demand had to be made within a period of fifteen days, extendable for another fifteen days.

By virtue of the principle of contradiction, which clearly occurred in this phase of the process, the person or authority causing the *greuges feytos*, to which we could give the name of the opposing party, had other equal terms to allege and prove the reasons for the detention; and, then, the 'Justicia' dictated his sentence if the matter had already been ruled by the first Judge; and in that sentence the 'Justicia' confirmed, reformed or annulled the previously issued one. If the first Judge had not ruled yet, -and this was the most frequent case- the 'Justicia' did not issue a sentence either, but limited himself to keeping the Manifestation in force while waiting for the first Judge to process the main process in accordance with the Fueros, since the 'Manifestación' did not suspend the jurisdiction of the ordinary Judge and the process initiated by the latter continued, although it guaranteed the safety of the manifested since all the actions that were necessary to be carried out by the first Judge close to the prisoner had to be carried out through the jurisdiction of 'Justicia'.

Up to this point, the intervention of the 'Justicia' of Aragon in the cases in which it did not issue a sentence, could be considered comparable to that of the modern Courts of Constitutional Guarantees.

When the first Judge handed down a conviction against the manifesto, the 'Manifestación' process continued in a new direction: that of examining whether or not the sentence should be annulled as "outrageous" for breach of the law.

Once the conviction was handed down, the accuser and all the Judges who had intervened in the substantive process were automatically summoned to appear before the 'Justicia' in the 'Manifestación' process; and, whether or not they appeared, the defendant had a period of 75 days counted from the date of the conviction, for what today we would call formalizing an appeal against the sentence, presenting before the 'Justicia' the encumbrances that for him were contained in it and the reasons why it should be considered invalid or illegal, having to prove all their allegations within the same period of seventy five (75.-) days.

The inactivity of the 'manifestación' in this phase, that is, the non-formalization of the appeal, determined the end of the 'Manifestación' process and that the 'Justicia' handed over the prisoner to the ordinary Judge for the fulfillment of the sentence. If the "recourse" was formalized, the accusers and the Judges had thirty-five (35.-) days for their allegations and evidence, and then both "parties" had twenty (20.-) more days each to reply, duplicate, and prove, after which the Judge issued a decision within a period of thirty (30.-) days the timely sentence that was not subject to any appeal.

The sentence that he considered adjusted to the Fueros, the one dictated by the ordinary Judge, logically had to order the return of the prisoner declared for the fulfillment of the same; if the certainty of the greuges alleged by the manifesto (illegal detention, torture) was declared proven, the prisoner was released by the 'Justicia'; if the first sentence was considered illegal, it was revoked; And if, in the judgment of the 'Justicia' or his Lieutenants, it deserved to be reformed, they themselves reformed it.

The 'Manifestación' of people had a special character in certain cases called "of the privileged route", when a person was arrested who had in his favor a «Firma»; when a person manifested himself, a criminal complaint was not presented against him within a period of three days; and when the prison order had been given by an incompetent judge. In these cases, the prisoner is released immediately or in a very short time after a very quick investigation by the Judge or his Lieutenants. And, the accused could not be re-arrested for any other reason before 24 hours had elapsed after his release, unless it was confirmed by a public document or summary information that he had committed another crime.

5. Dissemination of the right of 'Manifestación' and approximation to the comparison with the Habeas Corpus Act

The possible influence of the procedural figure of the Aragonese Manifestation on the Habeas Corpus Act of 1679[17] has been studied, with fruitful results, where the influence of the Manifestation on the writ of amparo of the Hispanic American peoples. This article would be incomplete without mentioning the historical and legal comparison of the legal figures of the 'Manifestation of persons' and the aforementioned English Habeas Corpus Act[18].

The first record of a document that outlines the justification of a subject verified through a public process, controlled and only by the will of the monarch was the *Magna Carta Libertatum*, being the first use of *habeas corpus ad subjiciendum* during the reign of Edward the First, in 1305. Thus, the first noted appearance of habeas corpus was in 1199, sixteen years before the Magna Carta. Utterly, part of the intermediate procedure of early British legal adjudication, the writ was extensively em-

[17] SÁENZ DE TEJADA Y DE OLOZAGA, F., *The Aragonese 'Derecho de Manifestación' and the English Habeas Corpus [El derecho de manifestación aragonés y el habeas corpus inglés]*, Ed. Compañía bibliográfica española, 1956, p. 50, et al.

[18] FAIRÉN GUILLEN, V., Consideraciones op. cit., In: *Revista Derecho Procesal*, 1963, vol. 1, p. 44-50.

ployed to corroborate the presence of parties in court [19]. In the fifteenth century, a substantially different version of contemporary habeas corpus appeared as the King's Chancery Courts started to use habeas corpus, along with writs of *certiorari*, to remove cases from inferior courts into their own [20]. Vaguely related to with the protection of individual rights or issues of due process as are conceived nowadays, this *cum causa* version of habeas corpus was viewed to support the privilege of certain social classes, such as "clergy, members of Parliament, ministers of the King, and officers of superior courts (…)" to have the advantage of legal proceedings in rather supportive legal bodies. Although, some authors give the resolution that the real beneficiaries of the document of the *liber homo* – Magna Carta, Article 39-were not the common people rather an "aristocratic class (…) who can no more be ranked amongst the people, than the country gentleman of today" [21].

In 1640, the Habeas Corpus Act of the English Parliament was promulgated and, in 1679, a new act was elaborated by the same body as an *ex professo* law that defined and gave legal structure to Habeas Corpus. Its legal basis sustains, in criminal matters except crimes of lese majesty or high treason, the right of the individual detained or a third party assisting him to appear before the Lord Chancellor, before the Justice of the King's Bench as a court of appeal or to the Barons of the Exechequer in their jurisdiction for a deliberation on the legality and grounds of their imprisonment, related to equity matters.

On the first hand, one distinction between both legal fundaments is the search for the physical integrity and protection of the individual to prevent any torture from being exercised in the case of the 'Manifestación'. Habeas Corpus writ, unlike the 'Manifestación', did not influence the execution of torture for the purpose of punishment. or confession. In an initial analysis -from a current legal perspective-, both institutions protect the fundamental right of individual freedom and that of certain effective judicial protection before real organisms.

On the second hand, another main difference is the temporal nature of the 'Manifestación' insofar as the presentation before the "Justiciazgo" guaranteed a review of the physical state of the prisoner but not a procedural one of territorial and material jurisdiction, without intercession with a higher authority. Unlike Habeas Corpus, the king's appeal or intercession was not required. It should be remembered that the crimes that were not covered by this prerogative were those of coinage and, later, those that were under the jurisdiction of the inquisition court.

Nonetheless, a keystone nuance between 'Manifestación' and Habeas Corpus lies on the personal scope of the legal application; 'Manifestación de personas' encompasses aslightly wider field of accuseds and offers certain procedural guarantees that provide some protection safeguards.

6. Fading of the procedural figure of the 'Manifestación'

The most illustrious case of acceptance of the prerogative of 'Manifestación' was that of the Secretary of State of Felipe the Second Antonio Pérez, who plotted a conspiracy with the aim of making enemies of the Monarch with his brother Don Juan of Austria, at that time Governor of Flanders. After the death of Don Juan, the documents and epistles were revealed and the tricks of Antonio Pérez and the princess of Éboli brought to light as accused traffic in State Secrets. Pérez was arrested and tortured in order to confess his involvement in the murder of Juan Escobedo, Juan de Austria's former secretary of state accused of treason and killed by hitmen at the request of Felipe the Second at the request of Antonio Pérez since he knew of the plot that Pérez was involved with the Flemish insurgents and his association with the princess of Éboli, of whom he was a lover.

Antonio Pérez, with the trust of the king already dilapidated and in possession of the documents that implicated the monarch, was helped by his wife and friends to escape to Zaragoza in 1590 where he was able to rely on his jus sanguis as the son of an Aragonese and claim the protection of the 'Justicia' of Aragon. Felipe the Second, before the parsimony of Aragonese 'Justicia' and to prevent Pérez from fleeing to France, accused him of heresy and caused the Inquisition to arrest him before whose jurisdiction the guarantees of Aragonese law had no effect. The attempted transfer provoked the anger and revolt of numerous Zaragozans who made the maneuver impossible.

On September 24, 1591, with Juan de Lanuza "El Mozo" occupying the position of 'Justicia', the transfer was made effective, not without great tumult. Pérez and his relatives take advantage of this to free him and get him to cross the Pyrenees mountains to take refuge in France. Faced with the failure of the operation, the fury of King Felipe the Second sent a military force of some 10,000-14,000 troops under the command of Alonso de Vargas that would cross the Aragon border on November 8. Lanuza, considering the use of royal armed force in Aragon as a contrajury, commands a force of 2,000 Aragonese soldiers. The numerical superiority of the royal army caused the Aragonese force to disperse before engaging in combat.

King Felipe the Second, who did not forgive 'Justicia' Juan de Lanuza 'El Mozo' for his intervention in the unfortunate matter of Antonio Pérez in the Alteraciones de Aragón, ordered, without prior formation of a process, his public execution; and this measure is explained by the phrase that the King attributed to the Count of Luna "not to cut off the head of Don Juan de Lanuza, but to the Office of 'Justicia'". The monarch thus committed a serious breach of Jurisdiction III De Officio iustitiae Aragonum, approved by the Cortes de Alcañiz in 1436 during the Justiciazgo de Diez. Daux; To whom is addressed the so-quoted Intimidated Bunk Bed by Ximénez de Cerdán.

[19] Cfr. COHEN, M., Some Considerations on the Origins of Habeas Corpus. In: *Canadian Bar Review,* vol. 16, 1938, p. 92; DUKER, WILLIAM F., *A Constitutional History of Habeas Corpus*. Westport, 1980, CT: Greenwood.

[20] Wert, J. J., With a Little Help from a Friend: Habeas Corpus and the Magna Carta after Runnymede. In: *Political Science and Politics*, vol. 43, No. 3, July 2010, p. 475-478.

[21] Jenks, E., The Myth of Magna Carta. In: *Independent Review*, 4, 1904, p. 260.

Once the Zaragoza revolution had been put down, Felipe the Second managed to get the complacent or frightened Courts of Tarazona, in 1592, to deal a fatal blow to the Manifestation of people and their "Privileged Way", starting to do so by making the customary immobility of 'Justicia' disappear, protected by the Fuero *De Officio lustitiae Aragonum* of 1442, superior guarantee of judicial independence, and the system of election of Lieutenants, inquisitors and judicants will be modified.

Fueros were promulgated, some of which had an explanation, such as the Penalty of those who falsely obtained surnames from 'Manifestación' or Inventory (so that the case that caused a riot and the lynching of the Marquis of Almenara in Zaragoza as a result of a 'Manifestación' with a false foundation), while others had a clear political intention such as the "Of the remission of delinquents, from this Kingdom to others", which made it possible for a prisoner to be transferred from Aragon to Castilla with the danger posed by the fact that the Castilian criminal process lacked the guarantees of the Aragonese[22].

The "Privileged Way" also suffered a severe blow. In the 'Fuero De la via privilegiada' (1592), approved in the same Courts of Tarazona, its use was prohibited towards certain crimes «(…) lese majesty, passing through the alpha merchants, the Gypsies and Bohemians, the 'Bruxos' and witches, false witnesses, the horse smugglers with France and the Bearn, the homicides and assassins (agreed murder), and even the concealers; even those who called for (instigated) freedom or moved seditions, or riots, or those who persuaded them, even if they had no effect»[23].

At the same time, an inquisitive system was established against the previous accusatory, with which the possibility of not being charged against a detainee or prisoner disappeared, by establishing an astrict Prosecutor (the current Public Prosecutor) who was forced, under threat from proceeding against him as a criminal official, to accuse and continue the accusations.

The criminal manifestation of people came to an end with the Decree of Nueva Planta of July 29, 1707, which repealed all the regional legislation, and the Decree of April 3, 1711, which restored the Fueros in civil matters but not in criminal matters, and with the introduction of a new Government and the use of the laws of Castile in criminal matters ("Among other things that I have deemed convenient to resolve to establish a new Government in Aragon for now and by interim providence, is one that there be in he an Audience… which is my will that is made up of people at my discretion, without restriction of province, country, or nature… In the Crime Chamber, lawsuits of this quality must be judged and determined, according to the custom and laws of Castile…» Law 11, Title VII, book V of the Novísima Recopilación).

6. Conclusions

Although the right of 'Manifestación de personas' no longer exists as such in practically all democratic legal systems, it has evolved into the legal procedure of Habeas Corpus promoted to the epitome of freedom as a fundamental right; the imprint left by the institution of the Justice of Aragon in our country tacitly maintains the prerogatives of the object of the Demonstration, among others. In the same way, the defense of the fundamental rights included in the Constitution as Fundamental Law and developed by each legal system, with the aim of effective judicial protection and, especially, of the procedural guarantee that the Penal Codes guarantee, suppose concepts of a complex but vital dogmatic eminence in a rule of law.

To complete the defense and consolidation of such fundamental rights, the Habeas Corpus law was introduced into the Spanish legal system in 1984 for "the recognition and protection of the life and liberty of citizens" whose regulation was ordered by the 1978 Constitution in its article 17. 4. Although, the objective of Habeas Corpus was present in the Constitutions of 1837, 1869 and 1874 but without a specific name. This law, among other specifications, outlines that the Ombudsman is empowered to initiate the procedure, an act of partial inheritance and Aragonese foral reminiscences.

In conclusion, it can be verified a notable importance in its use during the validity of the Kingdom of Aragon and, in part, a legislative precedent of the English Habeas Corpus with which it shares the principles that we understand today as fundamental rights of liberty and personal integrity.

At present times, the Habeas Corpus procedure is integrated and is used in the vast majority of States, without distinction based either on Anglo-Saxon or continental Law. There is a claim to establish a global Habeas Corpus in order to integrate it as an indisputable part of Human Rights with various international organizations promoting the initiative.

It will be a source of satisfaction if with this modest work - in which not all the citations are first-hand, and scientific honesty obliges me to proclaim it- we contribute to creating awareness of the need to globalize a jurisdictional guarantee of the right to freedom of individual as our Manifestation of people, and that, like this, is "a guarantee of freedom, but not of impunity", with the imprint of becoming aware of the existence of an Aragonese procedural figure that emerged from unity, but a participant in plurality and diversity.

[22] SÁNCHEZ NÚÑEZ, P., After the Aragonese Alterations: Aspects of the inquisitorial repression of the revolt of 1591[After the Aragonese Alterations: Aspects of the *inquisitorial repression of the revolt of 1591]. In: Ius fugit: Revista interdisciplinar de estudios histórico-jurídicos,*1996-1997, num. 5-6, pp. 311-358.

[23] *«el crimen de lesa Magestad, pasando por los Mercaderes alfados, los Gitanos y Bohemianos, los Bruxos y bruxas, testigos falsos, los contrabandistas de caballos con Francia y el Bearn, los homicidas y asesinos (homicidio acordado), e incluso los encubridores; hasta los que apellidaren (instigasen) libertad o movieren sediciones, o motines, o los que los persuadieren, aunque no hayan tenido efecto»*

Evolutionary Trends of the Continental European Commercial Company and Partnership Law in the First Half of the 20th Century

João Manuel Cardão do Espírito Santo Noronha *

Abstract

The present paper intends to present some critical considerations on the evolutionary cycle of the European continental law of commercial companies and partnerships that covers the first half of the 20th century. It focuses particularly on the German innovations represented by the introduction of the private limited liability type of company, and in the reconstruction of the relationship between the shareholders and the management brought by the German Public Limited Liability Company Law of 1937. These are two fundamental key areas for understanding the shape of the modern European-continental company law.

Keywords: *Company; partnership; 20th century; GmbHG; AktG; quotas; Führerprinzip; Rathenau.*

1. Introduction

The first half of the 20th century stands, for the domain of European-continental company law, as the period of the introduction of two fundamental features for the understanding of the modern significance of this sector of the Roman-Germanic legal systems, which explain the great social expansion of limited liability in the subsequent period.

These two elements are, on the one hand, the innovation of the limited liability for small collective businesses – which represents the introduction, at this level of market production, of a logic of full risk sharing of business failure between the entrepreneur and his creditors, never before allowed – and, on the other hand, the ending, in the public limited company type, of a logic of subordination of the directors to the shareholders *qua tale*, due to the German Corporation Law of 1937, which, in its positive aspects, can be historically valued as a mean to enhance the assumption of business risk and, as a result, the expansion of industrial economies.

In the following text, the German emergence of the private limited liability company and its continental expansion are paraded, as well as the landmark that, for the public limited liability company, stands the German first law on the public limited liability companies, putting an end to the historical career of the principle of managers as agents of shareholders.

2. The first half of the 20th century: company law between historical continuity and rupture

2.1 The continental spread of the German private limited liability company and the introduction of the private limited liability company in the Portuguese legal system

I — The German Law of Private Limited Liability Companies (*Gesellschaft mit beschränkter Haftung Gesetz*=GmbHG, for short) [1], of April 29, 1892, introduced in continental Europe a private limited liability company type. It is today commonplace to say that the German legislator did so without a social-historical precedent (unlike what happened with commercial codes and with special laws on public limited companies in the 1800 s, with the remaining company types), with policy objectives claimed by certain business sectors [2].

The German GmbHG influenced the mainland legislators in establishing a private limited liability company type, halfway between the public limited company and the general partnership. The trend was initiated by the Portuguese Law on Private Limited Liability Companies, of April 11, 1901, and included successively – without the need to be exhaustive – Austria (Law of March 6, 1906), Bulgaria (Law of May 8, 1924) and Poland (Commercial Code of 1934).

II – In Portugal the new company type was named *sociedade por quotas*, being *quotas* the technical name of the shares, which could not be publicly traded.

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1 The law was, however, consolidated into a new version, published on May 20, 1898. On the formation of the GmbHG, see, among others, SCHUBERT, W., Das GmbH-Gesetz von 1892 – 'eine Zierde unserer Reichsgesetzsammlung'. Reichsgesetzsammlung. In: MARCUS LUTTER, PETER ULMER & WOLFGANG ZÖLLNER (ed.), *FS 100 Jahre GmbH-Gesetz*. Köln, 1992, p. 1-29.

2 Thus, among several others, HUECK, A. & FASTRICH, L., Introduction. In: BAUMBACH, A. & HUECK, A. (ed.), *GmbHG, Gesetz betreffend die Gesellschaften mit beschränkter Haftung,* München, 2010, 9; WINDBICHLER, C., *Gesellschaftsrecht/Ein Studienbuch*. München, 2009, p. 206-207.

The Portuguese Law states, in its article 1, that "[*i*]*n addition to the commercial companies established in article 105 of the Commercial Code, it may also be incorporated limited liability companies, under the terms of this law.*/ Sole §. *Partnerships regarded in the Civil Code can be incorporated in the form of limited liability companies, subject to the provisions of commercial law, except for those relating to bankruptcy and jurisdiction*".

III – Among the most significant aspects of the Portuguese private limited liability company regime were: (i) the adoption of a social name (*firma*, in Portuguese), which should include the name of the shareholders, all or only some of them) or a *nomination* (*denominação*, in Portuguese) (a name that should include the company's objects, but not the names of the shareholders; article 3, § 1st); (ii) the requirement of a minimum share capital, which, in the original wording of article 4, was five *contos de reis*; (iii) the possibility of partial deferral of entries (article 5); (iv) the transferability of shares under the "*terms of law*" and, as well, the imposition that the transfer *inter vivos* (assignment) be carried out by authentic document (article 6, main, and § 2); (v) the possibility of making the assignment subject to the consent of the company or other requirements (article 6, § 3); (vi) the joint and several liability of the shareholders for the payment of the total capital to the company (articles 15 and 16); (vii) the possibility of establishing supplementary payments, without the necessary subordination to a maximum amount fixed in the articles of association (article 17); (viii) the possibility of amortizing *quotas* (article 25); (ix) that the company be managed and represented not necessarily by shareholders (articles 26, 29 and 31); (x) the possibility of establishing a supervision body by clause of the articles of association (article 33); (xi) the establishment of a material reserve of management competence to the shareholders (article 35); (xii) the establishment of the majority as the organizing principle of the shareholders acting as a corporate body, with one vote per 250 $ 00 of capital (article 39); and, (xiii), the requirement of a qualified majority for certain resolutions, such as amendments to the articles of association, merger or increase of share capital (article 41).

2.2 The subsequent spread of the private limited liability company: the French case

In France, a private limited company (*société à responsabilité limitée*) was introduced by the Law of March 7, 1925.

The French case deserves a special analysis, for the reasons set out below.

Firstly, the regions of Alsace and Lorraine — reintegrated into French territory by the Treaty of Versailles, but before a part of the German Empire (1871-1918), which had annexed them as a consequence of the French defeat in the Franco-Prussian War (1870) — already had the German private limited liability company since its creation, in 1892, which was maintained as local law by the French Law of June 1, 1924.

The large popularity enjoyed by this type of company in those regions seems to have constituted an important point of support in the evolution of the French general commercial law system after the end of the war, which would culminate with the approval of the Law of March 7, 1925[3], creating the private limited liability company.

Secondly, despite the clear inspiration that the French *société à responsabilité limitée* took from the German GmbH, it also contains original features, which allow one to affirm a certain distance of the French legislature in relation to the previous German model. It should be noted, for example, that the French law: (i) established a minimum total share capital (25,000 francs), stating that it should be divided into equal shares, of 100 francs each or multiples of 100 francs (article 6); (ii) did not allow the deferral of capital entries (article 7); (iii) did not provide for supplementary capital contributions; (iv) made the assignment of shares to third parties conditional to the consent of a majority of shareholders representing at least three quarters of the total share capital (article 22); and, (v), stated that each shareholder had one vote for each share owned (article 28)[4].

Overall, the French private limited liability company showed a greater closeness to the personal character of the general partnership than its German counterpart.

The French Law would produce a successive double influence: exclusive, on the one hand, in relation to other national laws that followed it, as is the case of Luxembourg Law, of September 18, 1933, which added Section XII to the pre-existing Law of August 10, 1915, concerning commercial companies; on the other hand, in competition with the German Law, in a mixture of elements of the two models, which one can detect, for example, in Belgian (Law of July 9, 1935) and Swiss (reform of the Obligations Code of 1936) regulations.

2.3 The German *Aktiengesetz* of 1937

In 1937, the German legislator extracted from the Commercial Code of 1897 (*Handelsgesetz*; HGB, for short) the regulation of the public limited liability company types, pure and mixed (*Aktiengesellschaft*, AG for short, and *Kommanditgesellschaft auf Aktien*, KgaA, for short), whose normative seat was separated to a *Shares Act* (*Aktiengesetz*; AktG, for short[5]).

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[3] See CHAPSAL, F., *Des sociétés à responsabilité limitée/Leur régime d'après la loi du 7 mars 1925,* Paris, 1925, p. 17; PIC, P., *Des sociétés commerciales*, II, Paris, 1925/1926, p. 19 e ss.; SANTINI, G. *Societŕ a responsabilitŕ limitata*, Bologna/Roma,1984, pp. 1-2.

[4] In view of the provisions of article 6, the original wording of article 28 could lead to the holding by a shareholder of a number of votes not proportional to his capital property, result altered with the Decree-Law of June 14, 1938, which established that the shares must necessarily be of equal nominal value; thus, as stated by ROUSSEAU, J., *Traité des sociétés a responsabilité limitée,* Paris, 1952, p. 175: *"[l]a puissance de vote de l'associé est nécessairement proportionnelle à sa participation de l'associé au capital".*

[5] Approved on January 30th; the official name oft he law is *Gesetz über Aktiengesellschaften und Kommanditgesellschaften auf Aktien* (*Aktiengesetz*). On the formation of the law, see, among others, MEZGER, E., *Le nouveau régime des sociétés anonymes en Allemagne (loi du 30 Janvier 1937, Décrets des 29 septembre 1937 et 21 décembre 1938) comparé avec le droit et les projets de réforme français avec un appendice sur la conception allemande de la nationalité et des conflits de lois en matière de sociétés",* Paris, 1939, p. 29 et seq. The nomination *Aktiengesetz* is an official abbreviation, intended to facilitate its citation. For a view of the political-economic constraints that explain several of the options of the *Aktiengesetz* of 1937, namely on the diverse relationship of the governing bodies comparing to what resulted from the previous law (HGB) and the limitation of the freedom of conformation of the articles of association, see WÜRDINGER, H., *Aktienrecht und das Recht des verundenen Unternehmens*, Heidelberg/Karlsruhe, 1981, p. 14-15.

In the AktG one can witness the subservience of the KgaA to the AG, the last emerging as a paradigmatic type of public limited lability company, following its growth of the socio-economic-industrial relevance; the KgaA regime is largely taken from the subsidiary application of the AG one (§ 219, 3).

The most historically significant aspect of the 1937 AktG, for its novelty, is the withdrawal of the principle of sovereignty of the shareholders, acting in the general meeting framework, and the corresponding submission of the managers to the will of the first, and its replacement by the *Führerprinzip*[6] [§ 70, (1): "*The board of directors manages the company under its own responsibility, in order to guarantee the well-being of the company and its purposes and the common benefit of the People and the Empire*"[7]]. This *leap* in the legal regime of the public limited liability company can be historically interpreted as the result of a conjunctural alliance between large German industries and the National Socialist regime[8].

Notwithstanding the possible ideological foundation of the *Führerprinzip* in the National Socialist ideology, there are also historical interpretations that affiliate this paradigmatic change in the political-legislative influence exerted by a theory related to National Socialist ideas, named *the company itself* (*Unternehmen an sich*), which conceived the public limited liability company, the legal structure of the large undertaking, as a servant of the public interest, identified with the interest of the State; and, thus, with interests of its own, not necessarily convergent with those of the shareholders, whose defence will be a function of the company's management. This concept was originally formulated by Walther Rathenau – an interesting figure of the Weimar Republic (1867-1922), a politician and industrialist who[9]–, in a 1917 text more economic than legal in character, outlined a framework for the modernization of the large industrial undertaking legal regime, namely with regard to the management function and the different roles to be recognized for fixed capital and savings investment (*Vom Aktienwesen: eine geschäftliche Betrachtung*[10]); in the words of Rathenau: "[…] *the large undertaken is no longer, above all, a structure of private interests; it is more than that, both individually and collectively, an economic system belonging to the whole, which, although has, rightly or wrongly, the features of private law of a purely commercial undertaken, has become increasingly useful to public interests and, therefore, created a new right to exist*"[11].

It should not be overlooked, however, that the general featuring of the AktG of 1937 is also the product of a two-pronged dynamic of economic problems/legal solutions that emerged in Germany between the wars and produced some interim laws, whose solutions would be reproduced in the first. During this period (1918-1939), three economic cycles took place: (i) inflationary growth (1918-1923); (ii) growth (1923-1928); and (iii), economic crisis (1928-1933). In Mezger's words: "[*d*]*uring each of* […] [these] *periods, other claims for reform, in terms of company law, occupied the foreground without, therefore, those formulated in the preceding periods having been lost to sight*"[12].

In the first of these periods – inflationary growth – it was a legal and political concern to limit the growth of companies control by the management, through detention of multiple vote shares, as well as the growth of the influence of banks in the conduct of business in large industries; the second – economic expansion – was dominated by the aims of a growth in company financing and enabling easier economic concentrations, specifically through mergers; in the third period – economic crisis – there were concerns about reinforcing supervision and minorities' rights.

The 1937 AktG echoes certain ideas of Rathenau on the essence of shareholder capitalism, namely the establishment of the management as a bastion of the company's interest, even against the interests of the shareholders.

The law was divided into four books, the first corresponding to the AG (§ 1 to 218); the provisions contained in Books Third (Merger, Transfer of Assets, Type changing) and Fourth (Stock Corporations and State. Criminal Provisions) are common to both types of company, AG and KgaA.

With the establishment of the *Führerprinzip*, the historical career of the idea of the public limited liability company's directors as mere agents of the stockholders ended; the changing of the correlation paradigm of powers in company control between the shareholders and the directors, purified from the ideological meaning of the *Führerprinzip*, was acquired in the subsequent continental evolution.

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[6] On the subject, see, among many others, GALGANO, F., & GENGHINI, R., *Il nuovo diritto societario/Le nuove società di capitali e cooperative,* I, Padua, 2006, p. 42 et seq.

[7] My translation from German.

[8] On the relationship between German industry and the rise of National Socialism, with an indirect reference to the 1937 AktG, see PLUMPE, W., *German economic and business history in the 19th and 20th centuries*, [n.p.], 2016, 114: "[…] *prior to 1933 German industrialists were sceptical of the republic and not willing to put any effort into its defence. This was not due to an affinity to National Socialism, which received only little financial or other forms of support from industry but developed from the critique of parliamentarism's failure to combat the economic crises of the interwar years. Of course, once in power, National Socialism did profit from the everyday opportunism of many company heads and met with approval in questions such as the regulation of the labour market, the elimination of the labour movement, and the expansion of autonomy in company management*".

[9] Biographical aspects of Walther Rathenau can be consulted, among others, in Volkov, S., *Walther Rathenau: Weimar's Fallen Statesman*, New Haven/London, 2012.

[10] RATHENAU, W., *Vom Aktienwesen: eine geschäftliche Betrachtung* (I consulted the 21th.-23th. Editions) Berlin, 1922.

[11] RATHENAU, W., *Vom Aktienwesen: eine geschäftliche Betrachtung*, above quoated, p. 38-39 [my translation from German; original: "[…] *die Großunternehmung ist heute überhaupt nicht mehr lediglich ein Gebilde privatrechtlicher Interessen, sie ist vielmehr, sowohl einzeln wie in ihrer Gesamtzahl, ein nationalwirtschaftlicher, der Gesamtheit angehöriger Faktor, der zwar aus seiner Herkunft, zu Recht oder zu Unrecht, noch die privatrechtlichen Züge des reinen Erwerbsunternehmens trägt, während er längst und in steigendem Maße öffentlichen Interessen dienstbar geworden ist und hierdurch sich ein neues Daseinsrecht geschaffen hat* […]"].

[12] MEZGER, E., *Le nouveau régime des sociétés anonymes en Allemagne*, above quoted, p. 13 (my translation from French); I follow this author closely in the continuing text.

2.4 The 1942 Italian Civil Code. The Italian reception of the private limited liability company

I – The second Italian Civil Code, of 1942, breaking with the French codifying tradition of formal regulatory autonomy between the Civil and the Commercial Private Law branches — materialized in a Commercial Code separated from the Civil Code —proceeded to the formal unification between the two[13]; this unification corresponds, in the company regulatory area, to the disappearance of the formal distinction between civil and commercial companies/partnerships that had appeared in the 19th century Italian codifications of Private Law[14]. The particular partnership for a specific purpose (*società particolare per una impresa determinata*) of the Civil Code of 1865 (article 1706) was succeeded, in part, by the simple partnership (*società semplice*; articles 2247 and 2249, I and II, of the Civil Code of 1942[15])[16], a partnership type functionally equivalent to the *simple civil partnership* or *civil company with a commercial type* of the French and Portuguese legal systems.

The scope of the transition transcends the domain of the simple partnership, as it can be noticed when one considers, firstly, that the Code of 1942 eradicated the age-old roman duality between the universal partnership (*societas universalis*) and the particular partnership (*societas particolaris*), which had penetrated the first wave of Latin codification, erecting the late species as the historically subsequent genus[17], that emerges in the set of articles 2247 (*With the articles of association, two or more people contribute with goods or services for the common exercise of an economic activity with the purpose of sharing the profits*[18]) and 2248 (*The partnership constituted or maintained for the sole purpose of mere enjoyment of one or more things is regulated by the rules of Title VII of Book III*[19])[20]. Secondly, the new partnership/company genus is distributed, on the one hand, in the *società semplice* — the successor of the previous civil *particolaris* partnership — and, on the other hand, in a typology that includes the partnerships of medieval tradition — the *società in nome colletivo*[21] and the *società in accomandita semplice*[22] — and the modern company types: the *società per azioni*[23], the *società in accomandita per azioni*[24] and the *società a responsabilità limitata*[25]. The mentioned historical-systematic transition covers the *società semplice* (articles 2284 to 2286) and the partnership types of medieval tradition: the general partnership (*società in nome colletivo*; whose specific regime contains a rule referring to the provisions that regulate the *società semplice*); and the limited partnership (*società in accomandita semplice*, whose specific regime includes a reference to the provisions that regulate the general partnership, which, in the regarded aspect, results in a second degree reference to the *società semplice* regime).

II – With regard to the establishment of a company type parallel to that of the German private limited liability company, the Italian case also deserves special mention, partly for reasons identical to those highlighted for the French experience.

In fact, by the Treaty of Sain-Germain-en-Laye (1919), concluded between the allies and the Republic of German Austria (*Republik Deutschösterreich*; 1918-1919), resulting from the break-up of the Austro-Hungarian Empire, the former Austrian regions of *Venezia Giulia* and *Venezia Tridentina* were incorporated into Italian territory. Those regions were also previously familiar with the Austrian private limited liability company (*Gesellschaft mit beschränkter Haftung*) as a result of the earlier territorial scope of the Austrian Law of March 6, 1906, which

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[13] On the subject, see, among many others, ASCARELLI, T., Sviluppo storico del Diritto Commerciale e significato dell'unificazione. In ASCARELLI, T. (ed.), *Saggi di Diritto Commerciale*, Milano, 1955, p. 25 et seq.; TAMBURRINO, G., *Manuale di Diritto Commerciale/L'impresa commerciale. Gli atti dell'imprenditore commerciale,* Roma, 1962, p. 7 et seq.; FRANCESCHELLI, R., Autonomia e ragione d'essere actuale del Diritto Commerciale. In: FRANCESCHELLI, R. (ed.), *Dal vecchio al nuovo Diritto Commerciale - Studi*, Milano, 1970, p. 51 et seq.; FERRARA (JR.), F., & CORSI, F., *Gli imprenditori e le societŕ*, Milano, 2009, p. 14 et seq.; ANGELICI, C. & FERRI, G. B., *Manuale di Diritto Commerciale*, Torino, 2001, p. 8 et seq. On the evolution of the various italian commercial coding projects since the Vivante Project (1922), see, among others, CAGNASSO, O., Dalla societŕ per azioni alla societŕ a responsabilitŕ limitata: vicende storiche e prospettive di riforma. In: *Rivista delle Società,* 1971, p. 547 et seq.; CASANOVA, M., Introduzione al diritto commerciale/Codice civile ed evoluzione legislativa: In: CASANOVA, M. (ed.), *Nuovi opuscoli di vario diritto*, Milano, 1983, p. 256 et. seq.

[14] See, among others, FERRANTE, U., *Il problema della qualificazione delle società*, Milano, 1974, p. 4-5; FERRARA (JR.), F. / CORSI, F., *Gli imprenditori e le società*, above quoted, p. 187 e ss.

[15] Italian Civil Code from 1942, article 2247 "(*Contrato di società*). – *Con il contratto di società due o più persone conferiscono beni o servizi per l'esercizio in comune di un'attività economica allo scopo di dividerne gli utili*"; art. 2249: "(*Tipi di società*). – *Le società che hanno per oggetto l'esercizio di un'attività commerciale devono costituirse secondo uno dei tipi regotati nei capi III e seguenti di questo titolo* [*società in nome colletivo* (*Capo III*); *società in accomandita semplice* (*Capo IV*), *società per azioni* (*Capo V*), *società in accomandita per azioni* (*Capo VI*) *e società a responsabilità limitata* (*Capo VII)*]./*Le società che hanno per oggetto l'esercizio di un'attività diversa sono regolate dalle disposizioni sulla società semplice, a meno che i soci abbiano voluto costituire la società secondo uno degli tipi regolati nel capi III e seguenti di questo titolo*".

[16] See, among others, FERRANTE, U., *Il problema della qualificazione delle società,* above quoted, p. 4-5; FERRARA (JR.), F. & CORSI, F., *Gli imprenditori e le società*, above quoated, p. 187 et seq.

[17] A phenomenon which is explained by the progressive erasure of the sociological relevance of the *societas universalis*.

[18] My translation from Italian.

[19] Title VII of Book III refers to the co-ownership of rights; my translation from Italian.

[20] A consequence of the mutation of the company genus was the incorporation of the objects into the typology of the contract (see ESPÍRITO SANTO, J., *Sociedades por quotas e anónimas /Vinculação: objecto social e representação plural,* Coimbra, 2000, p. 196).

[21] Chapter III, Title V, Book V.

[22] Chapter IV, Title V, Book V.

[23] Chapter V, Title V, Book V.

[24] Chapter VI, Title V, Book V.

[25] Chapter VII, Title V, Book V.

remained in force there (third provision of the Royal Decree approving the unification regime for law in the territories annexed to the Italian Kingdom [26]).

An autonomous type of company, nominated (*società a responsabilità limitata*) (private limited liability company) would only be introduced in the Civil Code of 1942 (articles 2472 to 2493), having already been considered in the preparatory works for a new commercial code that emerged from the twenties, the VIVANTE (1922) and the D'AMELIO (1925) projects: the first focused on a concept of the private limited liability company similar to those of the German and Austrian GmbH laws, but with some original features, such as the introduction of the shareholder squeeze-out; the second maintained, in essence, the guidance of the VIVANTE project on the subject.

The Civil Code of 1942, however, departed from the features of the twenties' projects, presenting a regulation of the private limited liability company very close to that of the public limited company, which earned it the metaphorical nomination of *small limited company without publicly traded shares*. Notwithstanding this, until the 2003 reform of Italian corporate law, the *società a responsabilità limitata* enjoyed considerable adherence from the practice.

3. Conclusions

If in any case the historical-cultural nature of law cannot be doubted, and if the modern commercial company/partnership law of the continental law systems does not constitute an exception to that, the chronological segment of the first half of the 20th century presents, for such domain, an autonomous relevance, on two levels.

On the one hand, because it stands for the consolidation in the company/partnership typology initiated by the *Code de commerce* (1807) of the last of the fundamental types: the private limited liability company, which, in the wake of the German innovation of 1882, would separate in a Germanic style and in a French style.

On the other hand, because the AktG of 1937 marks the definitive rupture of the public limited liability company type with one of its birthmarks: the conception of the directors as agents of the shareholders, making the path for its modern organic standard.

[26] Royal Decree N. ° 2324, from the 4th of November 1928, which can be consulted, for example, in the collection by SZOMBATHELY, M., *Le leggi di unificazione del diritto privato e processuale per la Venezia Giulia e Tridentina*, Padua, 1931.

Marital and Inheritance Law from the Middle Ages to the Positive Law. From Scanderbeg Canon to Positive Law

Majlinda Belegu, Bashkim Rrahmani***

Abstract

Family law is an important part of the civil law. Since the Roman Law this continues to be important part of this field. With the analysis of the paper the differences and similarities of norms from Scanderbeg, Lekë Dukagjini and Dibra Canon are underlined and emphasized. Paper covers and analysis the norms of historical law and customs through interpretation also positive norms of the countries where Albanian population lives. Engagement, marriage, the rights and duties of spouses during the marriage as regulated by the codexes through the history are analyzed as well as the disposal from sheria along with the rights and duties of spouses based on the positive law, for comparative reasons. Engagement is the first initiative before the marriage is concluded. Marriage was concluded after the engagement and it lasted until the death of spouses. The rights between spouses were always different where husband had more rights related to his wife. There were cases when he had the possibility to even kill his wife if the loyalty was not respected and also to divorce whenever he found it useful.

Keywords: *Engagement; marriage; heritage; law; canon; spouses.*

1. Introduction

Marriage is an important institute of the marital law. It is one of the most important institutes from which derive all other parts of the family law. From the marriage the family is created. But not always the family was created by marriage. Family is created also based on cohabitation. Paper goes with the analysis of historic legal norms of Scanderbeg Canon, Leke Dukagjini Canon, Dibra Canon and the Sheria, making comparison of these norms with the positive norms of Kosovo, Albania and Monte Negro. In favor of analysis some positive norms form the countries of regionwhere Albanians live, are analyzed (comparatively) as well. Since Albanians regarding the family issues are considered to be very traditional and since they treat the family as something saint, custom norms still continue to be present in the case of marriage. Most of these customs from engagement up to the extinguishing continue to be used even nowadays in some regions of Kosovo, Albania, North Macedonia and Monte Negro. For the needs of paper the methods of historical and comparison analysis are used. Paper elaborates the norms of canons since the pre marriage acts foreseen as engagement which indeed is foreseen also with the Kosovo positive legislation and in this sense the institute of engagement is analyzed for the comparative reasons with the norms from some countries that regulate engagement with the positive norms.

Paper tries to describe goer *(shkuesin*) and gifts by analyzing canon norms and analyzing the positive norms.

Efforts were made in order to analyze the age for concluding marriage according the cannons and the positive law from the region and with the norms of international law.

Paper gives an interpretation of norms on rights and duties between spouses and duties on children during the marriage based on the canon and based on the positive law.

Paper makes also the analysis of inheritance according to the custom law and making comparison amont this law and then with the norms from the Kosovo positive law.

2. Illyrian Civil Law (Epirus)

Together with the state the law was born and then with the law the legal norms. Historic law in Kosovo appears with the Illyrian law since Kosovo belonged to Illyria. Some norms are inherited from tribes and then some served to regulate relations between various tribes. There were also norms recently created with the legislative acts of state institutions which regulated relations in various fields of the life.

Ancient authors talk also for the constitution in Epirus. In Epirus the main resources customs, laws and other acts of the state organs.[1] With the different researches there were not found pandects or codes.

In Epirus based on archeological discoveries civil norms which regulated, first of all the right of slaveowners to possess,

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[1] Grup autorësh, Historia e Shtetit dhe së Drejtës, Luarasi, Tiranë, 2007, p. 46.

to enjoy and to accept objects which were under their ownership, were found. In Illyria the ownership existed, but it belonged only to rich. But there are data that talk for regulation of contractual relationships. The most frequent contracts were those of selling and buying and the contract of exchange. By the contract of sale the ownership was gained.

It should be stressed out that in Epirus the monogamic family existed. But there are data which show that a man could have more women. Illyrians paid a big attention to the family. Marriage was the basis of the family. Marriage was concluded between parents of future spouses that were indeed their children. Marriages were concluded also for strengthening the political connections between families or between tribes of Illyria. Legal norms were valid for the member of state. The principle of reciprocity was applied in cases when talked about the foreigners. Basically, people from other states were not given the rights of the Illyrian state. Therefore, they were not treated similarly with the citizens of the state. Thus, foreigners did not enjoy civil and political rights equally to the Illyrian citizens.

3. Family and the Scanderbeg Codex

Family Law regulates personal and property relations between the family members.[2] Law is mainly created with an act which consciously aims creation of law. Exclusion to this is the case where the origin of law comes from customs. This means that in a comprehensive behavior where person who brought such behavior do not have consciousness and the aim to create law, but their deeds they should consider as acts that are in accordance with the obligatory norm, not as something that they themselves have possibilities to regulate.[3] The right to family is guaranteed also with the international law. In this frame, marriage is covered as the basic human right.

According to the Scanderbeg Codex, family members are considered persons of the same blood who have a common father and that derive generation after generation. All persons that derive from the blood gender, they make up the tribe and they are considered persons of blood gender only be deriving from father. Kosovo family law regulates the family as the society cell. Family is a vital community of parents and children as well as other persons of the same cognation.[4] This makes it understood that apart from the husband and the wife, to family there belong other persons. To the Scanderbeg Codex as the blood cognition were considered persons from the father side. Father's brothers were of the same blood. Brothers were considered the closest blood persons. Brothers are close generations divided from an ingle.[5] The closest and distant brothers were differentiated. According to the positive law blood cognition is consisted of family girls and boys. According to this, blood cognition was considered as the marriage obstacle by explaining persons which are within this cognition. Marriage between persons of the blood cognition from the direct line cannot be concluded; or in the indirect line between brother and sister from a father and mother, sister and brother form father or mother, uncle and nice, uncle and granddaughter, aunt and nephew, as well as children of brothers and sisters from one father and mother and the children of brothers and sisters from the father or mother.[6]

As the blood cognition based on the Scanderbeg Codex there were considered persons close to the seventh circle; they are persons who take revenge if the case come for revenge as per tradition of Albanians over the centuries. They mourn for each other if any of them dies. They are considered as close because when they go to each others home they behave freely as they are in their own home and they serve to each other. In the positive law the blood cognition in the direct line is considered to be unlimited, whereas in the indirect line it is limited to the fourth line (level).

Of distant tribe there were considered persons of many generations that have the common family elder and marriages would not be developed between them and do not have the signs of the close tribe.

4. The rights and the duties of the family members

Members of the tribe according to the Canune had the following rights and duties: they could ask for support; assistance, protection for every needs, when they were in the difficult situation or when they were in danger. Family members are heirs of each other. Members of the tribe were given the rights of pre-emption. They cold care for the children of relatives if they therefore remain without parent's care.

Members of the tribe had the following duties: to respect elder of tribe and to obey the rights and duties for the common good of the family. Based on the norms of the codex (canon) family members were obliged to give to every member all what belongs to them. Family members shall discuss among them about every important issue for the tribe. They shall inform the tribe members if they wish to sell land and they have the right of pre-emption. Tribe members shall preserve the family community, to advice each other by making family unions, by extinguishing quarrels which may appear within the family. To help each other in their respective houses and in every situation or danger. To support children who have left without parental care. To take care on the wealth of children who have left without parental care until they gain the ability to act.

5. Generations

Generation is all what was left by a father[7]: brothers, sisters. They are the first generation. Generation is created by birth and they are divided deriving from the direct and indirect line. To the direct line belong all that come after eaxch other, for example: fourth grandfather, graet-grandfather, grandfather, father, son, nephew, great-grandson, etc. According to the positive law generations are divided based on the heritage circles. Legal

[2] Kondili, V. E Drejta Civile I, pjesa e përgjithshme, GEER, Tiranë, 2008, p. 27.
[3] Kelsen, H. Teoria e përgjithshme e së drejtës dhe e shtetit, Prishtinë, 2017, p. 154.
[4] Ligji për Familjen i Republikës së Kosovës, Gazeta Zyrtare e Republikës së Kosovës, article 2.
[5] Kanuni i Skenderbeut Botime Françeskane, Shkodër, 2019, art.1 article 51.
[6] Ligji për Familjen i Republikës së Kosovës, Gazeta Zyrtare e Republikës së Kosovës, article 21.
[7] Here the sentence on generation, in original language (old Albanian language is given as: *brezi asht cka lene prej nje babe*…).

heirs, according to our inheritance law are ranked in three inheritance queues.[8]

In the indirect line they were considered to derive from the fathers of a trunk, for example: uncle, brother, nephew and their descendants.

6. Cognition (base on marriage)

Cognition according to the Scanderbeg Canon is considered the home of the married woman. Cognition covers: woman, her parents and born generation after generation. Cognition created links between husband and the wife's family which nowadays is known as affinity (gender of marriage). Wife has established family links after the marriage with her husband and this link at that time was called *kunetia*. This derived from the marriage for wife that came in the husban's family, whereas *kunetër* were considered: brothers and cousins of husband, while *kunatat* (sister in law), cousins (female cousins), brother's spouses and cousins of husband. For husband *kunetër* (brothers in law) were considered brothers and cousins of spouse. *Kunata* (sister in law) were: sisters, cousins (female), brother's spouses and her cousins.

Father and mother of husband were called *vjehrri* (father in law) and *vjehrra* (mother in law). Sister's husbands were called *baxhanakë* and they had no blood or affinity links, they were simply connexion whereas their children were considered cousins among themselves. In the State of Scanderbeg "nipit për dajë dajës për nip" (nephew for uncle, uncle for nephew) gave the right to vendetta.[9] They could revenge (based on vendetta) within three generation and for this they did not fall into the blood debt. Based on the Scanderbeg Canon there were also other social links: godfather, marriage godfather, hair godfather, baptism godfather, confirmation godfather, circumcision and the brotherhood with the drinking blood.

Albanina Civil Code the explains the family proximity in an expressive way to the inheritance queues. As family are considered legal heirs up to the sixth level. According to the positive law legal heirs are considered: children ad their heirs, surviving spouse, parents, brothers and sisters and grandmother and grandfather, disabled person in charge, other close familiars up to the sixth level and after this the last in this regard is the state.[10]

7. Marital law

7.1 Engagement

It has always been a practice that before concluding marriage the ceremony of engagement was realized. The engagement was also the practice in the Roman Law. Engagement is reciprocal giving and receiving of promises for future marriage.[11] With the term *sponsalia* during the classic erait was shown that the agreement (stipulation) was being realized in form of sponsion.[12]

According to the Scanderbeg Canon marriage has a great importance. Within the canon the part of marital law is opened with the engagement. Hence, engagement was regulated with the canone and it was reciprocal promise between future spouses that they will get married in the future. Engagement is occupancy of a determined girl for a boy handed over as a mark from boy's parents, girl's parents and received by such.[13] At that time it was foreseen that engagement had to be realized by a delivery of a gift and with the presence of goer.

According to the Kosovo positive law, engagement is reciprocal promise of two persons of different gender to get married in the future.[14] Whereas, Albanian Family Code doesn't regulate engagement with its norms.

Verbally, engagement was not recognized and it was not accepted without goer or without the gift. Girl had no right to see her future husband but also they had no right to see the girl. It is interesting to underline that in the ceremony of engagement only men took part whereas if a house had no man then it was the housewife to give the word as the family representative. According to the Scanderbeg Canon engagement ended with the act of marriage of spouses.[15] This is the case with the positive law as well.

7.2 Marriage

Base on the free consent, everyone has the right to marriage and the right to create family in accordance with the law.[16] Anybody has the right to marriage and to have the family.[17] Marriage shall be concluded only with the total free consent of persons that are going to get married.[18] From this, it is seen that the consent is one of the basic conditions for concluding marriage. Every person has the right to conclude marriage if he/she has achieved adulthood. Men and women in the adulthood have the right to conclude marriage and to create family, without any restrictions regarding to race, citizenship or religion. They have equal rights while concluding marriage, during the marriage and in divorcing.[19] Spouses are equal on rights and the duties.[20] Man and women that reached adulthood for marriage have the right to marry and to create family according to the national laws that regulate realization of this rights.[21]

[8] Podvorica, H. E Drejta Trashëgimore, Universiteti i Prishtinës, Prishtinë, 2010, p. 49.
[9] See more at: Kanuni i Skenderbeut article 71.
[10] See more at: Ardian Nuni & Luan Hasneziri, E Drejta Civile III (Trashëgimia), Universiteti i Tiranës, Tiranë, 2010, p. 57.
[11] Puhan, I. E Drejta Romake, Universiteti i Prishtinës, Prishtinë 1984, p. 182.
[12] Mandro, A. E Drejta Romake, EMAL, Tiranë, 2007, p. 175.
[13] Kanuni i Skenderbeut, Botime Françeskane, Shkodër, 2019, article 132.
[14] Ligji për Familjen e Republikës së Kosovës, Gazeta e Republikës së Kosovës, 2006, Article 9.
[15] Rrahmani, B. & Belegu, M. The State of Scanderbeg. Institutions and applied law, ADJURIS, Bucharest 2020.
[16] Kushtetuta e Republikës së Kosovës, Gazeta Zyrtare e Republikës së Kosovës, 2008, article 37, paragraph 1.
[17] Kushtetuta e Republikës së Shqipërisë, Fletorja Zyrtare, 2008, article 53, pargraph 1.
[18] Deklarata Universale e të Drejtave të Njeriut, Article16, pargraph 2.
[19] Deklarata Universale për Mbrojtjen e të Drejtave dhe Lirive Themelore të Njeriut dhe Protokollet e saj, Article 16, paragraph 1.
[20] Bajrami, A. Sistemi Kushtetues i Republikës së Kosovës, Kolegji AAB, Prishtinë, 2014, p. 203.
[21] Konventa Europiane për të Drejtat e Njeriut, Article 12.

In the Scanderbeg Canon marriage came right after the engagement. It was one of the main parts of the family law. Marriage as the legal communion relies in the moral and legal equality of spouses, in the law feelings, in the respect and mutual understandings as the basis of the unity in the family.[22] Marriage is an eternal unity between spouses to have children, to grow them up ad to help each other in work of living.[23] According to the positive law in Albania, marriage can be established between a man and a woman that have reached age 18.[24] The Macedonia positive law doesn't allow wedlock before age of 18. Wedlock between persons that didn't reach age of 18 is forbidden.[25] With the free consent of man and women they enter into a wedlock with an agreement to assist and respect each other.[26]

According to this it is seen that as the condition of wedlock in the Canon and in the positive law is age, opposite sexes, existing wedlock and in some cases the form of entering into the wedlock. Whereas consent to enter into the wedlock is essential according to the positive law. Thus, both sexes under the positive law of Kosovo, Macedonia, Monte Negro and Albania gain the ability to act and have the right to wedlock as soon as they get the ability to act.

Since Macedonia is a state where Albanians live, we underline that there wedlock is established according to the legal procedure after the ability to act is reached. Wedlock is established between persons of opposite sex with the expression of free consent before the competent organ and based on the form determined by law.[27]

In the canon there is no probation wedlock. Wedlock in this canon is known as wedlock with crown, e.i. legal and wedlock without crown or cohabitation. It should be pointed out that according to the Scanderbeg Canon wedlock could be established even without the presence of the girl. In the positive law wedlock could have been established by representation. From this we see that someone else has decided in the case of wedlock between boy and girl. By using the representative, a person could legally be found at the same in more than one place.[28] According to this girl and the boy could be in an another place, whereas wedlock and engagement developed without their presence. This phenomenon is not allowed with the positive law.

According to the Canon wedlock is not allowed if girl is robbed or stolen without permit of parents and her family. Consent of family with the positive law the ability to act of future spouses is not relevant for the wedlock. While wedlock according to the positive law is established if the future spouses have achieved the ability to act (age of 18) with the Scanderbeg Canon this is conditioned with a lower age. And this, according to Scanderbeg Canon was different for boys and different for girls. Determined age for wedlock is not the same for male and female. Male had the right to wedlock on the age of 16,e.i.at this age they at this age they gain the ability to act. Female had the possibility to enter into the wedlock in the age of 14-15. According to this female have gained the ability to act at the lower age compared to male. Wedlock under this age was not known and in the time period from engagement to wedlock was called "under the ring".

Wedlock obstacles existed with the Scanderbeg Canon and they exist also with the positive law. With the Canon there existed also obstacles for engagement whereas these are not the case with the positive law.

As the wedlock obstacle is foreseen the blood cognition, *kuneteria* (brother-in-law), godfather and when spouses that pretend to enter into the wedlock, they cannot have any other wedlock relations. These obstacles are covered with the positive law.

Here we should stress out that residents which belong to Islam religion especially in the city of Kruja, wedlock obstacle was not considered the affinity cognition. It is important to stress out that the male of Islam religion had the right to marry the second wife and sometimes even the third. This was possible even when we talk about the divorce when he keeps the first spouse still in the wedlock. According to this Canon, for male belonging to the Islam religion the bigamy was allowed whereas for female it was not allowed.

If after engagement it is noticed that there were marital obstacles, boy's family had the right to ask for dissolution of this engagement so it doesn't transform into the wedlock. They should inform the family of the girls about this issue and the girl's family was obliged to turn back all gifts that had received when the engagement was created.

7.3 Goer

In the positive law, even though engagement in Kosovo is regulated by the law, engagement is not foreseen to be the part of these norms. Since engagement is not regulated with the Albanian and Macedonian positive law, then the notion of goer is not mentioned with the positive law.

Goer usually was known as a person that establishes engagement between a boy and a girl that pretended to enter into the wedlock. We should underline that goer presents a representative of the fiancé family to the girl's family. This person should be a person of high values, who was sent from the family of the boy to the family of girl to ask girl's hand for marriage. When goer went to the family of bride he delivered to her gifts. Gifts were sent to the bride's family through goer from the family of boy. It is important to point out that if engagement was dissolute then goer holds no responsibility. He ought to make efforts to correct relationships if relationships perish or entanglements appear between spouses. According to the Scanderbeg Canon

[22] Mandro, A. E Drejta Familjare, EMAL, Tiranë, 2009, p 85.
[23] Kanuni i Skenderbeut, Article 138.
[24] Kodi i Familjes i Republikës së Shqipërisë, Alb Juris 2009, Article 7.
[25] Ibidem, 16.
[26] Ligji për Familjen i Malit të Zi, Gazeta Zyrtare, article 3, 2016.
[27] Ligji për Familjen i Maqedonisë, Gazeta Zyrtare e Republikës së Maqedonisë, article 15.
[28] Nuni, A. E Drejta Civile, Universiteti i Tiranës, Tiranë, 2002, p. 243.

gifts were considered: rings, handkerchief, money that fiancé family sent to the bride. Ring once was made of copper then it was made of silver and afterwards gold.

Children born during the wedlock were considered legal children. Children born without wedlock crown were considered as extramarital and illegal children. Children either boy or girl by parents with no crown are illegal by canon and by religion.[29] Children born during the cohabitation were considered extramarital and only those born during the wedlock were considered legal. Both cases though with the positive law are considered legal.

7.4 The rights and the duties of spouses

Spouse's rights and duties with the positive law differ from those over the history. Spouses in the wedlock are equal in all personal and property relationships.[30] Regarding the rights and duties of spouses in the family according to the positive law the principle of equality of parties and their will, applies. This makes it known that parties in the civil-legal reports are totally equal and their consent in these legal-civil relationships is equal[31], respectively the consent of parties was freely declared which means that it had no short comings.

The rights and the duties of spouses are determined by the Scanderbeg Canon. According to this canon husband had the right to advice and to rebuke his wife and in cases when the advices were not heard he had the right to use force without being obliged to give explanation for this to anyone.

According to the canon for serious faults husband had the right to divorce in the presence of two witnesses and to expel her from the house only on her body cloths. If she was captured by her husband on the betrayal then husband could kill both of them and fort this he would not be called in responsibility.

7.5 Duties of husband in favor of wife

Husband is obliged to be loyal in wedlock; to ensure food, medicate and to ensure clothes for his wife. Further, husband was obliged to advice on how to behave in report to others and to relieve her when needed. Indeed, these duties according to the positive law belong to both spouses.

7.6 Duties of wife in favor of husband

Wife according to the canon had the determined duties: to be loyal to the husband, to be respond the obligations from the crown, to stay under the power of husband, to serve without any objection, to take care of children, to take care of the wealth and their common house, to ask fort permit for everything about the home, etc. She had no right to give her word or to think about the engagement and/or wedlock of children without consent of husband.

It is worth to be noted that until late the rights and the duties of spouses within the family were not equal. There were more rights for man (husband) and always more duties for woman. This is seen for example from an article of the Ahmet Zogu Code of 1929. Only husband has the administration of the world (dotes) as long as wedlock continues.[32] The other fact should be mentioned here regarding to the role of husband regarding to the rights of his wife. Parental power belonged to father and only when/if he even when alive could not exercise this power then that power belonged to mother.[33]

According to canon wife had no right in heritage, therefore she was not considered to be heir of her died husband.

7.7 Reciprocal rights and duties of spouses in the positive law

After entering into the wedlock spouses have reciprocal duties according to the law. This is, reciprocal duty for loyalty, for moral and material assistance, for cooperation in the interest of family and for the cohabitation.[34]

Spouses are obliged to be loyal to each other and to reciprocally help, respect and support financially each other, especially in cases when one of them has no sufficient material basis to live. Spouses will develop and express the feeling of reciprocal solidarity as well as the solidarity for children born during the wedlock or for the adopted children.[35]

With the positive law duties and the rights of spouses are similar, e/i. spouses are considered equal in this direction. The duties and the rights of spouses are equal in Albania, Macedonia and in Monte Negro.

Personal duties and rights of spouses are divided into: a) personal rights and duties for which spouses cannot make an agreement, and b) personal rights and duties for which spouse can make and agreement.[36]

While talking about equal rights we rely in the Constitution where it is said: wedlock and its dissolution is regulated by the law and this is based in the equality of spouses.[37] Based on this, in the positive law spouses are equal also in the property. They have common authorizations regarding the property and to take care of children. Property right is real right which contains more broader authorizations on using and disposition with an item.[38] In this case they have the right to manage and care for common items. Movable items could be put in the name of both spouses but they could be put in the name of one of the spouses whereas the other spouse is co-owner. Parents have equal rights regarding their children and these rights are determined by the law

[29] Kanuni i Skenderbeut, Botime Françeskane, Shkodër, 2019, article 43.
[30] Komentar Ligji për Familjen, Ministria e Drejtësisë, Prishtinë, 2012, p. 105.
[31] Aliu, A. E Drejta Civile, Univesiteti i Prishtinës, Prishtinë, 2013, p. 31.
[32] Kodi Civil i Shqipërisë i vitit 1929, Alb Juris, article 1342.
[33] Grup autorësh, Historia e Shtetit dhe së drejtës në Shqipëri, Universiteti Luarasi, 2007, p. 402.
[34] Kodi i Familjes i Republikës së Shqipërisë, Article 50, paragraph 2.
[35] Ligji për Familjen i Republikës së Kosovës, Article 42, pargraphs, 3 & 4.
[36] Podvorica, H. E Drejta Familjare, Universiteti i Prishtinës, 2011, p. 102.
[37] Kushtetuta e Republikës së Koosvës, article 37, paragraph 2.
[38] Aliu, A. E Drejta Sendore, Universiteti i Prishtinës, Prishtinë, 2006, p. 76.

and by the constitution.[39] While talking about the equality of spouses, about the rights and duties we should emphasize that spouses have the right to inherit each other in case of death. Spouse contains an important heir, because together with children is aligned in the first level of heritage.[40]

Surviving spouse passes to the second order of heritage if devisor has no biological children or adopted children.

8. Family according to the Lekë Dukagjini Canon

Lekë Dukagjini Canon regulates family with its second book. This shows the importance it pays to family. This canon begins with the establishment of family. According to this canon family is the collection of limbs. Family is a collection of limbs which live under one roof whose gool is to augment people through development of bodies and development of minds and senses. (*Familja asht nji t'mbledhun gjymtyrësh të cilët gjallisin nen nji kulm, qëllimi i të cilvet ash të shtuemt e gjindjes nper mjet zhdrvllimit i shtstit e ah zhvillimi i mendes e i shises*).[41] From this it is seen that family is so important which is determined as a body contained of limbs, it serves to increase number of people within the family, since it is the basis of reproduction.

According to canon family is contained from home people divided into brothers and brothers in cognition, cognition is divided into tribes and tribes with flags. If all these collected, they contain broader family which is known by this canon. From this canon person that derive from a person, one blood, one language and that have the same customs, are reflected.[42]

Canon determines that the house is led by the oldest person of the family who was elected within the family. This was usually done but there were cases when this didn't happen and the other person within the family was elected. This was the wisest person and the most quiet within the family. In most cases this person was married even though it could happen otherwise.

All rights and duties of other persons in family were determined by the lord of the house.

8.1 Wedlock according to the Lekë Dukagjini Canon

Wedlock is an important institute based on the canon. Wedlock according to this canon determines also the establishment of house not only as the object but also as the creation of family. Family was considered as the basis for reproduction in order to increase number of workers within the family as well as to increase the number of children. This canon supports crown wedlock which was classified as the legal wedlock. Wedlock without crown was considered illegal and even against this canon. Similarly, to the Scanderbeg Canon the robbery of girl was forbidden and it was considered illegal. Probation wedlock was prohibited in the same way it was prohibited with the Scanderbeg Canon.

8.2 Marriage

In ancient times wedlock was of a political character. These were alliances created by the lord of house by the consent of his brothers in order to "strengthen house" and as the consequence also the tribe, in the same way as this happens even today with the kingdom alliances.[43]

8.2.1 Duties of husband and the wife

Husband is obliged to take care for clothes and for everything his wife needed. He also cares about the honor of his wife so she doesn't complain for anything.[44]

Wife is obliged to care the honor of husband, to serve him, to listen his orders, to answer according to her obligations towards her husband, to care about children and not to interfere in the engagement of her sons and girls. She has the right to ask for clothing from her husband. As seen from this canon, as described above it is noticed that woman/wife had no rights within the family, apart of asking for clothes. She had no right on heritage, not right to property or co-ownership. She also was not equal on dividing the responsibilities within the family.

8.2.2 Engagement

Lekë Dukagjini Canon and Scanderbeg Canon regulate engagement to be before the wedlock. Both canons foresee the engagement to be created through goer. As the goer is selected person who is of a good word with the both families: girls and boy's families. Usually, a goer was a mediator sent from the boy family to the family of a girl. In all cases goer was rewarded by shoes form the family of boy. Goer talks to the families and parents of the boy and the girl. Engagement was not established if the boy and the girl are of the same blood cognition and of the same tribe. They both (girl and boy) should not have a godfather between them and they should not have any blood brotherhood of drinking blood among themselves. Similarly with the Scanderbeg Canon with this canon it was determined sign (*sheji*) which would be lived with the establishment of wedlock. Sign (*sheji*) here also is the ring which initially was made of silver and further it ended to be made of gold. It is important to be stressed out that boy had the right to break engagement with the girl, whereas girl didn't have this right.[45]

8.2.3 The rights of husband for wife

Husband had determined rights to his wife. He advised his wife and he could exercise violence and to scold her at any time.

8.2.4 The rights of father on children

He had rights on his children especially on their education and advice and this was his principal role. Lekë Dukagjini gives

[39] Kushtetuta e Republikës së Maqedonisë së Veriut, Gazeta Zyrtare e Republikës së Maqedonisë, 1991, article 40.
[40] Hakani, A. Trashëgimia Testamentare, Dudaj, Tiranë, 2010, p. 160.
[41] Kanuni i Lekë Dukagjinit, Shtëpia botuese Kuvendi, Geer, 2001, Article 18.
[42] Ibidem, article 20.
[43] Durham, E. Për fiset, ligjet, zakonet e ballkansve, Botimet Argeta, Tiranë, 2019, p 238.
[44] Kanuni i Lekë Dukagjinit, article 32.
[45] See more at Kanuni i Lekë Dukagjinit, Article, 43.

the right ox exercising force against them and to their imprisonment and for this the justification was not requested about this. Children were obliged to hand over their salaries or whatever profits they could gain to their father.

8.2.5 Duties of father

He was obliged to buy rams for his children, he was obliged not to write testament before informing his sons. He had no right to leave wealth under the heritage before living that to his sons. Based on this, we clearly see that girls were not equal to boys. Boys had even more rights than their mother. Mother had no rights against her sons. If they killed their mother, then parents of their mother could run for vendetta. A son to kill his mother fall in the blood debt to mother's parents (*Me vra biri t'amen bjen në gjak me prindt e s'amës*.)[46] To this it is important to be added that male children had the right to expel their mother without giving her anything.

8.3 Heritage according to the Lekë Dukagjini Canon

Albanian woman is not heir. Albanian woman has not at all any type of heritage from her parents, not piece and not in house-canon captures woman as a surplus in an house. (*Gruaja shqyptare farë trashëgimi ska te prindja, as, ë plang as në shpi,-kanuja e xen gruen si nji tepricë në shpi*.)[47]

Canon doesn't recognize female to be a heir. Man should enter into a wedlock in order to become heir. Heirs are all men who belong to the direct blood line. Female apart from not inheriting from her parents, she is not a heir of her husband. Even though woman could be married and to have a son as the heir, she has no right to inherit. When a boy remains without parents and without other persons, then his relatives take care of him. They shall care also about his wealth until he gets the ability to act. Ability to act according to Lekë Dukagjini Canon is gained at the age of 15. If devisor dies and leaves after only girls, then the closest cousin is obliged to take care of them and he becomes direct and necessary heir and he would inherit the entire wealth form the died cousin. Lekë Dukagjini Canon doesn't recognize testament. If someone wished to leave something to be inherited, he shall by all means get the consent of cousins.

Things (*lanunat*) that were called heritage were divided into: burdened and unburdened.

Things (*lanuna*t) by burden were left mainly to church in order to have the mass sang twice per year. Based on this we can say that obligation was inherited which had to be executed by directing it to the religious institution.

According to Lekë Dukagjini Canon, each person is the lord of his wealth and that he has the right to leave his wealth as per his desire. Important to be repeated that father cannot leave anything from his wealth to his daughters. Father could give to his daughters anything he found justified during his life. This cannot be done after his death.

9. Dibra Canon

Dibra Canon has been applied in the Albanian territories in especially Dibra region. Later on, these territories were divided and they now belong to different states. There is no exact date when this Canon began to be implemented, but it for sure was applied in the territories of Dibra Mountains even before the Ottoman conquest. Hence this Canon is used in these territories before the XIV Century.

9.1 Engagement according to Dibra Canon

Based on Dibra Canon wedlock starts with the engagement. This canon regulates engagement with its disposal in chapter VIII. According to this it is seen that two canons which were reviewed above give more priority to the marital law putting it in the first chapters. Dibra canon doesn't give right to female to be asked for their wedlock or their engagement. No opinion of girls is not requested regarding their wedlock or their engagement. The right to decide on their engagement is given to their fathers. Canon gives the right to decide on engagement to the land lord without prior permission of her father. From this it is noticed that the consent of girls was not foreseen as the condition for neither engagement not wedlock. Girls (*vashat*) are not asked for engagement. Father engages her daughter *(vashën*) wherever and as he wishes. Landlord engages each girl of the house based on his wish, sometimes even without asking for the opinion of her father.[48]

In case of engagement, based on this canon girl doesn't engage goer since this right belongs to male only. Thus, as the result it is seen that the consent of girls regarding engagement is not considered relevant whereas the consent of boys in most cases is taken into the consideration. It should be stressed out that engagement could be established without goer. It could be established between two families without any need for having a goer who would mediate. Important to be discussed in this line, is the determined age for engagement. For female there is no specific age determined for the engagement. She based on the canon disposals has the right to engagement at every age because for engagement it is not important the ability to act, and/or it is not important if she is minor or adult. Canon says that: girl may be engaged at every age and even before she was born.[49]

At the beginning of the article 1145 of the Dibra Canon emphasizes that engagement could be established within the same village, but it excludes the possibility of engagement between male and female between the blood cognition.

It is worth to be mentioned that in case of engagement the mole (*nishani*) was given in the same way it was given based on Scanderbeg and Lekë Dukagjini canon. It covered clothes as rice, sugar, coffee, handkerchief, socks, fruits and most importantly a ring.[50] Thus ring doesn't differ from other discussed canons that determined it to be obligative.

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[46] Ibidem, article 61, paragraph c.
[47] Ibid. article 28.
[48] Martini, Xh. Kanuni i Dibrës-trashëgimi etnojuridike, B & M, article 1137, Tiranë, 2016, p. 177.
[49] Ibidem, 1139.
[50] See more at Kanuni i Dibrës, Article, 1158.

9.2 Wedlock according to the Dibra Canon

Dibra Canon regulates wedlock with the chapter IX. Wedlock was an important institution of the custom law in general and especially historic law. It is important to mention that Dibra Canon has not allowed cohabitation of couple without establishing wedlock. According to the canon wedlock has some principal conditions which should be respected by girl and boy. They were nod dependent and not similar to the positive law. Very important for the enforcement of wedlock is wedding ceremony which closed procedure of wedlock, determining thus its form. Wedlock of girl was in addition something that serves as the labor force and also in the increase of family members. For the house that gives away bride, gives a girl out for wedlock it means to have less workforce for the house (*Për shpinë që qetë vashë nuse, me u martue do të thotë me nxjerrë nji njeri prej dere, me pasë nji krah pune ma pak*)[51], for the by house it means to add a crown, to add to the family a new person who is a strong workforce, to have more and to have happiness.[52]

The age for entering into the wedlock is not determined with the canon. In the practice where this law was applied for the wedlock the age was not determined, therefore wedlock could have been established when boy and girl were children and even before they were born. Wedlock could be broken only by husband. He could break wedlock and give up wife who joined him with wedlock crown.[53]

Apart from husband who could separate from his wife, the wedlock crown could have been broken also by the landlord.

When husband doesn't hold the position of landlord, he cannot separate his wife without getting permission from landlord. He has to explain causes about why he likes to break the wedlock. If he is at the position of landlord and likes to break up the wedlock, he is obliged to inform brothers and his tribe about the reasons that makes him break the crown with his wife. If they are not informed by husband about the reasons of separation from his wife, wedlock will not be considered as broken.

Wedlock could not be broken if one of the following reasons didn't exist: violation of honor, *brecllajk* and when betraying crony. Husband could not separate from his wife if she is pregnant. This contains an obstacle for breaking wedlock in the positive law.

Wedlock is considered to be over with the death of husband or the wife. In case of the death of husband, his wife remains in her husband's home if she has children with her husband that died. If she has no children, she has no right to stay at her husband's home and thus she has to go back at her parent's house and she can marry someone else, since the existing wedlock is considered to be finished by the death of her husband.

Children according to the Dibra Canon belong to the cognition of father. They belong to the family of father.

If father dies, children could stay together with their mother in the house of father, but they together with mother cannot go to the house of mother (cognition of mother). Children, if they are male have the right to inherit in the house of father whereas girls do not have this right. Male could inherit their father in the same way if he was alive.

Men based on the Dibra Canon could marry more women. Hence, the bigamy was allowed. Men could marry two or even more women according to the Dibra Canon. This, naturally is not the case with the positive law. Scanderbeg Canon allowed a man to marry two or more women only for the man that belonged to Islam religion. On the other side Lekë Dukagjini Canon doesn't allow a man to enter into the wedlock with more than one woman and vice versa, whereas sharia allowed a man to marry up to four women, similarly to the Dibra Canon.

As the justification for allowing men to marry more women was used the need to increase birth and to increase number of children in the family, especially male.

9.3 Heritage according to the Dibra Canon

Dibra Canon regulates the inheritance law with the chapter XXI. Heritage is the right to pass a material an spiritual wealth from father to son, from a generation to generation, from one who possessed to the one who did not possess.[54]

According to this, like all canons the Dibra Canon foresees the heritage as the transfer of wealth from devisor to heir of male gender. Females do not inherit their parent's, grandfather and great -grandfather wealth. According to a law principle the rights can be transferred in the amount the owner possesses. Article 2110 of Dibra Canon says that movables and immovables could be inherited.

Female can inherit only if devisor has no male heirs. She can inherit only if she dresses national clothes of men and then represents the family. In this case she is a heir and her children can inherit, her husband cannot do so.

Canon norms shows that illegitimate children cannot inherit wealth of their father. Children of a father but from different mothers are heirs of father's wealth. Wealth is divided from the land up to a spoon equally for boys of the family. For children without parents care, relatives can take care and close cousins can administer wealth but they cannot sell it.

Cousins should administer wealth until to a determined age of children. If children do not have cousins who would care then it is uncle to take care of them. Uncle also manages wealth but he has no right to alter the wealth of his nephews. Uncle has the right to work in the land of nephew until he reaches the age of wedlock and after the celebration of wedlock is done, so after that nephew takes care himself of his wealth. According to this it could be said that wedlock is the condition to reach the age of adult. So, it is not the age but the wedlock the condition. Earlier it was said that persons could enter into the wedlock or engage in the young age, e.i. the threshold for entering into the wedlock is not determined as it is done with the positive law when it is determined to be the age of 18. Scanderbeg Canon

[51] Ibidem, 1209.
[52] Ibidem, 1210.
[53] Kanuni i Dibrës, Article 1259.
[54] Kanuni i Dinrës, Article, 2108

says that the condition to enter into the wedlock at the age of 15. Every person that possesses wealth has the right to give it to someone. He, indeed only a part of the wealth, and he cannot give it away the entire land/wealth.

Wealth can bi given away conditionally and unconditionally. In this case we could say the Dibra Canon foresees legacy (**legu**).

Based on the disposal of canon, it is seen that a person that inherits rights, he inherits the duties as well. Hence, firstly the duties have to be fulfilled and then the rights to be inherited-enjoyed.

10. Sheria marital law

The Balkans region was under the Ottoman Empire conquest since early Middle Ages. Ottoman Power in Balkans, in early years (at least until the end of XVI Century) was a regular system of ruling, whereas living conditions could be compared easy in many aspects with those of the other parts of Europe.[55]

Ottoman Empire has conquered the territories of Balkans and it brought ottoman custom and legal law by which it acted in the occupied territories. Muslimism starts at the end of XV Century being established at the end of this century.[56] In the Albanian territories the Ottoman law which derived by Quran that is understood as Sheria law.

What is the Sheria law? It is law which derives from Quran. This is the law transmitted by Prophet and its hadiths.[57] Word sheria derives from the Arabic word "sheria" which means way, road.[58] Sheria is the religious law. Islam wedlock inherits some elements of wedlock from the pre-Islamic territories in previous Asia, whose genesis we find in Ancient Mesopotamia.[59] According to the Sheria law the marital law is a contract. Since it is the contractual form and since to enter into it the consent of both sides is needed. Since contract is concluded by the consent of two parties, in this contract parties can decide on conditions before wedlock, during the wedlock and after the wedlock in order to regulate their wedlock.[60] Wedlock is a contract for living community.[61] Thus we understand that with the wedlock there are determined some rights and duties with the contract. Each spouse has rights and duties like creditor and debtor have in a contract. According to sheria the marital law had to do with the husband and the wife. Wedlock is a relationship between two persons of opposite gender.[62] In Kosovo, since it belonged to Balkans, the sheria law predominated.

Marital law, according to sheria law as the part of the Islamic civil law supports polygamy, whereas Lekë Dukagjini supports Monogamy. Polygamy according sheria law is divided into several types which were applied in territories where sheria was applied.

Engagement in the sheria law is considered as a contract that enables better mutual recognition of future spouses. According to this we could say that engagement is a mutual contract which however doesn't cause legal effects in the interpersonal relations and property relations as it is the case with the marriage. Engagement based on the sheria law can be finished by: the consent of engaged couple, by the will of one from the couple supposed to be future spouses, by renunciation, by agreement and by the death.

Based on the sheria law, marriage was divided depending on the Islam schools. Starting from the Islam schools which acted in the Western Balkans, marriage could be divided: in the regular marriage and marriage with the slave and the other type of marriage (or third type marriage) known as temporary marriage. Polygamy based on sheria was allowed for men, only. Muslim man had the right to marry four women. This was allowed for Islam population, with the Scanderbeg Canon, whereas Lekë Dukagjini Canon didn't allow this because it was influenced by the catholic church. Husband in Islam should take material care of spouses and not only of one of them. If he was not able to materially take care of his wife, he could marry a slave and in this case we have to deal with so called marriage with slave.

In the sheria law the temporary marriage was known which means here we have to do with a temporary contract. It should be taken into the consideration that this marriage could be dissolved before the term, but this was the exclusive right of husband to dissolve. It is worth mentioning that here marriage was established not between husband and the wife, but it was concluded between the husband and the father of girl (wife).

After the consent taken from the father then it is requested the consent of girl for entering into the marriage. This marriage leads towards respect of the consent of girl compared to the canons where the consent of girl was not taken into the consideration. Marriage was concluded without the presence of the state organs, e.i. without legal procedures.

If compared to the positive law, such marriage would be invalid because the form of concluding marriage is the essential condition for marriage. According to the Lekë Dukagjini Canon and the Scanderbeg Canon marriage was concluded before cleric, whereas with the sheria law this was not required. No documentation was required and no state organ. It is important to me pointed out that the presence of witnesses was required. Positive law, determines the presence of witnesses as a condition so the form of marriage is respected.

Based on sheria, marriage was concluded as a contract where husband takes care of her wife and in case of dissolution of the marriage the compensation was foreseen. With the contract of marriage, the right for exclusion of polygamy was foreseen.

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55 Malcolm, N. Kosova një histori e shkurtër, (Albanian Edition), Prishtinë 2019, p. 131.
56 Schmitt, Oliver Jens. Kosova, histori e shkurtër e një treve qendrore ballkanike, Koha, Prishtinë, 2012, p. 89.
57 https://www.bbc.com/news/world-27307249, dt. 26. 09. 2021.
58 https://dornsife.usc.edu/news/stories/3541/sharia-islamic-law/, 25. 09. 2021.
59 Ismaili H. & Sejdiu, F. Historia e Shtetit dhe së Drejtës, Universiteti i Prishtinës, Prishtinë 2000, p. 279.
60 Nanda Chiranjeevi Rao, Marriage agreements under muslim law- a weapon in the hands of Muslim Woman, p. 94, https://www.jstor.org/stable/43953629.
61 Begovic, M. E Drejta Martesore Sheriatike, ALSAR, Tiranë, 2020, p. 33.
62 Ibidem.

In the positive law, spouses have common right and duties in regard to care about their children. Sheria law doesn't give material obligations for wife for her children. Hence not matter of her financial and economic situation she was not obliged to take care of her children.

In the sheria law, woman administer her wealth. She decides herself whether to sell it or to add it to the wealth of her husband. But she is not obliged to add her wealth to the wealth of her husband. This comes to some extent be similar to the modern law except that the modern law considers this to be as the common wealth after the marriage was established. On the other side sheria doesn't consider something common, but only property of wife and after marriage established no matter they live together, wealth is considered special.

Marriage in the sheria law could be dissolved at any time by the side of husband and that without any justification, which was not the case with the wife.

Children have obligations on parents and likewise parents had the same when children were minors.

11. Inheritance law based on sheria

Sheria law was very developed. It is clear, this law derived from Quran and from the Prophet hadiths. This law recognizes the inheritance law and this as: legal inheritance and inheritance with testament.

Inheritance sheria law doesn't recognize inheritance contractual law. As the basis for legal inheritance there are marriage, blood cognition and civil cognition. To the sheria law there is a difference because the priority is given to the legal inheritance before the testament inheritance. To the sheria law husband and the wife appear to be legal heirs and testamentary heirs. According to the Albanian custom law, e.i. according to the Scanderbeg Canon and Lekë Dukagjini Canon female was not considered to be neither legal nor testamentary heir.

Even though in the sheria law female is legal and testamentary heir she is not anyway equal to husband in some cases.

Children are not equal base on sheria law. Equal are considered only legal children from the marriage. If compared to the custom law they were in much better position compared to Scanderbeg Canon and Lekë Dukagjini Canon. According to sheria law, illegitimate children could inherit their mother but they did not inherit their father.

In the sheria law the principle of representation is not present. Children whose father died before grandfather, could not represent their father in heritage. They were not heirs of father and mother. In the Canon law representation was present and children inherited their father.

Object of heritage in the sheria law were movables and immovables and the property rights.

Testament was divided into verbal and written testaments. Testament could be private and public. In order to be final, testament should fulfil basic and special conditions. These conditions had to fulfil the principles of Islam. Testament based on sheria contained legu.

Basic conditions for validity of testament according sheria are enumerated as follows: to be older than 15, to have the ability to act, to exist the expression of consent and to be dignified.

12. Conclusions

Marriage was considered as the resource of family according to the Albanian custom law. In Albanian territories the custom law continues to be used but at a determined certain measure and it looks usable for the persons who enter into the marriage. In some Albanian territories marriage is concluded based in the custom law. According canons engagement was given a great importance as a part of family law. On the other side, based on the positive law, engagement in Kosovo is regulated with the legal norms whereas in Monte Negron, in Albania and in Macedonia engagement is not covered with the legal positive norms.

Marriage according to the positive law is concluded with the presence of both spouses, with the free expression of consent. According to the Scanderbeg Canon marriage was concluded without presence of future spouses, e.i.without representation.

Age for concluding marriage according to the Universal Declaration for Human Rights and the European Convention of Human Rights is connected with the age of gaining the ability to act, respectively by becoming adult. Positive laws of the countries from the region also allow marriage at the age of 18.

According to the Dibra Canon marriage was concluded at a very young age. This canon foresaw engagement to be possible even before the future spouses were born. Based on Scanderbeg Canon and Lekë Dukagjini Canon marriage was concluded when male achieved the age of 16 whereas female ate the age of 14-15.

According to the positive law both spouses shall achieve age of 18 whereas according to Canon it is seen that the age between husband and the wife for entering into the marriage differs from husband to wife.

While talking about marriage based on Scanderbeg marriage Muslim men had the right to marry more women, which means the polygamy was allowed. This type of marriage was allowed by the Sheria law in the territories od the Western Balkans. Men belonging the catholic religion had no right to marry the second woman based on the Scanderbeg and Lekë Dukagjini Canon. Girls (women) had the right to marry a man only of two religious' affiliation. Bigamy is a penal act according to the positive law. While talking about the duties and rights, Canon gives importance man and giving a small space for the woman's rights in report to man. Husband had the right to be responsible for the marriage of children, he was the representative of children and he gave the word on their engagement whereas wife could not enjoy this right. She could have these rights only if in the family she had no husband or if in the family there was no male at all.

The entire wealth belonged to male and not at any time to female. Females were no heir neither in the family of their spouse nor in the family of their origin. Hence if a comparison is made with the positive law female was never equal to male, nit when the engagement was established, not when the marriage was concluded and not when she became the member of the family. She was considered only as the family member who served and exercised family work and the work that was done in the land. In the positive law wife is equal her to husband. She inherits from the family of origin and she is the co-owner with the spouse from the moment the wedlock was concluded to its dissolution. She is also a necessary heir of the family of origin and she cannot be excluded from the legal or testamentary heritage.

Wojciech Materski

W obronie piędzi rodzimej ziemi. Estońsko-sowiecki/rosyjski spór terytorialny 1917–2018

[In Defense of the Native Land. Estonian-Soviet Russian Territorial Dispute 1917-2018]

Warsaw: The Center for Polish-Russian Dialogue and Understanding and Institute
of Political Studies of the Polish Academy of Sciences, 2020, 211 p., ISBN 978-83-65972-94-1

The publication in question is a joint publication of the Center for Polish-Russian Dialogue and Understanding[1] and the Institute of Political Studies of the Polish Academy of Sciences. In addition, it was released as the 6th volume in the East of the West series. It consists of five chapters arranged according to a chronological order. What is more, the introduction, conclusions, appendix, bibliography, map list, index of persons and index of geographical names have been distinguished.

In the introduction to the discussed publication, for the purpose of analysis, the Author points to two small territories, which in the 20th century were a point of contention between Estonia and the USSR, and after its collapse, Russia. It is a strip of land with a length of 1,200 km^2 located on the eastern bank of the Narva River and 1,100 km^2 of the Petseri area. In the introduction, the Author presents the historical conditions of the border between Estonia and Russia after the Great Northern War (1700-1721). He cites the Russian atlas published in 1792 in Saint Petersburg, listing important border points, as the source material illustrating the area in question.

The next point presented in the introduction concerns the characteristics of the analyzed border areas. In the case of the first research point, the strip of land located on the eastern bank of the Narva River, the Author begins his analysis with the period of the reign of Ivan III, who built the Ivangorod Fortress on the eastern bank of the Narva River. Another important aspect for the region relates to the third Northern War, as a result of which the area was taken over by Russia. As a consequence, the areas on both sides of the Narva River came under Russian rule.

The Author presents a slightly different historical analysis in the case of the second disputed area related to the Petseri area. As a point of explanation, for his analysis, he adopts the course of the border formed in the 13th century, that is along the Maidla River and the Piusa River. Another element concerning this area relates to the delimitation of the confession with the monastery in Petseri, with a brief description of the religious relations at that time. Importantly, this division was maintained despite the occupation of these territories by Russia and merging them in a common administrative unit. The next, significant, according to the author, historical episode for this region was the period of the First World War. The border line was then shaped as a result of military operations and the activity of German troops, which occupied western Latvia (the Courland Governorate) and part of Lithuania.

The preliminary historical argument, which is intended to be an introduction to further analysis, is supplemented by three maps. The first is a map of the 16th-century Livonia taken from the atlas of Abraham Ortelius[2]. The second map shows the lands occupied by Russia after the Peace of Nystad in 1721, but without giving its source, which allows for assuming that it is an author's study. The third map shows the Governorate of Estonia of 1835 and was taken from Russian Wikipedia.

The first chapter is entitled: *Between Autonomy and Independence [1914-1920]*. It should be noted that the Author presents in this chapter the most important facts about the emergence of independent Estonia, and at the same time describes which lands were taken into account in the process of forming Estonian statehood.

The Author uses the mid-19th century as the starting point for his analysis, when the Estonian national revival takes place, manifested primarily by the renaissance of the Estonian language and the emergence of schools and organizations functioning with Estonian as the primary language. The next points refer to the activity of the Estonian political elite in the last phases of the First World War. The author discusses the Manifesto addressed to Fr. Georgy Lvov, the Prime Minister of the Russian Provisional Government, regarding the granting of autonomy to Estonia and the Order of the Provisional Government on the autonomy of Estonia of March 30, 1917 (April 12, 1917).

The next point concerns the development of Estonian political life after the issued regulation, which was manifested, for example, in the formation of political parties. The Author signals that in this period problems begin to emerge regarding territorial delimitation, also raised by the Bolshevik circles.

In this chapter, the Author also mentions the regulations approved by the Provisional Government on June 22, 1917, *The provisional organization for the administration and self-government of the Estonian Governorate*, which confirmed the territorial scope of the Es-

[1] The Center for Polish-Russian Dialogue and Understanding is a state legal person operating pursuant to the Act of 25 March 2011 on the Center for Polish-Russian Dialogue and Understanding (uniform text – Journal of Laws of 2019, item 640). According to Art. 3 sec. 1 of this act, the aim of the Center's activity is to initiate, support and take actions in the Republic of Poland and the Russian Federation for the benefit of dialogue and understanding in Polish-Russian relations.

[2] Citing the website www.lbrowncollection.com as source.

tonian Governorate. As one of the first territorial incidents, the Author mentions the petition of the Seto people, dated September 1917, inhabiting the Petseri area, south-east of Lake Pskov.

Subsequent occurrences referring to the territory of autonomous Estonia concerned the decisions of the Congress of the North-West Oblast Council of 23 July 1917 and the referendum of 23 December 1917 held in Narva and Jaanilinna concerning their belonging to the Estonian Governorate.

Among the more important political events that took place at that time, the Author mentions the elections to the Estonian Constituent Assembly, or the activity of Estonian politicians – Jaan Tönisson, Konstantin Päts and Jaan Poska at the beginning of 1918. When it comes to the discussion of the Estonian Declaration of Independence issued by the Salvation Committee, the publication presents the lands which, according to this document, were to be part of Estonia.

The next incident referring to the definition of the lands to be included in Estonia was the presentation of the Treaty of Brest-Litovsk of March 3, 1918, according to which the border between the lands occupied by Germany and the lands that were to belong to Russia ran along the Narva River, which consequently meant that the lands inhabited by the Seto people were to belong to Russia. In the case of the Treaty of Brest-Litovsk, the Author presents the activities of the Estonian communists, including Jaan Anvelt, who aimed at subjecting the Estonian lands to Bolshevik Russia. Among the more important political events from that period, the actions of Estonian troops against the Bolsheviks, the elections to the Estonian Constituent Assembly, which took place on April 5-7, 1919, and the formation of the government with Prime Minister Otto Strandman are distinguished.

In the case of territorial issues, the Author discusses the provisional Estonian Constitution of June 4, 1919, describing the territory of Estonia.

Much attention in the first chapter is devoted to the talks between Estonian and Bolshevik representatives on the course of the border, initiated on September 17, 1919 between Ado Birk, the then Estonian Prime Minister, and Maxim Litvinov, a member of the People's Commissariat for Foreign Affairs of the RSFSR.

What is also pointed out is the talks between Jaan Poska and Adolf Joffe, a representative of the Bolsheviks, who proposed that the border run along the Narva River, leaving the city of Narva-Ivangorod and the island on this river, as well as the Petseri region on the Russian side. A different course of the border would take into account the then front line with the Komarovka River and 7 km of land east of the Narva River.

The first chapter ends with a discussion of the peace treaty of February 2, 1920, signed by Jaan Poska and Adolf Joffe, with a comment from Vladimir Lenin regarding the territorial concessions made to Estonia.

The second chapter is entitled: *The Independent Republic [1920-1940]*. As the first point of this chapter, the Author describes in great detail the course of the border between Estonia and Russia established on the basis of the peace treaty of 1920, defining it as a border based on strategic topographic points, with a remark that it took into account the security of Estonia.

Among the important historical facts illustrating the period discussed by the Author are the most significant political assumptions resulting from the Constitution of June 15, 1920, a description of the political scene in 1920, the unsuccessful communist coup on December 1, 1924, the policy concerning national minorities (with particular attention to the Riigikogu legislation of 1925), Estonia's participation in the created system of international security, the crisis in the early 1930 s with the political activity of the Estonian Union of Participants in the Liberation War, the imposition of martial law in 1933, the formation of authoritarian rule from 1934, the introduction of the Constitution of the Republic of Estonia on August 17, 1937, and the declaration of neutrality in 1938.

In the case of the constitution of 1937, the Author quotes a provision concerning the territory of Estonia, which was "indivisible".

The situation after the signing of the Ribbentrop-Molotov Pact on August 23, 1939 is highlighted as a separate point, with congratulations on the part of Karl Selter, the Minister of Foreign Affairs and diametrically different comments from the Estonian press.

In turn, regarding the interesting border areas near the Narva River and in the Petseri region, the Author discusses the demographic changes that took place at that time. Due to the poor areas near the Narva River, they were quickly depopulated. Regarding the Petseri region, according to data from 1934, approximately 60% of people were of Russian nationality. Only in the city of Pechory, about 50% of the population were Estonians and Seto people.

Referring to the outbreak of World War II, the Author presents the incident with the Polish submarine Orzeł and the signing of the Mutual Assistance Treaty with the Soviets on September 28, 1939, along with a secret protocol regarding military bases (on the islands of Saarema and Hiiumaa, and in Paldiski).

Later, the Author outlines the talks conducted by Joseph Stalin with the Estonian delegation regarding the treaty of September 28, 1939, as well as inviting the Estonians to a meeting of the Supreme Council of the USSR, at which Polish territories taken over on September 17, 1939 were incorporated into the Soviet Federation. The further part of this chapter deals with the seizure of Osmussaar Island for the purpose of creation of the soviet military base, and the imposition of the treaty of March 15, 1940 regarding the use of the Estonian Baltic coast by the Red Army.

The second chapter ends in 1940, when Estonia was occupied by the USSR along with two other Baltic republics – Lithuania and Latvia.

To sum up, in the second chapter, we deal with the most important episodes in the history of Estonia in the interwar period. Indeed, in one point the Author addresses the issues of Russian domination on the disputed territories around the Narva River and

Petseri. However, bearing in mind the title of the analyzed publication, there is no information whether in the interwar period, the Soviets made territorial claims against these areas, or whether the increasing domination of the Russian population contributed to any territorial claims in that period.

The third chapter is entitled: *Annexation and Occupation [1940-1944]*. Similarly as in chapter two, the Author presents the historical background of the period in question. Among the most important political events, the resignation of the government led by Jüris Uluots, the appointment of the Moscow-dependent government of Johaness Vares, and the activity of the Political Bureau of the Central Committee of the All-Union Communist Party (Bolsheviks) are discussed.

Two points should be given particular attention. The first concerns the process of transforming Estonia into a Soviet republic. It is aptly stated by the Author that a comedy was enacted such as the one that took place in the Polish lands occupied on September 17, 1939 by the Red Army, which consisted in legally sanctioning the annexation. This was achieved by the organization of the Constitutional Assembly which, on July 21, 1940, opted for Estonia's accession to the USSR. At this point, the Author discusses the activity of the Supreme Council of the USSR and its position on the inclusion of Estonia into the federation, as well as the adoption of a new constitution modeled on the Basic Law of the USSR. The next issue studied by the Author relating to the above concerns the adoption by the Political Bureau of the Central Committee of the All-Union Communist Party (Bolsheviks) of the decision entitled *On the state and economic system of the Soviet republics*, containing guidelines and directives which should be followed by the newly adopted republics (curiously enough, one of these directives concerned the organization of excursions of peasants from the Baltic republics to an exhibition in Moscow). The Soviet period ends with a discussion of the repressions used by the Soviet authorities against the Estonians (with a special attention to the deportations that began on June 14, 1941), as well as the creation of the Estonian guerrilla – the Forest Brothers.

The second issue, which can be distinguished in the chapter devoted to the period 1940-1944, relates to the offensive of the German army and its occupation of Estonia territory. In this part, the Author examines a noteworthy topic concerning the status of Estonia, presenting Estonian ambitions to revive independent Estonia and the concept of the Third Reich, which introduced a civil occupation administration, implemented by the Estonia General District Commissariat. In the case of the occupation of Estonian lands by the German army, the Author focuses on the formation of military units dependent on the Third Reich, also introducing similar activities from the Soviet side as well as the Battle of Narva in 1944. The last political episodes in 1944 presented in the publication concern the formation of a government with Prime Minister Otto Tief as well as the establishment of the Estonian National Council in exile.

In relation to territorial changes, bearing in mind the two mentioned areas (Estonia as a Soviet republic and its occupation by the German army), the Author discusses them separately. In the case of the establishment of the Soviet republic, the changes in the border line were related to the introduction of a new constitution. The correction of the border was to divide the area belonging to Seto people, meaning the inclusion of a 7 up to 12 km wide strip of land into Soviet Russia along the eastern bank of the Narva River and part of the area around the city of Pechory.

In turn, during the occupation of Estonia by the German army, in December 1941, the lands of the Petseri county (taken earlier by the Soviets) were incorporated.

Bearing in mind the book's title referring to the territorial dispute, the question arises whether the political elite of Estonia presented any concerns or remarks on these territorial adjustments. The next issue relates to the information put forward in the earlier parts of the book and concerns the national and population changes that took place in the area around the Narva River and the Petseri region, as well as the way in which this border adjustment was received by the local population.

The fourth chapter deals with the Estonian Soviet Socialist Republic and is entitled: *Soviet Republic [1944-1991]*. The topics related to the history of Estonia are strongly emphasized in the first three chapters. In the case of chapter four, the situation is diametrically different. Out of the most important historical events from the post-war period, the Author limits himself to presenting the activity of the Forest Brothers.

He begins his further historical considerations with the so-called "Singing Revolution" of 1988, that is the adoption by the Supreme Council of the Estonian SSR of the Sovereignty Declaration relating to the amendment to the constitution (not approved by Moscow), the organization of the so-called Baltic Chain on the anniversary of the Ribbentrop-Molotov treaty, the position of a special commission led by the Presidium of the Supreme Council of the Estonian SSR and its decisions defining the system of Estonia after June 1940 as a "regime based on armed aggression" or a resolution of the Supreme Council of November 12, 1989 *on the historical and legal assessment of the events in Estonia in 1940*.

The next points raised by the Author refer to the legal actions aimed at sanctioning the independence of Estonia, such as the Declaration of Independence of February 2, 1990 adopted by the Supreme Council of the Estonian SSR, the Act of May 8, 1990 on the name of the state, the resolution *on the relations of the Republic of Estonia and the Soviet Union* or the referendum on March 3, 1991.

Regardless of the actions taken in Estonia and relating to the process of its political emancipation, the book covers the following historical facts: the policy of the USSR in relation to the increasingly independent policy pursued by Estonia, as well as the attitude of Mikhail Gorbachev and Boris Yeltsin, the chairman of the Supreme Council of SFSR (such as the Act of April 3, 1990 *on the procedure for settling issues related to the departure of the union republics from the USSR*, meeting of the leaders of the Baltic republics with Boris Yeltsin in Jurmala, Latvia in July 1990, visit of Boris Yeltsin in Tallinn and signing on 12 January 1991, a declaration on mutual recognition of sovereignty with the leaders of Lithuania, Latvia and Estonia and signing the treaty on basic Estonian-Russian

relations, military intervention in Lithuania in January 1991 or the recognition of Estonia's sovereignty by the Supreme Council of the USSR on September 6, 1991). The author also mentions the meeting in the hunting estate in Viskuli on 7-8 December 1991, with paying attention to Estonia's non-accession to the Commonwealth of Independent States.

The Author begins his considerations on the border dispute with the position of the Estonian communists who addressed a claim to the authorities of the USSR to join the lands of both banks of the Narva River and include Jaanilinn in the Estonian republic, which was not taken into account. The next point discussed concerns the petition of the Presidium of the Supreme Council of the Estonian SSR on the unification of the municipalities of Petserimaa, Petseri and Jaanilinn cities and the eight municipalities bordering the Russian SFSR. As a consequence, on August 23, 1944, the Presidium of the Supreme Council of the USSR adopted a resolution to establish the Pskov region within the territory of the Russian SFSR. Another adjustment of the border was approved by the decree of the Presidium of the Supreme Council of the USSR of November 24, 1944 and of August 27, 1946 on the division of the Petseri area and the division of the Narva area. At this point, the Author also analyzes the national and demographic changes that occurred in these areas as a result of the war.

The next correction of the border between the Estonian SSR and the Russian SFSR was carried out on the basis of the decree of the Supreme Council of the USSR of October 31, 1957 and concerned the creation of the Dubki enclave and the annexation of Saatse saabas, which is part of the village of Saatse.

The last, fifth chapter is entitled: *The Second Independence [1991-2019]*. In the case of a historical outline accompanying each of the chapters, the Author presents and discusses the following events from the history of independent Estonia: the adoption by the Estonian parliament of the declaration *on the restoration of constitutional state power* on October 7, 1992, the Estonian-Russian talks concerning the disputes started in 1992 (relating to, among others, the withdrawal of Russian troops, the regulation of the status of the Russian minority in Estonia, economic relations and the issue of demarcation), the publication of a report on the crimes committed by the Soviet authorities in 1940-1991 or the moving of the Monument to the Liberators of Tallinn with a mass grave from Tonismagi Hill to the Military Cemetery in 2007 as well as incidents caused by the Russian minority.

However, touching on the issue of the state border, the Author first examines the course of the Estonian-Latvian border, and only in the further part does he present the most crucial stages related to establishing the Estonian-Russian border. The Author also mentions the sea border and problems related to agreeing on delimiting territorial waters. As far as the land border is concerned, the Estonian-Russian disputes concerning the observance of the provisions of the 1920 Treaty determining the course of the border are discussed. The Author also mentions the Estonian note of July 1992, addressed to the Russian Federation, concerning the withdrawal of Russian troops outside the border, the recognition of the 1991 demarcation as a temporary border (recognized by the State Duma in 1993 as a permanent border), an incident involving an Estonian group of cyclists who wanted to insert a symbolic sign in place of the 1920 border, seizing border posts by the Russians as well as a statement from the Estonian side regarding information about the planned cancellation of the 1920 Treaty by the Russian side, the activity of prof. Endel Lippmaa for the demarcation, exchange of land occupied by the Soviet side in 1957 for forest areas in the commune of Meremiae and the village of Suursoo, speech by Andrei Kozyrev, the Russian Minister of Foreign Affairs in 1994 on the treatment of national minorities and the further maintenance of Russian garrisons, issuing on June 18, 1994, the decree on the demarcation of the state border between the Russian Federation and the Republic of Estonia by Boris Yeltsin recognizing the demarcation, but according to the state of August 24, 1991, and the position of Prime Minister Matt Laar, as well as border regulations of 1994 together with regulation of the use of Lake Peipus.

The regulations contained in the so-called 1996 border agreements as well as the signing of the border treaty on 2005, along with the denunciation of the signature by the authorities of the Russian Federation, which was supposed to be a response to the wording of the Estonian ratification referring to the 1920 Treaty, are also highlighted. The Author also puts emphasis on the consequences of the situation that led to to a slow demarcation and suspension of further talks (due to the incident related to the relocation of the grave and the monument from Tonismagi Hill). Another issue characterized by the Author concerning the demarcation between Estonia and Russia are the talks initiated by Hendrik Ilvs, the then President of Estonia in 2011, concluded with the signing of the documents on February 18, 2014 in Moscow by the foreign ministers of both countries. The author describes the border incidents that took place as a result of an unregulated border (e.g. involving Eston Kohver, an officer in the Estonian security service detained by Russian border guards). It is worth noting the Russian position regarding the ratification of border agreements, which was to take place simultaneously in the Riigikogu and the Russian State Duma. In the case of the Estonian parliament, it occured in 2015. Whereas, the situation in the Russian parliament was diametrically different. At this point, the Author quotes the words of the Russian Foreign Minister, Sergei Lavrov, on the ratification of border agreements in the event of improvement in relations between the two countries.

Each chapter of the analyzed publication contains maps showing the territorial changes that took place in the period discussed by the Author (there are 11 of them in total).

In addition, the publication includes an appendix, which presents the most important documents, in Estonian and Russian, relating to the discussed topic. When examining the activities of Estonian politicians, their biographies were also included in the footnotes.

This work should be assessed from different perspectives. The first one will be the perspective of the Polish reader. The author, discussing issues related to the Estonian-Russian dispute concerning the course of the border between the two states (as well as the republics forming part of the USSR), presented his arguments in terms of the political changes that took place in Estonia. This

subject is known to the Polish reader mainly from the works of Jerzy Lewandowski and Piotr Łossowski, a leading researcher of the Polish foreign policy (especially of the interwar period). The appearance on the publishing market of another book containing Estonia's orderly historical and political outline enriches the subject literature and constitutes another valuable resource concerning Estonia, with a particular focus on border issues.

From the perspective of an Estonian reader, we can talk about the presentation of obvious facts or merely the most important factual points from Estonian history or Estonian-Soviet (Russian) relations. In turn, from the perspective of the Polish reader, sketching the historical background is crucial. History seems to have shown many times that we know the least about our neighbours or countries with which we share historical episodes or similar political experiences. On this occasion, I will present my subjective feeling, as a Polish reader. Juxtaposing the historical material presented in this book with information taken from the works of the abovementioned historians, one can afford a historiographic confrontation. However, it should be borne in mind that this historical material has two different functions. In the case of the discussed book, it provides a historical background, introducing the reader to the main thread of the work, which is the border dispute. Moreover, in the case of the publication in question, the presentation of the most important points in Estonian history allows the Polish reader to find themselves within the time frame. Importantly, the author maintains the right proportions, bearing in mind that the main topic of the work is focused on another issue. Bringing this issue closer, from the perspective of the Polish reader, it cannot be considered that factography dominates a particular part of the work or marginalises its main subject.

In view of the historical background presented by the author in his work, I will make a small remark about its scope. As I mentioned in this analysis, the work presents the most important facts about a specific time frame. An interesting issue seems to be the presentation of the Estonian political scene in the face of the border dispute (especially in the interwar period and after the collapse of the USSR). Was the border dispute reflected in political discourse at the time? How certain groups or political circles addressed this issue? Was there any alternative solution on the basis of political debates that could possibly be used in discussions with the USSR? Let me make a similar remark with regard to the attitude of Estonian emigration to the establishing of the border between Estonian and Russian Soviet Republic. Even a few-sentence development of this subject would undoubtedly enrich the historical outline presented.

The next perspective refers to the main thread of the work, namely the border dispute. In this case, the question arises whether this issue should be examined much more widely, and not narrowed to Estonia. In the interwar period, Poland and Latvia also shared a border with the Soviet Union. Polish historiography, as well as research in the field of legal history, strongly emphasises the issue of the Riga Treaty of 1921 and the problematic situations associated with the demarkation of the border. In addition, on the basis of research conducted within the resources of, for instance, Archives of New Files (leading Polish state archives) we can reconstruct Polish-Soviet disputes regarding the actual course of the interstate border as well as the informal movement of border course by the Soviet side. The first years of the post-war period also brought uncertainty about the course of the border, as evidenced by its correction in 1951.

In the case of Soviet neighbours, it is also worth considering Latvian experiences regarding the course of the border in the interwar period. Although, after the Second World War, Poland did not share the fate of Lithuania, Latvia and Estonia and did not become an integral part of the Soviet Union, after reading the book, the question on the situation of the border between Lithuania, Latvia, Estonia and the Russian republic arises. Did the other two republics, Lithuania and Latvia, face similar problems as the Republic of Estonia?

The next point of consideration refers to the period after the collapse of the Soviet Union. When the former borders of individual republics (i.e. Lithuania and Latvia) automatically became borders between Lithuania, Latvia and Russia, were there any points of contention? If that was the case, how were they resolved?

At this point, it is also worth highlighting the issues of the borders of other Soviet republics on the European side (i.e. Belarusian and Ukrainian) as well as the countries formed from them after the collapse of the Soviet Union.

I would like to mention that Wojciech Materski is the author of another work on the border dispute that took place between 1917 and 1991 between the Soviet Union (Russia) and Finland (from "export of revolution" to "finladization". Soviet-Finnish territorial dispute in 1917-1991, Warsaw 2019).

A summary of the results of the studies presented on the border of Finland and Estonia, as well as their extension into studies on border disputes concerning other Soviet republics (and independent states formed from them after the collapse of the USSR), would enable the reconstruction of one of the important elements of the foreign policy of the USSR.

Regarding this publication, I will present one more point. It concerns the absence of material from the Estonian archives relating to that territorial dispute. Presenting it (e.g. in the annex) would undoubtedly enrich this work. Additionally, the reader could familiarize themselves with fragments of the source base underlying the study in question.

Regardless of the above suggestions, I believe that this work is not only interesting but also vital in the context of research into political relations in Eastern Europe. While the most significant political and historical issues have been analyzed in numerous publications, focusing on a small section (in this case, a territorial dispute) perfectly complements research on "great politics".

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Gábor Hamza

Az európai magánjog fejlődése a kezdetektől a XX. század végéig. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján *[Trends in the Development of Private Law in Europe from the Beginning up until the End of the 20th Century. The Role of the Civilian Tradition in the Shaping of Modern Systems of Private Law]*

Budapest: Novissima kiadó, 20222, 488 p., ISBN 9786156484116

It was the the early fall of 2022, when the second, enlarged edition of the monograph *Az európai magánjog fejlődése a kezdetektől a XX. század végéig* (*Trends in the Development of Private Law in Europe from the Beginning up until the End of the 20th Century*) was published by Gábor Hamza in Budapest. Gábor Hamza is ordinary member of the Hungarian Academy of Sciences and professor emeritus of Roman Law and Comparative law at the Faculty of Law, Eötvös Loránd University of Sciences. The aim of this monograph is to describe the formation of the private law-systems of today based on the traditions of Roman Law.

Gábor Hamza purposed to present the formation and the structure of the modern private law systems with the method of the comparative private law highlighting the subsequent fate of Roman Law.

There is no doubt that there are numerous studies in the international literature, which deal with the general presentation of the universal history of private law. There are also several general introductions to the comparative law (*droit comparé*), too. I refer hereby — as examples — to the works of René David [1] and Franz Wieacker [2]. Taking into consideration these books one has to underli ne the specific methodological basic-principle of Professor Hamza's study.

The present book should not be regarded as only the *historia externa* of private law, but one may also collect several pieces of information on the dogmatic questions and the history of institutes of private law. Nevertheless one can find useful datas on the history of the science of private law, as well.

If one pays attention to the essence of this methodology it may not be surprising that the author puts high emphasis on Roman law and on the subsequent fate of Roman law. It is absolute beyond doubt that Roman law can function as a possibility for integration among the national legal systems. Overwhelming as it may be but Roman law can be regarded as a *lingua franca* of law.

If one takes a short look on the title of the present book, one may think that the monograph concerns only the European countries. Nevertheless we may find the short legal history of private law of every European country. The book, however gives detailed analysis on the impact of the European civilian tradition on countries outside Europe. One can read chapters on the legal development of North America, Central America and South America, South Africa and some countries of Asia, as well.

Professor Hamza's book is divided into four large parts, as follows:

1. *The Origins of European Private Law;*
2. *The Development of European Private Law in the Middle Ages;*
3. *The Development and Codification of European Private Law in Modern Times;*
4. *The Influence of the European Civilian Tradition on Countries Outside Europe.*

The first part of the book gives a very useful introduction to the origin of the European private law. The very first paragraphs of the book are on the fate of Roman law after the demise of the West-Roman Empire. This chapter also contains an analysis on the codification of Roman law in the Roman (Byzantine) Empire during the reign of Justinian. This codification can be regarded as the most important and most famous codification-process of the antiquity. I refer hereby to David Dudley Field, the famous American jurist in the 19th century who said that the code of Justinian is "*a great achievement of human genius*". It is absolutely beyond any doubt that the Code of Justinian had a huge impact on the codifications of Europe in the modern times.

The second part of Professor Hamza's book begins with a theoretical definition on the term of *ius commune*. As it is well-known there are many interpretations of *ius commune* in the legal literature. In the favor of a better understanding it's worth quoting the definition of *ius commune* applied by the author:

> *"Ius commune is nothing else but the surviving Roman law, which is functioning as a common legal system of the Europe of the Middle Ages and the very beginning of the Modern Times, including the countries having particular legal systems. This legal system is followed by the civil codes and other acts of the nations from the middle of the 18th century to the 19th century."* [3]

[1] David, R. – Jauffret-Spinosi, C., *Les grands systémes de droit contemporains.* Paris, 2002.[11] In English: David, R. – Brierley, J. E. C., *Major Legal Systems in the World Today. An Introduction to the Comparative Study of Law*. New York, 1978.

[2] Wieacker, F., *Privatrechtsgeschichte der Neuzeit*. Göttingen, 1967[2].

[3] Cf. Hamza, *op. cit.* 45.

This chapter gives a very detailed analysis on the development of law in Europe in the Middle Ages. Nevertheless one finds very useful pieces of information on the legal development of bigger countries, such as France or the Holy Roman Empire, but one can gather really important data on the smaller countries in Europe, as well. For instance we can read some paragraphs on the law of Wales, which became the part of England in 1283. It may be interesting to pay attention to the fact that the English legal system was introduced in Wales no sooner than in 1536 and 1543, based on the *Acts of Union*.

The book contains outstanding information on the field of general history, too. We can make out that it was Ivan, the Third (1462–1505) in Russia who used the title '*tsar*' in international relations for the first time. The title '*tsar*' is in very tight connection with the well-known theory of the '*Third Rome*'. (We can also find very detailed bibliography on the theory of third Rome.)[4]

It is absolutely beyond any doubt that the most sophisticated part of the book is chapter 3, "*The Development and the Codification of European Private Law in Modern Times*". Incredible as it may seem this chapter includes every European country without any exception. The first point of the chapter introduces the development of the European jurisprudence at the beginning of the modern era by sketching the most important scientific tendencies.

The first part of chapter 3 deals with countries of German language in Europe. Gábor Hamza gives a very detailed picture on the codification of the German Civil Code, BGB, which was put into force on the 1st of January, 1900. This Civil Code had huge influence on the codification of other European and non-European countries. From the point of view of Roman Law this code has particular relevance. As this code had become effective in Germany the force of the previous law, the so-called *law of Pandects* — which is a subsequent version of classical and post-classical Roman law — ceased to exist.

Upon reading this chapter one gets familiar with the background of the German Civil Code, i.e. with the German science of private law, *Historische Rechtsschule, Begriffsjurisprudenz*, etc. One can also read important information on the most outstanding representatives of these trends.

As it is wide-known after the second World War Germany was separated into two parts, *Bundesrepublik Deutschland* (BRD) and *Deutsche Demokratische Republik* (DDR). DDR belonged to the socialist world, therefore its legal system had to be taken into accordance with the socialist theory and economic structure. As a consequence of this there were many modifications on the legal system after the changes. It is worth mentioning that DDR adopted its own Civil Code, called *Zivilgesetzbuch* in 1976. After the reunification of the two parts of Germany, BGB became effective on the territory of the former DDR, as well.

One has to take into account as well, that Professor Hamza's book pays also attention to the very important modifications of BGB, which were adopted at the very beginning of 2002.

The chapter 3 gives a very thorough description on the law of Switzerland, containing private law doctrine and the codification of private law, too. One can clearly see how ZGB and OR was composed with regard to the law of the cantons in Switzerland.

It is not only BGB, which had huge impact on the codification of smaller countries. Under no circumstances can we underestimate the influence of the French Civil Code, *Code civil*, adopted in 1804. This Code declares in Art. 1732 that damages, which are caused against law, should be compensated by the liable person:

"*Art. 1382 — Tout fait quelconque de l'homme, qui cause à autrui un*
dommage, oblige celui par la faute duquel il est arrivé, à le réparer."[5]

This principle is the very basic of the *delictual liability*.[6] This principle shows up in the majority of the modern civil codes, too.

Gábor Hamza analyses the composition of the French *Code civil*, as well. He clarifies that the codificators of *Code Civil* paid attention to the prior French written law (*droit écrit*) and customary law (*droit coutumier*), as well. As it is known, *Code civil* had four fathers ("*Pères du Code civil*"), two of them were experts of Roman law (Jean-Etienne Marie Portalis and Jacques de Maleville), while two of them were specialists of French customary law (Félix-Julien-Jean Bigot de Préameneu and François-Denis Tronchet).

French law is also in effect in the oversea-counties and oversea parts of France, as well: *départements d'outre-mer* (French-Guyana, Guadeloupe, Martinique and Réunion), *collectivité départementale* (Mayotte), *collectivité territoriale* (Saint Pierre, Miquelon) and *territoires d'outre-mer* (French Polinesia, New-Caledonia, Wallis and Futuna). One has to take into account that there are several differences of legal and administrative nature between these territories.

Professor Hamza gives a good introduction to the law of the so-called mini-states in Europe. Hence, we may get information on Monaco, as well. It is not widely known that at the present day Monaco does have its own civil code — called *Code civil* —, consisting of 2100 articles. It should be important to highlight that this code is not equivalent with the French *Code civil*. One can learn a lot about such mini-states, as the Channel Islands or the Isle of Man.

I think that the Central — European lawyers and researchers may find extremely interesting those parts of the book, which deal with the Central-Eastern European countries (Hungary, the Czech Republic, etc.), the former Yugoslavian territories (Slovenia, Croatia, etc.) and the Soviet-successor states (Estonia, Armenia, Ukraine, etc.). It is not overwhelming to declare that many important historical and economic changes have happened in these territories, which have immeasurable legal significance, as well.

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[4] Cf. Hamza, *op. cit.* 89. To the theory of the *third Rome*, see especially: Strémooukhof, D., Moscow the Third Rome. Sources of Doctrine. In: *Speculum*, vol. 28, 1953; and Goez, W., *Translatio imperii*. Tübingen, 1958.

[5] *Code civil* (red.: Lucas, A.), 1990, Paris, 1990, p. 629.

[6] The term of delictual liability is pretty much equivalent with the term tort liability applied by Common Law countries.

We should stress that Professor Hamza's book is the first to report about them in Hungarian language. Being the modifications in the legal system of these countries in close connection with the historical changes Professor Hamza provides a thorough historical and political introduction. These parts might have relevance for historians and political scientists, as well.

I am sure that without a good view to the historical changes one would not be able to understand those legal changes of high relevance, which were able to build the very basic of the market economies in these former socialist countries. Of course this transition has not been put into practice to the same extent in each country. It has many reasons of political, social, economic nature, as well. To sum it up having read this part of the book one may see the common legal roots of these countries and may find ideas how they will find their place in Europe of the future.

The fourth and last part of Professor Hamza's book deals with the influence of the European civilian tradition on countries outside Europe. This chapter makes known what kind of impact the European tradition of private law had on states, which are not located in Europe.

Hence, we find very relevant information on the legal development of North America, Central America and South America, South Africa and some countries of Asia.

The author gives a good summary of the role of European private law in legal development of Louisiana. Louisiana does have a very specific situation among the member-states of the USA, hence this state was bought by the USA from France in 1803. The first civil code of Louisiana, *Louisiana Civil Code* was adopted in 1808. This code, which was originally composed in French is based on the French *Code civil* of 1804, but it has also many connections to Roman law[7]. In the present days Louisiana does have its third civil code, which was adopted in 1870. The *travaux preparatoires* to modify this Code began in 1979. This Code still maintains the characteristics of the European civil law, but one may also realize the influence of the *Common Law*, as well. All things considered the legal system of Louisiana — being *mixed jurisdiction* — is unique among the member-states of the USA.

One has to take into consideration that the legal system of Canada is also very similar to the European, mainly the French law from many aspects.

It is not only the legislation where European civilian traditions had influence in North-America. There are very important connections between the American and the European jurisprudence, as well.

The author summarizes the legal development of the Central American and South-American states. It is very important to pay attention to the efforts to unify private law in the Central American and South American states. These trends for unification are rooted in the common legal traditions, which are undoubtedly based on Roman law.[8]

From this point of view the *conference of Arequipa* (Peru), which was held between 4–7, of August, 1999 with the participation of Argentina, Bolivia, Peru and Puerto Rico, has particular significance. On this conference the *Acta de Arequipa* was passed, which contains the basic principles for unification private law in Central America and South America.

From the aspect of the Romanists the part, dealing with South Africa is extremely interesting. As it is known, the so-called *Roman-Dutch Law* is still valid in the South-African Republic. The expression Roman-Dutch Law originates from Simon van Leeuwen who used it first in Latin then in Dutch. In Afrikaans language Roman-Dutch Law is *Romeins-Hollandse reg*. Nowadays, with regard to the influence of Common Law the legal system of the South-African Republic can be considered as a *mixed-jurisdiction*, as well.

Although we cannot find the legal history of every Asian country in this book, we may gather very interesting information on the legal development of several Asian states. For instance it is very fascinating to keep in mind that the German law, especially BGB had huge impact on the legal development of Japan and South-Korea. It is in connection with the very strong economic relationship between the countries mentioned. Gábor Hamza puts high emphasis on the scientific emphasis on Roscoe Pound who played very important role in the spread of Roman law traditions and comparative law in China.

One has to pay attention to the fact that Professor Hamza provides a very rich bibliography to his book. To be clear the bibliography can be divided into two parts. On the hand one can find bibliography by each country. On the other hand one can read a twenty-five-page long general bibliography at the end of the book, which may serve as a perfect guide for further researches. The list of abbreviations, the index and the table of contents in six languages (Hungarian, English, French, German, Spanish and Italian) makes the entire work easy and quick to use.

Professor Hamza's book can be regarded as a course-book and handbook, as well. I find it very important to highlight that the monograph assumes the basic knowledge of history and institutes of Roman law. Hence it is advisable to use it together with the textbook of Roman law by Professor András Földi and Professor Gábor Hamza, which was published in the fall of 2022 in its twenty-sixth revised and extended edition.[9]

I am convinced that Professor Hamza's monograph on the development of private law in Europe is outstanding in international measures, as well. This book is strongly recommended for law-students or for researchers. Not only does have the book an extremely rich database on the development of private law but it also does analyze the most important trends of the present and future in a very logical and clear system.

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[7] Herman, Sh., Der Einfluß des römischen Rechts auf die Rechtswissenschaft Louisianas vor dem amerikanischen Bürgerkrieg. In: *ZSS RA*, vol. 113, 1996, p. 293–345.; Palmer, V. V., Two Worlds in One: The Genesis of Louisiana's Mixed Legal System, 1803–1812. In: *Louisiana: Microcosm of a Mixed Jurisdiction* (ed.: Palmer, V. V.), 1999.

[8] Garro, A. M., Unification and Harmonisation of Private Law in Latin America. In: *AJCL*, vol. 40, 1992, p. 587-616.

[9] Földi, A. – Hamza, G., *History and Institutes of Roman Law*. Budapest, 2022[26].

Therefore this book might be also useful for practicing lawyers, as well who often meet problems of conflicts of law or international commercial law. The book is especially current in our days, when the composition of the *ius commune (privatum) Europaeum* is in progress. All in all one can offer this book to those who intend to have a general but very deep summary on the development of private law in Europe and countries outside Europe with special emphasis on the trends of the future.

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Vier neuere Bände aus Karlsruhe – Inzwischen sind 40 Bände der Schriftenreihe des Rechtshistorischen Museums (RHM) Karlsruhe erschienen

Roland Stimpel: Walter Stimpel (1917-2008) – Kampfpilot und Bundesrichter, 2020, 292 S., ISBN 978-3-922596-30-1 (Band 37)
Detlev Fischer: Rechtshistorische Rundgänge durch Freiburg, Perle des Breisgaus, 2020, 171 S., ISBN 978-3-922596-31-8 (Band 38)
Harald Reiter: Das Ministerium für Staatssicherheit der ehemaligen DDR als Herrschaftsinstrument der SED – Einblicke in ein Unrechtsregime 2021, 65 S., ISBN 978-3-922596-32-5 (Band 39)
Norbert Gross: Was blieb von Kaisers Recht in Elsass-Lothringen? 2022, 100 S., ISBN 978-3-922596-33-2 (Band 40)

Alle vier Bände aus der Schriftenreihe des Rechtshistorischen Museums (RHM) Karlsruhe sind erschienen im Verlag der Gesellschaft für Kulturhistorische Dokumentation e.V.

1. Die neueren Bände der RHM-Schriftenreihe (37-40)

In der unseren Lesern bekannten RHM-Schriftenreihe sind nun wieder vier weitere Bände erschienen, die wir zur Besprechung ausersehen haben. Damit dürfen wir die beiden Herausgeber zu insgesamt 40 Bänden beglückwünschen, die allesamt in keiner rechtshistorisch ernst zu nehmenden Bibliothek fehlen sollten. Herausgeber sind Bibliotheksdirektor am Bundesgerichtshof Marcus Obert sowie Richter am Bundesgerichtshof a.D. Detlev Fischer, seit 2005 Vorsitzender des Vereins Rechtshistorisches Museum e.V., Karlsruhe.

Zu den vier Bänden zählen die Rechtshistorischen Rundgänge durch Freiburg von Detlev Fischer (Heft 38), sodann von Harald Reiter, Das Ministerium für Staatssicherheit der ehemaligen DDR als Herrschaftsinstrument der SED (Heft 39), besonders interessant für die osteuropäischen JEHL-Leser und Forscher der juristischen Zeitgeschichte. Heft 37 charakterisiert den ehemaligen Bundesrichter Walter Stimpel. Der Band von Norbert Gross, Was blieb von Kaisers Recht in Elsass-Lothringen? (Heft 40), über das droit local wird natürlich besonders Rechtshistoriker wie Rechtsvergleicher interessieren.

2. 40 Bände der RHM-Schriftenreihe (1982 – 2022)

In den 40 Bänden stachen zahlreiche Monografien zu Sachthemen der Gerichtsbarkeit und zu regionalspezifischen Institutionen hervor: Schon Heft 1 begann mit „Hammurabi und sein Gesetzbuch" von Herbert Rittmann im Jahre 1982. Ohne alle Bände hier Revue passieren zu lassen, erwähnen wir die Studien von Wolfgang Kneip zur Staatsanwaltschaft Mannheim im 19. Jahrhundert (Heft 19, 2010) oder Ulrich Falks Fallstudien zur zivilrechtlichen Judikatur des Reichsgerichts um 1900 (Heft 22, 2011). Unvergessen Fritz Sturms Bände zu 200 Jahren Badisches Landrecht (Heft 23, 2011) und über Geist und Ausstrahlung des Preußischen Allgemeinen Landrechts (Heft 30, 2014). Oder die bedeutende Studie von Angela Borgstedt zur Badischen Anwaltschaft und sozioprofessionellem Milieu in Monarchie, Republik und totalitärer Diktatur in den Jahren 1864-1945 (Heft 25, 2012).

Eigene Erwähnung zollen wir an dieser Stellen den Juristenporträts der Schriftenreihe des Rechtshistorischen Museums. Denn sie weist fein ziselierte Porträts bekannter und weniger bekannter Juristenleben auf. So zeichnete Hildebert Kirchner die Vita Eduard von Simsons nach (Heft 3, 1985), Reiner Haehling von Lanzenauer den Dichterjuristen Scheffel (Heft 6, 1988) sowie den badischen Juristen Reichlin von Meldegg (Heft 35, 2019). Detlev Fischer bearbeitete bereits die Karlsruher Juristenportraits aus der Vorzeit der Residenz des Rechts (Heft 9, 2004).

Es seien noch genannt: „Theodor Mommsen – Gedanken zu Leben und Werk des großen deutschen Rechtshistorikers" von Fritz Sturm (Heft 11, 2006), „Julius Federer (1911-1984), Rechtshistoriker und Verfassungsrichter" von Alexander Hollerbach (Heft 13, 2007) sowie „Eduard Dietz (1866-1940), Vater der badischen Landesverfassung von 1919" von Detlev Fischer (Heft 16, 2008; 2. Aufl. 2012).

Heft 17 der Schriftenreihe des Rechtshistorischen Museums Karlsruhe war dem badischen Universaljuristen Josef Kohler gewidmet (Heft 17, 2009). Diese Widmung und auch diejenige an Ernst von Simson mit dem Beititel „im Dienste Deutschlands: von Versailles nach Rapallo (1918-1922)" in Heft 8 erschienen im Jahre 2013. Vorgenannte Beiträge wie die Hommage (Heft 33,

2016) an den Karlsruher Rechtsanwalt Reinhold Frank (1896-1945) entstammen allesamt der Feder von Norbert Gross, der den jüngsten Band 40 beigesteuert hat.

Und weitere Biographien sind in der Schriftenreihe publiziert worden: Christian Würtz zu Reichskanzler Constantin Fehrenbach (Heft 27, 2013), Alexander Hollerbach über „Anton Christ (1800-1880); Vormärz, Revolution und Nachmärz im Spiegel des Wirkens eines badischen Juristen" (Heft 26, 2013) sowie von Karl Zippelius zu „Arnold Horn (1844-1938), Karlsruher Rechtsanwalt und Privatgelehrter" (Heft 24, 2012). Heft 29 erinnert schließlich an Hildebert Kirchner (1920-2012), herausgegeben von Detlev Fischer im Jahre 2013.

Erwähnt werden soll des Weiteren die Hommage an Guido Kisch von Wilhelm Güde (Heft 18, 2010). Selbiger hat 2019 seinen Vater Max Güde und dessen Juristenleben porträtiert: Max Güde (1902 –1984), ein Juristenleben im 20. Jahrhundert (Heft 36).

3. Bundesrichter Walter Stimpel (Roland Stimpel)

In Band 37 von Roland Stimpel begegnet der aufhorchen lassende Buchtitel: „Walter Stimpel (1917-2008) – Kampfpilot und Bundesrichter" aus dem Jahre 2020.

Der erste Teil betrifft Walter Stimpels Laufbahn als Luftwaffenoffizier (Ritterkreuzträger und zuletzt Major i. G.); der zweite Teil schildert seinen Weg als einer der führenden Gesellschaftsrechtler und bis 1985 langjähriger Vorsitzender des II. Zivilsenates beim BGH. Viele wegweisende Grundsatzentscheidungen aus dieser Zeit tragen die prägende Handschrift Walter Stimpels. Deswegen ist die Biographie für die Rechtsgeschichte des 20. Jahrhunderts wie für das geltende Gesellschaftsrecht Erkenntnis erweiternd.

4. Rechtshistorische Rundgänge durch Freiburg (Detlev Fischer)

Wer durch die Perle des Breisgaus spaziert, sollte dies nur mit Heft 38 der RHM-Schriftenreihe in der Hand tun. Detlev Fischer bietet vier Rundgänge an, die folgendermaßen aussehen. Zum einen der Gang „Ulrich Zasius und das vorderösterreichische Freiburg". Dann stehen Karl von Rotteck im Mittelpunkt sowie mit ihm die Badische Justiz. Vertiefte Itinerarien sind dem Stadtviertel Neuburg und dem Alten Friedhof sowie dem Stadtviertel Wiehre geweiht. Wer die Rechtshistorischen Rundgänge Fischers durch Karlsruhe selbst erlebt oder mit dem Stadtführer wahrgenommen hat, weiß, dass er für Freiburg die gleiche Präzision und Leidenschaft erwarten kann. Anhand von 80 Stationen, überwiegend in der Freiburger Innenstadt gelegen, stellt der Autor rechtsgeschichtliche Sehenswürdigkeiten und Erinnerungsstätten kenntnisreich und Quellen gestützt vor. Die Rundgänge sind in jeweils ca. zwei Stunden gut zu bewältigen und können obendrein nach persönlichem Gusto verknüpft und abgeändert werden. Diemut Majer hat als Vorsitzende der Eufori-Stiftung die Drucklegung des Buches durch einen großzügigen Zuschuss gefördert. Der Band ist schließlich deshalb sehr wertvoll, weil er ein sorgfältig geführtes Personenverzeichnis nebst Bibliographie bietet.

5. DDR-Stasi-Ministerium und SED (Harald Reiter)

Für Harald Reiter, Jahrgang 1961, ist dies der erste Band, den er der RHM-Schriftenreihe geliefert hat. 2003 zum Richter am OLG München befördert fungiert er seit 2012 als Richter am BGH, III. Zivilsenat. Als Hintergrund für den vorliegenden Band sei vermerkt, dass Reiter 2017 zum stellvertretenden Mitglied der Unabhängigen Gremiums zur Kontrolle der so genannten Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes berufen wurde. Während seiner Abordnung nach Karlsruhe als wissenschaftlicher Mitarbeiter beim Generalbundesanwalt in der Zeit vom 1. Mai 1991 bis 31. Dezember 1994 war der Autor überwiegend in der Abteilung Staatsschutz-Strafsachen gegen die äußere Sicherheit der Bundesrepublik Deutschland tätig und bearbeitete Ermittlungsverfahren wegen Landesverrats und geheimdienstlicher Agententätigkeit, die zumeist die strafrechtliche Aufarbeitung der Tätigkeit des Ministeriums für Staatssicherheit (MfS) betrafen. So ist es ihm möglich, zahlreiche bedrückende wie beeindruckende Einzelheiten zu menschenverachtenden Aktivitäten des MfS zwecks Verhinderung und Aufdeckung von Fluchtvorhaben und der skrupellosen Bekämpfung so genannter „Feindorganisationen" im Westen zu veranschaulichen.

6. Droit local in Elsass-Lothringen (Norbert Gross)

Geboren 1941, Promotion an der Juristischen Fakultät der Universität Freiburg i.Br. zum Dr. iur.utr. und 1971 an der Université de Grenoble zum Docteur en Droit, war Norbert Gross von 1995 bis 2016 Rechtsanwalt am Bundesgerichtshof. Zahlreiche Publikationen, Vorträge und Ämter verbinden ihn mit dem französischen Nachbarn.

Die Studie schildert die Entstehung und Entwicklung des für das heutige Elsass und das Moselgebiet (*Alsace-Moselle*) identitätsstiftende *droit local* in seinen Ausformungen. Der zugegebenermaßen reißerische Titel „Was blieb von Kaisers Recht in Elsass-Lothringen?" könnte sicherlich auch lauten: „Das droit local in den drei französischen Ost-Départements", hätte aber bei weitem nicht die Aussagekraft, in dem explizit auf das Reichsrecht und seine Weiterführung eingegangen wird.

Denn die Rechtsgeschichte hat eindeutig Praxisbezug, erklärt sie doch für den Rechtspositivisten nicht allein Herkunft und Genese, sondern liefert Erkenntnisse zur aktuellen Rechtsfindung. Gross leitet sauber den Terminus „Elsass-Lothringen" her, grenzt die Gebiete entsprechend ab und geht vor allem mit dem Territorialbegriff Lothringen korrekt um. Das seit 1985 sachkundig geführte *Institut du droit local Alsacien*-Mosellan (IDL) und dessen Bibliotheks- wie Fortbildungs- und Veröffentlichungsreihen begleiten die Praxis des *droit local* zum Wohl der rechtskundigen Berufe als auch der Bevölkerung, welche sich auf diese Weise identitätswahrend zum übrigen Frankreich abhebt. Dass es im deutsch-französischen Sprachengeflecht auch zu Anpassungen des ursprünglichen Rechts gekommen ist, wird mit dem Begriff der traditionellen Rezeption nicht mehr gänzlich erfasst. Daher wäre es

ratsam gewesen, von Translation zu entsprechen, wofür sich Elsass-Lothringen vorzüglich als Forschungsgebiet ausweist. Dies haben wir dargetan im Aufsatz mit Plädoyer für die Translationsthese: Translation von Recht im mehrsprachigen Kontext am Beispiel von Elsass-Lothringen, Saarland und Luxemburg. In: Journal on European History of Law 4/2 (2013), S. 24-32.

Norbert Gross vermittelt das *droit local* an prominenten Beispielen (S. 33-50), so für die Handelsgerichte und Kammern für Handelssachen, das Grundbuch und für das Dreiecksverhältnis von Staat, Kirche und Recht. Die Studie gibt damit einen wichtigen Überblick für den deutschsprachigen Leser, der auf die im Fußnotenapparat genannten Spezialpublikationen sowie die drei abgedruckten Entscheidungen des französischen *Conseil Constitutionnel* zurückgreifen kann.

Thomas Gergen*

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Markus Hirte und Johannes Dillinger (Hg.)

$chatz und $chatzsuche in Recht und Geschichte = Kataloge des mittelalterlichen Kriminalmuseums in Rothenburg ob der Tauber

Sankt Ottilien, 2023, ISBN 978-3-8306-8177-9

„Wird eine Sache, die so lange verborgen gelegen hat, daß der Eigentümer nicht mehr zu ermitteln ist (Schatz), entdeckt und infolge der Entdeckung in Besitz genommen, so wird das Eigentum zur Hälfte von dem Entdecker, zur Hälfte von dem Eigentümer der Sache erworben, in welcher der Schatz verborgen war."

Seit dem 1. Januar 1900 ist § 984 BGB unverändert Teil des deutschen Sachenrechts, geht sogar auf das Grundmodell der Hadrianischen Teilung (2. Jh.) zurück. Das geltende Recht wird in diesem leicht zugänglichen und angenehm zu lesenden Katalog zur Ende April 2023 eröffneten Ausstellung im mittelalterlichen Kriminalmuseum in Rothenburg ob der Tauber verwoben mit den einschlägigen Vorschriften der Bundesländer zum Schutz der Kulturdenkmale beziehungsweise Denkmalschutzgesetze (S. 156-180). Zu § 984 BGB gibt es reichlich Judikatur bis in unsere Zeit, siehe Stichwort „Dinklager Friedhofsschatz", mit dem das OLG Oldenburg mehrfach befasst war und das in klassischen wie sozialen Medien vorkommt.

Der Traum fast aller Menschen, schon seit Kindheitstagen durch Märchen gefördert, einen Schatz zu finden, wird sicherlich durch juristische Vorgaben in Geschichte und Gegenwart ernüchtert. Die Ausstellung des Kriminalmuseums erzählt davon, wie alt dieser Traum ist und mit welchen Mitteln versucht wurde, das Glück des Findens sogar zu erzwingen. Seit dem Spätmittelalter kam dabei Magie ins Spiel, um den Schatz ausfindig zu machen und obendrein die Geister zu bannen, die ihn bewachen sollten. Schatzsuche, ja Schatzgräberei wurde in der frühen Neuzeit zum Massenphänomen. Erst danach, seit dem frühen 19. Jahrhundert, schälten sich Methoden für die wissenschaftliche Suche nach verborgenen Zeugen der Vergangenheit heraus.

Eine Vielzahl von Exponaten und Medien führt die Besucherschaft des Kriminalmuseums in die Geschichte der Schatzsuche vom Mittelalter über die Frühe Neuzeit bis hin zur Moderne. Dem geschäftsführenden Direktor des mittelalterlichen Kriminalmuseums in Rothenburg ob der Tauber, Dr. Markus Hirte (amtierend seit 2013), sowie Professor Dr. Johannes Dillinger (Professor für die Geschichte der Frühen Neuzeit in Oxford) ist es gelungen, hoch qualifizierte Beiträge folgender Wissenschaftler zu versammeln: Dr. Ralf Fischer zu Cramburg (Brüssel), Birgit Kata (Kempten/Allgäu), Dr. Heide Klinkhammer (Aachen), Dr. Cathleen Sarti (Oxford), Dr. Jonathan Scheschkewitz (Stuttgart), Dr. Michael Siefener (Hamburg) sowie Universitätsdozent Dr. Manfred Tschaikner (Bregenz). Der amtierende Bundesminister der Justiz, Dr. Marco Buschmann, MdB, beginnt sein Vorwort mit den Sätzen: „Wer einen Schatz sucht, der braucht Geduld, muss sich aufs Zeichendeuten verstehen, muss hartnäckig sein und darf sich von Rückschlägen nicht entmutigen lassen. Und er muss überzeugt sein, dass er am Ende finden werde, was er sucht." Der Wortlaut des Kinderspruches „Wer's findet, darf's behalten." fällt sicherlich jedem Besucher dabei ein. Die Schätze, die in Rothenburg ausgestellt sind, müssen sicherlich entdeckt werden, obwohl sie -selbstredend- leider nicht behalten werden dürfen. Der Katalog umfasst neben der Betrachtung des aktuellen Geschehens und des geltenden Rechts, der Rechtsgeschichte, Fallstudien über Schatzgräber, Heiler, Wahrsager und Teufelsbanner, Zauberbücher, gleichermaßen Schatzfunde in Archäologie und Geschichte bis hin zur Technik der Metallsonde und schließlich die Populärkultur der Gegenwart.

Grundlegende Forschung bietet der wirklich Atem beraubende Überblicksartikel der beiden Herausgeber Hirte und Dillinger, den sie „Rundgang" (S. 15-95) nennen.

Somit liegt Band 4 der „Kataloge des mittelalterlichen Kriminalmuseums vor“. Wir erinnern uns noch an Band 3, herausgegeben von Markus Hirte und Andreas Deutsch, über Tiere in der Rechtsgeschichte und den eindrucksvollen Reim: „Hund und Katz -Wolf und Spatz“, Sankt Ottilien 2020.

Über die angesprochenen und besprochenen Kataloge des Kriminalmuseums hinaus gibt es zwei weitere Reihen, die in einer gut sortierten rechtsgeschichtlichen Bibliothek nicht fehlen dürfen. Es sind dies die bisher auf 15 Bände angewachsene „Schriftenreihe des mittelalterlichen Kriminalmuseums“, beginnend mit Band 1 von 1997 und dem letzten Band von Peter Dinzelbacher über Sklaven und Hörige im Mittelalter (2022).

Die „Rothenburger Gespräche zur Strafrechtsgeschichte“ mit inzwischen 8 Bänden (2000 bis 2020) sind gleichfalls ein Schatz, den möglichst viele Besucher vor Ort im malerischen Rothenburg ob der Tauber heben können. Wem dies nicht gelingt oder wer nach dem Besuch der Ausstellung sein Wissen vertiefen möchte, dem sei der hier besprochene Katalog „$chatz und $chatzsuche in Recht und Geschichte“ mit Nachdruck empfohlen. Abschließend sei gesagt, dass die beiden „S“ im Buchtitel von den Herausgebern eigens mit dem Dollarzeichen „$“ geschrieben wurden.

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Tobias Schenk

Actum et judicium als analytisches Problem der Justizforschung. Interdisziplinäre Perspektiven auf kollegiale Entscheidungskulturen am Beispiel des kaiserlichen Reichshofrats

Wetzlar: Gesellschaft für Reichskammergerichtsforschung, 2022, 165 S., ISBN 3-935279-59-8

Die Erforschung des „Alten Reiches“ ist mit den inzwischen 38 Bänden der „baR“ = „Bibliothek altes Reich“ [1] hervorragend aufgestellt. Als ein innovatives, langfristig angelegtes Forum für Veröffentlichungen zur Geschichte des Alten Reichs möchte diese Reihe zur inhaltlichen und methodischen Neuausrichtung der Erforschung des Alten Reichs anregen, die Forschungsdiskussion bündeln und Fachwissen popularisieren. Dabei versteht sie sich als grundsätzlich institutionsunabhängiges Unternehmen. Verantwortliche Herausgeber sind Anette Baumann, Siegrid Westphal und Stefan Wendehorst.[2]

Vorliegende Studie bildet Heft 51 der „Schriftenreihe der Gesellschaft für Reichskammergerichtsforschung“, wird also in Wetzlar herausgegeben und hauptsächlich von Anette Baumann lektoriert. Heft 1 dieser Schriftenreihe startete 1985 mit Bernhard Diestelkamp und seiner grundlegenden Analyse zu: „Das Reichskammergericht im Rechtsleben des Heiligen Römischen Reiches Deutscher Nation“. Derselbe legte 2002 eine „Untersuchung zum gesellschaftlichen Leben am Hof des Kammerrichters“ vor, publiziert als Heft 29. Große Resonanz hatten ebenfalls „Die Arbeit des Reichskammergerichts in Wetzlar. Kontinuität und Diskontinuität im Vergleich zur Speyerer Zeit“ (1988, Heft 4) sowie Roman Herzogs „Reichskammergericht und Bundesverfassungsgericht“ (1988/9, Heft 5). Über Wetzlar schrieb Hans Werner Hahn: Reichskammergericht und Stadtentwicklung: Wetzlar 1689-1806 (1991, Heft 12). Erwähnenswert ist schließlich Heft 34, verantwortet von Michael Stolleis [3] unter der Überschrift: „Heiliges Römisches Reich deutscher Nation, Deutsches Reich, „Drittes Reich“ – Transformation und Destruktion einer politischen Idee“ (2007, Heft 34). Autorinnen wie Anja Amend-Traut (Hefte 36, 37 und 50) und Anette Baumann (Hefte 28, 41, 43 und 47) sind mehrfach vertreten, ebenfalls Stefan Andreas Stodolkowitz (Hefte 44, 46).[4]

Tobias Schenk, verantwortlicher Bearbeiter bei der Erschließung der Reichshofratsakten, seit 2009 Nachfolger von Eva Ortlieb, gesellt sich als Autor von Heft 51 hinzu. Er ist wissenschaftlicher Mitarbeiter der Niedersächsischen Akademie der Wissenschaften zu Göttingen am Erschließungsprojekt „Die Akten des Kaiserlichen Reichshofrats“, verortet am Österreichischen Staatsarchiv, Ab-

[1] https://www.degruyter.com/serial/bar-b/html#volumes [28.12.2022].

[2] Siehe etwa zur Rolle Speyers in Reichspolitik und als Sitz der obersten Gerichtsbarkeit: Anette Baumann/Joachim Kemper (Hg.), Speyer als Hauptstadt des Reiches. Politik und Justiz zwischen Reich und Territorium im 16. und 17. Jahrhundert, Berlin 2016 (Reihe „bibliothek altes Reich“, Band 20) oder Baumann, Visitationen am Reichskammergericht: Speyer als politischer und juristischer Aktionsraum des Reiches (1529-1588), Berlin 2018 (Reihe „bibliothek altes Reich“, Band 24).

[3] Zu ihm siehe die Würdigung von Robert von Lucius, In memoriam Prof. Dr. Michael Stolleis. In: *Journal on European History of Law (JEHL),* vol. 13, Nr. 2, 2022, S. 106-108.

[4] Zu den Einzeltiteln siehe unter https://www.wetzlar.de/microsite/Staedtische_Museen/museen/unsere-museen/reichskammergerichtsmuseum/forschungsstelle-fuer-reichskammergerichtsforschung.php [27.12.2022].

teilung Haus-, Hof- und Staatsarchiv, in Wien [5] und plädiert für eine zukunftsorientierte Methoden- und Theoriediskussion in der Reichsgerichtsforschung (S. 128). Die Hinführung zum Thema gelingt ihm anschaulich, quellendokumentiert und in fesselndem Sprachduktus. In einem ersten Schritt widmet er sich dem richterlichen Entscheiden als Dreh- und Angelpunkt der Justizforschung, ehe er grundlegend nach dem „Quo vadis Reichsgerichtsforschung?" Ausschau hält (S. 7-27). Sodann folgen zwei Großkapitel, die sich dem „Worüber" (S. 27-79) und dem „Wie" des Entscheidens (S. 79-116) zuwenden.

Werfen wir, ohne die Lektüre des empfehlenswerten Buches ersetzen oder vorwegnehmen zu wollen, einfach einige Grabungsstätten auf, nämlich die richterliche Sachverhaltskonstruktion und die kritische Anwendung der frühneuzeitlichen Prozessmaxime, etwa der Mündlichkeitsgrundsatz, zu dem folgende Unterpunkte zählen: die Abschaffung der Audienz am Reichshofrat als Akt organisierter Heuchelei, das Reisen an den Gerichtsort auf der Suche nach rechtlichem Gehör, die informelle Mündlichkeit in der *Sollicitatur* sowie -ebenfalls hochspannend- der Gabentausch in der Privatwohnung des Berichterstatters (S. 50-72).

Dabei hallt die hinlänglich bekannte Kritik an Reichskammergericht wie Reichshofrat nach. Johann Stephan Pütter, Professor in Göttingen, geißelte seinerzeit den schleppenden Verfahrensgang und die geringe Arbeitsmoral zahlreicher Gerichtsassessoren. Der lange Titel seiner Schrift verrät schon die These, gedruckt zu Frankfurt a.M. 1756: *Patriotische Abbildung des heutigen Zustandes beyder höchsten Reichsgerichte, worin der Verfall des Reichs-Justizwesens samt dem daraus bevorstehenden Unheile des ganzen Reichs und die Mittel, wie demselben noch vorzubeugen, der Wahrheit gemäß und aus Liebe zum Vaterlande erörtert werden*. Im Revolutionsjahr 1789 ruft ein anonymer PHILANTROP in Wien aus: „Die gefällten Urtheile, obwohl sie dem Buchstaben nach von ganzen Versammlungen abgefasset zu seyn scheinen, sind in der That doch nur Machtsprüche einzelner Personen, indem die Wahrheit der erstatteten Relationen [T.G.: Berichterstattungen eines Richters mit Urteilsvorschlag für das gesamte Gericht] von Niemand untersuchet wird." [6] Bei Gericht weit verbreitet war die Bestechung (*barattaria*). Wer Bargeld verweigerte, galt bei Zeitgenossen als außergewöhnlicher Vertreter seiner Zunft. Anders gesagt: Probleme bekamen bei Hof nicht die bestechlichen, sondern die sich in der Minderheit befindlichen unbestechlichen Räte am Reichshofrat, so die eigens veröffentlichte Studie zur Richterbestechung von Johann Philipp Lyncker, *Tractatio de barattaria* (Jena 1684) oder von Johann Gerhard Hirschfeld „De barattaria" resp. „Von Bestechung der Richter" [7].

Wenn Schenk schlussfolgert, dass frühneuzeitliche Justiz ebenso wenig wirklich schriftlich prozessierte, wie die heutige „wirklich" mündlich prozediert, ist ihm recht zu geben, denn der gemeine Prozess der frühen Neuzeit war nicht wirklich schriftlich. In der Kollegial-Gerichtsbarkeit verhinderte bereits mangelnde Aktenkenntnis eine direkte Wahrnehmung des Sachverhalts durch den Spruchkörper. Dies wog umso schwerer, als die Relationstechnik nicht fähig war, das informationelle Ungleichgewicht zwischen Referent und Kollegium auszugleichen, dergestalt dass weder das Reichskammergericht noch der Reichshofrat nach Aktenlage entscheiden konnten, sondern lediglich schriftlich-mittelbar auf Grundlage der einzelnen Referentenvoten.

Die komplexe Gemengelage bestätigt einmal mehr den soziologischen Befund, wonach sich Formalität und Informalität wechselseitig bedingen, so dass es keineswegs darum gehen kann, einer Praxis jenseits der Norm auf die Spur kommen zu wollen. Konnte die „Referierkunst" die mangelnde Aktenkenntnis des Spruchkörpers nicht neutralisieren, mussten die Berichterstatter gleichwohl berücksichtigen, dass sie im Rahmen eines dem Anspruch nach schriftlichen Verfahrens agierten. Auf die Akte musste der Referent Bezug nehmen, auch wenn er und erst recht die anderen Entscheider diese nur oberflächlich kannten. Eventuell eingeflossener mündlicher Tatsachenvortrag musste obendrein verschwiegen werden.

Für die Menschen der frühen Neuzeit war es demnach vollkommen klar, dass die Kollegialentscheidungen auf Grundlage formell-mittelbarer Schriftlichkeit und informell-mittelbarer Mündlichkeit zustande kamen. Beide Ebenen zu bespielen, bildete nicht nur die Grundlage erfolgversprechender Prozessführung, sondern obendrein einen elementaren Bestandteil der alltäglichen Praxis des Gerichtspersonals. Sicherlich ist auch die Schlussfolgerung richtig, wonach Reichshofräte und Reichskammergerichts-Assessoren für mündliche Unterredungen mit Parteien und deren Advokaten kaum weniger Zeit aufwandten als für die Aktenarbeit und die Beratungen im Spruchkörper, weil ohne informelle Mündlichkeit kaum etwas lief (S. 72-78).

Im dritten Kapitel zur Grundfrage „Wie entschieden wurde", genauer: zum Beratungs- und Abstimmungsprozess höfischer Justizkollegien, sind insbesondere die Ausführungen zu den *Vota ad Imperatorem* von Belang, die Tobias Schenk als „ein Werkzeug zur Errichtung von Konsensfassaden" charakterisiert. Das typische *Votum ad Imperatorem* umschreibt er als der Formalisierung einer informell ausgehandelten Entscheidung dienend. Gleichzeitig sollte es die reichshofrätliche Spruchtätigkeit und die kaiserliche bzw. kurmainzische Reichspolitik synchronisieren. Der scheinbare Widerspruch war keiner, löste sich in praktischer Logik und Rationalität auf, die die Reichshofratsordnung in dieser Form gar nicht vorsah (S. 116).

Um den bisherigen Standort der Reichsgerichtsforschung sowie ihrer Perspektiven zur Erneuerung zu verstehen, muss der Leser sich dem vierten Kapitel zuwenden (S. 116-127). Interdisziplinär und epochenübergreifend sollte die Justizforschung auch künftighin angelegt sein. Dabei müssen der Medienwechsel und die Digital Humanities einbezogen werden, ohne Verlust der Bedeutungszumessung der gründlichen Archivarbeit. Schenk plädiert auf strategischer Ebene dafür, dass Drittmittel-finanzierte Archivarbeit und übergeordnetes Forschungsdesign nicht isoliert voneinander zu betrachten sind.

Wenn Schenk schreibt, dass es völlig verfehlt sei, die Funktion der Prozessakte allein auf das Verfahren zu verorten, ist ihm beizupflichten, damit auch die informellen Handlungen über die Akten hinaus angesehen und ausgewertet werden. Historiker und

[5] Minoritenplatz 1, A-1010 Wien, Homepage: www.reichshofratsakten.de [27.12.2022].

[6] Gedanken über die Justizverwaltung. Fürsten und Ministern gewidmet, Wien 1789, S. 8.

[7] Unter dem Präses (Erstbetreuer Heinrich von Bode, Universität Halle), verteidigt Halle 1688, erneut gedruckt aber mit Vermerk der *recusa* / Ablehnung in den Jahren 1702, 1708 (Halle) und 1743 (Wittenberg).

Rechtswissenschaftler sind bei dieser Aufgabe nach wie vor als Hauptvertreter gefordert. An dieser Stelle ist einzuflechten, dass das Privilegienwesen[8] in vorliegender Abhandlung offenbar keine Rolle spielt bzw. künftig nicht spielen soll. Meines Erachtens muss in der künftigen Perspektive der Fokus hierauf weiterhin gelegt, ja sogar verstärkt werden, da Privilegien kaiserliche Reservatrechte waren und bei ihrer Untersuchung, primär wie sekundär, Verfahrenswissen wie materielle Erkenntnisse für das Verfahren wie auch außerhalb des Verfahrens gewonnen werden können. Siehe dazu die Privilegien betreffend das Erb- und Familienrecht oder die Vorformen von geistigem Eigentum (*privilegia impressoria et medica*).[9] Mit Matthias Kordes können wir für Reichshofrat wie Reichskammergericht vor allem für den Bereich des Nachdruckens (Fälle beim Reichshofrat wegen der vom Kaiser angezogenen Souveränität, aus der die Privilegienerteilung resultierte) ein „aufwändiges, reputationssteigerndes Interaktionsmuster begüterter Schichten" konstatieren, über die wir sicherlich noch mehr erfahren sollten.[10]

Die erzielten Ergebnisse müssen in die Terminologie der skizzierten archivwissenschaftlichen Bewertungsdiskussion überführt werden. Neben dem Primärwert ist der Sekundärwert für die heutige Forschung zu beachten. Auch eine im Prozessdossier abgebildete handgezeichnete Karte behält ihren Quellenwert unabhängig davon, ob sie durch Berichterstatter und Kollegium zur Kenntnis genommen wurde oder nicht. Der sekundäre Informationswert ist bei Prozessakten oft sehr hoch. Mit Blick auf den Reichshofrat rücken die Exhibiten-, Referenten- und Resolutions-Protokolle gleichfalls in den Mittelpunkt. Um die Ablauforganisation besser verstehen zu können, empfiehlt sich die Sichtung der Geschäftsverteilungspläne. Juristische Arbeiten zu den aufgezählten Themen wären aus geschichtswissenschaftlicher Perspektive von höchstem Interesse, da die Referenten als Schlüsselfiguren der Interaktionssysteme zu betrachten sind. Selbstverständlich könnte die Reichsgerichtsforschung durch Digitalisierungsprojekte ihre Sichtbarkeit noch erheblich verbessern und national wie international ganz neue Verbindungen eingehen. Darüber hinaus bestünde die Möglichkeit, Vertreterinnen und Vertreter anderer Disziplinen anzusprechen, für die in Ermangelung hinreichender paläographischer Kenntnisse Archivarbeit für gewöhnlich nicht in Betracht kommen kann, so etwa Organisationssoziologen.

All diese Forschungsdesiderate bedürfen richtigerweise einer interdisziplinären Wissenschaft, einer politisch-administrativen Lobby und selbstverständlich eines fairen Wettbewerbs um Fördermittel zwecks ausreichender und ausgewogener Finanzierung künftiger Projekte.

Thomas Gergen*

[8] Elmar Wadle, Privilegia impressoria vor dem Reichshofrat. Eine Skizze. In: Leopold Auer / Werner Ogris / Eva Ortlieb (Hg.), *Höchstgerichte in Europa. Bausteine frühneuzeitlicher Rechtsordnungen*. Köln/Weimar/Wien 2007, S. 203-213.

[9] Thomas Gergen (Hg.), Vom Reichshofrat zur Reichsfilmkammer. Privilegienpraxis und Urheberrecht an Büchern und Filmen (16. - 20. Jahrhundert), Berlin 2019 (Schriften zur Rechtsgeschichte 186). Siehe zum DFG-Projekt der Privilegia impressoria vor dem Reichshofrat von Elmar Wadle / Thomas Gergen: https://gepris.dfg.de/gepris/projekt/20969012 [28.12.2022].

[10] Matthias Kordes, Eine Akte ist noch keine Quelle. Eine Standortbestimmung der Kölner Reichskammergerichtsforschung. In: *Geschichte in Köln (GiK)*, vol. 53, 2006, S. 75-98, insbes. S. 97-98.

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Joachim Conrad (Hg.)

Die evangelische Martinskirche in Köllerbach und ihre Gemeinde. Festschrift zur 800-Jahr-Feier der ersten urkundlichen Erwähnung

Saarbrücken: Geistkirch Verlag, 2022 (im Auftrag der Stiftung Evangelische Martinskirche zu Kölln in Zusammenarbeit mit Maurice Jelinski, Rainer Knauf und Eberhard Krauss) [1]

„Von daher rührt, dass ich, Graf Simon in Saarbrücken, aufgrund von Erwägungen von Männern im geistlichen Stand und auf Rat meines Onkels, des Grafen Heinrich von Zweibrücken, wie auch anderer Adliger für mein Seelenheil wie auch das meiner Vorgänger und Nachfolger das Patronatsrecht der Kirche St. Martin im Köllertal zusammen mit dem dritten Teil des Zehnten geschenkt habe als dauernden Besitz an das verarmte Gotteshaus St. Maria in Wadgassen." So lautet die von Stefan Flesch angefertigte Übersetzung eines Abschnitts der Urkunde des Grafen Simon von Saarbrücken aus dem Jahr 1223, die das Landeshauptarchiv Koblenz verwahrt (im Buch Lateinisch-Deutsch abgedruckt auf S. 19).

Der Erzbischof von Trier Theoderich inkorporierte in einer weiteren rechtsverbindlichen Urkunde die Martinskirche den Wadgasser Prämonstratensern, damit das Kloster die vollen

[1] Siehe bereits beim Historischen Verein für die Saargegend: https://www.hvsaargegend.org/buchrezensionen [09. 12. 2022].

Nutzungsrechte an der Pfarrei erwerben sollte. Die beiden Urkunden aus dem Jahre 1223 bilden die erste Erwähnung der evangelischen Martinskirche in Köllerbach, die mithin Urkunden gestützt im Jahre 2023 die 800. Wiederkehr ihrer ersten urkundlichen Erwähnungen feiern kann, obschon neueste Forschungsergebnisse den ersten merowingischen Kirchbau auf das späte 7. Jahrhundert datieren, welcher wiederum Ende des 9. Jahrhunderts von einem karolingischen Bau abgelöst wurde.

800 Jahre Martinskirche in Köllerbach – (fast) 800 Seiten Festschrift. Darauf wies ihr Herausgeber Pfarrer Joachim Conrad, Professor am Fachbereich Evangelische Theologie an der Universität des Saarlandes und Erster Vorsitzender des Historischen Vereins für die Saargegend, bei seiner Vorstellung des neuen Werkes am 18. November 2022 zurecht hin. Die Festschrift kommt einer weit gespannten Zielgruppe zugute: Text- aber auch bilderreich beruht sie auf dem Fleiß und der Akribie vieler Einzelstudien des Herausgebers wie auch der einzelnen Fachautoren. Sie erntet somit zum Jubeljahr die Früchte fundierter Forschung und Recherche, zum einen was die gesamte 800jährige Geschichte anbelangt, zum anderen, wegen der Bezüge zu einer von den Menschen getragenen Pfarrei. Das Gemeindeleben belegen Namen, Zahlen, Fakten sowie Anmerkungen zu den Zukunftsentwicklungen und Aussichten (S. 727-783). Das sehr ausgewogene Buch belässt die Darstellung eben nicht allein bei der Baugeschichte, sondern dokumentiert, dass diese Kirche bis heute mit Leben erfüllt ist, ob es die Kirchenmusik (inklusive der Glocken) ist, der Einsatz der Gruppen und Kreise im 19. und 20. Jahrhundert oder die Rolle der Martinskirche als Ort der Kunst und Kultur im Regionalverband Saarbrücken: Die Kirche dient der Verkündigung und ist Heimat von Menschen weit über die Grenzen von Köllerbach und der Stadt Püttlingen hinaus. 800 Jahre werden im Übrigen durch zahlreiche Vorträge und Konzerte im Jubeljahr bis zum Reformationstag 2023 würdig gefeiert.

Zurück zum Anfang: Nachdem Stefan Flesch die beiden Urkunden von 1223 in ihrem historischen Hintergrund untersucht hat, widmet sich Joachim Conrad der weiteren Geschichte anhand von Quellen und Katasterkarten. Des Weiteren schildert er die Ausdifferenzierung des Pfarrsystems im oberen Köllertal, bevor Georg Skalecki die frühmittelalterlichen Vorgängerbauten einordnet und Günter Himber die Ausgrabungen von 1929-1962 für die Baugeschichte interpretiert. Niko Leiß ergänzt neue Befunde zur Baugeschichte, Klaus Köehler widmet sich der Sanierung in den Jahren 2001-2009 bis hin zum Klimamonitoring und den Maßnahmen zur Klimaverbesserung, die uns Siegfried Wienecke erklärt.

Kultur- und Kirchenhistorisch interessant sind die Beiträge von Rainer Knauf zum Kirchhof und seinen Grabmalen sowie von Jan Selmer zum Martinskult „im Saargebiet" (*sic*, S. 225)[2]. Besser hätte es „in der Saargegend" oder „an der Saar" geheißen, da der Begriff Saargebiet die Sprache des Versailler Vertrages ist: Saar(becken)gebiet[3]. Für die Untersuchung des Martinskultes, der weit davor im Zeitraster lag, tut dies jedoch nichts zur Sache. Der Leser spürt, dass Heilige wie Martin seit Jahrhunderten und bis heute beide Konfessionen begeistern und sogar „auf die Straße gehen lassen", wie wir alljährlich um den 11. November feststellen dürfen.

Ein anschaulich gestaltetes Kapitel folgt zum Deckengemälde, wobei hier die theologischen Überlegungen zu den Wandmalereien von Joachim Conrad hervorzuheben sind. Theologen aber auch Rechtshistoriker (Abteilung: *signa iuris*) zieht selbstverständlich die Untersuchung des Martinszyklus und das Jüngste Gericht an (S. 249 – 261). Lobenswert aus Forschersicht ist, dass auch neue Deutungen zum sogenannten Stifterbild (Beitrag von Bernd Hartmann) abgedruckt sind.

Die weiteren Gebäude der Kirchengemeinde werden im vierten Kapitel beschrieben. Dazu gehören das alte und neue evangelische Pfarrhaus in Köllerbach, die evangelische Kirche und der evangelische Kindergarten in Walpershofen und das dortige Gemeindehaus sowie das inzwischen aufgegebene evangelische Gemeindezentrum in Püttlingen. Angeschlossen sind die Kapitel zum Leben der evangelischen Gemeinde (Gottesdienst. Kirchenschatz und -gerät, Kirchenmusik, kirchliche Vereine und Gruppen, Ökumene, Theologie, Bildung und Verwaltung nebst Kirche und Kunst) sowie besondere „Lebensäußerungen", wozu interessanterweise drei Unterkapitel zählen, nämlich das niedere Schulwesen im 18. und 19. Jahrhundert im Köllertal; Friedrich Locher und das Netzwerk „erweckter lutherischer Dissidenten" an der Saar zwischen 1839 und 1859 sowie die Bestattungssitten im Köllertal im 19. und 20. Jahrhundert: „Als die letzte Reise noch eine Kutschenfahrt war." Die Pfarrer an Sankt Martin zu Kölln/Saar werden schließlich quellengestützt biographiert, wobei zwei in ihrem Leben und Werk hervorgehoben werden: zum einen Karl Ludwig Rug (1901-1985) und Joachim Conrad (geboren 1961).

Auf die Wichtigkeit der geleisteten Einzelstudien wurde bereits hingewiesen; sie sind auch in chronologischer Reihenfolge aufgelistet (S. 737 bis 745). Beachtlich die verstetigten Reihen: Quellen zur Geschichte des Köllertals. Kommentierte Abschriften aus dem Pfarrarchiv Kölln (9 Bände) sowie die Veröffentlichungen des Presbyteriums der Kirchengemeinde Kölln (erste und neue Reihe, 11 Bände, siehe dazu S. 744-745). Wertvoll gleichermaßen für die Forschung ist die Zeittafel (S. 727-735). Die Martinskirche ist berühmt geworden durch das größte spätgotische Deckengemälde des Saarlandes, das in angemessener Breite beleuchtet wird. Sie besitzt überdies eine der ältesten Steinkanzeln in der Region aus der Renaissance. Schließlich verfügt sie mit den Fenstern des Meistermann-Schülers Pater Bonifatius Köck von den Tholeyer Benediktinern (später laisiert Robert Köck) ebenfalls über

[2] Gergen, Sichtbarkeit und Überwindung von Grenzen bei der Geschichtsschreibung: Der Kultur- und Rechtsraum von SaarLorLux (Saarland, Lothringen, Luxemburg). In: *100 Jahre Universität Posen/Poznan, Festschrift (Hg.), Visual aspects of academic traditions and law teaching/Visuelle Aspekte akademischer Traditionen und Rechtslehre*, 2022, S. 331-350 sowie bereits Ders., Historiographie ‚sans frontières': Saarland - Grenzregion in Europa. In: *Zeitschrift für die Geschichte der Saargegend*, vol. 68, 2020, S. 173-188.

[3] Gergen, Recht im Saargebiet. In: *Die 20er Jahre. Leben zwischen Tradition und Moderne im internationalen Saargebiet (1920-1935), Begleitband zur Ausstellung im Historischen Museum Saar*, S. 26-33 sowie Ders., Die Zwischenkriegszeit in der saarländischen Rechtsgeschichte - mit Beispielen aus Arbeits- und Sozialrecht im Saarjahrhundert (1920-2020). In: *Saar(jahr)hundert, hg. Arbeitskammer des Saarlandes*, 2020, S. 30-67.

ein Kunstwerk aus der zweiten Hälfte des 20. Jahrhunderts. Diese Fenster sind, im Gegensatz zu den von Pater Bonifatius Köck geschaffenen in der Sankt Mauritius Kirche der Abtei Tholey, in Köllerbach Gottlob noch erhalten (S. 92-94).

Auch die Zusammenhänge zum ehemaligen Prämonstratenserkloster Wadgassen werden dem Leser deutlich aufgetan: Graf Simon III. von Saarbrücken hatte dem Abt Rainerus von Wadgassen das Pfarrer-Einsetzungsrecht der Martinskirche übertragen (die so genannte Kollatur). Daher passt hervorragend, wenn Daniel Peter Janáček als der heutige Abt des Prämonstratenserklosters von Strahov, bei Prag gelegen, in seinem Geleitwort auf diese Zusammenhänge hinweist (S. 12). Nach der Französischen Revolution flohen nämlich Wadgasser Prämonstratenser nach Strahov. Am 6. Mai 1798 zelebrierte der damalige Abt aus Wadgassen der inzwischen in Strahov lebte, ein Pontifikalamt anlässlich des Jubiläums der Übertragung der Gebeine des Heiligen Norbert nach Prag.

Auf diese Weise umschließen Vergangenheit und Gegenwart das Erbe der evangelischen Martinskirche, die nicht allein an der Saar, sondern in ganz Europa Bezüge und Verbindungen aufweisen kann; dies zementiert die vorliegende Festschrift meisterhaft, weswegen ihre Lektüre mit Nachdruck empfohlen wird.

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Eric Hilgendorf / Hans Kudlich / Brian Valerius (Hg.)

Handbuch des Strafrechts, Sektion I (Grundlagen und Allgemeiner Teil des Strafrechts)

Band 1: Grundlagen des Strafrechts, Heidelberg: C.F. Müller Verlag, 2019, XLII, 1.245 S., ISBN 978-3-8114-9001-7
Band 2: Strafrecht Allgemeiner Teil I, Heidelberg: C.F. Müller Verlag, 2020, XLV, 1.042 S., ISBN 978-3-8114-9002-4
Band 3: Strafrecht Allgemeiner Teil II, Heidelberg: C.F. Müller Verlag, 2021, XLVIII, 1.354 S., ISBN 978-3-8114-9003-1

„Quidquid agis, diligenter agas" umschreibt wohl am treffendsten das Leitmotiv der Herausgeber und Beitragenden des – die Abbildung des deutschen Straf- und Strafverfahrensrechts in seiner Gesamtheit avisierenden – „Handbuch des Strafrechts". Mit seiner Anlegung auf neun Bände avanciert es bereits vom Umfang her als opus magnum in seinem Fachgebiet. Es besticht durch eine klare und stimmige Aufgliederung in drei Sektionen à drei Bände. In der hier zu besprechenden ersten Sektion sind die Grundlagen sowie der Allgemeine Teil des Strafrechts angesiedelt. In Sektion zwei wird man des Besonderen Teils mit ausgesuchten Teildisziplinen des Strafrechts habhaft und in der dritten Sektion des Strafverfahrensrechts.

Als Handbuch ressortiert es bei einem Publikationstypus zwischen Lehrbuch und juristischem Kommentar. Hinsichtlich ersterem kontrastiert es durch seine Informationsdichte und Anzahl der Mitwirkenden, insgesamt über 100 Autorinnen und Autoren, gut ein Viertel der inländischen Strafrechtslehrerschaft. Vom tradierten juristischen Kommentar unterscheidet es sich insoweit, als das Strafrecht und das Strafverfahrensrecht nicht über die Kommentierung der einzelnen Vorschriften erschlossen werden, sondern in Form themenspezifischer Abhandlungen. Fürderhin stellt das „Handbuch des Strafrechts" die Dogmatik in den Mittelpunkt und flankiert diese durch besondere Berücksichtigung der Grundlagen sowie deren Fortentwicklung. Ein weiteres Augenmerk des zu besprechenden „Handbuchs des Strafrechts" liegt auf Interdisziplinarität und Einbeziehung europäischer und internationaler Tendenzen. Diese Charakteristika lassen das Handbuch des Strafrechts nicht nur für die juristische Leserschaft reizvoll erscheinen. Vielmehr könnten die Themenspezifität, Interdisziplinarität und Inklusion europäischer und internationaler Tendenzen auch für die (Straf-)Rechtsgeschichte von großem Interesse und Mehrwert sein. Die folgende Rezension widmet sich deshalb dem „Handbuch des Strafrechts" insoweit bewusst von einer strafrechtshistorischen Warte.

I. Band 1: Grundlagen des Strafrechts

Band 1 erörtert die Grundlagen des Strafrechts aus rechtsphilosophischer, rechtssoziologischer und geistesgeschichtlicher Sicht unter Einbeziehung des Verfassungsrechts, der juristischen Methodenlehre, neuer dogmatischer Herausforderungen sowie der Kriminologie. Er führt im 1. Abschnitt ein in das Strafrecht im Gefüge der Gesamtrechtsordnung, konkret das Strafrecht im Kontext der Normenordnungen (§ 1 Eric Hilgendorf), in die verfassungsrechtlichen Vorgaben für das Strafrecht (§ 2 Stefanie Schmahl), in die Auslegung von Strafgesetzen (§ 3 Hans Kudlich) und die Anknüpfung des Strafrechts an außerstrafrechtliche Normen (§ 4 Frank Peter Schuster). Der 2. Abschnitt zur Strafrechtsgeschichte gliedert sich in die Geschichte des europäischen Strafrechts bis zum Reformationszeitalter (§ 5 Georg Steinberg), die geistesgeschichtlichen Grundlagen des heutigen Strafrechts in der Aufklärung (§ 6 Eric Hilgendorf) sowie die deutsche Strafrechtsgeschichte seit dem Bayerischen Strafgesetzbuch von 1813 bis 1871 (§ 7 Arnd Koch). Der 3. Abschnitt zu den geistigen Grundlagen und Strömungen des deutschen Strafrechts widmet sich der Entstehung und Entwicklung des Strafgesetzbuches von 1871 (§ 8 Arnd Koch), den Entwicklungsphasen des Strafgesetzbuchs (§ 9 Thomas Vormbaum), dem Strafrecht der Deutschen Demokratischen Republik (§ 10 Moritz Vormbaum), Aufbau und Struktur des Strafgesetzbuchs (§ 11 Thomas Weigend), den Straftheorien (§ 12 Tatjana Hörnle), der Internationalisierung des Strafrechts (§ 13 Robert Esser) sowie internationalen Kriminalitätsphänomenen und nationaler Verfolgungspraxis (§ 14 Robert Esser). Der

folgende 4. Abschnitt zur Strafrechtsaussetzung, -anwendung und -forschung nimmt sich den Grundlagen der Strafjustiz an (§ 15 Bertram Schmitt), der Strafverteidigung (§ 16 Hans Kudlich/Christoph Knauer), der Strafrechtspolitik und Rechtsgutslehre (§ 17 Eric Hilgendorf), der deutschen Strafrechtswissenschaft der Gegenwart (§ 18 Eric Hilgendorf), den Grundlagen der Kriminologie (§ 19 Johannes Kaspar), Kriminologischen Forschungsfeldern (§ 20 Johannes Kaspar), der Kriminalstatistik – die amtlichen Tabellenwerke (§ 21 Wolfgang Heinz), Kriminalität und Kriminalitätskontrolle (§ 22 Wolfgang Heinz) und dem Strafrechtsvergleich (§ 23 Thomas Weigend). Der erste Band schließt dann im 5. Abschnitt mit neueren Entwicklungen des Strafrechts, nämlich mit der Flexibilisierung des Strafrechts (§ 24 Michael Kubiciel), Strafrecht und Interkulturalität (§ 25 Brian Valerius) und Criminal Compliance (§ 26 Thomas Rotsch).

Dass der Strafrechtshistoriker von allen drei Bänden der ersten Sektion im ersten Band, dem Eröffnungs- und Grundlagenband, am fündigsten wird, dürfte nicht weiter wundernehmen. Den insoweit ertragreichsten Beiträgen widmen sich die folgenden Passagen:

Georg Steinbergs Beitrag zur Geschichte des europäischen Strafrechts von der Antike bis zum Reformationszeitalter (§ 5) gelingt nichts weniger als die „Quadratur des Kreises", nämlich eine gelungene Komprimierung ganzer Bibliotheken auf 32 Seiten. Erfreulich mit Blick auf die Rolle des Christentums als Wegbereiter des modernen Strafrechts sind die kirchenrechtsgeschichtlichen Darstellungen, wenngleich textumfangbedingt spezifischere Details wie die Delegitimation der Gottesurteile vor 1215 (Rn. 17),[1] die Frage, inwiefern Ordale angesichts ihres oft interpretationswürdigen Ausgangs (etwa des Heilungsverlaufs einer Brandwunde) – cum grano salis – bereits als erster Einbruch der „freien richterlichen Beweiswürdigung" ins Formalbeweisverfahren des Mittelalters zu würdigen sind, die Rolle des Eigenkirchenwesen auf dem Weg zum Investiturstreit (Rn. 20), die große Wahrscheinlichkeit einer Urheberschaft „mehrerer Gratiane" bei der Abfassung des Decretum,[2] und Innozenz' III. eher evolutionäres denn revolutionäres kirchenstrafrechtsgeschichtliches Wirken (Rn. 23)[3] nicht angesprochen werden konnten.

Dass die folgende Darstellung der geistesgeschichtlichen Grundlagen des heutigen Strafrechts in der Aufklärung (§ 7 Eric Hilgendorf) mit 44 Seiten insgesamt 12 Seiten umfangreicher imponiert als die vorige – 2.000 Jahre umfassende – ältere Strafrechtsgeschichte, akzentuiert die überragende Bedeutung der Aufklärung auf dem Weg zum Strafrecht zeitgenössischer Provenienz. Als einem führenden Rechtsphilosophen unserer Zeit gelingt es Hilgendorf meisterlich, die Aufklärung und Strafrechtsreform vermittels Ländern und Personen in kompakter Form so zu zeichnen, dass Fachkollegen, Studierende und interessierte „Laien" gleichermaßen angesprochen werden. Neben großen Traditionslinien lässt die Darstellung auch konkrete Einzelfragen der strafrechtsgeschichtlichen Forschung nicht missen, etwa eine zwischenzeitlich relativierte Sicht auf den vermeintlich „hexenverfolgungswütigen" Benedict Carpzov (Rn. 14)[4]. Als kleiner Wermutstropfen bleibt die – wohl beitragseinteilungsbedingt – getrennte und vom Umfang sehr knappe Darstellung der Hexenthematik mit nur einer Seite bei Steinberg (Wurzeln, Beginn, Verlauf und Kritik) und gut eineinhalb Seiten bei Hilgendorf (Kritik an den Hexenprozessen). Mit Blick auf die seit Jahrzehnten prosperierende Hexenforschung, die Katalysatorfunktion der pogromhaften Hexenverfolgung bei der Entwicklung von Verfahren und rechtsstaatlichen Standards und die im interdisziplinären Hexendiskurs leider zwischenzeitlich ihre ureigenste Domäne sukzessive aufgebende Strafrechtsgeschichte könnte es sich bei einer Zweitauflage anbieten, diesen Bereich in einem Beitrag oder gar eigenständigen Paragraphen und ausführlicher darzustellen.

Für die Deutsche Strafrechtsgeschichte von 1813 bis 1871 (§ 7) und die Entstehung und Entwicklung des Strafgesetzbuchs von 1871 (§ 8) gelang es den Herausgebern mit Arnd Koch einen ausgewiesenen Strafrechtshistoriker der „neueren Strafrechts- und Zeitgeschichte" zu gewinnen. Dass das 19. Jahrhundert in § 7 mit 60 Seiten und § 8 mit 29 Seiten alle früheren Epochen umfangmäßig weit übertrifft, reflektiert nicht nur die Forschungsentwicklung der letzten zwanzig Jahre. Es ist auch der Ausrichtung des Handbuchs geschuldet und insoweit treffend gewichtet. Einen Schwerpunkt der Darstellung nimmt das Bayerische Strafgesetzbuch von 1813 ein, welches zwischenzeitlich vortrefflich wissenschaftlich aufgearbeitet wurde.[5] Besonders erfreulich ist, dass sich Koch neben dem Preußischen Strafgesetzbuch von 1851 auch dezidierter dem lange Zeit vernachlässigte Polizeistrafrecht widmen konnte (Rn. 64–69). Eine engere Verzahnung mit der ebenfalls prosperierenden Forschung zur „guten Policey" der frühen Neuzeit wäre reizvoll[6], hätte indes vermutlich den Seitenrahmen gesprengt.

Auch die Bearbeitung der Entstehung und Entwicklung des Strafgesetzbuchs von 1871 (§ 8 Arnd Koch) kann auf einem breiten und gesicherten Forschungsfundament bauen, etwa durch die Arbeiten von S. Kesper-Biermann, W. Koch, A. Schubert, Th. Vormbaum und von letzterem betreute Forschungsarbeiten zum RStGB. Dem Autor gelingt es, diese kompakt zusammenzuführen und auszutarieren zwischen Entstehungsgeschichte, besonderen Angelpunkten (Rn. 15 f.)[7] und Entwicklungslinien ins 20. Jahrhundert.

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1 Vgl. dazu bereits HIRTE, M., *Papst Innozenz III, das IV. Lateranum und die Strafverfahren gegen Kleriker*. Tübingen, 2005, S. 113, 157 ff. m.w.N.
2 Vgl. WINROTH, A., *The Making of Gratian's Decretum*. Cambridge, 2000, S. 193, 142 ff.
3 Vgl. HIRTE, M., Innozenz III. S. 294.
4 Vgl. RÜPING, H., JEROUSCHEK, G., *Grundriss der Strafrechtsgeschichte.* 6. Auflage, München, 2011, Rn. 117.
5 Vgl. KOCH, A., KUBICIEL, M., LÖHNIG, M., PAWLIK, M. (Hrsg.), *Feuerbachs Bayerisches Strafgesetzbuch. Die Geburt liberalen, modernen und rationalen Strafrechts*. Tübingen, 2014.
6 Vgl. statt vieler WÜST, W. unter Mitarbeit von GUNKEL, C., *Frankens Policey. Alltag, Recht und Ordnung in der Frühen Neuzeit*, Darmstadt, 2021.
7 Vgl. auch HIRTE, M., *Die Todesstrafe in der Entstehung des Reichsstrafgesetzbuchs*. Berlin, 2013.

Daran anknüpfend gelingt Thomas Vormbaum in § 9 die Darlegung der Entwicklungsphasen des Strafgesetzbuchs. Der Schwerpunkt liegt weniger auf dem historischen Hintergrund (Rn. 2–24), als vielmehr auf den – in reinen rechtsgeschichtlichen Abhandlungen meist zu kurz kommenden und deshalb hier positiv hervorzuhebenden – rechtlichen Einflussfaktoren (Rn. 25–60) und strafrechtstheoretischen und kriminalpolitischen Einflüssen (Rn. 61–96).

Dem in den letzten Jahren zunehmend in den Fokus der strafrechtsgeschichtlichen Forschung gerückten Strafrecht der DDR widmet sich Moritz Vormbaum in einem gelungenen § 10 mit einer griffigen Gliederung in Besatzungszeit, Ulbricht- und Honecker-Phase sowie Entwicklung, Praxis und Deutungsmuster nebst einem ausführlichen und akribisch zusammengestellten Literaturverzeichnis.

Fast schon wie eine Zusammenfassung der vorangehenden Beiträge liest sich der Beitrag von Thomas Weigend in § 11 zu Aufbau und Struktur des Strafgesetzbuchs, spürt er doch den historischen Wurzeln der aktuellen Gesetzessystematik in Carolina (1532), Codex juris Bavarici Criminalis (1751), Josephina (1787), dem Preußischen Allgemeinen Landrecht (1794), Code pénal (1810), Feuerbachs StGB von 1813 und dem Preußischen StGB von 1851 nach. Eine systematische Ordnung im geltenden, größtenteils auf das RStGB von 1871 zurückgehenden StGB vermag Weigend kaum noch zu erkennen (S. 501 ff.) und geht neuen Systematiken nach. Die starke Fokussierung auf die gut 90 Jahre alte Arbeit von *Thomas Würtenberger, Das System der Rechtsgüterordnung in der deutschen Strafgesetzgebung seit 1532, 1933* und recht sparsame Verwendung aktuellerer Literatur, insbesondere zur Carolina, dürfte dem komprimierten Zuschnitt des Beitrags geschuldet sein.

Besonders verdienstvoll für den interdisziplinär-strafrechtshistorischen Diskurs nimmt sich Tatjana Hörnles klar strukturierter und in Notwendigkeit, Legitimität und Gestaltung staatlicher Strafe gegliederter Beitrag zu den Straftheorien unter § 12 aus. Da die gelungene Darstellung der in der deutschen Strafrechtswissenschaft gängigen Einteilung in absolute und relative Strafzwecke den metaphysisch-religiöse Prämissen nur eine Randnummer einräumt, ist der den Fokus auf die Epochen vor dem deutschen Idealismus legende Leser indes auf weiterführende Literatur zu verweisen.

Während die folgenden Beiträge 13 bis 16 dem aktuellen Recht verhaftet sind, spürt Eric Hilgendorf in § 17 (Strafrechtspolitik und Rechtsgutslehre) wieder stärker auch historischen Wurzeln nach, etwa bei der Geschichte des Rechtsgutsdenkens (S. 813–818) oder im historischen Rückblick zur Kriminalpolitik (S. 834–840) sowie in der geschichtlichen Einführung zu § 18 (Die deutsche Strafrechtswissenschaft der Gegenwart) (S. 857–863). Der in letzterem aufgezeigte Einfluss der deutschen Strafrechtsdogmatik, insbesondere auf die spanisch-sprechenden Länder Europas und Amerikas, Griechenland, die Türkei, Japan, Südkorea, Taiwan und China (S. 855 f.), mündet in einem hier vollumfänglich zu folgenden Votum für „eine[…] konzertierte[…] Außenwissenschaftspolitik des Rechts"; ein Desiderat, das auch die inländische Strafrechtsgeschichte trifft und sich dort auf allen Ebenen, neben Forschungsinstituten und Universitäten vor allem in den Rechtskundemuseen hypostasiert[8].

Für die historische Kriminalitätsforschung, besonders für die nichtjuristischen Schwesterdisziplinen und den juristischen Nachwuchs ein Gewinn sind sowohl der umfassende Beitrag von Johannes Kaspar zu den Grundlagen der Kriminologie (§ 19) – und hier nicht nur der geschichtliche Überblick, sondern auch die Verortung der Kriminologie im Gefüge der gesamten Strafrechtswissenschaft sowie deren Methoden und Theorien –, als auch Wolfgang Heinz' Beitrag zur Kriminalstatistik (§ 21). Die anschließenden Beiträge sind dann wieder eher auf aktuelle Themen zugeschnitten.

II. Band 2: Strafrecht Allgemeiner Teil I

Im zweiten Band des „Handbuchs des Strafrechts" betritt der geneigte Leser dann den Kernbereich des Allgemeinen Teils des Strafrechts. Am Grundfall des vorsätzlichen vollendeten Begehungsdelikts werden die Tatbestandsmäßigkeit, Rechtswidrigkeit und Schuld erörtert. Während Abschnitt 6 in die System- und Begriffsbildung im Strafrecht (§ 27 Eric Hilgendorf), in den Handlungsbegriff (§ 28 Claus Roxin) sowie in Handlungs- und Erfolgsunrecht sowie Gesinnungsunwert der Tat (§ 29 Hans Kudlich) einführt, thematisiert der Abschnitt 7 den zeitlichen Geltungsbereich (§ 30 Gerhard Dannecker) und den räumlichen Geltungsbereich (§ 31 Brian Valerius). Der Abschnitt 8 widmet sich dem Tatbestand, also der Begründung von Unrecht über die geschriebenen objektiven Tatbestandsmerkmale (§ 32 Rudolf Rengier), Kausalität und objektive Zurechnung (§ 33 Frank Zieschang), dem subjektiven Tatbestand (§ 34 Jochen Bung), Vorsatz (§ 35 Gunnar Duttge) und schließlich der Fahrlässigkeit (§ 36 Susanne Beck). Mit dem 9. Abschnitt bespricht der Band den Ausschluss des Unrechts über die Rechtswidrigkeit und zwar zunächst die Grundlagen der Rechtfertigungsgründe (§ 37 Till Zimmermann), die Notwehr (§ 38 Armin Engländer), den rechtfertigenden Notstand (§ 39 Jan C. Joerden), die Einwilligung (§ 40 Horst Schlehofer), die rechtfertigende Pflichtenkollision (§ 41 Harro Otto) und die sonstigen Rechtfertigungsgründe (§ 42 Hans-Ullrich Paeffgen). Schuldbegründung und Schuldausschluss werden schließlich im 10. Abschnitt ausgeführt, konkret die Grundlagen der Schuld (§ 43 Franz Streng), Schuldfähigkeit (§ 44 Heinz Schöch) und Entschuldigungs- und Strafausschließungsgründe (§ 45 Frank Zieschang). Mit den Irrtümern im Strafrecht im Einzelnen, das heißt, jenen auf Tatbestandsebene (§ 46 Tonio Walter) und auf Rechtswidrigkeitsebene (§ 47 Ulfrid Neumann) sowie Verbots- und sonstigen Irrtümern (§ 48 Ulfrid Neumann) schließt der 11. Abschnitt den zweiten Band des Handbuchs des Strafrechts ab.

Auch der zweite Band steht seinem Vorgänger in nichts nach. Kompakt, präzise und abschließend widmet er sich den jeweiligen Themenbereichen des Allgemeinen Teils des Strafrechts. Vor allem für nichtjuristische Rechtshistoriker kann er sich als idealer

[8] vgl. HIRTE, M., Eine kurze Geschichte des Mittelalterlichen Kriminalmuseums. In: DERS. (Hrsg.); *100 Jahre Mittelalterliches Kriminalmuseum. Festschrift zum Museumsjubiläum*. Darmstadt, 2021, S. 19–53, hier S. 31, 49, 53.

Einstieg in die moderne Dogmatik des Strafrechts erweisen. Themenzuschnitt und Handbuchcharakteristikum lassen es evident erscheinen, dass nicht jedes Kapitel dieses Bandes eine historische Einführung enthält. Gleichwohl bieten die folgend besprochenen Beiträge ein strafrechtshistorisches Surplus.

Hier ist zunächst der Beitrag von Eric Hilgendorf in § 27 zu nennen, der klar und prägnant den geistesgeschichtlichen Hintergrund des strukturierten Verbrechensaufbaus von der Aufklärung bis in die Gegenwart (S. 10–26) exzerpiert sowie jener von Gerhard Dannecker in § 30 zur historischen Entwicklung des Rückwirkungsverbots/Milderungsgebots mit einem Fokus auf das 19./20. Jahrhundert (S. 101–105). Gerade mit Blick auf die – dieses kleine Innuendo sei an dieser Stelle nachgesehen – teils enervierende babylonische Sprachverwirrung in den nichtjuristischen Schwesterdisziplinen der Rechtsgeschichte bei der Verwendung der Termini Vorsatz und Schuld avancieren die § 34 (Jochen Bung) zum subjektiven Tatbestand, v.a. dessen Grundlegung bei Hegel (S. 288–300), sowie § 43 (Franz Streng) zu den Grundlagen der Schuld (S. 718 ff.) und § 44 (Heinz Schöch) zur Schuldfähigkeit (S. 756 ff.) zum officium nobile. Rechtsphilosophisch und rechtsgeschichtlich instruktiv sind Jan C. Joerdens Erörterungen zum Notrecht bei Kant und Hegel (§ 39, S. 527–530) sowie Harro Ottos Exkurse zu problematischen Fallkonstellationen der rechtfertigenden Pflichtenkollision (§ 41, S. 649–653).

III. Band 3: Strafrecht Allgemeiner Teil II

Der dritte Band schließt die Sektion I des Handbuchs des Strafrechts ab. Er widmet sich den übrigen Problemfeldern des Allgemeinen Teils, vor allem Täterschaft und Teilnahme, Vorbereitung, Versuch und Vollendung, dem strafbaren Unterlassen, den Konkurrenzen, der strafrechtlichen Sanktionenlehre sowie in einem Abschnitt den prozessualen Voraussetzungen der Strafverfolgung.

Der Abschnitt 12 zu Täterschaft und Teilnahme untergliedert sich in die Strafbarkeit juristischer Personen (§ 49 Martin Paul Waßmer), die Lehre von der Beteiligung (§ 50 Bettina Noltenius), die Mittäterschaft (§ 51 Bettina Noltenius), die mittelbare Täterschaft (§ 52 Claus Roxin), die Anstiftung (§ 53 Uwe Murmann) und die Beihilfe (§ 54 Hans Kudlich) sowie besondere persönliche Merkmale (§ 55 Harro Otto). Der 13. Abschnitt nimmt sich der Vorbereitung und Versuchsstrafbarkeit an, konkret die Vorbereitungshandlungen (§ 56 Ralf Kölbel), den Versuch (§ 57 Hans Kudlich) und den Rücktritt vom Versuch (§ 58 Christian Jäger). Strafbarem Unterlassen widmet sich der von Georg Freund bearbeitete 14. Abschnitt in den § 59 (Unterlassungsdelikte allgemein) und § 60 (begehungsgleiches, sog. unechtes Unterlassungsdelikt). Der die Konkurrenzen behandelnde 15. Abschnitt separiert sich in Tateinheit und Tatmehrheit (§ 61 Tobias Reinbacher), Gesetzeseinheit (§ 62 Tobias Reinbacher) und Wahlfeststellung (§ 63 Nikolaus Bosch). Der 16. Abschnitt zur strafrechtlichen Sanktionenlehre inkorporiert sodann die Strafen (§ 64 Jörg Kinzig), die Maßregeln der Besserung und Sicherung (§ 65 Jörg Kinzig), die Strafzumessung (§ 66 Franz Streng), die Einziehung (§ 67 Nina Nestler) und Besonderheiten im Jugendstrafrecht (§ 68 Sabine Swoboda). Der von Wolfgang Mitsch bearbeitete 17. Abschnitt schließt den Band ab mit Strafantrag, Ermächtigung und Strafverlangen (§ 69) und Verjährung (§ 70).

Durch die Ausrichtung des dritten Bandes auf besondere Problemfelder des zeitgenössischen Allgemeinen Strafrechtsteils fallen die rechtshistorischen Passagen hier – ähnlich wie beim kongenialen zweiten Band – zwangsläufig knapper aus; dazu wie folgt: Gelungen eröffnet der Band mit einem bis zum römischen Recht reichenden kurzen historischen Überblick von Martin Paul Waßmer in § 49 zur Strafbarkeit juristischer Personen (S. 5–14), den kompakten Einblicken von Bettina Noltenius in die Beteiligungslehren ab dem ausgehenden 18. Jahrhundert in § 50 (S. 97–102) sowie in die Mittäterschaft seit der peinlichen Halsgerichtsordnung Kaiser Karls V. von 1532 in § 51 (S. 157–160). Zutreffend weist Uwe Murmann in § 53 bei der historischen Entwicklung der Anstiftung (S. 276–278) auf die Bedeutung des seinerzeit die Rechtsentwicklung prävalierenden mittelalterlichen Kirchenrechts hin (S. 276). Auch der profunde Beitrag von Ralf Kölbel zu den Vorbereitungshandlungen (§ 56) offeriert gewinnbringende rechtshistorische Rekurse. Sachlogisch in der neueren Strafrechtsgeschichte angesiedelt ist die erhellende kurze Geschichte der Konkurrenzen in § 61 und § 62 (Tobias Reinbacher, v.a. S. 727–736 und S. 800–802). Auch der letzte Beitrag des Bandes bietet einen, freilich knappen, Blick in die Geschichte der Verjährung (§ 70 Wolfgang Mitsch, S. 1293 f.).

IV. Resümee

Die von den Herausgebern angegangene Herkulesaufgabe eines Grundlagenwerks zur Gesamtdarstellung des deutschen Strafrechts, das „die Entwicklung des deutschen Strafrechts losgelöst von den Herausforderungen des Augenblick beständig und dauerhaft aus einer kritischen Distanz begleitet“ (Band 1, Vorwort S. VI) ist meisterlich umgesetzt. Die Einbindung gut eines Viertels der deutschen Strafrechtslehrerinnen und Strafrechtslehrer löst den Anspruch einer repräsentativen Darstellung des Strafrechts in seiner Gesamtheit vollumfänglich ein.

Der umfassende Fokus des Handbuchs auf die gesamte Breite des Strafrechts lässt der sich zunehmend an die Peripherie des universitären Lehrbetriebs exiliert sehenden Geschichte des Strafrechts den notwendigen Raum. Der Schwerpunkt liegt hier auf der neueren Strafrechtsgeschichte und Zeitgeschichte, was die gegenwärtige Forschungstendenz reflektiert. Obgleich sich an vorbenannten Stellen durchaus weitere und wertvolle Schlaglichter in frühere Epochen angeboten hätten, gereicht dies dem Werk – angesichts dessen inhaltlicher Ausrichtung – nicht zum Nachteil. Vielmehr ist der erste Band des Handbuchs des Strafrechts ob seines instruktiv-kompakten Einblicks in die Besonderheiten des Strafrechts hervorragend geeignet für die strafrechtshistorisch interessierte Leserschaft im In- und Ausland; insbesondere für die nichtjuristischen Schwesterdisziplinen.

Prädestiniert für strafrechtshistorisches Arbeiten sind auch die Bände zwei und drei des Handbuchs, vor allem zur ersten Standortanalyse bei epochenübergreifenden Arbeiten zu Unrecht und Zurechnung, Vorsatz, Rechtswidrigkeiten und Schuld, Täterschaft

und Teilnahme, Versuch, Unterlassen und Sanktionen. Die Konsultierung des Handbuchs vermag bei der konkreten Einordnung und Verwendung der verschiedenen juristischen Termini von großer Hilfe sein und die interdisziplinären Diskurse von manchen Missverständnissen befreien, die im Juristen doch gelegentlich ein „hic sunt leones" evoziert. Im Zusammenspiel mit dem ersten Band offenbart sich hier secunda facie ein weiteres Commodum aller drei Bände. Die dezidiert in den Mittelpunkt des Handbuchs gestellte Dogmatik, die tiefe dogmatische Durchdringung der Beiträge ebenso wie die identifizierten Herausforderungen der überkommenen Strafrechtsdogmatik für die Zukunft bieten dem nichtjuristischen Rechtshistoriker sowie dem mit der Materie nur fragmentarisch vertrauten Leser einen wertvollen Ariadnefaden im Labyrinth der neueren Strafrechtsgeschichte und – trotz stärkerer Entdogmatisierungstendenzen – auch der mittelalterlichen und damit älteren Strafrechtsgeschichte[9].

Das auf hohem wissenschaftlichen Niveau gehaltene „Handbuch des Strafrechts" ist nicht nur Wissenschaftlern und strafrechtlich spezialisierten Juristen in Justiz und Anwaltschaft sowie Studierenden der Rechtswissenschaften wärmstens ans Herz zu legen, sondern ebenfalls Interessierten aus anderen Fachgebieten und vor allem (Straf-)Rechtshistorikern der deutschen, europäischen und internationalen Rechtsordnungen. Das „Handbuch des Strafrechts"… eine „Lectio, quae placuit, decies repetita placebit" (Horaz/Giordano Bruno).

Markus Hirte*

[9] Vgl. dazu Willoweit, D., Entdogmatisierung der mittelalterlichen Strafrechtsgeschichte. In: *Rg Rechtsgeschichte*, vol. 14, 2009, S. 14–39.

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Elena Pezzato

Si sanctitas inter eos sit digna foedere coniugali. Gli apporti patrimoniali alla moglie superstite in età tardoantica e giustinianea.

Bologna: Bologna University Press, 2022, xiii & 295 p., ISBN 979-12-5477-016-0

The first part of the title of the reviewed book *Si sanctitas inter eos sit digna foedere coniugali. Gli apporti patrimoniali alla moglie superstite in età tardoantica e giustinianea* [If Affection between Them is Worthy of Conjugal Bond. Patrimonial Contributions to the Surviving Wife in Late Antiquity and in the Age of Justinian] is quotation of CTh 5, 1, 9, which is one of the first (and typical) fragments, which are analysed in the book.

The book begins by *Introduzione* [Introduction] (p. vii–xiii), where some basic characteristics and general notions are mentioned. The reasons why the surviving spouse stands in the centre of the book are both legal (weaker economical and legal position of women) and natural (women live longer and they are usually younger when entering the marriage). It shall be also mentioned that attention is paid to those women, which are (or will become following the death of their husband) *personae sui iuris* living in *matrimonium iustum*.

The book is then divided into two parts – late antiquity (sc. 4th and 5th century) and the times of Emperor Justinian. It might be a little bit confusing, that chapter numbers in the second part start again from Nr. 1 (such numbering would make sense if the respective chapters in both parts were completely corresponding each other, which is not the case). Nevertheless, overall is such division in two parts quite practical, as it enables to emphasize the chronological development of legal regulation.

The first chapter *La successione ab intestato. La bonorum possessio* [Intestate Succession according to Civil and Honorary Law] (p. 7–22) mentions an interesting, but almost unknown *SC Gaetulicianum* (p. 10) in relation to the position of *heredes sui*. Concerning the succession *unde vir et uxor*, one of the decisive fragments is C 6, 18, 1 (p. 15), which states that the wife (or husband) is not preferred to relatives, but only to fiscus.

In *La successione testamentaria* [Testamentary Succession] (p. 23–60), the author mentions (p. 25) the crisis of use of testament between spouses in that period of time, which relates to the new institute of nuptial gift. She also points out that the influence of Christian values in this regard is not as strong as some think. There is also difference (p. 26) between western and eastern provinces of the Empire, as the testament was of less importance in the latter. Concerning the interpretation of testaments, a crucial principle appears (p. 27): *favor testamenti*. Even though women could be appointed heirs (p. 28), they were often considered rather "keepers" of property for the children, or they were just receivers of legacy or trust. There were also specific legacies for the benefit of women, such as legacy of clothing and jewellery, and more generally of all the things which were bought or designated for her usage (p. 32); of course, the legacy of dowry is mentioned as well. A very modern rule (which is called "legacy by law" in some legal orders) is to be found in Ulp. Epit. 15, 1 (p. 48), which enables the surviving spouse to retain ten percent of the property of the other (followed by other provisions, such as usufruct of another one third); this rule was abandoned by CTh. 8, 17, 2. An apparent influence of Christianity is present in the abolishing of incapacity, which was imposed on *caelibes* and *orbi* by *lex Iulia et Papia Poppaea*, as the

chastity is no more considered to be unwanted (p. 50). Limitations of testamentary freedom appear in order to protect children from the first marriage by securing them at least the same proportion of the heritage as is given to the new spouse (p. 59).

L'istituto dotale [Institute of Dowry] (p. 61–92) can be regarded as a means of social security for the surviving wife. There are mentioned various types of dowries and their creation (*dos profecticia* and *adventicia, dotis dictio* and *promissio*) along with the possible reductions (*retentiones*) for children, expenses (only useful ones – *utiles* – are counted), bad morals and stolen things (*actio rerum amotarum*). A more favourable regime for the widow can be created by *legatum dotis*, because it is neither subject of *retentiones* (apart from necessary expenses, p. 83) nor limitation by laws such as *lex Falcidia* and *lex Iulia et Papia Poppaea*; a trust imposed on the widow to restitute the bequeathed dowry was generally also invalid.

La donazione nuziale [Nuptial Gift] (p. 93–116) is a new institute (in Latin *donatio ante/propter nuptias*), which was introduced in late antiquity, which is in some aspects close to testaments. An important source for this institute seems to be *liber Syro-Romanus* (p. 99 sqq.), which is in a professional manner dealt with by the author and which cannot be assessed by the reviewer due to the lack of his language skills. The subsequent limitations of widow's ability to gain and dispose the property are connected with the preference of family ties: the children have right to *residuum*, and if there were no children, part of the property will belong to the parents of the deceased (Nov. Val. 35, 8); this rule was valid only in the western part of the Empire (p. 105); there were also limitations of dispositions (*usufruct*) others than in favour of the children (p. 111). The position of widow was influenced in a decisive manner by entering subsequent marriage. It was preferred to stay in the state of viduity (*uninuba*), either due to the protection of the children, or due to the disrespect, which related to the subsequent marriage (p. 114). Thus, the property gained by *binuba* was lost and given to the children from the first marriage, as she is not considered worthy of receiving the profit form the first marriage anymore – this might be also seen as an influence of Christianity, but also as a manifestation of oriental habits. There is also a difference in the respective parts of the Empire. Whereas in the West, there was a tendency to unify the position of *uninuba* and *binuba*, in the East, the position of *uninuba* remained better (p. 116). If there were no children, the position of widow was identical in both parts of the Empire (sc. she received half of the property if the husband's parents were alive, and the whole property if not).

A very interesting is the chapter *La breve parentesi dell'iniusta lex Maioriani (Nov. Mai. 6, 5–8 [A. 458])* [Short Intermezzo of Unjust Majorian's Law (Nov. Mai. 6, 5–8 [Year 458])] (p. 117–124), which depicts a short-lived step aside from the relatively continuous development. Emperor Majorian, best known for his attempt to restore the declining western Empire, also attempted (and indeed did) to change the marriage regulation in a manner similar to that of Octavianus Augustus. Thus, he decided (Nov. Mai. 6, 5) that a widow without children, provided she is under forty years, shall not waste her fertility neither under pretext of superstition nor due to the sexual freedom (*lasciva libertas vivendi*, p. 118), but she shall re-marry within five years, otherwise half of the property will be given to the relatives of the husband and if there were no such ones, to the *fiscus* (in the meanwhile, she will have only usufruct of the other half of the property). It is quite ironical, as the author points out on p. 119, that this everlasting law (*aeternabilis*) was in force only five years (and only in the West).

The last chapter of the first part *Prassi e diffusione di dote e donazione nuziale. La crisi dell'istituto dotale nel corso del V secolo* [Practice and Dissemination of Dowry and Nuptial Gift. Crisis of the Institute of Dowry during Vth Century] (p. 125–149) deals with the mutual influence of dowry and nuptial gift. The usage of dowry was declining in the fifth century, which was probably caused also by the higher natality which was manifested by the effort to prefer the interest of the children (Nov. Mai. 6, 9; p. 128). Another important reason for of the decline of dowry can be the continuing "erosion" of the power of *pater familias* (p. 140), coinciding with the diminishing value of usual dowry. On the other hand, the dissemination of nuptial gift was increasing. Consequently, the usual tendency of mutual influence between similar institutes led to sort of merge, resulting in *donatio in dotem redacta* (Nov. Th. 14, 3; p. 134).

The other part of the book, which deals with the legal regulation in Justinian's times, begins by the short chapter *La successione intestata e testata* [Intestate and Testate Succession] (p. 153–157). There are analysed some minor changes introduced by Nov. 118 and 18, which cancels the limitations of grades in the order *unde cognati*, and, provided there are also children, prevents the widow to gain usufruct to the whole property, respectively.

The chapter *L'istituto dotale* [Institute of Dowry] (p. 159–201) depicts sort of partial transformation of the dowry into the institute of more alimentary function. Such tendency is reflected by *favor dotis*, even though the author emphasizes that it is rather a byzantine exaggeration; however, at least some interpretation "*pro dotibus*" can be found (p. 162). It was also both moral and legal duty of *pater familias* to provide his daughter with a dowry (D 23, 2, 19; D 38, 5, 1, 10; p. 165 and 177). C 5, 13, 1 also changed the procedural aspects, as *actio ex stipulatu* became applicable in all cases of dowry, sc. even though no stipulation took place (p. 183). This dotal "*actio ex stipulatu*" was nonetheless *bonae fidei* (this feature was taken from *actio rei uxoriae*, p. 187). The *retentiones* were also abolished (or modified, p. 189).

Concerning *La donazione nuziale* [Nuptial Gift] (p. 203–233), there appear some limitations – one which is certainly worth mentioning is *aequalitas* of dowry and nuptial gift in Nov. 2, 5 (p. 215): if the dowry promised e.g. by the father of the wife was not given, she cannot receive the nuptial gift; if the dowry was given only partially, the nuptial gift is also given only partially. *Uninuba* with children could according to Nov. 127, 3 gain not only usufruct, but also the property (p. 225).

The last chapter of this part deals with the famous *La quarta della vedova povera: Nov. 53, 6 (A. 537) e Nov. 117, 5 (A. 542)* [Quarter of Poor Widow: Nov. 53, 6 (Year 537) and Nov. 117, 5 (Year 542)] (p. 233–262). Nov. 53, 6 secures quarter of the estate for the surviving spouse (not only for the widow, but also for the widower – this provision was cancelled by the latter Novel), provided

there is neither dowry nor nuptial gift, which would provide property for his or her living (p. 239). Another interesting aspect is, that she is denominated as *heres* (note: there is omitted *h* in the translation on p. 238), whereas according to Nov. 117, 5, she gains only usufruct if their common children inherit (p. 248). The same Novel introduces also other limitations, which were not mentioned yet: she can receive the whole quarter only if there are three or less children, otherwise she will receive *pars virilis*, and at the same time, it cannot be more than hundred pounds of gold (p. 260).

The key information are summarized in *Osservazioni conclusive* [Concluding Observations] (p. 263–268), which are followed by two very practical indices – list of authors quoted and list of sources – and overview of contents.

The book is well written, it has an excellent scholarly quality on one hand, and is also very readable on the other hand. The approach of the author is very precise as she analyses even less accessible or short-lived sources such as *liber Syro-Romanus*, and Nov. Mai. 6, 5. At first sight, it might seem a pity that the Latin texts are not translated, but it is indeed unnecessary, as their meaning is always explained in the text (and considering the number and length of some of them, it would be even impractical). The fragments in other languages are translated (the Greek ones into Latin, *liber Syro-Romanus* into German, *Didascalia apostolorum* into English, which is very useful for most people, who would not understand the last two ones at all). There is no doubt the book is very attractive for anyone interested in Roman law (or the history of antiquity), but I think that at least some of its parts can be interesting also for lawyers in general, because there is much attention paid to the position of women these days, and this book also shows, that even though the position of women in Roman law was generally weak, they were not totally neglected and sometimes they were even stronger and their position in some aspects better, than some people might think.

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Andreas Zack

Das Ende des Zweiten Triumvirates und die Amtsgewalten des *Imperator Caesar Divi filius (Octavianus)* in der politischen Ordnung Roms (43–27 v. Chr.): Übersehene, vergessene und neue Überlegungen zur Deutung von Augustus, *Res gestae* 7,1; 25,2 und 34,1

Norderstedt: Books on Demand GmbH, 2022, 116 p., ISBN 978-3-7458-7079-4

Andreas Zack has chosen a long-debated, and intriguing subject of the legal position of C. Iulius Caesar Octavianus during the years 43 to 27 BC for his research. Zack focuses on Octavianus' position between the end of the Second Triumvirate and his assumption of control over part of the state affairs with the approval of the Roman people and the Senate in 27 BC (the beginning of the Principate). The fundamental question is the supposed end date of the triumvirate: some scholars vote for 31 December 33 BC, others prefer the year 32 BC, and there are those who believe the triumvirate was not to end on a fix date, but with the abdication of the triumvirs (see pp. 56–57). However, when did the triumviral commission actually come to an end for Octavianus? Did he resign the title as well as the powers at a certain date, or did he officially give up the title and in fact retained (some of) the powers for the good of the state until 28/27 BC? There have been divergent opinions among scholars over time. Regarding Octavianus' legal powers in general during the period under examination, we know that he was granted some kind of military commission for the war against Cleopatra VII (31–30/29 BC), whose exact nature is also a matter of discussion, and he was being elected one of the consuls for the years 31 to 23 BC.

Zack opted for self-publication of his study via the platform PubliQation (Books on Demand GmbH) in order to be free to shape the book according to his wishes and to make his contribution more accessible to scholars and libraries both in print and as an e-book. The book consists of an introductory part (a preface, the outline of the author's approach, initial considerations), the main body (three chapters and the conclusion), and a critical evaluation written in English by an expert in the field, Alberto Dalla Rosa. I consider this last part a highly valuable appendix, as it complements Zack's text and supplies contrasting views. Notes and bibliography follow at the end. An index is missing, but it is not a serious issue regarding the modest length of the study. Considering the extent of the notes, the readers may appreciate that they form a separate section after the main body of the study: it was the author's intent to give his readers the freedom to decide whether to read the notes together with the text or separately, which I find considerate.

The author was much concerned with coherence of his text, in which he, for the most part, has succeeded: the scientific debate to-date is neatly presented, the premises for the author's theories follow. The arguments are clear, the conclusions comprehensible. I commend the meticulous partitioning of the text, ongoing summaries, and a bibliographical list adequate to the timespan over which the scientific debate has been going on. Nevertheless, redundant portions of text can be found here and there: the excursus

concerning Rome's war with Pyrrhus (notes, pp. 77–78), extensive quotations of sources and literature, and, especially, several passages that repeat verbatim (e.g., the bibliographical references regarding numismatic evidence for Marcus Antonius' triumviral title in 32 BC, p. 63, are repeated with the exact same wording twice on p. 75).

The scholarly debate on the subject matter has been enormously rich. Zack maps it back to the 19th century, occasionally adding references to the 16th/17th century texts. He makes use of both literary and epigraphic ancient sources, the principal ones being Cassius Dio, Appianus, *Res gestae divi Augusti*, *Fasti Capitolini*, and *Fasti Colotiani*. He draws some interesting parallels with modern European history, as well.

Zack analyses Octavianus' position between the dissolution of the Second Triumvirate and the agreement on the "new order" in the Roman state in January 27 BC, as stated above. Beginning with the issue of the end date of the triumvirate, he questions the traditional reading of sources and proposes an alternative understanding of their time indications (the *quinquennia*, Augustus' statement that he was one of the triumvirs "continuously for ten years").[1] He advocates the year 32 BC as the terminus for both Octavianus' triumviral title and powers. That forces him to seek out alternative sources for Octavianus' prominent position in public life that he obviously retained until 27 BC. The year 32 BC (or the second half of it) is of special concern since Octavianus' row of consulates was to begin only in 31 BC. As Dalla Rosa aptly points out (p. 57), "the real problem is that we still do not know what exactly Octavian did in 32 BC". Octavianus must have received a special military commission in the latter part of 32 BC in order to lead the campaign against Egypt in 31 and 30 BC. Zack discusses the commission's possible nature.

It is a valid argument that, according to the republican rules, the military command should have come to an end by the time Octavianus celebrated the triple triumph in August 29 BC. However, I do not find plausible Zack's hypothesis that Octavianus would be granted a kind of "super-imperium" afterwards (p. 46). Zack is offering an answer to one of his initial questions here,[2] but one that does not make much sense at this point of political and military development. I am in full agreement with Dalla Rosa's statement that bestowing a "super-imperium" on Octavianus in 29 BC "does not seem to fit well into the political programme of gradual restoration of the rule of law after the end of the civil war. Why would the senate and the people vote such sweeping powers after the end of the emergency status caused by the civil wars? Why would Octavian have shown respect for the constitution in laying down the triumvirate and accept a totally unprecedented imperium?" (pp. 57–58) Zack's hypothesis is rooted in the account of the historian Cassius Dio, who mentions the assumption of the *praenomen imperatoris* by Octavian in 29 BC (Cassius Dio, *Roman History* 52. 41. 3–4). Dio also implies that the title had already been bestowed on C. Iulius Caesar and his potential descendants in 45 BC (Cassius Dio, *Roman History* 43. 44. 2–5). The credibility of neither of these statements has been generally accepted. Furthermore, Zack investigates the meaning of the term *imperator* in relevant sources, but I am missing an equally comprehensive discussion of the term *(prae)nomen*.

Although one can disagree on several points, Zack's study certainly represents a stimulating contribution to the intricate debate on the events at the crossroads between the Republic and the Empire – a debate still open as the ancient sources do not provide us with enough evidence to draw precise conclusions.

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[1] *Triumvirum rei publicae constituendae fui per continuos annos decem* (*Res Gestae Divi Augusti* 7.1).

[2] "Welches Amt, das er aufgab, meint Augustus in den *Res Gestae* 34,1 zum politischen Vorgang im Januar 27 v. Chr.? ...Beschrieb Augustus mit seinen Worten eventuell nicht die Gewalt eines speziellen Amtes, sondern stattdessen eine im Januar 27 v. Chr. existierende politische Gemengelage diverser gleichzeitig und nebeneinander bestehender Amtsgewalten und Privilegien?" (p. 11)

Jana Osterkamp

Řád v rozmanitosti: Dějiny federalismu v habsburské monarchii od doby předbřeznové do roku 1918

[Order in Diversity: the History of Federalism in the Habsburg Monarchy from Pre-March to 1918]

Prague: Argo, 2022, 646 p., ISBN 978-80-257-3707-1

In 2022, a book by Jana Osterkamp, translated from the German original Vielfalt ordnen: Das föderale Europa der Habsburgermonarchie (Vormärz bis 1918), published by Vandenhoeck & Ruprecht in 2020, was published by the Czech publishing house Argo. This book was produced with the support of the Czech-German Future Fund (*Deutsch-tschechischer Zukunftsfonds*). Also, it is worth mentioning that the author habilitated on the manuscript of this book at the Faculty of History and Arts of the Ludwig-Maximilian University in Munich.

The author has divided the book into twelve thematic parts (excluding the introduction and conclusion). These parts are always accompanied at the beginning by contemporary lithographs or other images illustrating the initial theme. In the first parts of the book, Jana Osterkamp goes back to the middle of the nineteenth century and during this journey she explains not only the political situation and realities, but also the development of ideas and perceptions of federalism, pointing out the differences in the meaning of the concept of federalism today and then. Moreover, she sheds light not only on the Habsburg Monarchy as a whole, and thus on Austrian Empire and Austria-Hungary, but also on the individual parts of this grouping - in each of the Crown Lands. It is even possible to read in the book about the constitutional drafts and tendencies of the Czech politician František Palacký at the end of the 1850s, but also about the constitutional draft of the Austrian politician Franz Seraph von Sommaruga. Also notable is the analysis of education and school policy, agrarian policy, health policy and social policy between 1867 and 1914. This is also a major contribution of the book itself, as it is one of the few books to deal in detail with such a broad area. After discussing the petition storms, the author goes back through the issue of constitutions and the revolutionary period, the Austro-Hungarian Compromise, other countries' attempts at settlement, financial history of Austria-Hungary, and even the ideas of personal autonomy for Jews to the last days of the Austro-Hungarian Empire.

As mentioned above, the author presents her research on the concept of federalism, the development of the ideas and the possibilities of their use, especially in the Austrian part of the monarchy. In the book, however, she explains, among other things, why this was such a problematic issue - by recounting historical realities, supplemented by a legal perspective, she expresses the problem of inconsistency not only in nationality (which hid more problems than it might seem, since the very concept of "nation" was a much debated topic and an inconsistent term), but also in the very ideas of the further development of the state system.

With this book, the author proves that the topic has not yet been exhausted and that there are many perspectives on the subject that can be further explored. And yet Jana Osterkamp has demonstrated her ability to cover a large part of them in one publication without depriving the reader of the slightest bit of information. Furthermore, it is necessary to point out the author's appropriate and non-violent linking of the history of the Habsburg Monarchy (Austria-Hungary) with its legal history, i.e. with the development of legal and political trends. Despite this, the book is written in a reader-friendly manner, but I would recommend this publication to readers who already have a basic overview of the subject.

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„In den Schluchten der Verträge“ – Eine Würdigung zum Tod von Herrn Rechtsanwalt Professor Dr. iur. Albrecht Götz von Olenhusen

Publikationsfreiheiten, Arbeitnehmer und Urheberrecht - so lautet die Veröffentlichung, die die Kanzlei von Albrecht Götz von Olenhusen in Freiburg im Breisgau im Jahre 2009 zu Ehren ihres Kanzleigründers und -inhabers herausgab, um seine Schaffensgebiete zu umreißen[1]. Albrecht Götz von Olenhusen, geboren am 8. November 1935, ist nunmehr am 22. Oktober 2022 endgültig von uns gegangen. Die Beisetzung fand am 8. November 2022 im kleinen Kreis auf dem Familienfriedhof (Gut Olenhusen) statt.

Ein „Leben zwischen Literatur und Recht“ beschrieb die Badische Zeitung eine Würdigung zu seinem 75. Geburtstag. In derselben Zeitung stand am 27. Oktober 2022 zu lesen: „Bekannter Rechtsanwalt, Kommunalpolitiker und Karl-May-Freund: Albrecht Götz von Olenhusen ist kurz vor seinem 87. Geburtstag in Düsseldorf gestorben“. Heinz Wittmann charakterisierte ihn als unermüdlich forschenden und streitbaren Anwalt im Urheber-, Verlags- und Medienrecht[2], denn der Verstorbene war langjähriger Beirat der Zeitschrift „Medien und Recht. Zeitschrift für Medien- und Kommunikationsrecht“ sowie „Medien und Recht International/MR-Int“. Fedor Seifert würdigte Albrechts Facetten in Medien und Recht International (2015, Heft 4, S. 123-124) zum 80. Geburtstag: „Happy Birthday to Albrecht Götz von Olenhusen“.

Nach dem Studium der Rechts- und Staatswissenschaften sowie der Volkswirtschaft in Göttingen, Freiburg i.Br. und Zürich war Albrecht Götz von Olenhusen tätig als wissenschaftlicher Assistent in der Verwaltung, es folgten Auslandsaufenthalte. Er hatte Lehraufträge an der Hochschule für Film und Fernsehen Potsdam-Babelsberg, dozierte an der Journalisten-Akademie in Stuttgart und war Vorstandsmitglied der Landesanstalt für Kommunikation Baden-Württemberg (LFK) sowie Mitglied in juristischen, wissenschaftlichen und literarischen Vereinen und Institutionen.

Unser Journal on European History of Law (JEHL) hat dem Verstorbenen ebenfalls für seine Beiträge zu danken und die Erinnerung an ihn aufgrund seiner rechtshistorischen Verdienste wachzuhalten.

1. Frühe Veröffentlichungen sowie Buchbesprechungen bis heute (1964-2022)

„Die nationalsozialistische Rassenpolitik und die jüdischen Studenten an der Universität Freiburg im Breisgau 1933-1945“ gilt als seine erste Veröffentlichung in den Freiburger Universitätsblättern aus dem Jahre 1964 (Seiten 71-80). Albrecht Götz von Olenhusen beschäftigte sich intensiv mit der NS-Zeit (so die NS-Regisseurin und Hitler-Vertraute Leni Riefenstahl, die er nach persönlichen Erzählungen bei Gericht erlebte) im Zusammenhang mit Universitätsgeschichte sowie zeitlebens dem Kernbereich seines Themenspektrums, d.h. der Geschichte, der Gegenwart, aber auch der Zukunft von Urheber-, Informations- und Medienrecht[3].

Viele Zeitschriften druckten seine wohlüberlegten Gedanken, so: Film und Recht; Vorgänger. Zeitschrift für Bürgerrechte und Gesellschaftspolitik; das Gutenberg-Jahrbuch, Medien und Recht, Zeitschrift für Urheber und Medienrecht (ZUM), die Mitteilungen der Karl-May-Gesellschaft bzw. deren Jahrbuch, sowie die UFITA = Archiv für Urheber- und Medienrecht, in früheren Zeiten „Archiv für Urheber-, Film- und Theaterrecht“ (seit der Gründung 1928)[4]. Dazu gesellen sich das Archiv für Presserecht (AfP) und die NJW. Von 1969 - 2021 hat Albrecht Götz von Olenhusen die Neuerscheinungen aus seinen Themengebieten stets hilfreich-kritisch für Herausgeber und Autoren sowie die Leserschaft in den einschlägigen Zeitschriften rezensiert. Sein dadurch erworbenes Wissen hat er sehr gern an die Kollegenschaft weitergegeben. Unser Journal on European Legal History hat er noch bis vor kurzem mit Buchbesprechungen versorgt; wir werden diese unersetzlichen Ausführungen sehr vermissen.

2. Standardwerke in den wissenschaftlichen Bibliotheken

Albrecht Götz von Olenhusen wurde der Titel des Honorarprofessors durch die Heinrich Heine-Universität Düs-

[1] *Publikationsfreiheiten, Arbeitnehmer und Urheberrecht. Der Arbeitnehmer-Urheber in Wissenschaft und Praxis. Publikationsfreiheit und ihre Grenzen. Ein Interview von Thomas Anz und Albrecht Götz von Olenhusen*. Freiburg im Breisgau, 2009.

[2] In: *„Medien und Recht“*, 2022, Heft 5, 4. Umschlagsseite.

[3] Siehe: *Publikationsfreiheiten* (Fn. 1), dort die Seiten 31-77 als Bibliographie zwischen 1964 und 2009. Zu seinen ersten Aufsätzen dortselbst, S. 41. Zwischen 2010 und 2021 treten zahlreiche Beiträge hinzu.

[4] Seit 2018 im Nomos-Verlag „umgetitelt“ in: UFITA – Archiv für Medienrecht und Medienwissenschaft.

seldorf aufgrund seiner Lehr- und Vortragstätigkeit sowie den zahlreichen Veröffentlichungen verliehen. Bis vor wenigen Jahren war er noch als Rechtsanwalt in Freiburg im Breisgau tätig auf seinen Spezialgebieten dem Urheber- und Verlagsrecht sowie Medienarbeitsrecht, letzteres dokumentiert durch das Standardwerk „Medienarbeitsrecht für Hörfunk und Fernsehen" (2004, Universitätsverlag Konstanz). Unverkennbar sein Blick des „Geltendrechtlers" und praktischen Rechtsanwenders zu den Grundlagenfächern der Rechtsphilosophie und insbesondere der Rechtsgeschichte und ihren kulturellen Bezügen. Dabei sticht das Begleitbuch zu seiner Ausstellung „Von Goethe zu Google" aus dem Jahre 2011 hervor[5]. Kriminologie und die Literatur von und über Karl May beschäftigten diesen literarisch orientierten Juristen respektive juristisch ausgerichteten Literaten. Beides verband er in einer Persönlichkeit. Schon das Buch „Schriftsteller, Recht und Gesellschaft" (Freiburg i.Br. 1972) offenbart den Weitblick in die gesellschaftliche Verankerung und Verantwortung der Rechtsordnung. Nicht fehlen darf das Handbuch der Raubdrucke mit dem bezeichnenden Untertitel „Theorie und Klassenkampf" aus dem Jahre 1973, erweitert 2002, Neuauflage 2005. Bedeutsam für das Jahr 1988 aus der UFITA-Schriftenreihe das Rundfunkrecht sowie das Versorgungsrecht einschließlich Künstlersozialversicherungsgesetz in 2 Teilen. 1993 erschien der Kommentar zum Filmarbeitsrecht, 2002 „Freie Mitarbeit in den Medien: Arbeits-, Tarif-, Vertragsrecht. Honorare, Urheberrecht. Leistungsschutz" sowie 2008 und 2015 „Der Journalist im Arbeits- und Medienrecht: Ein Leitfaden" (München, Verlag Medien und Recht).

3. Durchsicht der Sonderdrucke (Einzelstudien)

Beim Durchsehen der über die Jahre mit ihm ausgetauschten Sonderdrucke fallen dem Verfasser sehr viele Werke des Verstorbenen in die Hände. So insbesondere aus der „guten alten" UFITA Band 2014/III[6] den innovativen Beitrag: „Zur wirtschaftlichen Begründung der Pressefreiheit im Vormärz. Johann Paul Harl (1772-1842) mit dem Nachdruck des Werkes von Harl namens *Höhere Gesichtspunkte für die Würdigung der teutschen Preßfreiheit, dieses Palladiums teutscher Freiheit, nebst einigen national-ökonomistischen und finanziellen Ansichten der Preßfreiheit. Ein Versuch*. Spannend gleichfalls: Die „Casta Diva" und der „König des Humbugs" (Jenny Lind und P. T. Barnum). Zum Vertragsrecht und Vertragsbruch von Sängerinnen im 19. Jahrhundert in Europa und den USA. Die UFITA[7], unter damaliger Herausgeberschaft von Manfred Rehbinder im Stämpfli Verlag Bern, druckte Albrechts rhetorisch glänzenden Vortrag auf der unvergesslichen Tagung „Geschichte und Zukunft des Urheberrechts", die in Gotha vom 5.-8. September 2013 stattgefunden hatte.

Der Code Littéraire des Honoré de Balzac sowie Balzac und das Urheber- und Verlagsrecht beschäftigten Albrecht Götz von Olenhusen ebenfalls[8]. Louis Blanc und das geistige Eigentum aus dem Jahre 2003 muss erwähnt werden, weil es die Verbindung zwischen geistiger Arbeit und dem Recht auf Arbeit unterstreicht, die dem Verstorbenen ununterbrochen von hohem Belang war[9]. Bemerkenswert überdies aus der UFITA 2005/II: „Zeitverträge und Probearbeitsverhältnisse im Orchesterbereich, auch der Rundfunkorchester" (S. 397-425). Schon 2003 widmete sich der Verstorbene der Parodie und Urheberrechtsverletzung in der Schweiz und in Deutschland, insbesondere im Bereich der bildenden Künste[10]. Unvergessen seine großartige Studie über die Hintergründe zu Max Webers Presse-Enquęte und das Presse- und Urheberrecht seiner Zeit, UFITA 2015/III, S. 763-833.

Seine Leidenschaft zu Karl May und zum Nachdruckschutz seiner Werke findet sich in den Mitteilungen der Karl-May-Gesellschaft als „Der Nachdruck von Werken englischer und deutscher Autoren, insbesondere Karl Mays, in den USA und im 19. Jahrhundert"[11]. Der Leser möge darüber hinaus in der UFITA 2013/II[12] nachschauen, wo der Titel dieses Nachrufes für Albrecht Götz von Olenhusen zu finden ist: „In den Schluchten der Verträge - Karl May und seine Verleger 1888 – 1912". M.E. fühlte er sich genau dort am wohlsten! Nicht unterschlagen werden soll seine Forschung zu Karl May und Friedrich Ernst Fehsenfeld - der Autor und der Verleger[13]. Zu Fehsenfeld vergleiche man auch in den Badischen Biographien, Neue Folge Band V[14]. Grundlegend zum Spannungsfeld Autor- und Verlegerschaft: „Das Genie und die Geschäfte. Der Konflikt Dr. Johann Peter Eckermanns (Weimar) mit dem Verlag F.A. Brockhaus (Leipzig) über „Goethes Gespräche mit Eckermann". Zum Autor-Verleger-Verhältnis im 19. Jahrhundert", ein weiteres Meisterwerk, das sich in der UFITA 2010/III (S. 747-794) abgedruckt findet und dem sein Vortrag auf der Tagung des Arbeitskreises „Geschichte des Urheberrechts" im Septem-

[5] Irmtraud Götz von Olenhusen / Albrecht Götz von Olenhusen (Hg.): *Von Goethe zu Google. Geistiges Eigentum in drei Jahrhunderten*. Düsseldorf, 2011.
[6] S. 729-743.
[7] UFITA 2014/II, S. 435-513.
[8] Beide Vorträge / Aufsätze traditionell in der UFITA 2002/III, S. 809-824 sowie UFITA 2008/II, S. 441-463.
[9] UFITA 2003, S. 398-440.
[10] UFITA 2003/III, S. 695-724.
[11] Nummer 182, Dezember 2014, 4. Quartal, 46. Jahrgang, S. 44-52.
[12] S. 429-460.
[13] S. 16-22 zur Broschüre „Der Freiburger Karl-May-Verleger Friedrich Ernst Fehsenfeld", Karl-May-Verlag Bamberg 2002, verfasst von Karlheinz Eckardt, Albrecht Götz von Olenhusen, Peter Kalchthaler, in Zusammenarbeit mit dem Museum für Stadtgeschichte Freiburg i.Br.
[14] S. 73-75, im Auftrag der Kommission für Geschichtliche Landeskunde in Baden-Württemberg, herausgegeben von Fred Ludwig Sepaintner, Stuttgart 2005.

ber 2009 in Leipzig zugrunde liegt. Einem wichtigen Gestalter dieses Arbeitskreises, Rechtsanwalt Dr. Klaus Neuenfeld, hat er einen Nachruf geschrieben[15], und war Mitherausgeber der Festschrift für Klaus Neuenfeld „Im Dienste des Architekten-, Bau- und Urheberrechts“[16].

Gerade auf den erwähnten Arbeitskreis-Tagungen war Albrecht Götz von Olenhusen gestaltend und diskutierend präsent, aber auch außerhalb dieser Tagungen begegnete er uns allen unermüdlich hilfreich, fördernd durch Austausch. *Do ut des?* Ja, aber in der Summe gab er uns weitaus viel mehr als er „nahm“.

4. Weitere gemeinsame Wege

Reichhaltig und geistreich mit wissenschaftlichem Esprit sind Monografien und Aufsätze unseres lieben Freundes Albrecht Götz von Olenhusen, die für uns alle bleiben und uns an ihn erinnern werden, wenn wir uns in künftigen Forschungen auf ihn stützen und ihn zitieren dürfen. Zahllose Einzelwerke wären sicherlich noch zu nennen.

Gemeinsame Unternehmungen sind neben den Tagungen des Arbeitskreises für die Geschichte und Zukunft des Urheberrechts sicherlich die Publikationen in UFITA, Medien und Recht sowie MR-International sowie die Rezensionen im JEHL. Das Buchprojekt wie die Festschrift für Martin Vogel namens „Kreativität und Charakter. Recht, Geschichte und Kultur in schöpferischen Prozessen“[17] mit der feierlichen Übergabe in München an den Jubilar zu dessen 70. Geburtstag bleibt ewig in Erinnerung. Genauso Albrechts großer Aufsatz[18] im Band „Vom Reichshofrat zur Reichsfilmkammer. Privilegienpraxis und Urheberrecht an Büchern und Filmen (16.-20. Jahrhundert)“, Berlin 2019 (Schriften zur Rechtsgeschichte 186). Die Studie zu Elmar Wadle, die Christian Augustin und der Rezensent 2022 herausgegeben haben[19], konnte der Verstorbene noch für das JEHL 2022/I, hier S. 209-210, besprechen.

Für alle diese „Abenteuer“ in den wissenschaftlichen „Schluchten“ sei ihm aufrichtig gedankt.

Die Hommage an Albrecht Götz von Olenhusen möge der Titel eines Sammelbandes[20] beschließen, dem ein in Wien im Jahre 2006 gehaltener Vortrag zugrunde liegt mit dem Titel: „Max Weber und die Anarchisten“. Der Kongress war der 6. Internationale Otto Gross-Kongress, bei dem es um die Rebellion des Otto Gross ging: „Da liegt der riesige Schatten Freuds jetzt nicht mehr auf meinem Weg“.

Thomas Gergen*

[15] A Fellow of Infinite Jest, of Most Excellent Fancy… - Nachruf auf Rechtsanwalt Dr. Klaus Neuenfeld, Weimar 17. 12. 1935–19. 5. 2021, in: Stefan Meder (Hg.), *Geschichte und Zukunft des Urheberrechts III*, Göttingen 2022, S. 269-271.

[16] Inge Gräfin Dohna/Albrecht Götz von Olenhusen (Hg.), *Im Dienste des Architekten-, Bau- und Urheberrechts. Festschrift für Klaus Neuenfeld zum 80. Geburtstag*. Hamburg 2016.

[17] *Festschrift zum siebzigsten Geburtstag für Martin Vogel*. Hamburg, 2017.

[18] Aufsatztitel: *Filmkünstler und Filmproduzenten zwischen Urheberrecht und gewerblichem Rechtsschutz. Die Filmurheberrechtsreform in der Zwischenkriegszeit 1929-1939*, S. 325-401.

[19] „von Natur im Besitze des Gedankens selbst“ (Siebenpfeiffer) - Elmar Wadles Auseinandersetzung mit dem gewerblichen Rechtsschutz und dem Urheberrecht im Deutschen Bund, Kleine Schriftenreihe der Siebenpfeiffer-Stiftung, Bd. 20, Homburg/Saar, 2022.

[20] Herausgeber sind Raimund Dehmlow, Ralf Rother und Alfred Springer, Marburg an der Lahn, 2008, S. 184-198.

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Die Saar-Verfassung vom 15. Dezember 1947 – Erinnerung und Würdigung zu 75 Jahren Parlamentsgeschichte

Mit einem klaren und folgenreichen Nein stimmten die Saarländerinnen und Saarländer gegen das Europa-Statut am Sonntag, dem 23. Oktober 1955. Nach einer Übergangsphase wurde das Saarland 1957 zehntes Bundesland der Bundesrepublik Deutschland und trat damit dem Geltungsbereich des deutschen Grundgesetzes bei[1]. Alle kennen das Bundesverfassungsgericht, das von Karlsruhe aus sorgsam auf die Einhaltung des „Bonner Grundgesetzes“ achtet, welches am 23. Mai 1949 in Kraft trat und das für das Saarland erst später, als Land der Bundesrepublik, zur nationalen Verfassung wurde. Nahezu 18 Monate älter als das Grundgesetz ist dagegen die saarländische Verfassung: Die Saar-Verfassung

[1] Amtsblatt (ABl.) Saarland 1956, S. 797, sowie Saarländische Rechts- und Steuerzeitschrift 1956, S. 71. Zum Recht der Saar vor und nach der Abstimmung siehe Thomas Gergen, Politische Entscheidungsjahre 1815, 1935 und 1955. Zäsuren und Übergänge aus Sicht der Rechtsgeschichte. In: Gabriele B. Clemens (Hg.), *Schlüsseljahre. Zäsuren und Kontinuitäten an der Saar 1815-1935-1955* (Veröffentlichungen der Kommission für Saarländische Landesgeschichte 49). Saarbrücken, 2017, S. 51-88, insbes. S. 69-87.

wurde am 15. Dezember 1947 nicht per Volksabstimmung (wie das 1955er Referendum) erlassen, sondern vom saarländischen Landtag verabschiedet[2].

1. Grundrechte und Grundpflichten seit 75 Jahren in der Saar-Verfassung

Seit 1947 enthält die Saar-Verfassung einen umfangreichen Katalog nicht nur an Grundrechten, sondern auch an Grundpflichten – insgesamt fast 60 Artikel. Wie andere Verfassungen deutscher Bundesländer enthält die Saar-Verfassung Grundrechte, also Ansprüche des Bürgers gegen den Staat, die jede Staatsgewalt beachten muss und die seit Anfang 1959 vor dem eigens eingerichteten Verfassungsgerichtshof des Saarlandes eingeklagt werden können. Professor *Roland Rixecker* ist vielen Menschen als langjähriger Präsident dieses obersten saarländischen Gerichtes vertraut. Gemeinsam mit Professor *Rudolf Wendt* hat er den Kommentar zur Saar-Verfassung herausgegeben[3].

Die Saar-Verfassung gibt uns außerdem Auskunft, wie der Staat funktioniert, d.h. welche saarländischen Staatsorgane für die Bürger arbeiten: Regierung und Ministerien, Verwaltung, Gerichte und Landtag.

2. 100 Jahre Parlamentsgeschichte an der Saar („Landesrat" 1922-1934)

Zur Parlamentsgeschichte ist zu sagen, dass der Landtag des Saarlandes die Verfassung am 15. Dezember 1947 angenommen hat, also vor 75 Jahren, es aber sogar eine 100jährige Parlamentsgeschichte an der Saar gibt: Denn schon vor genau 100 Jahren wurde zur Saargebietszeit (1920-1935) der „Landesrat"[4] eingerichtet, der aber nicht die vollen Funktionen eines Parlamentes innehatte. Denn er durfte keinen Haushalt oder Gesetze beschließen, sondern nur zustimmen. Trotzdem arbeitete der Landesrat seit seiner Einberufung im Jahre 1922 als Sprachrohr für die Belange der Menschen an der Saar bis kurz vor der Abstimmung am 13. Januar 1935[5]. Danach herrschte die NS-Diktatur, die die Demokratie auf null degradierte.

Demokratische Tradition kennt man an der Saar schon länger, denn saarländische Abgeordnete saßen im Reichstag, im preußischen und im bayerischen Landtag. Allerdings gab es damals noch kein eigenes Staatsgebilde bzw. Gebietskörperschaft wie Saarland resp. Saargebiet (Saarbeckengebiet ist die Bezeichnung des Versailler Vertrages). Über die Herkunft und Zusammensetzung des Saarlandes aus verschiedenen Gebietsteilen klärt das aktuelle Wappen auf: Das Wappen des Bundeslandes Saarland führt seit 1957 die Wappen der vier wichtigsten Gebietsvorgänger auf: Grafschaft Saarbrükken, Kurtrier sowie die Herzogtümer Pfalz-Zweibrücken und Lothringen.

3. Zur Präambel und Urfassung von 1947

Der heutige Leser der Saar-Verfassung erkennt, dass im zweiten Hauptteil von „Staat" die Rede ist: Das Saarland ist Bundesland mit eigenem Staatsgebiet, Staatsvolk und Staatshoheit. Die Verfassung von 1947 titelte indessen noch „Ordnung und Aufgaben der öffentlichen Gewalt", gebrauchte den Begriff des Staates vorsichtig. Denn 1947 war die Bundesrepublik noch nicht gegründet, es gab noch kein Grundgesetz und Deutschland stand unter Oberster Alliierter Hoheit. Die Saar zählte seit Juli 1945 zur französischen Besatzungszone, durfte also noch keine völlige Souveränität beanspruchen. Der Begriff „Saar-Staat" bezeichnet sehr oft die Teilautonomie, die das Land damals hatte. Hierauf wirkte Militärgouverneur Gilbert Grandval im oftmaligen Hader mit Paris hin. Grandval wurde im Jahr 1948 Hoher Kommissar an der Saar. Professor *Rainer Hudemann* hat in seinen Forschungen und ganz besonders in seiner Rede vor dem Landtag des Saarlandes zu dessen 50jährigen Bestehen 1997 überzeugend dargelegt[6], wie sehr Grandval in Paris für die Saar Position ergriffen hat.

In historisch verantwortungsbewusster Weise wählten die Abgeordneten unter Vorsitz des späteren ersten Ministerpräsidenten Johannes Hoffmann (CVP) die Möglichkeit, die Zukunft der Saar noch offenzulassen. Dies wird in der „Präambel" ausgeführt, die die Grundsätze für das damalige politische Handeln ohne völkerrechtliche Verbindlichkeit erläuterte. Die „Präambel" stellte eine Besonderheit der Saar-Verfassung dar, die nach der schrecklichen Erfahrung im Nazi-Deutschland die Grundrechte an erste Stelle rückte, so

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[2] Nachweise und Differenzierungen bei Thomas Gergen, Die saarländische Verfassung von 1947: Landesgrundgesetz mit Frankreich-Präambel. In: *Die Saar 1945 - 1955: Ein Problem der europäischen Geschichte - La Sarre 1945-1955: Un problème de l'histoire européenne*. Hrsg. von Rainer Hudemann, Raymond Poidevin † und Armin Heinen. Unter Mitarbeit von Thomas Kees. 3. maßgeblich erweiterte Auflage. München, 2022, S. 557-574.

[3] Rudolf Wendt / Roland Rixecker sowie die Mitglieder des Verfassungsgerichtshofes des Saarlandes (Hg.), *Die Verfassung des Saarlandes, Kommentar,* 1. Aufl., Saarbrücken, 2009.

[4] VO betreffend die Wahlen zum Landesrat vom 19. 5. 1922, ABl. Saargebiet vom 20. 5. 1922, S. 76; 25. 6. 22 Wahlen, Juli 22 konstituierende Sitzung, Geschäftsordnung Landesrat vom 31. 10. 1922, ABl. Saargebiet S. 209: 4 Wahlen folgten.

[5] Thomas Gergen, Recht im Saargebiet, in: Simon Matzerath (Hg.), *Die 20er Jahre. Leben zwischen Tradition und Moderne im internationalen Saargebiet (1920-1935), Begleitband zur Ausstellung im Historischen Museum Saar*. Saarbrücken, 2020, S. 26-33 sowie zur älteren Entwicklung: Gergen, Preußische Formung des Rheinischen Rechts? Rezeption, Rechtsangleichung und Translation von Recht im 19. Jahrhundert, in: Gabriele Clemens (Hg.), *Preußen an der Saar* (Veröffentlichungen der Kommission für Saarländische Landesgeschichte 50). Saarbrücken, 2018, S. 57-79, v.a. S. 64-66, 78-79, sowie zur Gerichtsbarkeit ders., Saarlouis – *Siège présidial* und Oberster Gerichtshof. Ein Blick auf die saarländische Rechtsgeschichte seit 1679, in: Ulrich Falk, Markus Gehrlein, Gerhart Kreft und Marcus Obert (Hg.), *Rechtshistorische und andere Rundgänge. Festschrift für Detlev Fischer*. Karlsruhe, 2018, S. 129-149.

[6] Grundlegend Rainer Hudemann, *50 Jahre Landtag - 40 Jahre Bundesland. Notizen zur saarländischen Identität, in: 50 Jahre Landtag des Saarlandes. Protokoll der Sondersitzung des saarländischen Landtages aus Anlaß seines 50jährigen Bestehens am 12. September 1997*. Saarbrücken, 1997, S. 21-36, hier S. 23-26; Michael Sander, Die Entstehung der Verfassung des Saarlandes, in: Präsident des Landtages des Saarlandes (Hg.), *40 Jahre Landtag des Saarlandes*. Saarbrücken, 1987, S. 9-40, hier S. 31-38, sowie Bernhard Stollhof, Die Entwicklung der Verfassung von 1947 bis heute, in: ebd., S. 129-144.

wie wir es auch aus dem Grundgesetz (Artikel 1 bis 20) und den Verfassungen anderer Bundesländer kennen.

Die Präambel der Saar-Verfassung vom 15. Dezember 1947 sei nachfolgend ganz zitiert:

Das Volk an der Saar,
berufen, nach dem Zusammenbruch des Deutschen Reiches sein Gemeinschaftsleben kulturell, politisch, wirtschaftlich und sozial neu zu gestalten,
durchdrungen von der Erkenntnis, daß sein Bestand und seine Entwicklung durch die organische Einordnung des Saarlandes in den Wirtschaftsbereich der französischen Republik gesichert werden können,
vertrauend auf ein internationales Statut, das die Grundlage für sein Eigenleben und seinen Wiederaufstieg festlegen wird,
gründet seine Zukunft auf den wirtschaftlichen Anschluß des Saarlandes an die französische Republik und die Währungs- und Zolleinheit mit ihr, die einschließen:
die politische Unabhängigkeit des Saarlandes vom Deutschen Reich,
die Landesverteidigung und die Vertretung der saarländischen Interessen im Ausland durch die französische Republik,
die Anwendung der französischen Zoll- und Währungsgesetze im Saarland,
die Bestellung eines Vertreters, der Regierung der französischen Republik mit Verordnungsrecht zur Sicherstellung der Zoll- und Währungseinheit und seiner Aufsichtsbefugnis, um die Beobachtung des Statuts zu garantieren,
eine Organisation des Justizwesens, die die Einheitlichkeit der Rechtsprechung im Rahmen des Statuts gewährleistet.
Der Landtag des Saarlandes, vom Volke frei gewählt,
hat daher,
um diesem Willen verpflichtenden Ausdruck zu verleihen und - nach Überwindung eines Systems, das die menschliche Persönlichkeit entwürdigte und versklavte -, Freiheit, Menschlichkeit, Recht und Moral als Grundlagen des neuen Staates zu verankern, dessen Sendung es ist, Brücken zur Verständigung der Völker zu bilden und in Ehrfurcht vor Gott dem Frieden der Welt zu dienen,
die folgende Verfassung beschlossen: […]

4. Provisorische Verfassung: Landesgrundgesetz

Politisch sollte, so die Präambel, die Saar vom „Deutschen Reich" unabhängig, sich vor allem in Zoll-, Währungs- und Wirtschaftsunion sowie Außenvertretung an Frankreich orientieren. Damit lag keine Annexion, ergo keine Eingliederung in den französischen Staatsverband vor, auch wenn es dafür Überlegungen gegeben hat, wie *Michael Sander* bereits aufgezeigt hat[7]. Offen gelassen wurde die Verbindung zur noch nicht bekannten Nachfolgerin des Deutschen Reiches, denn die Bundesrepublik entstand erst im Mai 1949. Aus deutscher Sicht (Bundesverfassungsgericht) verlor die Saar, selbst nicht als Saargebiet von 1920-1935, niemals die Zugehörigkeit zu Deutschland. Da die Saar nicht als gänzlich souveränes Völkerrechtssubjekt sprechen und der Landtag nur eine provisorische Verfassung beschließen konnte, sind Begriffe wie „Saarprotektorat" bzw. „Protektorats- oder gar „Separatistenverfassung" fehl am Platze[8].

Die vorläufige Situation, die ebenfalls in anderen Bundesländern zum Ausdruck kommt (siehe die „Vorläufige Niedersächsische Verfassung" von 1951), wurde in der Saar-Präambel so konkret wie nötig und so politisch klug wie möglich hauptsächlich von den damaligen großen Parteien formuliert, der Christlichen Volkspartei (CVP) und der Saarländischen Sozialdemokratischen Partei (SPS), die unter Ministerpräsident Johannes Hoffmann (CVP) zwischen 1947 und 1955 oftmals in großer Koalition regierten. Zu nennen ist ebenfalls die DPS (Demokratische Partei des Saarlandes), die später in der FDP/DPS Saar aufging. Dass die europäische Einigung über den Weg Bundesrepublik, in enger Abstimmung mit dem Nachbarn Frankreich in der Grenz- und Großregion „SaarLorLux" (kurz für Saarland, Lothringen, Luxemburg) kam, war noch nicht abzusehen, hat aber die Gegner des Saar-Statuts nach 1955 mit der Hauptidee der europäischen und internationalen Anbindung versöhnt.

In der Präambel der Saar-Verfassung wurde die Vorläufigkeit ausgedrückt, so wie es auch das Grundgesetz tat: „Das gesamte deutsche Volk bleibt aufgefordert, in freier Selbstbestimmung die Einheit und Freiheit Deutschlands zu vollenden." Aus dieser Stellvertretung entwickelte das Bundesverfassungsgericht eine Rechtsauffassung, derzufolge die Bundesrepublik einem Wiedervereinigungsgebot unterlag. Grundgesetz wie Saar-Verfassung waren vorläufige Verfassungen. Beide wurden anlässlich der Vereinigungen zwar parlamentarisch verändert, doch nicht abgeschafft. Das Grundgesetz behielt seinen Namen, die Saar-Verfassung ebenfalls, allerdings ohne Präambel. Dem Leser der aktuellen Verfassung fällt dieser Verlust wahrscheinlich auf, startet die Verfassung unvermittelt mit den Grundrechten und Grundpflichten; ein Vorspann fehlt.

5. Grundrechte der Wirtschafts- und Sozialordnung – im Unterschied zum Bonner Grundgesetz

Die Saar-Verfassung kennt im Unterschied zum Grundgesetz besondere wirtschaftliche und soziale Grundrechte[9]; wichtig ist ihr Artikel 45: „Die menschliche Arbeitskraft genießt den Schutz des Staates. Jeder hat nach seinen Fähigkeiten ein Recht auf Arbeit." Im Teil der „Grundrechte und Grundpflichten" sind sogar folgende öffentlich-rechtlich

[7] Michael Sander, Die Verfassung des Saarlandes. Politische Planung und politischer Erfolg Frankreich, in: Hudemann/Poidevin/Heinen, *Die Saar 1945-1955* (Fn. 2), S. 315-332.
[8] Gergen, Die Verfassung (Fn. 2).
[9] Klaus Grupp, Arbeitnehmerrechte in der Verfassung des Saarlandes, in: *Arbeitskammer-Beiträge*. Saarbrücken, 1998, S. 7-23.

organisierte Kammern der saarländischen Wirtschafts- und Sozialordnung in Artikel 59 als Institutionen garantiert: Industrie- und Handelskammer sowie Handwerks-, Landwirtschafts- und Arbeitskammer des Saarlandes. Wesentlich weiter als das Grundgesetz geht Artikel 56 der Saar-Verfassung mit dem Streikrecht: „Das Streikrecht der Gewerkschaften ist im Rahmen der Gesetze anerkannt." Der Schutz der natürlichen Lebensgrundlagen, also Natur- und Tierschutz, ist nicht nur bloßer Programmsatz, sondern sogar Staatsziel, was der bei der Reform 1999 eingeführte Artikel 59a zum Ausdruck bringt.

6. Internationalisierungsstrategie des Saarlandes mit starkem Heimatbezug

Die Saar-Verfassung bot 1947 wie das Bonner Grundgesetz eine echte Landesverfassung mit Grundrechtskatalog sowie einer international und weltgewandt ausgerichteten Präambel, die eine politische Basisorientierung aussprach. Nach der Streichung der Präambel 1956 wird die Frankreich- und Europa-Strategie indes lebendig weitergeführt.

Wenn es bei der nächsten Verfassungsreform eine neue Präambel geben wird, dann sollte auf die ganz besondere Geschichte der Saar und die Leistungen dieser Präambel eingegangen werden. Einen Anfang macht schon der grundlegende Artikel 60, der in der zuletzt 1992 erweiterten Fassung festlegt, dass „das Saarland eine freiheitliche Demokratie und ein sozialer Rechtsstaat in der Bundesrepublik Deutschland" ist und „für die Beteiligung eigenständiger Regionen an der Willensbildung der Europäischen Gemeinschaften und des vereinten Europa" eintritt: „Das Saarland […] arbeitet mit anderen europäischen Regionen zusammen und unterstützt grenzüberschreitende Beziehungen zwischen benachbarten Gebietskörperschaften und Einrichtungen". Die letzte Änderung der Saar-Verfassung erfolgte 2016, nach der Artikel 120 im Falle einer Aufgabenübertragung oder -veränderung zu Lasten der Kommunen gleichzeitig Bestimmungen über die Deckung der Kosten zwingend vorschreibt (so genanntes „striktes Konnexitätsprinzip").

Die künftige Präambel müsste schließlich den ureigenen und historisch nachweisbaren Saar-Charakter ausrufen: interreligiöser Gottes-Bezug – Vorbild z.B. Rheinland-Pfalz [10]; starke direkte Demokratie von Bürgerinitiativen im „Land der kurzen Wege"; Natur- und Umweltschutz (Klimawandel betrifft uns alle!); Frankreich- wie Europaausrichtung sowie die Stärkung der Saar-Institutionen, die der Meinungs- und Rundfunkvielfalt dienen (Stichwort: Saarländischer Rundfunk) – alles in allem Errungenschaften einer die Demokratie fördernden Diversität, die wiederum Einheit und Zukunftskraft für „das Volk an der Saar" erbringen.

Thomas Gergen*

[10] Dazu kann der Vorspruch der Verfassung von Rheinland-Pfalz eine Vorlage bieten, der immer noch in Kraft ist.
Zur Genese dieser Verfassung und der Landesgründung siehe Rainer Hudemann, Zentralismus und Dezentralisierung in der französischen Deutschland- und Besatzungspolitik 1945-1947, in: Winfried Becker (Hg.), *Die Kapitulation von 1945 und der Neubeginn in Deutschland*. Köln, 1987, S. 181-209, hier siehe v.a. S. 202-205.

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Der Esther-Bejarano-Platz in Saarlouis: Eine Dokumentation wider das Nazi-Unrecht

Am 23. September 2022 lud die Kreis- und Europastadt Saarlouis zur Einweihung des Esther-Bejarano-Platzes ein. In seiner Sitzung vom 09. September 2021 hatte der Stadtrat bereits einstimmig beschlossen, das Andenken an die am 15. Dezember 1924 in Saarlouis als Esther Loewy geborene Überlebende des Konzentrationslagers Auschwitz [1] zu würdigen und einen Platz in der Innenstadt nach ihr zu benennen, und zwar vor der ehemaligen Synagoge, im so genannten „Postgässchen" in der Saarlouiser Altstadt.

Als Esther Loewy in den 1920er Jahren in Saarlouis das Licht der Welt erblickte, lag Saarlouis im Saarbeckengebiet, kurz Saargebiet (1920-1935), welches infolge des Friedensvertrages von Versailles zum 10. Januar 1920 geschaffen worden war. Saarlouis war zudem Sitz des Obersten Gerichtshofes [2]

[1] Siehe ihre Lebensstationen dargestellt von Roland Schmitt unter https://www.literaturland-saar.de/personen/esther-bejarano/ [26. 09. 2022].

[2] Gergen, Saarlouis – *Siège présidial* und Oberster Gerichtshof. Ein Blick auf die saarländische Rechtsgeschichte seit 1679. In: Falk/Gehrlein/Kreft/Obert (Hg.), *Rechtshistorische und andere Rundgänge, Festschrift für Detlev Fischer*. Karlsruhe, 2018, S. 129-149. Sowie mit weiterem Bildmaterial in: *Unsere Heimat (Mitteilungsblatt des Landkreises Saarlouis für Kultur und Landschaft)*, vol. 3, 2018, S. 97-1; Ders., Die Zwischenkriegszeit in der saarländischen Rechtsgeschichte - mit Beispielen aus Arbeits- und Sozialrecht im Saarjahrhundert (1920-2020). In: *Saar(jahr)hundert*, hg. Arbeitskammer des Saarlandes, 2020, S. 30-67 sowie Historiographie ‚sans frontières': Saarland - Grenzregion in Europa. In: *Zeitschrift für die Geschichte der Saargegend*, vol. 68, 2020, S. 173-188.

an der Saar, die von einer Regierungskommission unter Mandat des Völkerbundes regiert wurde. Damit war Saarlouis damals wie heute eine weltgewandte und weltoffene Stadt.[3] Saarlouis[4] hat als erste saarländische Stadt öffentlich der verschleppten und ermordeten jüdischen Pfadfinder gedacht.[5]

Oberbürgermeister Peter Demmer unterstrich, dass Saarlouis seine Ehrenbürgerin Esther Bejarano als bedeutende Persönlichkeit ehren möchte, weil sie unbeirrt und engagiert gegen Rassismus, Ausgrenzung und Antisemitismus kämpfte. Esther Bejarano, verstorben am 10. Juli 2021 nach kurzer, schwerer Krankheit, war des Öfteren in Saarlouis und sang „gegen rechts" mit der Band „Bejarano Microphone Mafia", eine Rap-Formation, die auch *post mortem* weitersingt im Sinne von Esther Bejarano (1924-2021): „Nie schweigen. Ihr sollt die Stimme gegen das Vergessen sein, wenn wir nicht mehr da sind!"[6]

Die Festrede der Vorsitzenden der Synagogengemeinde Saar, **Ricarda Kunger**, zeichnete Leben und Wirken von Esther Bejarano nach und verdient diese Veröffentlichung, welche bereichert wird durch das Gedicht von **Alfred Gulden**[7], der bei der Feierstunde zugegen war; es lautet: Synagoge Saarlouis Silberherzstraße.

Nino Deda (Neunkirchen-Hangard) spielte auf seinem Akkordeon folgende Stücke:
Auf dem Fluss brennt ein Feuer (tradit.)
Klezmer Freilach (Musik: Nino Deda)
Spilsche mir a lidele…(tradit.)
Bella Ciao (Partisanen-Lied)

Das Akkordeon war das vollends passende Instrument dieser Erinnerungsveranstaltung, da es das Instrument war, welches Esther Bejarano im Lager das Leben rettete. Obwohl sie es nicht zu spielen beherrschte, nahm sie allen Mut auf, sich einzuspielen und hatte damit Erfolg. Damit traf sie in Not eine folgenreiche Entscheidung; Näheres dazu trägt Richarda Kunger vor.

Schließlich folgen Ausschnitte aus der Festschrift der Alten Synagoge von Saarlouis aus dem Jahre 1928, die der Saarlouiser Rechtsanwalt Werner Vanghel dankenswerterweise beigesteuert hat sowie ein Bericht des Leiters der Dokumentationsstelle der Arbeitskammer des Saarlandes, Dr. Frank Hirsch, über die Verleihung des 2. Ester-Bejarano-Filmpreises 2022 in Saarbrücken. Folgende Reihenfolge ergibt sich somit für unsere Dokumentation:

I. Ricarda Kunger: Würdigung von Esther Bejarano (Ansprache)

II. Alfred Gulden: Synagoge Saarlouis Silberherzstraße

III. Auszüge aus der Festschrift der Synagoge Saarlouis (1828-1928)

IV. Bilder der Einweihung des Saarlouiser Esther-Bejarano-Platzes vom 23. September 2022

V. Frank Hirsch: Der 2. Esther-Bejarano-Filmpreis 2022. Erinnern und Gestalten

I. Ricarda Kunger: Würdigung von Esther Bejarano (Ansprache)

Sehr geehrter Herr Oberbürgermeister Demmer,
Sehr geehrter Herr Professor Rixecker,[8]
Sehr geehrte Damen und Herren,

die Synagogengemeinde Saar begrüßt die Initiative der Stadt Saarlouis, diesem Platz den Namen Esther-Bejarano-Platz zu geben. Sie ehrt damit eine jüdische Mitbürgerin, die sich unerschrocken gegen den wieder aufkeimenden Antisemitismus und Rechtsextremismus eingesetzt hat.

Es wäre zu begrüßen, wenn hier ein Barcode angebracht würde. So könnten dann auch interessierte Mitbürger das Leben und Wirken dieser außergewöhnlichen Persönlichkeit näher kennen lernen. Ab heute nennen wir den Platz vor der Gedenkstätte der ehemaligen Synagoge Esther-Bejarano-Platz.

Esther Bejarano: Wer war diese Person? Ja, wir fragen uns, wer war sie, denn sie weilt nicht mehr unter uns.

Ihr Vater nannte sie „Frech wie Oskar" – brav sein wollte sie auch in hohem Alter nicht. Wenn in ihrem Wohnort Hamburg ein Prozess gegen einen früheren KZ-Wächter lief und sie im Saal saß, nannte sie die Verhandlung eine Farce,

[3] Zum noch allzu wenig erforschten Wirken von Otfried Nippold, Präsident des Obersten Gerichtshofes zwischen 1921 und 1934 in Verbindung mit dem OVG des Saargebietes: Siehe Nippold, Otto Friedrich Richard (1864-1938): https://www.deutsche-digitale-bibliothek.de/person/gnd/117022020; Andreas Thier, „Nippold, Otfried". In: *Neue Deutsche Biographie 19* (1999), S. 284 [Online-Version]; URL: https://www.deutsche-biographie.de/pnd117022020.html#ndbcontent [18. 09. 2022].
Siehe die beiden Bände: Deutschland und das Völkerrecht, beide erschienen 1920 in Zürich: Die Grundsätze der Kriegsführung sowie Die Verletzung der Neutralität Luxemburgs und Belgiens.

[4] Zum Gedenken mittels Stolpersteine siehe Oranna Dimmig, https://institut-aktuelle-kunst.de/kunstlexikon/saarlouis-demnig-stolperstein-cahn-leo-emilie-und-leonie-wolff-ludwig-1369 [04. 12. 2022].

[5] Im Frühjahr 2022 folgte St. Ingbert, siehe Gergen, Pfadfinden und Recht an der Saar. Rede anlässlich der Gedenkfeier zur Erinnerung an die jüdischen Pfadfinder in St. Ingbert/Saar. In: *Journal on European History of Law*, vol. 13, Nr. 2, 2022, S. 163-165.

[6] Arbeitskammer des Saarlandes, Rundbrief zum Filmpreis, 2. Esther-Bejarano-Preis 2022, 18. Oktober 2022. Siehe: erinnert.euch@arbeitskammer.de

[7] Zur Vita von Gulden, siehe Rainer Petto, https://www.literaturland-saar.de/personen/gulden/ [05. 12. 2022].

[8] Professor Dr. iur. Roland Rixecker, Präsident des Verfassungsgerichtshofes des Saarlandes und saarländischer Landesbeauftragter gegen Antisemitismus und für das jüdische Leben.

wenn versucht wurde die Gräueltaten der NS-Verbrecher zu relativieren. Wenn Flüchtlinge drangsaliert wurden, schimpfte sie öffentlich, das sei eine Schande für die Stadt. Wenn irgendwo Neonazis aufmarschierten, sang sie laut mit Rappern gegen Rassismus und Antisemitismus an.

Esther Bejarano wurde in unserer Stadt als Esther Loewy am 15. Dezember 1924 als jüngstes von vier Geschwistern geboren. Ihr Vater, Rudolf Loewy, war Kantor und Lehrer der ehemaligen Synagogen-Gemeinde Saarlouis. Ihre Mutter, Margarete Loewy geb. Heymann, war Lehrerin.[9] 1926 zog die Familie nach Saarbrücken, da ihr Vater in der dortigen Synagogengemeinde eine Stelle als Oberkantor angenommen hatte.

1935, nach der Rückgliederung des Saargebietes in das Deutsche Reich, wurden auch die Repressalien gegen die jüdischen Familien stärker. Jüdische Kinder durften nicht mehr auf „arische Schulen“ gehen, sie mussten fortan jüdische Schulen besuchen, so auch Esther Bejarano.

1936 zog die Familie nach Ulm, ihre beiden älteren Geschwister wanderten 1937 aus Deutschland aus. Ihr Bruder nach Amerika und ihre Schwester nach Palästina. Esther wurde 1940 in ein Vorbereitungslager bei Berlin zur Auswanderung nach Palästina geschickt. 1941 beginnen die Nazis mit der systematischen Vernichtung von Juden. Esther Bejaranos Eltern werden von Breslau nach Kowno in Litauen[10] deportiert und dort mit 1000 anderen Juden erschossen. Sie selbst wird zur Zwangsarbeit in das Lager Neuendorf bei Fürstenwalde einbestellt.

1943 wird Esther in das Vernichtungslager Auschwitz deportiert. Sie erhält die Häftlings-Nr. 41948, die ihr eintätowiert wird. Dies Tätowierung lässt sie sich in den 1980ziger Jahren entfernen. Sie und ihre Mitgefangenen schliefen auf Brettern, ohne Stroh und ohne Decken. Sie erhielten wenig Essen, mussten Steine schleppen. SS-Wächter prügelten auf die Gefangenen ein. Aber sie hatte Glück. Sie wurde gefragt, ob sie im Lager-Orchester mitwirken kann. Gesucht wurde eine Akkordeonspielerin. Obwohl sie das Instrument nicht beherrschte, sagte sie zu. Zu Hause hatte sie Klavier gespielt, und es gelang ihr, die richtigen Töne zu finden. Das war ihre Rettung. Das Orchester spielte, wenn die anderen zur Arbeit gingen, wenn neue Transporte im Lager ankamen, die Menschen aussortiert wurden, für die Gaskammern oder für das Arbeitslager. Sie mussten spielen, während diese Menschen in den Gaskammern ermordet wurden.

Esther erkrankte an Typhus, kam mit hohem Fieber ins Lazarett. Wie alle jüdischen Häftlinge bekam sie keine Medikamente und war dem Tode nah. Doch offenbar rettete sie ihre Bedeutung für das Orchester. Otto Moll, ein hoher SS-Offizier, der in Auschwitz-Birkenau die Gaskammern und Krematorien leitete und sich für die Musik im Lager verantwortlich fühlte, veranlasste, dass Esther die notwendige Medizin bekam und so wieder gesund wurde. Es ging ihm dabei nicht um Esther, sondern allein um das Orchester. Moll war ein gefürchteter Sadist, der Gefangene von seinen Hunden zerfleischen und Kinder bei lebendigem Leib verbrennen ließ.

Nachdem Esther genesen war, kam sie im November mit 70 anderen Frauen in das KZ Ravensbrück, weil sie „arisches Blut“ in den Adern hatte. Ihre Großmutter väterlicherseits war nichtjüdischer Abstammung. 1945 zwangen die Nazis die Insassen zum „Todesmarsch“ ins mecklenburgische Malchow. Esther überlebte, sie wurde von US-Soldaten gerettet.

Erst nach Kriegsende erfuhr sie, dass ihre Eltern und ihre Schwester Ruth ermordet worden waren. Sie ging zu ihrer Schwester nach Israel und verbrachte dort die nächsten 15 Jahre. Sie machte eine Ausbildung als Sängerin, heiratete Nissim Bejarano und bekam zwei Kinder. Die Familie beschloss 1960, Israel zu verlassen und nach Deutschland zu gehen. Sie zogen nach Hamburg, eröffneten eine kleine Wäscherei. Später eröffnete ihr Mann eine Diskothek in Uetersen, die sie aber wieder infolge antisemitischer Hetze der Bewohner schließen mussten. Sie zogen nach Hamburg zurück. Esther eröffnete eine Boutique, ihr Mann wurde Feinmechaniker, ihr Sohn Versicherungskaufmann und ihre Tochter Sängerin.

In den 70er-Jahren holte ihre Vergangenheit sie wieder ein. In der Nähe ihres Ladens bauten Mitglieder der rechtsextremen NPD einen Infostand auf, und sie musste mit ansehen, wie die Polizei gegen Menschen vorging, die gegen die Neonazis protestierten. Sie sah, wie Neonazis ihre Flugblätter verteilten, wie sie auf Gegner einschlugen. Sie sah, wie die Polizisten daraufhin die Antifaschisten verhafteten. Esther sagte denen, dass sie im KZ gewesen war und nicht begreifen könne, dass sie Nazis schützten. Einer der Polizisten sagte, in Russland gäbe es auch KZs und außerdem sollte sie nach Hause gehen, sonst würde sie noch einen Herzinfarkt bekommen.

Daraufhin war sie auf hunderten Veranstaltungen gegen Rechtsextremismus. Sie erzählte in Schulen von ihrer Zeit in Auschwitz, protestierte auf Demos gegen die Neonazis. Sie übernahm den Vorsitz des deutschen Auschwitz-Komitees, ergriff das Wort für Flüchtlinge und sang mit der Band „Microphone Mafia“ auf Konzerten gegen rechts. Auch dort transportierte sie ihre Botschaft, dass sich die Geschichte nie wiederholen darf. Umso besorgter blickte sie auf die Parallelen zwischen heute und damals – auf die Verrohung der Sprache, die sie bei AfD-Funktionären beobachtete. Und auch wenn sich europäische Länder weigerten, Flüchtlinge aufzunehmen, dann erkannte sie ein Muster von damals.

Ich zitiere aus einem Spiegelinterview:

[9] Johannes A. Bodwing, https://www.saarbruecker-zeitung.de/saarland/saarlouis/saarlouis/steine-erinnern-an-esther-bejaranos-familie_aid-1602381 – SZ vom 15. Oktober 2015 [05. 12. 2022].

[10] Kaunas (deutsch veraltet Kauen, russisch Ковно Kowno, belarussisch Коўна Kouna, polnisch Kowno) ist mit über 300.000 Einwohnern heute die zweitgrößte Stadt Litauens.

„Das war damals genau dasselbe. Zum Beispiel meine Schwester, die ist geflüchtet in die Schweiz. Man hat sie wieder zurückgeschickt auf deutschen Boden, und sie ist ermordet worden. Heute ist das etwas anders, aber es ist ähnlich."

„Ich weiß, was weiterkommt, wenn es so weitergeht und wenn man nichts dagegen macht. Und wenn diese rechtslastigen Parteien noch stärker werden, dann sehe ich ganz schwarz. Weil dann kann genau dasselbe passieren, was damals geschah."

In einem offenen Brief schrieb sie an den damaligen Bundesfinanzminister Scholz, nachdem der Vereinigung der Verfolgten des Naziregimes (VVN-BdA) die Gemeinnützigkeit aberkannt wurde: *„Das Haus brennt – und Sie sperren die Feuerwehr aus."*

Zum 75. Jahrestag des Endes des Zweiten Weltkrieges hatte sich Ester Bejarano noch in einer Petition dafür eingesetzt, den 8. Mai zum bundesweiten Feiertag zu erklären.

Esther Bejarano war eine der letzten Zeitzeugen, die von den Gräueltaten der Nazis berichten konnte. Sie war eine stetige Mahnerin: *„Ihr habt keine Schuld an dieser Zeit. Aber ihr macht euch schuldig, wenn ihr nichts über diese Zeit wissen wollt. Ihr müsst alle wissen, was damals geschah. Und warum es geschah."* [11]

Ich danke Ihnen.

II. Alfred Gulden: Synagoge Saarlouis Silberherzstraße [12]

…betreffend Sanierung der ehem. Synagoge in der Silberherzstraße Saarlouis… Als Fazit dieser Untersuchung war die Übereinstimmung der an dieser Besprechung Teilnehmenden dahingehend festzustellen, daß eine Objektsanierung einen Aufwand zur Folge hätte, der nicht vertretbar sei… Erklärt sich Herr N. ausdrücklich damit einverstanden, daß die ehemalige Synagoge durch die Kreisstadt Saarlouis bzw. die Gemeinnützige Saarländische Sanierungsträgergesellschaft mbH. Als Treuhänder der Kreisstadt Saarlouis abgebrochen wird… Vor Durchführung der Abbruchmaßnahme ist eine fotogrammetrische Aufnahme des Gebäudekörpers der Synagoge durchzuführen…

Aus einem Protokoll

Schdään fo Schdään
abgereß gen
Schdään un Bään
Bään un Schdään
„Wai lou mòòl hin,
e Naas,
soo lank, soo kromm
han aich nòch kään gesin!"

De Schdään
en da Hand
Se drään

De Schdään
Nòmò hin
Se lään

Schdään fo Schdään
em de Schlachthòff ren

Schdään nòò Schdään
Bään nòò Bään

„Dääa schdällt sich draan
wii da Andamann,
dääa läschdich Judd!"
Hean aich se saan.

Schdään fo Schdään
abgezeelt sen

Schdään of Schdään
Bään of Bään

„E faina Mann!
Deem hättscht de Judd
net aangesin,
kann aich da saan!"

Schdään fo Schdään
vagäß gen?

Schdään om Schdään
Bään om Bään

„Hej es en Krach
wii en da Juddenschool!
Vadammt nòmòòl!
wii en da Juddenschool!"

De Schdään
en de Weech
se lään

De Weech
emma waida
geen

[11] Alles Zitate von Esther Bejarano.

[12] Mit freundlicher Genehmigung des Autors, aus: Alfred Gulden, Die Mundartgedichte. Hennam Baandamm, hennam Baandamm = Vollständige Sammlung der Mundartgedichte Alfred Guldens von „Lou mòòl lòò lòò laida" über „Naischt wii Firz em Kopp" bis „Vis-à-vis ma", ergänzt durch das bisher unveröffentlichte Langgedicht „Schinnen" und begleitet von Schwarzweißfotos des Autors, Merzig 2009, siehe S. 159-163. Zur Vita Guldens, der in Rodener Mundart schreibt, siehe dort, S. 210-211.

Schdään fo Schdään
Bään fo Bään

„Wai saan aich naischt me, saa:
dat wääscht dau dòch wii aich!
Dii han dòch uusen Härrgòtt
dòòmòòls aant Kraiz geschlaa!“

De Schdään gehoof
De Schdään gewòrf,
getròff.

Schdään iwwa Schdään
Bään iwwa Bään

„Dii hant dòch soo gewollt!
Dii sen dòch nirjenswoo dahäm!
Dòò kräänng aich aach de Flämm!
Dii sent dòch sälwa schold!“

Schdään onna Schdään
Bään onna Bään

„Haymchin, Haymchin!
Simmchin, Simmchin,
Jiddchin, Jiddchin!
Zockatiitchin!“

De Schdään
em Krääs
se lään

Em Krääs
sich drään
of Rääs se sen
òòn Änn?[13]

In der Silberherzstraße Nummer 14 errichtete die israelitische Gemeinde 1828, dem Jahre 5588 jüdischer Zeitrechnung, ihre neue Synagoge…[14]

Zur Jahrhundertfeier des Gotteshauses hieß es 1928 im Geleitwort der Festschrift: „… Jahrtausende bauen am Tempel einer lichteren Menschheit“… Zehn Jahre später aber wurde die Synagoge bei den Ausschreibungen der Reichskristallnacht schwer verwüstet.

Aus „Saarlouis in alten Ansichten“, von Hansjörg Schu[15]

1983 wurde die Synagoge Silberherzstraße Saarlouis abgerissen, ihre Steine wurden abgezählt, durchnummeriert und im Städtischen Schlachthof gelagert.

Richtfest an ehemaliger Synagoge setzt Schlußpunkt: Das „Saarlouiser Modell“ besagt, daß die Stadt Saarlouis für die Errichtung der „Synagogenhülle“, also u.a. für die Erd-, Maurer- und Betonarbeiten sowie für den Außenputz aufkommt, während der Innenausbau den künftigen Nutzern übertragen wird… Die künftige Nutzung der Gesamtfläche von 539 Quadratmetern sehe im Erd- und Untergeschoß ein Speiserestaurant, im ersten OG Büro- und Praxisräume und im zweiten OG Wohnungen sowie einen Gedenkraum von rund 28 Quadratmetern vor…

Aus Saarbrücker Zeitung vom 11. 2. 1987[16]

III. Auszüge aus der Festschrift der Synagoge Saarlouis (1828 – 1928)

Erschienen war 1877 eine Festrede zu Kaisers Ehren[17] sowie davor schon 1841 eine Schrift mit Predigt zum Aussöhnungsfest[18].

Es folgt hier der Abdruck der ersten Seiten der Festschrift der Synagoge von Saarlouis aus dem Jahre 1928[19], zur Verfügung gestellt von RA Werner Vanghel[20], Saarlouis. Das Vorwort schrieb der Verfasser L. Wollheim.

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[13] Zur Aussprache der Rodener Mundart nach Professor Dr. Otto Jastrow, Friedrich-Alexander-Universität (FAU) Erlangen (1976) vgl. Alfred Gulden, Hennam Baandamm, S. 208-209 (Mundart Schreiben. Saarlouis-Rodener Alphabet).
Jastrow, geboren am 19. Februar 1942 in Saarlouis ist ein deutscher Arabist. An der FAU führte er den Lehrstuhl für Orientalische Philologie bis 2007. Seine spannende Vita siehe etwa unter https://www.orientalistik.phil.fau.de/person/otto-jastrow/ [26. 09. 2022].
Der Rodener Dialekt (Ródena Platt) war und ist die Mundart folgender Schriftsteller: Nikolaus Fox, Alfred Gulden, Elmar Hein, Erich Hewer, Guido Lemier, Robert Zimmer sowie der Schriftstellerinnen Ursula Kerber und Luise Luft, sodann seit kurzem Marie Pauline Rupp. Diese Autorinnen und Autoren haben in Ródena Platt schon viel veröffentlicht, siehe z.B. Paraple, Revue littéraire. Literaturzeitschrift, Français, Deutsch, Platt, Éditions Gau un Griis in Bouzonville/Lothringen, Magazin mit schon mehr als 40 erschienenen Heften.

[14] Siehe dazu unter III.

[15] https://www.kreis-saarlouis.de/Aktuelles/Hohe-Auszeichnung-fuer-Hans-Joerg-Schu.html [05. 12. 2022].

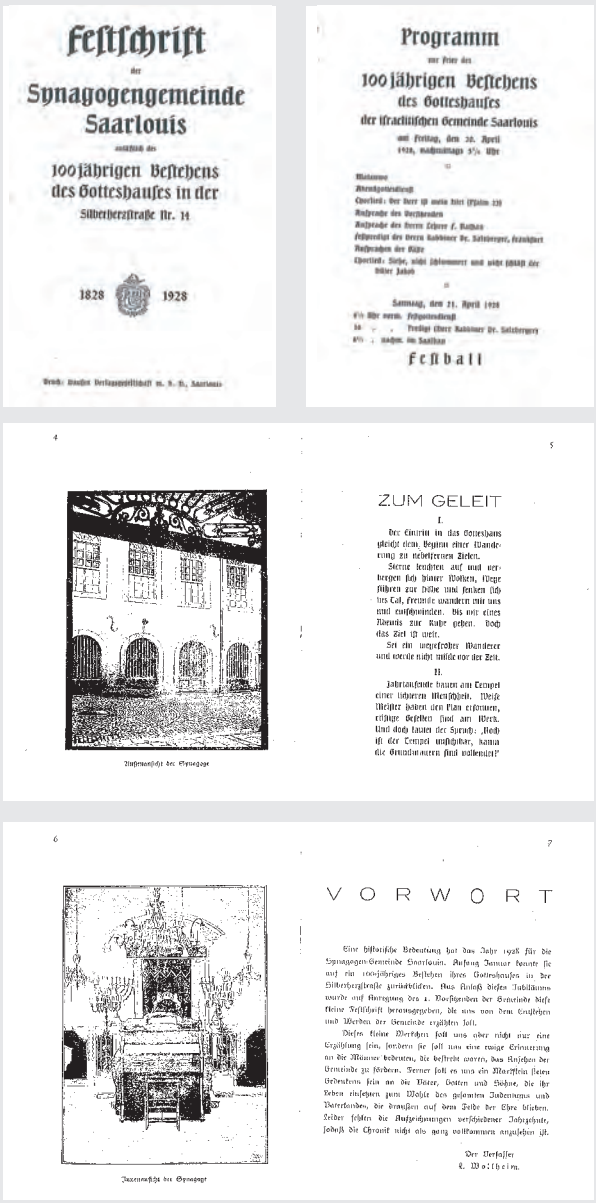
[16] Siehe dazu vom ehemaligen Saarlouiser Oberbürgermeister Richard Nospers, Der Gedenkraum der Synagoge in Saarlouis: Rede zur Einweihung am 9. November 1987, veröffentlicht in: *Unsere Heimat (Mitteilungsblatt des Landkreises Saarlouis für Kultur und Landschaft)*, vol. 13, 1988, S. 92-95.

[17] *Das Vaterland ein Altar: Worte, gesprochen in der Synagoge zu Saarlouis zur Feier des 81. Geburtstages Sr. Majestät des Kaisers Wilhelm I. am 22. März 1877: mit einer Einleitung „Judenthum und Patriotismus“ von L. Wolff, Prediger, Saarlouis* (Commissionsverlag Franz Stein), 1877, 22 Seiten.

[18] Joseph Kahn, *Das Pesach = als Aussöhnungsfest: Predigt gehalten in der Synagoge zu Saarlouis am Sabbath vor dem Pesachfeste 5601 (= 1841)*, Saarbrücken, 1841.

[19] *Festschrift der Synagogengemeinde Saarlouis anläßlich des 100-jährigen Bestehens des Gotteshauses in der Silberherzstraße Nr. 14*, Hausen Verlagsgesellschaft Saarlouis 1928.

[20] Er teilt mit: Auf der Seite 4 der Festschrift sieht man den Eingangsbereich mit dem Vorplatz der Synagoge. Der Eingangsbereich existiert noch heute in der Silberherzstraße mit der jetzigen Nummer 18. In der Silberherzstraße ist aber leider nicht mehr zu erkennen, dass dort der Zugang zu der Synagoge war.



Festschrift
der
Synagogengemeinde
Saarlouis
anläßlich des
100jährigen Bestehens
des Gotteshauses in der
Silberherzstraße Nr. 14
1828 1928

Programm
zur Feier des
100jährigen Bestehens
des Gotteshauses
der israelitischen Gemeinde Saarlouis
am Freitag, den 20. April
1928, nachmittags 5½ Uhr

Samstag, den 21. April 1928
Festball

ZUM GELEIT

I.

Der Eintritt in das Gotteshaus gleicht dem Beginn einer Wanderung zu nebelfernen Zielen.

Sterne leuchten auf und verbergen sich hinter Wolken, Wege führen zur Höhe und senken sich ins Tal, Freunde wandern mit uns und entschwinden. Bis wir eines Abends zur Ruhe gehen. Doch das Ziel ist weit.

Sei ein ungefährter Wanderer und verzage nicht müde vor der Zeit.

II.

Jahrtausende bauen am Tempel einer höheren Menschheit. Weise Dichter hatten den Plan ersonnen, erfüllige Geschlechter sind am Werk. Und doch lauten der Spruch: „Noch ist der Tempel unsichtbar, kaum die Grundsteinmauern sind vollendet."

Aufnahme der Synagoge

VORWORT

Eine historische Bedeutung hat das Jahr 1928 für die Synagogen-Gemeinde Saarlouis. Anfang Januar konnte sie auf ein 100jähriges Bestehen ihres Gotteshauses in der Silberherzstraße zurückblicken. Das Anlaß dieses Jubiläums wurde auf Anregung des 1. Vorsitzenden der Gemeinde diese kleine Festschrift herausgegeben, die uns von dem Entstehen und Werden der Gemeinde erzählen soll.

Dieses kleine Werkchen soll uns aber nicht nur eine Erzählung sein, sondern sie soll uns eine ewige Erinnerung an die Männer bedeuten, die bestrebt waren, das Ansehen der Gemeinde zu fördern. Ferner soll es uns ein Ansporn sein Gedenken sein an die Väter, Gatten und Söhne, die ihr Leben einsetzten zum Wohle des gesamten Judentums und Vaterlandes, die draußen auf dem Felde der Ehre blieben. Leider fehlen die Aufzeichnungen verschiedener Jahrzehnte, sodaß die Chronik nicht als ganz vollkommen anzusehen ist.

Der Verfasser
L. Wolheim.

Innenansicht der Synagoge

IV. Bilder der Einweihung des Saarlouiser Esther-Bejarano-Platzes vom 23. September 2022

Ricarda Kunger bei ihrer Ansprache. Quelle: Stadt Saarlouis.

Blick auf das „Postgässchen", jetziger Bejarano-Platz, anlässlich der Feierstunde. Quelle: Stadt Saarlouis.

Enthüllung des neuen Schildes durch Ricarda Kunger, Oberbürgermeister Peter Demmer sowie Professor Roland Rixecker. Quelle: Stadt Saarlouis.

Schild, das der Besucher betrachten kann. Quelle: Stadt Saarlouis.

V. Frank Hirsch[21]: Der 2. Esther-Bejarano-Filmpreis 2022. Erinnern und Gestalten

Am 18. Oktober 2022 wurde zum zweiten Mal der Esther-Bejarano-Filmpreis im Saarbrücker Kino 8 ½ verliehen. Prämiert wurden herausragende Filmbeiträge von Jugendlichen, die sich kritisch und kreativ mit Themen wie Widerstand im Nationalsozialismus, Fluchterfahrungen und Gefährdungen unserer Demokratie auseinandergesetzt haben.[22]

Ausgelobt wird der Preis von der Arbeitskammer des Saarlandes (AK), die in Artikel 59 der Verfassung des Saarlandes[23] institutionell verankert und als Körperschaft des öffentlichen Rechts verfasst ist. Das saarländische Arbeitskammergesetz von 1951, in der neusten Fassung von 2006, bestimmt, dass die AK des Saarlandes die „allgemeinen wirtschaftlichen, ökologischen, sozialen und kulturellen Interessen der Arbeitnehmer und Arbeitnehmerinnen wahrzunehmen und die auf die Hebung der wirtschaftlichen, ökologischen, sozialen und kulturellen Lage der Arbeitnehmer und Arbeitnehmerinnen abzielenden Bestrebungen zu fördern“ hat.[24] Daraus leiten sich eine Vielzahl von Aktivitäten ab, die unter anderem die Förderung von inner- und außerbetrieblichen demokratischen Strukturen zum Ziel haben. Dies betrifft etwa die Mitbestimmung im Rahmen der Betriebsverfassung, aber auch die Mitwirkung an der Festigung demokratischer Strukturen als Grundvoraussetzung für eine offene und Gesellschaft.

Neben einer Reihe von Aktivitäten etwa im Rahmen der Kampagne „Arbeitnehmer gegen Rechtsextremismus“, nimmt die Arbeitskammer besonders Jugendliche und junge Erwachsene in den Blick. Dazu gehört der 2019 erstmals ausgelobte Esther-Bejarano-Preis, der am 16. Oktober 2022 wegen coronabedingter Einschränkungen zum zweiten Mal vergeben wurde. Zu Esther Bejarano unterhielt die Arbeitskammer im Vorfeld bereits engere Beziehungen, etwa indem sie zusammen mit der Rapgruppe Microphone Mafia Konzerte für die Arbeitskammer an verschiedenen Orten im Saarland gab. Da sie bei ihren vielen Auftritten und Lesungen besonders Jugendliche im Blick hatte, erklärte sich Esther Bejarano auch direkt bereit, dass die Arbeitskammer den Filmpreis nach ihr benennen durfte.

Die insgesamt zwölf Einsendungen zum Wettbewerb von 2022 zeugen von einem tiefen thematischen Verständnis und einem sehr ausgeprägten technischen Niveau. Eine unabhängige Jury, bestehend aus der Filmemacherin und Moderatorin Mo Asumang, der Regisseurin Nora Mazurek und dem Kulturwissenschaftler Prof. Dr. Jonas Nesselhauf, entschied sich nach langen Beratungen dafür, dass der Beitrag „Die Schlangenbande“ von einem jungen Team um den Studenten Silas Degen den ersten Platz einnehmen sollte. Die Gruppe ergründete die Spuren einer jugendlichen Widerstandsgruppe im Nationalsozialismus und beeindruckte die Jury mit einer „überzeugenden Mischung aus Zeitzeugen-Interviews und Ortsbegehungen.“ Der Film sei mutig in Esther Bejaranos Sinne, so die Jury, und wirft die Frage auf: Ist die Vergangenheit bereits auserzählt?[25]

Die zwei weiteren Preise erhielten zwei Teams des Technisch-gewerblichen Berufsbildungszentrums Saarbrücken. Mit dem Film „Jugendpropaganda“ von Johannes Moser, Sebastian Franz und Steven Petry zeichnete die Jury einen Beitrag über aktuelle Positionen von Rechtsextremen und deren Codesprache aus. Die Jury lobte die Reportage als aufwändig gemachten Erklärfilm, der als Lehrvideo für Schulen geeignet wäre.

Die Drittplatzierung gewannen Oliver Paul und Nicolas Drum mit dem innovativen Trickfilm „Der Löffel“ über ein historisches Flüchtlingsschicksal, den die Jury als technisch beeindruckend und gleichzeitig thematisch sehr gelungen hervorhob. Eine lobende Erwähnung erhielt außerdem der autobiografische Film „Grenzenlose Hoffnung“ von Rawan Bozan von den Günter-Wöhe-Schulen Saarbrücken für eine bildstarke Kameraarbeit und ein sehr poetisches Voice-Over.

Im vollbesetzten Kino 8 ½ wurden nicht nur die Gewinnerbeiträge mit einem Gesamtpreisgeld in Höhe von 3000 € prämiert und alle eingereichten Beiträge gewürdigt. Man nutzte auch die Gelegenheit, Esther Bejarano zu gedenken, die am 10. Juli 2021 in Hamburg mit 96 Jahren gestorben ist. Ihrem Erbe bleibt die Arbeitskammer auch in Zukunft verpflichtet.

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[21] Dr. Frank Hirsch ist Leiter des Dokumentationszentrum der Arbeitskammer des Saarlandes, Saarbrücken.

[22] Vgl. zur Ausschreibung und Dokumentation der Beiträge die entsprechende Internetseite: https://www.arbeitskammer.de/erinnert-euch [28. 11. 2022].

[23] Gergen, Die saarländische Verfassung von 1947: Landesgrundgesetz mit Frankreich-Präambel. In: *Die Saar 1945 - 1955: Ein Problem der europäischen Geschichte - La Sarre 1945-1955: Un problème de l'histoire européenne*. Hrsg. von Rainer Hudemann, Raymond Poidevin † und Armin Heinen. Unter Mitarbeit von Thomas Kees. 3. maßgeblich erweiterte Auflage. München, 2022, S. 557-574; Ders., Die Saar-Verfassung: Demokratiebegleiter seit 75 Jahren. In: *Die Saar-Verfassung als Magazin*, Hamburg, 2022, S. 6-7.

[24] Vgl. zum Arbeitskammergesetz im Wortlaut: Gesetz Nr. 1290 über die Arbeitskammer des Saarlandes vom 8. April 1992, zuletzt geändert durch das Gesetz vom 15. Februar 2006 (Amtsblatt S. 474, 530). Die Arbeitskammer des Saarlandes stellt mit der Arbeitnehmer Kammer Bremen eine Besonderheit in Deutschland dar, während etwa die Interessensvertretungen der Unternehmerseite in Form der Industrie- und Handelskammern flächendeckend wirken.

[25] Vgl. zu den Jurybegründungen (Pressemitteilung) und den Filmen selbst das Portal der Arbeitskammer zum Esther-Bejarano-Preis unter https://www.arbeitskammer.de/erinnert-euch [28.11.2022].

Teilnehmer und Jury nach der Preisverleihung im Kino 8 ½ in Saarbrücken. Quelle: AK des Saarlandes.

Gedenken an Esther Bejarano: v.l.n.r. Kutlu Yurtseven, Joram Bejarano (beide Microphone Mafia), die Juryvorsitzende Mo Asumang und die Moderatorin Dörte Grabbert. Quelle: AK des Saarlandes.

Thomas Gergen*

* Prof. Dr. iur. Dr. phil. Thomas Gergen, Maître en droit, Institut Supérieur de l'Économie, ISEC Université Luxembourg, E-Mail: thomas.gergen@ isec.lu / ORCID 0000-0002-0546-204X.

Report on the First Stage of the OTKA Research Entitled "The Development of Private Law in the Interwar Period"

The research team held its first meeting on 1 September 2021. Members included habil. associate professor and project leader Norbert Varga; professor Mária Homoki-Nagy; senior lecturer Máté Pétervári; researcher Dénes Legeza; PhD students Kristóf Szivós and Bence Krusóczki.

After every secondary source was successfully collected related to the topic, and the research of archive sources began during the first stage of the project, the following is the detailed description of the major achievements. the main results of dissemination are detailed below.

Mária Homoki-Nagy dealt with the examination of the historical foundations of contract law relationships. Commercial purchase, as one of the most fundamental contract types of commercial law, did not come to fruition via codification in Hungarian legal practice, but was already established during a much earlier period in the system of common law, demonstrated by the evidences of archival sources. The first legal regulation of commercial purchases was the traffic contract, which received legal regulation via a legislative provision during the modification of the 1944 bills of exchange law, and this served as the foundation of its regulation in contract law.[1] Not to mention that the continuance and survival of some special regulation related to the property rights of women in the 20th century were also researched via archival sources (National Archives of Hungary, Archives of Csongrád-Csanád County IB.B.157.a29/III1854.). Relevant scientific presentations: Das ungarische Handelsgezetzbuch. (Regensburg, 19-20 May 2022); County responses to the works of regular committees. With a specific focus on private law and rent-roll operations (Budapest, 16 Feburary 2022) and Die Entwicklung des ungarischen Vertragsrechts an der Wende vom 19. zum 20. Jahrhundert. (Szeged, 10 June 2022).

In the Act V of 1916, the regulation of compulsory non-bankruptcy settlements was legally reinforced. The aim of Máté Pétervári's research was to dissect the practices of such procedures by examining archive sources following the aforementioned regulation. The concept of compulsory non-bankruptcy settlement was the Hungarian government's response to the economic difficulties emerging during the First World War. Therefore, the first thing to examine is the appliance of the procedure in that era, since guarantees an opportunity to trace feature shifts during the initial timeframe, not to mention its effects on practical law procedures. (National Archives of Hungary, Archives of Bács-Kiskun County VII.2-b. The documents of the Royal Regional court of Kalocsa, Litigation documents 29-32. 1909-1914; 1915-1919.). Relevant scientific presentations: The Effects of the Lifetime Achievements of Kelemen Óvári on the Development of Hungarian Insolvency Law. (Szeged, 14 October

[1] HOMOKI-NAGY, M., Certain Edicts of Commercial Purchase. In: BIRHER, N. – MISKOLCZI-BODNÁR, P. – NAGY P. – TÓTH J., Z. (Eds.), *Studia in honorem István Stipta 70.* Budapest, 2022, pp. 211–221.

2021); The relationship of the Legal Profession and Compulsory Non-Bankruptcy Settlements. (Miskolc, 25 February 2022); Appearance of the Compulsory Non-Bankruptcy Settlement in the Practice of the Royal Regional Court of Kalocsa. (Szeged, 10 June 2022) and The Compulsory Non-Bankruptcy Settlement in the Hungarian Bankruptcy Practice During the First World War (Athens, 12 July 2022).[2]

In one of his essays, Kristóf Szivós examined the appeal stage of civil lawsuits, with a special focus on the question that what situation should allow the litigants to establish new statements of facts and bring forward new pieces of evidence which they failed to do within the frameworks of the first instance proceedings. The essay also highlights the changes introduced by Act XXXIV of 1930.[3] Another topic he tackled during his research was the examination of international predecessors of the Hungarian code of civil procedures by referring German[4] and Austrian[5] procedural law. Furthermore, the researcher analysed one of the most significant achievements in the codification of the Hungarian code of civil procedures, namely the appearance of the principle of the unity of the cause[6] (National Archives of Hungary, Archives of Baranya County VII.2-b the documents of the Royal Regional Court of Pécs, National Archives of Hungary, Archives of Pest County VII.1-b the documents of the Royal Regional Court of Pest region, National Archives of Hungary, Archives of Csongrád-Csanád County VII. 1-b the documents of the Royal Regional Court of Szeged). Relevant scientific presentations: The Practical Questions Regarding the Unity of Oral Hearing After the Codification of Hungarian Law of Civil Procedure. (Krakow, 17 September 2021); The Changes in the Right of Novelty in the Hungarian Civil Procedure in the Interwar Period. (Krakow, 7 October 2021); Before and After Franz Klein. The So-called Socialisation of the Draft of the Code of Civil Procedures at the End of the 19th Century. (Debrecen, 27 May 2022); Die Rolle der Prozessaufnahmeverhandlung in der ersten ungarischen Zivilprozessordnung: Theorie und gerichtliche Praxis. (Szeged, 10 June 2022); The Tools Preventing Undue Delay in Act I of 1911. (Budapest, 17 June 2022) and The Comparative Analysis of Avoiding Undue Delay in the History of Austrian, German, and Hungarian Civil Procedure (Athens, 12 July 2022).

Bence Krusóczki examined the practices of the courts of arbitration of the chamber of commerce, and the practices of the jury. He sought to find a definitive answer to one question by focusing on the general clause of the act on unfair competition (Act V of 1923), and also by examining the practices of the Court of Arbitration of the Budapest Chamber of Commerce and Industry and the Jury of the chamber: what is the moral standard according to which they could decide whether or not a certain business can be considered unfair. Protection against unfair competition mostly can only fall under private law, for most times, unfair competition harmed the competitors' personal rights. Moreover, the researcher examined the Hungarian legislation's certain solutions against unfair competition. (BaCA P. III. 1859 -1934., National Archives of Hungary OL Z 195. J. VII. 1924-126., National Archives of Hungary OL Z 202. Vb. 1925-1927.). Relevant scientific presentations: The Emergence of Competition Law in Hungary. (Krakow, 17 September 2021); Competition Qualification in Relation to Unfair Competition – Is it Unfair to Exceed Closing Time? The Lawsuit of Druggist Against Pharmacists. (Szeged, 10 December 2021); The First Hungarian Competition Act in the Judicial Practice. (Szeged, 10 June 2022) and The Circumscription of Honest Practices According to the Practices of the Budapest Chamber of Commerce and Industry. (Budapest, 17 June 2022.)

In connection with cartel private law, Norbert Varga's main focus was the analysis from a dogmatic (for example, the edicts of the Cartel Court in relation to private law, the principal statement of the Cartel Court on boycotts) and a practical standpoint, supported by examples (for example, coal cartel, Viktória Chemical Plant). He analysed the difficulties of cartel private law, taking the rights and duties of cartel members, and conflict management into account. In connection with the presentation obligation of cartel contracts, the validity requirements were regulated by Act XX of 1931, which meant that the Cartel Act contained mandates of private law, as well. Based on archival sources, it can be stated (for example, electricity transfer cartel, sulphuric acid argil and alum agreement, enamelled cookware cartel, ship agreement) that the regulations on presentation obligation were enforced.[7] (National Archives of Hungary Z Commerce Archives 1585-1948, Na-

[2] PÉTERVÁRI, M., Megakadályozta-e a csődnyitási hullámot az I. világháború alatt a csődönkívüli kényszeregyezség bevezetése a Kalocsai Kir. Törvényszék illetékességi területén? [Whether the Introduction of Compulsory Non-Bankruptcy Settlement Prevented the Wave of Declarations of Bankruptcy in the Area of Competence of Royal Regional Court of Kalocsa During the First World War?] In: *Jogtörténeti Szemle* (under publication).; PÉTERVÁRI, M., Changes in the Hungarian Insolvency Law in the Interwar Period. In: *Krakowskie Studia Z Historii Panstwa i Prawa,* Vol. 15., No. 2., 2022, pp. 227–244.

[3] SZIVÓS, K., The Changes in the Right of Novelty in Hungarian Civil Procedure in the Interwar Period. In: *Krakowskie Studia z Historii Panstwa i Prawa*, Vol. 15, No. 2., 2022, pp. 245–259.

[4] SZIVÓS, K., A perelhúzás liberális szankciórendszerének XIX. századi kialakulása a német jogterületen [The evolvement of liberal sanctions against undue procedural delay in Germany in the 19th century] In: *Iustum Aequum Salutare*, Vol. 18., No. 4, 2022, pp. 81–96.

[5] SZIVÓS, K., A szóbeliség és közvetlenség térnyerése az osztrák polgári perben [The development of orality and immediacy in the Austrian civil procedure] In: *Jogtörténeti Szemle*, Vol. 20., No. 2, 2022 (under publication).

[6] SZIVÓS, K., Das freie Vorbringen und seine Begrenzung nach der Kodifikation des ungarischen Zivilprozessrechts. In: *Journal on European History of Law*, Vol. 13, No. 2, 2022, pp. 114–120.

[7] VARGA, N., Between Public and Private Law: The Foundations of the Regulation of the Hungarian Cartel Law of 1931. In: *Jogtörténeti Szemle*, Vol. 19., Special Issue, 2021, pp. 65–71.; VARGA, N., All Essential Elements of a Cartel Contract Based on a Specific Example, In: BIRHER, N. – MISKOLCZI-BODNÁR, P. – NAGY P. – TÓTH J., Z. (Eds.), *Studia in honorem István Stipta 70*. Budapest, 2022, pp. 505–512.

tional Archives of Hungary BFL. XI. Commerce bodies 1776-1999.). Relevant scientific presentations: Cartel Private Law in the Interwar Period in Hungary. (Athens, 11-14 July 2022); Regulation on the Cartel Agreements in the Interwar Period in Hungary. (Szeged, 14 June 2022); Additions to the History of Cartel Law Regulation According to Relevant Works of Law Professors of Szeged. (Szeged, 14-15 October 2021); The Presentation Obligation of Cartel Contracts During the Interwar Period. (Miskolc, 25 February 2022.) and Cartel Contracts in Practice During the Interwar Period. (Hódmezővásárhely, 30 July-7th September 2022.)

Dénes Legeza summarised the codification backgrounds of the pursuits of copyright law experts. He dealt with the achievements of P. Elemér Balás, one of the most significant private attorneys of the interwar period, especially his copyright law proposal of 1933. It is common knowledge from archival sources that the representative of copyright law codification of the Ministry of Religion and Public Education requested that Endre Nizsalovszky should analyse the proposal, and the text survived in its entirety. Apart from providing a general description of the proposal of Balás, the purpose of the researcher is to process the written review of Endre Nizsalovszky in connection to a handful of topic, for example, personality rights, radio broadcast and the transfer of copyrights through inheritance.[8] (National Archives of Hungary, the archives of the Ministry of Religion and Public Education (Section K), the documents of the Copyright Law Experts Committee, registration number: XIX-I-42). Relevant scientific presentations: The Role of Experts in Copyright Disputes. (Budapest, 24th September, 2021.); The Copyright Law Proposal of P. Elemér Balás, According to Endre Nizsalovszky. (Szeged, 14 October 2021); "What is behind the mp3?" – From Music Rolls to Collective Management of Mechanical Rights (Oslo, 18 February 2022) and The Protection of Authors' Moral Rights in Hungary – In the First Half of the 20th Century (Szeged, 14 June 2022).[9]

In connection to talent management, the class "What Makes a Good Study?" was announced, and within its framework, Máté Pétervári, Norbert Varga, Bence Krusóczki, Dénes Legeza and Kristóf Szivós gave lectures. Graduate students Benedek Varga, István Szabó and Ákos Epinger were also taken into the project for SSA (Student Scientific Association) study topic research and study writing. On the Night of Researchers (24 September 2021), Máté Pétervári and Norbert Varga gave a lecture entitled The Appearance of State Intervention in Economic Life. The event of the 10th Legal Historical Days (14-15 October 2021) was also arranged during the first stage of the project, where the researchers gave lectures. Within the framework of "The 1st Joint Workshop of the Jagellonian University and the University of Szeged" on 10 June 2022, the researchers of both the University of Szeged and the Jagellonian University introduced their respective research results.

Our aim in the second stage of the project is to continue fundamental research, and also to organise a dissemination forum for not only Hungarian and Polish researchers, but also students, which could result in a significant boost in the propagation and educational usage of the results of the research.

Norbert Varga*

[8] LEGEZA, D., The Role of Experts in Hungarian Copyright Disputes. In: POGÁCSÁS, A. (ed.), *Intellectual Creations in the Service of Mankind*. Budapest, 2022, pp. 263–278.

[9] LEGEZA, D., A kereskedelmi forgalomban nem elérhető szerzői művek szabályozásának fejlődése – Mária Teréziától a DSM irányelvig [The Development of Out-of-commerce Works' Regulation – from Maria Theresa to the CDSM Directive]. In: GÖRÖG, M. – MEZEI, P. (ed.), *Innovatív társadalom – innovatív szellemi tulajdonvédelem* [Innovative Society – Innovative Intellectual Property Protection]. Szeged, 2020, pp. 24-42. LEGEZA, D., Development of the Hungarian 'Work Made for Hire' Provisions. In: DAVID, A. F., – VARGA, N., (ed.), *New Studies in History and Law*. Athens, 2019, pp. 47-64.; LEGEZA, D., *A kiadói szerződés története: A reformkortól 1952-ig,* [History of Publishing Contract – From the Reform Era until 1952] Szeged, 2018, 212 p. LEGEZA, D., Az akadémiai pályadíj és a színházi drámajutalom szerzői jogi kérdései [Copyright Issues Concerning Rewards of the Academy and of the National Theatre]. In: *Iparjogvédelmi és Szerzői Jogi Szemle*, Nr. 4, 2017, pp. 109-125.

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