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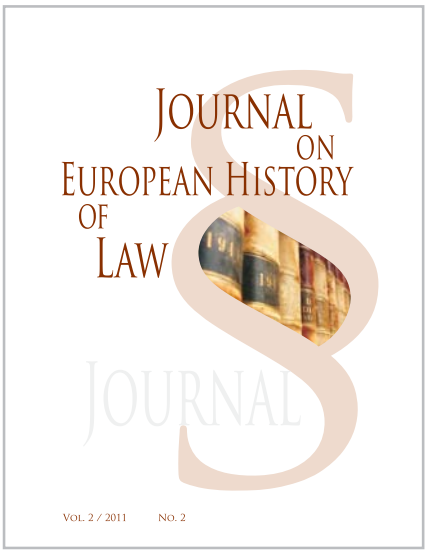

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TABLE OF CONTENTS

Thomas Gergen: Regionalsprachen in Frankreich: Zersplitterung der einheitlichen Republik? 2
Sebastian Krafzik: Licet iuris – Gefecht um die Macht zwischen Kaiser und Papst 6
Christoph Schmetterer: Rechtsvorschriften zur Hausnummerierung in Österreich von 1770 bis heute . . . 11
Tamara Ehs: The Other Austrians 16
Tamás Nótári: Some Remarks on ius vitae ac necis and ius exponendi 28
Magdolna Gedeon: Juristische Regelung der Einführung und der Organisation der Zirkusspiele im alten Rom bis zur Prinzipatszeit 39
Eszter Cs. Herger: Alimony in Hungarian Family Law in the 19th Century 43
Gábor Schweitzer: Legal Education and Ethos of the Legal Profession in Hungary in the Civil Era 51
Norbert Varga: The Codification of the Law of Conflict of Interest (incompatibilitas) in Hungary in the 19th Century 55
Alberto Iglesias Garzón: Reformation of Law Administration in Jean Domat's Masterworks 59
Magdolna Szűcs: "Creditor rem sibi oppignoratam a debitore emere non potest" (Brev. IP. 2, 12, 6) 65
Mirela Krešić: Entitlement of Female Descendants to Property of Croatian Communal Household 73
Przemysław Dąbrowski: Union of Brest and its Dissolution on the Territories of the Congress Kingdom of Poland, Belarusian and Lithuanian Lands 86
Anna Klimaszewska: General Principles in the Commercial Code of France of 1807 91
Jakub H. Szlachetko: The Geopolitical Thought of Józef Piłsudski and his Political Camp Concerning Central Europe in Comparison to the Achievements of Other Political Centers 95
Kamila Kędzierska: The Internal Organization and Supervision as Vital Issues in Post-War County Administration in Poland 100
Michaela Uhlířová: Punishments Connected with Person of Offender in Selected Countries of Ancient World 105
Magda Schusterová: Präambel im Fokus –Anmerkungen zum Vorspruch des Podiebradschen Friedensvertrages 110
Bohumil Poláček: A Brief History of River Navigation in Bohemia up to the 19th Century – Part 1 117
Lucie Bendová Bednářová: The Crime of the „Forced Abortion" before the Regional Court in Olomouc in the Second Half of the Eighties and in the First Half of the Nineties of the Nineteenth Century 125
Katarína Fedorová: Justices of the Peace in the Judicial Reform of Tsar Alexander II. 134

BOOK REVIEWS

Beiträge zur Rechtsgeschichte Österreichs. Thomas Olechowski, Christoph Schmetterer (Hrg.), Band 1/2011: Testamente aus der Habsburgermonarchie: Alltagskultur, Recht, Überlieferung. 139

REPORTS FROM HISTORY OF LAW

Anti-Semitic Legislation in Slovakia and in Europe (Report from a Conference) 141
200 Years of ABGB – from the Codification to the Recodification of Czech Civil Law, 2nd–3rd June 2011. 142
Konferenz „Die Entwicklung des Privatrechts auf dem Gebiet der Tschechischen Republik" 143
Conference of Doctoral Students from the Department of the History of the State and Law at the Faculty of Law, Masaryk University, Dated 30th June, 2011 144
Viva Voce Examination Report 145

ANNEX: THE DEVELOPMENT OF PRIVATE LAW THROUGHOUT THE CZECH TERRITORY

Ladislav Vojáček: Geleitwort. 148
Petr Dostalík: The Term "Causa" in Roman Law and in the Later Legal Science 150
Miroslav Frýdek: Influence of Roman Law on the Law of Obligations according to ABGB – the Comparison of Selected Contract Types 156
Naďa Štachová: Law of Obligations in Light of the Bohemian Diplomatic Documents of the Thirteenth Century. 160
Petra Jánošíková: Mining Business Pursuant to "Ius Regale Montanorum" in the 14th Century 165
Stanislav Přibyl: ABGB und das kanonische Eherecht 169
Karel Schelle: Die Bedeutung des österreichischen Gesetzes über den Versicherungsvertrag aus dem Jahre 1917. 175
Pavel Salák: Die Ersitzung im tschechischen und römischen Recht 181
Renata Veselá: Die Änderungen im Familienrecht in der Tschechoslowakei in der Zwischenkriegszeit . . 185
Jaromír Tauchen: Die Einziehung des jüdischen Vermögens im Protektorat Böhmen und Mähren 189
Radovan Dávid: Czechoslovak Socialist Civil Law in the Years 1948–1989 193
Ladislav Vojáček: A Few Remarks on the Origination and the Concept of the Labor Code of 1965 197
Radka MacGregor Pelikánová: History of the Czech Copyright Regulation 201

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Regionalsprachen in Frankreich: Zersplitterung der einheitlichen Republik?*

*Thomas Gergen***

Abstract

The two first articles of the French Constitution declare that the French concept of State creates a connection between the unity of State and language in order to strengthen social life. Our study sheds light on the way how regional languages and lesser used languages have been treated in French history until today. Since the "Ordonnance sur le fait de la justice" from Villers-Cotterẹts, published in 1539 under François Ier, the French language is the symbol for national unity and predominant in justice, administration and government.

France seems to keep being one of the most famous examples for the monolinguism because the French language remains the one and only official language.

Key words: *French constitution; Lesser used languages; Regional languages; "Ordonnance sur le fait de la justice" (Villers-Cotterêts, 1539).*

Die beiden ersten Artikel der Französischen Verfassung sprechen deutlich aus, dass es nach französischem Staatsverständnis einen starken Zusammenhang zwischen der staatlichen und der sprachlichen Einheit gibt, der der sozialen Kohäsion dienen soll. Wie dabei die Regional- bzw. weniger verbreiteten Sprachen in Frankreich im Laufe der Geschichte bis heute berücksichtigt wurden, ist Thema unseres Beitrages, der feststellen kann, dass Frankreich nach wie vor ein prominentes Beispiel für den Monolinguismus einer einzigen Amtssprache ist.

Nach Artikel 1 der Französischen Verfassung von 1958 ist Frankreich eine ungeteilte Republik.[1] Artikel 2 erklärt Französisch als Sprache dieser Republik und lässt mithin keine weitere(n) Sprache(n) zu: La langue de la République est le français. Diese Verfassungsnorm wird dadurch gerechtfertigt, dass Französisch lange im Wettbewerb mit anderen Sprachen stand. Schon im Ancien Régime bis in die 1950er Jahre war diese Furcht von „untreuen" Minderheiten zu spüren: Wenn in einer Region eine als fremd betrachtete Sprache benutzt wurde, so entstanden regelmäßig Befürchtungen vor republikuntreuen bzw. königsuntreuen Untertanen, die für Nachbarstaaten ein Motiv schaffen könnten bzw. hätten schaffen können, Territorialansprüche gegen Frankreich zu erheben. Die immer noch lebendigen Regionalsprachen werden heutzutage durch Art 75-1 der Verfassung geschützt: Sie gehören damit zwar zum nationalen Kulturgut, doch wird die Vorstellung einer einheitlichen Sprache in einem einheitlichen Staat weiterhin zugrunde gelegt und durch die einheitliche französische Sprache verkörpert. Die Frage der Sprache in Frankreich kann unter zwei wesentlichen Gesichtspunkten analysiert werden: Die der Bildung und Bewahrung eines einheitlichen Staates (I) sowie die der Verteidigung eines nationalen Kulturgutes, um die internationale Rangstellung des Staates zu sichern (II).

I. Die Bewahrung des einheitlichen Staates

A. Historische Einigung Frankreichs: Die Ordonnanz von Villers-Cotterêts vom 10. August 1539

Das Problem der Stellung der Sprachen entstand mit der historischen Einigung Frankreichs, vor allem durch die Ordonnanz von Villers-Cotterẹts im Jahre 1539. Nach Art. 111 dieser „Ordonnance sur le fait de la justice" waren Verträge, Urteile und Gerichtsprotokolle „en langage maternel francoys et non autrement" abzufassen. War das Französische bis zu jenem Jahr bloß Amts- und Gerichtssprache der Ile-de-France, und damit ebenfalls nur Regionalsprache, wuchs die Bedeutung der französischen Sprache nunmehr zur Sprache der Rechtsprechung der französischen Monarchie in Verwaltung und Justiz.[2]

* Der Aufsatz entstand im Rahmen des Projekts „Translation und Recht" am Max-Planck-Institut für Europäische Rechtsgeschichte (MPIeR) in Frankfurt/Main; vgl. zu diesem Projekt den Tätigkeitsbericht des MPIeR von 2010, S. 55. Die Thematik war auch Gegenstand eines Saarbrücker Vortrags im Wintersemester 2010/11. Für Hinweise sei ausdrücklich Frau Audrey Schlegel gedankt.

** Thomas Gergen ist Professor an der Rechts- und Wirtschaftswissenschaftlichen Fakultät der Universität des Saarlandes und forscht am Max-Planck-Institut für Europäische Rechtsgeschichte in Frankfurt/Main, Deutschland.

1 Statt vieler: Cécile Teissier, Zum Schutz der Regionalsprachen im europäischen Frankreich. Rechtstatsachen und Rechtsprobleme, Hamburg 2005 (Schriftenreihe Verfassungsrecht in Forschung und Praxis, Bd. 25), passim. Dazu unsere Rezension: Thomas Gergen, in: Revista de Llengua i Dret 49 (2008), S. 337–340.

2 Christian Schmitt, Sprachgesetzgebung in Frankreich, in: Osnabrücker Beiträge zur Sprachtheorie 5 (1977), S. 107–125, hier S. 108.

Französisch ist historisch die Sprache der Franken (*Francia*), musste aber mit anderen Sprachen koexistieren, was die Macht des Königs beeinträchtigte. Nachdem das Königreich und die tatsächliche Herrschaft sich immer mehr auf dem Territorium des aktuellen französischen Staates verbreitet hatten, entschied François Ier (Franz I.), die ganze Macht im Land in seinen eigenen Händen zu konzentrieren. Seine Ordonnanz sah folgende zentralen Punkte vor: Die Kirche soll alle Geburten, Todesfälle und Eheschließungen in ein einziges Buch eintragen, und zwar auf Französisch. Darüber hinaus galt: Französisch wird Amtssprache. Alle administrativen Dokumenten, Urkunden, Urteile etc. sollen auf Französisch verfasst werden. Französisch war damit die einzige Sprache, die während der Prozesse zugelassen war, nicht zuletzt auch, um die Vormacht der Kirche zu zügeln; denn vorher waren Geburtsurkunden, soweit es sie überhaupt gab, auf Latein verfasst.

Diese Ordonnanz hatte konkrete Folgen: Die Beamten benutzten nicht mehr Dialekte oder Regionalsprachen. Ihre Ausbildung wurde nunmehr auf Französisch durchgeführt. Daher sollten die Untertanen ebenfalls Französisch lernen, um mit den Staatsvertretern kommunizieren zu können. Auch sollte eine Einheit nach innen bezeugt werden, um eine Sprache für einen einheitlichen Wirtschaftsraum zu haben.

Der Vereinheitlichungsprozess der französischen Sprache verlief indes nicht in allen Bereichen geradlinig, denn neben Französisch wurden weitere Sprachen angewandt. Dafür gibt es berühmte Beispiele aus der Institutionen- und Verwaltungsgeschichte:

- Königliche Edikte wurden auf Latein erlassen, wenn sie sich an Minister wandten (z.B. die Anweisungen zur Steuereinkassierung von Henri II (Heinrich II.), der zwischen 1547 und 1559 regierte);
- Sitzungen der Ministerräte auf Spanisch während der Régence, ehe Ludwig XIV. an die Macht kam (Zwischen 1715 und 1723 übte sein Onkel Philippe d'Orléans tatsächlich die Macht aus.) [3]

Diese „Mischung" hat sich bis heute fortgesetzt, was ein Beispiel aus dem Jahr 2009 zeigt, das viel diskutiert wurde. Christine Lagarde, französische Wirtschaftsministerin hatte fast 20 Jahre lang in den USA studiert und gearbeitet. Am Anfang ihrer Amtszeit hatte sie oft Anweisungen auf Englisch verfasst. Dafür wollten einige Vertreter sie im Parlament anklagen (nicht möglich wegen Art 68-1 Verfassung). Sie argumentierte, dass internationale wirtschaftliche Angelegenheiten notwendigerweise in anderen Sprachen auszudrücken seien. Das Verfahren gegen einen Beamten, der ihre Anweisungen aus einem auf Englisch verfassten Brief nicht gefolgt war, lief für die Ministerin erfolgreich. Argumente im Verfahren vor dem Conseil d'Etat (CE) waren: Französisch ist die Sprache der Republik: Eine Ministerin darf daher keine internen Regelungen auf Englisch verfassen. Als Franzose kann keiner von einem Beamten erwarten, dass er Englisch versteht.

Der CE stützte sich aber letztlich auf den Arbeitsvertrag. Da dort stand, dass der Beamte Englisch beherrschen sollte und dies auch aus seinem Lebenslauf hervorging, waren die internen Regelungen der Ministerin ihm gegenüber wirksam.

B. Die Abwehr gegenüber fremden Mächten

Die Villers-Cotterẹts-Vorschriften galten zwar für die Beziehungen zwischen Staat und Bevölkerung, lange gab es aber keine Regelungen für die Beziehungen unter Bürgern; die ersten wurden erst nach dem II. Weltkrieg erlassen.

Nach dem II. Weltkrieg war oft die Rede der „untreuen Minderheiten", die mit ihrer Autonomieforderung zum Krieg geführt hätten.[4] Die brennende Frage in Frankreich war die des Elsasses, aber auch die von ein paar Territorien um Nizza, die von Italien an Frankreich abgetreten worden waren. Obwohl nur ein paar Quadratkilometer, war es ein echter politischer Brennpunkt. Damals wurde einzelne Regelungen bezüglich der Alltagssprache erlassen, jedoch mit einem wesentlichen Unterschied zu Villers-Cotterẹts-Ordonnanz: Diese waren keine allgemeinen Regelungen, die auf dem ganzen Territorium galten, sondern je nach Region verfasst. Dazu ein paar prominente Beispiele:

Für das Elsass: Elsässisch wurde von den Schulen verbannt. Dasselbe galt für die Konversation am Arbeitsplatz (Gesetz von März 1947). In manchen Städten wurde Elsässisch sogar in den Läden verboten: Verkäufer und Käufer dürften nicht mehr Elsässisch benutzen, um ihre Verträge abzuschließen, auch wenn sie nur mündlich waren! Dies sah eine Verordnung des Straßburger Bürgermeisters von 1948 vor, der viele kleinere Städte folgten (wie z.B̃ Altkrich). Als Rechtfertigung diente der Vorwand, französische Unternehmen ins Elsass zu locken. Dasselbe Gesetz von März 1947 galt in den Territorien um Nizza, ging aber weiter: Neue oder schon bestehende Vereine dürften nicht mehr während ihrer Zusammenkünfte Italienisch oder „eine sonstige ähnliche Sprache" sprechen (Gesetz vom Juni 1948).

In den Départements, in denen Katalanisch gesprochen wurde, wurde diese Sprache in den Schulen verboten, und zwar per Gesetz von 1950. Dasselbe Gesetz verbot noch Treffen von Vereinen oder „andere Formen von organisierten Gesellschaften" auf Katalanisch.[5]

Überraschenderweise wurden keine spezielle Regelungen für die Bretonen erlassen, obwohl sie zahlenmäßig die größte Minderheit waren, die eine „fremde" Sprache" benutzten.

Im öffentlichen Leben hatte schon seit Ende des 19. Jahrhunderts der „Kreuzzug" gegen fremde Veröffentlichungen

[3] Herman Van Goethem, Die Sprachenpolitik in Frankreich zwischen 1620 und 1804, in: Jörn Eckert/Hans Hattenhauer (Hg.), Sprache – Recht – Geschichte. Rechtshistorisches Kolloquium 5.–9. Juni 1990, Christian-Albrechts-Universität zu Kiel. Heidelberg 1991, S. 169–194.

[4] Eindrucksvoll für Österreich jüngst: Jürgen Pirker, Kärntner Ortstafelstreit. Der Rechtskonflikt als Identitätskonflikt (Schriftenreihe der Europäischen Akademie Bozen Bereich „Minderheiten und Autonomien" Bd. 16), Baden-Baden 2010.

[5] Thomas Gergen, Sprachengesetzgebung in Katalonien – Die Debatte um die Llei de Política Lingüística vom 7. Januar 1998, Tübingen 2000 (Beihefte zur Zeitschrift für Romanische Philologie 302) sowie zur aktuellen Diskussion ebenfalls: Gergen, Probleme der Vereinbarkeit von Art. 34 der LPL (= Llei de Política Lingüística) mit dem Europarecht in der Sprachendebatte zur LPL, in: Revista de Llengua i Dret 51 (2009), S. 197–227.

begonnen, und zwar stammen die ersten parlamentarischen Beratungen dazu von 1871, also gleich nach der Niederlage Frankreichs gegen Deutschland, und nach der Ausrufung der III. Republik.

Das erste maßgebende Gesetz wurde 1889 erlassen. Von hervorragender Bedeutung ist der Artikel 14: Der Innenminister darf die Verbreitung oder den Verkauf von ausländischen Veröffentlichungen in fremden Sprachen verbieten, egal ob diese in Frankreich oder im Ausland gedruckt. Nach der Änderung des Gesetzes im Jahre 1939 wurden sogar auch fremde Veröffentlichungen, die ins Französische übersetzt worden waren, verboten!

In der Original-Fassung waren auch Veröffentlichungen verboten, die aufgrund ihres Inhalts die sprachliche oder kulturelle Verfassung Frankreichs durch Erwähnung der Minderheitenfragen oder der Frage der Dialekte in Frage stellen könnten. Dieses Gesetz wurde fast ein Jahrhundert lang nicht beachtet, bis der Rückschlag 1988 kam: Ein Buch über die Geschichte des Baskenlandes wurde veröffentlicht und kurz darauf vom Innenminister verboten. Dieses Verbot wurde 1997 vom CE für nichtig erklärt, 2001 landete der Fall vor dem Europäischen Menschenrechtsgerichtshof, der entschied: Ein solches Gesetz kann aufgrund nationaler Sicherheitsgründe legitim sein. Die Pressefreiheit ist aber eine der wichtigsten Freiheiten für eine demokratische Gesellschaft; daher muss die Rechtfertigung eines solchen Verbots für ein Buch begründet und alle milderen Mitteln unzureichend sein, um das angestrebte Ziel zu erreichen. Da es jedoch keine Begründung im Erlass des Innenministers gab, war seine Entscheidung unrechtmäßig.

II. Verteidigung eines nationalen Kulturgutes

Der zweite Zweck der Gesetzgebung gegen die Verwendung von Fremdsprachen ist die Verteidigung des nationalen Kulturerbes, zu der Französisch gehört.

A. Auf nationaler Ebene

Im Binnenstaat will Frankreich die französische Sprache gegen die Globalisierung schützen. Aus diesem Grund wurde 1992 die Verfassung geändert. In Artikel 2 wurde hinzugefügt, „La langue de la République est le français."

Hinzu kam das Toubon-Gesetz, das mit vollständigem Namen heißt: „ Gesetz zum Schutz der französischen Sprache". Es sieht die Übersetzung jedweder Schrift ins Französische vor, die für die Öffentlichkeit bestimmt ist: Benutzerhandbücher, Menüs in Restaurants, Garantien. Der Verbraucher darf jede nützliche Information auf Französisch erhalten. Zugleich will man aber auch das regionale Erbe Frankreichs aufwerten. Die Vorschriften, die nach dem Kriege erlassen worden sind, gelten indes immer noch, wenn auch etwas abgemildert: 1951 wurde die Loi Deixonne[6] erlassen, die immerhin die Zulassung von bilingualer Ausbildung auf Staatsschulen vorsah.

Mehr und mehr machte sich die Idee der Gleichheit der Bürger breit; deshalb sollten sie auch nicht benachteiligt werden, wenn sie die nationale Sprache Französisch nicht beherrschen. In folgenden Bereichen kam es zu Abweichungen vom Monolinguismus:

1. Im Arbeitsrecht steht in der Rechtsprechung seit den 1970er Jahren fest, dass der Arbeitsvertag unbedingt in die Sprache des Arbeitnehmers übersetzt werden muss.
2. In der Zivilprozessordnung wurden 1961 mehrere Vorschriften hinzugefügt, die die Anwesenheit eines Übersetzers vorsieht, wenn eine der Prozesspartei es verlangt.[7]
3. In der Strafprozessordnung steht keine ähnliche Vorschrift, jedoch ergibt sich aus der Rechtsprechung der Cour de Cassation, dass jeder Angeklagte ein Recht auf einen Übersetzer hat. Dies ergibt sich nicht zuletzt aus dem Prinzip (verbürgt in der EMRK), nach dem jeder Angeklagte die Anklage verstehen soll.
4. Auch vor dem Conseil d'Etat gilt das Gebot der Übersetzung, um Fairness und Gerechtigkeit des Verfahrens für die Parteien herzustellen.

   Dies beweist, dass andere Sprachen zugelassen werden. Da es aber bloß eine Übersetzung einer anderen Sprache ist, behält die französische Sprache ihre Protagonistenrolle.

B. Schutz der Regionalsprachen durch internationale Instrumente

Dieser Schutz drückt sich aus in zwei intenationalen Normen: im Prinzip der Nichtdiskriminierung im internationalen Pakt über bürgerliche und politische Rechte sowie in der Europäischen Charta der Regional- oder Minderheitensprachen (Europäische Sprachencharta), die der Europarat 1992 verfasste.

Bemerkenswert ist die Tatsache, dass der Pakt in Dezember 1966 in New York unterzeichnet wurde, aber erst 1976 in Kraft trat. Frankreich ratifizierte ihn sogar noch vier Jahre später, d.h. erst 1980!

Das Prinzip der Gleichheit ist zunächst in der UN Erklärung der Menschenrechte enthalten (Artikel 1): Alle Menschen sind frei und gleich in Würde und Rechte geboren.[8] Aber das Prinzip der sprachlichen Nichtdiskriminierung kann erst aus dem Pakt abgeleitet werden. Art 1 besagt nämlich: Die Völker sind frei in ihrer kulturellen Entwicklung. Die Sprache gehört zur Kultur. Lange wurde dieser Artikel aber nur als negative Freiheit verstanden. Denn der Staat darf nicht in die Privatsphäre der Bürger eingreifen, in der Privatsphäre darf jeder die Sprache seiner Wahl benutzen.

Dazu trat dann Artikel 2, der keine Diskriminierung aufgrund der Sprache duldet: Er ist aber in Frankreich nicht von besonderer Bedeutung, denn es gibt keine ethnischen Konflikte. Manche Personen berufen sich jedoch darauf, wie etwa die,

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6 Hierzu umfassender Überblick: Manuel J. Peláez Albendea, El dret inalienable a la llengua prŋpia. Alguns aspectes jurídics i polítics de la persecució del catalŕ. De l'edicte de Lluís XIV (1702) a la Llei Deixonne (1951), sense oblidar-nos de les dictadures espanyoles (1923–1930 i 1939–1975), in: Revista de dret histŋric catalŕ 7 (2007), 167–193.

7 Icíar Alonso Araguás/Jesús Baigorri Jalón/Helen J.L. Campbell (Hg.), Translating justice = Traducir la justícia, Granada 2010.

8 Montserrat Tafalla Plana, El multilingüismo en la organización de las Naciones Unidades, in: Revista de Llengua i Dret 53 (2010), S. 137–162.

die besser Bretonisch als Französisch beherrschen und zu einer Behörden gehen müssen. Der CE sah darin aber keine Diskriminierung im Sinne des Artikels 2 (CE, 1988, Alain).

Artikel 9 II ist indes von wesentlicherer Bedeutung: Wenn jemand verhaftet wird, darf er die Gründe seiner Verhaftung erfahren. muss also die Erklärung verstehen. Daher bedarf es eines Dolmetschers. Hinzu kommt noch Artikel 8 der Eurpäischen Menschenrechtskonvention: Der Angeklagte hat ein Recht darauf, dass ihm die Klage in einer Sprache, die er beherrscht, erklärt wird.

Die Europäische Sprachencharta führte eindeutig zu einer Aufwertung der regionalen Sprachen.

Die Europäische Charta der Regional- oder Minderheitensprachen (Europäische Sprachencharta) wurde durch den Europarat verfasst und 1992 unterzeichnet. Sie soll mehrere Regional- und Minderheitssprachen schützen:

- Die Sprachen von Gemeinschaften die in einem einzigen Staat leben, ohne dort die Mehrheit darzustellen, beispielsweise das Bretonische in Frankreich oder das Walisische im Vereinigten Königreich.
- Die Sprachen von Gemeinschaften, die in zwei oder mehreren Staaten existieren, ohne in einem davon die Mehrheit darzustellen, beispielsweise das Baskische in Frankreich und Spanien oder das Samische (Lappländische) in Finnland, Norwegen und Schweden.
- Die Sprachen von Gemeinschaften, die in einem Staat eine Minderheit, in einem anderen jedoch eine Mehrheit darstellen; beispielsweise Dänisch in Deutschland, oder Finnisch in Schweden und Schwedisch in Finnland.
- Nicht territorial gebundene Sprachen, die traditionsgemäß in einem oder mehreren Staaten gesprochen, jedoch nicht einem bestimmten Gebiet zugewiesen werden können, zum Beispiel die Sprachen der Sinti und Roma (Romani), der Juden (Jiddisch), der Jenischen (Jenisch) oder auch der Russland-Mennoniten (Platdietsch).

  Dialekte und Sprachen von Minderheiten werden aber nicht hinzugerechnet. Die Europäische Charta der Regional- oder Minderheitensprachen, für deren Schaffung die Feststellung eines starken Rückgangs der „kleinen" Sprachen war, führte im Ergebnis zur Verstärkung des Übersetzungszwanges.[9]

Frankreich hat diese Charta 1999 unterzeichnet, aber noch nicht ratifiziert. Denn die Ratifizierung kann nur durch ein parlamentarisches Gesetz erfolgen, das aber den Entscheidungen des Conseil Constitutionnel unterworfen ist. Da letzterer in einem Beschluss erklärt hatte, dass die Charta nicht mit Artikel 2 der französischen Verfassung vereinbar sei, wurde die Verfassung im Jahre 2008 geändert, um die Ratifizierung zu ermöglichen. Es heißt seitdem in Art 75-1 « Les langues régionales appartiennent au patrimoine de la France. ». Gleichwohl lässt die Ratifizierung auf sich warten!

Und selbst dann wäre die Charta nicht in ihrer Gesamtheit in Frankreich verbindlich. Denn eine der Vorschriften der Charta sieht vor, dass die Staaten nur (mindestens) 33 Vorschriften achten müssen, die sie dem Europarat mitteilen müssen. Frankreich hat sich auf diese Vorschrift berufen, um nur 39 der insgesamt 98 Verpflichtungen der Charta zu akzeptieren. Die wichtigsten sind:

- Die Verpflichtungen, die die Schulen betreffen (Unterricht in der jeweiligen Regionalsprache);
- Verwaltung: in den Regionen, in denen Regionalsprachen oder Minderheitenprachen stark verbreitet sind; dort erfolgt die Übersetzung jedes administrativen Aktes;
- Veröffentlichung der Gesetzgebung in allen diesen Sprachen;
- Radios, Fernsehprogramme in diesen Sprachen sollen zugelassen werden.

Fazit: La langue de la République restera le Français.

Die Prinzipien, die Frankreich aus der Regionalsprachen-Charta des Europarates von 1992 anerkennen will, werden an der sprachlichen Situation der weniger verbreiteten Sprachen auch in Zukunft nichts ändern, wenn Frankreich die Charta je ratifiziert. Denn alle Prinzipien finden bereits Anerkennung und Geltung in Frankreich. Damit entstehen keine weiteren Pflichten für Frankreich,[10] das im Ergebnis auch weiterhin dem Monolinguismus seiner Amts- und Nationalsprache (Artikel 2 der Französischen Verfassung) treu bleiben wird.[11] Diese Prinzipien erklären sich aus der französischen Verfassungs- und Institutionengeschichte heraus und reichen zurück bis in die Frühe Neuzeit, d.h. der „Ordonnance sur le fait de la justice" von Villers-Cotteręts von 1539.

[9] Meike Guskow, Entstehung und Geschichte der Europäischen Charta der Regional- oder Minderheitensprachen, Frankfurt a.M. et al. 2009, S. 27.
[10] Jean-Marie Pontier, Droit de la langue française, Paris 1997.
[11] Zum „monolingüisme oficial" und dem Fall Frankreich: Eva Pons, in: Jaume Vernet (Hg.), Dret Lingüístic (Col·leció Eina 23), Barcelona 2003, S. 47–51.

Licet iuris – Gefecht um die Macht zwischen Kaiser und Papst

Sebastian Krafzik*

Abstract

The political episode of the Middle Ages was marked by the tension between papacy and empire. In the dispute about the supremacy of institutions, there was a particularly sharp conflict about the inauguration. The apostolic Church claimed for itself to confirm and to crown the emperor selected. The kingdom, however, wanted to absolve from this influence of the church. Emperor Louis IV had a particularly large share with this debate. With his decree licet iuris papal approval should now come to an end.

This paper provides a closer look at this law and examines its previous interpretation critically. Firstly the reproduction and translation of the main part of the decree are given, followed by a historical classification and the actual exegesis. Finally an insight on the historical significance of licet juris is discussed.

Key words: *Licet iuris; Emperor Louis IV.; approbation; inauguration.*

Übersetzung aus dem Text: Kaiser Ludwig IV., Gesetz über die Königswahl – Licet iuris (1338), ediert von Lorenz Weinrich, Quellen zur Verfassungsgeschichte des römisch-deutschen Reiches im Spätmittelalter (1250–1500), Darmstadt 1983, S. 290–293

Ludovicus, dei gratia Romanorum imperator et semper augustus. Ad eternam rei memoriam. Licet iuris utriusque testimonia manifeste declarent, imperialem dignitatem et potestatem immediate a solo deo ab initio processisse et deum per imperatores et reges mundi iura humano generi tribuisse, ac quod imperator ex sola electione eorum, ad quos pertinet electio, verus efficitur imperator nec alicuius alterius eget confirmatione seu approbatione, quoniam in temporalibus superiorem non habet in terris, sed eidem omnes subsunt nationes, et ipse dominus Iesus Christus mandavit, que sunt dei deo et que sunt cesaris cesar[o] fore reddenda; quia tamen aliqui avaritie et ambitionis cecitate devicti et nonnulli Scripture intelligentiam se habere fatentes, sed divertentes a tramite recti sensus, in quedam iniqua et prava commenta et in assertiones detestabiles proruperunt contra potestatem et auctoritatem imperialem et iura electorum imperatorum et aliorum principum et imperii fidelium mendaciter et fallaciter asserentes, quod imperialis dignitas et potestas est a papa, et quod electus in imperatorem ex electione non est verus imperator nec rex, nisi prius per papam sive per sedem apostolicam confirmetur, approbetur et corroboretur[1], et per huiusmodi pravas assertiones et pestifera dogmata hostis antiquus moveat lites, iurgia suscitet, contentiones paret et seditiones procuret: ideo ad tantum malum evitandum de consilio et assensu electorum et aliorum principum imperii declaramus, quod imperialis dignitas et potestas est immediate a solo deo, et quod de iure et imperii consuetudine antiquitus approbata est quod, postquam aliquis eligitur in imperatorem sive in regem ab electoribus imperii concorditer vel a maiori parte eorundem, statim ex sola electione est verus rex et imperator Romanorum censendus et nominandus, et eidem debet ab omnibus imperio subditis ob[o]ediri, et administrandi bona et iura imperii et cetera faciendi, que ad imperatorem verum pertinent, habet plenariam potestatem, nec pape sive sedis apostolice aut alicuius alterius approbatione, confirmatione et auctoritate indiget vel consensu. Et hac in perpetuum valitura lege decernimus, ut electus in imperatorem concorditer vel a maiori parte electorum ex sola electione censeatur et habeatur ab omnibus pro vero et legitimo imperatore, et eidem ab omnibus subiectis imperio debeat obediri, et administrationem et iurisdictionem imperialem et imperialis potestatis plenitudinem habeat et habere ac obtinere ab omnibus censeatur et firmiter asseratur. […]

Ludwig, von Gottes Gnaden Römischer Kaiser und immerfort heilig. Zu ewigem Gedächtnis an das Geschehnis.

Mögen die Zeugnisse beiderlei Rechts[2] offenkundig besagen, dass die kaiserliche Würde und Amtsgewalt unmittelbar von Gott allein hervorgegangen ist und Gott durch die Kaiser und Könige der Welt Recht dem Menschengeschlecht zuerteilt hat, ferner dass der Kaiser allein aus der Wahl derer, aus denen sich die Wahl erstreckt, gemacht wird zum wahren Kaiser und nicht der Bestätigung eines anderen bedarf, denn er hat im Weltlichen keinen Höheren über sich auf Erden, vielmehr unterliegen ihm alle Völker, und selbst der Herr Jesus Christus hat befohlen, es soll Gott, was Gottes ist, und dem Kaiser, was des Kaisers ist, gegeben werden; weil aber einige, von der Blind-

* Sebastian Krafzik, Promotionsstudent, Doctorate/Ph.D. Program in Law and Economics of Money and Finance, Graduate School of Economics, Finance and Management, Frankfurt am Main, Deutschland.

1 In einer anderen Überlieferung heißt es coronetur.

2 Gemeint sind das Kirchenrecht (Corpus Iuris Canonici) und das weltliche Recht (Corpus Iuris Civilis).

heit der Habsucht und des Ehrgeizes geschlagen, und manche, die behaupten, von der Schrift das Verständnis zu haben, aber vom Pfade rechten Sinnes abirren, sich nun zu üblen und verwerflichen Auslegungen und zu abscheulichen Behauptungen verstiegen haben gegen die Amtsgewalt und Vollmacht und gegen die Rechte der erwählten Kaiser, und der anderen Fürsten und Getreuen des Reiches mit Lug und Trug behaupten, die kaiserliche Würde und Macht sei vom Papst und der zum Kaiser Gewählte ist nicht aufgrund der Wahl wahrer Kaiser und König, es sei denn, er werde erst durch den Papst oder durch den Apostolischen Stuhl bestätigt, anerkannt und gefestigt, und weil durch derartige schlimme Behauptungen und verderbliche Lehrsätze der alte Feind Streit anstiftet, Zank erregt, Händel hervorruft und Aufruhr entflammt: um daher solch großes Unheil zu vermeiden, deswegen erklären wir mit Rat und Zustimmung der Kurfürsten und anderen Fürsten des Reiches, die kaiserliche Würde und Amtsgewalt stammt unmittelbar von Gott allein, und nach dem Recht und dem seit alters anerkannten Herkommen des Reiches gilt, sobald jemand von den Kurfürsten des Reiches einmütig oder von einer Mehrheit von ihnen zum Kaiser oder König gewählt wird, ist er sofort allein aufgrund der Wahl wahrer König und römischer Kaiser, als solcher anzusehen und zu benennen, ihm muss von allen Untertanen des Reiches Gehorsam geleistet werden, er hat die volle Amtsgewalt, die Güter und Rechte des Reiches zu verwalten und alles sonst zu tun, was einem wahren Kaiser zusteht, und weder von Seiten des Papstes oder des Apostolischen Stuhles noch irgendwem sonst bedarf er der Anerkennung, Bestätigung, Ermächtigung oder Zustimmung. Und durch dieses Gesetz, das für immer und ewig gelten soll, entscheiden wir, dass der einmütig oder mehrheitlich von den Kurfürsten zum Kaiser Erwählte allein aufgrund der Wahl von allen als wahrer und rechtmäßiger Kaiser angesehen und geehrt werden soll, ihm muss von allen Untertanen des Reiches Gehorsam geleistet werden, er soll die kaiserliche Verwaltung und Gerichtsbarkeit und die Fülle der kaiserlichen Amtsgewalt innehaben, und alle sollen ihm deren Besitz und solche Zuständigkeit zuerkennen und fest bei dieser Aussage beharren. […]

I. Verfassungsrechtlicher Zeitgeist

Die Regierungszeit Ludwig IV.[3] war geprägt von zwei großen Machtkämpfen. Zum einen war da der Konflikt mit der apostolischen Kirche[4] um die Vormachtstellung geistlicher bzw. weltlicher Regierungsgewalt, zum anderen gab es einen Kampf innerhalb des Deutschen Reiches mit dem Gegenkönig Friedrich dem Schönen[5]. Dieser wurde zeitgleich mit Ludwig im Jahre 1314 gewählt. Da Ludwig die Mehrheit[6] der Stimmen erhielt, bestanden für ihn an der eigenen Legitimität als höchstem Souverän keine Zweifel. Dennoch beanspruchte auch Friedrich die Königskrone und stellte für Ludwig eine jahrelange Bedrohung dar.

Für den Apostolischen Stuhl kam der Königsstreit nicht ungelegen, denn dieser hatte zur Folge, so die Argumentation der Kirche, dass es keinen legitimen römisch-deutschen König gab. Die Stelle sei demnach vakant, der Papst als Oberhaupt der Christen habe somit die Pflicht, das Vikariat zumindest in den außerdeutschen Teilen, wie etwa Oberitalien, auszuüben. Dem Papsttum war folglich daran gelegen, den deutschen Königsthron für lange Zeit unbesetzt zu halten. Daher hielt sich die vatikanische Kirche aus dem Streit der Könige heraus.[7] Diese Strategie aber war nicht von langem Erfolg, denn Ludwig erlangte im Jahr 1322 mit dem Sieg gegen Friedrich in der Schlacht bei Mühldorf seinen militärischen Durchbruch. Von nun an stand ihm die königliche Macht in vollem Umfang und im ganzen Reich zu. Dies hatte insbesondere im Verhältnis zum Heiligen Stuhl die Konsequenz, dass Ludwig keine Notwendigkeit mehr sah, seine Herrschaft seitens des Papstes anerkennen zu lassen.[8] Die Fronten zwischen der apostolischen Kirche und Ludwig verschärften sich nun zusehends. Ludwig war nicht mehr gewillt, irgendwelche Rücksicht auf Ansprüche des Heiligen Stuhls zu nehmen.[9] Die Kurie begegnete Ludwig daher mit immer härteren Kirchenstrafen; im Jahre 1324 wurde schließlich der Kirchenbann gegen ihn ausgesprochen. Doch alle Versuche der apostolischen Kirche, Ludwig politisch zu schwächen, führten umso mehr zum Gegenschlag des Königs. Er versuchte, den Papst auszumanövrieren und spielte die Kurie im politischen Bewusstsein regelrecht gegen die Wand.[10] Der Gipfel an Desavouierung gegenüber der katholischen Kirche stellte die inszenierte Kaiserkrönung anno 1328 dar. Diese fand ohne Papst und Kurie, dafür aber mit den deutschen und oberitalienischen Fürsten sowie dem römischen Stadtadel statt. Die Krönung wandelte sich nunmehr zu einer reichsrechtlich, eben nicht kurial veranlassten Erhöhung seines Königtums.[11] Als substanzielle Quelle des Kaisertums wurde der Papst ausgeschaltet.

Das politische Geschehen des Mittelalters war geprägt durch die Spannung von Papsttum und Kaisertum. In Westeuropa bestand bereits seit Auflösung der weströmischen Herrschaft keine fest fixierte Zuordnung von Religion und Politik.[12] Die römische Kirche entwickelte sich zunehmend zu einer gesetz-

[3] Römisch-deutscher König seit 1314, römisch-deutscher Kaiser seit 1328 bis zu seinem Tod 1347.

[4] Während der Regierungszeit Ludwigs gab es drei Päpste. Mit allen lag er im Streit. Es war also kein persönlicher Zwist, sondern ein Konflikt mit der Apostolischen Kirche im Allgemeinen.

[5] Gegenkönig von 1314 bis zu seinem Tod 1330, wobei es seit 1325 eine Aussöhnung mit Ludwig IV. gab; *Menzel, Michael*, Ludwig der Bayer – Der letzte Kampf zwischen Kaisertum und Papsttum, in: Schmid, Alois / Weigand, Katharina, Die Herrscher Bayerns – 25 historische Portraits von Tassilo III. bis Ludwig III., 2001, S. 112.

[6] Gewählt von den Erzbischöfen von Mainz und Trier, sowie dem Böhmenkönig, den Markgraf von Brandenburg und dem Herzog von Sachsen-Lauenburg.

[7] *Menzel*, S. 109.

[8] Auch wenn sich Ludwig die geistliche Approbation gewünscht hätte, sah er sie schon zu Beginn seiner Amtszeit nicht als wesentlich für sein Königtum an; *Menzel*, S. 109, 112.

[9] *Menzel*, S. 109.

[10] *Menzel*, S. 112.

[11] Das besagt aber nicht, dass Ludwig IV. den Titel mit Recht führte; *Menzel*, S. 113.

[12] *Jordan, Karl*, Investiturstreit und frühe Stauferzeit, 1999, S. 37.

lich geregelten und regierten Institution. Auch die Amtseinsetzung sollte durch päpstlichen Zuspruch unter dem Deckmantel der Gnade Gottes erfolgen.[13] Der Loslösungsprozess des Kaisertums von kirchlicher Kontrolle hinsichtlich der Approbation fand seinen Höhepunkt im Investiturstreit, der lediglich mit einem Kompromiss[14] und dem Bußgang Heinrich IV. nach Canossa im Jahre 1076 endete.

Rechtsgelehrte und Staatstheoretiker haben bereits zu damaliger Zeit über die Amtseinsetzung und das damit einhergehende Machtverhältnis von Kirche und Staat debattiert.[15] Darüber hinaus wurden Dekrete und Beschlüsse über die Approbation immerfort von Ranghohen erlassen.[16] So scheint die Proklamation *Licet iuris* zunächst einmal nur eine von vielen Texten zu sein. Ihre besondere Rolle, die sie in der Zeitgeschichte einnimmt, soll daher im Folgenden erörtert werden.

II. Die Verkündung Licet iuris‘ auf dem Reichstag zu Frankfurt am Main 1338

Am 6. August 1338 tagte die Reichsversammlung im Deutschordenshaus in Frankfurt. Wegen Unstimmigkeiten untereinander und aus Angst vor päpstlichen Sanktionen vermied jedoch ein Teil der Kurfürsten ein persönliches Zusammentreffen mit dem gebannten Kaiser; lediglich ein geistlicher Kurfürst, der Erzbischof von Mainz, war der Einladung Ludwigs gefolgt.[17] Auf diesem Reichstag verabschiedete Ludwig die Proklamation *Licet iuris* während eines feierlichen Akts in der Deutschordenskirche.[18] Trotz aller Kämpfe gegen den Apostolischen Stuhl und dessen Kurie lässt dieser zeremonielle Rahmen eine Sympathie Ludwigs gegenüber der christlichen Religion erkennen.

Seinen Namen hat *Licet iuris* von seinem Incipit. Der Gesetzescharakter ist besonders hervorgekehrt durch die dem justinianischen Gesetzgebungsstil entsprechende Sprache, die ausdrückliche Betonung der Dauerwirkung des Dekrets [hac in perpetuum valitura lege dercernimus][19] und dem Vermeiden von Namen und Titel Ludwigs sowie des päpstlichen Gegners, was das Werk aus der Tagespolitik auf eine Ebene allgemeiner Gültigkeit heraushebt.[20] Inhaltlich diskutiert *Licet iuris* den Schritt vom Königtum zum Kaisertum. Ludwig verkündete durch dieses Gesetz, dass *erstens* die Wahl zum König allein durch die Stimmenmehrheit der Kurfürsten erfolge und *zweitens*[21] der zum König Gewählte nicht nur zur Führung des König-, sondern auch des Kaisertitels berechtigt sei. Die erste Aussage, also die allein durch die Mehrheit der Kurfürsten legitimierende Wahl, hatte zur Folge, dass es zur Erhebung zum römisch-deutschen König nunmehr keiner Approbation durch den Papst bedürfen sollte. Eine solche Erklärung ähnlichen Inhalts hatten schon die Kurfürsten selbst in ihrem *Rhenser Weistum* nur wenige Wochen zuvor, am 16. Juli 1338, abgegeben. Doch entsprach dies lediglich einem Beschluss unter den Kurfürsten, sodass dieses Prinzip der Mehrheitswahl mit *Licet iuris* nun erstmalig in einem Reichsgesetz formuliert worden war.[22] Zudem entsprach die Rhenser Solidaritätserklärung nicht den Erwartungen Ludwigs; besonders auf Seiten der Erzbischöfe gab es Unbehagen im Verhältnis zum Apostolischen Stuhl, die die Kurfürsten dazu veranlasste, sich in ihrer Erklärung sehr abstrakt zu halten.[23] Daher hatte Ludwig mit *Licet iuris* nun die Möglichkeit, nochmals politischen Druck auf die Fürsten auszuüben: stellten sie sich nicht unmissverständlich vor ihren König, könnten sie ihr Wahlrecht verlieren, denn sie würden dem Papst ein wie auch immer geartetes Mitspracherecht bei der Wahl zum König zugestehen und es vermeintlich nicht mehr abstoßen können.[24]

Auch dieses Gesetzeswerk nutzte Ludwig IV., um den Heiligen Vater öffentlich zu desavouieren. Betrachtet man sich die Textstelle, in der die Behauptung der päpstlichen Partei wiedergegeben wird, so findet sich in der oben abgedruckten Textversion das Wort *corroboretur* (gefestigt), in einer anderen Überlieferung heißt es stattdessen *coronetur* (gekrönt). Die vorliegende und am meisten verbreitete Version spricht damit lediglich vom bisherigen Recht des Papstes, die Wahl zum König bzw. Kaiser zu festigen, also zu bestätigen im Sinne von *confirmetur*. Würde in der päpstlichen Behauptung jedoch besonders auf die Kaiserkrönung Wert gelegt, ist die andere Textversion heranzuziehen.[25] Daraus kann geschlussfolgert werden, dass die zweite Überlieferung aus dem Apostolischen Hause stammt, die erste und am meisten verbreitete hingegen von Ludwig, der der Krönung nicht gedenkt und somit das Papsttum in seiner Funktion abermals herabwürdigt.

III. Das Recht auf die Führung des Kaisertitels

Wesentliches Kernmerkmal *Licet iuris‘* ist die Erklärung, dass zukünftig der Gewählte allein in Folge der Wahl zum König das Recht auf die Führung des Kaisertitels habe [ex sola

[13] *Berman, Harold*, Recht und Revolution: Die Bildung der westlichen Rechtstradition, 1991, S. 161.
[14] Wormser Konkordat von 1122.
[15] So beispielsweise Bartolus von Sassoferato in seinem Traktat De regimine civitatis, siehe hierzu *Krafzik, Sebastian*, Die Herrschereinsetzung aus der Sicht des Bartolus von Sassoferato, in: Journal on European History of Law, Nr. 1/2 2010, S. 39–43.
[16] Beispielsweise die Decretale Venerabilem von Papst Innozenz III. 1202 oder auch das Rhenser Weistum 1338, siehe hierzu II.
[17] *Kaufhold, Martin*, Gladius Spiritualis – Das päpstliche Interdikt über Deutschland in der Regierungszeit Ludwigs des Bayern (1324–1347), 1994, S. 227; *Lieberich, Heinz*, Kaiser Ludwig der Baier als Gesetzgeber, in: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (ZRG), 1959, S. 190; *Stengel, Edmund E.*, Avignon und Rhens – Forschungen zur Geschichte des Kampfes um das Recht am Rhein in der ersten Hälfte des 14. Jahrhunderts, 1930, S. 161.
[18] *Thomas, Heinz*, Ludwig der Bayer (1282–1347) – Kaiser und Ketzer, 1993, S. 313.
[19] *Lieberich*, S. 189.
[20] *Benker, Gertrud,* Ludwig der Bayer – Ein Wittelsbacher auf dem Kaiserthron (1282–1347), 1980, S. 229.
[21] Siehe hierzu unter III.
[22] *Benker*, S. 229.
[23] *Menzel*, S. 116; *Lieberich*, S. 190.
[24] *Menzel*, S. 111.
[25] *Zeumer, Karl,* Ludwigs des Bayern Königswahlgesetz ‚Licet iuris‘ vom 6. August 1338, 1905, S. 100.

electione est verus rex et imperator Romanorum censendus et nominandus].[26] Das Königtum und Kaisertum werden dadurch gleichgesetzt, es kommt zu einer Verschmelzung von *regnum* und *imperium*. Verstärkt wird dieser Gedanke an einer anderen Passage schon zu Anfang des Textes, in der darauf verwiesen wird, dass die kaiserliche Würde und Amtsgewalt von Gott allein hervorgegangen ist [imperialem dignitatem et potestatem immediate a solo deo ab initio processisse]. Einem zusätzlichen Akt der Kaiserkrönung durch den Papst als Stellvertreter Gottes wird somit der Verzicht ausgesprochen.[27] Dieser unmittelbare Schritt vom König zum Kaiser prägt das mehrheitliche Textverständnis von *Licet iuris*.[28] Eine andere Sichtweise bestreitet jedoch die Kaisertitulierung allein durch Königswahl.[29] Denn das lateinische Wort *nominandus* beziehe sich nicht auf die Führung des Kaisertitels. Zwar könne *nominandus* so viel heißen wie „einen Titel führen", es könne aber auch allgemeiner übersetzt werden, so etwa mit „bezeichnen". Ein weiteres Indiz für die Fehlinterpretation, den Kaisertitel mit der Königswahl zu erwerben, sei die Stellung im Text. Hätte man dem Gewählten dieses Recht zusprechen wollen, wäre es stärker hervorgehoben worden. Erwähnt wird es in der mit der Zustimmung der Kurfürsten ausgesprochenen Erklärung über das bisher geltende Gewohnheitsrecht, also einer weniger wichtigen Stelle. Bei der eigentlichen Satzung durch den Kaiser wenige Zeilen später wird vom Recht, den Kaisertitel zu tragen, nichts erwähnt [decernimus, ut electus in imperatorem concorditer vel a maiori parte electorum ex sola electione censeatur et habeatur ab omnibus pro vero et legitimo imperatore]. Wäre dieser Gedanke von solchem Gewicht, so hätte er an dieser Stelle noch einmal wiederholt werden müssen.[30] Betrachtet man zudem die Vita Ludwigs, wird der Gedanke der Trennung von Königswahl und Erwerb des Kaisertitels bekräftig, denn wenn er durch Wahl zum König wahrer Kaiser geworden wäre, hätte er sich nicht noch einmal durch zeremonielle Weise den Titel verleihen lassen.[31] So lässt Ludwig auch die unter seiner Herrschaft erlassenen Gesetze in differenzierten Jahren datieren; beispielweise wurde *Licet iuris* abgefasst und veröffentlicht 11 Jahre nach seiner römischen Krönung, dies entspricht den Kaiserjahren [imperii vero XI], und 23 Jahre nach seiner Wahl in Frankfurt, die Königsjahre [regni nostri anno XXIII].

Nach dieser differenzierteren Auffassung spricht folglich *Licet iuris* dem zum König Gewählten durch die Wahl nicht unmittelbar den Kaisertitel zu, hierfür ist die Krönung als zusätzlicher Akt weiterhin erforderlich. Das Dekret gewähre lediglich den Besitz des Kaisertums, indem durch die Wahl zum König schon der wahre Kaiser zu sehen, er danach zu behandeln und als solcher zu bezeichnen ist.[32] *Licet iuris* bekräftigt also zumindest, dass der zum König Gewählte alle Reichsrechte auch ohne päpstliche Zustimmung ausüben darf. Mit dieser Auslegung bliebe somit auch die notwendige Rücksicht auf das damals allgemein anerkannte Recht des Papstes gewahrt.[33]

IV. Auswirkungen auf das Machtverhältnis

Der Kampf um die Macht zwischen kirchlicher und weltlicher Institution erlangte unter Ludwig IV. einen letzten Höhepunkt.[34] Aber nicht der Apostolische Stuhl und die eifernde Kurie sollten als Sieger hervorgehen. Das Reich wandte sich zusehends vom Papsttum ab.[35] Die Zukunft sollte dem zunehmend laizistischen Staatswesen gehören. Ob das immer der beste Weg war, soll aber an dieser Stelle unbeantwortet bleiben.

Ludwig hatte bei der Entwicklung der Trennung von Kirche und Staat einen großen Anteil.[36] Neben etlichen Beschlüssen, die unter seiner Herrschaft erlassen wurden, zählt *Licet iuris* sicherlich zu den umstrittensten und bedeutendsten Werken.[37] Nicht nur die Deklaration des Mehrheitswahlrechts, sondern auch der Erlass, der Erwählte sei nicht nur wahrer König, sondern auch wahrer Kaiser, war revolutionär; dies ging über die bisherigen Beschlüsse hinaus.[38] Was in vorherigen Kundgebungen nicht erreicht worden war, wurde jetzt von Ludwig proklamiert. Die unmittelbare Wirkung des Gesetzes ist allerdings nur schwer zu beurteilen. Zwar wird am Ende des Dekrets auf einen Schuldspruch wegen Majestätsverbrechen [crimen lese maiestatis] und anderer Strafen[39] abgestellt, wenn jemand Bedenken äußern oder zustimmen sollte. Eine auch nur einmalige Vollstreckung dieser Strafandrohung, die den Tod bedeutet hätte, ist aber nicht überliefert.[40] *Licet iuris* wurde mehrfach verkündet[41] und immerfort von großen Staatstheoretikern des Mittelalters zitiert[42]. Eine Aufnahme des Dekrets in das *Corpus iuris* jedoch unterblieb, denn *Licet iuris* ist ein Zwitter aus Kaisergesetz und

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[26] *Zeumer*, S. 103.
[27] *Stengel*, S. 157; *Thomas*, S. 314.
[28] Siehe beispielsweise *Thomas*, S. 314; *Kaufhold,* S. 227; *Mitteis, Heinrich,* Die deutsche Königswahl – Ihre Rechtsgrundlagen bis zur Goldenen Bulle, 1938, S. 188.
[29] So vor allem *Zeumer*, S. 103; *Stengel*, S. 158 f.
[30] *Zeumer,* S. 104.
[31] *Zeumer*, S. 104; *Stengel*, S. 160.
[32] *Stengel,* S. 159; *Zeumer*, S. 105.
[33] *Zeumer,* S. 106.
[34] *Menzel*, S. 106.
[35] *Menzel*, S. 117.
[36] *Menzel*, S. 117.
[37] *Lieberich*, S. 189; *Stengel*, S. 153.
[38] Vgl. etwa Rhenser Beschlüsse vom 16. Juli 1338; siehe hierzu unter II.; *Stengel,* S. 160.
[39] Entzug [privamus] von Lehen [feudis], Gnaden [gratiis], Herrschaftsrechten [iurisdictionibus], Vorrechten und Freiheiten [privilegiis et immunitatibus].
[40] *Thomas,* S. 314.
[41] So etwa am 02.09.1338 auf dem Reichstag zu Koblenz.
[42] So in etwa in *Ockhams* Traktat „De iuribus regni et imperii", Kapitel 6.

Deutschem Reichsgesetz und konnte sich somit nicht eindeutig einreihen.[43] Auch der unmittelbare Effekt von Ludwigs Mandat war sehr verhalten. Obwohl die Erlasse des Reichstags sofort veröffentlicht wurden,[44] erklärten sich anfangs nur neun Reichsstädte im Elsass für dieses Dekret.[45]

Das Prinzip der Mehrheitswahl des Königs durch die Kurfürsten war hingegen erfolgreicher. Es wurde bereits anno 1356 unter dem Folgekaiser Karl IV. in der Goldenen Bulle endgültig kodifiziert. Somit waren die Fürsten eine Art parlamentarische Regierungsgewalt geworden. Das römisch-deutsche Reich entwickelte sich auf diesem Wege zu einer konstitutionellen Monarchie.[46]

Auch wenn der Sieg um den Machtkampf zu Gunsten des Reiches gewertet wird, muss dennoch festgehalten werden, dass ein direkter politischer Erfolg Ludwigs hinsichtlich der völligen Loslösung von der apostolische Kirche ausblieb, denn erst 200 Jahre später, im Jahre 1530, war Karl V. der letzte vom Papst gekrönte Kaiser.

[43] *Lieberich*, S. 195.
[44] Indem sie an die Türen der Deutschordenskirche und des Frankfurter Domes geschlagen wurden, siehe *Kaufhold*, S. 227.
[45] Noch nicht einmal die bedeutendste elsässische Reichsstadt Straßburg war darunter; *Lieberich*, S. 191 mit Fn. 53.
[46] *Benker*, S. 231.

Rechtsvorschriften zur Hausnummerierung in Österreich von 1770 bis heute

Christoph Schmetterer*

Abstract

This article explores the legal history of house numbering in Austria from the second half of the eighteenth century to the present. Prior to 1930, federal authorities were responsible for the legal regulation of house numbering in Austrian cities and towns, yet subsequently individual states began to pass their own house numbering laws. However, both federal and state laws had to be implemented by the municipalities. The current study therefore provides a historical overview of the rescaling of house numbering law in Austrian, focusing particularly on the case of Vienna.

Key words: *Austria; house numbers; addresses; population census; building order; competences.*

1. Einleitung

Seit ihrer generellen Einführung 1770 beruhen Hausnummern in Österreich auf Rechtsvorschriften. Verschiedene Aspekte dieser Vorschriften haben sich in den letzten 240 Jahren geändert, die Regelungskompetenz, der Regelungsort und natürlich auch der Regelungsinhalt wie etwa die verschiedenen Systeme zur Nummerierung.

Das Ziel dieses Beitrages ist es, einen systematischen Überblick über die historischen und geltenden Regelungen für Hausnummern in Österreich zu geben. Dabei werden alle Vorschriften auf Ebene des Gesamtstaates und der Bundesländer berücksichtigt. Auf diesen Ebenen wurden bzw. werden vor allem Grundsätze für die Vergabe von Hausnummern bestimmt. Diese Prinzipien werden dann von den einzelnen Gemeinden umgesetzt. Angesichts der Tatsache, dass es in Österreich derzeit 2357 Gemeinden gibt, ist es von vornherein unmöglich die Vorschriften zu Hausnummern auf Gemeindeebene auch nur annähernd vollständig zu erfassen. Daher wird lediglich die Entwicklung der Hausnummerierung in Wien als ein Beispiel beschrieben.

2. Vorschriften auf gesamtstaatlicher Ebene, 1770 bis 1930

Nach ersten Versuchen mit Nummerierung von Häusern in einzelnen Städten (Prag und Brünn) und Regionen (Tirol) wurden Hausnummern in der Habsburgermonarchie erstmals durch ein kaiserliches Patent vom 10. März 1770 allgemein eingeführt.[1] Dieses Patent enthielt in erster Linie Vorschriften über die Konskription von Wehrpflichtigen. Die Hausnummern wurden eingeführt, um die Ergänzung der Armee zu erleichtern. Das Patent enthielt weder Vorschriften über das Aussehen der Nummern noch über die Art und Weise, in der diese anzubringen waren. Am 15. Dezember setzte ein neues Patent allerdings eine Strafe von neun Gulden für das Nicht-Anbringen, Zerstören oder Entfernen von Hausnummern fest. Ein weiteres Patent vom 17. September 1777 enthielt dann wesentliche detailliertere Vorschriften über die Hausnummern. Es wurde etwa festgelegt, dass die Häuser nach Orten und nicht nach Straßen nummeriert werden sollten. Das war freilich schon seit 1770 in dieser Form geschehen, aber erst 1777 wurde diese Art der Nummerierung auch rechtlich verbindlich vorgeschrieben. Das Patent von 1777 enthielt auch Vorschriften über die Nummerierung neuerrichteter Häuser durch die Unterteilung der bestehenden Nummern durch Buchstabenindizes. Das Patent selbst gab das Beispiel, dass ein neues Haus zwischen den bestehenden Häusern Nr. 12 und Nr. 13 die Nummer 12a erhalten sollte.[2]

1804 wurden die Vorschriften über die Hausnummerierung erneut geändert.[3] Die Unterteilung der Nummern durch Buchstabenindizes wurde abgeschafft; stattdessen wurde für größere Städte eine regelmäßige Neunummerierung der Häuser vorgeschrieben.[4] Außerdem wurde festgelegt, dass ein neues Haus, das an Stelle mehrerer alter Häuser errichtet wurde, alle Nummern der früheren Häuser führen musste, solange in der Stadt keine allgemeine Neunummerierung durchgeführt wurde. Die Vorschriften von 1804 blieben bis zur Volkszählungsverordnung 1857 in Kraft.[5] Diese Verordnung enthielt unter dem Ti-

* Dr. iur., Dr. phil. Christoph Schmetterer ist Mitarbeiter der Kommission für Rechtsgeschichte an der Österreichischen Akademie der Wissenschaften, Wien, Republik Österreich.

1 TANTNER, Anton, *Die Hausnummer. Eine Geschichte von Ordnung und Unordnung*, Marburg, 2007, S. 13–17.

2 *Sammlung aller k.k. Verordnungen und Gesetze vom Jahre 1740 bis 1780*, Band. 6, Nr. 1259; *Sammlung aller k.k. Verordnungen und Gesetze*, Band 8, Nr. 2068.

3 Patent vom 25. Oktober 1804, *Politische Gesetzessammlung*, 1804, Teil 3, Nr. 4.

4 Zu den Neunummerierungen in Wien siehe Abschnitt 4.

5 Kaiserliche Verordnung vom 23. März 1857 mit der Vorschrift für die Vornahme der Volkszählungen, *Reichsgesetzblatt (RGBl.)* 67/1857.

tel *Vorbereitungen zur Zählung* (§§ 6–15) detaillierte Vorschriften über die Hausnummerierung. Die wichtigste Neuerung durch die Volkszählungsverordnung war, dass die ortsweise Nummerierung zwar die Regel blieb, für größere Städte aber auch – das erste Mal in Österreich – eine Nummerierung nach Straßen gestattet wurde.[6]

Ebenso wie das Patent von 1804 sah die Volkszählungsverordnung 1857 keine Unterteilung bestehender Hausnummern durch Buchstabenindizes vor. Die Nummern neu errichteter Häuser sollten an die höchste bisher vergebene Nummer anschließen, und zwar unabhängig von der Lage des neuen Hauses, also auch wenn das neue Haus zwischen zwei bereits bestehenden Gebäuden errichtet wurde. Diese Vorschrift galt sowohl für Orte mit ortsweiser Nummerierung als auch für solche, in denen die Häuser straßenweise nummeriert waren. Das führte dazu, dass Nummern in einer Straße nicht mehr fortlaufend waren, sobald ein neues Haus zwischen zwei bereits bestehenden errichtet wurde. Die Volkszählungsverordnung legte außerdem fest, dass die Hausnummern von den Hauseigentümern bezahlt und angebracht werden mussten. Wenn sich ein Hauseigentümer weigerte, an seinem Haus die entsprechende Nummer anzubringen, konnte das die Gemeinde auf seine Kosten tun. Jegliche Verletzung von Vorschriften der Volkszählungsverordnung war mit einer Geldstrafe von einem bis zwanzig Gulden oder Arrest bis zu einer Woche bedroht.[7]

Die Volkszählungsverordnung von 1857 wurde 1869 durch ein neues Volkszählungsgesetz ersetzt.[8] Dieses Gesetz brachte allerdings keine Neuerungen bezüglich der Hausnummerierung; vielmehr wurden die Regelungen der Verordnung von 1857 (§§ 6–16) nahezu wortgleich in das neue Gesetz übernommen (§§ 1–10). Das Volkszählungsgesetz 1869 blieb bis zum Ende der Monarchie und darüber hinaus unverändert in Kraft. 1930 wurde das Gesetz novelliert, die Vorschriften über die Hausnummerierung bleiben dabei aber unverändert..[9]

3. Vorschriften auf Ebene der einzelnen Bundesländer, 1930 bis heute

Im Jahr 1930 wurden mit dem § 49 der Bauordnung für Wien erstmals Vorschriften über die Hausnummerierung in ein Landesgesetz aufgenommen.[10] Es ist nicht vollkommen klar, wie das aufgrund der Kompetenzverteilung zwischen Bund und Ländern überhaupt möglich war. Bis zu diesem Zeitpunkt war die Hausnummerierung stets im Zusammenhang mit der Konskription oder den Volkszählungen geregelt worden. Die Wehrpflicht war immer eine Angelegenheit des Gesamtstaates und die Verfassungen von 1861 und 1867 hatten die Gesetzgebung zu Volkszählungen ausdrücklich dem Reichsrat und nicht den Landtagen zugeordnet. Auch in der 1925 in Kraft getretenen Kompetenzverteilung der republikanischen Bundesverfassung war der Bund in Gesetzgebung und Vollziehung für das Volkszählungswesen zuständig.[11] Die Länder hingegen waren – wie schon in der Monarchie – für das Baurecht zuständig.[12]

Die Kompetenzverteilungsregelungen der österreichischen Bundesverfassung werden nach der „Versteinerungstheorie" ausgelegt, die besagt, dass die einzelnen Kompetenztatbestände in der Weise zu verstehen sind, in der sie in jenen einfachgesetzlichen Vorschriften gebraucht wurden, die zum „Versteinerungszeitpunkt" in Kraft waren. Der Versteinerungszeitpunkt ist jener Zeitpunkt, an dem eine konkrete Kompetenzvorschrift in Kraft getreten ist – im konkreten Fall also der 1. Oktober 1925.[13] Zu diesem Zeitpunkt war das Volkszählungswesen im Volkszählungsgesetz von 1869 geregelt. Der Kompetenztatbestand Volkszählungswesen umfasste also all das, was in diesem Gesetz geregelt war. Da das Volkszählungsgesetz 1869 auch Vorschriften über Hausnummern enthielt, schloss die Kompetenz des Bundes zur Regelung von Volkszählungen auch die Kompetenz für die Hausnummerierung mit ein.

Somit widersprach § 49 der Bauordnung für Wien bei seinem Inkraftreten 1930 der bestehenden Kompetenzverteilung. Die Zuordnung der Hausnummern zum Bereich Baurecht mag zwar wesentlich naheliegender erscheinen, als die Zuordnung zum Volkszählungswesen, aber das eindeutige Ergebnis einer Interpretation der Kompetenztatbestände nach der Versteinerungstheorie bleibt, dass die Kompetenz zur Regelung der Hausnummerierung ein Teil des Kompetenztatbestandes Volkszählungswesen war und damit dem Bund zukam. Auch wenn § 49 der Bauordnung für Wien 1930 formal nicht der bestehenden Kompetenzverteilung entsprach, enthielt diese Regelung inhaltlich keine Widersprüche zu den entsprechenden Vorschriften des Volkszählungsgesetzes.

Wien war das einzige Bundesland, in dem schon vor dem Zweiten Weltkrieg Vorschriften über Hausnummern in ein Landesgesetz aufgenommen wurden. Kurz nach dem Zweiten Weltkrieg erließ der Bund 1950 ein neues Volkszählungsgesetz, das keinerlei Regelungen mehr über die Hausnummerierung enthielt. Auch in dem bis heute gültigen Volkszählungsgesetz von 1980 finden keine Vorschriften über Hausnummern. Nachdem die Hausnummerierung nun nicht mehr im Rahmen des Volkszählungswesens geregelt war, erließen alle Bundesländer eigene Vorschriften über Hausnummern. Es ist höchst erstaunlich, dass dies ohne eine formelle Änderung der Kompetenzverteilung in der Bundesverfassung geschehen konnte.

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[6] § 11.

[7] § 7; § 9; § 13; § 15; § 34.

[8] Gesetz vom 29. März 1869 über die Volkszählung, *RGBl.* 67/1869.

[9] Bundesgesetz vom 25. Juni 1830, *Bundesgesetzblatt (BGBl.)* 230/1930.

[10] Bauordnung für Wien, *Landesgesetzblatt (LGBl.)* für Wien 11/1930.

[11] Grundgesetz über die Reichsvertretung vom 26. Februar 1861 (*RGBl.* 20/1861) § 11; Gesetz vom 21. Dezember 1867, wodurch das Grundgesetz über die Reichsvertretung vom 26. Februar 1861 abgeändert wird, *RGBl.* 141/1867; Bundes-Verfassungsgesetz Art. 10, Abs. 1, Z. 13, *BGBl.* 268/1925, *BGBl.* 367/1925.

[12] Bundes-Verfassungsgesetz Art. 15, *BGBl.* 268/1925, *BGBl.* 367/1925.

[13] Zur Versteinerungstheorie, WALTER, Robert / MAYER, Heinz / KUCSKO-STADLMAYER, Gabriele, *Grundriss des österreichischen Bundesverfassungsrechts*, Wien, [10]2007, S. 173–177; *Fachwörterbuch zum öffentlichen Recht* herausgegeben von MAYER, Heinz, Wien, 2003, S. 510.

Die Mehrzahl der Bundesländer erließ Vorschriften zur Hausnummerierung in der ersten Hälfte der Fünfzigerjahre. In Niederösterreich und Oberösterreich wurden 1951, in Tirol 1952 ein eigenes Gesetz über Hausnummern und Straßennamen beschlossen. Die Steiermark, Kärnten und Salzburg nahmen 1951 bzw. 1952/54 Bestimmungen zu Hausnummern in ihre Bauordnungen auf, wie es in Wien bereits 1930 geschehen war.[14] Vorarlberg und das Burgenland erließen erst sehr viel später entsprechende Vorschriften: Vorarlberg im Gemeindegesetz von 1985 und das Burgenland sogar erst im Straßengesetz von 2005.[15]

Keines der Gesetze aus den Fünfzigerjahren ist noch heute in Kraft. Derzeit sind Hausnummern in fünf Bundesländern (Kärnten, Niederösterreich, Salzburg, Steiermark und Wien) in den Bauordnungen geregelt. In zwei Ländern (Burgenland und Niederösterreich) sind die entsprechenden Vorschriften in den Straßengesetzen enthalten. Nur In Tirol gibt es immer noch ein eigenes Gesetz nur über Hausnummern und Straßennamen. In Vorarlberg schließlich finden sich die Vorschriften zu den Hausnummern im Gemeindegesetz. Die älteste noch in Kraft stehende Vorschrift über Hausnummern ist die Wiener Bauordnung von 1930, die zweitälteste das Vorarlberger Gemeindegesetz von 1985 und die jüngste das burgenländische Straßengesetz von 2005.[16]

Vier Länder (Kärnten, Niederösterreich, Salzburg and Vorarlberg) beschränken die Vergabe von Hausnummern ausdrücklich auf bewohnte Gebäude. Im Burgenland und in Oberösterreich gibt es Regelungen, die praktisch zu demselben Ergebnis führen. In diesen beiden Ländern sind Nebengebäude wie Garagen oder Gartenhäuser nämlich von der Nummerierung ausgenommen.[17] Die Gesetze zweier Länder (Salzburg und Tirol) ordnen ausdrücklich an, dass die Hausnummern aus arabischen Ziffern zu bestehen haben. In Tirol ist außerdem die Unterteilung der Nummern durch Buchstabenindizes ausdrücklich gestattet.[18] Eine derartige Unterteilung ist freilich auch in den anderen Ländern nicht verboten. Vier Bundesländer (Burgenland, Oberösterreich, Salzburg und Tirol) gestatten sowohl eine Nummerierung nach Ortschaften als auch eine Nummerierung nach Straßen. Die Gesetze der anderen Länder enthalten keine Vorschriften über ein bestimmtes Nummerierungssystem.[19] In allen Ländern außer dem Burgenland, Kärnten und Oberösterreich muss der Name der Straße auf den Hausnummerntafeln enthalten sein. In Salzburg und Vorarlberg gilt dies allerdings nur für Orte mit straßenweiser Nummerierung.[20]

In Niederösterreich und Wien sind fortlaufende Türnummern in Häusern mit mehr als einer Wohneinheit verpflichtend vorgeschrieben. In diesen beiden Ländern müssen auch Stiegenhäuser mit separaten Eingängen durchgehend nummeriert sein. Das Tiroler Gesetz schreibt die Vergabe von Nummern für alle Eingänge eines Gebäudes vor; die einzelnen Stiegenhäuser innerhalb eines Gebäudes müssen in Tirol aber nicht nummeriert werden. In Kärnten ist es ausdrücklich gestattet, jeden Eingang eines Hauses mit einer Nummer zu versehen, aber es besteht keine Verpflichtung dazu.[21] In allen Ländern außer dem Burgenland und Oberösterreich müssen die Hauseigentümer die Kosten der Hausnummern übernehmen.[22] In allen Ländern außer dem Burgenland und Niederösterreich ist es eine Verwaltungsübertretung, Hausnummern zu entfernen oder zu zerstören.[23] Die Strafe dafür ist in Oberösterreich mit bis zu € 360 am niedrigsten und in Wien mit maximal € 21.000 am höchsten. Die ausnehmend hohe Strafdrohung in Wien bezieht sich allerdings auf nahezu alle Verstöße gegen die Bauordnung, nicht nur auf solche gegen die Nummerierungsvorschriften. In der Praxis sind Strafen im Zusammenhang mit Hausnummern selten und deutlich niedriger. In allen Bundesländern ist die Hausnummerierung eine Angelegenheit der Gemeinden im eigenen Wirkungsbereich; nur für die Verwaltungsstrafen sind nicht Gemeinden, sondern die Bezirksver-

[14] Niederösterreich: Gesetz vom 27. Juni 1951 über die Hausnumerierung, Straßen- und Ortsbezeichnung, *LGBl.* 32/1951; Oberösterreich: Gesetz vom 10. Juli 1951 über die Numerierung von Gebäuden und das Anbringen von Ortschaftstafeln, *LGBl.* 13/1952; Tirol: Gebäudenumerierung, Straßen- und Ortschaftsbezeichnung, *LGBl.* 5/1952;Steiermark: Gesetz vom 27. Mai 1952, womit die Bauordnung für Steiermark mit Ausnahme der Landeshauptstadt Graz durch Bestimmungen über die Gebäude- und Wohnungsnumerierung ergänzt wird, *LGBl.* 34/1952; Gesetz vom 27. Mai 1952, womit die Bauordnung für die Landeshauptstadt Graz durch Bestimmungen über die Gebäude- und Wohnungsnumerierung ergänzt wird. *LGBl.* 35/1952; Salzburg: Gesetz vom 10. Juli 1951, *LGBl.* 38/1951; Gesetz vom 24. Oktober 1951 womit die Bauordnung für das Land Salzburg mit Ausnahme der Landeshauptstadt Salzburg abgeändert wird, *LGBl.* 48/1952; Bauordnungsnovelle für die Stadt Salzburg, 57/1954.

[15] Vorarlberg: Gesetz über die Organisation der Gemeindeverwaltung, *LGBl.* 45/1985; Burgenland: Burgenländisches Straßengesetz, *LGBl.* 79/2005.

[16] Kärnten: Bauordnung, *LGBl.* 62/1996; Niederösterreich: Bauordnung, *LGBl.* 8200-17; Salzburg: Baupolizeigesetz, *LGBl.* 40/1997; Steiermarkisch: Baugesetz, *LGBl.* 59/1995; Wien: Bauordnung, *LGBl.* 11/1930; Burgenland: Straßengesetz, *LGBl.* 79/2005; Oberösterreich: Straßengesetz, *LGBl.* 84/1991; Tirol: Gesetz vom 20. November 1991 über die Bezeichnung von Verkehrsflächen und die Numerierung von Gebäuden, *LGBl.* 4/1992; Vorarlberg: Gesetz über die Organisation der Gemeindeverwaltung, *LGBl.* 45/1985.

[17] Kärnten: § 41 Abs. 1 Bauordnung; Niederösterreich: § 31 Abs. 1; Salzburg: § 18 Abs. 1 Baupolizeigesetz; Vorarlberg: § 15 Abs. 4 Gemeindegesetz; Burgenland: § 9 Abs.2 Straßengesetz; Oberösterreich: § 10 Abs. 2 Straßengesetz.

[18] Salzburg: § 18 Abs. 6 Baupolizeigesetz; Tirol: § 4 Abs. 5 Gesetz über die Numerierung von Gebäuden.

[19] Burgenland: § 9 Abs. 2 Straßengesetz; Salzburg:§ 18 Abs. 2 Baupolizeigesetz; Tirol: § 4 Abs. 2 and Abs. 3; Gesetz über die Numerierung von Gebäuden; Vorarlberg: § 10 Abs. 2 Straßengesetz.

[20] Salzburg: § 18 Abs. 6 Baupolizeigesetz; Vorarlberg: § 15 Abs. 4 Gemeindegesetz.

[21] Niederöstereich: § 31 Abs. 7 Bauordnung; Wien: § 49 Abs. 3 Bauordnung; Tirol: § 4 Abs. 1 Gesetz über die Numerierung von Gebäuden; Kärnten: § 41 Abs. 2 Bauordnung.

[22] Kärnten: § 41 Abs. 3 Bauordnung; Niederösterreich: § 31 Abs. 4 Bauordnung; Salzburg: § 18 Abs. 7 Baupolizeigesetz; Steiermark: § 7 Abs. 3 Baugesetz; Tirol: § 5 Abs. 5 Gesetz über die Numerierung von Gebäuden; Wien: § 49 Abs. 1 Bauordnung; Vorarlberg § 15, Abs. 6 Gemeindegesetz.

[23] Kärnten: § 50 Abs. 1 lit. d Z. 1 Bauordnung; Salzburg: § 18 Abs. 1, Z. 19 Baupolizeigesetz; Steiermark: § 118 Abs. 12 Baugesetz; Tirol: § 9 Gesetz über die Numerierung von Gebäuden; Oberösterreich: § 39 Abs. 1 Z. 2 Straßengesetz; Wien: § 135 Abs. 1 Bauordnung; Vorarlberg: § 98 Abs. 1 lit. d Gemeindegesetz.

waltungsbehörden (in Wien die Magistratischen Bezirksämter) zuständig.[24]

4. Vorschriften auf Gemeindeebene am Beispiel Wiens, 1770-present

Von 1770 bis 1771 wurden die Häuser in Wien gemäß dem Patent vom 10. März 1770 mit Nummern versehen. Die Nummern wurden nach dem Hauptinhalt des Patents als Konskriptionsnummern bezeichnet und verliefen in relativ unsystematischer Weise durch die Stadt. Gleichzeitig wurden auch die Gebäude in 34 Vorstädten nummeriert, wobei jede dieser Vorstädte einzeln durchnummeriert wurde. Die Nummern in der Stadt waren rot und jene in den Vorstädten schwarz[25]. In den folgenden Jahren kam es immer wieder zu Neunummerierungen: 1795 wurden für die Stadt und für nahezu alle Vorstädte neue Nummern vergeben. Die nächste Neunummerierung erfolgte 1821. Von dieser Neunummerierung war wieder die Stadt selbst und etwa die Hälfte der Vorstädte (16 von 34) betroffen. In manchen Vorstädten gab es sogar noch häufigere Änderungen der Hausnummern. Die Häuser in Gumpendorf etwa hatten von 1770 bis 1830 insgesamt fünf verschiedene Nummern. Einzelne andere Vorstädte, wie beispielsweise Spittelberg, behielten die Nummern hingegen von 1770 bis 1862.[26]

1862 kam es zur bedeutendsten Änderung der Hausnummern in Wien überhaupt, als der Gemeinderat die Einführung eines neuen Systems mit straßenweise Nummerierung beschloss. Diese neuen Nummern wurden im Gegensatz zu den bisherigen Konskriptionsnummern als Orientierungsnummern bezeichnet, und viele der Grundsätze, die 1862 eingeführt wurden, sind bis heute gültig.[27]

Auf Plätzen wurden die Gebäude im Uhrzeigersinn nummeriert, auf den Straßen erhielten die Häuser auf der linken Straßenseite ungerade Nummern und die auf der rechten Straßenseite gerade Nummern. In der Innenstadt (dem 1. Bezirk) begann die Nummerierung immer an jenem Ende einer Straße, das näher am Stephansplatz (als dem Zentrum der Stadt) lag. In den anderen Bezirken (die alten Vorstädte waren mittlerweile als Bezirke in die Stadt Wien eingemeindet worden) wurde zwischen Radialstraßen, die aus der Innenstadt heraus führten, und Querstraßen, die zumindest teilweise um die Innenstadt herum verliefen, unterschieden.[28]

In Radialstraßen begann die Nummerierung an jedem Ende, das näher an der Innenstadt lag, während Querstraßen im Uhrzeigersinn nummeriert wurden, sodass die ungeraden Hausnummern auf der äußeren und die ungeraden Hausnummern auf der inneren Straßenseite waren. Diese Grundsätze sind im Gegensatz zu den Vorschriften von 1862 über das Aussehen der Nummernschilder noch heute gültig.[29] Damals war vorgeschrieben worden, dass die Tafeln mit den Hausnummern einen weißen Grund haben sollten. Die Hausnummern darauf waren grundsätzlich schwarz, auf Plätzen in der Innenstadt aber rot. Die Umrandungen der Tafeln hatten in jedem Bezirk eine andere Farbe.[30] In der Innenstadt waren alle Nummernschilder rechteckig mit abgeschrägten Ecken. In den anderen Bezirken waren die Tafeln in Radialstraßen rechteckig (ohne abgeschrägte Ecken) und in Querstraßen oval. Auch die Tafeln mit den Straßennamen hatten dieselbe Form wie die Nummernschilder an den einzelnen Häusern.[31]

Bei der Eingemeindung der bisherigen Vororte als neue Wiener Außenbezirke von 1890 bis 1892 wurden auch dort Hausnummern nach den beschriebenen Grundsätzen vergeben.[32] Allerdings waren die Umrandungen der Tafeln in allen Bezirken rot, da es nicht genug eindeutig unterscheidbare Farben für alle neuen Bezirke gab. 1923 wurde ein neues Design (weiße Schrift auf blauem Grund) für Straßentafeln eingeführt. Erst fünfunddreißig Jahre später wurde dieses neue Design, das seither nicht mehr verändert worden ist, auch auf die Hausnummern ausgedehnt. Die Tafeln sind nunmehr in allen Straßen rechteckig und tragen weiße Nummern und Straßennamen auf blauem Grund.[33]

Interessanterweise wurden die alten Konskriptionsnummern 1862 bei der Einführung der Orientierungsnummern nicht abgeschafft. Den Hauseigentümern wurde sogar ausdrücklich vorgeschrieben, die Konskriptionsnummern weiter am Haus ersichtlich zu machen – allerdings nicht an der Außenfassade des Hauses, sondern im Inneren. In der Inneren Stadt und den Innenbezirken wurden 1874 sogar noch einmal neue Konskriptionsnummern vergeben. Diese sind mit den bis heute in der Regel unveränderten Einlagezahlen in den damals neu angelegten Grundbüchern ident. Insofern sind die Konskriptionsnummern noch heute relevant.[34]

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[24] Burgenland: § 40 Abs. 1 Straßengesetz; Kärnten: § 1 Abs. 1 Bauordnung; Niederösterreich: § 2 Abs. 1 Bauordnung; Salzburg: § 18 Abs. 11 Baupolizeigesetz; Steiermark: § 1 Baugesetz; Tirol: § 8 Gesetz über die Numerierung von Gebäuden; Oberösterreich: § 4 Straßengesetz; Wien: § 139 Abs. 1 Bauordnung; Vorarlberg: § 15 Abs. 4 Gemeindegesetz; § 26 Abs. 1 Verwaltungsstrafgesetz, *BGBl.* 52/1991.

[25] WOHLRAB, Hertha / CZEIKE, Felix, Die Wiener Hausnummern und Straßentafeln, *Wiener Geschichtsblätter* 27 (1972), S. 334.

[26] WOHLRAB / CZEIKE (wie 25), S. 335–336; *Historisches Lexikon Wien*, herausgegeben von CZEIKE, Felix Band 3, Wien, 1994, S. 90 enthält eine detaillierte Übersicht über die Neunummerierungen in den Vorstädten.

[27] Gemeinderatsbeschluss vom 2. Mai 1862, Nr. 4551.

[28] *Historisches Lexikon Wien*, herausgegeben von CZEIKE, Felix, Band 5, Wien, 1997, S. 289–290, 560–561; SELIGER, Maren / UCAKAR, Karl, *Wien: Politische Geschichte*, Band 1, Wien, 1985, S. 293–297.

[29] WOHLRAB / CZEIKE (wie 25), S. 345–346.

[30] Erster Bezirk: rot; zweiter Bezirk: violett; dritter Bezirk: grün; vierter Bezirk: rosa; fünfter Bezirk: schwarz; sechster Bezirk: gelb; siebenter Bezirk: blau; achter Bezirk: grau; neunter Bezirk: braun.

[31] WOHLRAB / CZEIKE (wie 25), S. 345–348.

[32] CZEIKE (wie 28), S. 289–290; 558–559;SELIGER / UCAKAR (wie 28), S. 390–415.

[33] WOHLRAB / CZEIKE (wie 25), S. 249; Beschluss des Gemeinderatsausschusses vom 19. September 1923, Nr. 1904/23; CZEIKE (wie 28), S. 369; Gemeinderatsbeschluss vom 24. Oktober 1958, Nr. 100/1958 [http://www.wien.gv.at/recht/landesrecht-wien/rechtsvorschriften/pdf/b0200800.pdf] (15. September 2010).

[34] Gesetz […] über die […] Anlegung neuer Grundbücher, *RGBl.* 88/1874; *Historisches Lexikon Wien*, herausgegeben von CZEIKE, Felix, Band 2, Wien, 1993, S. 622.

5. Resumee

Hausnummern haben eine große praktische Bedeutung – und zwar nicht nur im Alltagsleben, sondern auch speziell im rechtlichen Kontext. Zahlreiche Rechtsakte (Urteile, Ladungen, sonstige Entscheidungen) können erst rechtskräftig werden, wenn sie korrekt zugestellt worden sind. Eine Voraussetzung für eine korrekte Zustellung ist die Adressierbarkeit. Theoretisch mag es denkbar sein, rechtlich relevante Schriftstücke auch ohne Hausnummern eindeutig zu adressieren, aber praktisch ist das in Österreich nicht (mehr) vorstellbar. Vor diesem Hintergrund ist es erstaunlich, dass die Regelungen von Hausnummern von der juristischen Fachliteratur wie von der juristischen Praxis – im Gegensatz etwa zum Zustellgesetz – nahezu vollkommen ignoriert werden. Das Zustellgesetz, das normiert, wann ein amtliches Schriftstück korrekt zugestellt ist, wird in Lehrbüchern, Kommentaren und einschlägiger Judikatur ausführlich behandelt. Ganz anders ist die Situation bei den Vorschriften über Hausnummern. Natürlich gibt es ausführliche Kommentare zu den Bauordnungen, Straßengesetzen etc., aber die Vorschriften über Hausnummern werden in diesen Werken nur sehr kurz oder gar nicht behandelt. Die Existenz von Hausnummern ist offenbar derart selbstverständlich, dass sie von der Rechtswissenschaft schlichtweg vorausgesetzt, aber nicht behandelt wird.[35]

Nur deshalb konnte es geschehen, dass die Regelungskompetenz für Hausnummern nach 1930 auf die Bundesländer überging. Normalerweise sind Änderungen in der Kompetenzverteilung sehr umstritten und das Ergebnis langer und zäher Verhandlungen, da sie das Machtverhältnis zwischen Bund und Ländern ganz direkt beeinflussen. Lediglich in einem Rechtsbereich, der – wenn überhaupt – nur als sehr unbedeutend wahrgenommen wird, kann die Kompetenz ohne formelle Änderung der Kompetenzverteilung, also eigentlich in verfassungswidriger Weise übergehen, und das noch dazu dauerhaft. In jedem anderen Fall hätte die Anmaßung einer Kompetenz, die nach der Verfassung dem Bund zukommt, durch die Bundesländer zu einem Verfahren vor dem Verfassungsgerichtshof geführt.

Von 1950 bis 1985 bzw. 2003 gab es in Vorarlberg und im Burgenland keine gesetzliche Grundlage für die Vergabe von Hausnummern. Auch daran wird deutlich, dass die Hausnummerierung nicht als bedeutendes Rechtsgebiet angesehen wird. Das bedeutet allerdings nicht, dass es in diesem Zeitraum in diesen beiden Bundesländern keine Hausnummern gab. Die Vergabe war nur nicht gesetzlich auf Bundes- oder Landesebene, sondern höchstwahrscheinlich ausschließlich durch Verordnungen auf Gemeindeebene geregelt.

Die rechtliche Bedeutung von Hausnummern ist insgesamt durchaus paradox. Einerseits sind Hausnummern in Wirkung rechtlich von enormer Wichtigkeit, da sie die Adressierbarkeit und damit die Zustellung von rechtserheblichen Schriftstücken ermöglichen. Andererseits sind Hausnummern für sich genommen keineswegs ein bedeutendes Rechtsgebiet.

An der Entwicklung der Vorschriften über Hausnummern wird deutlich, dass der Regelungskontext in den letzten 240 Jahren immer ziviler wurde. Ursprünglich bestand ein enger Zusammenhang zwischen Hausnummern und der militärischen Konskription. Besonders deutlich wird das am Patent von 1770. Damals wurden Hausnummern vergeben, um die Erfassung der Bevölkerung zu erleichtern. Diese Erfassung diente ursprünglich praktisch ausschließlich militärischen Zwecken. Das wird nicht zuletzt daran deutlich, dass 1770 nur überhaupt Männer gezählt wurden, und Frauen erst ab 1777 erfasst wurden. Die leichtere Adressierbarkeit war lediglich positiver Nebeneffekt.

Ab 1857 bestand dann kein direkter Zusammenhang mehr zwischen Heeresergänzung und Hausnummern, da Volkszahlungen selbst nicht mehr im Kontext der Rekrutierung geregelt wurden. Dennoch war der primäre Zweck der Hausnummern – zumindest dem Gesetz nach – weiter ein statistischer. Ihre Vergabe gehörte nach dem Wortlaut der Volkszählungsverordnung bzw. des Volkszählungsgesetzes zu den „Vorbereitungen zur Zählung". Die Adressierbarkeit war weiterhin nicht der primäre Zweck der Hausnummern. Das änderte sich erst als in Wien 1930 und in den anderen Bundesländern ab 1950 Vorschriften über die Nummerierung erlassen wurden. Seither sind Hausnummern in Gesetzen geregelt, die alle im Zusammenhang mit Raumordnung im weiteren Sinne stehen. Damit ist die Adressierbarkeit nicht mehr ein Nebeneffekt, sondern der Hauptgrund für die Vergabe von Hausnummern.

[35] Zum Beispiel: HAUER, Wolfgang Reinhold J. / ZAUSSINGER, Friedrich, *Niederösterreichisches Baurecht*, Wien, [7]2006, S. 430; HAUER, Wolfgang Reinhold J., *Kärntner Baurecht*, Wien, [3]1996, S. 243; HAUER, Wolfgang Reinhold J. / TRIPPL, Paul, *Steiermärkisches Baurecht,* Wien, [3]1995, S. 126; HAUER, Wolfgang Reinhold J., *Salzburger Baurecht*, Eisenstadt, [2]1994, S. 136.

The Other Austrians

Tamara Ehs*

Abstract

Some observers of the recent economic crisis compare it to the Great Depression of the 1930s and discuss interwar ideas bearing on these questions such as those of "the Austrians". There is a lively treatment of Ludwig Mises and his pupils but the other Austrian discourse of this time is neglected, that of the three full professors of political economy at the law faculty of the University of Vienna: Othmar Spann, Hans Mayer and Ferdinand Degenfeld-Schonburg – "the Other Austrians". This paper calls them to mind and gives an insight into their stances on the economic crisis.

Key words: *Austrian School; Economic crisis; Ferdinand Degenfeld-Schonburg; First Republic of Austria; Hans Mayer; Interwar Vienna; Ludwig Mises; Othmar Spann; Political Economy; Law Faculty of the University of Vienna.*

I. Introduction

The recent economic crisis and financial instability have resulted in a growing demand for alternative theories and policies. Some observers compare the crisis to the Great Depression of the 1930s and therefore discuss interwar ideas bearing on these questions such as those of "the Austrians"– be it as a remedy or as a warning, because controversy still rages as to whether the weak performance of Austria at that time could be traced back to the harmful impact of Ludwig Mises' ideas or to non-observance of his policy advice. There has already been a lively treatment of Mises, his predecessors and his pupils in the literature (Ebeling 2003, Hagemann et al. 2010) discussing their internal controversies (Garrison 2004) and their struggles with the economic and political situation of Austria itself (Craver 1986, Klausinger 2006a, Klausinger 2006b). But the authors concentrated and still concentrate on Austrian Economics with a capital "E", that is, on members of the Austrian School (Boehm and Caldwell 1992). Hence, the other Austrian economic discourse of this time is neglected: that of those scholars outside the Austrian School but inside university, the three chair holders of political economy at the University of Vienna: Othmar Spann, Hans Mayer and Ferdinand Degenfeld-Schonburg.

We do know something about Othmar Spann and his romantic tradition of "universalism" (Siegfried 1974, Haag 1976, Riha 1985, Schweinzer 2000); we have had a glimpse of Hans Mayer's struggle academic power with Spann, but his works are relatively unknown apart from Milford and Rosner (1997) and a discussion in Leonard (2007); finally, hardly anything has been written about Ferdinand Degenfeld-Schonburg, although he occupied one of the most important chairs at the University of Vienna.

Admittedly, researching these other Austrian economists is not easy because Spann broke with every tradition of Austrian economics, gave up all pretence of being an objective scholar, and did not regard himself as a mere economist as his universalist ideas went far beyond economics; moreover Mayer and Degenfeld-Schonburg did not publish any great and lasting contributions, only essays and smaller scholarly pieces. On account of this problematic source material situation it is not surprising that Mayer, and even more so Degenfeld-Schonburg, are largely ignored in the literature on Austrian history. Therefore, as far as their international reception is concerned, the non-liberal, historical and universalist-romantic strands of Austrian economics have fallen into oblivion.

This current lack of knowledge is unsatisfactory because, although the Other Austrians were and are of no international relevance, their opposition to ideas of high growth rates and an excessively individualistic economy, and their call for interventionism and economic ethics show some similarities to opposition movements we encounter today. In many respects, the current critiques of the economic and financial system, of the politics of neo-classical liberalism, even of "globalisation" and the resulting call for the state to tame the "egoistic" market have much in common with the thought of Spann, Mayer and Degenfeld-Schonburg.

This essay is intended to generally call to mind the Other Austrians and give an insight into their stance on the economic crisis. I begin by identifying the mainstream of academic Austrian economics during the interwar period. I will then briefly explore the history of political economy at the University of Vienna[1] in order to introduce the holders of the three chairs. I demonstrate the different directions in which the Austrian

* Dr. Tamara Ehs, Department of Legal and Constitutional History, University of Vienna, Austria.

1 As the University of Vienna had almost monopolised academic education in Austria, and the vast majority of adherents of Austrian Economics received doctorates from the University of Vienna, I concentrate on Vienna.

School and the Other Austrians developed by exposing the non- and anti-liberal (and anti-Semitic) conditions at the faculty. The paper then looks at the Other Austrians' stance on the economic crisis by revisiting their writings and lectures. I conclude with a word on the chair holders' anti-economics and the similarities that can be found with a current stream of economic thought.

II. Political Economy at the University of Vienna

Whereas the literature on Austrian economics of the interwar period mostly studies the (later) emigrants (Moss 2005, Hagemann 2005), the other side of (migration) history remains unexplored, namely those who stayed (see Gestrich and Krauss 2006). In the early 1920s, the three chairs in political economics at the University of Vienna had become vacant and were not given to The Austrians but to the Other Austrians: Othmar Spann, Hans Mayer and Ferdinand Degenfeld-Schonburg. As Hagemann (2010, 180) correctly states, "professors, none of whom is remembered today for having made important contributions to economics." But the message of these appointments was clear: Austrian Economics was no longer welcome at the university. The appointment of these professors broke with the traditions of the Austrian School and drove it into "extramural exile" (Ehs 2011), largely through migration, for the most part to the U.S.A. In the interwar years these three professors (and their pupils) marked a break with the latest developments in political economy. Their influence on the academic study of economics in Austria was to last for decades because after 1945 almost no attempt was made to enliven the discussion of the subject by calling back the émigrés.

In order to make clear the full extent of the break in the development of political economy at the University of Vienna these appointments brought about, the next section will offer an overview of the school's history. In 1763 a chair for *Polizey- und Kameralwissenschaften* was created in the Faculty of Arts and Josef Sonnenfels was appointed professor. In 1784 the chair was re-allocated to the Faculty of Law and from then on economics was included in the training of lawyers. The fact that political economy was taught under the auspices of the law faculty coloured the students' training: they were exposed to idealistic philosophy, political and economic history and theory, but received no instruction in mathematics or the sciences. The Study Regulations of 1893[2] stipulated that political economy was to be examined through the subjects Economics and Political Science; Public Finance and Austrian Financial Law were also to be tested.

By this time Carl Menger had brought about a sea change in economics: in 1871 he published his *Grundsätze der Volkswirtschaftslehre* [Principles of Economics], thereby revolutionising classic economic theory. Menger taught in Vienna from 1874 until 1901, and his book is acknowledged as the first thorough-going discussion of the tasks and the methods of the social sciences in the German language. It made him the intellectual father of the theory of marginal utility. In 1883 he followed it up with his *Untersuchungen über die Methode der Sozialwissenschaften und der politischen Ökonomie* [Investigations into the Method of Social Sciences with Special Reference to Economics], which precipitated a methodological debate with the German Historical School, in particular with Gustav Schmoller, and at the same time laid the foundations for the Austrian School. Menger's works were translated into English and so the Austrian School became known beyond the German-speaking world. At this time Carl Menger and his two pupils, Friedrich Wieser (who became professor in Vienna in 1903) and Eugen Böhm-Bawerk (who obtained a chair in Vienna in 1904) developed a neo-classical or rather marginalistic economics: they did not use a macro-economic approach to examine economic problems as had been the case hitherto but, for the first time, applied a micro-economic approach, oriented towards the individual (Neudeck 1986).

The Austrian school flourished in the decade before the First World War, when a triumvirate of Menger pupils occupied the Vienna chairs of political economy:[3] Eugen Böhm-Bawerk, Friedrich Wieser and Eugen Philippović, whose *Grundriß der politischen Ökonomie* [Outline of Political Economy, 1893] greatly contributed to the dissemination of Menger's ideas.

When Böhm-Bawerk died in 1914, the Marxist economic historian Carl Grünberg was appointed as his successor, but in 1923 he went to Frankfurt in order to build up the Institute for Social Research. As Philippović died in 1917 and Wieser retired in 1922, all the chairs of political economy were vacant at the beginning of the First Republic, which, at a time of extreme political polarisation and after the Social Democrats had left the government, led to the vacancies being filled with conservative candidates. Grünberg's successor was Ferdinand Degenfeld-Schonburg, a representative of the Historical School; Philippović was succeeded by Othmar Spann, who replaced the central doctrine of the Austrian School, methodological individualism, by a neo-romantic-universalistic holism and who was, moreover, more of a social philosopher that an economist.

This meant that the individualistic tradition at the University of Vienna had been broken. Wieser's successor was his favourite student, Hans Mayer, but Mayer could not fulfil the hopes that had been vested in him and wore himself out struggling against Spann. In addition, as Joseph Schumpeter and Ludwig Mises, Böhm-Bawerk's pupils, had been passed over when the appointments were made, in the early 1920s the Austrian School at the university was 'beheaded' (Feichtinger 2001, 182). From this point on, the School operated extramurally and continued its work abroad, in some cases sooner (Schumpeter, who accepted a chair in Bonn in 1925 and went to Harvard in 1932) or in others, later (Mises, who went to Geneva in 1934 and then to the U.S.A. in 1940). Feichtinger (2001) gives a mixture of anti-Semitism and ideological and scientific reservations as the reason for university appointments policy at this time, as well as the fact that in the First Republic economic liberalism had lost its socio-political relevance. The political economy institutionalised at the University of Vienna, that of Othmar Spann, Hans Mayer and Ferdinand Degenfeld-Schonburg, was of little significance in the world at large compared with the activities

[2] RGBl 68/1893 and § 14 RGBl 204/1893.

[3] Friedrich Hayek (1968, 461) referred to the decade before the First World War as "the period of the School's greatest fame".

of the extramurals. This is why the university gradually lost its reputation as one of the three best schools of economics (alongside Stockholm and Cambridge) at this time.

III. The Three Chairs in Biographical Sketches

Othmar Spann[4], born on October 1st 1878 in Altmannsdorf near Vienna, began to study philosophy at the University of Vienna in 1898 but he also took courses at the Faculty of Law and Political Science, for example with Carl Menger. He soon left Vienna and studied political science in Zurich, Bern and finally Tubingen, where he took his doctorate in political science in 1903. In 1907 he submitted a post-doctoral thesis and acquired the teaching qualification for political economy at the Deutsche Technische Hochschule in Brno[5]. From 1909 on he was associate professor in Brno and from 1911 to 1919 he was full professor of economics and statistics. In 1919 Spann was appointed Eugen Philippović's successor at the University of Vienna[6], with responsibility for teaching economic theory, political economy and public finance. In the negotiations prior to his appointment he insisted that the social sciences also be included in his brief. In June of 1921 – the political situation had shifted in Spann's favour, the coalition between the social democrats and the Christian socialists had been dissolved in the previous year and the ministry of education was in the hands of the *Großdeutsche Partei* [Greater German People's Party] – Spann was able to wriggle out of teaching public finance and teach more hours of social studies instead. In the application the Faculty submitted to the ministry we find the somewhat resigned comment that Spann had never taught political economy and would not teach it in future. That is to say, Othmar Spann, Philippović 's successor to the chair of political economy in Vienna was, from that day on, only required to teach five hours of economics, four hours of social studies and four hours of classes on topics from these two areas.[7]

Othmar Spann's appointment in Vienna functioned as a counterweight to the left-leaning intelligentsia (Knoll 1981, 69), and he immediately attracted large numbers of German-nationalist students because his writings were imbued with pan-German nationalism and romantic idealism. Spann had been appointed as professor for political economy but what he taught was social philosophy.[8] For the Austrian School his appointment meant that "one more time an appointment had gone to someone who represented neither the Austrian tradition nor, for that matter, the international mainstream of economic thinking" (Craver 1986, 6). And yet Spann managed to gather an ever-increasing number of followers. "Spann has by far the most important chair in Vienna, politically speaking, as far as pan-German students are concerned", said Paul Karrenbrock (1931). The reason for this perception was that Spann was prepared to take time for his students outside of his lectures, too.[9] Starting out from the Aristotelian idea that the whole is more important than its parts, he transcended the boundaries of the University of Vienna to become one of the leading social theorists of his time. Up until 1938 his book *Haupttheorien der Volkswirtschaftslehre* [Major Theories of Economics, 1911] went through 24 editions, making it the German-language academic publication with the highest circulation and putting even Oswald Spengler's bestselling *Untergang des Abendlandes* [*The Decline of the West*] into the shade. But, according to Caldwell (2004, 138), "despite his initial popularity, it was not long before many students came to view Spann as something of a joke. Those who inclined to positivism of course found intuitive universalism all but incomprehensible … Later in the 1920s, his open rivalry with Wieser's successor, Hans Mayer (himself a strange case), was an embarrassment for surrounding academics and students." As soon as he could, Spann shifted his activities to Germany under the national socialists, where he felt there was still an opportunity to set up a corporatist state: since 1931 the German Catholic *Akademikerbund* had been organising sociological congresses at the Benedictine abbey in Maria Laach. The aim was to build a bridge to National Socialism. Spann received encouragement from Catholic circles because of the encyclical *Quadragesimo anno*, which pressed for social reform and developed ideas about a corporatist type of social organisation. The industrialist Fritz Thyssen also attended these congresses and, fired with enthusiasm for Spann's idea of a corporatist state as an alternative to the existing class society, he founded the *Institut für Ständewesen* [Institute for Corporate Statism] in Düsseldorf in May 1933.

Notwithstanding this, the leading national socialists gradually distanced themselves from Othmar Spann. He had been in touch with NS organisations since the 1920s, was seen as the intellectual leader of the national socialists at the University of Vienna and was also an (illegal) member of the NSDAP, and yet his views did not totally coincide with those of the Nazis.[10] He was barred from teaching in March 1938, imprisoned in Munich until August 1938, and then allowed to return to the Burgenland. In 1939 he went into forced retirement; after 1945 he struggled in vain to be reinstated at the University of Vienna. Spann was sent on leave and then, without having

[4] For more biographical details see Mentschl 2005.

[5] Spann's post-doctoral teaching qualification (*venia docendi*) was also transferred to the University of Vienna in 1908. Philippović and Wieser, as referees, recommended the transfer "in the light of the outstanding academic achievements of the applicant" (Ministry of Education, December 18 1908, Z 164, habilitation record Spann).

[6] Before Spann was appointed, negotiations had taken place with Kurt Wiedenfeld from the University of Halle an der Saale.

[7] Cf. decree by the Ministry of Education, June 25 1921, Z 11580, Habilitation record Spann.

[8] Kurt Rothschild (2009, 62), who attended Spann's lectures, comments, "You can treat Spann as a philosopher, there are plenty of those who are as woolly as he is, but as an economist he is lacking in interest".

[9] Oskar Morgenstern remembers, "Spann had a private seminar in his home and he took me right away, just at the same time when I enrolled in the university. We discussed Marxism, in particular. He was all against Marxism" (quoted in Craver 1986, 10). Indeed, Spann gathered a large circle of followers and friends about him. His hegemony within the Faculty can be attributed to their number, for Spann had far more doctoral and post-doctoral candidates than other professors and he also managed to find university posts for them.

[10] For more details refer to Siegfried 1974.

held a lecture since 1938, he was retired on full pay. He died on July 8, 1950 in Neustift. At the university, the main proponent of Spann's ideas after his death was his former pupil, Walter Heinrich[11].

Hans Mayer[12] was born on February 7, 1879 in Vienna. He attended Eugen Böhm-Bawerk's celebrated seminar and also became Friedrich Wieser's assistant. He took his doctorate in law and then, in 1912, before his academic teaching qualification for the University of Vienna had even been approved, he was appointed associate professor of political economy at the University of Freiburg in Switzerland thanks to his study *Theorie und Preisbildung* [Theory and Price Formation]. When the First World War broke out, Mayer was called up, from mid-1917 until the end of the war he worked as head of department for the scientific committee for wartime economy in the imperial war ministry, in the end he was head of the budget section in the office for military affairs until February 1919. In 1919 Hans Mayer followed a call he had previously received, in 1914, to become a full professor of political economy at the Deutsche Technische Hochschule in Prague; from the end of 1921 on he taught in Graz.

In April 1923 Friedrich Wieser selected Hans Mayer as his successor, particularly as Mayer's publications, articles in the *Zeitschrift für Volkswirtschaft* clarifying problems of subjective value doctrine, such as *Eine neue Grundlegung der theoretischen Nationalökonomie* [New Foundations of Economic Theory, 1911] about a controversy between Böhm-Bawerk and Wieser as to how to assess supplies of goods, and the *Untersuchung zu dem Grundgesetz der wirtschaftlichen Wertrechnung* [An Investigation of the Basic Principles of Economic Calculation, 1921/22], were seen as significant contributions to the Austrian School. These writings made him the "last representative of the Austrian School" (Rothschild 2009, 62), or to put it more precisely, the last representative of a particular strand of the Austrian School in the university context.

In his work Hans Mayer stressed the psychological roots of economic theory. As a critical response to modern theories of price and value he developed the so-called "causal-genetic approach". But, as Mayer never elaborated a theory of his own, his ideas fell on deaf ears abroad and were destined to have no significant impact.

Hans Mayer was unable to fulfil the high hopes that Wieser had had of him. His students report that he left articles unfinished and lectures unpublished, in other words he seemed, "unable to sit down and write anything consecutively" (Gerschenkron quoted in Craver 1986, 8) and had very poor nerves.[13] This may well be attributable to the relentless power struggle with his opponent, Othmar Spann. According to Rockwell (2009), "Mayer wrote only a handful of essays. But then, his main concern had nothing to do with theory and nothing to do with ideas. His focus was on academic power within the department and within the profession." Mayer could have left the University of Vienna to take up university appointments in Frankfurt am Main (1927), Bonn (1932) or Kiel[14] (1933). Notwithstanding this, he remained in Vienna and continued to hold lectures on economics, public finance and the *Theorie der Einkommensbildung* [Theory of the Formation of Income].

Worn out by his struggle with Othmar Spann, Hans Mayer produced no significant work on the theory of value or on fundamental questions of economic theory, with the exception of an essay on the *Erkenntniswert der funktionellen Preistheorien* [The Epistemic Value of Functional Theories of Price, 1932]. Between 1927 and 1932 he did edit a *Wirtschaftstheorie der Gegenwart* [Contemporary Economic Theory] in 4 volumes with the assistance of Richard Reisch among others, and was co-editor of the *Zeitschrift für Nationalökonomie*, the *Wiener rechts- und staatswissenschaftlichen Studien* [Vienna Studies in Law and Political Science] and the *Beiträge zur Wirtschaftstheorie* [Notes on Economic Theory], but apart from some entries for the *Handwörterbuch der Staatswissenschaften* [Dictionary of Political Science, 1924] he published hardly anything of his own. And yet, the extramurally organised economists could not get round Professor Mayer. Since Ludwig Mises could not supervise the habilitation of his own post-doctoral students and since he simply could not involve the social philosopher Spann or Degenfeld-Schonburg, a representative of the Historical School, he tried to remain on good terms with Mayer although Mayer was hostile towards him and that not only because of professional squabbles.[15]

So it came about that Mayer was made a member of the board of trustees of the *Institut für Konjunkturforschung* [Institute for Business Cycle Research] as well as editor of the *Zeitschrift für Nationalökonomie* and de-jure-president of the *Nationalökonomische Gesellschaft*. His behaviour in the latter function was particularly shameful: on March 18, 1938, he sent round a circular cancelling the membership of all Jewish members of the society. An alternative option would have been to dissolve the whole society instead (cf. Müller 1987, 267; Leube 1998, 309), especially as the most important members had already emigrated and the Austrian School had lost its base in Vienna. Still, Hans Mayer had always been adept at adjusting to political change and was one of the few full professors at the Faculty of Law and Political Science who taught uninterruptedly under all systems (from 1924 to 1950) and managed to ensure that their students made their way within the university. In the Second Republic of Austria Mayer's ideas were upheld by his pupil Alexander Mahr in particular. Hans Mayer retired in 1950 but continued teaching as honorary professor until 1954. He died on October 28, 1955. His personnel records include countless condolence letters from distinguished personages from academia and from politics, among others Ludwig Erhard und Alfred Müller-Armack.

[11] The tradition of Universalism was kept alive by the *Zeitschrift für Ganzheitsforschung* [Journal of Holistic Studies] until very recently, 2008.
[12] For more biographical details see his personnel records J PA 362 and S 304.803 at the Vienna University Archive.
[13] Ebeling (2003) gives a somewhat more favourable evaluation of Mayer.
[14] In the academic year 1931/32 Hans Mayer had been visiting professor and director of the *Volkswirtschaftliche Zentralstelle für Hochschulstudium und akademisches Berufswesen* [Centre for Economics at University and for Academic Professions] in Kiel.
[15] Compare, for example, Felix Kaufmann's song "Die Mises-Mayer-Diskussion" (1992).

Ferdinand Degenfeld-Schonburg[16] was born in Vienna on March 1, 1882. He succeeded Carl Grünberg, who went to FranKfurt to become the founding director of the *Institut für Sozialforschung*. Degenfeld-Schonburg attended the Jesuit College Stella Matutina in Feldkirch and then the grammar school in Ravensburg, where he took his final exams in 1902 and went on to study law at the universities of Innsbruck, Freiburg im Breisgau, Berlin, Strasburg and Vienna. Alfred Schulze supervised his doctoral studies in Freiburg and he was awarded a doctorate in law in 1907 with a dissertation on *Stammeinlage und Geschäftsanteil bei der Ges.m.b.H.* [Investment Capital and Quotas in Limited Liability Companies]. As he was especially interested in the relationship between the Social Question and political economy, he undertook further studies in economics, philosophy and agriculture. In 1914 he took a doctorate in philosophy at the University of Berlin, where he had made contact with the socialist student movement). His dissertation was on *Die Lohntheorien von Adam Smith, David Ricardo, John Stuart Mill und Karl Marx* [The Theories of Wages of Smith, Ricardo, Mill and Marx]. As a result of his training in Germany, Degenfeld-Schonburg had got to know of recent developments in the Historical School of economics, attending lectures by Max Sering as well as Gustav Schmoller, Werner Sombart and Adolph Wagner. During his two years at the University of Vienna he had also made contact with the Austrian School of economics and had attended Böhm-Bawerk's seminar. He started work on his dissertation with Wieser and Philippović and went on to complete it with Max Sering, the most important German agricultural economist of the time.

After serving in the war as a volunteer, Ferdinand Degenfeld-Schonburg returned to Berlin in the autumn of 1917, where he was assistant to Sering and worked on his habilitation. In 1920 he submitted the thesis *Die Motive des volkswirtschaftlichen Handelns und der deutsche Marxismus* [The Motives for Economic Actions and German Marxism] at the economics department of the University of Marburg, received his teaching qualification and taught there as a private lecturer until he was appointed associate professor at the University of Würzburg.

Since Carl Grünberg's chair had been unoccupied for years, Ferdinand Degenfeld-Schonburg was appointed full professor at the Faculty of Law and Political Science of the University of Vienna on October 20, 1927 – he had also had an offer from Rostock at the same time, which he did not take up.[17] From the summer term of 1928 on Degenfeld-Schonburg was responsible for the subject Political Economy and lectured on social policy, public economic policy and the history of economics as well as teaching classes in these subjects. In addition, from the academic year 1928/29 on, he was director of the *Seminar für Volkswirtschaftslehre und Gesellschaftslehre* [Seminar for Economics and Social Studies] and was a member of the board of trustees of the *Wirtschaftspsychologische Forschungsstelle* [Research Institute for Economic Psychology] from 1931 on.

Economic development and social organisation were the focus of Ferdinand Degenfeld-Schonburg's research; his scientific approach was influenced by the fact that he was a practising Catholic. He dealt with Marxism in his dissertation and his habilitation, and also later on in *Wirtschaftsantriebe des Liberalismus und Sozialismus* [Economic Incentives in Liberalism and Socialism, 1926] and, on the occasion of the fortieth anniversary of the encyclical, he wrote *Sozialpolitische Forderungen der Enzyklika rerum novarum und ihre Erfüllung* [The Socio-Political Demands of the Encyclical *rerum novarum* and their Realisation, 1931a]. Furthermore, like his colleague Hans Mayer, Degenfeld-Schonburg was concerned with the social problems caused by graduate unemployment as his book *Geist und Wirtschaft. Betrachtungen über die Aussichten der deutschen Akademiker* [Intellect and the Economy: Thoughts on the Prospects for German Academics, 1927] attests. In the *Jahrbüchern für Nationalökonomie und Statistik* [Yearbooks of Economics and Statistics] he published, among other things, an investigation of the economic connections between *Wettbewerbsstreben und Ertragsgestaltung* [Competition and Profit, 1941] and the *Grundlinien einer Theorie der wirtschaftlichen Entwicklung* [Outline of a Theory of Economic Development, 1949].

As a late representative of the Historical School of economics, who was, in addition, competing with the extramural next generation of the Austrian School, Ferdinand Degenfeld-Schonburg did not succeed in making a lasting impression outside of the limited circle of his collaborators and students at the University of Vienna. Moreover, wounds he had sustained in the First World War, which resulted in the amputation of his left leg and the loss of vision in his left eye, meant that he was not as energetic and creative as he could have been. Students described him as a "pleasant and eminently decent", but "not at all brilliant man" (Gerschenkron quoted in Craver 1986, 2), some of them even dubbed him a "complete nonentity" (Machlup quoted in Craver 1986, 2). To be sure, Machlup will have made this remark because of Degenfeld's open anti-Semitism.

In spite of his anti-Semitism, Ferdinand Degenfeld-Schonburg was retired by the Nazis at the end of August 1938 according to §6 of the *Verordnung zur Neuordnung des österreichschen Berufsbeamtentums* [Decree Regulating the Re-organisation of the Civil Service, May 31, 1938, RGBI. I, 607] ostensibly for being unfit for duty because of his First World War wounds but more probably because of his strict Catholicism. In 1945 he was re-instated and in 1950, after Hans Mayer retired, he became head of the Department of Economics. Degenfeld-Schonburg died in Vienna on March 11, 1952, shortly before he was conferred emeritus status. He was succeeded by Theodor Pütz; and Ernst Lagler, who had been his assistant until 1938, was appointed (as an extraordinary professor) to the post that had become vacant after Spann's death.

[16] For more biographical details see his personnel records J PA 296 and S 304.164, Vienna University Archive, as well as the obituary by Ernst Lagler (1953) and his autobiography in Grass (1952).

[17] So Leonard (2007, 238) is mistaken in claiming that Oskar Morgenstern said that Degenfeld-Schonburg was already at the faculty in 1922, when he began his studies, but did not influence him in any way. Degenfeld-Schonburg could not have done so as he only took up the chair after Morgenstern had completed his studies.

IV. The Outsiders

The new appointments to the three chairs in economics are a good indicator of the limited career prospects for qualified young economists of the Austrian School (Hagemann 2010). Although the liberal strand of Austrian economics reached new heights in the interwar period, it only played a very marginal role within the confines of the University of Vienna. Even in the 1920s anti-liberal and anti-Semitic developments within the university anticipated expulsions like those which were to take place only a little later in the world outside. The Austrian School had done groundbreaking research, but in the First Republic liberalism was curbed. The ministry of education's appointments policy was conservative-Catholic to explicitly anti-Marxist and, ultimately, anti-Semitic, which prevented any further development of the Austrian School within the university. In addition, the ministry was against both socialism and the social sciences because of the close links between them. Consequently, Ludwig Mises, for example, was prevented from becoming a full professor and had to transfer his research work from the university to the "extramural exile" of private seminars and research associations – years before the period of actual emigration to other European countries or the U.S.A.

Ludwig Mises had obtained his academic teaching qualification in 1913 with his post-doctoral dissertation *Theorie des Geldes und der Umlaufmittel* [Theory of Money and Credit], which was assessed by Philippović and Wieser, but he was never offered a professorship in Vienna. There were four openings for political economy and he was passed over four times. In 1919 he became *Privatdozent mit dem Titel eines außerordentlichen Professors* [private lecturer with the title of associate professor], which marked the "summit" of his academic career. His students were unanimous in giving three reasons for this: In the first place, Mises was a liberal at a time when liberalism was both economically and politically out of fashion; secondly, he was Jewish, and thirdly, he was obnoxious (cf. Craver 1986, 5). All this notwithstanding, Mises was the crucial figure in the further development of the Austrian School, although as such he was also responsible for the school's splitting into two strands: the Austro-liberals and those who took a more critical stance on liberalism (Klausinger 2006a) [18].

For his part, Mises considered himself to be Menger's legitimate heir; he was influenced by the Swedish economist Knut Wicksell and oriented himself more towards Eugen Böhm-Bawerk's rather than Friedrich Wieser's branch of the Austrian School. What he held against Wieser (and Wieser's successor Hans Mayer) was that they had never understood the true nature of Menger's subjectivism.[19] Extramural acclaim was to prove him right: by the time the *Verein für Sozialpolitik* met in 1928, Mises' theory of the trade cycle was acknowledged throughout the German-speaking world, and the third generation of the Austrian School had reached its high point.

The School's practical influence mainly derives from the work Ludwig Mises did to earn his daily bread. Ever since 1909 he had worked at the Chamber of Commerce and before long he became head of the financial section there, which meant that he came into contact with politics and politicians. Apart from this, Mises' associates tried to influence public opinion by writing articles for the daily press. Fritz Machlup, for instance, authored the column *Zwei Minuten Volkswirtschaft* in the *Neues Wiener Tagblatt* around 100 times (Klausinger 2004).

Starting in 1920, Ludwig Mises held a private seminar for his colleagues and students every fortnight: here they discussed economics as well as questions of social philosophy, sociology, logic and epistemology. Furthermore, the young economists met for an interdisciplinary exchange of ideas at the *Geist-Kreis*, at the *Nationalökonomische Gesellschaft*, which had been especially set up for this purpose, and later at the *Österreichische Institut für Konjunkturforschung*, founded by Mises and Hayek. The young private lecturers handed on the doctrines of economic liberalism, which rejected socialism and nationalisation as well as any state intervention in the economy (see Mises 1929). In the light of the crises of the 1920s, this young Austrian School concerned itself primarily with monetary and trade cycle theory. Mises expanded on his *Theorie des Geldes* in a second edition in 1924; he laid the foundations for Austrian trade cycle theory which was, in its day, a rival to Keynesian theory, often exchanging ideas with Friedrich Hayek (*Geldtheorie und Konjunkturtheorie* [Theory of Money and Cycles], 1929), but also with Fritz Machlup (*Börsenkredit, Industriekredit und Kapitalbildung* [Stock Market, Credit and Capital Formation], 1931) and Richard Strigl (*Kapital und Produktion*, [Capital and Production], 1934).

The extramurally organised Austro-liberals like Mises, Hayek, Haberler and Machlup were private lecturers at the university. They disseminated an individualistic-microeconomic method that was geared to the decisions of individuals and taught "structural economic thought" (Streissler 1969) and methodological individualism. Their doctrine was well-regarded abroad, but at the University of Vienna they were not even entitled to supervise doctoral students nor could they ever hope to become (full) professors.

In March 1933, the Austrian parliament was dissolved and the country was gradually transformed into a clerical fascist state. The Christian-Social politician Chancellor Engelbert Dollfuß, who had frequently attended Othmar Spann's lectures during his student days, governed by means of emergency decrees and martial law. With the constitution of May 1934, Dollfuß created an authoritarian corporate state, relying on the support of the Catholic Church and the *Heimwehr* (Home Guard, in this case a paramilitary force). Besides Othmar Spann's writings, the theoretical basis for Austrofascism was the encyclical *Quadragesimo anno* (1931) by Pope Pius XI, in which he called on all Catholics to end the conflict between the classes and seek harmonious co-operation. In Austria, this was sought at the price of dictatorship. By May 1934 most Austro-liberals had quit Austria and the work of those who remained was often censored, which is why this branch of the Austrian School and its ideas disappeared from the country. When Ludwig Mises and most of the members of his group left Austria in the early

[18] Nota bene: The Austrian School of Economics passed through various transitional phases and was not homogenous in itself (cf. Hagemann, Nishizawa, and Ikeda 2010).

[19] On the different approaches of Wieser and Mises cf. Schweinzer 2000.

1930s, they left a vacuum and Austrian Economics shifted from Mises to Morgenstern, from the liberal to a non-liberal strand (Klausinger 2006b).

As a matter of fact, the impact the Austrian School had on Austrian university students at that time and even later on has been overstated. Ludwig Mises and his pupils held lectures and seminars for students of law and political science, but none of them was appointed to a professorship, which meant that they had no influence on the development of the study programme, they could not supervise doctoral candidates and they certainly could not advise post-doctoral candidates and help them get their academic teaching qualification (*Habilitation*). Thus the great majority of students who studied economics were not influenced by Mises or his followers but by the three full professors, Spann, Mayer and Degenfeld-Schonburg. This was already so in the First Republic, when there were still representatives of the Austrian School in Austria; once these people had emigrated, it was even more the case as the proponents of non-liberal strands and their pupils made their mark on the Second Republic.

V. The Other Austrians and the Economic Crisis

Austria had been among the countries hit hardest by the Great Depression[20]. According to the Austro-liberals, the reasons for an economic crisis of such proportions were to be found in the errors of policy committed under the influence of the Social Democrats, errors that had violated the general conditions for economic liberalism. The logic of a capitalist market economy and the social legislation enacted immediately after the war were perceived to be incompatible. According to Ludwig Mises (1927; 1929), the economy would function smoothly, following in-built mechanisms, provided that there was total freedom, whereas intervention would inevitably lead to a crisis. In Austria the free play of market forces had been disrupted by interventionist measures such as the regulation of wages and prices, and the increase in state spending on welfare measures. The crisis could only be overcome by true liberalism and not by a new round of interventions (cf. Mises 1931, 34).

But this is not the place to give an account of the Austro-liberals' view of the Great Depression and the causes of crises as this has already been exhaustively studied, especially by Klausinger (1995; 2003; 2005). Consequently, I will only revisit the positions of the non-liberal strands represented by Spann, Mayer and Degenfeld-Schonburg.

The Universalist-Romantic Strand: Othmar Spann

Spann's stance on the economic crises can only be understood by exploring his sociological paradigm, which represents a radical break with the Austrian tradition of political economy. Indeed, Spann did not even take note of modern developments in value and price theory. It was not his intention simply to correct the errors in older theories; his aim was rather to produce a new, fundamental justification of political economy. He was deeply rooted in the German Romantic School of Adam Müller, Franz von Baader and Friedrich List and developed universalism as an answer to political questions; investigating knotty economic problems was only a low priority for him (Schweinzer 2000).

Othmar Spann, being a fierce opponent of Marxism (Spann 1929), developed an organic theory of the relationship of the individual to the community, understanding society as an organic entity bound together in spiritual unity. For him, the human being as such does not exist, for he is always a member of a family, class, state or culture. The notion of causality is replaced by that of the *Gliedlichkeit* of *Ganzheiten* (a system of parts making up holistic entities). In his book *Gesellschaftslehre* [Social Theory, 1914] Spann first presented (and in later editions and other writings further elaborated on) his understanding of the ideal state[21], and therefore the ideal economy. Being opposed to democratic liberalism, he sketched a community in which everyone has an "appropriate" place. His model was the rural and medieval world, a metaphysical fiction of social order rooted in Christianity, idealising the medieval *Stände* (corporations) – the re-feudalisation of society. Carty (1995, 93) correctly speaks of a "cult of medieval and then Christian Western culture [that] was a deeply reactionary response to the radical individualization of modern industrial society which Spann hoped to sweep back with his call to integrative cultural nationalism".

Universalism understands the economy as organic; economy would be an organic part of society. This holistic notion of the economy brings Spann to an alternative to marginal utility theory: the theory of achievements (Spann 1923). Here, the actions of individuals are interesting merely from a psychological point of view, only going back to the all-encompassing whole makes actions economically interpretable (see Schweinzer 2000, 61). In contrast to all classical and neo-classical theories, which regard human beings as individuals who take economic actions, Spann's held that individual economic action was meaningless. The individualism of the Austrian School analyses social institutions as the result of individual economic action. But, according to Spann, an action or an institution is only of economic significance by virtue of its usefulness to a 'whole'. He therefore rejected the theoretical framework of the natural and the social sciences because these were based on causality and did not provide any deep insight into the essence of things. Thus he repudiated both the individualism of the Austrian School and also the inductive methodology of the Historical School, which had, he said, forgotten the Romantics (Spann 1930, 21). He did give the Historical School and his colleague Ferdinand Degenfeld-Schonburg credit for pursuing much needed social reform: for Spann one of the major causes of crises was non-existent or misguided social policies.

In his teaching Othmar Spann was bold enough to put forward social critical ideas: according to him, the methods of the Austro-liberals would have catastrophic repercussions for humankind. Individualism, relativism and atomism would lead to a denial of truth and of God (Spann 1939). Consequently, he devised a theory of knowledge and methodology that was at one and the same time a political (and so also an economic) programme. For Spann, the crisis was an opportunity for change,

[20] For details see Rothschild 1947, 51 et seq.
[21] For details see Haag 1976.

and for the realisation of his socio-political programme. According to his universalistic notion of crises[22] a crisis is, "a gradual shift associated with more or less violent and potentially disastrous reorganisations that are necessary to adjust to the new situation" (Spann 1923, 125).

According to Staudinger (2005), Othmar Spann's influence on fascist ideologies should not be underestimated as his suggested solutions to political problems could legitimise almost every authoritarian measure[23]. Haag (1980, 244) even called Spann and his academic community "a veritable breeding ground of fascist and Nazi ideas." At any rate, Spann became the leading Austrian theorist of his time by offering blueprints for the reorganisation of state, society and economy on the basis of corporations[24] – also as a remedy for the economic crisis. "A corporate economy will not only solve the social problem, but also offers a way out of the world economic crisis! It is mistaken to assume that a return to free trade will defuse the crisis. On the contrary, such a course of action would aggravate the situation and would end in chaos" (Spann 1933, 360).

And so Othmar Spann argued in favour of a system of economic alliances, of syndicates and cartels, for a European economic system based on corporations that would transcend individualism. For, "individualism leads to liberalism; liberalism leads to capitalism; capitalism leads to Marxism; Marxism leads to Bolshevism … the alternative is universalism" (Spann 1930, 36). Spann's proposed remedies for the deficiencies in the economy and in society were universalism and corporate statism, and he saw these endorsed in the encyclical *Quadragesimo anno,* to which he referred repeatedly.

The Historical-Ethical Strand: Ferdinand Degenfeld-Schonburg

Ferdinand Degenfeld-Schonburg can be counted as a member of the younger German Historical School of Schmoller and Brentano. The German Historical School was closely linked to the national(isation) history of Germany and won the approval of the political establishment. Degenfeld-Schonburg added his Christian belief to this tradition and thereby created a very distinct form of the Historical School. He was a moralist and therefore could not endorse the "atheism" of the liberal economists as regards social justice. For him, first and foremost, the remedy for the economic crisis lay in a moral economy, in improved morality, in a better society.

According to Gustav Schmoller, crises are caused by the lack of planning in production and excessive speculation. In order to combat them he suggested introducing social reforms such as trade and craft associations modelled on medieval guilds, unemployment insurance and the like. Degenfeld-Schonburg's response to the economic crisis was similar, but more moralistic: his approach was determined by social questions and Christian values. He was not so much concerned with exact scientific methods as with the social impact of his ideas. He made no pretence of being an objective scholar: in his work facts and values mix, and studies are combined with sketches of policies for social and moral reform.

In his essay *Sozialpolitische Forderungen der Enzyklika rerum novarum und ihre Erfüllung* (1931a) he declares that a combination of individual liberty and collective planning in the sense of state intervention would be the only right way forward. Even in a lecture held on the eve of the promulgation of the new Austrian constitution of 1934 he explained, "that state intervention is necessary, that it should be planned, but that it should leave as much room for freedom as possible, nonetheless" (Degenfeld-Schonburg 1934, 86) and thus rejected state socialism. He regarded the state as a "good gardener", whose job it was to create the right conditions for the economy to grow and flourish although he did refer to the principle of subsidiarity, citing the encyclical as he did so.

A particular concern of Degenfeld-Schonburg was the morality of the state, which ought to care for those put at risk by the economy, "In particular it falls to the state to look after the workers; in the course of the last hundred years ensuring the welfare of the workers has shown itself to be one of the most important tasks of the state" (Degenfeld-Schonburg 1934, 88). In this connection he repeatedly put forward the idea of a regular income for the unemployed because, although Catholic morality included a duty to work, there was a moral obligation, too, to care for children, the old, the sick and other people who were unable to do so. Degenfeld-Schonburg stressed that providing an income for the unemployed was not simply an act of charity, on the contrary, citizens had a right to receive support from the state (Degenfeld-Schonburg 1931b).

This socio-political approach was also apparent in Ferdinand Degenfeld-Schonburg's teaching at the University of Vienna. When the legal amendment of the study regulations passed in 1935 gave more importance to political economy in law studies, he welcomed the introduction of a 3-hour compulsory lecture on social policy because it would enable him to cover socio-political theories and measures, and also include a discussion of labour problems, matters which he considered central to the training of the students (Degenfeld-Schonburg 1935). In his lectures he always discussed his call for the de-proletarianisation of the workers by creating property for them (Degenfeld-Schonburg 1929), thereby expanding on the "organic" co-operation of state, members of different professions and individuals.

In addition to workers' welfare and a planned economy, Ferdinand Degenfeld-Schonburg saw a further remedy for the crisis in the re-creation of a Central European economic area with Austria at its heart, for "only in this wider context can the creation of a proper relationship between state and economy prove its worth" (Degenfeld-Schonburg 1934, 89).

The doctoral dissertations in political science Degenfeld-Schonburg supervised provide further insights into his teaching and his influence. In *Ist die Rationalisierung eine Ursache der Krise?* [Is Rationalisation a Cause of the Crisis?, 1934] the doctoral

[22] *Grundlagen einer universalistischen Krisenlehre* [The Foundations of a Universalist Theory of Crises, 1928] by Spann's closest pupil and collaborator, Walter Heinrich, provides insight into Spann's approach to the Great Depression.

[23] Nota bene: Although Spann shared general features of National Socialism and was a member of the (illegal) NSDAP he rejected biological-racial anti-Semitism, and therefore was banned from the university and arrested after the Nazi annexation of Austria in March 1938.

[24] But it has to be clearly stated that Spann dissociated himself from the way the corporate state was finally set up in Austria (Spann 1934, 246).

student Franz Slavetinsky investigated the relationship between rationalisation and unemployment and critically examined the theory of compensation. He concluded that this was unsatisfactory and came out in favour of interventionist measures. Capitalist rationalisation had led to a dead end, to a crisis, which cannot be remedied by means which are part of the process. The dead end can only be avoided by government and bank policies. In particular, Slavetinsky contradicted Ludwig Mises' view (1931), which denied that there was any connection between rationalisation and unemployment. Slavetinsky concluded that capitalism in its present form had failed and quoted the encyclical *Quadragesimo anno* for a solution to the problem, "Higher and more noble powers must take economic power into their hands: social justice and altruism" (Slavetinsky 1934, 116). Citing Spann's *Der wahre Staat* [The Ideal State, 1921] and his doctoral advisor's latest speech (Degenfeld-Schonburg 1934), Slavetinsky sets out his preference for a corporatist state and economy.

Ferdinand Degenfeld-Schonburg's predilection for corporate statism derived from his idealised picture of medieval culture, which, in combination with Christian-Germanic culture, he held to have brought forth outstanding intellectual achievements. His cultural and social elitism meant that he rejected a socialist model of social organisation and besides, solely for economic reasons, he thought such a model was not sustainable in the long term (Degenfeld-Schonburg 1920). In addition, with his argument that derived from the medieval ideal of culture Degenfeld-Schonburg attacked the capitalist economic approach, which turned intellectual activity into a good of value, "The spirit of profit is invading the intellectual sphere" (Degenfeld-Schonburg 1931b, 28). He condemned the commercialisation of science and culture in the free-market economy.

The Dead-End Strand: Hans Mayer

Hans Mayer's views on the economic crisis are the most difficult to research as, on the one hand, he published very little during that time because of his debilitating power struggle with Othmar Spann and, on the other, because he criticised contemporary work on the trade cycle and crises, while not coming up with any fully worked out theory of his own. Mayer wrote nothing specifically on the economic crisis, which is why in the following I will only briefly sketch his position within or as opposed to the Austrian School of economics.

Hans Mayer had his roots in the tradition of Friedrich Wieser, who, with his *Theorie der gesellschaftlichen Wirtschaft* [Social Economics, 1914], had brought about a shift from strict economic theory as in Carl Menger's work to more comprehensive social studies. According to Mayer, human action is oriented towards satisfying needs. He understands economics as an empirical science, which can be applied to certain psychological incentives to act (Mayer 1924) and which takes differently empirically determined types of entrepreneur as its starting point (Mayer 1933). However, instead of developing an empirical research programme, he made do with referring to the real world, which could be explored by simple observation (Mayer 1911). This naďve empiricism was put in the shade by the research programme developed by Mises (1933) and marked the end of the development of the Austrian School in a university context.

Mayer was unable to contribute anything to the attempts to explain the economic crisis of the 1930s apart from his criticism of purely statistical trade cycle research, which provided clues but not a solution to the problem. Among his colleagues he looked in vain for a complete and general theory of the trade cycle and reminded them of Böhm-Bawerk's comment about the theory of crises being the last chapter of economic theory (Mayer 1933). Yet he himself did not elaborate further on his psychological theory of crises. What is more, Hans Mayer rejected theories that start out from the satisficing individual, which are standard nowadays, and also repudiated the notion of general equilibrium, which meant that his ideas actually lagged behind those of Menger.

Conclusion

Whereas the Austro-liberals blamed political violation of the general conditions for economic liberalism as responsible for the crisis in the economy and for its depth, and argued for the end of interventionism and true liberalism, the Other Austrians thought that it was precisely excessive liberalism and the lack of intervention, especially regarding social policy, and the lack of moral values, that was the problem. Although Othmar Spann, Hans Mayer and Ferdinand Degenfeld-Schonburg worked alongside and/or against each other rather than with one another, which resulted in the emergence of three different strands of non-liberal political economy at the university, they do show certain similarities in their critiques of economic liberalism. For the Other Austrians man, not the invisible hand, was the master of the economy. They did not accept the self-regulating nature of the marketplace because they distrusted the "natural" equilibrium mechanisms in the economy and believed in the necessity of state intervention. Small enterprises and family-run businesses were favoured.

Most similarities are to be found between Othmar Spann and Ferdinand Degenfeld-Schonburg as they both referred to the encyclical *Quadragesimo anno* when elaborating their opinions on political economy and on the economic crisis. They were critical of the capitalist competitive ethic and therefore viewed Christian moral values as the most important goal of economic policy. Both fleshed out their arguments on subsidiarity, social policy and interventionism by visualising the corporatist state. Their stances on economics and their opposition to (excessive) economic growth were confirmed by the Great Depression. In line with the encyclical, they wrote about fair wages and social reform (also seen as moral reform), and last but not least about the necessity of rejecting socialism. Abandoning liberal rationalist ideas, they showed no traces of Mengerian economics.

Vandewalle (1986) recognised similarities between the romantic economics of the beginning of the nineteenth century (Adam Müller, Jean-Charles-Léonard Simonde de Sismondi etc.) and the ideas of some adherents of the doctrines of zero growth and ecological economics in the 1970s. It would be worthwhile taking the Other Austrians into account when discussing the (history of) political economy in the light of the current crisis as Spann in particular directly referred to Adam Müller and Franz von Baader as two of the early critics of capitalism. And Degenfeld-Schonburg was deeply rooted in Christian ethics and the Church's critique of the liberal society and economy.

Hans Mayer cannot be counted among the adherents of the encyclical and the organisation of society and economy along corporatist lines. But he belonged to another non-liberal strand, as can be seen above all from his outspoken epistemological critique of equilibrium price theory. For Mayer, the law of equal marginal utility was impossible in the real world of the psyche. Similar to Spann, and yet in a quite different way, Mayer chose a holistic approach, which offered an answer to the social problems of the interwar period. If Spann, "clearly spoke to the material and social difficulties of Vienna of the twenties, so too did Mayer […] speak to the psychological uncertainty of the time" (Leonard 2007, 247) – a time when democracy was interpreted as synonymous with degeneration and drift.

With these non-liberal strands the University of Vienna became a hotbed of anti-economics – and anti-Semitism. In accordance with Coleman's (2002, 2003) differentiation, Othmar Spann and Ferdinand Degenfeld-Schonburg can be called "right-wing anti-economists", and Spann maybe even an "irrationalist anti-economist". They were both followers of Werner Sombart, the leading corporatist anti-economist of the 1930s, and regarded the market as destructive of a desirable social order, deploring the lost sense of community – lost as a result of liberal individualism. Spann, and even more so Degenfeld-Schonburg, were moralists who rejected "godless" liberalism. Both are also reported to have been outspoken anti-Semites, equating Judaism and capitalism with rationalism and regarding them as the deadly foes of mysticism, unity and spiritual Germandom. For his part, Hans Mayer was far too deeply embroiled in his inner-faculty struggles with Spann to respond to these tendencies by developing his own theory or even steering the Austrian School in a new direction. As he did not take methodological individualism to be of great importance, he tended to be neo-liberal in comparison with Ludwig Mises and the other extramural Austrians.

The Other Austrians are hardly remembered in the literature on the history of economic thought. Perhaps this is because they did not sketch out a grand theory or master plan for economics (Mayer, Degenfeld-Schonburg) or because their proposals are said to have prepared the ground for fascism (Spann). Whereas some interwar ideas and experiments like Gesell's theory of depreciative money are resurfacing these days, the three interwar holders of chairs of political economy at the University of Vienna are not mentioned. Yet, in many respects, the Other Austrians' – especially Spann's and Degenfeld-Schonburg's – stances on the economic crisis show similarities to arguments and opposition movements we encounter today. They are a reminder of the ideological baggage that all economic measures come with. After all, weighing up the pros and cons of contemporary trade cycle measures is never "just" scientific; it depends on personal ideas and convictions. Commentators and economic advisors belonging to very different schools of economics assess crises and economic measures differently – then as now. Criticism of economic policies is always criticism of the social order, and economic theory is social theory, too.

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Some Remarks on ius vitae ac necis and ius exponendi

Tamás Nótári*

Summary

A Roman pater familias was entitled to the following positive rights: ius vitae ac necis, ius exponendi, ius vendendi and ius noxae dedendi. What follows is an in-depth analysis of the changes in ius vitae ac necis and ius exponendi. Ius vitae ac necis denotes right of disposal over the life and death of a filius/filia familias, while ius exponendi the right to expose newborn infants. Exposing a child often contained its death or wilful murder; e.g., in case of a deformed child when the aim was to get the family or the community rid of prodigium representing ill luck. Therefore, it seems to be more proper to discuss the rights a father had against newborn infants – no matter if they applied to killing or only exposing the child – as part of ius exponendi since killing or exposing children was several times limited and sanctioned in a single imperial decree. Originally, ius vitae ac necis was sacral and punitive law power. Its sacral character came to the front when killing a deformed child since this right is the component of the father's power over his newborn infant, and this will be discussed under the heading ius exponendi; its punitive law aspect will become obvious when it is used against an adult child. This paper, first, intends to describe changes in ius vitae ac necis, and dwell on the restrictions and rules of procedure of exercising it (I.). After that, changes in ius exponendi will be followed up, with special regard to the regulation of the legal status of the exposed child (II.).

Key words: *patria potestas; ius vitae ac necis; ius exponendi.*

In Roman law *potestas* always denotes some power; *plena in re potestas* is full power of the owner of the thing over the thing, by which *"in his own property everybody can do everything that does not disturb others"*.[1] *Pater familias* was entitled to *patria potestas* over his children and *dominica potestas* over his slaves.[2] *Patria potestas*, just as power over one's wife, *manus*, comes from the same full-scope power of the head of the family. This power is total: on the one hand, because free family members, slaves and lifeless things are all subjected to it; on the other hand, because it contains the right to destroy things and kill the above mentioned persons.[3] Consequently, the power over persons and things the head of the family was entitled to (*potestas, manus, mancipium, dominium*) developed from the same ancient power, none of the formations of power served as an example for the other[4], which clearly refutes Mommsen's view that the father had ownership over his children.[5] According to Ulpian, *pater familias* is the one who is entitled to dominion in his house.[6] (*Domus* is also a sacral concept, which had its own household gods (*dii penates*).[7]

It is well known that according to Roman law certain persons have rights of their own, such as the *pater familias*, others are under power, such as the wife (*uxor in manu*), the person in *mancipium* and the family child under *patria potestas*.[8] Several descriptions of *patria potestas* can be found in the sources of Roman law, e.g. in *Institutiones* of Gaius[9] and Iustian.[10] Almost

* Dr. habil. Tamás Nótári, PhD, associate professor, Faculty of Law of the Károli Gáspár University, Budapest, Hungary.

1 Ulp. D. 8, 5, 8, 5.

2 Paul. D. 50, 16, 215. *'Potestatis' verbo plura significantur*: *In persona magistratuum imperium: in persona liberorum patria potestas: in persona servi dominium.*

3 Kaser, Max: *Der Inhalt der patria potestas*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 83. 1971. pp. 62–87, 62.

4 Kaser 1971. p. 63. *In Warheit beruht die Gleichartigkeit* der *Gewalten über die Personen und über die Sachen nur darauf, daß sie beide, auch noch lange Zeit nach ihrer Ablösung aus der einheitlichen Urgewalt, gleich total geblieben sind. Keine hat der anderen zum Vorbild gedient, sondern beide sind ebenso ursprünglich, wie die Teilung einer Sache in einheitliche Teile den Teilstücken im gleichen Augenblick ein selbstandiges Dasein verleiht.*

5 Mommsen, Theodor: *Römisches Strafrecht*. Leipzig 1899. p. 17., 20.

6 Ulp. D. 50, 16, 195, 2. *Paterfamilias est, qui in domo dominium habet.*

7 Cic. *dom*. 41. *Quid est sanctius, quid omni religione munitius quam Domus unus cuiusque civium. Hic arae sunt, hic foci, hic dii penates, hic sacra religiones ceremoniae continentur. Hoc profugium est ita sanctum, ut inde abripi neminem fas sit.*

8 *Inst.* 1, 8.

9 Gai. *inst*. 1, 55. *Item in potestate nostra sunt liberi nostri quos iustis nuptiis procreavimus. Quod ius proprium civium Romanorum est; fere enim nulli alii sunt homines qui talem in filios suos habent potestatem, qualem nos habemus. Idque divus Hadrianus edicto, quod proposuit de his qui sibi liberisque suis ab eo civitatem Romanam petebant, significavit. Nec me praeterit Galatarum gentem credere in potestate parentum liberos esse.*

10 *Inst*. 1, 9. *In potestate nostra sunt liberi nostri, quos ex iustis nuptiis procreaverimus. Nuptiae autem sive matrimonium est viri et mulieris coniunctio individuam consuetudinem vitae continens. Ius autem potestatis, quod in liberos habemus, proprium est civium Romanorum: nulli enim alii sunt homines, qui talem in liberos habeant potestatem, qualem nos habemus. Qui igitur ex te et uxore tua nascitur, in tua potestate est: item qui ex filio tuo et uxore eius nascitur, id est nepos tuus et neptis, aeque in tua potestate, et pronepos et proneptis et deinceps ceteri, qui tamen ex filis tua nascitur, in tua potestate non est, sed in patris eius.*

surprised, Gaius notes that such an extended father's power does not exist anywhere else, perhaps only among the Galatas. (He is presumably wrong on this point since we have information on similar extensive *potestas* in the Antiquity among the Celts in Gaul[11], as it is described by Caesar.[12]) Although several presentations of *patria potestas* can be found in the sources, it was not defined uniformly. Presumably, they considered it unnecessary to determine it exhaustively since *patria potestas* was clearly the product of the Roman spirit, and it owed its existence not to the State's lawmaking as it went back to times long before the State.[13] Only *sui iuris* citizens with full right could be *patres familias*[14], all the persons were under *patria potestas* over whom the *pater familias* exercised his rights not due to *dominica potestas* or *manus*: children begotten in lawful marriage[15], adopted children[16], legitimated children, wives of blood children and adopted children (in case of *manus* marriage), if their father was under *patria potestas*, grandchildren, great-grandchildren etc. and their wives (in case of *manus* marriage).[17] In Watson's definition, *patria potestas* meant the power that in Roman society the male head of the family was entitled to over the free family members subordinated to him (apart from the wife, who was under *manus*).[18]

Pater familias was entitled to the following rights: *ius vitae ac necis*, *ius exponendi*, *ius vendendi* and *ius noxae dedendi.*[19] What follows is an in-depth analysis of the changes in *ius vitae ac necis* and *ius exponendi*.

I. In Antique sources several references can be found to *ius vitae ac necis* that constituted an essential element of the *potestas* of the *pater familias*.[20] One of the royal laws left to us by Dionysius of Halicarnass under the name of Romulus regulates the father's punitive power over his adult child. According to it, the father was entitled to full-scope power over his son during the son's whole lifetime, he was allowed to restrict his personal freedom, beat him, exile him in handcuffs to do rural work, and kill him; thus, the source, listing the canon of punishments that could be imposed, refers to the possibility of exercising *ius vitae ac necis* almost as *ultima ratio*.[21] Although the law does not say anything on either the scope of application of these punishments or the procedure necessary for imposing them, it can be made probable that the family child was not at the mercy of the father, if we consider the strict control that the *gens* exercised initially over the internal life of the family and which was later assumed by the *censor*.[22] We know from Dionysius that *censores* controlled how the *pater familias* brought up their children and if they deemed upbringing too strict or too mild, they took firm measures; they acted similarly with regard to disciplining slaves.[23] Presumably, *censores* also took care to ensure that the religious cult of the house community was properly fulfilled.[24] By clear irony, Plutarch notes that *censores* did not leave either marriage or upbringing of children or feasts without control, instead they exercised supervision over everybody's conduct of life and political thinking.[25]

The first proof of the restrictions of exercising *ius vitae ac necis*, which constituted the *content* of *patria potestas,* is provided by the stipulation of the Twelve Table Law that can be more or less safely reconstructed from the Gaius text of *Codex Veronensis* and from *Fragmentum Augustoduniense*: *"Ergo tum praetor corpus te dedere dom …… parentem putes …… iure uti t… ……<do> mino vel parenti etiam occidere eum et mortuum dedere in no<xam> …… …… patria potestas potest. n …… cum patris potestas talis est ut habeat vitae et necis po<testatem>. De filio hoc tractari crudele est, sed… non est. … n post r…. <occi>dere sine iusta causa, ut constituit lex XII tabularum, sed deferre iu<dici> debet propter calumniam.*[26] *Fragmentum Augustoduniense* discusses the power of *pater familias* that gives him the right to kill the slave or family child who has caused damage to a third party delictually, and to fulfil the obligation of *noxae deditio* by handing over the corpse or a part thereof. Directly after that, it clearly states that *patria potestas* contains *ius vitae ac necis*, and that in accordance with the provisions of the Twelve Table Law the *pater familias* was not allowed to kill his son *sine iusta causa*. Krüger's reading of the text is not completely certain, however, in spite of these changes it is possible to read the phrase without any doubt *<occi>dere sine iusta causa, ut constituit lex XII tabularum*,

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[11] Mitteis, Ludwig: *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*. Leipzig 1891. p. 24.

[12] Caes. *Gall*. 4, 19, 3–4. *Viri in uxores sicuti in liberos vitae necisque habent potestatem, et cum pater familiae inlustiore loco natus decessit, eius propinqui conveniunt et de morte, si res in suspicionem venit, de uxoribus in servilem modum quaestionem habent, et si compertum est, igni atque omnibus tormentis excruciatas interficiunt. … omnia quaeque vivis cordi fuisse arbitrantur in ignem inferunt, etiam animalia ac paulo supra hanc memoriam servi et clientes, quos ab iis dilectos esse constabat, iustis funeribus confectis una cremabantur.*

[13] Pólay, Elemér: *Az atyai hatalom intézményének alapvonalai a római jogban*. (Principles of patria potestas in Roman Law) Miskolc 1940. p. 7.

[14] *Inst*. 1, 9, 1–2.

[15] Gai. *inst*. 1, 55.

[16] Gai. *inst*. 1, 97.

[17] Pólay 1940. 14.

[18] Watson, Alan: *The Law of Persons in the Late Roman Republic*. Oxford 1967. p. 77.

[19] Nótári, Tamás: *Római köz- és magánjog*. (Roman Public and Private Law) Szeged 2011. p. 176.

[20] Cic. *dom*. 29. 77; *Pis* 40. 97; *fin* 1, 8; *rep* 2, 35; Val. Max. 5, 8, 2–5, 9, 1; 5, 10, 1; 6, 1, 6; Suet. *Tib*. 35; Liv. 1, 26; 2, 41; 8, 7; *epit*. 54; Plin. *nat*. 34, 4, 16; Auct. ad Her. 4, 16, 23; Sall. *Cat*. 39, 5; 52, 30; Sen. *clem*. 1, 11. 50; Quint. *decl*. 317; Dio Cass. 37, 36; Gell. 5, 19, 9.

[21] Dion. Hal. 2, 26, 4.

[22] Liv. 6, 20; Gell. 9, 2.

[23] Dion. Hal. 20, 13, 3.

[24] Pólay, Elemér: *A censori regimen morum és az ún. házibíráskodás*. (Regimen morum of the censors and the so called iudicium domesticum) Acta Universitatis Szegediensis XII. 1965. p. 5.

[25] Plut. *Cato mai*. 16.

[26] *Fragmentum Augustoduniense* 85–86. In: Collectio librorum iuris anteiustiniani. Edd. P. Krüger – Th. Mommsen – G. Studemund. Berolini 1923. p. 160.

i.e., that in accordance with the provisions of the Twelve Table Law the *pater familias* was not allowed to kill his son without *iusta causa*. The authenticity of the quotation would be doubtful if it should or could be presumed that this is only an independent insertion of the jurist who compiled *Fragmentum Augustoduniense* from Gaius's texts. However, in the present case rather fragmentary text of *Codex Veronensis* contains the *"…tabul…"* fragment[27], which can mean nothing else than *leges XII tabularum*, which makes it highly probable that this provision from the Twelve Table Law was contained in the original Gaius text too.[28] Kunkel claims that originally *iusta causa* meant that it was mandatory to prove that the son had committed a crime which made it lawful to apply death penalty.[29] Presumably, demonstration had a determined order where, after the case had been accurately described and investigated, the family child charged with committing the crime was given the opportunity to defend himself. This is also implied by the phrases found in the cases to be discussed later *cognita domi causa*[30], *inspecta diligentissime causa*[31], *audita causa* and *quae adulescens pro se dixerat*[32].

The fragment *deferre iu<.....> debet propter calumniam* was read by its first publisher, Chatelain as *hoc*, which was borrowed from him by Krüger too. First, Ferrini and Scialoja read and supplemented it to *iu<dici>*, which version was soon shared by Krüger too. However, as it has been proved by Kunkel[33], the *iu<dici>* reading is not acceptable either in terms of content or textual criticism. Namely, if the translation of *deferre iudici* is "*beim Richter Anklage erheben*" or "*dem Richter anzeigen*", then, by interpreting *iudex* as a body of administration of justice (*öffentliche Justiz*), two opportunities are offered. Either the *pater familias* shall bring a charge against his son before the law to avoid *calumnia*; but this interpretation would fundamentally question the existence or exercisability of *ius vitae ac necis*, which constitutes a cardinal point of *patria potestas*. Or the *pater familias* had to report to the *iudex* the killing carried out by him owing to the *ius vitae ac necis* he was entitled to, and in this case it is difficult to harmonise a mere obligation to report with the prohibition of killing of the *filius familias sine iusta causa*. If we accept the reading *iu<.....>* as proper, the addition *iu<dici>* cannot satisfy us because it does not fill up the *lacuna* present in the text. Namely, the edge of the page was cut off in equal width in order to use it again, so, at least seven-eight – and not four-letters are missing from each line; consequently, the addition *iu<dicibus>* instead of *iu<dici>* seems to be more acceptable. This reading will give sense if we interpret *iudices* not as judges of administration of justice but members of the *consilium*, the relatives and friends. At the same time, it is also possible that the reading *iu<.....>* not having been confirmed can be replaced by *nec<essariis>* or *pro<pinquis>*. As the reading of the text raises serious problems, it should not be considered a proof beyond any doubt of the absolute necessity of *consilium necessariorum*, yet, from the above it is absolutely clear that in order to exercise *ius vitae ac necis* the crime of the *filius* had to be proved (*iusta causa*), if the father wanted to avoid the charge of murder. At the same time, other sources provide convincing proofs that to exercise *ius vitae ac necis* it was necessary to hold *iudicium domesticum* and to convene the *consilium necessariorum*: *"Maiores nostri dominum patrem familias appellaverunt, honores in domo gerere, ius dicere, permiserunt et domum pusillam rem publicam esse iudicaverunt."*[34] Seneca, in his letter to Lucilius, mentions that the ancestors made it possible for the *dominus*, i.e., the *pater familias* to fulfil offices in the house community and exercise *iurisdictio*, thus, they considered the home or house community a reduced-sized copy of the State. The *dominus*, exercising punitive power, acted in compliance with *exemplum maiorum*[35] and *priscum institutum* according to Tacitus;[36] in compliance with *mos maiorum* according to Sueton;[37] and in compliance with *consuetudo* according to Cicero[38]. The *iudicium* took place, within certain formalities, usually in the *atrium* of the home of the *pater familias*.[39]

With regard to the question whether *iudicium domesticum* was real jurisdiction, the literature is rather divided. The view that does not acknowledge *iudicium domesticum* as real jurisdiction can be traced back to Mommsen.[40] He refuses the concept of *iudicium domesticum* for being an *oxymoron*, and speaks about *Hauszucht* only, which can be called *coercitio* or *disciplina* too; so, *iudicium domesticum*, that is, according to him *Hauszucht* is nothing else than a sort of a *Gewissensgericht*.[41] Following Mommsen, Volterra claims that the judgment of the *iudicium domesticum* did not exempt the person under power from the State's court proceedings and the punishment imposed by it[42], and that the existence of State's court set up for judging the crime

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[27] Gai. *inst*. 4, 80.

[28] Rabello, Alfredo Mordechai: *Effetti personali della „patria potestas"*. Milano 1979. p. 90; Visscher, Ferdinand de: *Le régime romain de la noxalité*. Bruxelles 1947. p. 175; Kunkel, Wolfgang: *Das Konsilium im Hausgericht*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 83. 1966. pp. 219–251., 243.

[29] Kunkel 1966. p. 243.

[30] Liv. 2, 41, 10.

[31] Val. Max. 9, 5, 1.

[32] Sen. *clem*. 1, 15, 3.

[33] Kunkel 1966. p. 244.

[34] Sen. *epist.* 47, 14.

[35] Tac. *ann*. 2, 50. *Adulterii graviorem poenam deprecatus, ut exemplo maiorum propinquis suis ultra ducentesimum lapidem removeretur suasit.*

[36] Tac. *ann*. 13, 32. *Isque prisco instituto propinquis coram de capite famaque coniugis cognovit et insontem nuntiavit.*

[37] Sue. *Tib*. 35. *ut propinqui more maiorum de communi sententia coercerent.*

[38] Cic. *Rosc. Am*. 15, 44. *Quod consuetudine patres faciunt, id quasi novum reprehendis…*

[39] Val. Max 5, 8, 3. *Succurrebant effigies maiorum cum titulis suis ut eorum virtutes posteri non solum legerent, sed etiam immittarentur.*

[40] Mommsen 1899. pp. 16–26.

[41] Mommsen 1899. p. 17.

[42] Volterra, Edoardo: *Il preteso tribunale domestico in diritto romano*. RISG 85. 1948. pp. 103–153, 117.

excludes the existence of *iudicium domesticum* as a legal institution.[43] Guided by a similar thought, Mommsen also misses the accurate description of the scope of crimes to be judged by *iudicium domesticum*.[44] According to Kunkel's opinion, this way of thinking was not typical of the Romans as scopes of authority overlapped in the order of the state administration of justice too, which also proves that the competence of the courts of justices ordered to judge determined crimes had never become exclusive, between domestic jurisdiction and the State's administration of justice, and while they existed side by side a mutual competition of competencies prevailed between them.[45] (A similar situation evolved between the *tresviri capitales* and the *quaestiones perpetuae*[46], and due to certain crimes it was possible to bring a charge before the *quaestio repetundarum,* the *quaestio maiestatis* or the *quaestio de vi* too.[47]) Kaser-although he does not resolutely refuse to give any significance to *iudicium domesticum* as Mommsen and Volterra-emphasises that it did not belong to the scope of *ius*.[48] *Iudicium domesticum* is considered real jurisdiction by those who more or less share Geib's opinion, as Geib claims that the *pater familias* was entitled to the right of punitive jurisdiction over the members of his family.[49] Romans considered the family a reduced-sized copy of the State, in which *pater familias* can be made equal to *magistratus* having *imperium*, and similarly their *iudisdicto* can be made parallel too[50], as Bonfante has already called the attention resolutely to this point.[51] This opinion was shared by Düll, although in his view in *iudicium domesticum* the *pater familias* was not necessarily bound by the opinion of the *consilium*.[52] Kunkel ties the wife's and children's capital culpability by all means to *consilium*, and believes that the *pater familias* could not make himself independent of the majority judgement of the *consilium* with regard to guilt or innocence of the accused.[53] Below we provide a few examples which reveal that if the father wanted to exercise the *ius vitae ac necis* he was entitled to and wanted to be exempted from the charge of murder, he had to deal with the case in *consilium necessariorum*.

Livy discloses two traditions on the conviction and death of Cassius.[54] According to one of them, his father executed the death sentence on him; after he had held the necessary trial at his home, he had his son whipped and executed. He offered the son's property to Ceres, he had a statue made of that and had it written on it that it had been made by Cassius's family. According to the other tradition, *quaestores* Caeso Fabius and L. Valerius brought a charge against Cassisus due to *perduellio* and convicted him in the proceedings conducted before the *comitium* in 486/5 B.C. Livius tends to give credit to the second tradition, however, the impossibility of this version has already been demonstrated by Mommsen too.[55] Therefore, in the tradition that can be considered authentic, an example of *iudicium domesticum* is presented to us. Killing on the father's order is not arbitrary because the cases have been investigated and negotiated. Livy does not expressly refer to *consilium necessariorum*, however, as the other cases published by him reveal this was natural to the writer of the age of Augustus, his intention by giving this account was primarily to highlight the *severitas* and *gravitas* of heads of family of ancient times.[56] According to Voci, the fact that it is the word *familia* and not the word *pater* that can be read on the statue erected for Ceres refers to a *giudizio commune*.[57] In the present case it seems to be proper to translate the word *familia* as *family* and not as *property* because also Livius mentions the *consecratio* of the son's *peculium* only, and *familia (pecuniaque)*[58] was not used as a synonym of *peculium*. The phrase *damnatus*, for that matter, does not prove that the father had adopted the judgment independently, *sine consilio* because the words *condemnare* and *damnare* in classical *quaestio* lawsuits denote the activity of the accuser too.[59]

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[43] Volterra 1948. pp. 135. ff.
[44] Mommsen 1899. p. 20.
[45] Kunkel 1966. p. 222.
[46] Kunkel, Wolfgang: *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit.* München 1962. p. 76.
[47] Kunkel 1966. p. 223.
[48] Kaser 1971. p. 69. *Die Eindordnung der hauslichen Gerichtsbarkeit in den Bezirk der mores läßt vielmehr deutlich erkennen, daß sie bei der Scheidung von Recht und Sitte aus der Rechtsordnung ausschlossen worden ist.*
[49] Geib, Gustav: *Die Geschichte des römsichen Criminalprozesses*. Leipzig 1842. p. 82.
[50] Sen. *contr*. 10, 2, 8. *cetera iura puto, paterno imperio subiecta esse*; Gell 10, 23, 4. *Vir… mulieri iudex pro censore est, imperium quod videtur habet*. Sen. *epist*. 47, 14. *Maiores nostri dominum patrem familias appellaverunt, honores illis in domo gerere, ius dicere permiserunt et domum pusillam rem publicam esse iudicaverunt.*
[51] Bonfante, Pietro: *Corso di diritto romano*. Roma 1925. I. p. 98. *Tutto quanto il diritto punitivo del paterfamilias non e poi altrimenti spiegabile che come l'esercizio di un impero giurisdizionale. Le forme sono quelle di un giudizio publico; come il magistrato ha un consilium di sua libera scelta, cosi il paterfamilias convoca all'uopo un consilium necessariorum o propinquorum o anche di amici e di persone autorevoli – in un caso, si narra, un paterfamilias chiamo a consiglio quasi tutto il senato – ed ha luogo un vero giudizio, iudicium domesticum.*
[52] Düll, Rudolf: *Iudicium domesticum, abdicatio und apoceryxis*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 63. 1946. pp. 54–116, 60.
[53] Kunkel 1966. p. 249.
[54] Liv. 2, 41, 10–12. *Quem ubi primum magistratu abiit damnatum necatumque contstat. Sunt qui patrem auctorem eius supplicii ferant: eum cognita domi causa verberasse ac necasse peculiumque filii Cereri consecravisse; signum inde factum esse et inscriptum: 'Ex Cassia familia datum.' Invenio apud quosdam, idque propius fidem est, a quaestoribus Caesone Fabio et L. Valerio diem dictam perduellionis, damnatumque populi iudicio, dirutas publice aedes. Ea est area ante Telluris aedem. Ceterum sive illud domesticum sive publicum fuit iudicium, damnatur Servio Cornelio Q. Fabio consulibus.*
[55] Mommsen, Theodor: *Römisches Staatrecht I–III*. Berlin 1887–1888. II. p. 541.
[56] Kunkel 1966. p. 225.
[57] Voci, Pasquale: *Storia della patria potestas da Augusto a Diocleziano*. IURA 31. 1980. pp. 37–100, 53.
[58] See also Zlinszky, János: *Familia pecuniaque*. Jogtörténeti Tanulmányok VI. Budapest 1986. pp. 395–406.
[59] ThLL IV. 125 *condemno* B *de accusatore*: *efficere ut is quocum agitur condemnetur*; V. 17 *damno* B *de accusatore, efficere ut is quocum agitur damnetur.*

According to Valerius Maximus L. Gellius (*cos.* 72 B.C.; *censor* 70 B.C.), who charged his son with the intention to kill him and having committed adultery with his stepmother, invited almost the entire *senatus* to the trial to judge his son's crime.[60] He disclosed his suspicion to the accused and allowed him to defend himself; then, after very careful deliberation of the case he acquitted him on the grounds of the judgement of the *consilium* and of his own. The judgment was adopted *de consilii sententia*, so it was based on the votes of the *consilium*; *sua sententia* refers merely to the fact that the father found his son innocent too.[61] Volterra asserts that the father, being convinced of his son's innocence from the outset, convened the *consilium* to clarify his own honesty and to save his son from the popular action proceedings of *parricidium*.[62] Kunkel, however, calls the attention to the point that the source does not contain any reference to that, what is more, it speaks about a highly careful investigation of the charge, and that the state of facts of *parricidium* had never been extended to merely attempted or planned crime and that the assassination attempt was to be punished in certain cases only, even after *lex Cornelia de sicariis*.[63]

According to Seneca L. Tarius Rufus (*cos. suff.* 16 B.C.) punished his son, who tried to kill him, by exile only, and continued to pay him the previously set annuity.[64] If Seneca praised the *bonus pater familias* only, then the description of the case would serve as a proof of the unlimited punitive power of *pater familias*. The philosopher, however, commemorates Augustus too as *bonus princeps*. The praise of the emperor and description of his behaviour clearly reveals that the *filius*'s crime was judged by a *consilium*, and Augustus was its most respected member, however, a member only, because, taking care that the father should conduct the *cognitio,* he did not ask the *consilium* and its members to appear before him, instead, he went to see them at the home of the head of the family. After the *cognitio* had been conducted, in which his son was allowed to defend himself, in accordance with usual order of procedure the persons present cast their vote orally on the issue of the son's guilt, however, Augustus, preventing his own vote cast first as the ballot of the most highly ranked person from influencing the others, proposed voting in writing. After the boards, on which the *sententia*s were written, had been collected but had not been opened yet, he made an oath that he would not accept Tarius's inheritance. So, in this case the issue of guilt was decided in writing, and he did not want to influence them. In imposing the punishment, however, he wanted to urge the *consilium* to adopt a lenient judgment, which was carried out orally. Tarius had to decide on the basis of the majority of the votes cast, because if he had considered the *sententia*s advice only, then Augustus's efforts not to influence anybody by his vote and to count his ballot as equal to the other votes would have been unnecessary.

In the case referred by Marcian, emperor Hadrian sent a father to exile who killed his son while they were hunting because he had an adulterous affair with his stepmother.[65] According to the emperor, the act of assassination is a deed worthy of a rogue and not a father, as the essence of *patria potestas* is *pietas* and not cruelty. The father should not have killed his son even if he had caught him in the act of adultery with his stepmother as he was not entitled to do that by *lex Iulia de adulteriis coercendis*.[66] Whereas, if the above mentioned law would have entitled the *pater familias* to kill his son or wife caught in the act of adultery, here he should not have exercised his such right because this was not a case of being caught in the act but a permanent adulterous affair (the phrase *adulterabat* is used here as *durativum*). In this case in *iudicium domesticum* a *consilium* should have been convened to judge over the offenders. The father did not do that, instead, he assassinated his son. It is more probable that here Hadrian punishes the father due to lack of proper punitive proceedings, *iudicium domesticum* and not just *schimpliche Gesinnung*, as Kaser presumes.[67]

Special attention should be paid to the fragment of Ulpian that states that the father shall not kill his son without hearing him; instead, he shall bring a charge against him before the principals of the province.[68] The first part of the text (*indauditum filium pater occidere non potest*) is perhaps the only trace of the existence of *iudicium domesticum* in Iustinian's *Digest*. The originality of the second part of the text (*sed accusare eum apud praefectum praesidemve provinciae debet*) has been questioned by Mommsen already[69], and Bonfante clearly considered it interpolated.[70] Perozzi believed that the description was possibly

[60] Val. Max. 5, 9, 1. *L. Gellius onmibus honoribus ad censuram defunctus, cum gravissima crimina de filio, in novercam conmissum stuprum et parricidium cogitatum, propemodum explorata haberet, non tamen ad vindictam continuo procucurrit, sed paene universo senatu adhibito in consilium expositis suspicionibus defendendi se adulescenti potestatem fecit inspectaque diligentissime causa absolvit eum cum sonsilii tum etiam sua sententia. Quod si impetu irae abstractus saevire festinasset, admisisset magis scelus quam vindicassset.*

[61] Kunkel 1966. p. 224.

[62] Volterra 1948. p. 133.

[63] Kunkel 1966. p. 224.

[64] Sen. *clem*. 1, 15, 2–6. *Cogniturus de filio Tarius advocavit in consilium Carsarem Augustum; venit in privatos penates, adsedit pars alieni consilii fuit, non dixit: 'Immo in domum meam veniat', quod si factum esset, Caesaris futura erat cognitio, non patris. Audita causa excussisque omnibus ex his quae adulescens pro se dixerat, et his, quibus arguebatur, petit, ut sententiam suam auisque scriberet, ne ea omium fieret, quae Caesaris fuisset. Deinde priusquam aperientur codicilli, iuravit se Tarii, hominis locupletis, hereditatem non aditurum. Tarius quidem eodem die et alterum heredem perdidit, sed Caesar libertatem sententiae suae redemit; et postquam adprobavit gratuitam esse severitatem suam, quod principi semper curandum est, dixit relegandum, quo patri videretur.*

[65] Marc. D. 48, 9, 5. *Divus Hadrianus fertur, cum in venatione filium suum quidam necaverat, qui novercam adulterabat, in insulam eum deportasse, quod latronis magis quam patris iure eum interfecit: nam patria potestas in pietate debet, non atrocitate consistere.*

[66] D. 48, 5.

[67] Kaser 1971. p. 69.

[68] Ulp. D. 48, 8, 2. *Indauditum filium pater occidere non potest sed accusare eum apud praefectum praesidemve provinciae debet.*

[69] Mommsen 1899. p. 618.

[70] Bonfante 1925. p. 111.

original because in his view in the times of Severus the rights the father was entitled to had not lost their effect yet, they were subordinated to the obligation to report to the *magistratus* only.[71] Kunkel adds the following explanation to this locus: The first part forbids the father to kill his son without hearing him; the second part, however, clearly refuses to give him the right of killing and thereby entirely and generally orders him to bring a charge before the State's court of justice. Therefore, it is probable that the original text applied to the case of holding the *iudicium domesticum*, and if under it the *filius* was allowed to defend himself, it permitted the killing of the son. Furthermore, in his opinion, the part on *praeses* and *praefectus* is not necessarily interpolated because the father could also waive exercising his punitive power and bring the son's crime before public court of justice, and so, perhaps, the compilers deleted the reference to *iudicium domesticum* only, which might have run as follows: "*sed cognoscere de eo cum amicis vel accusare eum apud praefectum praesidemve provinciae debet*."[72]

In the *Digest*, apart from the above-mentioned case, all traces of *iudicium domesticum* and *consilium necessariorum* had been carefully deleted by the compilers as *patria potestas* had been reduced to a merely instructive, disciplinary power already before Iustinianus, and so the *ius vitae ac necis* exercised in *iudicium domesticum* had completely lost its significance. Consequently, the lack of *iudicium domesticum* and *consilium* cannot be proved by the *argumentum e silentio* that we cannot find any reference to them in Iustinian's codification.[73]

The fact that *iudicium domesticum* was required in order to exercise *ius vitae ac necis* is apparent from the above. In certain exceptional cases the law allowed killing *sine iudicio* too. Among these cases the regulations of *lex Iulia de adulteriis coercendis* had highly great significance. This law provides the father with the right to kill both his daughter caught in the act of adultery and the man committing adultery, with impunity; however, it confines this right to certain terms and limits.[74] The daughter had to be under the father's[75] *potestas*[76], the *adulterium* had to be committed at his own or his son-in-law's house[77], the father had to kill his daughter too, along with the man. If he killed the *correus* only, it was considered *homicida*, and his deed was to be judged in accordance with *lex Cornelia de sicariis*.[78] The father who killed the *correus* only was not punishable in the event that his daughter stayed alive because she fled and not because the father saved her life.[79] The *rescripta* of emperors Marcus Aurelius and Commodus provided the father with acquittal from the charge of *homicidium* in the case where the father had killed the *correus* but his daughter stayed alive, if the father had seriously wounded the daughter – which reveals that he wanted to kill her – but his daughter recovered owing to pure luck.[80] The father had to catch the offenders *in ipsis rebus Veneris*.[81] He had to kill both offenders at the same time, without any delay (*uno ictu et uno impetu et aequali ira*).[82] If the father killed his daughter only after a certain amount of time has elapsed, it was deemed *homicida*, if, however, the daughter escaped, and the father reached and killed her – as he acted *continuatione animi* – he was acquitted from the charge of *homicidium*.[83] What is the connection between *ius vitae ac necis* arising from *patria potestas* and *ius occidendi* provided by *lex Iulia de adulteriis coercendis*?[84] Papinian[85], to the question why it was necessary to set forth in law that the father had the power to kill his daughter too although the relevant *lex regia* granted him *vitae necisque potestas* over his children, responds that the law does not vest the father with new power, instead, it obliges him to kill his daughter too together with the man committing adultery because thereby – i.e., if he does not pardon his daughter either – he acts with greater

[71] Perozzi, Silvio: *Instituzioni di diritto romano*. Roma 1928. I. p. 424. On the contrary see Kunkel 1966. p. 248.
[72] Kunkel 1966. p. 249.
[73] Kunkel 1966. p. 247.
[74] Cantarella, Eva: *Adulterio, omicidio legittimo e causa d'onore in diritto romano*. Studi in onore di G. Scherillo I. Milano 1972. pp. 243–274.
[75] Pap. D. 48, 5, 23. (22) *Nec in ea lege naturalis ab adoptivo pater separatur.*
[76] Pap. D. 48, 5, 21. (20) *Patri datur ius occidendi adulterum cum filia quam in potestate habet: itaque nemo alius ex patribus idem iure faciet: sed nec filius familias pater*. Ulp. D. 48, 5, 24 (23), 2. *Quare non, ubicumque deprehenderit pater, permittitur ei occidere, sed domi suae generive sui tantum, illa ratio redditur, quod maiorem iniuriam putavit legislator, quod in domum patris aut mariti ausa fuerit filia adulterum inducere.*
[77] Paul. Coll. 4, 12, 1. *Permittitur patri tam adoptivo quam naturali, adulterum cum filia cuiusque dignitatis domi suae vel generi sui deprehensum sua namu occidere*.
[78] Paul. Coll. 4, 2, 6. *Sed si filiam non interfecerit sed solum adulterum, homicidii reus est.* Pap. Coll. 4, 9, 1. *Si pater quis adulterum occidit et filiae suae pepercit, quaero quid adversus eum sit statuendum? Respondit: sine dubio iste pater homicida est: igitur tenebitur lege Cornelia se sicariis.*
[79] Pap. Coll. 4, 9, 2. *Plane si filia non voluntate patris, sed casu servata est, non minimam habebit defensionem pater, quod forte fugit filia. Nam lex ita punit homicidam, si dolo malo homicidium factum fuerit, hic autem pater non ideo servavit filiam, quia voluit, sed quia occidere eam non potuit.*
[80] Mac. D. 48, 5, 33. (32) *Nihil interest, adulteram filiam prius pater occiderit an non, dum utrumque occidat: nam si alterum occidit, lege Cornelia reus erit. Quod si altero occiso alter vulneratus fuerit, verbis quidem legis non liberatur: sed divus Marcus it Commodus rescripserunt impunitatem ei concedi, quia licet intermpto adultero mulier supervixerit post tam gravia vulnera, quae ei pater infixerat, magis fato quam voluntate eius servata est.*
[81] Ulp. D. 48, 5, 24 (23) *Quod ait lex 'in filia adulterum deprehenderit', non otiosum videtur: voluit enim ita demum hanc potestatem patri competere, si in ipsa turpitudine filiam de adulterio deprehendat. Labeo quoque ita probat, et Pomponius scripsit in ipsis rebus Veneris deprehensum occidi: et hoc est quod Solo it Draco dicunt en erga.*
[82] Ulp. D. 48, 5, 24 (23), 4. *Quod ait lex 'in continenti filiam occidat', sic erit accipiendum, ne occiso hodie adultero reservet et post dies filiam occidat, vel contra: debet enim prope uno ictu et uno impetu utrumque occidere, aequali ira adversus utrumque sumpta. Quod si non affectavit, sed, dum adulterum occidit, profugit fulia et interpositis horis adprehensa est a patre qui persequebatur, in continenti, videbutur occidisse.*
[83] Paul. Coll. 4, 2, 6–7. *Sed si filiam non interfecerit, sed solum adulterum, homicidii reus est. Et si intervallo filiam interfecerit, tandundem est, nisi persecutus illam interfecerit: continuatione enim animi videtur legis autorictate fecisse.*
[84] Pap. Coll. 4, 8, 1. *Cum patri lex regia dederit in filium vitae necisque potestatem, quod bonum fuit lege conprehendi, ut potestas fieret etiam filiam occidendi, velis mihi rescribere; nam scire cupio. Respondit numquid ex contrario praestat nobis argumentum haec adiectio, ut non videatur lex non habenti dedisse, sed occidi eam adultero iussisse, ut videatur maiore aequitate ductus adulterum occidisse, cum nec filiae pepercerit?*
[85] A szöveg eredetiségét illetően lásd Rabello 216.

equity. The question might arise why it is necessary to discuss this legal institution in details in the *Digest* and the *Collatio*. As it has become apparent from the above, the father's *ius vitae ac necis* terminated in the 4th c. already and careful compilers deleted almost all references to *iudicium domesticum* necessarily related to it. Thus, it became indispensable to maintain *lex Iulia de adulteriis coercendis*, which continued to operate now without *ius vitae ac necis* arising from *patria potestas*.

Ius occidendi that may be exercised over the daughter caught in the act of adultery is an organic part of *patria potestas*. Probably, here they applied the criminal law principle that punishment – in the present case: killing – of offenders caught in the act (*manifesti*) was permitted without proceedings too.[86] This right would continue to hold against a married daughter too, even if his father had given her *in mariti manum*, which is probably connected with the provisions of *lex Iulia de adulteriis coercendis* that restricted *manus*. Namely, according to *leges regiae,* the husband judged, in the *consilium domesticum* together with relatives, over his wife's acts to be punished by death such as adultery and drinking wine.[87] If, however, he had caught her wife in the act of adultery (*in adulterio uxorem tuam si prehendisses*), according to Cato, he could kill her with impunity (*impune*) and without any special proceedings (*sine iudicio*).[88] The *lex Iulia de adulteriis coercendis*, however, deprived the husband from this right, even in the case where his wife was under *manus*; thereby Augustus weakened *manus* and adjusted it to the current conditions of the age.[89] He argued that whereas father's love encouraged him to give pardon, a husband's rage urged him to take hasty revenge.[90] If the husband nevertheless killed his wife caught in the act of adultery, he had to account for his act under *lex Cornelia de sicariis*.[91]

The father's *ius vitae ac necis* remained untouched until the 4th c. A.D. in spite of minor or greater legal or out-of-law restrictions. Constantine speaks about *ius vitae ac necis* still as a living legal institution.[92] In 365, this right of the *pater familias* weakened to pure punitive power; the emperor's decree determined the father's duty that he should reprimand young people for their blunders, and should prevent them from committing further faults.[93] With a few changes, Iustinianus borrowed Constantine's text from *Codex Theodosianus*. However, he made such changes specifically with regard to *ius vitae ac necis* as he mentioned it merely as the power that the *pater familias* used to be entitled to.[94] This clearly reveals that by the age of Iustinianus *ius vitae ac necis* as a legal institution had long become extinct, and application of the provisions set forth therein was subject to criminal law regulation.

II. *Ius exponendi* and *ius vitae ac necis* exercised over newborn infants had been contained from the outset by *patria potestas*. A *lex regia* left to later ages under the name Romulus obliged the *pater familias* to bring up every male child and firstborn female child, and forbade him to kill children younger than three years, except for deformed children immediately after their birth. It did not forbid exposition of the latter either, however, it set the condition that they had to be shown to five neighbours. On those who might not comply with this law, it imposed the punishment of confiscating half of their property.[95] This norm, which belonged to the system of sacral law, had at one time actually restricted *patria potestas*, yet, later on we can find no reference to its application – especially with regard to applying forfeiture of property as sanction in such cases.

After that, we learn from Cicero of a provision of the Twelve Table Law, which probably not only allowed but ordered the *expositio* of deformed children: *"Cito necatus tamquam ex XII tabulis insignis ad deformitatem puer."*[96] Just as Romulus's *lex regia* did not forbid exposition of deformed children, the norm from the Twelve Table Law left to us from Cicero's *De legibus* also permits, what is more, perhaps orders their destruction. *Leges regiae* provides for exposition of children, the Twelve Table Law for killing children, however, presumably these phrases in these sources – even if they are not used as synonyms – denote acts with identical outcome in terms of the child's fate. For, in the case of deformed children nobody thought of adopting and bringing them up, which can be attributed to practical and religious causes. In Roman thinking, a deformed child was considered *prodigium*, which the community had to be get rid of during *procuratio prodigii*. Romans called the usual order, repose of the world *pax deum*, which meant gods' peaceful relation to men, and if this order was upset, it could be always attributed to gods stepping out of this repose.[97] Breaking down of the cosmic order, so every extraordinary, new event was considered

[86] Kunkel 1966. p. 240.

[87] Dion. Hal. 2, 25.

[88] Gell. 10, 23, 4. *Verba Marci Catonis adscripsi ex oratione quae inscribitur De dote, in qua id quoque scriptum est, in adulterio uxores deprehensas ius fuisse maritis necare: 'Vir' inquit 'cum divotium fecit, mulieri iudex pro censore est, imperium quod videtur habet, si quid perverse taetreque factum est a muliere; multiatur si vinum bibit; si cum alieno viro probri quid fecit, condemnatur.' De iure autem occidenti ita scriptum est: 'In adulterio uxorem tuam si prehendisses, sine iudicio impune necares; illa re, si adulterares sive tu adulterare, digito non audetur contingere, neque ius est.'*

[89] Kunkel 1966. p. 237.

[90] Pap. D. 48, 5, 23 (22), 4. *Ideo autem patri, non marito mulierem et omnem adulterum remissum est occidere, quod plerumque pietas paterni nominis consilium pro liberis capit: ceterum mariti calor et impetus facile decernentis fuit refrenandus.*

[91] Pap. Coll. 4, 10, 1. *Si maritus uxorem suam in adulterio deprehensam occidit, an in legem de sicariis incidat, quaero. Respondit: nulla parte legis marito uxorem occidere conceditur: quare aperte contra legem fecisse eum non ambigitur.*

[92] CTh. 4, 8, 6. *Libertati a maioribus tantum impensum est, ut patribus, quibus ius vitae in liberos necisque potestas permissa est, eripere libertatem non liceret.*

[93] C. 9, 15, 1. *In corrigendis minoribus pro qualitate dilicti senioribus propinquis tribuimus potestatem, ut quos ad vitae decora domesticae laudis exempla non provocant, saltem correctionis medicina compellat. Neque nos in puniendis morum vitiis potestatem in immensum extendi volumus, sed iure patrio auctoritas corrigat propinqui iuvenis erratum et privata animadversione compescat.*

[94] C. 8, 46, 10. *Libertati a maioribus tantum impensum est, ut patribus, quibus ius vitae in liberos necisque potestas olimerat permissa, eripere libertatem non liceret*.

[95] Dion. Hal. 2, 15.

[96] XII tab. 4, 1. (Cic. *leg*. 3, 8, 19).

[97] Köves-Zulauf, Thomas: *Bevezetés a római vallás és monda történetébe*. (Introduction into the History of Roman Religion and saga) Budapest 1995. p. 61.

prodigium.[98] The etymology of the word is dubious; in Walde-Hofmann's interpretation *prodigium* comes from *prod-aio*,[99] accordingly *prodigium* means *foretelling* or *forecastring*. This approach does not seem to be acceptable because "*prodigium itself does not declare anything*"[100], actually, needs to be interpreted, that is why they used the assistance of *pontifex*es, the *Sibylla books* or *haruspex*es.[101] There is a more proper interpretation claiming that the word comes from the compound *prod-agere*, so *prodigium* is nothing else than "*breaking through this shell, supernatural forces hiding behind the surface come forth, become manifest*".[102] Whenever *prodigium* appeared, be it of a private or state kind, after its meaning had been found out, that is, interpreted, *procuratio* had to be carried out, upon the proposal made again by the interpreters; if the same *prodigium* recurred more frequently, the *pontifices* always ordered the same conciliation.[103] (For example, if stone rain was falling, *novemdiale sacrum* had to be held.[104]) Deformed children had to be destroyed[105], and children born on an ominous day were considered *prodigium* too.[106] Sueton describes that on the day of Britannicus's death stones were thrown at the temples, altars were turned over, the Lares were driven to the street, and children were exposed. The *procuratio* of deformed children considered *prodigium* was usually carried out by killing or exposition; however, it should be added that in these cases exposition always meant that the child was destined to die, the outcome of the two acts was eventually identical. The *procuratio* had to be always bloodless, therefore they performed it by drowning.[107]

Data on newer regulation of *ius exponendi* are available from a much later period, the 4th c. A.D. only, so it is possible that this element of *patria potestas* had not been considerably limited until then. Exposition of children could be attributed, as a matter of fact, not only to religious causes, in this period either. Likewise, the father could expose the child that it was not willing to acknowledge as his own due to the mother's alleged or real infidelity or that he did not want to bring up because of his poverty or other economic reasons. In these cases the child was not meant to perish; they exposed it at a place where others could easily find it.[108] As a matter of fact, we know of cases where a child, having been admitted, was meant and instructed to be a prostitute or gladiator (*ad servitutem aut ad lupanar).*[109] It occurred that the father met and got familiar with his formerly exposed daughter now as a prostitute.[110] Several of them were afflicted and forced to beg.[111]

Sources from the age before Constantinus do not provide a uniform picture on the legal status of exposed children. In Plautus's and Terence's plays exposed and then admitted children keep their free *status*.[112] In Plautus's comedy *Casina,* the exposed female child was admitted by the *libertina* Cleostrata, who gave her the name Casina. Casina, having grown up, became the wife of Eutyrichus also having free *status.* In *Cistellaria* by Plautus, the procuress Melaenis admitted and brought up the exposed Selenium born as a free person, who later married the free Alcesimarchus. In Terence's *Heautontimorumenos*, Antiphila, who was exposed by his mother, Sostrata, kept his free *status*, and married the also free Clinia. At the same time it is beyond doubt that several exposed children were forced to live as a slave.[113] Sueton provides information first on M. Antonius Gnipho, who was born free in Gaul (*ingenuus*), however, was exposed as a child, and was then liberated and educated by the person who brought him up. After that he mentions that Gnipho was a highly talented man with outstanding power of memory, who acquired erudition in both Latin and Greek.[114] The second source is about C. Melissus born also free (*ingenuus*) in Spoletium, who was exposed in his childhood due to conflicts between the parents.[115] Thanks to the person who brought him up and admitted him, he was given training in higher sciences, and was recommended to Maecenas as a grammarian. Maecenas made friends with him, and although his mother supported his son's freedom too – using the claim called *adsertio libertatis* – Melissus nevertheless remained *in statu servitutis* because he

[98] Zintzen, Clemens: *Prodigium*. Der Kleine Pauly. München 1979. IV. pp. 1151–1153.
[99] Walde, Alois – Hofmann, Johann Baptist: *Lateinisches etymologisches Wörterbuch I–II*. Heidelberg 1954. II. p. 368.
[100] Köves-Zulauf 1995. p. 62.
[101] Zintzen 1979. 1153.
[102] Köves-Zulauf 1995. 62.
[103] Latte, Kurt: *Römische Religionsgeschichte*. München 1967. p. 204.
[104] Liv. 1, 33, 4; 30, 38, 9. *In Palatio lapidibus pluit, id prodigium more novemdialisacro, cetera hostiis maioribus expiata.*
[105] Liv. 27, 37, 6; 31, 12, 7; 39, 22, 5.
[106] Suet. *Cal*. 5. *Quo defunctus est die, lapidata sunt templa, subversae deum areae, Lares quibusdam familiares in publicum abiecti, partus expositi.*
[107] Sen. *ira* 1, 15. *Portentosos fetus extinguimus, liberos quoque, si debiles monstrosique editi sunt, mergimus.* Tib. 2, 5, 79. *Prodigia indomitis merge sub aequoribus.*
[108] Cf. Fest. *s. v. Lactaria columna in foro olitorio dicta, quod ibi infantes lacte alendos deferebant.*
[109] Lact. *inst*. 6, 20, 18; Memmer, Michael: *Ad servitutem aut ad lupanar ...* . Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 108. 1991. pp. 21–93.
[110] Min. Fel. 31, 4; Iust. *apol*. 1, 27; Boswell, John Eastburn: *Expositio and Oblatio. The Abandonment of Children in the Ancient and Medieval Family.* American Historical Review 89. 1984. pp. 10–33. *Incest comprised the single most common objection of Christian moralists to expositio, and no solution to this problem presented itself. Few, if any fathers of the church objected to abandonment as a dereliction of parental duty. In the relatively few places where early Christian literature touched on the practice, which it describes as common, authors complained of the possibility that parents might unknowingly use as prostitutes children they once abandoned*.
[111] Sen. *contr*. 10, 4. *Quidam expositos debilitabat et debilitatos mendicare cogebat ac mercedem exigebat ab eis.*
[112] Memmer 1991. p. 26.
[113] Sen. *contr*. 10, 4, 13. *Deinde, an hoc non licuerit illi facere. Licuit, inquit, expositi in nullo numero sunt, servi sunt.*
[114] Suet. *gramm*. 7. *M. Antonius Gnipho, ingenuus in Gallia natus sed expositus, a nutritore suo manumissus institutusque fuisse dicitur ingenii magni, memoriae singularis, nec minus Graece quam Latine doctus.*
[115] Suet. gramm. 21. C. Melissus, Spoleti natus ingenuus, sed ob discordium parentum expositus, cura et industria educatoris sui altiora studia percepit, ac Maecenati pro grammatico muneri datus est. Cui cum se gratum et acceptum in modum amici videret, quamquam asserente matre, permansit tamen is statu servitutis praesentemque condicionem verae origini anteposuit.

deemed it more than his original descent. Weiss interpreted the phrases *ingenuus natus* and *manumissus* as opposites, and derived Gnipho's slave status therefrom.[116] According to Coril, in this text *in servitute* denotes merely a *de facto* status and not that the child had been made *servus* also *de iure*.[117] Watson believes that Suetonius does not use the phrases *status servitutis* or *manumissus* as *terminus technicus*, so it would have been unnecessary to pay special attention to them.[118] *Manumissus* not necessarily refers to *status servitutis* since they used *remancipatio* or *manumissio* also in the case of *filius* in *mancipium*.[119] The father could reclaim his exposed child from the *nutritor* after having reimbursed the costs of *alimentatio*.[120]

On the legal status of children born free and then exposed, Pliny the Younger, *propraetor* of Bithynia and emperor Traianus exchanged letters. The letters were presumably dated in Plinius's second year in office, in 111.[121] In his letter, Plinius presents the issue of the *status* and *alimentatio* of children born free and then exposed, called *threptos*, as a problem affecting the entire province to emperor Traianus, as he has not found a rule that applies either expressly to Bithynia or the whole empire and believes that he could not be satisfied with other examples in a matter that can be decided solely by the emperor's authority. Although he knows about certain *epistulae* and *edicta*, such as for example those issued by emperors Augustus, Vespasianus and Titus for Andania, Sparta and Achaia, they all contain particular rules only, and therefore cannot be applied to Pliny's province. Otherwise, he does not send Traianus the copies of the documents referred to because they are probably available in the emperor's archives, which much better text.[122] In his response letter, Traianus precisely formulates the question raised by Pliny: so, the issue addressed concerns children born free who have been exposed by their parents and then have been admitted and brought up as slaves by others. Traianus mentions that his predecessors have indeed settled this issue with general effect extending to each province, and refers to Domitianus's two *epistulae* written to *proconsules* Avidius Negrinus and Armenius Brocchus, which are perhaps not to be fully ignored, however, as they do not have a general scope, cannot be applied to Bithynia. Traianus grants the opportunity of *adsertio in libertatem*, and refuses to give the *nutritor* the right to claim reimbursement of the costs of *alimentatio* and *ius retentionis* that serves to ensure that. The question arises who may enforce plea for freedom. As it was *vindicatio in libertatem* and not *vindicatio in patriam potestatem* that Traianus permitted, according to Cornil, it was not the parents but the child itself that was entitled to the right of *vindicatio*.[123] Yet, because a child living as a slave was not allowed to initiate a lawsuit, action taken by the *adsertor* was needed to represent the child in the lawsuit.[124] Consequently, Traianus sets out from the child's *status libertatis* that, accordingly, cannot be lost.[125] The costs of *alimentatio* are not be reimbursed because in the present case regaining freedom is not ransoming from *status sevitutis* but liberation from slavery.[126]

According to Scaevola's fragment, which also bears decisive significance in determining the legal status of exposed children, a Roman citizen divorced his wife and married again.[127] The cast off wife exposed the child, who was brought up by a third party. In his last will and testament the father, as he did not know if his son was alive or not, did not name him as his inheritor and did not disinherit him either. Following his father's death, the son, once he had been recognised by his mother and father's mother, took possession of the estate as legitimus heres. In Scaevola's view, the last will was invalid because the son was under patria potestas, even if his father did not know about it.[128] According to Paulus, the exposed child will retain its status libertatis, even if it might not be aware of it and might consider itself a slave.[129]

[116] Weiss, Egon: *Peregrinische Manzipationsakte*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 37. 1917. pp. 136–176.

[117] Cornil, Georges: *Contribution ŕ l'étude de la patria potestas*. Paris 1897. p. 428.

[118] Watson 1967. p. 171.

[119] Kaser, Max: *Das römische Privatrecht I–II*. München 1971–1975. I. p. 65.

[120] Sen. *contr*. 9, 3. *Expositum qui agnoverit, solutis alimentis recipiat.*

[121] Plin. *epist*. 10, 65. *C. Plinius Traiano Imperatori. Magna, domine, et ad totam provinciam pertinens quaestio est de condicione et alimentis eorum, quos vocant threptus in qua ego auditis constitutionibus principum quia nihil inveniebam aut proprium, aut universale, quod ad Bithynos ferretur, consulendum te existimavi, quid observari velles; neque enim putavi posse me in eo, quod auctoritatem tuam posceret, exemplis esse contentum. Recitabatur autem apud me edictum, quod dicebatur divi Augusti, ad Andaniam pertinens; recitatae epistulae et divi Vespasiani ad Lacedaemonios et divi Titi ad eosdem et Achaeos, et Domitiani ad Avidium Nigrinum et Armenium Brocchum proconsules, idem ad Lacedaemonios, quae ideo tibi non misi, quia et parum emendata et quaedam non certae fidei videbantur, et quia vera et emendata in scriniis tuis esse credebam*.

[122] Plin. *epist*. 10, 66. *Traianus Plinio. Quaestio ista, quae pertinet ad eos, qui liberi nati expositi, deinde sublati a quibusdam et in sevitute educati sunt, saepe tractata est, nec quicquam invenitur in commentariis eorum, qui ante me fuerunt, quod ad omnes provincis sit constitutum. Epistulae sane sunt Domitiani ad Avidium Negrinum et Armenium Brocchum, quae fortasse debeant observari: sed inter eas provincias, de quibus rescripsit, non est Binthya. Et ideo nec adsertationem denegandam iis, qui ex eius modi causa in libertatem vindicabuntur, puto, neque ipsam libertatem redimendam pretio alimentorum.*

[123] Cornil 1897. p. 430.

[124] Memmer 1991. p. 33.

[125] See also Bang, Martin: *Die Herkunft der römisches Sklaven II. Die Rechtsgründe der Unfreiheit*. Mitteilungen des kaiserlich deutschen archäologischen Instituts. Röm. Abt. 27. 1912.

[126] Memmer 1991. p. 34.

[127] Scaev. D. 40, 4, 29. *Uxorem praegnantem repudiaverat et aliam duxerat: prior enixa filium exposuit. Hic sublatus ab alio educatus est nomine patris vocitatus usque ad vitae tempus patris tam ab eo quam a matre, an vivorum numero esset, ignorabatur; mortuo patre testamentoque eius, quo filius neque exheredatus neque heres institutus sit, recitato filius et a matre et ab avia paterna adgnitus hereditatem patris ab intestato quasi legitimus possidet. Quaesitum est hi qui testamento libertatem acceperunt utrum liberi an servi sint. Respondit filium quidem nihil praeiudicii passum fuisse, si pater eum ignoravit, et ideo, cum in potestate et ignorantis patris esset, testamentum non valere. Servi autem manumissi si per quinquennium in libertate morati sunt, semel datam libertatem infirmari contrarium studium favore libertatis est.*

[128] Gai. *inst*. 2, 123.

[129] Paul. D. 22, 6, 1, 2. *Si quis nesciat se cognatum esse, interdum in iure, interdum in facto errat.nam si liberum se esse et ex quibus natus sit sciat, iura autem cognationes habere se nesciat, in iure errat: at si quis (forte expositus) quorum parentium esset ignoret, fortasse et serviat alicui putans se servum esse, in facto magis, quam in iure errat.*

In the *rescriptum* of emperors Diocletianus and Maximianus, dated 295, addressed to Rhodonus, the following can be read:[130] Rhodonus admitted and brought up a girl born free and exposed, and after she had grown up, he meant her to marry his son. Before entering into the marriage, the natural father took action and claimed to release his daughter. The father retained his *potestas* over the child, and he could have enforced it through *praeiudicium de patria potestate*.[131] The question, however, concerned only the issue whether the father should reimburse the costs of *alimentatio*. In the *rescriptum*, the rulers decided that if the natural father should be against conclusion of marriage between his daughter and the foster father's son, then he should reimburse the costs of *alimentatio*, if, however, he agreed to it, then he would be exempted from reimbursing the costs.

An exposed slave child also retains its innate *status servitutis.* The issue of ownership over the child was regulated by emperor Alexander Serverus in his *rescriptum* written to A. Claudius in 224:[132] if the child was exposed without the *dominus* being aware of it or against his will, he was entitled to the right of *vindicatio*, however, he had to reimburse the *nutritor* for his costs. On the other hand, if the *dominus* himself had the slave woman's child exposed, then he would not be granted the right of *repetitio*. In accordance with the principle of *derelictio,* the slave child so exposed will retain its *status*, yet, will become a child having no *dominus*, and the *collector* will obtain ownership over him through *occupatio*.[133]

Reference to the exposed child's slave *status* can be found also among the contracts of the waxed boards of Dacia:[134] on 17 March 139, in Kartum, purchase of a slave was entered into between Maximus Batonis and Dasius Versonis, its subject was an approximately six-year-old slave girl called Passia. The seller was obliged to name the origin of the slave in negotiating the purchase and sale[135] as it highly influenced what occupation she was suitable for; for this reason, the *aedilisi edictum* also obliged those who sold slaves on the market to name their *natio*.[136] Mommsen claims that the phrase *empta sportellaria* implies that the owner had purchased the girl's mother, and was given the slave girl, Passia as a present since *sportella* means present.[137] Weiss's interpretation seems to be more probable, he asserts that the seller himself had purchased the girl as an exposed child, and he proves it by the following:[138] the papyruses reveal that the phrase *sportellarius* is identical with *koptriaireios*[139], which always denotes the exposed child. Undoubtedly, *sportella* means a small basket, as in Hieronymus's *Vulgata* regarding the exposition of Moses can be read.[140] *Fiscella*, which is the *deminutivum* of *fiscus* that originally meant basket, is the synonym of *sportella*, and refers to the custom that a basket was often used when exposing a child. Therefore, *sportellaria* means a female child exposed in a basket; it is possible to get closer to this interpretation by certain Greek sources, which assert that a child was exposed also in some kind of vessel (*ostrakon, enkhystria*).

Constantine's law dated 17 April 331 brought significant change in the legal status of exposed children, for it extended the regulation pertaining to the fate of slave women's children, adopted by Alexandrus Severus, to free children.[141] Thus, the father who has exposed his child, will lose his *potestas* over the child, and thereby the right to reclaim the child. The *nutritor* freely decides the *status* of the admitted child, irrespective if the child was born as a free person or a slave. The phrase *retineat sub eodem statu, quem apud se collectum voluerit agitare* shows that the father was not given the opportunity of *vindicatio in libertatem* or *adsertio libertatis*.[142] It is quite clear that this law provided highly effective protection for the person who brought up the exposed child.

Restriction or prohibition of *ius exponendi* was implemented on the level of law rather late. In February 374, emperors Valentinianus, Valens and Gratianus ordered to impose death penalty for killing children.[143] A month later Valentinianus declared that exposition of children was to be punished.[144] As Valentinianus referred to an earlier punishment, it cannot be ruled out that he renewed a prohibition of exposition that had existed for a long time. On the contrary, it is also possible – if we interpret *expositio* as a form of *necatio*, which was not alien from post-classical thinking at all – that Valentinianus referred to the prohibition of killing children dated February of the same year

[130] C. 5, 4, 16. *Patrem, qui filiam exposuit, at nunc adultam sumptibus et labore tuo factam matrimonio coniungi filio desiderantis favere voto convenit. Qui si renitatur, alimentorum solutioni in hoc solummodo casu parere debet.*

[131] Memmer 1991. p. 38.

[132] C. 8, 51 (52), 1. *Si invito vel ignorante te partus ancillae vel adscripciae expositus est, repetere eum non prohiberis. Sed restitutio eius, non a fure vindicaveris, ita fiet, ut, si qua in alindo vel forte ad discendum artificium iuste consumpta fuerint, restitueris.*

[133] Memmer 1991. p. 40.

[134] FIRA III. 284.=CIL III. 937. *Maximus Batonis puellam nomine Passiam, sive ea quo alio nomine est, annorum circiter sex plus minus, empta sprotellaria emit mancipioque accepit de Dasio Verzonis Pirusta ex Kavieretio v/v ducentis quinque…*

[135] Lenel, Otto: *Das „Edictum Perpetuum".* Leipzig 1927. p. 554. *Clausula de natione pronuntianda*.

[136] Pólay, Elemér: *A dáciai viaszostáblák szerződései*. (Contracts of the tabulae ceratae from Dacia) Budapest 1972. p. 146; Ulp. D. 21, 1, 31, 21. *Nationem cuiusque in venditione pronuntiare debent.*

[137] Pólay 1972. 146.

[138] Weiss 1917. p. 160.

[139] Aristoph. *ran*. 1190.

[140] Exod. 2, 3. *Sumpsit fiscellam scripeam … posuitque intus infantulum et exposuit eum.*

[141] CTh. 5, 9, 1. *Quicumque puerum vel puellam, proiectam de domo patris vel domini voluntate scientiaque, collegerit ac suis alimentis ad robur provexerit, eundem retineat sub eodem statu, quem apud se collectum voluerit agitare, hoc est sive filium sive servum eum esse maluerit: omni repetitonis inquietudine penitus submovenda eorum qui servos aut liberos scientes propria voluntate domo recens natos abiecerint*.

[142] Memmer 1991. p. 65.

[143] CTh. 9, 14, 1; C. 9, 16, 8. *Si quis necandi infantis piaculum adgressus adgressave sit, sciat se capitali supplicio esse puniendum.*

[144] C. 8, 51 (52), 2. pr. *Unusque subolem suam nutriat. Quid si exponendam putaveri, animadversioni quae costituta est subiacebit.*

and the item of penalty imposed thereon.[145] The latter standpoint can be supported by the argument that the addressee of both *constitutiones* was the same Probus *praefectus praetorio*. The item of punishment cannot be known from the latter *contitutio*. According to Memmer, the fact that in 442 a person who exposed his child was certainly not sentenced to death yet is confirmed by the proof that the tenth canon of the *Concilium Vasense* held in the same year dealt with ecclesiastical punishment of those who exposed their children.[146] Namely, if a regulation imposing death penalty on exposition had existed, then the discussion of ecclesiastical punishment would have become completely unnecessary.[147] The prohibition of exposition of children of 374 presumably applied to the *pater familias*'s own children only because this law also regulated the *dominus*'s rights over the exposed *colonus* and slave child.[148] Based thereon the *dominus* or the *patronus* who meant the child to die and for this reason exposed it was not entitled to the right of reclaiming it. In 412, emperors Honorius and Theodosius entered a similar regulation into force.[149] Compared to the previous regulation, it appears as a new element that the regulation makes admitting the child subject to meeting two conditions: it had to take place before the bishop and a document had to be made thereon. According to Memmer, this makes it probable that the *collector* had the right in accordance with the norm of 331 to decide the *status* of the child.[150]

In accordance with Iustinianus's regulation of 529 covering the entire empire, it was prohibited to sink the exposed child to the fate of *colonus* or slave, no matter what *status* he was from.[151] So, it ensured freedom to all exposed children, even to slave children who were caused to be exposed by the *dominus*. It forbids the *collector* to gain advantage from bringing up the child; his act is deemed *officium pietatis*.[152] He confirmed the provisions set forth in this regulation in the same year.[153] In 541, he *expressis verbis* guaranteed the freedom of exposed children too[154], and he allowed the *dominus* to prove his ownership over the child only in the event that the child had been exposed without him being aware of it or in spite of his will.

Coming to the end of this analysis, it is necessary to add a few remarks in summary on the two legal institutions of *patria potestas*, discussed in this paper. *Ius vitae ac necis*, that is, the punitive power of *pater familias* against an adult child meant a right that actually existed until the 4th c. A.D., based on which the father himself could kill his children. The exercise of this right, however, was confined to meeting certain rules of procedure and limits. Consequently, he had to conduct the proceedings within the frameworks of *iudicium domesticum*, in which the *consilium necessariorum* investigated the charge and heard the defence of the accused, and, then, in the event that the offence seemed to be a crime that deserved death penalty indeed, it decided guilt by majority of the votes cast, which decision had absolutely binding force upon the *pater familias*. By *lex Iulia de adulteriis coercendis,* Augustus further narrowed the scope of application of *ius vitae ac necis*. *Ius exponendi*, that is, the right of the *pater familias* over the newborn infant was a living legal institution also in practice until 374 A.D. Two sides of its exercise are distinguished. One of them is basically ecclesiastical, in this case the exposition of the child as *procuratio prodigii* was aimed at the child's death and was not separated from killing the newborn infant. In the other case the reason was merely that the family or the *pater familias* did not want to bring up the child; yet, they could reckon that somebody would find and bring up the child. If the latter opportunity occurred, then the issue of the *status* of the brought up child arose as a question. During the centuries this showed rather variable picture until the law of the age of Iustinian reached the stage where it ensured free *status* to almost all exposed and brought up children.

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145 Bonfante 1925. p. 112; Kaser 1971. p. 79.

146 *Sacrorum conciliorum nova et amplissima collectio*. Ed. Mansi. Graz 1960. VI. 455. *Sane si quies post hac diligentissimam sanctionem expositorum hoc ordine collectorum repetitor vel calumniator extiterit, ut homicida ecclesiastica distinctione feiatur.*

147 Memmer 1991. p. 70.

148 C. 8, 51 (52), 2, 1. *Sed nec dominis vel patronis repetendi aditum relinqiumus, si ab ipsis expositos quodammodo ad mortem voluntas misericordiae amica collegerit: nec enim dicere suum poterit, quem pereuntem contempsit*.

149 CTh. 5, 9, 2. *Nullum dominis vel patronis repetendi aditum relinqiumus, si expositos quodammodo ad mortem voluntas misericordiae amica collegerit: nec enim dicere suum poterit, quem pereuntem contempsit; si modo testis episcopalis subscriptio fuerit subsecuta, de qua nulla penitus ad securitatem possit esse cunctatio*.

150 Memmer 1991. p. 70.

151 C. 8, 51 (52), 3. pr. 1. *Sancimus nemini licere, sive ab ingenuis genitoribus puer parvulus procreatus sive a libertina progenie sive servlili condicione maculatus expositus sit, eum puerum in suum dominium vindicare sive nomine dominii sive adscripticiae cive colonariae condicionis: sed neque his, qui eos nutriendos sustulerunt, licentiam concedi penitus (cum quadam distintione) eos tollere et educationem eorum procurare, sive masculi sint sive feminae, ut eos vel loco servorum aut colonorum aut adcsripticiorum habeant. Sed nullo discrimine habito hi, qui ab huiusmodi hominibus educati sunt, liberi et ingernui appareant et sibi adquirant et in posteritatem suam vel extranenos heredes omnia quae habierint, quomodo voluerint, transmittant, nulla macula vel servitutis vel adscripticiae aut colonariae condicionis imbuti: nec quasi patronatus iura in rebus eorum concedi, sed in omnen terram, quae Romanae dicioni supposita est, haec obtinere.*

152 C. 8, 51 (52), 3, 2. *Neque enim oportet eos, qui ab initio infantes abegerunt et mortis forte spem circa eos habuerunt, incertos constitutos, si qui eos susceperunt, hos iterum ad se revocare conari et servlili necessitati subiugare: neque hi, qui eos pietatis ratione suadente sustulerunt, ferendi sunt snuo suam mutatnes sententiam et in servitutem eos retrahentes, licet ab inito huiumodi cogitationem habentes ad hoc prosiluerint, ne videantur quasi mercimonio contracto ita pietatis officium gerere.*

153 C. 1, 4, 24.

154 N. 153, 1. *Quicunque igitur in ecclesiis, vel vicis, vel aliis locis expositi probantur, eos omnibus modis liberos esse iubemus, licet actori manifesta probatio suppetat, qua personam illam ad suum dominium pertinere ostendat. Se enim legibus nostris praeceptum est, ut servi aegrotantes, qui a dominis neglecti, quum de valetudine eorum desperarent, tamquam cura a dominis digni non habiti omnino in libertatem rapiantur, quanto magis eos, qui in ipso vitae initio aliorum hominum pietati relicti, et ab ipsis enutriti sunt, in iniustam servitutem trahi non patiemur? His igitur et sanctissimum Thessalonicensium archiepiscopum et sanctam dei ecclesiam, quae sub illo constituta est, et gloriam tuam opem ferre, libertatemque illis adiudicare sancimus. Neque illi, qui haec faciunt, legum nostrarum poenas effugient, ut qui omni inhumanitate et crudelitate repleti sunt, domnique homicido tanto deteriore, quanto miserioribus id afferunt.*

Juristische Regelung der Einführung und der Organisation der Zirkusspiele im alten Rom bis zur Prinzipatszeit

Magdolna Gedeon*

Abstract

In the ancient Roman sources we can find many legal rules relating to the organization of the circus games. In the regal period the king himself initiated and organised the new games in veneration of the gods. The ludi votivi and the ludi publici were established during the Republic. The organization of these games were the duty of the consuls and the aediles.

Key words: *Roman law; Circus games; Votum; Votive games; Aediles.*

Stellen wir uns vor, dass wir im antiken Rom leben, wo es kein Fernsehen, kein Radio gab, wo diejenigen Möglichkeiten der Unterhaltung fehlten, die heute einen Teil unseres Alltagslebens bilden. Im antiken Rom spazierten die Bewohner auf den Straßen ohne Arbeit, und sie suchten immer etwas, womit sie ihre Freizeit verbringen könnten. Daneben hatten sie Angst vor den Göttern und davor, dass Kriege, Seuchen oder Katastrophen sie heimsuchen. Für die Lösung dieses Doppelproblems, also für die Befriedigung der Unterhaltungssucht der Stadtbewohner und für den Gewinn der Gunst der Götter gaben die zirzensischen Spiele ein Mittel.

Cicero erwähnt, dass die *ludi circenses* aus körperlichen Wettbewerben, also aus Lauf, Faustkampf und Wagenrennen bestehen.[1] Demnach können wir feststellen, dass auf den *ludi circenses* im engeren Sinn nur Athletenkämpfe und Wagenrennen gehalten wurden, die populärsten Gladiatorenspiele bildeten eine weitere Kategorie.

Da die Zirkusspiele im antiken Rom eine besondere Rolle erhalten haben, kann gefragt werden, wie und mit welchen Mitteln der Staat auf diesem Gebiet auf die Ordnung achten konnte. Die Quellen informieren uns darüber, dass es zahlreiche Rechtsnormen bezüglich der Spiele gab. Es wurde geregelt, wie die Einführung eines neuen Spiels erfolgte, wer das Recht oder die Pflicht der Spielorganisation hatte, welche Rechtsstellung die Wettbewerber hatten, an welchen Tagen man Spiele veranstalten durfte. Wir finden viele Normen bezüglich des Verlaufes der Spiele, der Aufgaben der Magistrate, der Zuschauer, und der Gebäude, wo die Spiele stattfanden. Die meisten Normen sind uns aus der Kaiserzeit überliefert, weil die Kaiser die Spiele auch zentralisieren wollten.

Wir können bemerken, dass diese Normen nicht einem sondern mehreren Rechtsgebieten zugeordnet werden können, so kann man diese Regeln aus Gebieten des öffentlichen und des Privatrechts zusammensammeln, wie etwa heute die Vorschriften des Sportrechts. Auffälligste Ähnlichkeit zwischen den antiken und heutigen Normen besteht darin, dass wir im antiken Recht dieselben Regelungen antreffen, wie wir sie auch in den heutigen Sportgesetzen finden.

Diese Studie möchte diejenigen von diesen Normen aufzeigen, die sich auf die Einführung der Spiele, und auf die Regelungen der Spielorganisation in der Königszeit und der Republik beziehen. Diese Regeln gehören zum Gebiet des *ius publicum*.

Aus der Königszeit werden uns wenige Quellen überliefert, aber wir können feststellen, dass *ludi circenses* schon in dieser Epoche abgehalten wurden, damals noch ausschliesslich zu Ehren der Götter. Thuillier hält Rom für „die Tochter der Zirkusspiele",[2] nachdem die Verführung der sabinischen Frauen bei einem Zirkusspiel erfolgte.

Aus der Vollmacht und aus der zwischen den Göttern und dem Volk vermittelnden Rolle des Königs folgte, dass er die Einführung der Spiele angeordnet hat.[3] Die konnte der *rex* entweder nach eigenem Ermessen[4] oder nach dem Rat der Sibyllenbücher infolge schwerwiegender Umstände, zur Aussöhnung der Götter bestimmen.[5] Die Aufgabe der Spielorganisation teilte der König mit den Pontifexen.[6]

* Dr. Magdolna Gedeon, Ph.D., Universitätsdozent, Lehrstuhl für Rechtsgeschichte, Staats- und Rechtswissenschaftliche Fakultät, Universität Miskolc, Ungarn.

1 Cic. *leg*. 2,38.

2 THUILLIER, Jean-Paul, *Sport im antiken Rom*, Darmstadt, 1999, S. 2.

3 WEILER, Ingomar, *Der Sport bei den Völkern der Alten Welt*, Darmstadt, 1981, S. 239.

4 Liv. 1,9; Cic. *rep*. 2,12.

5 Serv. *Aen*. 2,140. Zur Zeit der Herrschaft von Tarquinius Superbus wurden die *ludi Taurii* nach der Befragung der Sibyllinischen Bücher wegen der die schwangeren Frauen bedroheneden Epidemie von Fehlgeburten eingeführt. Vgl. THUILLIER (o. A. 2), S. 35–36.

6 Varr. *l. l.* 6,20.

Aus der Zeit der Republik liegt uns schon mehr Datenmaterial vor. In dieser Epoche können verschiedene Spiele unterschieden werden. So sind die *ludi votivi* und die *ludi publici* in dieser Ära entstanden, an denen auch Athletenkämpfe und Wagenrennen gehalten wurden.

Die *ludi votivi* bekamen ihren Namen über das *votum*, also über das Gelübde. Die Römer gelobten nämlich in einer schweren Lage, wenn Iuppiter ihnen Hilfe gibt, veranstalten sie Spiele zu Ehren des Gottes. Diese Spiele waren außerordentliche Veranstaltungen, und jedes Spiel ist dem Iuppiter gewidmet worden.[7]

Fraglich ist die juristische Beurteilung des *votum*s. Nach den Quellen verursacht das *votum* eine Obligation zwischen Mensch und Gott.[8] Aber es ist eine bedingte Obligation, weil der Gelübder nur in dem Fall die Spiele veranstalten musste, wenn der Gott den Wunsch erfüllte. Eine weitere Frage ist, da es sich um eine Obligation handelt, wie die Erfüllung erzwungen werden kann?

Iuppiter konnte natürlich nicht zur Verantwortung gezogen werden. Das war auch nicht nötig, weil der Gott entweder den Wunsch erfüllte oder nicht. Wenn nicht, dann sollten die Spiele nicht organisiert werden. Wenn Iuppiter behilflich war, musste man die Spiele veranstalten. So konnte nur der Gelübder zur Verantwortung gezogen werden. Dementsprechend ist das *votum* ein einseitiges Rechtsgeschäft, das eine Obligation verursacht.

Eine weitere Frage ist, wer eigentlich derjenige Gelübder war, der die Spiele veranstalten musste. Dazu sollen wir zuerst untersuchen, wie das Verfahren der Gelobung erfolgte. Es gab drei Möglichkeiten.

Erste Möglichkeit: In einer schweren Situation ersuchte der Senat das Priesterkollegium, das die Sibyllenbücher bewachte darum, in die Bücher einzusehen, ob die eine Lösung für die Probleme empfehlen. Es kam mehrmals vor, dass das Kollegium das Gutachten erteilte, dass die Römer zu Ehren der Götter Spiele geloben sollen.[9] Diese Sententien wurden in schriftlicher Form erteilt. [10]

Der nächste Schritt im Verfahren war, dass der Senat einen Magistrat mit der *nuncupatio voti*, also mit dem Aussprechen des Gelübdes beauftragte. Es konnte ein *dictator*,[11] *consul*,[12] *praetor*[13] oder ein Dezemvirkollegium[14] sein. Man kann bemerken, dass der Votant in jedem Fall ein *magistratus* oder *collegium cum imperio* war.

Der nächste Verfahrensabschnitt war, dass der Gelübder gelobte, Spiele zu veranstalten, wenn Iuppiter die gleichzeitig gerichtete Bitte erfüllt. Bei dieser *actus vovendi* wurde der Magistrat von einem *pontifex* geleitet. Der Priester sagte den Text der *nuncupatio voti* vor, damit der Votant etwas nicht falsch sage.[15] Um die Fehler zu vermeiden, wurde der Text zuerst in Schrift gefasst.[16]

Wenn der Erbetene eintrat, musste die Versprechung eingehalten werden. Mit dieser Aufgabe beauftragte der Senat entweder den Votant oder einen anderen *magistratus cum imperio*, am meisten den *consul* oder den *praetor*. Wenn dies nicht möglich war, wurde ein außerordentlicher Magistrat für diesen Zweck ernannt, ein *dictator rei grundae causa oder ein ludorum faciendorum causa*.[17]

Der zweite Typ des Gelobungsverfahrens war, als der Senat ohne die Sibyllenbücher zu befragen, selbst entschied Spiele zu geloben.[18] Im weiteren lief das Verfahren gleich ab wie im vorerwähnten Fall.

In diesen zwei Verfahren können wir bemerken, dass die Gelübder nicht in eigenem Namen, sondern im Namen des Staates gelobten Spiele zu veranstalten. Deshalb sollten sie die Kosten der Spiele auch nicht selbst tragen, sondern der Senat gab dafür Geld.[19] Deshalb können wir in diesen Fällen auch nicht davon sprechen, wer zur Verantwortung gezogen werden musste, wenn die Spiele nicht veranstaltet worden waren. Da die Spielveranstaltung eigentlich eine Geldfrage war, und der Senat den ganzen Betrag zur Verfügung stellte, konnte es nicht vorkommen, dass die Spiele unterblieben wären. Eigentlich hätte nur Iuppiter den römischen Staat zur Verantwortung ziehen können, aber die Römer hatten größere Angst vor den Göttern, als dass sie die Spiele nicht hätten veranstalten wollen. Deshalb finden wir in den Quellen keinen Fall, als das Gelübde nicht eingehalten worden war. Dementsprechend steht im Heumann-Seckel Handlexikon, dass aus dem *votum* eine sakrale Obligation ohne weltlichen Schutz entsteht.[20] Auch nach Kaser gehört das *votum* zum Gebiet des *ius sacrorum*.[21]

Etwas anderes ist der dritte Typ des Gelobungsverfahrens. In diesen Fällen wurde nicht vom Senat entschieden, Spiele zu geloben, sondern es kam mehrmals vor, dass ein Feldherr in einer schweren Situation selbst, in eigenem Namen versprach den Göttern Spiele zu geben.[22] In diesem Fall gab aber der Senat nicht freiwillig Geld dafür. In den Quellen finden wir mehrere

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7 Vgl. BERNSTEIN, Frank, *Ludi publici. Untersuchungen zur Entstehung und Entwicklung der öffentlichen Spiele im republikanischen Rom*, Stuttgart, 1998, S. 84.

8 Cic. *leg*. 2,16,41: *De diligentia votorum satis in lege dictum est ac voti et sponsio qua obligamur deo*. Ulp. D. 50. 12. 2. pr.: *Si quis rem aliquam voverit, voto obligatur; quae res personam voventis, non rem, quae vovetur, obligat; res enim, quae vovetur, soluta quidem liberat vota, ipsa vero sacra non efficitur.*

9 Liv. 21,62; 22,9; 22,10.

10 Liv. 42,2.

11 Liv. 4,27.

12 Liv. 31,9; 36,2.

13 Liv. 27,33.

14 Liv. 4,12.

15 Liv. 4,27; 36,2.

16 Plin. *n. h*. 28,11.

17 Liv. 27,33. Vgl. KUNKEL, Wolfgang, *Staatsordnung und Staatspraxis der römischen Republik*, München, 1995, S. 698.

18 Liv. 4,12; 42,28.

19 Liv. 22,10.

20 SECKEL, E., *Heumanns Handlexikon zu den Quellen des römischen Rechts*, 9. Afl., Jena, 1914, S. 633.

21 KASER, Max, *Das römische Privatrecht. I: Das altrömische, vorklassische und klassische Recht*, 2. Aufl., München, 1971, S. 253.

22 Liv. 5,31; 39,22; 40,40.

Stellen, wo der Gelübder vom Senat für die Votivspiele Geld forderte.[23] Der Senat hatte das Recht zu entscheiden, ob der Staat dafür Geld gibt. Wenn der Senat die Abhaltung der Spiele bewilligte, trug der Staat die Kosten der Spiele.[24] Wenn nicht, erhielt der Feldherr keine Unterstützung, aber er konnte mit Genehmigung des Senats die Kriegsbeute darauf aufwenden.[25] Ich meine, wenn der Feldherr die Spiele nicht veranstaltet hätte, hätte der Senat das erzwingen können, weil es im Interesse des Staates lag.

Einige Spiele, die zuerst als Votivspiele veranstaltet wurden, sind später jährlich abzuhaltende Spiele geworden. Dazu bedurfte es aber eines Gesetzes, worin auch der Tag der Spiele festgesetzt worden war. Zum Beispiel die *ludi Apollinares*, die zuerst im Jahre 212 v. Chr. nach dem Rat der Sibyllenbücher als Votivspiele veranstaltet wurden.[26] Im Jahre 208, zur Zeit einer Pestseuche brachte der *praetor urbanus*, P. Licinius Varus eine Gesetzesvorlage ein. Nach der darauf erhaltenen *lex Licinia de ludis Apollinaribus* sind die *ludi Apollinares* zu *ludi annui* geworden.[27]

Neben den sakralischen und Votivspielen entstanden nämlich zur Zeit der Republik die jährlich veranstalteten, magistratischen Spiele, die *ludi publici*. Im Rahmen der *ludi publici* waren die bedeutendsten Spiele die *ludi Romani*, die zu Ehren von Iuppiter organisiert worden waren. Eine Liviusstelle überliefert uns, dass diese Spiele vom Tarquinius Priscus gegründet wurden, und der *rex* veranstaltete sie jährlich.[28]

Mommsen meinte, dass diese Nachricht von Livius falsch ist, und diese Spiele zunächst als *ludi votivi* veranstaltet wurden, denn Tarquinius Priscus organisierte diese *ludi* zum erstenmal nach dem Sieg über die Latiner, und diese Spiele sind erst seit 366. v. Chr., als die *aediles* mit der *cura ludorum* beauftragt worden waren, zu jährlich stattfindenden Spielen geworden. Mommsen begründet seine Thesen weiterhin damit, dass die *ludi Romani*, wie die Votivspiele, auch *ludi magni* genannt wurden.[29]

Bernstein erklärt es damit, dass diese Spiele große Aufwendungen brauchten, und sowohl die *ludi Romani*, als auch die Votivspiele zu Ehren von Iuppiter veranstaltet wurden, deshalb war neben dem Attribut *Romani*, das *magni* auch gebraucht worden.[30] Ich bin der Meinung, dass da Iuppiter der Hauptgott der Römer war, ist es ja unwahrscheinlich, dass ausgerechnet für ihn jährlich kein Spiel veranstaltet worden war.

Da die Konsulen zur Zeit der Republik die Aufgaben des Königs übernahmen, erhielten sie auch die Pflicht der Veranstaltung der *ludi Romani*. Im Jahre 366. v. Chr. übernahmen die Aedilen diese Aufgaben von den Konsulen. Kubitschek meint, dass sich diese Pflicht der Aedilen daraus entwickelte, dass die *aediles* den Konsulen bei der Spielorganisation helfen mussten.[31] Nach Meinung von Kunkel teilten die Konsulen ihre Aufgaben mit den anderen Magistraten, weil sie alle ursprünglichen Pflichten nicht mehr erfüllen konnten. Die *iurisdictio* wurde von den Prätoren, die *cura ludorum* von den Aedilen übernommen.[32] Von dieser Aufgabe der Konsulen ist so viel übriggeblieben, dass die, als *praesides* der *ludi*, das Zeichen für die Wagenrennen gegeben haben.[33] Da die Quellen erklären, dass die *aediles curules* gerade zum Zweck der *cura ludorum* gewählt wurden,[34] meine ich, können wir Kunkel Recht geben.

Neben den *ludi Romani* wurden zur Zeit der Republik weitere Spiele eingeführt. So die *ludi plebeii*,[35] die von den *aediles plebis* veranstaltet wurden.[36] Im Jahre 208 wurden die vorerwähneten *ludi Apollinares*, im Jahre 204 die *Megalesia*,[37] 173 die *Floralia* durch Senatsbeschlüsse eingeführt.[38] Es gab noch in der Reihe der *ludi publici* die *Cerialia*, über ihre Entstehungszeit ist aber keine Quelle erhaltengeblieben.[39]

Mommsen konnte nicht entscheiden, welcher Magistrat die *ludi Floralia* veranstalten sollte.[40] Cicero spricht nämlich davon, dass er, als *aedilis curulis* diese Spiele veranstaltete.[41] Da die Kirche von Flora aber von den *aediles plebis* gebaut wurde, ist es unwahrscheinlich, dass die *Floralia* von *aediles curules* organisiert worden wären.[42] Bezüglich der *Cerialia* führt uns Cicero auch auf Irrwege. Er hat nämlich diese Spiele auch veranstaltet,[43] obwohl Gellius erklärt, dass es Gepflogenheit war, dass die Pa-

[23] Liv. 28,38; 36,36; 40,52.
[24] Liv. 7,11; 36,36; 40,52.
[25] Liv. 28,38; 36,36.
[26] Liv. 25,12.
[27] Liv. 27,23.
[28] Liv. 1,35; Cic. *rep*. 2,36.
[29] MOMMSEN, Theodor, *Die ludi magni und Romani*, in: Römische Forschungen, Bd. II, Hildesheim, 1962, S. 42–57.
[30] BERNSTEIN (o. A. 7), S. 31–35.
[31] KUBITSCHEK, Wilhelm, *Aedilis*, in: Paulys Real-Encyclopädie der Classischen Altertumswissenschaft, Bd. I (1893), S. 456.
[32] KUNKEL (o. A. 17), S. 477.
[33] Liv. 45,1. Vgl. BERNSTEIN (o. A. 7), S. 58.
[34] Liv. 6,42; Pomp. D. 1,2,2,26: *Deinde quum placuisset creari etiam ex plebe consules, coeperunt ex utroque corpore constitui. Tunc ut aliquo pluris patres haberent, placuit duos ex numero patrum constitui – qui ludos curarent – ita facti sunt aediles curules.*
[35] Die Umstände der Entstehung der *ludi Plebeii* sind nicht einduetig. Wahrscheinlich wollten die Römer im zweiten punischen Krieg mit Einführung neuer Spiele den Beistand und die Gunst von Iuppiter sichern. Vgl. BERNSTEIN (o. A. 7), S. 162.
[36] Liv. 10,47; 23,30; 32,7; 33,25; 40,59 usw.
[37] Liv. 29,14.
[38] Ov. *fast*. 5,327.
[39] Vgl. BERNSTEIN (o. A. 7), S. 163. Nach THUILLIER sind diese Spiele seit 202 v. Chr. veranstaltet worden (o. A. 2, S. 38).
[40] MOMMSEN, Theodor, *Römisches Staatsrecht*, Bd. II/1, Berlin, 1887–1888, S. 521.
[41] Cic. *Verr*. 2,5,14,36.
[42] KUNKEL (o. A. 17), S. 507.
[43] Cic. *Verr*. 2,5,14,36.

trizier bei der *Megalesia*, die Plebeier bei den *Cerialia* einander eingeladen haben.[44] Auch nach Cassius Dio wurden diese *ludi* von den *aediles plebis* veranstaltet.[45] Deshalb meint Kunkel, dass Cicero wahrscheinlich die Pflicht der plebejeraedilen erfüllte.[46] Die *ludi Megalenses* wurden eindeutig von den *aedilis curulis* veranstaltet.[47]

Im letzten Jahrhundert der Republik erweiterten Sulla und Caesar die Serie der *ludi publici*. Eine von diesen waren die *ludi Victoriae Sullanae* zum Gedenken des Siegs von Sulla im Jahre 82 v. Chr. bei der Porta Collina.[48] Diese Spiele wurden wahrscheinlich durch ein *senatus consultum* eingeführt, die Spielveranstaltung gehörte zu den Aufgaben des Prätors.[49]

Die anderen Spiele waren die *ludi Victoriae Cesaris*, die Caesar zu Ehren von Venus Genetrix wegen des Sieges bei Pharsalus im Jahre 46 v. Chr. gründete. Mit der Spielveranstaltung wurde ein Magistratskollegium beauftragt,[50] nur im Jahre 34 organisierte der Konsul diese Spiele.[51] Diese beiden *ludi* deuten schon auf die Übung der Kaiserzeit, als die Kaiser es selbst entschieden, zum Gedenken ihrer Taten neue Spiele einzuführen.

Zur Zeit der Republik sind die Spiele in den Händen der Magistrate ein Mittel geworden, in den Wahlkämpfen zu siegen, deshalb verloren sie ursprüngliche Funktionen, und sind reine Massenunterhaltung geworden, die später in der Kaiserzeit für einige Unternehmer auch große Geschäfte bedeuteten.

44 Gell. 18,2,11.
45 Cass. Dio 47,40,6.
46 KUNKEL (o. A. 17), S. 506.
47 Liv. 34,54; Cic. *har. resp*. 24,20.
48 Vell. 2,27,6.
49 Das wird eigentlich nur durch den Denar des Sex. Nonius Sufenas bestätigt. Vgl. BERNSTEIN (o. A. 7), S. 319.
50 Cass. Dio 43,22; 45,6.
51 Cass. Dio 49,42,1.

Alimony in Hungarian Family Law in the 19th Century

Eszter Cs. Herger*

Abstract

The system of marital property law was primarily formed by the judicial practice based on traditional customary laws in Hungary in the 19th century. The traditional family model meant on the one hand the personal and property independence of both parties stemming from the full capacity of both parties, on the other hand the position of the husband as the head of the family. This position can explain the fact that temporary and final alimony – although being an institution of property law – was dealt with in the area of the legal effects of marriage on persons in special literature. During marital cohabitation it was the husband's obligation to provide decent maintenance and cover all expenses incurred in relation to matrimony. Discontinuing marital cohabitation did not terminate this obligation, just as marriage was not terminated by it either. The temporary alimony did not depend on whether the wife was at faulty or not for causing the irretrievable breakdown of the marriage. Before the entry into force of the Matrimonial Causes Act (Act 31 of 1894), denominational laws usually regarded the obligation of the husband to provide alimony to be terminated upon the dissolution of the bond. Contrary to this, the Matrimonial Causes Act created a situation far more favourable for the woman. The intention of the lawmaker was to maintain the non-fault woman's social and financial status enjoyed during marriage in this way, since "the husband, who caused the dissolution of marriage by his injurious conduct and thus deprived her wife of the financial advantages which she could enjoy in the conjugal life, deserves to be obliged to compensate her for the loss of those advantages."

Key words: *marriage; marital property law; judicial practice; traditional family model; gender equality; temporary alimony; final alimony; principle of fault; Hungary.*

The system of marital property law was primarily formed by the judicial practice based on traditional customary laws in Hungary in the 19th century. This picture was modified by denominational legal norms pertaining to the marriage bond in so far as the institution of property law in question was the pecuniary consequence of rights and duties of a moral kind between the spouses. The lateness of civil law codification led to the survival of the plurality of legal sources regulating marital property even after the first Hungarian secularized uniform Matrimonial Causes Act (Act 31 of 1894, hereinafter MA) had come into force as in addition to marriage bond law this act provided for only some institutions of property law and as we will see, not in an exhaustive manner. A legal historian can only undertake to describe the duality of statutory law and judicial practice with the help of the comprehensive works of civil law scholars.[1] Judicial practice concerning temporary and final alimony is described on the basis of the author's own archival research.

1. The Content and Nature of the Legal Effect of Marriage on Persons

The legal effect of marriage on persons is the total of non-pecuniary rights and duties of a moral nature which spouses enjoy and owe to each other and which originate from the fact of their valid marriage. The moral nature of these rights and duties do not terminate their legal nature since these have pecuniary consequences and thus determine matrimonial property and inheritance law. Parties are primarily obliged to live in matrimony,[2] which in 19th century Hungary meant that parties had to owe fidelity to each other, mutually discharge conjugal debt (*debitum conjugale*) and live together. Specialists of private law of the time were of the opinion that the husband was the head of the family who consequently had a decisive say in managing family matters. The wife had, albeit not unconditionally, to follow her husband to his place of residence, which played an important role in cases of divorces on the ground of "deliberate desertion

* Eszter Cs. Herger, associate Professor, Department of Legal History, Faculty of Law, University of Pécs, Hungary.

1 *Frank*, Ignác: A közigazság törvénye Magyarhonban [Law of public justice in Hungary], Buda, 1845 = Frank; *Grosschmid*, Béni: A Házasság törvény (1894. XXXI. t.-cz.) [The Matrimonial Causes Act (Act 31 of 1894)], Vol. 1–2, Budapest, 1908 = Grosschmid; *Herczeg*, Mihály: Magyar családi és örökösödési jog [Matrimonial and inheritance law in Hungary], Budapest, 1885; *Jancsó*, György: A magyar házassági és házastársi öröklési jog [Matrimonial law and marital inheritance law in Hungary], Budapest, 1901 = Jancsó; *Nagy*, Domokos: A házassági jog és a Kuria gyakorlata [Matrimonial law and judicial practice of the Curia], Budapest, 1941; *Szladits*, Károly: A magyar magánjog vázlata [The sketch of privat law in Hungary], Budapest, 1909; *Zsögöd*, Benő: Családjog [Matrimonial law], in: Magánjogi tanulmányok II., Budapest, 1901 = Zsögöd.

2 MA § 67 I, § 77, § 88 II.

without a justifiable cause"[3]. She bore her husband's surname during marriage, widowhood and after the dissolution of marriage provided she expressed her wish to further bear that name unless the divorce decree established her fault.[4] The explanation of this provision in the ministerial reasoning of the statute was that the bearing of name of the divorced woman might have an impact on her social status, but the faulty woman "who had stained her husband's name" "deserved" that society would protect the family's name against her.[5] The (separated or cohabitating) surviving woman or husband had to decently bury the deceased spouse if the inheritors could not pay the costs of a decent funeral from the estate.[6]

Considering these legal consequences, the question arises as to how the dominance of the husband can be reconciled with civil equality, in this case with the principle of gender equality. It was a common position in special literature[7] that the power of the husband was similar to *manus* in Roman law and the German Munt was unknown in Hungarian law both at the time of Werbőczy and later.[8] Thus matrimony did not rest on the sexual subordination of the woman but it rested on the equality of the spouses – as Lőrincz Tóth has put it into words, "by the unique law of the Hungarian race". Although the MA did not expressly provide for the equality of spouses, the ministerial reasoning explained (in connection with the woman's right to a divorce petition) that the statute rested on this principle.[9] I am of the opinion that this equality first of all manifested itself in the full capacity of women living in matrimony: the wife could independently enter into any kind of legal transaction; neither the wife nor the husband could bind his or her spouse by their independent legal transactions,[10] although the husband was liable for the legal transactions concluded by the wife for domestic arrangements even if he did not directly benefit from them; generally the husband could not represent the wife in a lawsuit or elsewhere without authorization;[11] further they could freely enter into legal transactions *inter vivos* and *mortis causa* not only with third parties but with each other as well.

Nevertheless it is indisputable that civil family law, which gradually replaced traditional law, contained certain elements constituting sex discrimination. My research shows that state divorce law insisting on the principle of fault, which was nevertheless the product of the last decade of the 19th century, was more unfavourable for the wife in judicial practice, although this could not have been foreseen when creating the MA.[12] Though the husband's position as the head of the family and its consequences were generally explained by "the nature of marital cohabitation" and it was emphasized that this fact did not exclude the principle of the equality of spouses,[13] I suggest this complexity can better be described by the term traditional Hungarian family model. On the one hand it meant the personal and property independence of both parties stemming from the full capacity of both parties, on the other hand the position of the husband as the head of the family ensured the primacy of the husband.

The position of the husband as the head of the family can explain the fact that alimony – although being an institution of property law – was dealt with in the area of the legal effects of marriage on persons in special literature.[14] According to the principle established by judicial practice the husband as "the head of the family"[15] fulfils his "spousal (and paternal) obligation"[16] when providing maintenance for his wife and underage children. In respect of maintenance the wife was taken into consideration in the same way as an underage child. Most Hungarian women had no qualifications and conducted no gainful activity even in the second part of the 19th century, thus alimony continued to be interpreted as the consequence of actual living conditions.[17]

2. Alimony During Marriage with the Parties' Cohabitation

During marital cohabitation it was the husband's obligation, which the wife could not waive for the benefit of the husband, to provide decent maintenance and cover all expenses incurred in relation to matrimony. This obligation was terminated upon the death of the wife as it was linked to the person of the wife, consequently the wife's entitlement did not devolve to her heirs or third parties. Maintenance was "decent" if it was in

[3] MA § 77.
[4] MA § 94.
[5] Jancsó, p. 577.
[6] Curia No. 5386/1893 and No. 5652/1898 The decisions of the Curia see, Márkus, Dezső (edit.): Felsőbíróságaink elvi határozatai. A m. kir. Curia és a kir. táblák elvi jelentőségű döntéseinek rendszeres gyűjteménye [Principal decisions of our superior courts. Systematical collection of decisions of fundalmental importance of the Hungarian Royal Curia and the royal courts of appeal], Vol. 2–10, Budapest, 1883–1901.
[7] *Szladits,* Károly: A házastársak közötti személyes jogviszony [Personal legal relation between the spouses], in: Márkus, Dezső (edit.): Magyar jogi lexikon, Vol. 4, Budapest, 1903, pp. 118–120 = Szladits, Jancsó, pp. 571–573; *Tóth*, Lőrincz: A magyar nőkről (Függelék Gide Pál: A nők joga című művéhez) [About Hungarian women (Appendix to the book entitled „Right of women" of Pál Gide)], Budapest, 1887, p. 40 and pp. 400–405.
[8] For the opposite opinion see, *Dell'Adami*, Rezső: Magánjogi codificatiónk és régi jogunk II. [Codification of our private law and our traditonal law II], Budapest, 1885, pp. 31–32 and pp. 40–41.
[9] Reported by Grosschmid, Vol. 2, pp. 678–679.
[10] Frank, p. 333.
[11] Act 59 of 1881 § 12 and Act 18 of 1893 § 7.
[12] *Herger*, Eszter Cs.: A nővételtől az állami anyakönyvvezetőig. A magyar házassági köteléki jog és az európai modellek [From purches of women to the public registrar. Matrimonial law in Hungary and European models], Budapest-Pécs, 2006, p. 190, pp. 222–223 = Herger.
[13] Jancsó, p. 575.
[14] Szladits, p. 119, Jancsó, p. 578.
[15] Curia No. 5889/1885, No. 9243/1892 and No. 4/1897.
[16] Curia No. 6843/1883.
[17] Jancsó, p. 578.

accordance with the financial situation and social status of the husband. In judicial practice maintenance basically covered accommodation, food, clothing and intellectual needs[18] but the husband had to "cover the medical costs of the treatment of the wife".[19] However, the husband was not liable for the legal costs of the wife's civil or criminal proceedings or for her possible prisoner's maintenance even in a subsidiary manner (*in subsidio*) as both spouses had full capacity and thus enjoyed personal and property independence.

The husband provided maintenance in the common household in-kind. The wife could – exceptionally – demand it in money only if the husband refused to provide it in-kind or his or his relatives' unbearable conduct made it impossible for her to enjoy it.[20] The husband could not demand his wife to contribute to the maintenance of the family from her own wealth. However, during marriage the husband disposed of and handled her dowry (*allatura*), which had been given by the bride's father, brother or any other person except the husband[21] for easing the financial burden of the marriage. It follows that the dowry (movable and immovable property and property rights) constituted the property of the wife over which the husband exercised exclusive beneficial interest. In addition, the wife could let the husband administer her own separate property – either by an express statement of will or tacitly. The husband was not accountable for the growth of the separate property to the wife unless stipulated otherwise, and he did not have to refund it. Thus the income from the separate property was used for covering the expenses of the household. If the husband did not provide decent maintenance and the wife had to ensure it from her separate property, she did not have the right to demand its reimbursement even if the marriage was terminated, nor could the husband demand the money he had spent on maintenance from the wife or her heirs.

3. Alimony During Marriage with the Parties' Separation

The Types and Content of Temporary Alimony

Discontinuing marital cohabitation did not terminate the husband's obligation to maintain the wife, just as marriage was not terminated by it either. This life situation could occur in four different legal situations. After the entry in to force of the uniform state divorce law independent of denominations,[22] separation from bed-and-board (*separatio a thoro et mensa*) as a residue of canon matrimonial law meant a legal solution only for those who wanted to maintain the bond itself either because of their religious conviction or because they hoped to be able to eliminate the causes of the breakdown of the marriage during separation. In the course of my research I examined all the matrimonial cases initiated at the royal court of Pécs between 1895 and 1918, altogether 1842 cases. However, I could find only one case of this kind.

After 21 years of cohabitation Mari K. left her husband, András G., whom she had married in 1875 by the rites of the Roman Catholic Church. Three out of their four children had already grown up by then. The irretrievable breakdown of their marriage was caused by the cruelty of the husband. One and a half year after the court had rejected András G.'s divorce petition on the grounds of desertion, Mari K. petitioned the royal court for separation from bed-and-board. The court granted separation, declared the husband's fault, granted the wife the child's custody and ordered the husband to pay child support. The husband was also ordered to pay alimony in the amount of 12 Ft per month from the day of the divorce petition, 22nd June 1898 to the death or a new marriage of the woman.[23] The two superior courts upheld the decision of the first instance court in the course of a review initiated ex officio.[24]

In respect of financial matters, thus also in the issue of alimony, separation had the same legal effect as divorce, nevertheless since the bond still existed and matrimony could be restored at any time, in the cases where separation from bed-and-board[25] was sought the court ordered temporary alimony for the term of separation or till the death or a new marriage of the wife.

Secondly, it should be noted that parties could request the court to order them to live separate and apart from bed and table for the term of the suit for nullity or divorce.[26] In such cases the husband had to pay temporary alimony until the closure of the proceedings.

Thirdly, the court could also order separation ex officio in cases for nullity[27] or when trying to reconcile the parties in a divorce case. In the case of divorce petitions on so called absolute grounds for divorce, courts "usually" did so; or rather the court could only forbear from it if there was no hope for reconciliation.[28] In the case of relative grounds for divorce separation was always ordered, even if parties had lived separately for a long time before filing the divorce petition.[29] The term of separation was 6–12 months under statute law; however my research shows that judges always applied the shortest, i.e. the six-month period.[30] Temporary alimony was restricted to this period of time.

[18] Curia No. 6843/1882, No. 5889/1885 and No. 7614/1885.
[19] Curia No. 3939/1884, No. 1356/1896 and No. 9243/1892.
[20] Curia No. 198/1899.
[21] Act 7 of 1886 § 21.
[22] 1st of Oktober 1895.
[23] Baranya Megyei Levéltár (BML) [County Archive of Baranya (hereinafter CAB)] VII/2b II/1898/249 16219p/1899.
[24] CAB VII/2b II/1898/249 544p/1900 and 1861p/1900.
[25] MA §§ 104–106.
[26] MA § 72, § 98.
[27] MA § 72.
[28] MA § 99.
[29] Curia No. 812/1897.
[30] Herger, pp. 188–189, pp. 217–232.

Finally, the wife could demand temporary alimony without initiating separation or divorce proceedings against her husband living apart. The MA – quite obviously – did not cover such a situation, only rules established in judicial practice were followed,[31] yet the provisions of the MA were regarded as the guiding principle when assessing temporary alimony. This "contradiction" may be explained in as much as the legal institution of temporary alimony was regarded uniformly in judicial practice regardless of which of the four above mentioned situation was at stake. The wife could enforce her claim not only at the beginning of living apart but later as well. Contrary to the general limitation period of 32 years, courts consistently applied the economic principle according to which the amount of the temporary alimony claimed retroactively for the past years should not ruin the financial status of the husband.[32] Contrary to its name, temporary alimony claimed without initiating a separation or divorce proceedings was due for the lifetime of the woman unless matrimony was later restored or final measures were taken concerning maintenance in a divorce proceeding.

The obligation of the husband to pay temporary alimony was terminated when the woman died. The right of the woman did not devolve to her heirs or any third person. However, if the husband died, his obligation devolved onto his heirs to the extent of the balance of the income of the estate.[33] The widow could have needed this if she was not entitled to dower (*jus viduale*) for any reason and her maintenance was not ensured because of it.

Although providing alimony was the obligation of the husband, in 1897 the Curia established that the entitlement of an impecunious and incapacitated woman who was forced to live apart through no fault of her own was valid against her living husband's father provided her husband as a son with no separate property had taken her to the father's house with his consent and the son performed his activities in working on the father's property.[34]

Whilst alimony was provided in-kind in the common household while living together, temporary alimony had to be provided monthly in cash. Temporary alimony could be provided for otherwise by the parties in a notarial deed, in a formal marital property agreement. An agreement concluded before separation was not regarded to be against good morals in judicial practice even if the parties agreed on an unconditional alimony to be paid in the case of separation.[35] Although temporary alimony could not be ensured under statute law, the parties could agree otherwise in this respect as well. In case the husband transferred his property to a third party in a gratuitous contract, this person was obliged to provide alimony under judicial practice.[36]

Adhering to the principle of legal security, the court ordered both divorce and separation in a judgement and not in an order after hearing the parties and thus examining their financial and earning conditions[37] but usually without hearing experts. Relying upon these findings the court – in theory – could discharge the husband from his obligation to provide temporary alimony if the wife was affluent and the husband was so poor that his earnings could hardly cover his own needs. According to the ministerial reasoning of the statute, in such cases alimony would not only be unreasonable but unfair as well.[38] If the financial conditions of the parties had changed during separation to the extent that the woman could maintain herself at a level in accordance with her social status or the husband had become impoverished to the extent that he could hardly cover his own needs, in a new proceedings the husband – in theory – could request the revision of the former judgement and to be discharged from his obligation to provide alimony.

The Impact of Fault on Granting Alimony

Before the entry into force of the MA judicial practice acknowledged the claim of the woman against her husband for temporary alimony for the term of the proceedings if separation was not her fault.[39] Although the divorce law of the MA insisting on the fault principle contained several provisions which can only be interpreted as quasi punishment imposed on the party at fault, temporary alimony did not depend on whether the wife was at faulty or not for causing the irretrievable breakdown of the marriage i.e. a ground for divorce since the issue of fault cannot be adjudicated[40] in a judgement ordering living apart (*ex officio* for the sake of reconciliation or upon request for the term of the proceedings).[41] Thus in such cases the wife was unconditionally entitled to temporary alimony. Contrary to judicial practice, some authors considered this principle to be a violation of the sense of justice, mainly because the husband could not reclaim temporary alimony back from the wife after she had been found at fault upon the dissolution of the marriage.[42]

Contrary to all this, the fact that the woman was at fault excluded temporary alimony if the court separated the parties from bed-and board for separation had the same legal effect as dissolution in respect of financial arrangements.[43] In the same way the wife at fault could not be granted temporary alimony if she had requested it against her husband living apart without

[31] Curia No. 157/1896.
[32] Jancsó, pp. 595–597.
[33] MA § 92.
[34] Curia No. 56/1897.
[35] Curia I. G. No. 21/1896.
[36] Curia I. G. No. 274/1897.
[37] MA § 102.
[38] Reported by Grosschmid, Vol. 2, pp. 781–785.
[39] Curia No. 4771/1882, No. 6843/1883, No. 3668/1884, No. 10.495/1890 etc.
[40] Curia No. 1306/1899.
[41] Curia No. 2805/1897.
[42] Jancsó, p. 453.
[43] MA § 105.

initiating separation or divorce proceedings. Thus temporary alimony was not granted if the woman or the woman as well (in addition to the husband) [44] was at fault for the breakdown of the cohabitation, neither if she behaved in a faulty way while living apart.[45] The burden of proving the husband's fault was on the petitioning woman.[46] As it has already been mentioned, the MA did not regulate such independent property claims. Thus former judicial practice remained in effect and – although some authors questioned its lawfulness [47] – courts often adjudicated on independent temporary alimony claims. Consequently, if the not at fault wife proved that "her husband's injurious conduct made conjugal life unbearable for her", she was granted temporary alimony.[48] It is still to be examined what the courts qualified as "injurious conduct".

Although rough treatment on the side of the husband was usually admissible as a lawful cause of the wife's leaving the husband's house, the following decision shows that the term "usually" made roughness relative. "Amongst common peasants the fact that the husband slaps his wife twice in the face for talking back is not to be regarded a cause of such a nature and measure which could justify the woman's leaving the husband's house and living apart, taking into consideration the parties' social status and education." If the woman did not prove that her husband had driven her out of the house and she had made steps to return to him in vain, she could not demand alimony from her husband.[49]

In 1895 in the opinion of the Curia the degree of "beating the wife" which did not qualify as a criminal offence did not constitute "injurious conduct". At the end of the 19th century in Hungary the position of the husband as the head of the family entailed the entitlement to inflicting light corporal punishment according to the superior court the decisions of which were authoritative for all other courts of the country. Moreover, as the wife had to follow her husband to his residence, the husband was found at fault only if the wife had tried to restore conjugal life in vain after the expulsion. Three years later the Curia assessed the "stubborn or over-sensitive" conduct of the wife as well. In its opinion "injuries of a lesser importance" should be pardoned by the wife "for the sake of maintaining family life", but if she fails to do so, and her "stubbornness" results in the termination of conjugal life, she cannot demand any financial provision from her husband.[50] Now I can only repeat the statement of my position that some consequences of the husband's position as the head of the family, for instance the above mentioned corporal punishment, cannot be reconciled with the principle of the legal equality of sexes. The content of the traditional value judgement is usually explained first of all by ethico-religious norms. In my view the traditional family model cannot be reconciled with the spirit of the following principles of the Bible: „So ought men to love their wives as their own bodies. He that loveth his wife loveth himself" [51] and „giving honour unto the wife, as unto the weaker vessel" [52].

Alimony after the Dissolution of Marriage

Before the entry into force of the MA, denominational laws usually regarded the obligation of the husband to provide alimony to be terminated upon the dissolution of the bond. In the case of evangelical parties if the wife proved "such facts" which "might justify derogation from this rule", final alimony could be granted.[53] Such "substantial cause" could be the fact that the wife became incapacitated caused by the husband or that the wife was impecunious and – although not caused by the husband – incapacitated at the same time. However, the general principled position was that "the obligation to pay alimony fell on the husband during the existence of the marriage bond, should which be dissolved (that is in the case on non-Catholic parties) and a financial arrangement not be provided for in a judgement of divorce, the husband would be obliged to pay alimony until a financial arrangement is stipulated." [54]

Contrary to this, the MA created a situation far more favourable for the woman. Each of its drafts [55] stuck to the position that the husband's obligation arising from his position as the head of the family to maintain his non-fault ex-wife was not terminated by the dissolution of marriage. The *in subsidio* entitlement of the non-fault wife was explained in the ministerial reasoning of the statute by the fact that it was a "law in action in Hungary too", and then it was underpinned by some similar provisions of the ALR, the Code Civil and the ABGB.[56] Thus the intention of the lawmaker was to maintain the non-fault woman's social and financial status enjoyed during marriage in this way, since "the husband, who caused the dissolution of marriage by his injurious conduct and thus deprived her wife of the financial advantages which she could enjoy in the conjugal life, deserves to be obliged to compensate her for the loss of those advantages." [57]

Subsidiarity meant that the husband had to provide for the wife in accordance with his financial and social status if her actual income (property and earnings) was not sufficient for this

44 Curia No. 77/1897.
45 Curia No. 57/1898.
46 Curia No. 4234/1885.
47 MA § 72, § 98 and § 105.
48 Curia No. 264/1896, No. 321/1897, No. 214/1899 etc.
49 Curia No. 10635/1895.
50 Curia No. 4/1898.
51 Ephesians 5:28, Authorized Version.
52 I. Peter 3:7, Authorized Version.
53 Royal Court of Appeal in Budapest No. 41743/1885, reported by Jancsó, p. 599.
54 Curia No. 1376/1892.
55 Grosschmid, Vol. 2, p. 738–740.
56 Grosschmid, Vol. 2, p. 738–740.
57 Jancsó, p. 607.

when filing the divorce petition.[58] The amount of the final alimony, as in the case of the temporary alimony, was determined after hearing the parties and thus examining their financial and earning conditions, as is shown in the following case, although the claim for alimony was not granted due to the dismissal of the divorce petition.

After four years of cohabitation Karolin F. petitioned the royal court in Pécs to dissolve her marriage contracted with András G. under Israelite rites in July 1894 and to grant alimony and child maintenance. The petitioner told the court at the hearing that the respondent had pointed a gun at her and her child, had gone bankrupt due to neglecting his business, and had lost her dowry of 400 forints. After this she left him. The six-month separation ordered by the court yielded no result. The first instance court found the respondent at fault, dissolved the marriage on the grounds of wilfully and seriously violating his conjugal duties and granted only child maintenance in the amount of 20 crowns per month from the submission of the petition to the child's becoming of age.[59] Neither of the parties appealed. In the review instituted ex officio at second instance the proceeding Royal Court of Appeal dismissed the petition because the cause of breaking off conjugal life was not the "respondent's rough treatment" but financial hardship.[60] The Curia reversed both judgements and ordered the law court to obtain the receiving order and clarify what led to the breaking of the parties' conjugal life.[61] In the new proceedings the law court dissolved the marriage on the same ground and decided on financial matters in the same way as previously.[62] The court of appeal dismissed the petition again. This time, however, its ruling was substantially reasoned: "Petitioner herself tells that their conjugal life was broken when the respondent went bankrupt and travelled to Pécs to declare himself bankrupt, she left him. (…) The respondent satisfied the court that he "tried to restore cohabitation" but his wife prohibited him from contacting her either through letters or in person. The fact that the respondent suffered financial hardships and went bankrupt "does not entitle the petitioner to arbitrarily dissolve conjugal life, on the contrary it stems from the nature of marriage as a moral institution that the petitioner as wife should have most supported the bankrupt respondent just because of it."[63]

In the reasoning of its ruling the Royal Court of Appeal blamed the petitioner for not supporting her husband when he lost his assets. Although in 19th century Hungarian private law the wife had no obligation to maintain her husband, at the very end of the century, in 1898 a statute[64] provided that the wife was to bear liability for her husband's public nursing fees. Nevertheless, the wife could claim the reimbursement of this payment from the husband as household expenses were still to be borne by the husband due to his position as the head of the family. In 1990 the draft of the civil code provided for the obligation of the wife to support the husband in his earning activities necessary for their common livelihood, and imposed an obligation on the wife to maintain the husband unconditionally during marital cohabitation and conditionally during separation if he cannot maintain himself due to his lack of resources or incapacitation.[65] As it has been shown, courts grounded this concept of the legislator through playing their role in legal development.

Going back to the issue of the husband's maintenance obligation, the alimony imposed could be increased if the husband had been exempted from this obligation due to his financial status but later it improved or if an income of the wife which she later lost through no fault of her own had been taken into consideration when assessing alimony.[66] However – contrary to the judicial practice[67] before the entry into force of the MA – the alimony imposed could not be decreased under the MA because it might have made the not at fault wife's financial status unstable.[68]

Alimony – for practical purposes – had to be paid in cash and usually in monthly instalments in advance, however derogation was possible in the case of persons engaged in agriculture and manufacturing industries.[69] The husband had to provide maintenance if the wife expressly claimed it in an action. In such cases the judgement had to contain a provision to this effect too. This could be secured in several ways, for instance by recording mortgage in the land register on the husband's real estates in an amount equal to the annual amount of the alimony regarding it as allowance or by depositing an amount of money or securities in court the interest on which equals to the annual amount of the alimony. If the securities exceeded the necessary amount, it could be restricted in an action.[70]

Parties could freely agree on final alimony, the woman could even waive it.[71] This right of disposal, though it also followed from general legal principles, was expressly laid down in the MA, as the husband's maintenance obligation and the wife's above right were otherwise restricted since the spouse could not waive maintenance during marriage. For this reason Grosschmid declared the woman's such right of disposal to be "impossible"

[58] MA § 90.
[59] CAB VII/2b II/1898/78 4691p/1901.
[60] CAB VII/2b II/1898/78 1769p/1901.
[61] CAB VII/2b II/1898/78 6860p/1901.
[62] CAB VII/2b II/1898/78 5942p/1902.
[63] CAB VII/2b II/1898/78 1721p/1902.
[64] Act 21 of 1898 §§ 6–7.
[65] Zsögöd, pp. 807–827.
[66] MA § 91.
[67] Curia No. 9887/1890.
[68] Jancsó, p. 610.
[69] Jancsó, p. 608.
[70] Curia No. 1574/1897.
[71] MA § 92.

before initiating a divorce case.[72] According to the ministerial reasoning domestic judicial practice required a solution without time limitation: "The courts' task is to try to have property settlement concluded between the spouses, and the courts decide on property issues disputed only if such an agreement fails to be concluded. Parties are free to work for agreement and waive their rights after the closure of the proceedings in which case the judgement will be replaced with an agreement."[73]

The wife could enforce her right to alimony through a claim or a counterclaim, thus – although the MA used the term "obliged to maintain" – courts did not provide for alimony ex officio. Whilst the first draft of the MA created by Elek Győry would have allowed for granting alimony for the woman only in the divorce proceeding itself,[74] later drafts and the MA did not provide for it expressly. Among the matrimonial causes initiated at the royal court in Pécs between 1895 and 1918 there were only few, less than 10% of the claims and counterclaims annually for final alimony (too). This can only partly be explained by the fact that the financial conditions of the women did not make alimony necessary. It was rather due to the fact that as a result of the fault theory adhered to in divorce law such a claim could be made only if the woman was the petitioner or she herself requested the marriage to be dissolved and the husband to be found at fault in a counterclaim. During the given 24-year period the wife was found at fault in more than half of the cases (female respondent: 49.5% + female petitioner: 0.8%). In 30.2% of the cases the husbands were found at fault (male respondent: 29% + male petitioners: 1.2%), 5.2% of the cases were both at fault cases. Apart from some exceptional years,[75] the pattern was the same in a yearly breakdown and statistical figures showed a similar tendency nationwide. I found one case at the end of the "long 19th century", in 1912, where the court approved the counterclaim of a woman having been found at fault and granted alimony.

The marriage contracted between József B. and Anna K. by the rites of the Roman Catholic Church in 1884 was dissolved by the royal court in Pécs in 1912 on the ground of wilful and unjustified desertion with finding the respondent at fault. The court approved the claim for alimony of 600 crowns (contrary to Article 90 of the MA) and ordered the petitioner to pay "five crowns monthly in advance as of 1st August 1911, the amount overdue in total within 15 days under penalty of distraint, whilst the other instalments at the beginning of each month till the death of the respondent." The reasoning of the court was as follows: the petitioner made no demur to the request of the respondent but offered to pay five crowns per month instead of the payment of 600 crowns, which offer was accepted by the respondent. The fact that the wife deserted the petitioner after two years of cohabitation 26 years before the filing of the petition made his generosity even more surprising. Thus the court regarded the litigants' right of disposal stronger than the negative legal consequence attached to fault. An unusually short period of time, 24 days elapsed between filing the petition and passing judgement. The respondent made no defence and did not object to the dissolution of marriage.[76]

If the woman requested alimony in a separate property law action, the ruling of the court concerning fault had to be taken into consideration as res judicata even if it had been made under the denominational laws before the adoption of the MA.[77]

The obligation to pay final alimony devolved to the husband's heirs regardless of how they got title. Although foreign codes of natural law did not take a uniform position in this respect either, in Hungary outstanding private law scholars making preparations for the MA were of the opinion that provision for the no fault woman "would be stuck halfway" if alimony were not further on granted from the active estate of the husband.[78] Since dower (*jus viduale*) and alimony are legal institutions with essentially the same aim and the divorced woman is not entitled to the former, the latter could be needed. However, the unconditional devolution of the obligation of alimony to the heirs might have been injurious mainly in the case of a small estate and even the considerable appreciation of the woman's situation could not justify it. For this reason the heirs could request the amount of the alimony to be decreased to the amount of the net estate: even if this was done, there was nothing left for them from the estate. In other words if there was a conflict between the right to alimony and the right to inherit, the former prevailed.

The husband's maintenance obligation terminated upon the woman's death or new marriage.[79] This was the general approach of the codes of natural law, except for the Prussian ALR.[80] As the new marriage of the divorced woman originates the maintenance obligation of the new husband as a legal consequence of the personal legal relation between the two parties, the legal ground of the obligation of the former husband terminates and this holds even if the new marriage ensures a lower level of maintenance than was ensured by the former maintenance since the woman voluntarily decided on the new marriage.

Other Property Claims Enforced in Matrimonial Cases

In addition to temporary alimony courts also made provisions ordering the husband to hand over the objects necessary for the wife. This had to be provided unconditionally – in line with the "requirement of equity" and the nature of living apart[81] – upon the request of the woman even if the husband was exempted from alimony. Statute law did not define the

[72] Grosschmid, Vol. 2, p. 751.
[73] Grosschmid, Vol 2, pp. 749–750.
[74] Grosschmid, Vol 2, p. 738.
[75] Herger, p. 190 and p. 273.
[76] CAB VII/2b II/1912/255 10612p/1912.
[77] Jancsó, p. 605.
[78] Grosschmid, Vol. 2, p. 750.
[79] MA § 93.
[80] ALR I/1 § 805.
[81] Reported by Grosschmid, Vol. 2, pp. 781–785.

term necessary objects. The clothes and underwear of the woman and the furniture and kitchen utensils necessary for living apart were regarded as such in judicial practice.[82] Obviously, the woman's separate property had to be handed over too. If it was disputed whether a particular asset belonged to it or not, it could be decided in a judgement declaring separation from bed-and-board but not in a judgement ordering to live separate and apart from bed and table. In the latter case, provision was made only in the judgement declaring dissolution after living apart for six months.

In a matrimonial case parties could likewise enforce their further property claims in addition to final alimony, though this could also be done in a separate property law suit. Joint enforcement in a matrimonial case was favourable for the parties inexperienced in law, since the MA provided for legal representation. Thus the necessary legal knowledge was by all means ensured on the side of both the petitioner and the respondent. However, this opportunity was rarely taken in practice. In the matrimonial cases instituted at the royal court in Pécs between 1895 and 1918, though there were about a dozen property claims annually, they were usually of an insignificant value: one cupboard, one wardrobe and one bed;[83] six bed sheets, one new tablecloth, one shawl, three pillows with feathers and two bolsters;[84] 30 forints received as an engagement present;[85] one complete wedding costume, three pillow cases, one eiderdown case, two coats, three head scarves.[86] More substantial property claims in actions concerning marriage bond were exceptional.

After seven years of cohabitation József H. petitioned for the dissolution of his marriage contracted with Katalin D. by the rites of the reformed church in January 1894 and the cancellation of their marital property agreement. The court declared the dissolution on the ground of wilful and unjustified desertion on the side of the respondent wife and found her at fault.[87] There was no disagreement between the parties in respect of the property claim; the court authorized the husband to have his title to the real estates he had handed over to the respondent registered in the land registry.[88]

Separate property actions were preferred in the case of complex property law disputes since until 1907 first instance judgements had ex officio to be referred to a second and a third instance court in lack of an appeal, which substantially delayed their becoming final. Thus the property law provisions of the first instance court which were not appealed against could not be executed before the third instance court passed judgement.[89]

[82] Jancsó, p. 453.
[83] CAB VII/2b II/1895/8 13138p/1898.
[84] CAB VII/2b II/1897/8 8116p/1897.
[85] CAB VII/2b II/1897/40 15790p/1898.
[86] CAB VII/2b II/1897/85 12092p/1898.
[87] MA §77 a.
[88] CAB VII/2b II/1900/340 11096p/1901.
[89] Curia No. 247/1900.

Legal Education and Ethos of the Legal Profession in Hungary in the Civil Era

Gábor Schweitzer*

Abstract

The paper is dealing with several aspects of legal education in Hungary in modern times and also reflects with the image of legal professions in Hungary from the age of enlightenment up to WW I. Legal education was considered to be one of the privileges of the churches before the period of enlightenment. The only university of Hungary, established at 1635 in Nagyszombat (today Trnava), was deeply influenced by the roman catholic church. Later on the significant protestant churches, the Calvinist and the Lutheran also established their so called legal academies. After the educational reform of Maria Theresia in 1777, several so called royal legal academies were also established in Hungary. In the period of dualism, after 1867 there were existing two universities and 10 legal academies in the country. The number of legal professionals among the Hungarian intelligence was traditionally high. The paper would like to answer why legal studies were so popular in that period. Citing memoirs and literary works also describes the changing images of different legal professions.

Key words: *Legal education in Hungary; Legal universities in Hungary; Legal academies in Hungary; ethos of legal professions in Hungary; image of lawyers; image of notars.*

I. Universities and Legal Academies

At the Jesuit University founded in Nagyszombat (today Trnava) in 1635, regular legal education commenced in 1667, as legal education in Hungary even before was a sort of monopoly of the Catholic Church. Education was focused on Canon Law and Roman Law. These disciplines taught at university level, however for an uncertain duration, were amended from the end of the 17th century with the so-called domestic law (ius patrium). Up until the second half of the 18th century, there was little change in the structure of education or the method of teaching, which was typically dictation of the Latin-language legal material, and omitted any printed text books. Practical skills were to be acquired not during the study period, but in separate court or attorney practice sessions.[1] Up until the mid-18th century, pursuit of the legal profession as either a judge or attorney was open even without proper qualification in law.

In addition to the universities, in protestant colleges – of the Reformed or Lutheran faith – legal subjects were taught additionally to theological majors, however independent legal departments were established only starting with the end of the 18th century. In their efforts for recognition of their legal status, Protestant Churches found it explicitly important to breed jurists in the Protestant spirit who were well versed not only in Church law, but were also adept in defending their respective Church in case of any attack.[2] A development of the system of education offered in the first half of the 19th century in Protestant colleges led to the establishment of the so-called legal academies maintained by Protestant Churches. The so-called royal (legal) academies, funded by either the Catholic Church or the state, were established somewhat earlier, as the majority of them were founded after the educational reform in 1777, known as the Ratio Educationis. Legal academies, eked between the secondary and tertiary level of education had a unique place in the system of higher education in Hungary.[3] Due to their existence up until the mid-20th century, Hungarian legal education was in fact duplicated, however the level of education and qualifications may have varied.

Starting with the period of enlightened absolutism, the sociological composition of jurists in Hungary became broader. First of all, feudal constraints were loosened, and so were religious restrictions. The Josephine policy of religious patience opened up the road for Protestants to serve in the civil service, however, well-off individuals of non-noble origin were also allowed to enroll to tertiary legal education. In the first half of the 19th century, with the spread of liberalism, non-nobles, the so-called honoratior intellectuals were also permitted to take up office. From the mid-19th century – as the next step of social-

* Gábor Schweitzer, PhD, senior research fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, Budapest, Hungary.

1 Nagy Zsolt: A jogi oktatás fejlődése és aktuális kérdései. (The Development and Current Issues of Legal Education.) Szeged, Pólay Elemér Alapítvány, 2007, p. 49.

2 Nagy Sándor: A jogi oktatás és szervezete a debreceni református kollégiumban 1742–1914. (Legal Education and the Structure of Education in the Reformed College of Debrecen Between 1742–1914) In: A jogászképzés a magyar felsőoktatás rendszerében. Ed.: Kovács Kálmán. Budapest, 1984, p. 155.

3 Mezey Barna: Egyetemek és jogakadémiák. A jogi oktatás kezdetei és fejlődésének tendenciái Magyarországon. (Universities and Legal Academies. The Beginnings and Trends of Legal Education in Hungary) In: Győri Tanulmányok. No. 20. Győr, 1998, pp. 13–14.

denominational liberalization – Jews were allowed to enroll to the legal faculties, although the effects of this measure were to be felt only in the final third of the century. (The social image of the legal profession in the interwar period was shaped also by the acceptance of female students of law.)

The legal educational policy of enlightened absolutism changed not only the institutional framework of education, but also the syllabus. The primary goal of royal (legal) academies, established pursuant to the Ratio Educationis, was to train the young nobility for the service of "the king and the homeland", in addition of course to the acquisition of universal knowledge, that is to become "useful citizens" of the country.[4] The curriculum of the royal academies was set for four years: the first two years were dedicated to liberal arts (philosophy), which were succeeded by an additional two-year course in law. Ratio Educationis II, issued in 1806, amended the length of the legal course to three years for royal academies. It must be noted that the effect of Ratio Educationis did not involve Protestant colleges, and thus it had no direct influence on the legal education offered in these colleges. Meanwhile, the university that was relocated first to Buda in 1777, and successively to Pest was shifted from the Jesuit order to the authority of the government (primarily the Royal Council of Governor) – introduced new subjects at its legal faculty, following Viennese example, to include natural law, and "politico-cameral" studies, and changed the training period to four years from three.

The theoretical training period at both legal academies and universities were considered basically equal, although the duration varied, and was followed by a practical training session for two years (so-called patvaria, and jurateria), in a law office and in court. Bar examination could only be taken thereafter. The training period under the supervision of a principal did not always involve the desired acquisition of legal knowledge. An innovator of the 18-1th century Hungarian literary life, Ferenc Kazinczy (1759–1831) in his memoirs reprimanded those parents who had sent their sons to legal practice, but failed to double check how the young trainees actually had spent their time. "I learnt day and night", wrote Kazinczy reminiscing about the years 1770–1780, "but never the law", rather to dance, play the flute and paint.[5] Neither did his principal require him to excel in the art of boot polishing and boot jacking which many trainees were to acquire at the expense of legal skills.[6]

Latin language was later replaced by a Hungarian language curriculum paving the way for the development of a Hungarian legal language, and in addition to the incorporation of theoretical and positive legal subjects into the curriculum, the adoption of Act XIX of 1848 on academic freedom was the greatest breakthrough of the period of civil transformation, declaring the principle of academic freedom respecting higher education. Academic freedom, assuring freedom to teach and learn, was curtailed following the crush of the revolution and freedom fight of 1848/49, during the ensuing period of the so-called Austrian Neo-Absolutism. Austrian educational concepts, however, in the 1850's resulted in the spread of Austrian law. In the field of legal education, Austrian authorities temporarily suspended the operation of denominational legal academies, and the remaining royal (legal) academies were set in the service of training judges and administrative professionals.

The dilemma of a duplicated legal education system was revived after the Comprise with Austria in 1867. Matters concerning legal education were brought under competence of the Hungarian Legislation, namely the ministry of religion and public education. In addition to ensuring university level education of legal and political science based on the principle of academic freedom, the future of legal academies became a burning issue, especially after the inauguration of the second university in Kolozsvár (now Cluj-Napoca) in 1872. (The third Hungarian university of the period was established in the capital of Croatia, in Zagreb.) There was an increasing number of proposals made for the merging or closure of legal academies[7]. „The major deficiencies of legal academies lie in the fallibility of the faculty, the imperfection of the education system, and the unparalleled unscientific or even anti-scientific spirit that pervades their operation and substance." – writes a contemporary critic.[8] Following a reform of the legal education in 1874 – which resulted in the separation of the legal doctorate degree from the doctorate degree in political science-legal academies were transformed into school of law and school of political science, in line with the universities. The training period-irrespective of the maintainer – was uniformly set for four years[9]. Legal academies enjoying only moderate funding and human resources cracked under the burden of the transformation, however, others could in fact successfully adapt to the changed environment. The right of "promotio" and "habilitation" was not granted to legal academies, i.e. students could not pass the doctorate exam, and lecturers could not get habilitation, which was another disadvantage for legal academies.[10] In this respect the government clearly preferred universities. As an even bigger disadvantage for legal academies, provisions of the Act on the Rules of Attorneys at Law (Act XXXIV of 1874), as well as the provisions regulating the passing of practical judge exam (Act VI of 1912.) required that the applicant shall have a J.D. degree, conferred

[4] Csizmadia Andor: A hazai jog oktatása a XVIII. század második felében és Huszty István Jurisprudentia Practica-ja. (The Education of Domestic Law in Hungary int he second half of the 18th Century and István Huszy's Jurisprudentia Practica.) In: Jogi emlékek és hagyományok. Tanulmányok és esszék. Budapest, Közgazdasági és Jogi Könyvkiadó, 1981, p. 211.

[5] Kazinczy Ferenc: Az én életem. (My Life.) Ed.: Szilágyi Ferenc. Budapest, Magvető Könyvkiadó, 1987, p. 113.

[6] Ibid. p. 97.

[7] Ladányi Andor: Törekvések, kísérletek a jogászképzés reformjára 1890–1944. (Efforts to Reform Legal Education between 1890–1944.) Budapest, Gondolat Kiadó, 2007, pp. 9–18.

[8] R. [sic!]: Jogakadémiáink valódi képe néhány vonásban rajzolva. (The True Characteristics of our Legal Academies in a Sketch.) Jogtudományi Közlöny, May 11, 1870.

[9] Mezey Barna: A jogakadémiák 1874. évi reformja. (The Reform of Legal Academies in 1874.) In: Jogászképzés a magyar felsőoktatásban. Ed.: Kovács Kálmán. Bp., 1984, p. 110.

[10] Mezey Barna: Egyetemek és jogakadémiák. (A jogi oktatás kezdetei és fejlődésének tendenciái Magyarországon). (Universities and Legal Academies. The Beginnings and Trends of Legal Education in Hungary) In: Győri Tanulmányok. No. 20. Győr, 1998, p. 16.

only by universities. Following the educational reform of 1874, the legitimacy of still surviving legal academies became vaguer and vaguer, as the majority of the potential student body chose to enroll to one of the universities – or transferred to a university – while employment opportunities of the graduates of legal academies were limited to public administration only.

Legal academies were the target of other professional attacks also, challenging the niveau, or rather lack of satisfactory niveau of the faculty. Although the tenured faculty did in fact acquire university habilitation degree – and many of them pursued outstanding career in legal research – from time to time, they were contested, even without good reason. At the end of the discussed period, in 1915, Győző Concha, respectable professor of the School of Law of the University of Budapest published a sardonic article in which the author ponders upon the issue of habilitation of legal academy professors. Mr. Concha, in order to maintain the professional standard, challenged the practice by which in many instances the educational and scientific requirements were disregarded. "Instead of professional qualifications, in many cases, the reasons were quite unjustified. There were cases in which military service record, the ability to play the organ, religious zeal, devotion, or relationship with influential families were the causes for habilitation."[11]

Of the above, nobody should infer that everything went well concerning university level education. After the inauguration of the second school of law – due, perhaps to the more moderate requirements as compared to Budapest – a large number of students chose to graduate in Kolozsvár. Not only students of legal academies but also of the Budapest School of Law chose to pass their doctorate exam in Kolozsvár. István J. Kováts (1880–1965), a reputed expert of Calvanist ecclesiastical law, noted in his memoirs that while a professor in Budapest called the Law School in Kolozsvár a "blissful degree factory", the Law School in Budapest could have been referred to as a "flunking industry".[12]

After a lengthy preparation period, Hungarian legislature, in 1912, decided on the opening of two new universities, one in Pozsony (now: Bratislava) and another in the city of Debrecen. Although in both cities legal academies existed even before, the Ministry of Culture decided to fill the faculty positions from fresh resources. The potential student body was huge due to the attraction of the legal career. Due to the wide range of employment opportunities – as Andor Lázár (1882–1971), minister of justice during the interwar period reminisced about the turn of the 19–20th century – "the number of students of law was disproportionately high at the universities." In the period mentioned by Mr. Lázár, at the turn of the 19–20th century, the two Law Schools had 4800 students enrolled, whereas the ten legal academies had altogether 1600 students enrolled.[13] The overcrowding of law schools was no secret to the faculty or the maintainer of the law schools, still no reforms were implemented with a view to influence the size of the student body.

II. Image of the Legal Profession and Elements of the Ethos of the Profession

Typically, law students – of both legal academies and universities – did not attend classes. They would use the lecture notes of their fellow students, or text-book abstracts, however, classes were very short, taking only thirty minutes. There was even a term coined in the university lingo for students who would show up only for the exams: they were the so-called "field lawyers", or *mezei jogász* in Hungarian. The everyday life of a jurist at the turn of the 19–20th century was described in living color by an alumnus of the episcopal legal academy of Pécs, Mr. Béla Fischer (1877–1953): "I was immersed in the life of a small-town jurist, which involved loitering on the corner of Király street [the main pedestrian street of Pécs] in a top hat, with a walking stick in my hand, escorting young ladies on their shopping errands in the morning, disputes over the provisions of the duel code, playing billiards in cafes, organization of dance parties, and at times, sitting in on a legal lecture, and finally, some fairly insignificant, and rather unproductive activity at a law firm. (…) Sitting in on a legal lecture was the least popular amusement".[14] We can read similar characterization about student life at the legal academy in Pozsony. The memoirs of Mr. György Földes (1885–1977) set the picture straight on the motivations of students of law. "My readers may come to the conclusion that the student years at the academy consisted of only carnivals. I must admit that I also shared this perception. I attended the lectures, and passed the little go all right, but our major occupation was to indulge in social life. And discussing politics."[15] The mindset of students of law, and the public spaces occupied by students must have been identical, by and large, at legal academies or universities. We don't want to look biased or unfair vis-à-vis those students who were indeed devoted to their studies. Mr. Ferenc Finkey (1870–1949), a reputed penal lawyer, solicitor and member of the academy of sciences, writes in his memoirs that he spent his student years firmly committed to his studies. "I did not waste my time on drinking wine, or playing cards, or billiards, or even courting. Luckily I had no inclination to pursue such activities. I devoted my time to reading the scientific literature and learning modern languages." – he wrote about his school years at the reformed legal academy of Sárospatak.[16]

Nonetheless, some of the legal academies were quite lenient towards the students, fearing that otherwise they would lose them, and turned a blind eye on their torpidity. Some professors of law, however, did get fed up with the attitude of their students, for example, Professor Béla Tuka of the legal academy of Pécs. This is what he wrote in a letter: They don't care about

[11] Concha Győző: A jogakadémiai tanárok egyetemi magántanári habilitatiója. (The Habilitation of the Professors of the Legal Academies.) Jogállam, 1915, p. 168.
[12] Kováts J. István: Egy élet prédikációja. Önéletrajz. (Preaching of a Life. Authobiography.) [Budapest, Open Art nyomda, 2006], p. 88.
[13] Horváth Ödön: Jogakadémiák és jogi vizsgálatok. (Legal Academies and Legal Exams.) Budapest, Pallas Irodalmi és Nyomdai Rt., 1903, p. 8.
[14] Fischer Béla visszaemlékezései. (The Memoirs of Béla Fischer.) Pécs, Pécs Története Alapítvány, 2006, p. 78.
[15] Földes György: Visszaemlékezések. Önéletrajzi vázlatok. (Memoirs. Authobiographical Sketches.) Pozsony, Kalligram, 2008., p. 57.
[16] Finkey Ferenc: Emlékképek és élmények életem derűs napjaiból. (Memoirs and Experiences of the Happy Days of my Life.) Sárospatak, 1944, pp. 43–44.

attending classes, but apart from this, the faculty could not care less about these young people."[17] The level of testing was also uneven, according to another letter of Béla Tuka – most of the professors were "satisfied with a minimal level of knowledge".[18]

The acquisition of legal knowledge, or more precisely, a degree in law was for a long time an integral part of the ethos of Hungarian nobility, but, with the impoverishment of the nobility, it became a matter of livelihood. From the aspect of livelihood the attorney profession was the most attractive – in addition to prestigious clerkly positions. The memoirs of Ferenc Pulszky (1814–1897), a noble landowner in Sáros county, and director of the Hungarian National Museum, reflects the mentality of the 1830's. The passage of bar exam "in the old days" was to complement good education, and if somebody "of the noble class" failed to pass it "was considered a dud".[19] Anders Lindeberg (1789–1849), a Swedish politician traveling in Hungary also noted that the attorney profession was equally important and profitable for the Hungarian nobility, due to the prolongated trial processes, that could continue for as long as a decade.[20]

Another contemporary, Sándor Ujfalvy (1792–1866) from Transylvania criticized the one-sided nature of legal education. According to the young noble man who pursued his university studies in Kolozsvár at the beginning of the 19th century, "Jurisprudence was, sadly, not only the major but also the only element of the education of a young Hungarian noble man", for pragmatic reasons, and it was seen as the key to the "long happy life of the nation". The author of the memoirs took a firm stance, naturally, not against the teaching of "jurisprudence", as he considered it as the "safest weapon" of patriotism, but scolded the very mentality that completely neglected the pursuit of other studies "fostering the gumption of the nation."[21]

Compared to attorneys, village notaries embodied a completely different legal ideal and societal ethos. Johann Centurius von Hofmannsegg (1766–1849), an amateur ornithologist from Saxony, who traveled in Hungary in the early 1790's in incognito, wrote fairly sarcastically about Hungarian village notaries. According to him, a village notary is "a half legal expert and a half, if not a complete boor". That is, a notary is characterized by his rustic way of life and mindset, rather than by the legal erudition he clearly possesses. In the early 1840's, József Eötvös (1813–1871) – minister of education in 1848 and later on between 1867–1871 – drew an idealized picture of the village notaries in his novel, entitled "The Village Notary", who were university graduates of noble origin and travelled abroad extensively. The novel portrays the village notary as the prime depository of unavoidable, still unfeasible, social reforms.

The belle lettres of the period was eager to portray Hungarians as a nation of jurists. According to the somewhat malicious and exaggerated view of a novelist, Kálmán Csathó (1881–1964): "This country used to be the land of wranglers, swineherds, shepherds and jurists".[22] His contemporary, Mihály Babits (1883–1941), a most dominant figure of 20th century Hungarian poetry and prose wrote down this sentence in one of his novels, to appear right before the break of the Great War, in 1913, urging a protagonist of the novel, as it turned out, in vain, to choose the legal profession: "In Hungary, a talented jurist can become anything and everything".[23] This view was supported by the illustrations quoted above on student life, as quoted also by the editors of the volume, that jurists enjoying a decisive majority in higher education could find a livelihood not only in national, municipal or county positions, in attorney offices or as notary publics, in courts, at big companies, but even with newspapers and magazines.[24] The attraction of the legal career had also other aspects, first and foremost the so-called lightness of pursuing legal studies.

The first cracks on the wall of the seemingly solid image of jurists already appeared. In a generation novel, saturated with autobiographical elements, entitled "The Sons of Death", Mihály Babits writes about his personal dilemma as a young man. When his alter ego in the novel makes a heedful remark about his intention to pursue a legal career, a family member fiercely challenges him: "Please. don't do it, my dear. It is sad enough that the sons of the nobility have chosen the path of fiscals or poor "beamter" (clerk). We are a litigious nation, and our country will bear the brunt of it. In our world, career in culture is the future. Jurist is not the only profession to choose."[25] The protagonist of the novel – just like Mihály Babits – did not think twice before choosing a career in liberal arts, rather than becoming a jurist.

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The modernization of the legal educational system in Hungary – with the manifestation of the requirement of special qualifications – started at the end of the 18th century and came to fruition in the second half of the 19th century. The duplication of the system of legal education – at the level of university and legal academy – complicated the picture, but was a significant factor in the contribution of the legal profession to becoming a statistical factor, and the development of the slogan of the "nation of jurist", however utopian it may have sounded.

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[17] Tuka Béla levele Concha Győzőnek. (The letter of Béla Tuka to Győző Concha) Pécs, April 21, 1907. In: Magyar Tudományos Akadémia Könyvtára Kézirattára. Ms 4811/621.

[18] Tuka Béla levele Concha Győzőnek. (The letter of Béla Tuka to Győző Concha) Pécs, December 18, 1907. In: Magyar Tudományos Akadémia Könyvtára Kézirattára. Ms 4811/625.

[19] Pulszky Ferenc: Életem és korom. I. (My life and my age. Vol. I.) Budapest., Szépirodalmi Könyvkiadó, 1958, p. 95.

[20] Tardy Lajos: Egy svéd utazó a reformkori Magyarországon (1840). (A Sweedish Traveller in Hungary in the Reform Era, 1840). Filológiai Közlöny, 1983/3–4. szám. 401.

[21] Ujfalvy Sándor emlékiratai. (The Memoirs of Sándor Ujfalvy.) Ed.: Gyalui Farkas. Kolozsvár, Erdélyi Múzeum-egyesület, 1941, pp. 140–141.

[22] Csathó Kálmán: Divat! – Nem divat. (In Fashion! – Out of Fashion.) Budapest, Singer és Wolfner, 1942, p. 99.

[23] Babits Mihály: A gólyakalifa. (The Storchkalif). Budapest., Szépirodalmi Könyvkiadó, 1968, p. 66.

[24] Magyar diákélet és diákegyesületek. (Student Life and Student Associations in Hungary.) Ed.: Ludwig Rezső – Szemenyei Kornél. Budapest, Athenaeum Irodalmi és Nyomdai Rt., 1900, pp. 52–53.

[25] Babits Mihály: Halálfiai. (The Sons of Death). In: Babits Mihály: Tímár Virgil fia. Halálfiai. Válogatott novellák. Budapest, Szépirodalmi Könyvkiadó, 1976, p. 487.

The Codification of the Law of Conflict of Interest (incompatibilitas) in Hungary in the 19th Century

Norbert Varga *

Abstract

I intend to present in my paper the development of codification of conflict of interest, which is still a very important legal institution of Hungarian parliamentary system. The aim of my study is to discuss the codification procedure of the national assembly. We are dealing with a legal institution that was of outstanding significance for the whole society, since it was through the regulation of conflict of interest situations that the principle of the separation of powers could be implemented in practice. In the course of my project, I will examine the system of incompatibility in the late feudal period, which had an influence on the legislative process in the bourgeois era.

Key words: *Conflict of interest; national assembly; status of representatives; history of constitutional law.*

Basically the scholarship of public law is still lacking to this day in a dogmatic and practice-based examination, using comparative methods, of conflicts of interest regulations applying to members of the national assembly in the 19th century. I intend to analyze the codification of the body of law governing conflicts of interest from the point of view of legal history.

Preliminary research showed that very few legal scholars have taken up this research topic so far, as is also shown in the bibliography attached to this research proposal. There were only a few short essays, political pamphlets and books providing an overview of the laws however, no one has to date undertaken a theory-based research project on this issue using the methods of modern legal historical scholarship.[1] Contemporary scholars of public law (Móricz Tomcsányi, Ernő Nagy, Károly Kmety, Kálmán Molnár, Imre Korbuly, Gejza Ferdinandy etc.) were dealing with the period after the legal regulations of 1875, and were especially engaged in schematic descriptions of the issue of conflict of interest after the turn of the century.[2] This is also the reason for the absence of a comprehensive and systematic study of the issue based on principles of scholarship, which is what I will attempt to provide in the course of my study. We can find no comprehensive treatment of this topic in more recent literature either.[3]

The purpose of my paper is to analyse the public law reforms of the dualistic era, which was also significant from a political point of view, through the discussion of the antecedents, dogmatics and the practice of Act I of 1875.

In the feudal period we can only find scarce examples for the regulation of conflict of interest. The aim of these rules was to ensure the independence of the representatives in the national assembly. The requirement to take an oath, which was introduced by the national assembly of 1790/91 did not live up to the expectations. It was at this session of the national assembly also that the first conflict of interest case emerged (the case of Gábor

* Dr. Norbert Varga, PhD et PhD.; associate professor, Department of Hungarian Legal History, Faculty of Law, University of Szeged, Hungary.

1 Ferenc Pecze: *A magyar parlamenti jog intézményei a 19. század második felében 1861–1900. Különös tekintettel a képviselők jogállására.* [The Institutions of Hungarian parliamentary law in the second half of the 19th century (1861–1900) with special attention to the legal status of Members of Parliament.] Budapest, 1974., Árpád Zellner: *Az országgyűlési képviselők összeférhetetlenségéről.* [On conflict of interest with respect to Members of Parliament.] Budapest, 1930., István Egyed: *Országgyűlési összeférhetetlenség. Közjogi és politikai tanulmány.* [Conflict of interest in the Parliament. A study of public law and politics.] Budapest, 1937., Emericus: *A magyar parlament tekintélye.* [The authority of the Hungarian Parliament.] Budapest, 1897., Emil Oppler: *A törvényhozás tagjainak összeférhetetlenségéről.* [On conflict of interest involving members of the legislature.] Budapest, 1918., Ervin Pálosi: *Az összeférhetetlenségi kérdés Magyarországon.* [Conflict of interest in Hungary.] Budapest, 1932., Gyula Techert: *Törvényhozói összeférhetetlenség az európai államokban.* [Conflict of interest involving members of legislature in European states.] Budapest, 1932., Sándor Várnai: *A képviselői összeférhetetlenség (1875:I. tc.) elvei és gyakorlata.* [The principles and practice of conflict of interest regulations (Act I of 1875.)] Budapest, 1897.

2 Kálmán Molnár: *Magyar közjog.* [Hungarian public law.] Budapest, 1929. pp. 535–549., Károly Kmety: *Magyar Közjog.* [Hungarian public law.] Budapest, 1926. pp. 332–344., Móricz Tomcsányi: *Magyarország közjoga.* [Public law of Hungary.] Budapest, 1940. pp. 470–480., Imre Korbuly: *Magyarország közjoga illetőleg a Magyar államjog rendszere.* [Public law of Hungary and system of Hungarian state law.] Budapest, 1884. pp. 244–246., Gejza Ferdinandy: *Magyarország közjoga (Alkotmányjog).* [Public law of Hungary (Constitutional law).] Budapest, 1902. pp. 468–480., Árpád Ferenczy: *A politika rendszere. (Alkotmány és közigazgatástan.)* [System of Politics. (Constitution and Administration.)] Budapest, 1905. pp. 265–271.

3 Gizella Föglein – Barna Mezey – Mihály Révész T.: *Az országyűlés.* [The National Assembly.] In: Barna Mezey (ed.): Magyar alkotmánytörténet. [Hungarian Constitutional History.] Budapest, 2003. pp. 336–339. Zoltán Szente: *A törvényhozó hatalom szervezete és működése: parlamentek Európában.* [The organization and operation of legislative power: parliaments in Europe.] In: Barna Mezey – Zoltán Szente: Európai alkotmány- és parlamentarizmustörténet. [European parliamentary and constitutional history.] Budapest, 2003. pp. 600–601.

Ráthonyi, lawyer to the king). Gábor Hajnóczy also expressed his opinion in his work titled De Comitiis Regni Hungariae that a representative of the nation must be free and independent.[4] It can be concluded that in the late feudal period there were already attempts at settling the issue of conflicts of interest of representatives by way comprehensive legislative acts.

A significant change was brought about by the revolution and war of independence of 1848/49, by way of eliminating the feudal system and creating equality before the law and making the principle of popular representation general, which necessarily created a demand also for legal regulations to be put in place for conflict of interest situations. Several representatives argued for codification; however, this could not be achieved due to the events of the revolution.

After the Compromise that a wave of legislation started, of which Act I of 1875 was an integral part, which remained in effect until the adoption of the new law governing conflicts of interest, Act XXIV of 1901.

Of special importance in Hungarian constitutional history was the regulation of conflicts of interest as one of the cornerstones of parliamentary governmental structure, since the improper operation of the national assembly would have resulted in a constitutional crisis, in addition to interrupting legal continuity, also by way of pushing the historical constitution to the background. Therefore, the statement of István Egyed that "the magnificence and honor of constitutional life can only be preserved intact by strict rules of incompatibility" can be considered as correct even to our day.[5]

First of all, the history of the origins of Act I of 1875, along with the political and economic causes, need to be examined.[6] On the insistence of opposition representatives, Ödön Kállai and others submitted to the national assembly their proposal for a new law in 1866, which was never brought to debate but nevertheless had a practical influence due to the constantly increasing influence of public opinion, since some representatives (e.g. Lajos Kálóczy, Béla Perczel) resigned their mandates due to conflicts of interest. Following a proposition by Ferenc Deák, the House of Representatives issued a resolution in 1867 which stated that in case a representative undertook an office depending on the government, then new elections had to be held for his mandate. This rule was to be applied also in case of appointment as a minister. This provision did not satisfy the contemporary demands, since it did not address the most outrageous case of incompatibility, namely when a public official is elected as a representative. In any case, there were difficulties with the practical implementation of the resolution, since it did not include any sanctions, and therefore some representatives (e.g. Gedeon Ráday, Miksa Ürményi) accepted it, while others did not abide by these rules.

The bill submitted in 1868 is associated with the names of Károly Bobory and Pál Nyáry, which took as its basis the draft of Kállay with the difference that it provided an opportunity to choose between the mandate as a representative and the public office. Despite the fact that this law never entered into effect, it still had a great significance, since the House instructed the government to submit for the next session of the national assembly its bill for the regulation of cases of conflict of interest.

At the next session of Parliament, representatives adopted several new rules concerning conflict of interest. One very important rule among these new provisions of law was Act IV of 1869,[7] in which the rules governing conflicts of interest for judges were set forth. Pursuant to the provisions of Act XVIII of 1870, officials of the State Audit Office could not be members of the House of Representatives or of the Upper House.[8] Act XXXIII of 1871 on prosecutors extended the rules governing conflict of interest for judges also to representatives of this legal profession.[9]

This was only partial regulation, however, since the codification of conflicts of interest still did not happen, and consequently, Kálmán Tisza continued to urge the creation of such law. This ex lex situation rendered the elimination of conflicts of interest even more difficult. The bill sponsored by Dániel Irányi in 1870 was also not brought to debate. Some progress can be seen in the fact that during the debate of the elections law of 1872, it was accepted that a bill regulating cases of incompatibility must be submitted to the national assembly, in a way the new law could enter into effect together with the elections law. As a result of these political events, Vilmos Tóth, minister of internal affairs, submitted his bill in 1872 on the incompatibility of a representative's mandate and public office. Dezső Szilágyi was put in charge of the bill, which however never became law due to the fact that the national assembly was dissolved.

From the point of view of the issue of conflict of interest, the 1872/75 session of Parliament was of outstanding importance. On the occasion of the debate of the proposed law on the Hungarian Discounting and Commercial Bank, on the motion of József Madarász, Member of Parliament, it was included in the text of the draft that members of the bank's board of directors cannot also be Members of Parliament.[10] In this respect, Act XXVI of 1873 is important, as it set forth that in case a member of the Upper House should accept a seat on the board of directors of a bank, then he cannot exercise his right of participating and voting during such mandate. Act XXXV of 1874 on notaries public added the rule that public notaries cannot be Members of Parliament.

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[4] Original title is: De comitiis Regni Hungariae deque organisatione eorundem dissertation iuris publici Hungarici. Andor Csizmadia: *Hajnóczy József közjogi-politikai munkái.* [József Hajnóczy's public law-political works.] Budapest, 1958. pp. 187–265.

[5] Egyed, 1937. p. 5

[6] These sources are primarily available in the holdings of the Hungarian National Archives and the Library of the Hungarian Parliament. MOL BM presidential documents K. 148 (department of legislative preparation, department of public law; MOL BM general documents K 150).

[7] Korbuly, 1884. p. 245., Ferdinandy, 1902. p. 470.

[8] Korbuly, 1884. p. 245., Ferdinandy, 1902. p. 470.

[9] Ferdinandy, 1902. p. 470.

[10] Korbuly, 1884. p. 245.

At the proposition of Sándor Bujanovics, the House of Representatives set up a separate committee for creating rules of incompatibility. "It is necessary therefore [...] to solve this question; necessary to the major significance it has in principle which this question has on legislation from a constitutional point of view."[11] The issue of conflict of interest of Members of Parliament was also on the agenda of the session of the Council of Ministers held on 3 April 1874. The question arose whether it is in the supplementary law on election law or in a separate provision that the issue should be regulated. The Council of Ministers was of the opinion that a separate law should be created to govern incompatibility. The official position adopted was that ministers, state secretaries and ministerial counsellors should be exempted from the conflict of interest provisions.[12]

The proposed law that was prepared regulated public service and economic incompatibility. The formal rules, however, were included in the order of procedure of the legislative body, which meant that it was only the House that could terminate the mandate of a Members of Parliament.

At the sessions of Parliament there was fierce debate concerning the incompatibility of persons renting state assets, monks, judges, as well as Croatian-Slavonian representatives.[13] As a result of exchanges of messages between the two chambers, the Act only entered into force in 1875 (Act I of 1875).

Next, it is important to examine the practical implementation of Act I of 1875. The act first provided the rules of substantive law governing conflicts of interest: the incompatibility rules applicable to public officials and conflicts of interest of economic nature, in addition to some "cases of indignity." The latter category was fundamentally a legal consequence of norms of criminal law. It was the obligation of the Members of Parliament to give notice of conflicts of interest and to eliminate the cases thereof, failing which incompatibility committee decided in the issue. The formal rules of the act were supplemented by the provisions entered into the order of procedure of the legislative body.[14]

A question that emerges is what practical results these legislative provisions had in political life? Contrary to the earlier, adverse parliamentary practices, they attempted to protect the cleanness of public life. While they ensured full compatibility concerning public service to the maximum extent possible, it seems that there remained loopholes concerning economic conflicts of interest.

On the basis of the new law, the investigations into cases of incompatibility were commenced. The practice, however, raised several further problems. Cases of incompatibility concerning membership in the Upper House were not regulated, which was an issue emerging especially in connection with the appointment of bishops. It must be examined how the issue of incompatibility emerged in connection with the appointment of joint ministers (e.g. Count Gyula Andrássy). Another question that emerges is whether the rules of incompatibility should be applied from the moment of appointment for the public office, or from the acceptance of it, or perhaps from the time when the oath of office is taken. Can a representative exercise his rights if otherwise he is in violation of conflict of interest rules? How and when must one resign from an office that is in conflict with one's mandate as representative? What effect does it have on the incompatibility if the resignation is not accepted? Does delegation to the government cause conflicts of interest? With the emergence of economic life, the shortcomings of the law became even more pronounced in practice. There were additional provisions of law concerning the regulation of incompatibility in the period examined. Act XXXIX of 1876 provided that Members of Parliaments who were unable to present their letters of commissions would leave their mandates. It was the incompatibility committee that could declare that an Members of Parliament was deprived of his mandate. Meanwhile, the Csemegi Code declared that a person deprived of his political rights could not be a member of the legislature. The reform of the Upper House (Act VII of 1885) also examined the issue concerned. The law regulated the case of what would happen to members of the Upper House who were elected representatives. The law also provided that filling government or ecclesiastic offices and serving in the military would not exclude one's status as a member of the Upper House. In cases of conflict of interest related to the membership in the Upper House a court formed from among members of the House would decide.

Members of the Parliament could not be compelled to perform military service during the terms of their mandates (Act XXII of 1889), but they could voluntarily sign up on the basis of the consent of the House. Act XVII of 1891 extended the rules of incompatibility applicable to judges also to public officials. The number of incompatibility cases was increased by X of 1895, which provided that no person can be a Member of Parliament against whom a bankruptcy procedure was started. The rules of conflict of interest established by Act IV of 1869 were also applicable to members of the Patent Council (Act XXXVII of 1895) and the Public Administration Court (Act XXVI of 1896). With the transformation of economic life, further financial institutions, railway and other companies were formed, which opened up new opportunities to representatives to acquire economic positions, which also contributed to an unhealthy distortion of political life and the increase of the cases of corruption. Ferenc Pecze, in his study regarded as of fundamental importance from the point of view of the research topic wrote that "the social and economic conditions […] were still

[11] Iván Nagy (ed.): *Az 1872. évi September 1-re hirdetett országgyűlés képviselőházának naplója.* [The journal of the National Assembly summoned for 1 September 1872.] Vol. VIII. Buda, 1874. p. 42.

[12] MOL K 27 (03. 04. 1874.) 18R/26 pp. 18–19.

[13] Iván Nagy (ed.): *Az 1872. évi September 1-re hirdetett országgyűlés képviselőházának naplója.* [The journal of the National Assembly summoned for 1 September 1872.] Vol. XI. Buda, 1874. pp. 75–142.

[14] *Az országgyűlés Képviselőházának házszabályai: 1848–1939.* [The orders of procedure of the House of Representatives of the Hungarian Parliament: 1848–1939.] Pest, 1875. passim.

not ready for working out the economic (interests) type of incompatibility."[15]

The changes in the political and economic situation were indicated by the fact that the

number of conflict of interest cases increased in the 1890s. On the basis of the above we can state that the substantive and formal rules applicable to conflicts of interest situations awaited further reforms, which political struggle started at the 1895 session of the national assembly; however, due to other events happening in the meantime (millennial celebrations, the adjournment of the national assembly), it remained unfinished. The general revision of Act I of 1875 was also included in the programme of the Széll-administration.[16] Kálmán Széll said the following: "My aim will be that the committee which is put in charge of this issue should deal with the complicated and difficult issue in depth and if possible also quickly."[17] As a result of the parliamentary debate, Act XXIV of 1901 on conflicts of interest was passed.

[15] Ferenc Pecze: *A Magyar parlamenti összeférhetetlenségi jog (inkompatibilitás) szabályozása a századforduló előtt (1861–1901).* [The regulation of the law of conflicts of interest (incompatibility) in the Hungarian Parliament before the turn of the century (1861–1901).] In: Andor Csizmadia (ed.): Jogtörténeti tanulmányok I. [Studies in legal history I.] Budapest, 1966. p. 43.

[16] Egyed, 1937. pp. 43–51.

[17] Péter Kiss (ed.).: *Magyar kormányprogramok 1867–2002.* [The programmes of Hungarian governments 1867–2002.] Vol I. Budapest, 2004. p. 229.

Reformation of Law Administration in Jean Domat's Masterworks*

Alberto Iglesias Garzón**

Abstract

The quest for clarity and legal security in Jean Domat's legal thought binds his masterwork Les Loix Civiles dans leur Ordre Naturel (1689-1694) to the process of reformation of the judiciary administration in Louis XIV's France. It is also through this perspective that his legal and philosophical thought reaches the 1804 French civil code. Overcoming medieval jurisprudence and its substitution by sovereign's law as the main source of legal creation will influence Jean Domat. His great concern about what he thought to be the "false groundings of jurisprudence" came along with his concern about judges not respecting the sovereign's law. The whole of his legal view is about the increasing absolute power of the king and his means to the unification of law. Aiming to the suppression of the judge's discretionary legal practice and making him bounded to the sovereign's law was a certain way to controlling the non-conformist members of the judiciary administration. The main argument for implementing Domat's view was the (divine) perfection of roman law.

Key words: *Jean Domat; Reformation of Justice; Code Civil; Natural law; Positive law.*

1. Introduction

This paper intends to set a new approach to Jean Domat's influence on the French civil code of 1804. Set aside the material influence of his legal assertions on roman law there is a very important outline that has not been pointed out by researchers as a main influence [1]. His philosophical view of the law includes a formal structure that is similar to the Code's. This influence has to be explained by the sovereign's intention of binding the judges to the (positive) law in order to enforce it [2]. A judiciary administration reform was thus necessary [3]. Domat contributed to this process with a brand new pedagogical treaty, *Les Loix Civiles dans leur Ordre Naturel* (the civil law in its natural order), which will influence not only the whole XVIIIth century but also the Code's redactors.

One of the many differences between these two periods is the legal philosophy paradigm. Transition from a natural law system to a positive law one can be observed at the Code, notably through its art.4 [4]. Another important distinction was the conquest that the Revolution had made over the venality or private justice as seen in the 1789's decrees of 4th and 11th august and so establishment of a "free of expense" administration of justice. It is my purpose to point out that a similar intention lies within Jean Domat's works although respecting the judiciary (private) status which was at its utmost.

Taking roman law and religion as the main grounds to establish his legal and philosophical view, Domat constructs a scientific and natural order that would clear up the juridical science and would force the judge to apply the sovereign's legal orders.

2. From Justice Reformation to the Civil Code: Domat's Milestone

Jean Domat is an author that pretends to "mutter" the judge and force him to apply the law without letting him interpret it. Later on, Montesquieu's *Esprit des Loix* shows this same intention when saying that the judge is to be "the instrument that pronounces the words of the law. D'Aguesseau would say that "the judge should be the servant of the law and not, as he is now, its master". Domat tried to enforce this view of the judge through a very complicated plan that makes religion consider-

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** Assist. Prof. Alberto Iglesias Garzón, Ph.D., Universidad Carlos III de Madrid, Spain.

1 Researchers and commentators have mostly paid attention to a literal influence and to the order (dispositio) of laws, vid., DARD, H.B.;*Code civil des français avec des notes indicatives des lois romaines, coutumes, ordonnances...qui ont rapport à chaque article; Ou conférence du Code civil avec les Lois anciennes*, Paris, J.A. Commaille, 1805; ARNAUD, A.J.; *Les origines doctrinales du Code Civil français*, LGDJ, Paris, 1969; ORESTANO, R.; *Introduzione allo studio del diritto romano*, Bologna, Il Mulino, 1987.

2 DESRAYAUD, A.; „Étude exploratoire sur l'effectivité des lois et souveraineté du roi en droit privé (France XIIIème-XVIIIè siècle)", in *Cuadernos de historia del Derecho*, Ed. Complutense, nº1, 1994, pp. 139–192.

3 BART, J.; „Le droit privé à l'époque de Domat", in DESCOTES, D. (ed.); *Le droit a ses époques. De Pascal a Domat*, Université Blaise Pascal, Clermont-Ferrand, 2002, s.p.

4 CATTANEO, M.; *Illuminismo e Legislazione*, Milano, Edizioni di comunità, 1996, p. 145.

ations along with roman and natural law. This combination, between tradition and novelties makes his contribution to the history of ideas a very unique one that allows explaining not only the first steps towards legal codification but also the modern distinction between roman and civil law.

Jean Domat's contribution to the codification process has been analyzed through a comparison between the text of some of the Code's articles and the ones contained in the *Loix Civiles dans leur ordre naturel* (LC). The result is somewhat arbitrary and pays no respect to Domat's main view. There are not many legal figures that Domat would have invented by himself. He just updated them being, as he was, a lawyer who took a deep view into the judiciary practice. No matter how much resemblance the LC will show regarding the Code, it will be difficult to establish a distinction between what Domat wrote and what the legal practice was[5]. Another comparison that has been made between Domat and the Code is regarding the new *dispositio* that would reform the classic *personae, res, actiones*. A new legal order is established by Jean Domat but if he pretended to do this it was only to offer more coherence to the legal study and so I think this analysis is not complete either[6].

Anyhow, Domat represents an important milestone as he prepared legal unification before the Civil Code in a time when legal pluralism in civil law was the rule. His legal work remains attached to the process of Reformation of the judiciary administration initiated by Louis XIV. As to what is this paper's main concern the most important reference in the whole process is found on the 1667 ordonnance that establishes an ordinary and binding procedure to the civil judgments. In its first article, (I,1) is said: "Nous voulons que la présente Ordonnance et celles que nous ferons ci-après, ensemble les édits et déclarations que nous pourrons faire à l'avenir, soient gardées et observées par toutes nos cours de Parlament, gran Conseil, Chambres de Comptes, Cours des Aides et autres nos cours, juges, magistrates, officiers, tant de nous que des seigneurs, et par tous nos autres sujets, meme dans les officialités"[7]. It contains a general and universal obligation to observe the legal procedure and other legal orders from the sovereign to the whole of judges, not only those dependent on the king (here there are precedents) but also concerning the judges of feudal lords, which is a novelty. If this legal obligation is put together with the one set on the I,6: "Voulons que toutes nos ordonnances, édits, déclarations et letters-papentes soient observées, tant aux jugemens des process qu'autrement, sans y contrevenir, ni que sous prétexte d'équité, bien public, acceleration de la justice, ou de ce que nos cours auroient à nous représenter, elles ni les autres juges s'en puissant dispenser ou en moderer les dispositions, en quelque cas et pour quelque cause que ce soit", a general rule is obtained: no judge is allowed to judge disregarding the ruler's orders. This legal obligation can be seen as a precedent to art.4 of the Civil Code: "A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of a denial of justice". Louis XIV's intention to bring the judges under the legal orders matches the codification intent to make its rules mandatory for all judges. Of course there is a significant change between both periods that should be explained. Getting through a catholic view of the law to a secular legal state is one of the main differences. In fact, it was the secular constitution of the French republic what allowed enforcing the legal binding of the judge to the law.

At the Ancient Regime, no matter what efforts Louis XIV or his successors would do in order to control the judiciary administration, a basic structural problem remained unsolved. The judge had a legitimacy that could not be easily undertaken by the king as the judge would, as well as the monarchs, represent a divine function on earth: making justice prevail[8]. In fact, this unsolved problem was certainly one of the main causes of the Revolution as it was one of the first policies to be changed[9].

This legitimacy was dependent on God's will and not in the Prince's decision. It means that the judge in the gallican French tradition, was performing, as well as the most part of the legal administration (including the king), a divine duty and that their main objective was to make natural and divine catholic view prevail, even above the king's order who could be controlled by the rest of the administration, according to medieval an early XVIth century theory[10]. This legitimacy was confronted by Louis XIV's absolutism who tried to monopole the function of interpreting natural law as well as avoiding judges to use equity, or other consideration regarding natural or divine justice, on their judgments. Of course, this model was never totally implemented during Ancient Regime. As anyone could expect, in a natural law paradigm, reasons of conscience were more important to a catholic judge than a mere rule (positive law) established by the king and in final terms, legal orders might be easily avoided and so they usually were.

Jean Domat is aware of this order of things when he was called to the king's audience around the year 1682[11]. He is urged to continue writing a legal didactic plan that was presented to the king in its early stages after years of commitment to a legal vision that was basically matching the king's: the submission of the judge to the legal system and the establishment of a new order that would make clear which rule to apply in private law.

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[5] GOYARD-FABRE, S.; *Montesquieu, la nature, les lois, la liberté*, PUF-essais, Paris, 1993, p. 70.

[6] In fact, according to LOSANO, M.; *Sistema e struttura nel diritto*, 3 vols., Giuffrè, Milano, 2002, vol.I, p.335, there is a very important transition in legal structure after Domat. He would have established inner coherence among the private law.

[7] Grammar is respected from original XVIIth century french in the whole paper. As for the ordonnance, it can be found in the popular Recueil Isambert.

[8] RENOUX-ZAGAMÉ, M.F.; *Du droit de Dieu au Droit de l'homme,* París, PUF, 2003, p. 212 and s.

[9] CHARTIER, J.L.; *Justice, une réfome manquée, 1771–1774: Le Chancellier Maupéou*, Paris, Fayard, 2009.

[10] For instance, SEYFFEL, Claude; *La grand monarchie de France, composee par Messire Clavde de Seyffel lors eueque de Marfeille & depuis Archeueque de Thurin adreffant au Roy trefchreftien, Francoys premier de ce nom*, Paris, Denys Ianot, 1541.

[11] McKENNA, A. & LESAULNIER, J. (dirs.); *Dictionnaire de Port Royal*, Paris, H. Champion, 2004.

3. The Role of the Judge in Domat's Early Works

Bringing the judges under the king's control was an early expectation in Domat's thought. He tried to struggle against the greed of the judges who could, before 1789 legally enrich themselves out of their judgments[12]. The first writings of Domat show so. It is in the *Harangues* where this concern first appears[13]. This control is not due, however to positive law but to natural and divine law (which Domat identifies as equal).

The first duty of a judge is always to apply justice. In 1657, the date of his first Harangue, Domat makes a difference between a fair judge and an unfair one. The last one lets the judge's self-interest prevail over reason and justice. The former does not since he is aware that his judgments are due obedience to the Truth: "Ce n'est pas sans sujet que Dieu demande aux juges l'amour à la vérité, qui peut être appellé, selon que nous la concevons, une lumière qui éclaire […] cette lumière, qui nous enseigne que nous ne devons pas faire aux autres, ce que nous ne voudrions qu'on nous fit, est une vérité à laquelle on consent en même temps qu'on l'a connuë"[14]. As he expresses here, knowing the groundings of the law is simple, as it is something natural. He remains inside natural law paradigm as he considers that formal justice (following of the legal procedure) is not enough and that deep fair resolutions must be always taken[15]. In 1660 he turns into a more religious discourse: "Et c'est que nous trouvons en une seule parole dans l'Écriture; car on ne peut rien dire de plus grand ny de plus veritable de la qualité de Juge, que le mot qu'elle repète en divers endroits & que l'on n'oseroit seulement penser qu'après elle, que les juges sont des Dieu", and "La plus simple regle & la plus générale du devoir des Juges, est qu'ils doivent imiter Dieu pour user de son pouvoir qu'il leur a donné […] il est evident qu'ils doivent juger comme Dieu jugeraoit luy-même"[16].

In 1670 he is as clear as usual pointing out that the function of the judge is divine: "Nous voyons par cette suite de la conduite de Dieu pour la justice, que les juges sont des dépositaires & les dispensateurs de la lumière & de l'authorité divine & qu'ils tienennent dans cette fonction la place de Dieu"[17]. He enforces this view by saying that disregarding this divine function brings along a profanation sin[18] which is compatible with what he announces to be one of the main features of the judge: to have fear of God[19].

All of this view brings up a problem that Domat faces, the identity of functions between the priest and the judge. The distinction will be used by Domat to establish a relationship between the king and the judges. To Domat, the priest must attend to the self, inner peace, to the soul. The judge must attend to the exterior, to the social peace. In the 1666 Harangue he said: "Parce que la fin & son exercise est d'établir la paix dans le corps politique, comme la fin de l'autre est de l'établir dans les coeurs des hommes"[20] and he completes it by saying that the judge could not make an unfair person to become fair, which is the priest's duty[21]. It is the duty of the judges and the king to sustain the social body which will crumble without authorities intervention: "Car le principal du devoir des Rois est de prévenir les enterprises & les rebellions des members contre le corps [politique] & le principal du devoir des juges est de reprimer les injustices & les enterprises des members entr'eux"[22].That is, in these first writings Domat only allows the king to make public laws, not private ones which would be a matter to be taken care of by the judge.

So does Domat distinguish between judge and king and between judge and priest. Even though their functions are all divine and that their legitimacy remains equal, a certain division of their functions is so established. This division does not contemplate the king's power to interfere into private affairs. An evolution in Domat's thought will be seen regarding this point.

3.1 Inner Conscience of the Judge as a Cognitive Method

The judge must appeal to his inner conscience, where a straight relationship with God is established, in order to make justice. This is part of the medieval judiciary tradition where Domat is embedded. He tries however to renew its basis in order to establish a judiciary administration able to perform justice in modern times. For Domat legal security is needed and the traditional judiciary administration would not be able to perform a reform that could accomplish it let alone legal unification. He knew some new method had to be established for legal practice in order to achieve reform. This method would be an epistemological one in which he would appeal both to reason and to faith.

Domat explains clearly his method to legal recognition in the Preface to the LC: "on a commencé par la vûë des principes naturels & inmuables de l'équité, comme sont par exemple ces vérités générales: Qu'il ne faut pas faire tort à personne; qu'il faut render a chacun ce qui luy appartient; qu'il faut être sincere dans ses engagements. Et on est ensuite descendu aux règles particulières, comme sont par exemple Que tout vendeur doit garentir, que la perte et le gain doivent se communiquer entre les associes […]. Et parce qu'on a eu besoin de fixer par des reglemens, de certaines difficultés où les loix naturelles ne déterminent pas précisement à ce qui est juste, il a été necessaire d'y parvenir par d'autres loix". Here Domat makes somewhat clear that he uses a particular certain truth (cfr. Pascal) where he can logically develop new rules from (Descartes). But also he knows about the lack of certainty of the natural, abstract law,

12 MOUSNIER, R.; *La venalité des offices sous Henri IV et Louis XIII*, presses Universitaires de France, 1971.
13 LAMBINET, V.; „Domat et ses harangues", in *Bulletin du bibliophile et du bibliothècaire*, Paris, 1865, pp. 99–122, p. 117.
14 HARANGUE, 1657, p. 207,3d.par.left.
15 HARANGUE, 1657, p. 209,4th par.left.
16 HARANGUE, 1660, p. 211,1st par.right and p. 212,last.par.left.
17 HARANGUE, 1670, p. 220,5th par.right.
18 HARANGUE 1670, p. 221,last.par.right.
19 HARANGUE 1660, p. 212,5th.par.right.
20 HARANGUE 1666, p. 215,4th.par.right.
21 HARANGUE 1666, p. 217,3rd.par.right.
22 HARANGUE 1666, p. 217,6th.par.left.

and recalls the necessity to make specific laws to complete them since mere deduction is not enough.

He is very clear about how to recognize the very first principles of the law: "on jugera du caractère de la certitude de ces principes par la double impression que doivent faire sur notre esprit des veritez que Dieu nous enseigne par la religion & qu'il nous fait sentir par notre raison. De sorte qu'on peut dire que les premiers principes des loix ont un caractère de vérité, qui touche & persuade plus que celles des principes des autres sciences humaines"[23]. What he calls religion is no more than an inner conviction: "[…] l'essentiel de la religion regarde principalement l'intérieur de l'esprit & du Coeur de l'homme, dont les bonnes intentions devraient être le principe de l'ordre extérieur de la société"[24]. So inner conscience is a useful tool in order to reach first legal principles acknowledgement.

Right after establishing the first principles a deductive operation comes in. This deduction is to be made over the roman law rules. Since, as he says, this will still not extract rules than be clear enough, the legal authority must complete the schema.

4. Natural Law Reduction to Positive Law in les Loix Civiles dans leur Ordre Naturel

According to Domat the judge must be able to recognize justice by inner self-conscious means. This is only established regarding the basic and more general principles. When it comes to specific civil law, they must apply the legitimate and legal authority's orders. What Domat proposes as a novelty is that the reason of obedience to the positive law does not lay on the mere fact that it has been declared by the king, whose legitimacy comes out of divine order, but for a different and more complex reason. Using his legal knowledge method, Domat presents the positive law (legal orders from the king) as the possible development of only law the judge should apply in order to obey his own conscience.

4.1 Roman Law as Natural Law

If it were not such a lack of human and religious principles into the Roman law, Domat says, it would be the perfect legal order. In fact, he calls it "la raison écrite" trying to elevate its legitimacy over the traditional customary law and so only reasonable roman law would be accepted: "on peut donc mettre cette subtilité au nombre de plusieurs autres du Droit Romain que nous rejettons, parce que'il n'est reçu en France que comme la raison écrite & que ces subtilités blessant l'ordre naturel, blessent la raison"[25]. Since 1254 Roman law was in France considered to be binding as customary law but Domat set in some arguments to show it was so much more[26].

Roman law was for Domat part of a natural law science, as he says at the *preface* of *Loix Civiles*, and so one of those authors that showed the path towards codification[27]. The place that roman law has in Domat's legal view is an intermediate one. It is the main deposit of law. It will, however, require to be interpreted according to the divine and natural law. Romans could not do it since Revelation had not been given to them but a french, catholic XVIIth century could easily apply these principles to the roman law. That is basically the natural order. "Cette opposition si extreme entre l'équité qui luit dans les loix si justes qu'ont fait les romains 6 l'inhumanité de cette licence [to kill their servants], fait bien voir qu'ils ignoraient les sources de la justice […]"[28]. It will be only into the roman law that the rules of material law can be found: "Mais pour les loix naturelles, comme nous n'en avons le detail que dans les livres du Droit romain & qu'elles y font avec peu d'ordre & mêlées avec beaucoup d'autres qui ne font ni naturelles, ni de notre usage […][29]. Application must not, however, be done uncritically, since romans did not know the first principles of the law, the religious truth and so a complementary notion of religion must be included into the roman law order.

What is important here is to notice that Domat says that roman law is nothing but the result of a completely natural condition of humanity. It does not have anything to do with religion. These rules of roman law, could be easily understood by pagans as well as catholics and so, that is a reason why roman law is so much important for society than customary law. In fact, for Domat, roman law equals natural law and equity, and equity is a basic pillar of society: "C'est cette lumière de la raison, qui faisant sentir à tous les homes les regles communes de la justice & de l'équité, leur tient lieu d'une loy, qui est restée dans tous les esprits, […]. Ainsi tous les homes ont dans l'esprit les impressions de la vérité & de l'autorité de ces loix naturelles: Qu'il ne faut faire tort à personne; qu'il faut rendre à chacun ce qui luy appartient; […] Car la connaissance de ces regles est inseparable de la raison, ou plutôt la raison n'est elle-même pas que la vûë & l'usage de toutes ces regles"[30].

First principles come to reason due to an epistemology that empowers self-consciousness and faith. Second principles are those of the common human nature, that is equity. Equity is confused in Domat's thought with natural law. A very important part of the natural law includes roman law which is basically "raison écrite". In order to explain the difference of the natural law and roman law, Domat employs the notion of logical (natural) order which includes the recognition of the first (religious) principles, not known to romans, and the dismissal of those roman rules that would not agree to them.

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23 DOMAT, *Traité des Loix*, I, II. From now on *Traité des Loix* will be cited as TL.
24 TL, X, II.
25 TL, XI, XXIV.
26 GUZMÁN BRITO, Alejandro; *Ratio scripta,* Vittorio Klostermann, Frankfurt am Main, 1981, p. 121.
27 FASSÒ, G.; *Storia della filosofia del diritto. II, L'età moderna*, Roma, Laterza, 2001, p. 128.
28 TL, I, I.
29 TL, XI, XIX.
30 TL, IX, V.

4.2 Positive Law Embedded in Natural Law

Understanding natural law in Domat is crucial to comprehend the whole of his legal system. There is not one but many natural laws. One of their features is to be abstract and general. King's power is not able to introduce any modification: "Les loix inmuables s'appellent ainsi, parce qu'elles sont naturelles & tellement justes toujours & par tout qu'aucune autorité ne peut ni les changer, ni abolir"[31]. Here will be checked how does Domat promote that the king, without incurring in any changes into the natural law, may be able to introduce legal orders into the basic natural schema. It is done through the arbitrary law (as he calls the positive law).

Arbitrary law in Domat can be dictated in two different situations. "La première de ces deux causes est la necessité de regler de certaines dificultes qui naissent dans l'application des loix inmuables, lorsque ces dificultes sont telles, qu'il ne peut y éter pourvû que par des loix, & que les loix inmuables ne les reglent point"[32]. And the second one, "[…] a été l'invention de certaines usages qu'on a crû utiles dans la société"[33]. It will be in the first cause that a twofold interpretation of his system can be made.

Since natural law and arbitrary law can be found together: "[…] on voit […] que dans toutes les matières, & naturelles & autres, on a l'usage mêlé de loix inmuables & des loix arbitrarries; […]"[34], their limits are not clearly defined. This is for Domat a minus that must be avoided. He uses arbitrary law to establish the limits of abstract natural law, as seen when he points out in the examples he sets to distinguish natural from arbitrary laws. Arbitrary law only makes sense if it is considered a limit to a natural rule extension. In the first example he considers two different natural laws that could easily be misunderstood if limits are not cleared up: "C'est une loy naturel & inmuable que les pères doivent laisser leurs biens à leurs enfans après leur mort;& c'est ausi una autre loy qu'on met communement au nombre des loix naturelles, qu'on puisse disposer de sesbiens par un testament. Si no donne à la premièe de ces deux loix une étendu sans aucunes bornes, un pere ne purra disposer de rien; & si on étend la seconde à una liberté indefine de disposer de tout un pere pourra priver ses enfans de toute part en sa succession"[35]. Arbitrary law is intended to solve this kind of issues. That is one of the main functions of the legislator.

This mixture of the two different kind of law allows a very specific consideration in Jean Domat's thought: "il faut remarquer ans tous ces exemples & dans les autres sembables des loix arbitraries, qui sont des suites des loix inmuables, que chacune de ces loix arbiraires a deux caracteres, qu'il est important d'y reconnoiter & de distinguer, & qui sont comme deux loix en une. Car il y a dans ce loix une partie de ce qu'elles ordonnent, qui est du droit naturel & il y en a une autre qui est arbitraire"[36]. This means that when applying an arbitrary law, at least a natural one is being applied as well.

Utility of arbitrary law is its stronghold feature: "[…] la justice de ces loix [arbitraries] consiste dans l'utilité particulière qui se trouve à les établir, selon que les temps & les lieux peuvent y obliger"[37]. In Domat utility shall not be understood against natural law. When applying arbitrary law, natural law is applied too. Arbitrary law comes into force only when two different natural laws have a extended content that do not have defined limits. Defining the limits avoids having a too extended interpretation of the laws, which only brings incoherence. It is, then, useful for society to have those limits established and that is the function of the legislator who rules to promote social utility.

4.3 Legislative Monopoly

Domat also provides reasons that allow the king to legislate in private law issues, even though inner and private affairs were traditionally a family and local business. Problems would no more be solved by the judge's use of equity. This is the upstanding point of Domat's thought in what concerns the process of judiciary administration reformation. The founding of the judge's general obedience to the king was clearly established in what concerned the public law not only by Domat but within most of the legal authors. Regarding Domat exclusively he would pretend this obligation to be a matter of conscience which extends to rules in the private order[38].

Nobody does as well as Domat in establishing a general capacity for the king to define civil law. In defining the limits, he would be actually defining the content as he could give more importance to some principles over another or he could create arbitrary laws appealing to be limiting whatever natural law.

Regarding the important customary local law, the king in Domat's natural order has the capacity to confirm the local customs or to dismiss them as non binding law: "mais dans les Etats sujets à un souverain, les coutumes ne s'établissent, ou ne s'affermissent en forme de loix que de son autorité"[39] Domat shows as well a deep concern in avoiding parliament's jurisprudence as binding law[40].

Legislative monopoly over civil law and the submission of the judge to the legally established rules are two of the most important means to situate Domat under a "second process" of reformation of the judiciary administration[41].

31 TL, XI, I.
32 TL, XI, VI.
33 TL, XI, XII.
34 TL, XI, XV.
35 TL, XI, VII.
36 TL, XI, XI.
37 TL, XI, XX.
38 DOMAT; *Droit Public*, Liv. I, I, II, III.
39 DOMAT, *Les loix civiles dans leur ordre naturel*, Liv. Prel., I, I, XI.
40 GORLA; „Attengiamento di Domat verso la giuriprudenza e la dottrina", in VV.AA.; *Studi in onore di Gioacchino Scaduto*, Cedam, Padova, 1970, pp. 331–355.
41 KAN, J. Van; *Les efforts de codification en France, étude historique et psycologique*, Rousseau & cie., Paris, 1929, p.93. Regarding the first process, no important influence can be observed, BNF, Ms. Fr.6820, Suppl. Fr.3017, *Mémoire fait par M. Domat en 1664, du temps que les grandsjours etoient à Clermont et qu'il etoit avogat du roy au présidial*.

4.4 Bringing the Judge under the Positive Law: a Shortcut

The judge in Domat's legal universe has a choice to make. He might undertake the study of law and try to get to its "esprit" through a series of complicated considerations or he might just apply the king's arbitrary law which is a legitimate shortcut to those considerations. Although the study of natural law seems necessary: "Ce qu'on remarque icy de la necesité de connoître le detail des loix, regarde principalement les loix naturelles. Car encore que la raison enseigne les loix naturelles, & qu'il soit plus facile de les bien entendre que les loix arbitraires qui sont naturellement inconnuës, il est bien plus difficile & aussi plus important de bien sçavoir les loix naturelles que les loix arbitraires […][42], it is not really so in the case the legislator decides to develop its legislative capacity through arbitrary law. In that case the study of the law would not be really needed: "[…] au contraire les loix arbitraries sont toujours en evidence, parce qu'elles sont écrites & qu'elles ne contient que des dispositions sensibles & que la plupart se comprenent sans raisonement"[43].

A general presumption guarantees that the arbitrary law will always be applied, unless contrary is proven. That way the judge can avoid understanding the process of deducting laws: "On a vu que les loix arbitraries […] ont leur fondement sur quelque utilité, soit pour prévenir ou faire cesser les inconvénients que ceux qu'elles font cesser & que quelque fois même on ignore quells ont été les motifs de ces sortes de loix & quelles et leur utilité, on doit présumer que la loi qui est en usage est utile & juste, jusqu'à ce qu'elles soient abrogée par une autre loy, ou abolie par le non usage"[44].

In this case, study of natural law would become just the study of the application of the law, since arbitrary law will have taken over the natural law and it will be the only one being applied. This might explain the rise of a legal theory that would eventually replace the study of natural law.

Anyhow, this interpretation of Domat's view is correct but might not have been so thoroughly contemplated by him. His theory is stacked into a strong natural law paradigm although it contains the necessary elements to consider an evolution towards legal positivism. In fact, the legal definition of the natural law did not ever happen under that paradigm, let apart the D'Aguesseau ordonnances about donations and testaments in the 1730's. It would not be until the arrival of the Civil Code that this vision of the law would take finally place. Domat masterwork was basically intended to be used as a pedagogical treaty and so it was[45]. The comparisson among the many editions of *Loix Civiles dans leur Ordre Naturel* and the scarcity of scientific and doctrinal commentators helps proving so.

5. Conclusion

In Domat's works a tendency towards intervention in private law by the legislator is set and consequently towards legal unification and eventually towards private law codification. Domat's works were used as pedagogical treaty. His legal vision was shared by many of the jurists that would take part in defining the Civil Code and that is how his legal teaching is placed at the roots of the Civil Code. His influence on the Code was not only material but also structural. In order to avoid legal pluralism, it was necessary to have all judges applying the same rules at a time where there was no legislative capacity to do so. It could only be done by appealing to the inner conscience of the judge, strategy that Domat achieves. He not only would establish a general obligation for the judge to obey the king's rules in civil law but also would create a stronghold argument for his monopoly of legislative capacity. It is then possible to place Domat in the path to judiciary legal positivism and into the path to legal unification.

[42] TL, XI, XXVIII.
[43] TL, XI, XIII.
[44] TL, XII, III.
[45] „Le sevère Bretonnier ne trouve à lui adresser qu'un seul reproche, c'est celui de trop plaire aux jeunes gens par sa politesse et sa brièveté, en sorte qu'il leur donne du dégout pour les autres auteurs", COCHET; *Éloge de Domat. Discours de rentrée à la Cour royale de Lyon, le 12 novembre 1846*, Lyon, Perrin, 1846, in -8º, pp. 38–39.

"Creditor rem sibi oppignoratam a debitore emere non potest" (Brev. IP. 2, 12, 6)

Magdolna Szűcs*

Abstract

In the Lex Romana Visigothorum is present the rule on the prohibition to the pledgee to buy the pledged thing from the debtor. The author analyzing the texts of the Breviary intends to answer the question: why the texts of Pauli Sententiae and the Constantine's constitution on commissoria rescindenda were interpreted as a prohibition to the creditor to purchase the object of the pledge from the debtor? By the interpretations the new rule was introduced which is contrary to the classical and Justinian's law. Accepting the opinion that the ius was subordinated to the leges and even harmonized with it in the Breviary, the research embraces also those imperial constitutions which can show the circumstances in which the rule was made. Using both, the dogmatic and historical method, the author's conclusion is that creditors used sale contract to cover unlawful appropriation of the debtor's property. This practice and the problems of Vth century were well known to the interpreters and to the people as well, therefore the rule expresses the common understanding.

***Key words**: postclassical Roman Law; pledge; lex commissoria; purchase of the pledge; Lex Romana Visigothorum.*

I. Introduction

The rule on the prohibition to the pledgee to buy the pledged thing from the debtor is present only in the Lex Romana Visigothorum[1], (Breviarium Alaricianum, hereafter: Breviary) from 506 A.D., which belongs to the so-called 'vulgar law'.[2] Besides being the most important Code of early medieval Western Europe, considering the sources used for its composition,[3] the Breviary also provides important information about postclassical law practiced in the Western part of the Empire in the intermediate period, between Constantine the Great and Justinian.

The Breviary is a complex Code, made as a compilation of rules taken from different sources. Some belong to leges:[4] the books of the Codex Theodosianus[5] and the Post-Theodosian Novels; other books belong to ius (ius vetus):[6] Epitome Gaii, Pauli Sententiae and one fragment of Papinian. The compilers qualified the rescripts inserted from Codex Gregorianus and Hermogenianus also as ius[7] and there are the comments (Interpretatio) as well. Some of these sources were postclassical alterations of classical sources (Epitome Gaii, Pauli Sententiae), while others originated from different times of the postclassical period (Codex Gregorianus, Hermogenianus, Theodosianus, Novellae and Interpretatio).

* Dr. Magdolna Szűcs, PhD, Associate Professor, Faculty of Law, University of Novi Sad, Serbia.

1 *Lex Romana Visigothorum*, ed. Haenel, G. Scientia Verlag, Aalen (reprint) 1962.

2 On Roman vulgar law and the critic of the term in: Liebs, Detlef: Roman Vulgar Law in Late Antiquity, in: Boudewijn Sirks (Hrsg.): *Aspects of law in late antiquity:* dedicated to A.M. Honoré on the occasion of the sixtieth year of his teaching in Oxford. Oxford: Souls College, 2008, S. 35–53; http://webcache.googleusercontent.com/search?q=cache:XEnwmE9Wld4J:www.freidok.uni-freiburg.de/volltexte/6857/pdf/Liebs_Roman_vulgar_law.pdf+Beseler+roman+law+1936&hl=en.

3 About the drafting and the content of the Breviary see Sič, M "Lex Romana Visigothorm", Zbornik *radova Pravnog fakulteta u Novom Sadu*, Novi Sad 1–3/ 1984, p. 151–169.

4 The term leges signifies the constitutions of the emperors from the beginning of the 4th century in all sources (legal, historical and literal), see Massei, M, "Le citazioni della giurisprudenza classica nella legislazione imperiale", *Scritti di diritto romano in onore di Contardo Ferrini*, Milano 1946, p. 421 and 434; Orestano, R, *Il potere normativo degli imperatori e le costituzioni imperiali, Roma*, 1937, p. 17, n. 27; Archi, G. G, in "Il problema delle fonti del diritto nel sistema romano del IV e V secolo", *Giustiniano legislatore*, Bologna 1970, p. 58–60, emphasized that in the 4th century the utilization of the terms ius and leges was not consequent. Constantine, for example, utilized the term ius ones as publica iura (C. Th. 1, 2, 2: ius = publica iura), and on the other place for leges publicis (C.Th. 1, 2, 3: ius = leges publicis). According to Archi the terms ius and leges meant "ordinamento giuridico romano" (the Roman legal order) even in the time of publishing the Theodosian Code.

5 *Codex Theodosianus* (CTh.), ed. Th. Mommsen, vol. I, Weidmann, Dublin-Zürich (reprint) 1971. The rules are taken from all XVI books of the Theodosian Code, omitting those which were opposite to the interest of the new Visigoth Kingdom, together with those which could not be useful for practical needs.

6 Guarino, A, *Storia del diritto romano*, Napoli 1969 (4. ed), 575.

7 Taking into consideration that the Codex Gregorianus and the Codex Hermogenianus contained above all rescripts that were solving legal issues of private persons, in the postclassical period a question emerged whether these codes belong to ius or leges. Some sources, starting from the point that these codes contain rules of private law, classify them among the sources of ius, like the Collatio legum Mosaicarum et Romanarum, and the Interpretatio of the so called Lex citationis (Int. CTh. 1, 4, 3: ...Sed ex his omnibus iuris consultoribus, ex Gregoriano, Hermogeniano, Gaio, Papiniano et Paulo, quae necessaria causis praesentium temporum videbantur, elegimus).

Although the relationship between ius and leges is disputable[8], the rules of ius (the law made by classical jurisprudence) had to be in compliance with the imperial policy already in the classical period[9]. One may read in the Romanist literature about the flourishing collaboration between the jurisprudence and the Emperor in classical times[10]. Honoré even proves that the influence of the jurisprudence on the imperial decisions was considerable in this period[11], recognizing however „the increased dependence of lawyers on imperial goodwill."[12]

The imperial legislation in the postclassical period of crises and decadency protected the interests of the Empire as common interests (utilitas publica). Therefore, the lawyers lost the power of creating law. Starting from the time of Constantine the Great they either expressed the Emperor's will or just putted it in writing. Hence regarding the postclassical period, the rules of ius were supposed to be interpreted in accordance with imperial legislation. Theodosius II even planned to make a handbook collecting the rules of leges and ius in one code (Codex magisterium vitae) for practical needs[13], but his project to publish a codification of ius and leges together was unsuccessful[14]. This idea was later abandoned by Justinian, and he edited the rules of leges and ius in separate codes. However, the need for a collection which contained the actual rules of leges and ius was proved by appearance of the mixed codes of ius and leges published all around the Empire during the postclassical period. The most successful compilation of that kind is the Breviary. In the Breviary the rules of ius are in compliance with the rules of leges (primarily by the choice of texts incorporated into the compilation). Consequently, the texts of Pauli Sententiae should be interpreted in accordance with the constitutions. On the other hand, the compliance of ius and leges is also pointed at by the instructions of the interpreters to consult the sources of ius in the Breviary (Pauli Sententiae or Epitome Gaii) regarding certain issues of legal technique.[15]

Regarding the texts of Pauli Sententiae (Sentences of Pseudo-Paul), as they are based on classical rules and were more or less altered during the postclassical period, it is particularly important to provide a separate explanation for them, both in the classical (if it is possible) and in the postclassical context. Explaining the Pauli Sententiae in the postclassical perspective, one must take into consideration other postclassical rules (leges) and the changed circumstances in the society[16]. Starting from the concept that the imperial law was intended to save the Roman Empire and thereby modified or changed the previous rules, the question is raised whether one can find out the meaning and the reasons for a given norm by explaining it only on the basis of a textual analysis and on the method of dogmatica iuris? The simple dogmatic analysis regarding the postclassical law cannot lead to a satisfactory answer. To find out the reasons for and the meaning of postclassical rules it is necessary to use the historical method as well. In order to explain the changes incorporated, one has to reconstruct the circumstances at hand and the problems of the period. The preface of the Novels tells a lot about the circumstances, problems and reasons of issuing law. From the constitutions of Codex Theodosianus the compilers have cut out the preamble[17] but the reasoning can be found in the emperor's cogent decisions. In these constitutions one will not find (or possibly rare) the express reason or the textual connection with the rules of ius. Nevertheless, the decisions were based upon concrete reasons that led also to the alterations of classical texts. Due to the enormous number of constitutions, it is impossible to take into account all the relevant ones without omissions. However, even if one omits some, the examined numbers of the constitutions that express the spirit of the time amounts to a representative sample. This, thereby, opens a possibility for conclusions.

Having in mind that the Breviary was made for the practice, as a Code of applicable law for the settled Gallo-Roman and Hispano-Roman population of the Visigoth Kingdom, in interpreting its rules it is primarily necessary to follow the logic and the intention of the law-maker during postclassical times when the rules were created, as well as the contemplation of compilers in making a selection from the existing rules that were inserted in the Breviary.

II. The Prohibition to the Creditor to buy the Pledged thing from his Debtor

The rule on the prohibition to the pledgee to buy the pledged thing from his debtor is to be found in the books of the Breviary

[8] Archi, G. G, "Problemi e modelli legislativi all' epoca di Teodosio II e di Giustiniano", *Studia et documenta historiae et iuris*, Romae 50/1984, 353, considers the relation between leges and scientia iuris as a central problem having in mind its philosophical aspects and its historical importance for the legal development. See also Massei, M, op. cit. p. 401–475.

[9] There is no doubt that the subordination of the jurisprudence to the will of the emperor was in the classical period a gradual process as a consequence of his growing power. It is also well-known that the famous representatives of the legal science in the times of the Severan dynasty, when the collaboration between the legislation and the jurisprudence was intensive, have held the high positions in the imperial offices or they were members of the consilium principis.

[10] Massei, M, op. cit. p. 401–475.

[11] Honoré, T, *Emperors and Lawyers*, Clarendon press, Oxford 1994 (2. ed), p. 30 etc.

[12] Honoré, T, op. cit. p. 14–15.

[13] CTh. 1, 1, 5 (429); Manfredini, A. D, "Il 'Codex Theodosianus' e il 'Codex magisterium vitae'", *Atti*, Perugia 1983, p. 178.

[14] Therefore he decided (435) to collect only the leges generales given from the time of Constantine the Great up to his own and this code entered in force the Eastern part of the Empire 438, and its Western part 439 A.D.

[15] For example: Brev. Int. CTh. 5, 1, 3 in fine: Hic de iure addendum, quid sit fiducia.

[16] We have no intention in this work either to reconstruct the principal edition of Pauli Sententiae or to identify the author of the Sententiae, even to follow step by step the periods of gradual changes it underwent marked by Levy. See, E. Levy, "Vulgarisation of Roman law in the early Middle Ages", *BIDR (Bull.)* (Supplementum post bellum) 55–56/1951, p. 222 etc.

[17] Volterra, E, "Intorno ad alcune costituzioni di Costantino", *Rend. Cl. Scienze Morali Accad. Lincei*, ser. VIII, vol. XIII, 1958, p. 62–76.

dedicated to the Pauli Sententiae[18] and its Interpretatio, and in the Interpretatio of Constantine's constitution concerning commissoria rescindenda.

It is evident that the first rule of Sentences prohibited the debtor to sell to the creditor the thing given in fiducia.

Brev. PS. 2, 12, 6 (= PS. 2, 13, 3): "Debitor creditori vendere fiduciam non potest; sed aliis, si velit, vendere potest: ita ut ex pretio eiusdem pecuniam offerat creditori, atque ita remancipatam sibi rem emtori praestet".

According to this text the creditor couldn't buy the thing given in fiducia since "neque emptio…rei sue consistere potest" (nobody can buy his own thing) and he is already an owner.[19] The debtor can sell the thing to some other person (in classical law the res aliena could been the object of the contact of sale, since up to the time of delivery the seller should acquire the ownership[20]) and getting the price he can pay his debt to his creditor who is obligated to make him again the owner (remancipatio). After, as an owner he can fulfill the contract of sale transferring the ownership to the buyer.[21]

However the fiducia is present in the Breviary as a kind of a pledge[22], there were no more dogmatically differences between fiducia and pignus[23]. Because the institutions were changed in the postclassical time it is difficult to interpret the text in postclassical sense. The interpreters had also problems to accommodate it to postclassical rules. They changed the term fiducia with the term oppignorata, which embraces all kinds of pledges. Interpreting they altered the meaning of the Sentence, however on dogmatically incorrect way.[24]

IP. 2, 12, 6: Creditor rem sibi oppignoratam[25] a debitore emere non potest. Sed debitor cum alia persona inire contractum potest, ut accepta ab emtore pecunia debitum restituat creditori: et sic postea rem suam a debito(re) liberatam, cui voluerit vendat.

Changing the term fiducia by the verb oppignorare the classical reason of the nullity ("neque emptio…rei sue consistere potest") doesn't stays any more. The creditor in case of pignus is only a possessor and not an owner of the pledge, so there are no any obstacles to buy it. By this terminological change a new rule was made which is in accordance with the Interpretatio of Constantin's commissoria rescindenda[26] (Brev. CTh. 3, 2, 1 /=CTh. 3, 2, 1 = C. J. 8, 34, 3/). The Interpretatio prohibits the creditor-pledgee to buy the thing given in the pledge from the debtor.[27] But the debtor as an owner could sell (inire contractum) to some other person. An initiation of the contract of the

[18] The book of the Sententiae (pricipal edition) was lost, but its excerpts entered the following sources besides the Breviary: Fragmenta Vaticana, Consultatio, Collatio legum Mosaicarum et Romanarum and Digest of Justinian. It is quoted in the copy of Gaius from Antinoe. It was also used by the compilers of the Lex Romana Burgundionum and the Edictum Theodorici. Beside the Digest, the Breviary is its most important source, as it follows the original order of the full Sententiae. See, more: Paradisi, B, Storia del diritto Italiano, vol. I, Liguori, Napoli 1977 (3. ed), p. 91–97. The authorship of the Sententiae is disputable, see Romac, A, Foreword, Paulo Sentencije, Latina et graeca, Zagreb 1989, p. 22–32. The prevailing opinion is that the version of the Sententiae available today is a work of an anonymous author coming from the late 3rd century based on Paul's opus, with further changes during the upcoming centuries. About the reconstruction of its gradual changes, see Levy, E, Pauli Sententiae, *A Palingenesia of the Opening Titles as a Specimen of Research in West Roman Vulgar Law,* Ithaca, New York 1945. The criticism by Schiller, A, Classical Philology, Vol. 42, No. 4. (Oct., 1947), p. 260–261; Schulz, F, *Journal of Roman Studies*, Vol. 37, Parts 1 and 2. (1947), p. 207–208. The critical edition of the Interpretatio of Pauli Sententiae, in Kaser, M, Schwarz, F, Die Interpretatio zu den Paulussentenzen, Köln – Graz 1956. Although the book of the Sentences in the Breviary carries the title 'De pignoribus'(Brev. P. S. 2, 5) these rules are inserted under the title 'De deposito' (Brev. P. S. 2, 12).

[19] Ulp. D. 50, 17, 45; Levy (Oblig. p.); Biscardi, A, *Appunti sulle garanzie reali in diritto romano*, Cisalpino-Goliardica, Milano 1976, p. 186. There are also thesis that the lex commissoria originally was inherent to fiducia cum creditore contracta (references in: Burdese, A, *Lex commisoria e ius vendendi nella fiducia e nel pignus,* G. Giappichelli, Torino 1951, p. 16. n. 2), or that the creditor could definitively appropriate the fiducia only if the lex commissoria was inserted in the pactum fiduciae (references in: Burdese, A, op. cit. p. 17. n. 1). According to Frezza `la fides, puo essere qui invocate per negar fede all'una come all'altra opinione`(Frezza, P, *Le garanzie delle obbligazioni,* vol. II, Garanzie reali, Cedam, Padova 1963, p. 59; also Longo, C, *Corso di diritto romano*, *La fiducia*, Giuffre, Milano 1933, p. 55–56).

[20] D. 18, 1, 28 (Ulp. 41. ad Sab.) "Rem alienam distrahere quem posse nulla dubitatio est: nam emptio est et venditio: sed res emptori auferri potest."

[21] The possibility to deliver the purchased thing later to the sale is in: Brev. P. S. 1, 13, 4: Si id quod emtum est, neque tradatur, neque mancipetur, venditor cogi potest, ut tradat aut mancipet. According to the Interpretatio the buyer has a right to ask for the delivery only if he has paid the purchase price. Int.:Si eam rem, quam aliquis accepto pretio facta venditione distraxit, tradere distulerit, ad traditionem rei qua vendidit, omnibus modis compellendus est.

[22] The texts of the Pauli Sententiae placed in the Breviary on fiducia can be differed in three groups. In the first are those which utilize only the word fiducia: Brev. PS. 2, 12, 4; 5;6;8; 2, 13, 1; 2;3, 9, 53; in the second those in which the word fiducia is present together with the word pignus: Brev. PS. 1, 9, 8; 2, 4 /the title/; 2, 12, 7; 3, 8, 15; 5, 1, 1; 5, 28, 4; and in the third group are the Sententiae which Interpretatio utilizes the term fiducia as well: Brev. IP. 1, 9, 8; 2, 13, 1 and 2.

[23] The texts of the Breviary could not prove that one of these kind of pledges transfers the ownership (fiducia) and the other the possession (pignus), but even not that only one of them could been realized without the transfer of possession, because in both of the cases (fiducia and pignus as well) the ownership was not transferred and the transfer of the possession depends on the will of the parties. Though dogmatic rules are the same for both fiducia and pignus, fiducia does not occur as a synonym to pignus in the sources of the so called West Roman vulgar law. In contrast to pignus or a pledge in favor of the Roman treasury that is considered to be tacitly concluded (tacite contrahitur), this kid of pledge the debtor hands over to the creditor relaying on his fides that the thing will be kept and thereafter given back or the creditor only charges the debtors thing with pledge counting on the debtors fides that he will keep the pledged thing and place on the creditor's disposal to fulfill his claim. More about in: Sič (Szűcs) M. Fiducia and Pignus in Sources of Post-Classical Roman Law – Synonyms or Terms Utilized for Different Kinds of Pladges, Zbornik radova Pravnog fakulteta u Novom Sadu, 2008, Vol. 42, N. 1–2, p. 475–498, and N. 3, p. 143–172.

[24] Also, Liebs, op. cit. p. 51.

[25] In Kaser – Schwarz: oppigneratam.

[26] Mostly its version in the manuscript Epit. Guelph.: "Opignoratam rem creditor emere non potest quodsi conparauerit. rescindi potest uindicio."

[27] See explanation by Levy, E, *Weströmisches Vulgarrecht. Das Obligatonenrecht*, Hermann Böhlaus Nachfolger, Weimar 1956, p. 193. he analyzes the Sentence and its interpretation as the same rule, so he could not get an acceptable solution.

sale with third person[28] who will pay him the price before the delivery of the thing is a possible exception from the customable cash-sale of the Breviary, in which case the seller is obligated to deliver to the buyer the thing sold "omnibus modis"…[29]. Getting the price and paying the debt he will liberate the thing from the pledge. All this is acceptable as a postclassical rule. The questionable is the last part of the Sentences: "et sic postea rem suam a debito(re)[30] liberatam, cui voluerit vendat." It is evident that the thing sold has to be delivered to the buyer. Only the buyer can vend it after, as he wish to somebody else[31].

The second rule prohibited the creditor to buy the pledge (pignus) from the debtor against his will (invito debitore) through a straw man.

Brev. PS. 2, 12, 7 (= PS. 2, 13, 4): Si per suppositam personam creditor pignus suum invito debitore comparaverit, emtio non videtur: et ideo quandoque lui potest: ex hoc enim causa pignoris vel fiduciae finiri non potest.

The interpreters did not consider it important whether the debtor knew or did not know who the buyer was – it was always prohibited.

IP. 2, 12, 7: Creditor pignus, quod a debitore accepit, nec per suppositam personam emere potest. Quod si factum fuerit, agente debitore soluto debito, emtio non valebit.

Both interpretations are formulated in a sense that the prohibition relates to the purchase of the pledge from the debtor on the pledgee`s initiative. It was not a mistake. As in other cases the alteration of the interpreted rule was not a result of ignorance or misunderstanding of their authors. The interpreters consequently and consciously accommodate the interpreted rules to the circumstances and needs of a society in crises in post-classical Roman times. These circumstances were similar to those of early middle ages barbarian kingdoms.

The interpretations of quoted sentences were almost certainly under the influence of practical experience: the oppression made by creditors on debtors to transfer the ownership of the pledged thing by valid or simulated causa emptionis. Usually the pledged thing is more valuable than the debt, therefore under pressure, without having a possibility to estimate the thing in just price, this kind of transaction would lead to the creditor's enrichment by taking advantage of the debtor's difficult position. For the same reason the Breviary inserts Constantine's constitution (dating from the year 320[32]) on the prohibition of lex commissoria.

The text has been taken over from the Theodosian Code.

Brev. CTh. 3, 2, 1 (= CTh. 3, 2, 1 = CJ. 8, 34, 3): 'Imp. Constantinus A. ad Populum. Quoniam inter alias captiones praecipue commissoriae legis crescit asperitas, placet infirmari eam et in posterum omnem eius memoriam aboleri. Si quis igitur tali contractu laborat, hac sanctione respiret, quae cum praeteritis praesentia quoque depellit et futura prohibet. Creditores enim, re amissa, iubemus recipere, quod dederunt. Dat. prid. Kal. Febr. Serdica, Constantino A. VI. et Constantino Caes. Coss.[33]

However, the text opens more questions; its preliminary explanation could be the following. It has three parts. In the first part the Emperor points to the problem that, among others, captious practice (seizures), especially those on the basis of the lex commissoria, increased. Therefore, he ordered that such provisions shall be invalidated. In the second part he repeated the prohibition more precisely: past and present agreements of that kind were cancelled and any future would be prohibited. At the same time, alluding to the fact that the agreement pressures the debtor, the Emperor emphasized that the debtor shall be relieved by this sanction (hac sanctione respiret). It remains uncertain which agreement (tali contractu) the constitution is speaking about.

The pledge is not mentioned in the constitution. If the third part of the constitution (creditores enim, re amissa…) was not added (maybe later), one could not suppose that it relates the lex commissoria in the case of pledge[34]. In the Codex Iustinianus this constitution was inserted (CJ. 8, 34, 3) invoking to the pignus: "commisssoriae pignorum legis". However the fact of oppression is emphasized in the constitution the sanction in its third part is not as hard as could be expected. Only the annulment of the transaction is foreseen: the creditor will lose

[28] See Levy, E, Oblig, p. 193 "contractus de vendendo".

[29] Brev. I. P. 1, 13, 4.

[30] In Haenel's edition `debitore`, while in Epit. Aeg.;d Epit. Monachi `debito`.

[31] The text is logically most acceptable in formulation given in the manuscript Epit. Monachi. "Creditor rem sibi oppignoratam a debitore emere non potest, sed debitor cum alia persona inire contractum potest, ut debitum restituat creditori et sic postea rem suam a debito liberatam cui voluerit vendat."The part: "inire contractum... ut debitum restituat creditori" permits to have in mind some other contract from which the debtor can gain the money for paying his debt.

[32] The dating of the constitution is questionable: in the Theodosian Code Mommsen gives the date 31 January 320, with a question mark, because in subscription of the constitution stays the VIIth consulship of Constantine and his son Constant (Constantio). Consequently, Krüger in the edition of the Justinian Code accepts 31 January 326 A.D. In the recent reprint of Codex Iustinianus from 1998 by Keip Verlag, the VIth consulship of Constantine and his son Constantine is accepted. Hänel marked the VIth consulship as well. We accept the opinion that the exact date is 31 January 320, because in this year Constantine the Great held his sixth consulship together with his son Constantine. More about it in Sargenti, M, "Per una revisione critica dei problemi di datazione delle costituzioni di Costantino", in *Studi sul diritto del tardo impero*, Padova 1986, p. 311.

[33] In Pharr's translation (Pharr, C, *The Theodosian Code and Novels and the Sirmondian Constitutions*, Liber I–VI, Princeton University Press 1952): "Emperor Constantine Augustus to the People. Since among other captious practices, the harshness of the provision for forfeiture is especially increasing, it is Our pleasure that such provision shall be invalidated and that hereafter all memory of it shall be abolished. If any person, therefore, is suffering under such a contract, he shall be relieved by this sanction which cancels all such past and present agreements and prohibits them for the future. For We order that creditors shall surrender the property and recover that which they have given".

[34] About the theory that lex commissoria in case of the pledge is very close or even identical to lex commissoria as pactum adiectum of sale contract, see Burdese, A, op. cit. p. 1951, 110–118.

the thing (pledge), but the debtor must pay his debt (creditores enim, re amissa, iubemus recipere, quod dederunt).[35]

The Interpretatio explains the constitution as a prohibition to the creditor to buy the pledged thing from the debtor, even if it was confirmed in the written document by a specific clause.

Int.: Commissoriae cautiones dicuntur, in quibus debitor creditori suo rem, ipsi oppignoratam ad tempus, vendere per necessitatem conscripta cautione promittit: quod factum lex ista revocat et fieri penitus prohibet: ita ut, si quis creditor rem debitoris sub tali occasione visus fuerit comparare, non sibi de instrumentis blandiatur, sed quum primum voluerit ille, qui oppressus debito vendidit, pecuniam reddat et possessionem suam recipiat.[36]

While from the text of the constitution one could not notice which contract was prohibited, the Interpretatio[37] of it and the interpretations of the Pauli Sententiae unanimously accepts that the prohibition concerns the purchase of the pledged thing by the creditor.

The interpreters explain lex commissoria in sense of the document by which the debtor obliges himself to sell the pledge to the pledgee if not being able to pay the debt in time-limit. Reconstructing the case in circumstances of the period that is characterized by economic crises and poverty, the real transaction would be the following: The debtor, who was oppressus debito, under the pressure of his debt and his creditor gave some of his most valuable things instead of the payment. After this transaction the parties made a written document about the purchase transaction based on the pledge inserting lex commissoria. Therefore, selling the pledge was equivalent with attaining ownership of the pledge by the creditor. The conclusion can be evidenced by the fact that by selling the pledge to the pledgee the debtor could not hope for reaching the real price (oppressus debito vendidit), but in essence, he gave a thing of a higher value than the debt was.

The interpretations introduced a new rule, which was opposite to the classical rule. According to the classical law, the creditors were allowed to buy the pledged thing from their debtors[38]. As Justinian was loyal to the classical law, this constitution overtaken in Codex Iustinianus (CJ. 8, 34, 3) cannot be interpreted more as the prohibition of the purchase of pledged thing by the pledgee. Concerning Justinian's law, the standpoint is that not the purchase, but the acquisition of ownership of the pledged thing was prohibited.

However, having in mind that in circumstances of economic crises the cash-sale or the permutation was practiced and according to the vulgar law the contract of sale has translative effect, transferes the ownership of the sold thing, there is no distinction between the pledge with the clause of lex commissoria and its effect, and no distinction of selling the pledge and retaining or acquiring it in ownership. All this cases are prohibited.

The creditor's standpoint that he is entitled to take the debtor's most valuable thing instead of payment could be justified by practical difficulties to realize the payment. On the other hand, as the antichrésis was a natural element of the pledge contract (it is doubtful whether this concept originates from classical or

[35] Why it was not tougher against the creditor? In the constitution there are expressions showing that the creditor used the pressure i.e. some kind of violence. The use of any kind of violence is threatened with punishment. For example, according to the constitution of Constantine from 334 A.D. (CTh. 8, 15, 2 /= Brev. CTh. 8, 8, 1/) if the pressure was utilized by the person employed in imperial office staff, he must give back to the vendor the thing bought and he shall be punished by losing the price paid. (Imp. Constantinus a. ad Veronicianum vicarium Asiae. Post alia: Damus provincialibus facultatem, ut, quicumque sibi a numerariis, qui diversis rectoribus obsequuntur, conquesti fuerint aliquas venditiones extortas, irritas inanesque efficiant, et male vendita ad venditoris dominium revertantur, amissione etiam pretii illicitis ac detestandis emptoribus puniendis. Dat. XIV. kal. iun. Optato et Paulino coss.). However, on the other hand, according to the constitutions everybody is compelled on paying debts. The last short and therefore unclear sentence (creditores enim, re amissa, iubemus recipere, quod dederunt), shows the conflict of interests of the Empire: on one side the interest of the Empire was to punish the use of violence and on the other side, to compel the debtor to fulfill the obligation. This problem requires more elaboration therefore it will be explained and solved in separate article.

[36] In Pharr's translation: "Those written acknowledgements of debt are called agreements for forfeiture in which a debtor through necessity promises in a written acknowledgement of debt to sell to his own creditor a thing which he had pledged for a time to the creditor. This law cancels any such agreement for forfeiture which has been made and absolutely prohibits one to be made. Thus if any creditor should appear to have bout property of his debtor under such a pretext, he shall not delude himself with written documents, but as soon as the debtor wishes, who sold when oppressed by debt, the creditor shall recover his money, and the debtor shall receive back his property".

[37] The Interpretatio usually called `visigothic`. However, we are more inclined to adhere to the general opinion that they emerged in law schools of the West during the 5th century. See more, Sič, M, p. 157–167. According to Hänel (Haenel, G. p. XII–XIII) the legal practice applied the Interpretatio.

[38] For example: F. V. 9 (Papin. III respons); Tryphoninus, D. 20, 5, 12 pr.; in case of multiply pledges D. 20, 5, 6 Mod. 8. reg; Paulus, D. 20, 4, 17; C. J. 8, 19 (20), 1 (230); Marcianus, D. 20, 1, 16, 9: "Potest ita fieri pignoris datio hypothecaeve (the word hypotheca is consider as a later addition, see, Peters, F, "Der Erwerb des Pfandes durch den Pfandglaubiger im Klassischen und Nachklassischen Recht", *Studien im Römischen Recht (Max Kaser zum 65. Geburtstag gewidmet von seinen Hamburger Schülern),* Berlin 1973, p. 143 and the literature in not. 15), ut, si intra certum tempus non sit soluta pecunia, iure emptoris possideat rem, /iusto pretio tunc aestimandam/: hoc enim casu videtur quodammodo conditionalis esse venditio, et ita divus Severus et Antoninus rescripserunt." (also, Tryphoninus, D. 2o, 5, 12, pr.; Pap. Vat. Fr. 9). Marcianus does suggest the possibility of the creditor to purchase the pledge, but for a just price. However, according to the prevailing opinion, the part "iusto pretio tunc aestimandam" is later, postclassical or Justinian's addition (Peters, op. cit. p. 145. and not. 28). As Ebrard stays not only this part, but the whole fragment is `unheilbar interpoliert`(From Peters, op. cit, p. 143. n. 18). The part of the text "iure emptoris possideat rem" is in accordance with Justinian's legislative politics. Namely, Justinian prohibited the creditor's uncontrolled ownership acquisition on the pledge. He prohibited the clause of lex commissoria in case of the pledge (CJ. 8, 34 /35/, 3); he removes definitely fiducia as a kind of pledge from his law. To the creditor he gives the possibility to acquire the ownership on the object of the pledge only exceptionally, if the debtor is not able to pay his debt and if an adequate buyer for reimbursement of the credit from the purchase price could not be found. The request for acquisition of ownership on the pledged thing the creditor should realize under public control in special procedure of impetratio domini (C. 8, 33, 1 /229/ and C. 8, 33 /34/, 3, 1–6 (530); More about, A. Burdese, op. cit, 206–215. It is in harmony also with the fragment of Modestinus which shows the fact that the reason of the purchase of the pledged thing by the creditor is not the acquisition of the ownership, but the security of debt payment. D. 20, 5, 6 Mod. 8. reg.: "Cum posterior creditor a priore pignus emit, non tam adquirendi dominii quam servandi pignoris suis causa intellegitur pecuniam dedisse et ideo offerei ei a debitore potest." In Peters opinion (Peters, F. op. cit. p. 153–154) the fragment is dogmatically incorrect.

post-classical times), the creditor could used the pledged object instead of interest,[39] and if it gave fruits, as a rule, the creditor could collect the fruits with the consent of the debtor.[40] The logical outcome would be: if the thing gives no fruits, its larger value covers the interest.

Nevertheless, the rules of the Breviary are contrary to these possibilities too. According to the Breviary the superfluum belongs to the debtor, and if there are fruits, their value reduces the principal amount of the debt.

Brev. PS. 2, 12, 4 (= PS. 2, 13, 1): „Debitor distractis fiduciis a creditore de superfluo adversus eum habet actionem."

Brev. PS. 2, 12, 5 (= PS. 2, 13, 2): "Quidquid creditor per fiduciarium servum quaesivit, sortem debiti minuit."

Although interests were allowed up to twelve per cent, the Breviary does not contain the Sentence on the creditor's possibility to retain as much fruits as it would comply with legal interest rates[41]. It is also significant that while one of the texts of Pauli Sententiae allows keeping the fruits by the pledgee on the debtor's consent, its interpretation does not suggest such a possibility – the fruits always belong to the debtor.

Brev. PS. 2, 5, 2: „Fetus vel partus eius rei quae pignori data est pignoris iure non tenetur, nisi hoc inter contrahentes convenerit."

Int: „Si quis gregem equarum, vaccarum vel ovium accepta mutua pecunia pignori creditori dederit, foetus earum rerum ad debitorem, non ad creditorem pertinet. Ita est et si ancillam dederit, et partum ediderit, ad debitorem pertinet, non ad creditorem."

All these norms of the Breviary protect the debtor's interests. Evidently, the purchase or a promise of purchase of the pledge would not result on the debtor's free will.[42] In accordance with Constantine's quoted constitution and the constitution of Honorius and Theodosius (which annuls all kinds of negotiation made under the pressure of potentiores[43]) the Sentences of Paul qualifies the seizure of pledged thing by the creditor as a crime.

Brev PS. 2, 14, 5: "Si quis pignora debitoris citra auctoritatem iudicantis abduxerit, violentiae crimen admittit."

The fact that the rule about the commissoria rescindenda (Brev. CTh. 3, 2) is placed beside the constitution of the title"De patribus, qui filios distraxerunt" (Brev. CTh. 3, 3) shows the problems of pauperized population to survive. According to this constitution, as the thing given in pledge could not remain in the ownership of the pledgee, neither the sold son could remain in eternal slavery:

Int. Brev. CTh. 3, 3, 1: "Si quemcunque ingenuum pater faciente egestate vendiderit, non poterit in perpetua servitude durare, sed ad ingenuitatem suam, si servitio suo satisfecerit, non reddito etiam pretio, revertatur."[44]

These rules are in accordance with other rules of postclassical period by which the emperors defending the empire's public interest (utilitas publica) limited the freedom of contracting by various prohibitions. In order to protect the debtor, i.e. the weaker contractual part, his impoverishment and economic failure against the potentior, the Breviary contains other prohibitions too, for instance: the prohibition to make cession to potentiores – Brev. CTh. 2, 13, 1 (=CTh. 2, 13, 1 422)[45] and the prohibition on selling the res litigiosa – Brev. CTh. 4, 5, 1 (=CTh. 4, 5, 1).[46]

Some legislative measures against potentiores belong to private law. These measures intended to protect the debtor against the enrichment of potentiores that could abuse the poverty of the great mass of population and thereby make profit.[47] They were issued under the proclamation to protect the public interest (utilitas publica). The Empire had an interest to protect the poor small tenants (land owner) against the latifundists (potentiores). The small tenant was a tax payer (the potentiores had a power to refuse tax payment), and the imposts were primary sources for financing the imperial bureaucracy and military.[48] The imperial treasury had the right of pledge on all present and future property of tax charged population[49] and the tax collectors were authorized to take over (seizure) the thing or the

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[39] Mod. D. 20, 1, 23: „Creditor praedia sibi obligata ex causa pignoris locare recte poterit." It is suspected that the text has been interpolated.

[40] Marc. D. 20, 1, 11, 1: „cum in usuras fructus recipiat"; Sev. C. 4, 24, 1; C. 4, 32, 17, Korošec, V, *Rimsko pravo*, I. del, 2005, p. 210.; A. Földi, A – Hamza, G, *A római jog története és institúciói*, Budapest, 1996, p. 435–436, support the view that this opinion originates from the post-classical period.

[41] PS. 13, 1b: „Cum debitor gratuita pecunia utatur, potest creditor de fructibus rei sibi pigneratae ad modum legitimum usuras retinere." – is not inserted into the Breviary.

[42] Levy, E, *West Roman Vulgar Law, The Law of Property*, Philadelphia, 1951, p. 215.

[43] Brev. CTh. 3, 1, 9: "Venditiones, donationes, transactiones, que per potentiam extortae sunt precipimus infirmari."

[44] The text of Brev. PS. 5, 1, 1 (= PS. 5, 1, 1) is in accordance with the quoted constitution. "Qui contemplatione extremae necessitatis aut alimentorum gratia filios suos vendiderint, statui ingenuitatis eorum non praeiudicant: homo enim liber nullo pretio aestimatur. Idem nec pignori ab his aut fiduciae dari possunt: ex quo facto sciens creditor deportatur. Operae tamen eorum locari possunt."

[45] "Impp. Honor. et Theodos. aa. Ioanni pf. p. post alia: si cuiuscumque modi cautiones ad potentum fuerint delatae personas, debiti creditores iactura mulctentur. aperta enim credentium videtur esse voracitas, qui alios actionum suarum redimunt exactores etc. dat. v. id. iul. Ravenna, dd. nn. Honorio xiii. et Theodos. x. aa. coss.»

[46] "Imp. Constantinus a. ad provinciales. post alia: lite pendente illud, quod in controversiam devocatur, in coniunctam personam vel extraneam donationibus vel emptionibus vel quibuslibet aliis contractibus minime transferri oportet, tanquam nihil factum sit lite nihilominus peragenda".

[47] According to Stanojević (Stanojević, O, Karakter države pozne rimske istorije, *Anali Pravnog fakulteta u Beogradu*, 4/1961, p. 672.), these measures "were not so much in interest of poor man, as much they were against the power of potentiores, against the feudalization and colonatus."

[48] About the difficulties of realization the tax payment from potentiores and the different measures for it, Sič, M, Zakonske mere za obezbeđenje naplate poreza u kriznim vremenima poznog rimskog carstva, *Pravni život* (Legislative measures for the realization of tax payment in the time of crises of the Late Roman Empire), Kopaonička škola prirodnog prava, tematski broj – Moć i nemoć prava, Beograd, 1998/10, Tom. II, p. 725–741.

[49] CJ. 8, 14 (15), 1 from 213 A. D.: "Universa bona eorum qui censentur vice pignorum tributes obligate sunt"; Hermogenianus, D. 49, 14, 46 par. 3: "Fiscus /semper/ habet ius pignoris."; *Fragmentum de iure fisci* of the anonim author (A. D. 2nd–3rd century ?) Fol. I, 5. "Bona *eorum* qui cum fisco contrahun*t lege* uacuaria uelut *pign*oris iure fisco *obligan*tur, non solum ea q*uae* habent, sed *et* ea, quae postea habituri sunt."

patrimony of the delinquent taxpayer[50]. Without protection, the pauperized small tenants would sell a land and themselves to potentiores and become their slaves or colons and the fiscus would lose the taxes. The problem that the rich man refused the tax payment is exposed in the Novel of Valentinian.

Nov. Val. 10, 1: *„…Neque ultra valebit perpetuitas eorum manere paucis atque defessis inposita sarcina, quam potior detrectat, locupletior recusat et validiore reiciente solus agnoscit infirmior".* (Nor can the continuity of sach tax payments remain any further if there should be imposed upon a few exhausted persons the burden which the more powerful man declines, which the richer man refuses, and which, since the stronger reject it, only the weaker man assumes)[51].

III. The Problem of just Estimation of the Pledge

One of the reasons of the prohibition to the pledgee to buy the pledge from the debtor was that under the pressure of the powerful creditor (potentior), or tax collector (curial) the debtor could not hope to get a just price. At this point the question arises: whether this prohibition could be avoided by datio in solutum?

The text of Gaius on datio in solutum has been interpreted during the Vth century and entered in the Breviary (Liber Gaii – Epitome Gai tit. X (XVII s, XVIII) with important alterations.

Gaius, Inst. 3, 168: „Tollitur autem obligatio praecipue solutione eius, quod debeatur. unde quaeritur, si quis consentiente creditore aliud pro alio soluerit, utrum ipso iure liberetur, quod nostris praeceptoribus placuit, an ipso iure maneat obligatus, sed aduersus petentem per exceptionem doli mali defendi debeat, quod diuersae scholae auctoribus uisum est."

Brev. EG. X (XVII s, XVIII): "Tollitur obligatio solutione debiti. Praeterea aliquoties tollitur obligatio, etiam si aliud, quam cautum fuerit a debitore, creditori reddatur. Nam si quicunque pro pecunia, quam creditori cavit, acquiescente creditore, aurum aut argentum aut mancipia vel alias quaslibet species, habita aestimatione, consentiente creditore, dederit, obligatio evidenter tollitur".

In accordance with the practical needs that the Epitome served, there is missing the conflict between opinions of schools about the question, whether the obligation is terminated ipso iure or ope exceptionis, and the termination ipso iure ("obligatio evidenter tollitur") is accepted. While Gaius did not specify which obligation is terminated and what is offered instead of fulfillment, according to the Epitome a pecuniary obligation could be settled by giving a certain individually determined thing (often gold, silver or slave). Such a view emerges under the condition of inflation and lack of money. For datio in solutum, naturally, the consent of the creditor is necessary. Moreover, what is of utmost importance for the case of prohibition of selling the pledge to the pledgee, is a specifically imposed demand that the creditor and the debtor agreed on the estimated value of the thing. It should be in equivalence with the debtor's pecuniary obligation. Apart from that, while the purchase of the pledge was demanded by the pledge, in case of datio in solutum the fulfillment of the pecuniary obligation by giving the pledged thing was offered by the debtor.

It can be summed up that the Breviarium tends to protect the debtor by just estimation of the pledged thing's value and giving a rule that in case the value of the pledge was higher than the debt the debtor should get the superfluum.[52] In this case the Breviarium insists on the just price, and does it in an even stricter sense than circumscriptio in case of a common sale contract.[53] For the same reason, under a doubt that the price would not be just, it prohibits the selling of the pledge to the pledgee. This is in accordance with the intention to protect the interests of the Empire, which is also present in the rule of the Breviary on collection of public debts (debitum publicum), i.e. if the interest of the Empire is represented, the price must be just.[54]

Brev. Int. CTh. 10. 9, 1(=CTh. 10, 17, 3)/391/: "Si quicunque publici debiti enormitate constringitur, ut non possit hoc ipsum debitum nisi vendita propria facultate dissolvere, in eiusmodi debito hanc executores vel exactores formam servare debebunt, ut non ita rem praecipitent, ut res minore, quam valet pretio distrahatur nec tales sub quolibet conludio provideant emtores, ut et debitor proprietatem perdat et parum fiscus adquirat."

IV. The Problem of Multiply Pledges

There is in the Breviary under the title of Pauli Sententiae: "De lege commissoria" the rule on multiply pledges.

Brev. PS. 2, 13, 3 (PS. 2, 13, 8): „Novissimus creditor priorem oblata pecunia, quo possessio in eum transferatur, dimittere potest. Sed et prior creditor secundum creditorem, si voluerit, dimittere non prohibetur, quamquam ipse in pignore potior sit."

Int. „Si duo creditores unum pignus debitoris habeant obligatum, et posterior creditor priori creditori offerat pecuniam, potest pignus obligatum ad se transferre. Item prior creditor licet potior sit in pignore retinendo, si offerat pecuniam, potest apud se pignus retinere."

When the same thing is burdened by pledge as a security for two creditors, according to the Sentence, and the Interpretatio both creditors can retain the pledged thing if they settled the other pledgee's claim. The wording used in the Sententiae („quo possessio in eum transferatur") and even in its interpretation ("pig-

[50] CTh. 11, 7, 7: Impp. Constantius et Constans aa. Bibulenio restituto praesidi Sardiniae. "Provinciales pro debitis plumbi verbera vel custodiam carceris minime sustinere oportet, cum hos cruciatus non insontibus, sed noxiis constitutos esse noscatur, satis vero sit debitorem ad solvendi necessitatem capione pignorum conveniri". Dat. VIII id. dec. Thessalonicae Constantio VI et Constante III aa. conss. (353, 346? dec. 6); CTh. 11, 7, 4 (=Brev. CTh. 11, 4,1).

[51] Salv. *De gubernat. Dei* 5, 7; 4, 6.

[52] Brev. PS. 12, 4. also, C. J. 8, 27, 20 Imperatores Diocletianus, Maximianus. "Secundum placiti fidem, si nihil convenit specialiter, pignoribus a creditore maiore quam ei debebatur pretio distractis, licet ex eo fundus comparatus sit, non super hoc in rem, sed in personam, id est pigneraticia, de superfluo competit actio."

[53] The Breviarium did not take over the rule on laesio enormis. For more see: Sič, M, "Sloboda ugovaranja i iustum pretium u rimskom i savremenom pravu," *Pravni život*, no. 10., vol. II, Beograd, 2005, p. 857–882.

[54] Brev. Int. C. Th. 10. 9, 1(=C. Th. 10, 17, 3)/391/: "Si quicunque publici debiti enormitate constringitur, ut non possit hoc ipsum debitum nisi vendita propria facultate dissolvere, in eiusmodi debito hanc executores vel exactores formam servare debebunt, ut non ita rem praecipitent, ut res minore, quam valet pretio distrahatur nec tales sub quolibet conludio provideant emtores, ut et debitor proprietatem perdat et parum fiscus adquirat". See also Sirks, A. J. B. La laesio enormin en droit romain et Byzantin, *The Legal History Review*, Antwerp, LIII, 1985, p. 297.

nus ad se transferre" or "apud se pignus retinere") is not precise. Placing the norms of leges at the beginning of the Breviary, the compilers intended to indicate that the norms of ius should be interpreted in accordance with the norms of leges, therefore this Sentence should be interpreted in compliance with Constantine's norm about the prohibition of lex commissoria, in sense that this way the second pledgee will be able to hold the pledged thing as a guarantee of his claim in his possession and not as an owner.

Paul's fragment inserted into the Digest from his first book of Opinions (D. 20, 4, 17)[55] discussed the part of same problem. According to the fragment the second creditor could purchase the pledge from his debtor if he satisfies the first creditors claim. On the other side in the rescript of Alexander Severus (C. J. 8, 19 (20), 1) published to Athenion 230 A.D. (at that time probably Paulus was praefectus praetorio) was discussed the problem, how could Athenion being the second pledgee satisfy his claim, if the pledged thing was sold or given in solutum to the first pledgee.[56]

In both cases the buyer becomes the owner of the purchased pledge (if we ignore the insertion in Marcian's fragment "iure emptoris possideat rem" and Modestin's reasoning) and it depends on just or unjust estimation of the pledge the debtor could realize his right to surplus (superfluum) or he will lost it.

V. Conclusion – the Reasons of the Prohibition

The prevailing opinion is that the prohibition of the clause of lex commissoria was introduced to protect the debtor against the pressure of his potent creditor. Some authors have added as a motivation for it the Christian humanity of Constantine the Great, but none gives an acceptable answer about the reasons for and about the meaning of Constantine's constitution on commissoria rescindenda (CTh. 3, 2, 1 = Brev. CTh. 3, 2, 1) from 320. A.D. Concerning the meaning of the constitution the opinions differ: does it prohibit the acquisition of ownership directly by the clause or does it concern the prohibition of the purchase of the pledged thing by the pledgee?

Regarding the reason for the commissoria rescindenda (prohibition of the forfeiture clause) in Constantine's time, my thesis is that the main reason was the seizer of the land of small tenant by the potentiores and by the corrupt imperial officers, chiefly the tax collectors.

With regard to the contract (tali contractu) which is prohibited by the constitution, I incline to the opinion of Burdese[57] and Biscardi[58] that Constantine intended to embrace by the prohibition not only the typical lex commissoria, but also the analogous clauses between the creditor and debtor, which leads to the acquisition of the ownership on the pledged thing by the pledgee. There are constitutions which can indicate different ways of forfeiture. A few months before the constitution on commissoria rescindena was published, Constantine passed the constitution CTh. 11, 3, 1 (319 Jul. 1)[59], addressed to the Governor of the First Province of Lyons, showing in practice "that some persons are taking advantage of the temporary exigencies of others and are purchasing rich and choice farms under the condition that they shall not pay to the fiscus the delinquent taxes of such farms and that they shall possess them tax free".[60]

On the other hand, one can learn from the rules about the imperial emphyteutic and patrimonial estates that if the rental (which is at the present moment nothing else than the tax on the land) was not promptly paid, these estates would be forfeited (taken over from the possessors as a punishment). These kinds of forfeiture could be found in Constantine's constitution CTh. 12, 6, 2, 1 from 325 A.D.[61], as legem commissi frustratus incurrat (to become liable to the law of forfeiture) and as debitam commissi nexu (the bond of forfeiture because of the debt). The constitution of Valentinian and Valens CTh. 5, 15, 15 (= Brev. CTh. 5, 13, 15) from 364 A.D. indicates that from the year of the consulship of Leontius and Sallustius (344 A.D., twenty years previously) some emphyteutic estates which fell into the fortune of forfeiture (in commissi fortunam inciderint) were held in ownership by private persons.

There is also Marcian's Novel (Nov. Marc. 2, 2 = Brev. Nov. Marc. 2, 2) from 450 A.D. which enumerates a few ways which have been used for the appropriation of the tax payer's property by private persons: "…a public debt has passed into private contract or a written acknowledgment of debt, or to have been novated…"[62]

A controversial point is also why, in the practice of the post-classical period, the appropriation of the pledged thing was covered by the contract of sale. According to the Interpretatio of the CTh. 3, 2, 1 = Brev. CTh. 3, 2, 1 (320) and IP. 2, 12, 6 and 7, the pledgee was prohibited to purchase the pledged thing from his debtor. In my opinion the answer lies in public control of ownership transfer on land and on things of higher value.

When the land registers were established with more or less success throughout the Empire, primarily in order to register the taxpayers, the sales contract of land and later also of the things of higher value got a special form prescribed in the constitution of Constantine from 337 A.D. (CTh. 3, 1, 2 = Brev. CTh. 3, 1, 2). The secret and fraudulent sales were not valid for acquisition of the ownership. On the other hand, the direct acquisition of the ownership on the bases of pledge was not possible. Therefore, the acquisition of the ownership on the pledged thing by the creditor was presented as the purchase of the pledged thing.

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[55] D. 20, 4, 17: "Eum qui a debitore suo praedium obligatum comparavit, eatenus tuendum, quatenus ad priorem creditorem ex pretio pecunia pervenit."

[56] Ankum, H, Rescripts of Roman Emperors Promulgated Until the End of the Reign of Diocletian in 305 A.D. in *Zbornik radova (Collected Papers)*, XL, 1/2006, Novi Sad, str. 9–18; Ankum, H, Consequences of a Pledge Extinguished by Merger in Classical Roman Law", in *Ex iusta causa traditum (Essays in honour of Eric H. Pool)*, Pretoria, 2005, p. 3–20.

[57] Burdese, A, op. cit. p. 125 and n. 2.

[58] Biscardi, A, op. cit. p. 190 and n. 24.

[59] It is not inserted in the Breviary.

[60] '…quod nonnulli captantes aliquorum momentarias necessitates sub hac condicione fundos opimos comparent et electos, ut nec reliqua eorum fisco inferant et immunes eos possideant…'

[61] It is not inserted in the Breviary.

[62] Nov. Marc. 2, 2 = Brev. Nov. Marc. 2, 2…in privatum contractum vel in cautionem debitum publicum transiisse vel novatum esse...

Entitlement of Female Descendants to Property of Croatian Communal Household *

Mirela Krešić **

Abstract

The paper analyses provisions of the three legal acts on communal households which had regulated the entitlement of female descendants to communal household property. Those are the rights which the female descendants practiced in the course of division of a communal household and inheritance, as well as the right to trousseau or dowry. Furthermore, the social and economic frameworks are explained for the passing and validity of communal household laws, which had marked the second half of the 19th century, and the beginning of the 20th century in the Kingdom of Croatia and Slavonia. Of particular concern is the status of communal household legislation within Croatian legal system, which was based on the General Civil Code after the abolition of feudalism in 1848.

Key words: *communal household; female descendants; household division; inheritance; trousseau or dowry; the General Civil Code; the Kingdom of Croatia and Slavonia.*

1. Introduction

The communal household was an institution common on the entire territory of today's Croatia.[1] However, this paper exclusively deals with the communal households on the territory historically known as the Kingdom of Croatia and Slavonia[2] and in the period covered (second half of the 19th and the beginning of the 20th century) was included in the Hungarian part of the Austro-Hungarian Monarchy, to which the territory of the Military Border was annexed in 1882.[3] The reason for the territorial (and temporal) limitation of the topic lies in the fact that only on this Croatian territory was the communal household legally regulated.

Although this paper focuses on Croatian communal households, the households were not common on the Croatian territory only. Croatian households, or similar institutes also existed on other Slavic territories.[4] However, this form of a household economic community is found among other nations, and on all continents as a customary concept, typical for a specific level of development, or under specific economic and social conditions.[5] However, the first published study on communal households referred specifically to the communal households on the South-Slavic territory, more specifically Croatian territory. Thus, in 1859 a book by Ognjeslav Utješenović Ostrožinski was published in Vienna titled „Die Hauskommunionen der Südslaven. Ein Denkschrift zur Beleuchtung der Volksthümlichen Acker- und Familienverfassung des serbischen und des kroatischen Volkes." Ostrožinski was a Croatian writer, lawyer and a high state

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** Mirela Krešić, Ph.D., Chair for Croatian History of Law and State, Faculty of Law, University of Zagreb, Croatia.

1 English translation of the term "*kućna zadruga"* – communal household (Germ. Hauskommunion) is used in the paper, not the translation of the term "*obiteljska/porodična zadruga*" (family cooperative). As synonym, insted of „communal household" in various literature is also used english term „house cooperative".

2 Hereafter, instead of the correct administrative term "Croatia and Slavonia" and the derived adjectives, the term "Croatia" will be used, except where due to specific reasons it is necessary to emphasize that the Kingdom of Croatia and Slavonia as a Croatian territory with its own autonomy is exclusively concerned. On the issue of administrative names, Croatian identity and terminology, see ČEPULO, Dalibor. *Building of the modern legal system in Croatia 1848–1918 in the centre-periphery perspective,* in: Giaro, Tomasz (Hg). Modernisierung durch transfer im 19. und frühen 20. Jahrhundert, Frankfurt am Main, 2006, p. 50.

3 In the period between the 15th century and 1882, the Military Border encompassed the border territories of today's Croatia towards Bosnia and Herzegovina, that is towards the border with the Ottoman Empire, set up for the defense against the Ottoman attacks. Until 1850, the Military Border was organized as a separate military and administrative system, independent of the authority of the Croatian Diet and the Banus. After 1850, the Military Border was organized as one of the regions of the Austrian Monarchy. The process of demilitarization and unification with Croatia started with Emperor's manifesto of 1871, while the strategic significance of the Military Border was lost in 1878 through Austro-Hungarian occupation of Bosnia and Herzegovina. The final unification with Croatia and Slavonia was only viable upon the Hungarian – Croatian negotiations, which ended with a revised Croatian-Hungarian Settlement in 1881.

4 In the 19th and 20th centuries the existence of households or similar institutes were recorded in some Slavic countries, such as Bulgaria, Serbia, Montenegro and Slovakia, while in other Slavic areas, eg. the Czech Republic, they had ceased to exist. SICARD, Emile. *Razmišljanja o postojanju i konceptu kućnih ekonomskih zajednica,* in: Socijologija sela, Year XII, 43, 1974, no. 1, p. 28–52.

5 More on the study of communal households in non-Slavic nationss see in PAVLIČEVIĆ, Dragutin. *Hrvatske kućne zadruge I (do 1881),* Zagreb, 1989a, p. 46–54.

official in Vienna, born, as he had said himself, "in a communal household of the Croatian Military Border"[6] and considered himself a good, objective observer of the communal household and the household lifestyle. Significantly earlier than Ostrožinski, the communal household was described by Hungarian scholars Mattias Piller and Ludwig Mitterpacher during their travel through Slavonia at the end of the 18th century,[7] while the author of the first written record on the communal household was Croatian linguist Bartol Kašić. Kašić was a Jesuit and head of two Papal missions which had passed through Slavonia, among other parts. In 1612 he left a record on the communal household, i.e. on the so called *"patrijakalni život"* [patriarchal life] as the communal household had been called for centuries.[8] Still, the largest number of papers on the communal households comes from the 19th and the beginning of the 20th century, or the time of intense dealing with the communal household issues. Historian Dragutin Pavličević has dealt with the Croatian communal household most in the recents decades, and he considers it a "socio-economic, traditional phenomenon of sorts of our (Croatian auth. note) territory and society..."[9]

Multiple levels of operation can be observed in a communal household (e.g. division and distribution of work, decision making within the household, external relations, economic status). Proving particularly interesting to establish was the economic and legal position of women within the communal household. Or more precisely, which property rights to the communal household property were granted to female descendants born into the household. Namely, within households, particularly those with a large number of members, there existed the so called female subculture, comprising all the female members of a single communal household. Those women, in relation to other members of the household, held a special status, which had been a reflection of a general attitude to women in the society, so their unfavourable position within the society and weak influence can be stressed. On the other hand, the position of women in the communal household was also marked by the fact that they had had a certain economic independence, which was the result of their ability to dispose of their own property.[10] Therefore, in reality, indirectly (e.g. through the husband or son, or within their women's circle, based on their real economic power) women could still accomplish a certain social position, and gain influence in the communal household. As the women also mutually differed within their circle, the female descendants born within the communal household and their entitlement to communal property will be discussed here exclusively, as their (economic) power in the families into which they would marry was partially based on the entitlements they had had in their native communal households.

2. Croatian Communal Households Prior to the Implementation of Special Communal Household Legislation

When, during the revolutionary 1848, feudal rule was abolished in Austro-Hungarian Monarchy, the best part of the population were peasants. In the subsequent period the peasants were forced to adjust to the newly formed economic and legal circumstances. The economic environment in some of the areas of the Monarchy at the time of the abolition of the feudal rule was not uniform. In the western part of the Monarchy the feudal relations were based on the cash tribute, while the labour tribute barely existed, or was implemented on a very small scale.[11] Therefore, the changes enforced, regardless of the rise in the cash tribute, did not cause too great disturbances in the life of the peasant population. At the same time, in the eastern parts of the Monarchy, including Croatia, the labour tribute prevailed for the peasant population as a consequence of the refeudalization in the 17th century. The changes, therefore, forced the peasants to a speedy adjustment to market economy, in order to make money through sufficient production to pay their obligation to former landlors and the state.[12] Apart from the economic order, legal order in the Monarchy also changed, under the influence of the General Civil Code, gradually introduced in the states of the Monarchy since 1812. The GCC was introduced in Croatia by the Imperial Patent during the Bach absolutism in 1852, entering into force in May in 1853.[13] The

[6] UTJEŠENOVIĆ OSTROŽINSKI, Ognjeslav. *Kućne zadruge – Vojna krajina,* Zagreb, 1988, p. 71.

[7] PILLER, Mattias, MIITERPACHER, Ludwig. *Iter per Poseganam Sclavoniae provinciam mensibus junio et julio anno MDCCLXXII,* Budae, 1783.

[8] VANINO, Miroslav. *Autobiografija Bartola Kašića,* in: Građa za povijest književnosti hrvatske, book XV, JAZU, Zagreb, 1940.

[9] PAVLIČEVIĆ, 1989a, p. 15.

[10] More on the existence of a female subculture in communal households see in RIHTMAN-AUGUŠTIN, Dunja. *Struktura tradicijskog mišljenja,* Zagreb, 1984, p. 169–172.

[11] GRANDITS, Hannes. *Inheritance and Social Change in the Decades of Emancipation in the Late Habsburg Empire: Some General Trends;* in Grandits, Hannes, Heady, Patrick (eds.). Distinct Inheritances. Property, Family and Community in a Changing Europe, Münster, 2003, p. 209.

[12] In the 17th century in the best part of Croatia the so called refeudalization took place. It was a process of return from the initial, humble capitalist forms of enterprise to feudal ones. Thus, the so called *second serfdom* was marked by an increase in labour tribute and its transformation into the main feudal tribute. The peasants became tied to the land by way of migration limitation, the opportunity for the change of their social status was narrowed down, and all the income other than from farming was cancelled. The serfs became *coloni perpetuae obligationis.* ADAMČEK, Josip. *Agrarni odnosi u Hrvatskoj od sredine XV do kraja XVII stoljeća,* Zagreb, 1980, p. 768; Comp. BEREND, Ivan,T., RÁNKI, György. *Evropska periferija i industrijalizacija 1780–1914,* Zagreb, 1996, p. 38–41.

[13] The General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB) constituted a codification of civil law, decreed by the Imperial Patent in1811 in the Austrian hereditary lands of the Habsburg Monarchy. It was gradually introduced in other parts of the Monarchy, and in the period between 1812–1820 enforced on the Croatian territory of the Military Border, Istria and Dalmatia. In 1852, the GCC entered into force in the Kingdom og Hungary, Croatia and Slavonia, in the Serb Vojvodina, and Tamiš Banat. With the abolition of the Bach´absolutism (1859) and the introduction of the October Diploma (1860) the enforcment of the GCC continued, evolving into a Croatian Civil Code in its own right, independent of the Austrian model. Following the secession of Croatia from the Monarchy in 1918, the GCC remained in the force, and the attempts to replace it with the Preliminary Principles of the Yugoslav Civil Code (1934) and the Principles of the Civil Code for the Independent State of Croatia (1943) were not successful. The GCC remained part of the Croatian legal system until the passing of the Law on Invalidity of Legal Acts Passed Prior to 6 April 1941 and During the Occupation (1946), whereupon single legal rules could be applied subject to legally prescribed provisions.

GCC was adopted with a certain amount of reserve, due to the circumstances under which it was introduced, as well as due to the liberal and individually based provisions of the Code, contrary to the interests of the ruling classes at the time.[14] Although in the course of time it had proved its valour and remained in force as part of Croatian legal system even after the abolition of absolutism, the property law and inheritance law provisions of the GCC caused some problems for part of Croatian population living in communal households.[15]

In the period prior to 1848 and the abolition of feudalism, a significant percentage of Croatian population lived in communal households, notwithstanding their class. Using class as a criterion for the classification of the communal households, Pavličević distinguishes three types of households: 1. peasant-communal households, with the serf households until 1848, communal households of free peasants after 1848, households of colonates, leasees and fishermen in Croatian coastal areas, and households of the Military Border peasants until the accession of the Military Border in 1881. These communal households included all those who farmed the land, cattle and lived in the country; 2. noble-communal households were common among Croatian nobility, living in such communities from the antiquity, regardless whether members were high, middle or lower nobility, although they were for the best part households of the so called *nobiles unius sessionis*. Judging by the style of work, life and internal structure, the noble households had not differed from the peasant-communal households; 3. city-communal households could be found in the city and trade centres, where craftsmen, salesmen, inn owners and fishermen lived, continuing with the same activity for centuries, passing on the tradition from generation to generation. Still, Pavličević points out that noble and city communal households were not typical.[16]

The communal household was prevalent among the peasant population working exclusively in agriculture, farming the serf land on manors as part of the feudal economic order. The existence of household serfs, and thus the households, is not recorded in the Tripartite, the backbone of (Hungarian-)Croatian law prior to the introduction of the GCC.[17] However, the fact that the concept of ownership comprised in the Tripartite was not built upon the closed circle of property rights allowed the co-existance of the communal household and its customary law based legal order with the institutes specifically stipulated and regulated in the Tripartite.[18] Thus in the feudal system a communal household was considered a subject obliged to pay feudal tribute, therefore, as the sum of all those who lived in a household on the given serf land. The property of a communal household was under joint ownership of all the members of the household, who were not necessarily family related, without established individual shares. As a rule, communal households were not divided, and there was no inheritance after decease of a household member. If necessary, a share could be established, *per capita,* whereby male members of a household would be considered, and in exceptional cases also the female members of the household.[19] Apart from joint property, individually owned property of single members of the household also existed, although on a small scale, which allowed inheritance.[20] The turning point for the well established communal household lifestyle which came with the introduction of the GCC was the result of the fact that the GCC did not recognize the institute of joint ownership, only co-ownership as a form of ownership with a group of participating individuals, each with a strictly de-

[14] MAUROVIĆ, Ivan. *Das österreichische Allgemeine Bürgerliche Gesetzbuches in Kroatien*, in: Festschrift zur Jahrhundertfeier des Allgemeinen Bürgerlichen Gesetzbuches, Wien, 1911, p. 689.

[15] GAVELLA, Nikola. *Građanskopravno uređenje u Hrvatskoj i pripadnost pravnog poretka kontinentalnoeuropskom pravnom krugu,* in: Gavella et. al (eds.) Hrvatsko pravno uređenje i kontinentalnoeuropski pravni krug, Zagreb, 1994, p. 13.

[16] For details see PAVLIČEVIĆ, Dragutin. *Pokušaj tipizacije kućnih zadruga,* in: Naše teme 33, 1989b, no. 10, p. 2653–2659.

[17] The Tripartitum (*Tripartitum opus iuris consuetudinarii inclyti regni Hungariae*, 1517) by Stephen Werböczy, is the most important source for the study of the Hungarian-Croatian law, depicting vividly the laws and legal customs at the beginning of the 16th century. The Croatian translation of The tripartitum was edited by Ivan Pergošić in 1574, and was in force until the implementation of the GCC. However, it should be noted that certain differences existed between the legal systems of Hungary and the Croatian territories, which is also underlined by Werböczy: „Because we see that the long-established laws and customs of the aforesaid kingdoms of Dalmatia, Croatia, Slavonia and (of) Transylvania vary in certain terms and articles from the laws of our country, namely this kigdom of Hungary..." (Trip. III, 2). BAK, János M., BANYÓ, Péter, RADY, Martyn (eds.). *Stephen Werböczy: The Customary law of the Renowned Kingdom of Hungary: A work in Three Parts Rendered by Stephen Werböczy (The Tripartitum)*, Idyllwild CA-Budapest, 2005, p. 377.

[18] Hungarian historian Jenő Szűcs calls attention to the mismatch between the Tripartite and the real position of the peasant population when he says that the legal position of nine tenths of the population of the Hungarian-Croatian kingdom is not confirmed by the provisions of the Tripartite. Although he does not, understandably, explicitely mention the customary communal household life in Croatian areas, his statement is also applicable to Croatian communal households. SZŰCS, Jenő. *Orisi triju povijesnih regija Evrope*, in: BIBÓ, István, HUSZÁR, Tibor, SZŰCS, Jenő. Regije evropske povijesti, Zagreb, 1995, p. 213.

[19] Authors who were attempting to create a geographic map of Europe regarding the rules of inheritance in force prior to the implementation of civil codes, precisely due to the existence of communal households and the relations within, classed the territory of Croatia as the area of "the system of equally partible male inheritance" where men held the monopoly over the entitlement to ownership and inheritance. Furthermore, all the men stayed on the land, among other reasons, because the demand for the labour force was met using family members, not from outside. In the western European countries the so called "system of male impartible inheritance" existed, whereby a male member of the family would also inherit, but only one of several potential heirs – the youngest or the oldest son – since property was not divided. KASER, Karl. *Power and inheritance. Male domination, property and family in eastern Europe, 1500–1900,* in: The history of the Family, vol. 7, 2002, 3, p. 375–395.

[20] Individual property could be acquired in various ways, therefore, it could be the property which was in fact the dowry of a woman married into the household (e.g. land (although rarely) money or cattle) or money earned by a household member through employment outside the communal household (as a rule, subject to the household leader's approval). GAVAZZI, Milovan. *Iz tradicijske kulture južnih Slavena i jugoistočne Europe,* in: Vrela i sudbine narodnih tradicija, Zagreb, 1978, p. 86.

termined share in co-ownership. Furthermore, the GCC rules of inheritance introduced the principles of inheritance stipulating inheritance equal for all types of property, and for all persons, regardless of their class and gender.[21]

The discrepancy between the new legal order and the customary law household order was the reason for the 1857 order of the Austrian justice minister Krauss for the abolition of the GCC inheritance law provisions and the related provisions of Non-Contentious Proceedings Act (1854) regarding communal households and their property. In 1858 the Ministry of Interior in Vienna invited the Croatian Locumtenential Council to draft and submit an act on the regulation of communal households. Based on the draft, the Parliament committee outlined a proposal of the act, adopted by the Croatian Diet as the Act CXII:1861. Although adopted by Croatian Diet, the act was not confirmed by the king, and the legislative work on the regulation of the communal households was postponed until the period after the signing of the Croatian-Hungarian Settlement (1868). Namely, based on the Austrian-Hungarian Settlement (1867) the Kingdom of Croatia and Slavonia was acceeded to the Hungarian part of the Monarchy where it held a special status, regulated by the Croatian-Hungarian Settlement. This status guaranteed its autonomy regarding the internal administration, education, religion and justice, in charge of the Croatian parliament and the State Government headed by a Banus. After the regulation of the state issues, Croatia finally embarked on a serious quest to resolve other extremely important issues, with the issue of the communal households standing out, or the issue of keeping or removing the communal households from Croatian legal order.

3. Croatian Communal Household Legislation

Legally unregulated position of the communal household in the period after 1848, and particularly after 1853 and the implementation of the GCC proved a source of numerous problems. Long-term deferment of the regulation of the position of the communal household in the circumstances of a changed social, economic and legal frame brought to the situation where the households started dividing secretly through the agreement of the members of a household, but without participation of a state body. In this way, without any sort of legal or social control, a large number of dwarf estates started forming, which were to prove economically inadequate to generate any kind of economic prosperity in the years to come.[22] One of the reasons for a protracted resolution of the position of the communal households certainly lay in the fact that those who were in charge of dealing with this issue could not reach a consensus on what to do about the household. Eventually, three positions had formed after all on the fate of the communal household. One group was in favour of preservation of the communal household and its special legal regulation, others supported their gradual removal from the legal system, whereas the third option favoured immediate abolition of the households.[23]

When legal regulation of the households finally commenced in Croatia, the idea of a liberal agricultural policy was adopted. This policy, among other, advocated exemption of a tenement or a peasant from feudal tribute, individual ownership and freedom of land exploitation for personal economic needs, or the regulation of land matters according to the provisions of the private law according to which the land was a matter of a legal transaction.[24] The legislative work of the Croatian Diet and the passing of two acts on communal households in 1870[25] and in 1874[26] were based on these positions. These acts were directed against the survival of the communal household as an institute which, as a relic of the past, had to be removed from the legal system and thus allow a speedier economic development. It was only the adoption of the last act on the communal household in 1889[27] that represented a deviation from the policy of a complete abolition of communal households. This act was passed after it had become obvious in everyday life how, due to a simplified process of division of the households by former laws, intensive demise of Croatian peasants began. In order to reduce the impoverishment of peasants, that is peasant migration from the land (this was a time of intensive internal and external migrations)[28] and preserve the peasant population from economic decline, it was possible not only to keep the existing communal households, but to establish new ones after the division of the old ones.

However, not everyone was seeking the culprit for the peasants' demise in liberal communal household legislation.

[21] Prior to the implementation of the GCC, various rules of succesion existed within the Croatian-Slavonian territory regarding the type of property inherited. Also, different rules of succesion existed for the individuals of different estates of realm. Such state of affairs was the consequence of the estate differentiation existing in the society, of the differentiation of the object of succession regarding the means of its acquisition, as well as the distribution of such assets according to a range of various criteria. It was relevent for the process of succession whether the property inherited was hereditary property (*bona hereditaria*) or acquired property (*bona acquisita*); whether it was immovable, or movable property, and finally, whether the nobility, citizens or tenant peasants were concerned. The rules of succesion for the nobility and the tenant peasants were mostly comprised in the Tripartitum, while the rules of succession for the citizens were regulated by royal charters granted to the royal free cities of Kingdom of Croatia and Slavonia.

[22] According to 1895 records, 44.23% of the tenements on the territory of Croatia and Slavonia had less than 5 ha of land (cca. 3 acres) while forty years later this percentage was as high as 75.9%. More on the structure of land estates in Croatia see: ŠIMONČIĆ-BOBETKO, Zdenka. *Mijena struktura podiobe zemljišnih gospodarstava u Hrvatskoj 1895–1931,* in: Povijesni prilozi 12, 1993, p. 229–279.

[23] PAVLIČEVIĆ, 1989a, p. 213.

[24] KRIŠKOVIĆ, Vinko. *Hrvatsko pravo kućnih zadruga,* Zagreb, 1925, p. 28.

[25] Act IV: 1870 on communal household (Zakon ob uredjenju zadrugah), in: Sbornik zakonah i naredabah valjanih za kraljevine Hrvatsku i Slavoniju (hereafter cited as Sbornik), Year 1870,part XVI, no. 50, p. 295–307.

[26] Act of 3 March 1874 on communal household (Zakon o zadrugah), in: Sbornik, Year 1874,part IX, no. 18, p. 161–168.

[27] Act of 9 May 1889. (Zakon o zadrugah) in: Sbornik, Year 1889, part VIII, no. 32, p. 365–382.

[28] Analyzingthe state of the communal household at the end of the 19th and the beginning of the 20th century in certain Croatian counties, Pavličević concludes how in some of them, the number of passport issued and the number of households dissolved in certain years was almost identical. PAVLIČEVIĆ, Dragutin. *Kućne zadruge ili struktura tradicijskog življenja,* in: Naše teme, Year XXIX, 1985, no. 4, p. 395.

R. Bićanić, for example, thought that "the acts on division were only an expression of the actual economic processes and did not have the crucial meaning attributed to them. Therefore, against the legalist theory of the division of the communal household we pose the economic, or the crisis theory... the legal acts were not the cause of the division of the households. They had been passed at the same time for the entire legal territory of Croatia and Slavonia since the demilitarization of the Military Border. And their effect was different in individual areas... It is naive to think that a different style of the legal paragraphs could have prevented the division of the households at the time of the agricultural crisis."[29] Apart from Bićanić, similar opinion was held by V. Vernić who thought that "...the dissolution of the communal households yesterday was not caused by the Roman law, liberal legislation etc., but by the cause of this legislation: the advent of capitalism, and subjecting of the farming economy to it... through the market, loans, taxes, through banks and credit unions, scissors between the prices of industrial and agricultural products, etc, etc."[30] It is true that the course of disintegration of the communal households was not uniform in all the parts of Croatia and that it depended to a large extent on the ability of a single household and its members to adjust to the new economic circumstances. Agricultural crises which gripped Europe in the 19th century presented another aggravating circumstance in the process of adjustment, with impact on the Croatian territory as well. Particularly significant was the crisis which began in 1873 and lasted until around 1895, right at the time when intensive activities were underway on the legal regulation of the communal households. Apart from great efforts required for the general improvement of Croatian economy in the sense of strengthening of commerce and industry, it was equally necessary to overhaul the entire agricultural sector and transform it from autarchic agricultural production to market oriented production. It was no easy task even for the peasant estates not organized as communal households. The situation on the land only started improving after 1895, due to a rise in agricultural protectionism of the Austria-Hungary, better prices of agricultural products and the end of the agricultural crisis. However, World War I and unfavourable post-war circumstances accompanied by famine, and the new economic crisis of the 1930s posed a new blow to the communal households. Even the most fervent supporters of their preservation became aware that the process of division of the households and their slow elimination could not be stopped. Notwithstanding all this, the 1889 Act stayed in force until after World War II, when the legal status of Croatia within (the former) Yugoslavia was changed, i.e. included in the legal system of the socialist states. The process of extinction of the communal households, which started in the mid-19th century, lasted as long as the second half of the 20th century, when communal households were removed from the Croatian legal system by the decision of the Croatian Supreme Court in 1956.[31] Despite this, and regardless of the attempts of the communist authorities to nationalize the land above a specified maximum [size] during the implementation of the agricultural reform, nevertheless, in some areas communal households persisted, or rather, the people carried on living the household lifestyle until the 1980s.[32]

Let us point out at the closing of this overview how the regulation of the legal position of the communal household intertwined with the efforts to regulate the position of the entire peasant population. Particularly considering inheritance, regardless whether a peasant estate was concerned, where a household family, or an isolated nuclear family lived. Difficulties in reaching this goal were partially a consequence of some nuclear families, as the reports from that time suggest, also lived according to the principles of the communal household.[33] It is, therefore, likely that they also had difficulties in adjusting to the hereditary, as well as the family and property right principles of the GCC. This was precisely the reason why the idea of the extension of the implementation of the GCC to include the entire peasant population collapsed. However, the attempt at a unique regulation of the position of the peasant population contrary to the GCC provisions did not succeed either, although the GCC itself provided that particular option (§761).[34] Croatian peasants continued living by a dual system, subject to the GCC based on the private law, and the communal household based legislation.

4. The Notion and the Legal Nature of the Croatian Communal Household

In the course of legal regulation of the communal household, the issue arose of the definition of the notion of the communal household and its legal nature. Difficulties came already with the first, and as it would later transpire, the only attempt to legally define the communal household. According to the Act of 1870, the communal household comprised more families or individuals living in communal households presided over by the household leader and with undivided immovable property used

[29] BIČANIĆ, Rudolf. *Agrarna kriza u Hrvatskoj 1873–1895,* Zagreb, 1937, p. 27–29.

[30] VERNIĆ, Vuk. *Zaštita seljačkog posjeda,* in: Mjesečnik, 1939, no.3, p. 128.

[31] Supreme Court decision of the People's Republic of Croatia of 18 December 1956, see in: Milan PAVIĆ, Đuro. *Komentar Zakona o nasljeđivanju (sa sudskom praksom),* Zagreb, 1964, p. 535–539.

[32] PAVLIČEVIĆ, Dragutin. *Hrvatske kućne/obiteljske zadruge II (nakon 1881),* Zagreb, 2010, p. 252–258.

[33] GALJER, Josip. *Osvr tna hrvatsku seosku obitelj,* in: Mjesečnik, 1885, p. 290–294.

[34] Prior to the implementation of the GCC, the hereditary systems of the western parts of the Monarchy were mostly characterized by impartible inheritance based on which a peasant's estate would be left to one heir, the male one as a rule-the oldest, or the youngest son. As article 761. of the GCC allowed the option for the peasant population to regulate the hereditary rules differently from those stipulated in the GCC, in the Austrian part of the Monarchy the existing rules did not alter until as late as 1868. Then, by the Act of 27 June, equality of inheritance was introduced regardless of the gender (in accordance with the GCC). However, the procedure customary by that time for the inheritance could not be easily removed, or ignored. In 1889 it was made possible for the countries represented in the Imperial Committee to independently regulate the issue of inheritance for medium size farms, which some of them had done. STUBENRAUCH, Moriz von. *Commentar zum österreichischen Allgemeinen bürgerlichen Gesetzbuche*, Wien, 8th ed., 1902, p. 929.

jointly (§1). No subsequent law attempted to define this term.[35] Nevertheless, the later acts comprised the basic characteristics of the communal household life, after all, which distinguished this type of lifestyle differed from others, and which were recorded in this first and the only legal definition of the communal household. Thus the following was common for a communal household: a) a community of several persons (predominantly) family related or (less) not family related,[36] b) (their) union of life and work, c) communal property (communal ownership of the household property) although individually owned property also existed, d) the authority of the household leader – who would manage the household and oversee the work in the household, as well as represent the household against third party. The powers of the household leader were mainly economic and are not to be compared to the rights the *pater familias* or the patriarch had had, although communal households prevailed in the areas for which it could be said had been typically patriarchal.[37] It can therefore be said that the communal household was comprised of members, both related and non- related, which had constituted the living and production union based on solidarity and the collective spirit. Movable and immovable property was under joint ownership of the household members. Besides, each household member was entitled to individually owned property called *osebunjak* or *osebina.* Freedom of disposal of joint property did not exist, unlike individually owned property which could be included in legal transactions. The household had a legal entitlement to obtain immovable and movable property, which served as acknowledgment of its legal capacity.

Numerous prominent Croatian legal experts have discussed the legal nature of the communal household. Franjo Josip Spevec in his thoughts on the household started from the viewpoint that in order to explain the legal nature of the household it was not necessary to construct an „artificial subject", opposing in that manner the understanding of the communal household as a legal person. In his opinion, the household, comprised of several household members with equal rights and obligations indeed manifested outwardly as one subject, but a subject which does not differ from its component parts.[38]

Unlike Spevec, Ivan Strohal saw the household as a legal person, as the actual household was considered the owner of the peasant property or the communal household property, and not the father of the family as an individual owner, or all the members of the family as co-owners. Namely, by revoking the authority to some members of the household to freely dispose of the household property, or their share of the said property, as well as single items of the property, this household had gained "a certain property law character and had outwardly started projecting an individual personality and as a special bearer of rights and obligations, i.e. it had started presenting itself as a separate legal person...".[39] Strohal, therefore, thought that the household was a legal person separate from individual members, and this separation and the existence of a separate legal person was necessary, because without that all the constituents of the communal household would not be known.

Vinko Krišković saw the communal household as an indigenous historical institute which had developed on the principles of domestic law, accepting that a special pecuniary union, the *communio,* existed among the household members. In the pecuniary relations of the household members he saw co-owner relations, granted, with significant modifications, such as non-existence of shares in co-ownership. Krišković, therefore, terms the communal household a "collective co-ownership" where each member has nominal entitlement to the entire household property, but the said property belongs as a whole to all the household members combined. Finally, Krišković considers the communal household a type of community comprised of "a multitude of individual persons, which combined constitute a subject with equal rights and obligations. On the outside it possesses singularity, and plurality inside."[40]

Ivo Krbek considered a communal household a separate legal person under Croatian law, to which the terms from the Roman law *societas* and *universitas* could not be applied. Namely, members of the household could not (until division) freely dispose of their household share, but on the other hand, in strictly specified cases, they could all together dispose of the household property. He thought that in legal relations which occurred within the communal household its legal construction as a legal person was necessary considering the existence of this duality: the household and single members as holders of the entitlement. Therefore, Krbek considers the household close to the German legal notion of *Genossenschaft*, theoretically developed by Gierke, according to which the main trait of this institute is that the legal person is a community and its many members at the same time. In accordance with this, the ownership over property is also joint, and belongs to the community, as well as individuals at the same time. Apart from that, Krbek recognizes another duality within the household, and that is the household as a pecuniary and concurrently a family union.[41]

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[35] An explanation of the communal household was however comprised in the orders for the implementation of the law from 1874 and 1889, passed by the Croatian-Slavonian-Dalmatian government. See: *Decree of Implementation* (Naredba bana kraljevine Hrvatske, Slavonije i Dalmacije kojom je izdan naputak za provedbu zakona od 3. ožujka 1874. o zadrugah), *in:* Sbornik, Year 1874,part XI, no. 21, p. 199–21, and *Decree of Implementation* (Naredba bana kraljevine Hrvatske, Slavonije i Dalmacije kojom se izdaje provedbeni naputak k zakonu od 9. svibnja 1889. o zadrugah), in: Sbornik, Year 1889, part XV, no.72, p. 620–638.

[36] Non-family communal households were the product of the merging of two or more households (or nuclear families) by free will, or forced. Forced non-family merging was common on the territory of the Military Border, and was conducted in order to create as large a number as possible of men available for military service. GAVAZZI, 1978, p. 83.

[37] A woman could be a household leader. Thus articles 6 of the Act of 1870, article 5 of the Acr of 1874 and article 8 of the Act of 1889 stipulate that in the household without a male member capable of becoming the household leader a capable woman can be elected the household leader.

[38] SPEVEC, Franjo Josip. *O juridičkoj naravi zadruge,* in: Mjesečnik, 1884, no. 1, p. 6–7s.

[39] STROHAL, Ivan. *Razvitak zadružnog prava u Hrvatskoj i Slavoniji,* Zagreb, 1907, p. 1–2.

[40] KRIŠKOVIĆ, 1925, p. 64–65.

[41] KRBEK, Ivo. *Pravna konstrukcija hrvatske kućne zadruge,* in: Arhiv za pravne i društvene nauke, vol. XXXVI (LIII) Beograd, 1938, no. 1–2, p. 5–6.

The majority of discussions, as is evident from the previously presented ones, a certain legal personality of the communal household was recognized. However, non-recognition of the communal household as a "pure legal person" is evident in the communal household legislation which does not record this term anywhere,[42] but indirectly such viewpoint stems from individual provisions of the household acts, particularly those based on which the households were entitled to obtain movable and immovable property.

5. Property of the Croatian Communal Household

One of the basic, if not the most significant traits of the communal household was the existence of the typical household property, that is the property jointly owned by all the members of the household. The household property comprised movable and immovable property, and the entitlements whose use and disposition was regulated by the communal household legislation. It was the existence of the communal household property that was the key reason for the introduction of the communal household laws, since the GCC in its system of property rights did not recognize the institute of joint ownership. The encounter of individual ownership comprised in the GCC with the joint (communal household) ownership from customary law proved an encounter of two different legal traditions leading to the existence of pluralism in Croatian private law: the GCC legal order based on individual ownership and the communal household order based on household ownership.[43]

The Act of 1870 defined the entire movable and immovable property, as well as the households's entitlements as "the union of all its members" which had been entered into land register in the name of the communal household and "in all matters to be considered as one entity" (§4). The right to obtain immovable and movable property, as well as the entitlement to disposal thereof belonged to the communal household, in accordance with the communal household law (§5). Since within the communal household there was also individual ownership, the right to obtain movable and immovable property was also granted to individual members of the household. This property was called *osebunjak* or *osebina* and individuals were entitled to dispose of such property according to the provisions of the GCC (§19). The Act of 1874 also allowed the communal household to obtain movable and immovable property (§4) whereby for the existence of the communal households against third parties immovable property had to be entered into the land register as communal household immovable property (§3). Subject to the order from the leader of the household, each member of the communal household was obliged to work for the benefit of the household. But, subject to permission from the leader, they were allowed to work for themselves, whereby everything they would gain or earn in this way was considered individual property of the household member which they were allowed to dispose of freely (§11). In the same manner the household property, as well as the property of individual household members was regulated by the Act of 1889 (§§3, 4, 20, 21).

6. Entitlement to the Property of a Communal Household

For the duration of the existence of a communal household, members of the household could exercise their entitlement to the property through division of the household, or through inheritance. A special way, that is to say a way of exercising the right to household property specific for the female descendants was by way of trousseau or dowry. Obtaining the entitlement to the communal household property was linked to the membership in the household whereby any (male and) female person could be a member of a communal household, provided they met certain, legally prescribed requirements.

According to the Act of 1870, a woman was member of a household if: a) she had been born into the household, or b) had married into a household, or if she had been accepted into the household: c) via special contract, d) subject to permission of the former landlord, or e) with the unspoken consent of the household in the manner that she would live and work in the household, and was not hired as a servant, for ten years, without objection from the household. Where a female child was concerned, adopted into the household for bringing up, the ten year term started running only after the female child had turned sixteen (§2). Provided these requirements had been met, it was further necessary that in the meantime the person didn't lose their membership in the household for any reason, or that they hadn't been dismissed from the household, or that they hadn't left the household of their own will. According to the Act of 1874, a woman was member of the communal household if: on 1 April 1848[44] she was a co-tenant on a household land, b) if she had been born into the household after 1 April 1848 to parents household members, or c) she had married into the household, or d) if she had been accepted into the household via special contract. According to the Act of 1889, a woman was a member of the household if: a) she held the status of a co-tenant on a household land on 1 April 1848 (the Kingdom of Croatia and Slavonia), or 7 May 1850[45] (former Military Border), b) if, after the above stated dates, was born into a household to parents-members of the household in a valid marriage, or c) she had married into the household, or d) if she had been accepted into the household via special contract. The position of a female member of a communal household based on birth into the household was subject to birth out of a valid marriage

[42] An exception was the 1879 law introducing to the territory of the Military Border a temporary cadaster order from 1855, with subsequent changes and ammendments, which specifically stated that the ownership of the communal household was entered into the land register as the ownership which belongs to a legal person "*juristi*č*noj osobi (družbi)*" (§ 1, art. VII., C). Act of 28 April 1879 (Zakon od 28. Travnja 1879. Valjan za hrvatsko-slavonsku vojnu krajinu) in: List zemaljske uprave za hrvatsko-slavonsku vojnu Krajinu od 18. svibnja 1879., Year VIII, no. V, p. 3.

[43] ČEPULO, Dalibor. *Tradicija i modernizacija: "Iritantnost" Općeg građanskog zakonika u hrvatskom pravnom sustavu,* in: Liber amicorum Nikola Gavella, Zagreb, 2008, p. 41.

[44] 1 April 1848 was the day when serfdom was abolished in the Habsburg Monarchy via the imperial order.

[45] 7 May 1850 was the day when the Basic Act on the Military Border Area (Temeljni krajiški zakon) was passed, abolishing the military vassal relations.

of her parents, both of whom had to be members of the household. This means that the child with only one parent-member of the household was not granted the status of a member of the household.[46] The validity of marriage was judged subject to the GCC provisions.[47] Furthermore, according to the GCC provisions, the communal household legislation allowed illegitimate children to obtain the status of household members based on the institute of legitimation. As the membership in a household was subject to birth to member parents, legitimation was possible only as legitimation *ex lege* (§160) or *legitimatio per subsequens matrimonium* (§161). If the child had retained the status of an illegitimate child, it could not gain the status of a member of a household (at least not based on birth into the household), but the household of the child's mother was obliged to care for the child, i.e. be in charge of its upkeep if a person obliged by the GCC to do so, i.e. the father, was prevented from doing so.

Of these, above mentioned female members of a communal household, only daughters suit our topic, meaning the female members of a communal household born into the household to parents members of the household.

6.1 Division of the Household

Division of the household was one of the ways to obtain entitlement to a share of the household property. In the feudal period division of a household was not frequent, as a rule due to reasons of economy, as the duties due to the landowners by the household members (as serfs) would be harder to fulfill. Besides, the division was subject to the landowner's permission which he, again for reasons of economy was reluctant to grant. Still, if and when division would occur, a share in the household was determined *per capita.* Such manner of division, among other things, pointed to the notion of the household as an economic unit, which could be linked through relations, but it could also be a non-relation union. When, during the regulation of the position of the peasant population of the Hungarian-Croatian kingdom, the Hungarian-Croatian Diet passed the Act VIII.:1840, it had comprised the principle of division of serf land, therefore, of a communal household serf land *per linea.* With such division the family relations within the household were emphasized, not the economic unity of all its members. Although this Act was not in force in Croatia, its passing had a significant influence in the period after 1848. Namely, due to a lack of legal regulation during the division of households the *per linea* principle was applied comprised in the said Act. Such manner of division was viewed as an unscrupulous violation of customs, as it had been considered unfounded and incompatible with the institute of the communal household.[48]

Until the introduction of the communal household laws a conflict existed between the advocates of the division *per capita* and *per linea* respectively. This conflict continued even after the passing of the law. Namely, all three communal household acts endorsed the division of the household immovable property *per linea*, but at the same time the endorsed manner of division was considered their largest drawback. What had been the problem? The communal household, if its internal organization is observed, was an example of a complex form of a household where more nuclear families (parents and children) could live ordered vertically or horizontally.[49] When a communal household family was observed within the GCC framework, under the term family greatparents were considered with all their descendants (§40) while one nuclear family as its constituent part corresponded to the concept of line according to the GCC (§41). In accordance with such understanding of the image of a complex communal household family, communal household property was to be divided among individual nuclear families i.e. *per linea.* The basis for such division was the family relationship, or the transfer of rights and obligations from ancestor to descendant, i.e. intestate succession. Division according to the *per linea* principle equalled the right to request the division of the household, and the right to household property. Granting an active right of division to the representatives of a line, it had transpired that only they were entitled to household property, while all the other members of that line derived their entitlement to the household property from the entitlement of a representative of the line. This actually meant that to exercise the rights from the household the representation in the household had become the merit, not the membership as before. How many problems, as well as illogical circumstances in the course of the division of a household was brought by the implementation of the *per linea* principle is evidenced in the case of a Bedeković household from the village of Mićevac near Zagreb. This household comprised two lines. One line consisted of the representative, also the household leader, and his wife. Other line was comprised of five families numbering 36 members. In case of a division of a household, the first line (the household leader and his wife) would gain ″ of the household immovable property, and the second line (36 individuals) the second half of the immovable property. Although this particular household did not seek division, its example illustrates why there were objections to the division *per linea*. A potential division could provide a substantial pecuniary advantage for one line, although it was questionable how much that line had actually contributed to the household fortune.[50] The extent of the dilemma over the acceptability of the *per capita* or *per linea* principles is evidenced in the decisions of the Table of Seven, the supreme court of Croatia, as an example of inconsistency on the highest judicial instance. The Table of Seven concluded, on the occasion of the discussion of the change of the Act of 1870, that in the mat-

[46] TONČIĆ, Dragutin. *Vrhovne upravne i sudske rješidbe k Zakonu od 9.V.1889 o zadrugama i zadružnoj noveli od 30. IV. 1902,* Zagreb, 1925, decision no. 7, p. 15.

[47] For the validity of marriage a permission of the household leader was required, and without his permission no household member was allowed to marry, and in-marrying with a female household member was not permitted. KRIŠKOVIĆ, 1925, p. 115.

[48] PAVLIČEVIĆ, 1989a, p. 189, 280.

[49] It should be noted that the household eventually lost the markings of a complex household. While in the times past the households were so large that their members could inter-marry due to the distance in relations, according to the records from 1910, of the still existing 112 065 households, 33 280 had a complex structure, while 77 234 were comprised of only one family. TONČIĆ, 1925, p. 242.

[50] TONČIĆ, 1925, p. 254–255.

ters of judging the authority of individual household members over household property, and considering general inheritance law principles comprised in the Act of 1840 and the GCC, it was just that the household property should be divided *per linea.* However, there is also a decision of the same court in which it is stated that "the only manner of division, appropriate for the nature of the communal household, and the core of the traditional customs, was that the household should be divided by heads" i.e. *per capita.*[51]

This system of division of communal households also reflected on the rights obtained by daughters during the division.

6.1.1 The right of a daughter to request household division and the entitlement to associated share in the course of the division

According to the Act of 1870, a communal household division had to be carried out as soon as one of the household members requested it. It was strictly prescribed who had been entitled to request the division, so, when it came to daughters, they had been entitled to it if their parents (i.e. father) had died, and they were of age. Daughters were considered of age at the age of 24, or they were considered of age, even if under 24, if they had been married. Therefore it transpires that the married daughters could request division (of their native) household, although they were married outside the household, and that was because the membership in the native household was not lost upon marriage. An exception existed for the daughters married prior to 1 April 1848. They were not entitled to request the division of the household and thus obtain any entitlement to the household property, except if "that right was kept for them by their parents staying in the household". Daughters who married after 1 April 1848, but before the enforcement of this law, could request the division of the household and the entitlement to a share of the household property only if their father had died (§45). During the division, regardless whether requested by married or unmarried daughters (or some other household member) a difference existed regarding the manner of division, depending on whether movable, or immovable property of the household was concerned. Movable property of the household was divided *per capita* among all the male and female members of the household who had turned 16 years of age. The law specifically states food, livestock feed, drink, pigs, cows, calves, foals and poultry as movable property of the household. Immovable property of a household was divided *per linea* based on the family relations and the GCC principles. Thus, a daughter, could be the representative of her line, but only provided her parents had not been alive, and obtain the entitlement to the household immovable property. In the course of the division, for the married daughters, everything they had received from their household as dowry upon marriage was deducted from their share (§32).

According to the Act of 1874 division of the household could be requested by an unmarried daughter of age whose parent had died, or ceased to be a member of the household (§ 12). This meant that, compared to the Act of 1870, a married daughter lost the entitlement to request the division of a household. The new act stipulated that by marrying outside the household membership in the household was lost, and with it the entitlement to participate in the division of the household property (§27).[52] In the course of the division, regardless of the requesting household member, immovable property was divided among members of the household *per linea*, among the lines whose representatives were alive on 1 January 1837,[53] unless otherwise agreed by the household members (§13). Divided immovable property became individual property of the representative of the line, in accordance with the GCC provisions (§15). Movable property was divided *per capita* among all the members of the household of over 16 years of age, while the household members under 16 were entitled to ″ of the share received by the members over 16 years of age (§16). Comparing the basic rules of the division of the household property, as a rule, daughters exercised the same rights as their brothers, i.e. the sons of the household members. Diversity of their legally granted entitlement to property comes from the fact that to daughters, regardless of their will, the relevant share of the movable property could be paid not only in kind, as to other household members, but also in cash (§14). Cash payment was subject to discretion of the household, but only after a survey of the household property had been executed by two surveyors, whereby one was appointed by the communal household, and the other by the daughter.

According to the Act of 1889, the division of the communal household could also be requested by an unmarried daughter of age, whose parent had died, or ceased to be a member of the household (§ 29). A daughter married outside the household would lose her membership in a household upon marriage, and thus the entitlement to request the division (§ 50). However, it was possible that these daughters should regain the membership in the household, and thus the entitlement to the household property. As it transpires from one administrative act, if a daughter who had married outside the household returned to the native household e.g. following a divorce and lived and worked in the household, and there were no objections to her return, tacitly she would regain membership in the household and even the entitlement to the household property.[54] This law was the first communal household law applied on the territory of the Kingdom of

[51] STROHAL, 1907, p. 81.

[52] Unlike with the communal household legislation, according to the GCC, there was no distinction between unmarried and married women, and a woman's marital status did not influence her legal position, that is, it did not result in the limitation of her contractual capacity.

[53] According to the Act IV:1836, serfs obtained the entitlement to a serf land which they could dispose of *inter vivos* and *mortis causa.* That right could only be obtained by the serfs who were alive at the time of the enforcement of this act, and not those who died prior to 1836. It was therefore decided that for the creation of a genealogy of a family 1 January 1837 was meritorious as the date when the creation of individual families started. SMREKAR, Milan. *Zakon o zadrugah od 9. svibnja 1889. sa zadružnom novelom of 30.travnja 1902., te sa provedbenim i svima ostalima na nj odnosećima se naredbama i propisima*, Zagreb, 1903, p. 33.

[54] TONČIĆ, 1925, p. 11.

Croatia and Slavonia, including the territory of the former Military Border.[55] Considering the difference between the solutions contained in the regulations formerly in force on these territories, this diversity was further retained. Thus the Act of 1889 regulated the division of the household property differently on the territory of the Kingdom of Croatia and Slavonia (the so called civilian Croatia) and the area of the former Military Border. In the former civilian area the household property was divided *per linea*, more specifically, the lines whose representatives were alive on 1 January 1837, unless otherwise agreed. If a woman had been the representative of a line, but had married into her native household, she would lose all the entitlement to immovable property that she had possessed as the representative of the line (§30). But, she would obtain all the entitlement of a representative of a line, even though she had a father or a brother who were alive, if her husband came to live with her.[56] At the same time, in the former Military Border area the immovable property was divided *per capita* among the male and female members of the household who were of age (§32). On both territories the movable property of the household was divided *per capita,* i.e. among all the members of the household in equal parts, whereby ˝ of the share of movable property that was received by the household members over 16 would be received by the members under 16 (§33). This act also stipulated that the communal household was entitled to pay to its female member a relevant share in money, not in kind, based on the estimate, and regardless of the will of the female member of the household (§34).

Many had seen the right of a daughter to request the division of a household, and to participate in the division of household property as the reason for the demise of the communal households. Therefore, this right was quoted in favour of the so called woman's theory on the disintegration of the households. Based on this theory women (wives, daughters, daughters in law) with their (argumentative) nature would cause discord among the male members of the household (fathers, brothers, husbands) and cause its disintegration. This theory was successfully rebutted after all and characterized as naive and superficial.[57]

6.2 Inheritance within the Communal Household

By its legal status, the property of a communal household was under joint ownership of the communal household, that is all its members. Furthermore, individual shares of the household members were not determined, although they were determinable, which meant that, considering the household property, there was no inheritance in the communal household.[58] However, there were two occasions for inheritance within a household. During the existence of a household, independent of the household property, if single members of the household had *osebunjak*, property in their individual ownership, which was, therefore, distinct from the household property. Or, upon the division of a household, when individual shares of the household members were determined, i.e. individualized.

In the feudal period, the absence of inheritance within a communal household, but also within the families not living in a household can be seen in the efforts to shape the serf land into allotments of the same size, and thus of a similar economic strength. Consequently, a permanent and unchangeable size of a serf land was established by the Croatian (1780) and Slavonian (1756) Terriers of Maria Theresa, aimed at the prevention of its division below a certain minimum.[59] The Act IV of the Hungarian Diet from 1836 also underlines the difficulties with potential inheritance and particularly already quoted the Act VIII of 1840.[60] These regulations showed how the principles of inheritance law comprised therein, such as the equality of the descendants in inheritance regardless of the gender and the division of property *per linea,* not *per capita,* were not applicable to serf families living in households. Therefore, the provisions of these legal acts were not enforced on the territory of Croatia. Following the abolition of feudalism and the implementation of the GCC, which, as has been previously stated, did not provide for joint ownership with undetermined individual shares of the household members, the communal household found itself in the state of legal deregulation. Notwithstanding, within a very short period of time an avalanche of probate hearings ensued following the decease of individual members of the household, in accordance with the principles of inheritance stipulated in the Act of 1840, and subsequently also in the GCC.Thus, with inheritance the communal households were actually being divided, and regardless of the will of their members too, according to unclear rules on whether in such cases the property should be divided *per capita* or *per linea.* The intertwining of the inadequately clear rules of division of the households with inheritance can be seen in the case of the Golub household from Brest, near Petrinja. Zagreb County issued in 1860 a permit for division of a household to two brothers, who, due to a dispute within the household, left the household and took up residence with a married daughter of one

[55] At the time of the accession of the Military Border to the Kingdom of Croatia and Slavonia, the Border area communal households were regulated by the Basic Act on the MilitaryBorder Area of 7 May 1850, with changes and amendments in 1871 and 1876, as well as the Act of 14 April 1880 on communal household in Military Border (Zakon o zadrugah u hrvatsko-slavonskoj krajini). The content of these regulations see in: VEŽIĆ, Milivoj. *Pomoćnik za javnu upravu – sbirka najvažnijih zakona i naredabah,* Zagreb, 1884, p. 724–736, 746–763.

[56] TONČIĆ, 1925, Decision no. 7, p. 41.

[57] BIĆANIĆ, 1937, p. 25.

[58] How significant the non-existence of inheritance within a communal household was is evident in the fact that during the reconstruction of the development of the communal households in the Military Border area Karl Kaser, lacking written sources, used what he called two auxilliary aides. One was the average size of the family, while the second aide were the rules of inheritance. Thus Kaser states how in a household there could be no inheritance from father to son, but the land would always remain in the joint ownership of all (male) members of the family. He also poses the question whether in the areas of the Military Border where regulations applied which had stipulated individual order of inheritance communal household existed at all. Or, he thinks that in the areas where along with the provisions on individual order of inheritance also found were provisions on communal land estate, individual families and communal households existed simultaneously. KASER, Karl. *Slobodan seljak i vojnik – povojačeno društvo (1754–1881) II,* Zagreb, 1997, p. 133.

[59] STROHAL, 1907, p. 17, 30; Text of the Croatian and Slavonian Terriers see in: VEŽIĆ, Milivoj *Urbar hrvatsko-slavonski,* Zagreb, 1882.

[60] VEŽIĆ, 1882, p.

of them. Appeal of the household (or the remaining members) was accepted by the Locumtenential Council and had highlighted in its grounds how the proposal for the division was overruled, among other reasons, also because no law existed regulating the inheritance of a peasant's property, and the Act of 1840 did not apply. According to the Council, a problem existed because the plaintiffs had no male heirs, only daughters who, according to the customary law, were not entitled to the household immovable property. Although subsequently the division of the household was granted, still, it is of importance to note the linking of the entitlement to division with rules of inheritance and the discrepancy and inconsistency in the proceedings of the administrative body due to a lack of legislation regarding this issue.[61]

Previously mentioned frequent probate hearings after the decease of a member of a household finally ended in 1857, when the Austrian minister of justice Krauss banned Croatian courts from conducting probate hearings regarding communal household property, except with the consent of all the household members.[62] The impossibility to apply the succession law principles of the GCC to communal households certainly contributed to the necessity of their regulation through application of special legislation. However, even here indecisiveness was exhibited regarding the issue of what to do about inheritance within the household. Thus, the solutions endorsed by the legal acts introduced were a reflection of the current view of the household and their position within the Croatian legal system which was being intensely built around the GCC.

The first communal household act passed by the Croatian Diet in 1870 was also the only act which comprised the rules of inheritance of the household property. Its basis on a liberal stand on the household as an obsolete institute whose removal from the legal system should be facilitated and sped up resulted in the adoption in the Act of the solutions close to the GCC concept and in some elements significantly opposed to the notion of the communal household. This polarity is evident in the actual acceptance of the possibility of inheritance within a household. In three very brief articles the Act stipulates how each member of the household is authorized to dispose of their share of the household property by will or inheritance contract (§20) and how in the household (upon decease of a member) probate hearings were not permitted (§21). In case the last living member had not disposed of their property, the application of the provisions of the GCC was prescribed. (§22).

Such concise and inadequately clearly regulated process of inheritance within a communal household caused in practice numerous dilemmas and posed numerous questions, such as can the GCC provisions on inheritance be applied subsidiary in cases where the Act does not specifically require their application? Furthermore, the Act permitted disposition by will and disposition by contract of inheritance, while intestate inheritance and right to a compulsory portion were not mentioned. Since the testamentary heir and contractual heir were authorized to request the division of a communal household (§27) it transpires that a household member could dispose *mortis causa* of their share before the division, not knowing exactly what and how much of the household property belonged to them. Besides, according to the provisions of §20, a household member was turned into a co-owner of the household property allowed to dispose of their share freely and transfer to their heirs, which was contrary to §4 of the same Act, stipulating that the property of a comunal household was the joint property of all its members. Furthermore, if the stipulations on the division are analyzed, it is evident that the entitlement to immovable property of the household was only granted to the household members -representatives of the family. Or, the immovable property was divided *per linea*, whereby the line (and a relevant family representative) were determined according to the GCC principles, taking into consideration the family relationships (§32). Considering who had been authorized to request the division and how, the asociated share was determined upon division, it is unclear whether all the household members were in fact authorized to dispose of *mortis causa*, in accordance with §20. Could someone who was not a family representative, or did not have the authority to request the division of a household dispose of *mortis causa* at all? At the same time the question arises what would happen to the property which the household member did not dispose of testamentary or through contract of inheritance? The law does not mention intestate succession anywhere, but did such manner of inheritance occur in such cases, and if it did, in which manner were the legal heirs determined? This question is important considering that according to a strict legal order probate hearings were not permitted. This ban also meant that it was not possible to check whether explicitly permitted disposition by will and disposition by contract of inheritance were valid at all. If intestate inheritance had occurred, presuming that the household members' descendants were presumed their legal heirs, a possibility existed that the entitlement to the household property could be granted to a non-member descendant. This possibility was more likely in cases of testamentary or contractual heir, since there had been no limitation regarding the person of the heir. This system of inheritance also meant that the testamentary and contractual heirs had had an advantage over descendants of the household members who would hold the status of forced heirs. Because of these legal imprecisions and dilemmas which had occurred in practice regarding the application of the entire Act, a change of statute was adopted as early as 1872.[63] This amendment banned disposition *mortis causa* of the undivided share of the communal property during the course of suspension of household divisions (§2).

The new Act of 1874 did not contain provisions on inheritance. This Act also bore no mention of a possibility of disposition by the household member of their share of the household property (compared to the act previously in force) which in practice again caused certain dilemmas. The consequence of that was the introduction of a supplementary Act of 1877 which specifically stipulated that in the course of existence of a household

[61] PAVLIČEVIĆ, 1989a, p. 186.

[62] GROSS, Mirjana. *Počeci moderne Hrvatske,* Zagreb, 1986, p. 213.

[63] Act of 6 October 1872 (Zakon o pravostaji za diobe zadružnih dobara na temelju zakonskog članka IV:1870), in: Sbornik, Year 1872, part VII, no. 36, p. 265–266.

community no member was entitled to dispose of *inter vivos* or *mortis causa* the share of the household property which he could be entitled to after division is conducted (§1).[64] This regulation entirely excludes the possibility of disposition by will of a household member, as well as signing of contracts of inheritance during the existence of a communal household, in the way it was regulated by the Act of 1870. The inability to dispose of household property *mortis causa*, or the inability to inherit within a communal household was retained in the Act of 1889.

Unlike the household property, the property under individual ownership of single household members could be inherited, whereby the GCC rules of inheritance applied. Upon decease of each individual a death certificate was issued in which property of the deceased had to be listed. If it should be established that the deceased had been a household member, and had no individual property, probate proceedings would not be initiated. However, if the deceased household member had had the so called *osebunjak* (individual property) probate proceeding would be initiated, conducted in accordance with the GCC provisions and Non-Contentious Proceedings Act.

Probate proceedings were conducted in all cases where division of a communal household had been conducted. Therefore, the cases should be pointed out here of intestate inheritance by married and unmarried daughter after decease of the father who had been (as a family representative during division *per linea*) registered as an individual owner of property. Considering that it had no longer been a case od household property, the communal household legislation did not apply, but the GCC provisions on inheritance. Daughters of former household members, married and unmarried, were entitled to intestate inheritance. Preserved probate records and reports from that time show how this had caused "a true disbelief" among the married daughters (not among those not yet married) as well as among their brothers who considered it unjust. The injustice stemmed from the fact that the married daughters had exercised their right to former household property upon marriage, and had consequently lost all further property rights upon leaving the household. Therefore it was considered that the change of the legal status of that property should not grant (new) rights to married daughters and subsequently include them in the system of inheritance. It ishould also be mentioned that upon marriage, daughters were granted entitlements exclusively to the household movable property, while immovable property was out of reach. And it was the former household immovable property that they could count on in the probate proceedings. However, this authority, as a rule, was not practiced since the married daughters would waive their share of inheritance for the benefit of their brother/s. Such conduct should not be surprising knowing that even in the cases where communal household property was not concerned there were difficulties regarding the inheritance of immovable property by female descendants.[65]

6.3 Entitlement to Trousseau/dowry

In the context of the analysis of women's entitlement to property of a communal household, the entitlement of a daughter to a dowry should not be omitted from mentioning. Dowry is a very old, legally regulated institute, however, doubts still exist regarding the definition of the dowry, the causes which led to its appearance, as well as its related functions. One of the frequently mentioned, and most widely spread functions of the dowry is dowry as the hereditary share of the daughter.[66] In cases where the dowry was provided by the parents and when the daughter had been excluded from any further property rights in her family upon the receipt of the dowry, it can certainly be viewed as a hereditary share.[67] In Croatian legal order which was being built after the introduction of the GCC, the dowry, according to the letter of the law, did not have the hereditary function. Daughters had a right to intestate inheritance equal to the inheritance rights of their brothers, whereby the dowry had been included into legal portion of inheritance/hotchpot (§788). In practice, however, very often the payment of dowry was used to avoid subsequent claims of the female descendants to the inheritance of their parents.[68]

In Croatian communal household legislation instead of the term dowry, the term trousseau was used, whereby both terms had been used as synonyms.[69] Trousseau was paid upon marriage, according to the customs of the bride's place of permanent residence.

The Act of 1870 does not explicitely stipulate trousseau, however, its existence and payment come from the provision which states that during the division of the communal household into the associated share of the married daughters all the items would be calculated that they had received from their household upon marriage (§ 32). According to the Act of 1874, trousseau belonged to the bride who had married outside her native communal household (§30), while the Act of 1889 does not specifically stipulate that this right is granted to a bride marrying outside the communal household, but refers to marriage of a bride in general (§54). However, I believe that non-distinction of the marriage outside and inside the household considering the trousseau, as in the previous act, is irrelevant. I think that it is about the households becoming ever smaller by

[64] Act of 8 December 1877 (Zakon kojim se dopunjuje zakon od 3. ožujka 1874. o zadrugah u pogledu razredjivanja sa zadružnim dielovi za vrieme nerazdieljenje zadružne zajednice) in: Sbornik, Year 1877, part XXXIII, no. 72, p. 806.

[65] KREŠIĆ, Mirela. *Intestate succession of female descendants according to the Austrian General Civil Code in the Croatian-Slavonian legal area 1853–1946,* in: The Annals of the faculty of Law in Belgrade – Belgrade Law Review, Year LVII, 2010, No. 3, p. 129.

[66] GOODY, Jack, *Introduction,* in: Goody, Jack, Thirsk, Joan, Thompson, E.P., Family and inheritance, Rural Society in Western Europe 1200–1800, Cambridge, 1976, p. 2.; It is interesting that the Croatian term "miraz" in the meaning 'dowry' is a Turkish word of Arab origin and comes from the Turkish word "miras" which means inheritance.

[67] For other functions of the dowry see STANIMIROVIĆ, Vojislav. *Brak i bračna davanja u istoriji,* Beograd, 2006, p. 296–301.

[68] KREŠIĆ, 2010, p. 131–133.

[69] According to the GCC, the terms dowry and trousseau were not synonyms. Thus, the trousseau of the bride (Aussteuer/Ausstattung/instructus muliebris) comprised female clothes, linens and furniture to which the husband held no title or the right of usufruct. RUŠNOV, Adolf, POSILOVIĆ, Stjepan. *Tumač občemu austrijskomu gradjanskom zakoniku, II,* Zagreb, [1910] p. 561, 570.; Comp. STUBENRAUCH, 1902, p. 517, 533.

the number of members so that the family relationships among the household members had become too close for a valid marriage, so marriage outside the household was the only option.

Trousseau had to be paid to the bride by the entire communal household, not individual members, specifically the parents, upon the wedding. Part of the bride's trousseau did not inlude the property considered by the daughter her own, individual property, obtained from personal work with permission from the household leader, not for the household. What would be included into trousseau can be seen from the records comprised in some of the preserved documents. Thus, for example, it was the duty of the communal household to provide a respectable wedding, according to the customs of the bride's place of residence, and provide for her as part of the trousseau one outfit, one box of linens and one cow. The content and value of the trousseau varied from area to area, however, eventually the trousseau became larger and larger. Instead of the principle of the customs of the bride´s place of residence, the trousseau became established according to the economic status of the household, which is where the influence of the GCC was evident. Althought the GCC does not mention the value of the dowry, or does not specify how the value of the dowry is determined, the term "appropriate dowry" is mentioned, which can be construed as the dowry fit for the class and property status of those obliged to provide it. This is also evident from the task of the court to nominally study the property status of the party obliged to provide the dowry in case of a dispute arising from the establishment of the amount of dowry, and based on that establish appropriate dowry, or relieve the parents from the dowry duty (§ 1218–1221).

If the household should refuse to pay for the trousseau, the maid was entitled to request the payment from the household through administrative bodies, but only prior to the wedding. However, if the household promised to provide trousseau, and subsequently failed to do so, the court would decide on pressing the charges against the household.[70] In any case, the content of the trousseau was comprised of movable property. Since the daughters, according to the Acts of 1874 and 1889, ceased to be members of a household upon marriage, the only way they could obtain the entitlement to the communal household property was through the institute of trousseau.

7. Conclusion

With the abolition of feudalism, at the outset of the building of a modern civil society in Croatia, the communal households found themselves in a dire position. Their customary law regulation was contrary to the legal system about to be built around the General Civil Code, therefore the issue of legal regulation of the communal household was raised. Full 22 years after the abolition of feudalism, the first act on communal households was adopted (1870), and then shortly afterwards two more acts (in 1874 and 1889). The key problems of the household legislation came from the disputes over the manner of division of the communal household (*per capita* or *per linea)* the issued of joint (household) ownership, (im)possibility to inherit household property and the so called female entitlement. The female entitlement concerned the entitlement of women, more precisely, the entitlement of female descendants to the communal household property, particularly of the female descendants who had married outside their native household.

Considering the exercise of the right to the household property, a distinction should be made between male and female members of the household, or the male and female descendants born into the household, and among female descendants the daughters who had married and the daughters who still lived in their native household. With household property, a distinction should be made between the movable and immovable property of the household, whereby entitlement to that property could be obtained in the course of division of the household and through inheritance, or upon marriage (of a female member) by way of trousseau/dowry.

As a rule, the descendants, regardless of the gender difference, would obtain the right to movable property – which was in accordance with the principle of gender equality stipulated by the GCC, i.e. in Croatian civil law order. The gender based difference still existed, since the associated share of movable property could be paid in cash to the daughters, regardless of their will. The difference also existed between the female descendants, depending on whether the daughter included in the division of the movable property had been married or not. After daughters would lose their household membership by marrying outside the household, they would also lose the right to participate in the division of the movable property. Regarding the entitlement to immovable property, the position of female descendants was even more unfavourable, as it had been considered that daughters, particularly the married ones, held no title to the immovable property of the household. The limitation of entitlement to the immovable property of the household for the married daughters was the consequence of the customary understanding according to which the daughter marrying outside the household was leaving her native household for the husband's household, that she worked and earned in favour of the new household and that it was unbecoming that she should obtain any further benefit from her former household, apart from the dowry upon marriage. At the same time, the entitlement of an unmarried daughter to the immovable property of the household stemmed from the entitlement of the father or brother as the representatives of the line, considering the endorsed division of the immovable property *per linea.* Considering the stated limitations, it should not be surprising that the female descendants had difficulties exercising their entitlement to property, even after communal household property lost its household character and was included in legal transactions regulated by the GCC. Similar problems were encountered by the female descendants not residing in a communal household. In both cases the attitude to female entitlement to property was the consequence of deeply seeded feudal views according to which the female descendants were not entitled to immovable property, particularly the family, or hereditary immovable property.

[70] TONČIĆ, 1925, Decision nos. 2 and 6, p. 158–160.

Union of Brest and its Dissolution on the Territories of the Congress Kingdom of Poland, Belarusian and Lithuanian Lands

Przemysław Dąbrowski*

Abstract

The conditions of the union of Brest were set on a meeting in Torczyn, on 2 December 1594. Once the union was announced in Rome on 12 June 1595, a synod was convoked to Brest. Two letters were drawn – one to Sigismund III, the other to the pope Clement VIII. Cyryl Terlecki and Hipacy Pociej were appointed as plenipotentiaries to talk with the pope. In a letter to the pope they announced subscribing to the provisions of the Council of Florence of 1439, and asked for preservation of the whole liturgy and Eastern rites. In the letter addressed to the king they appealed for preservation of their old privileges and granting them the privileges enjoyed by the Catholic clergy, but also for defense in case of any interference of the Constantinople patriarchs or church sanctions. This issue was to be finally concluded at the next synod convoked in Brest. The act of union was concluded on 9 October 1596. From the times of Catherine II the Union on was doomed to be annihilated. The Orthodox Church viewed Unites as its brothers, separated from the Tsardom in the 16th century. The policy of Russian authorities was very consistent, with short breaks during the rule of Paul I, Alexander I and at the beginning of Alexander II rule.

Key words: *Union of Brest; dissolution; Congress Kingdom of Poland; Belarusian and Lithuanian Lands.*

After the 1569 Union of Lublin, the population of Polish-Lithuanian Commonwealth embraced a great number of the orthodox people. In that period the Eastern Church included the Kiev metropolis with its seats both in Vilnius and Novgorodok, the archbishopric of Polotsk and nine dioceses: of Przemysl, Chelm, Wlodzimierz, Lutsk, Pinsk, Lvov, Polotsk, Smolensk and Chernihiv. The diocese of Smolensk and then Polotsk, subject to the territorial changes, became a part of the Tsardom of Russia[1]. It needs to be emphasized that in the 16th century the Eastern Church was in the appalling condition[2]. Bishops began entering into marriages and they took care of their own businesses. Even the visit of the Constantinople patriarch Jeremias II[3], who stopped in the Grand Duchy of Moscow in 1589 on his way to Moscow, did not improve the situation[4].

In the face of lamentable condition of the Eastern Church, a considerable majority of the Commonwealth Orthodox bishops declared their will to unite with a better organized Catholic Church. On the one hand, this meant submission to papal supremacy, yet on the other preservation of the traditional Eastern rites. Among the advocates of such a solution there was the bishop of Lutsk, Cyryl Terlecki, and the bishop of Wlodzimierz, Hipacy Pociej. In 1590, on a synod convoked in Belz (later on moved to Brest), four orthodox bishops drew up a declaration expressing their will to enter the union and affixed their signatures to it[5]. A year later the document was handed in to Sigismund III Vase. The king promised the orthodox bishops his protection and agreed to ensure them previous posts and benefice, as well as the preservation of the Eastern rite and the privileges enjoyed by the Latin rite. However, a few years had passed before the union with Rome was finally concluded. The major reason for that delay was the indecisiveness of Mykhajlo Rohoza, from 1589 the Kiev metropolitan, who postponed replying to letters concerning the union. In June 1593 a senator, Kiev governor, and fierce supporter of changes in the Orthodox Church – the duke Konstanty Wasyl Ostrogski – put forward a draft of reform to the Orthodox Church, supplemented by *Terms and Conditions of the Union* with the Catholic Church[6]. Ostrogski's draft included: a) preservation of the orthodox rite and material status of the Orthodox Church in the Commonwealth; b) prohibition against admitting the Unites to the Cath-

* Przemysław Dąbrowski, PhD., University of Gdansk, Poland..

1 B. Kumor, *Historia Kościoła*, part 5, *Czasy nowożytne. Rozłam w chrześcijaństwie zachodnim*, Lublin 2002, s. 237; idem, *Geneza i zawarcie Unii Brzeskiej*, [in:] *Unia brzeska z perspektywy czterech stuleci*, red. J. S. Gajek, S. Nabywaniec, Lublin 1998, s. 32; look: H. Dylagowa, *Unia brzeska. Geneza – dzieje – zagłada*, [in:] *Czterechsetlecie zawarcia unii brzeskiej 1596–1996. Materiały sesji naukowej zorganizowanej w Toruniu w dniach 28–29 listopada 1996 r.*, red. S. Alexandrowicz i T. Kempa, Toruń 1998, s. 12.

2 P. Nowakowski, *Problematyka liturgiczna w międzywyznaniowej polemice po Unii Brzeskiej (1596–1720)*, Kraków 2004, s. 30–37.

3 B. A. Gudziak, *Kryzys i reforma. Metropolia kijowska, patriarchat Konstantynopola i geneza unii brzeskiej*, Lublin 2008, s. 334–335.

4 B. Kumor, *Geneza i zawarcie unii brzeskiej*, [in:] *Unia brzeska: geneza, dzieje i konsekwencje w kulturze narodów słowiańskich*, red. R. Łużny, F. Ziejka i A. Kępiński, Kraków 1994, s. 26–29.

5 H. Dylągowa, *Unia brzeska i unici w Królestwie Polskim*, Warszawa 1989, s. 7.

6 B. Kumor, *Geneza i zawarcie unii brzeskiej...*, s. 31.

olic Church; c) establishing new schools[7]. The conditions of the union were set on a meeting in Torczyn, on 2 December 1594[8]. Once the union was announced in Rome on 12 June 1595 (the bull *Magnus Dominus et laudabilis nimis* of 23 December 1595)[9], a synod was convoked to Brest[10]. Two letters were drawn – one to Sigismund III, the other to the pope Clement VIII. Cyryl Terlecki and Hipacy Pociej were appointed as plenipotentiaries to talk with the pope. In a letter to the pope they announced subscribing to the provisions of the Council of Florence of 1439, and asked for preservation of the whole liturgy and Eastern rites. In the letter addressed to the king they appealed for preservation of their old privileges and granting them the privileges enjoyed by the Catholic clergy, but also for defense in case of any interference of the Constantinople patriarchs or church sanctions. This issue was to be finally concluded at the next synod convoked in Brest in October 1596[11]. From the very beginning two opposite camps emerged: the supporters and the opponents of the union[12]. The head of the latter was Prince Konstanty Ostrogski who assembled the representatives of fourteen orthodox brotherhoods, part of parochial clergy and some archimandrites[13]. The camp backing the union included the Kiev metropolite – Mykhajlo Rohoza and five diocesan bishops of Wlodzimierz, Lutsk, Polock, Pinsk and Chelm as well as three archimandrites and a part of secular clergy. Three Roman Catholic bishops – archbishop of Lvov, Jan Solikowski, bishop of Lutsk, Bernard Maciejowski and bishop of Chelm, Stanisław Gomoliński – acted as papal delegates[14]. They were accompanied by Jesuit theologians, Piotr Skarga being one of them[15]. The act of union was concluded on 9 October 1596, witnessed by royal envoys. Both supporters and opponents of the union excommunicated each other, as a result depriving one another of previous ecclesiastical dignities[16].

The Union of Brest did not solve the problem of reuniting the Eastern and Roman Catholic Churches in the Commonwealth[17]. To the contrary, it made the religious conflicts more visible by separating the Catholics into Unites and Latin Rite Catholics and the Eastern Church into Unites and Orthodox Church. This split was not clear because it did not reach the class, social or territorial level. Still, it comprised all possible groups of people: the szlachta, bourgeoisie, peasants, lower and higher clergy and different territories of the Polish-Lithuanian Commonwealth. Yet, the position of the Unite Church was much stronger because it became the only legal eastern church, which took over the powers of the Orthodox Church, enjoyed new privileges and the support of the Holy See. The Orthodox Church was playing in a lost position. It was deprived of the legal protection; the state authorities merely tolerated it, just as any other non-catholic creed. Ever since the union was concluded there were strivings to dissolve it and restore the past state of affairs. However, it turned out to be impossible and for this reason there were attempts to rebuilt the lost hierarchy. The orthodox szlachta of Volhynia, Kiev and Bratslav provinces stood up for their creed. The szlachta of Lithuanian provinces converted to Catholicism or Protestantism much quicker than szlachta of the Commonwealth's Ruthenian provinces. As a result of their activities, the orthodox people procured two acts, passed on Sejm in 1607 and 1609, recognizing the rights of the Orthodox Church in the Commonwealth. The king agreed for these concessions but he did not resign from his plans of dissolving the Orthodox Church in favor of the union[18]. After death of orthodox bishops of Lvov and Przemysl he wanted to appoint the supporters of the union to their posts. The plan failed with the bishop of Przemysl who having received the royal nomination, was consecrated a bishop by the Unite metropolite in 1610. With the time passing by, the Orthodox Church lost the support of magnates and Ruthenian szlachta, who converted to Catholicism in the 17th century. The Orthodox Church found support in numerous Orthodox brotherhoods, friars and Cossacks[19]. The already mounting tension aggravated in 1623 when the Unite archbishop of Polotsk, Jozafat Kuncewicz, was assassinated by the orthodox mob. Cult of the dead (beatified in 1643, canonized in 1867) contributed to the increase in the number of the Unite Church's supporters[20].

After Sigismunt III's death in 1632, his son Wladyslaw IV made some concessions to the Orthodox during the elections time. Taking a *pacta conventa* oath he consented to settle the re-

[7] T. Kempa, *Unijne koncepcje Konstantego Wasyla Ostrogskiego*, [in:] *Czterechsetlecie zawarcia unii brzeskiej 1596–1996...*, s. 39–40; look too: M. Mełnyk, *Zagadnienia soteriologiczne, widziane w świetle projektu inii katolicko-prawosławnej autorstwa księcia Konstantyna Wasyla Ostrogskiego, z 1593 r.,* [in:] *400-lecie unii brzeskiej. Tło polityczne, skutki społeczne i kulturalne*, red. A. J. Zakrzewski i J. Fałowski, Częstochowa 1996, s. 17–36.

[8] J. Rzońca, *Kościół unicki w okresie panowania Wazów (1596–1668)*, [in:] *400-lecie unii brzeskiej...*, s. 39.

[9] R. Soszyński, *400-lecie Unii Brzeskiej 1596–1996*, Michalineum 1996, s. 13; H. Tüchle, C. A. Bouman, *Historia Kościoła*, cz. 3, *1500–1715*, Warszawa 1986, s. 375.

[10] E. Ch. Suttner, *Unie Kościołów wschodnich z Kościołem wschodnim w wiekach XVI i XVII*, [in:] *Unia brzeska z perspektywy czterech stuleci...*, s. 127.

[11] H. Dylągowa, *Unia brzeska – pojednanie czy podział?*, [in:] *Unia brzeska: geneza, dzieje i konsekwencje w kulturze narodów słowiańskich...*s. 46.

[12] J. Moskałyk, *Problem zjednoczenia w Kościele kijowskim w I połowie XVII wieku*, Poznań 2006, s. 87; O. Halecki, *Od unii florenckiej do unii brzeskiej*, t. II, Lublin 2003, s. 242–243.

[13] B. A. Gudziak, *op. cit.*, s. 331.

[14] M. Banaszak, *Historia Kościoła katolickiego*, part 3, *czasy nowożytne 1517–1758*, Warszawa 1989, s. 124.

[15] H. Dylągowa, *Unia brzeska i unici w Królestwie Polskim...*, s. 8.

[16] R. Soszyński, *op. cit.*, s. 16–17.

[17] J. Półćwiartek, *Podziały i zbliżenia między Kościołem łacińskim a greckokatolickim i Cerkwią prawosławną w strukturach parafialnych na ziemiach czerwonoruskich czasów nowożytnych*, [in:] *400-lecie unii brzeskiej...*, s. 66–84.

[18] H. Dylągowa, *Unia brzeska i unici w Królestwie Polskim...*, s. 9.

[19] Ibidem, s. 10.

[20] T. Kempa, *Czy męczeńska śmierć arcybiskupa Jozafata Kuncewicza przyczyniła się do rozwoju unii brzeskiej na obszarze archidiecezji połockiej*, [in:] *Kościoły wschodnie w Rzeczypospolitej XVI–XVIII wieku. Zbiór studiów*, red. A. Gil, Lublin 2005, s. 93–105; A. Gil, *Kult Jozafata Kuncewicza i jego pierwsze przedstawienia ikonowe w Rzeczypospolitej (do połowy XVII wieku). Zarys problematyki*, [in:] ibidem, s. 65–72.

ligious disputes between the Orthodox and the Unites. In 1635, the Sejm confirmed the rights granted to the Orthodox, while the Unites were guaranteed with *status quo*. A commission was created to distribute the orthodox churches and monasteries within the king's lands between both churches. As a result of this compromise, the Eastern Church in the Commonwealth got divided in 1635. The Unite metropolis included seven dioceses, while the Orthodox comprised six. After the wars with Cossacks (1648–1652) and Russia (1654) the Union's foundations were shaken. However, at the turn of the 18th century the Union enlarged its territories by the dioceses of Przemysl, Lvov and Lutsk[21]. The victory of the Unite Church resulted in the reduction of the Orthodox Church to around 400 parishes, forty male monasteries and five female. To the contrary, the Unites had 9300 parishes, 147 male and 19 female monasteries and over four million of followers.

It needs emphasis that the Unite Church occupied a secondary position although formally it had rights equal to those of the Roman Catholicism. The Catholic doctrine determined the superiority of the Latin rite over others, while the Unites were connected with the eastern, Byzantine culture which was deemed inferior. The Unite religion was becoming the creed of the peasantry – the Ruthenians. Consequently, it came to be regarded as a church of the common folk, while the Latin church was viewed as a church of the higher strata[22]. The additional issue was the participation of Unite bishops in the sessions of the Senate (during the Great Sejm, in 1790, it was decided that the Unite metropolitan would take a seat in the higher chamber). There were attempts to introduce a prohibition against Unites converting to Latin rite[23]. Latinization had a huge impact on the Unite Church's life since it affected all of its spheres: the liturgy, rites, institutions and organizational structures, the architecture, equipment of the churches, outfits and lifestyle of clergy[24]. These changes were also linked to the polonization of the Unites.

After partitions of Poland, the Unites lived mostly in Russian and Austrian partitions. Those living in the latter were called Greek Catholics and were treated as equal to the Roman Catholics. To Russia, however, the Union was a breach of law and the Unites were treated as brutally separated from the Orthodox Church. That was the incentive for the process of conversion which began in 1793. The plan drafted in Petersburg in 1794 outlined the beginning of the activities in Ukraine where the union was the weakest. A group of Orthodox missionaries, backed by the secular authorities, converted by means of persuasion as well as duress. In the north-east territories of the former Grand Duchy of Lithuania, the results were much poorer. Catherine II dissolved few Unite dioceses[25], while Paul I restored the diocesan structure which resulted in the Unites having three dioceses – the archbishoprics of Polotsk, Wlodzimierz and Brest, Lutsk and later on Vilnius. Alexander I of Russia restored the function of Unite metropolitan, still not assigning it to any Episcopal See. The worst period was brought by the reign of Nicholas I of Russia who dissolved the Unite church in the Russian Tsardom and incorporated the Unites to the Orthodox Church[26]. The head figure actively engaged in all those activities was priest Jozef Siemiaszko. In 1828 a Unite Clergy Academy was established in St. Petersburg and few years later – in 1837 – it was incorporated to the Orthodox Synod[27]. The unite churches were deprived of bye-altars, pipe organs, pews and confessionals. All existing dioceses were divided between the Belarusian diocese with its seat in Polotsk and Lithuanian one with its seat in Żyrowice. Basilian monks were also under the authority of bishops and consistories[28]. The priest Siemaszko was nominated by Nicholas I to the position of Belarusan suffragan bishop. Tsar, supported by his closest associates, was very determined in his attempts to join the Unite Church with the Orthodox one. There was even some rivalry between dignitaries who worked on the process of the union's dissolution, especially between the priest Alexander Golicyn and a minister Dymitr Bludov. The first one supported the solutions of Catherine II kind, that is using force, while the second preferred plans of gradual conversion of the Unite Church to the Orthodox creed, put forward in 1827 by Siemaszko. In 1830 Nicholas I issued a decree ordering the Unite Church to preach sermons in the language of the folk, that is Belarusian and Ukrainian[29]. The final solution to the Unite Church problem came in 1838 with the decease of the Union's opponent – the Unite metropolite, Jozafat Bulhak[30]. On 12 February 1839 on the synod in Polotsk a return to the Orthodox Church was solemnly announced[31]. To commemorate this event, the Tsar ordered to strike a medal with an image of Jesus Christ and a caption saying *Separated by force, reunited by love*[32]. This just as the impediment of the Polish expansion and elimination of foreign[33], Latin influences had undoubtedly contributed to the reduction of the Catholic Church's – the potential rival – influ-

[21] H. Dylągowa, *Unia brzeska i unici w Królestwie Polskim...*, s. 11.
[22] P. Zubowicz, *Kościół i narodowość na Litwie, Kolekcja Ludwika Abramowicza*, Lietuvos Mokslų Akademijos Vrublevskių Biblioteka. Rankraščių skyrius, fond 79, teczka 682, k. 24.
[23] H. Dylągowa, *Unia brzeska i unici w Królestwie Polskim...*, s. 12.
[24] Ibidem, s. 13–14.
[25] H. Mościcki, *Ziemie litewsko-ruskie pod zaborem rosyjskim*, [n.d.s.p.], s. 1–2.
[26] H. Dylągowa, *Unia brzeska i unici w Królestwie Polskim...*, s. 15–16.
[27] B. Kumor, *Historia Kościoła*, part 7, *Czasy najnowsze 1815–1914*, Lublin 1991, s. 114.
[28] *Śladami unii brzeskiej*, red. R. Dobrowolski i M. Zemło, Lublin – Supraśl 2010, s. 127–495.
[29] O. Łatyszonek, E. Mironowicz, *Historia Białorusi od połowy XVIII do końca XX wieku*, Białystok 2002, s. 73.
[30] B. Kumor, *Historia Kościoła*, part 7..., s. 112–113.
[31] O. Łatyszonek, E. Mironowicz, *op. cit.*, s. 74.
[32] B. Kumor, *Historia Kościoła*, part 7..., s. 115.
[33] L. Wasilewski, *Dzieje męczeńskie Podlasia i Chełmszczyzny*, Kraków 1916, s. 12.

ence[34]. There was only one Unite diocese (of Chelm) in the Kingdom of Poland which remained under the Tsar's rule[35].

In 1595 the bishop of the Chelm diocese – Dionizy Zbirujski – signed the act of accession to the Council of Florence. A year later he participated in the synod in Brest where he still opted for the union of both churches. From that moment until the dissolution of the diocese by Russian authorities in 1875, it belonged to the Union. Wladyslaw IV gave the warranty in 1635. However, in 1650, after Zborow Agreement of 1649, John Casimir passed the diocese to the Orthodox but three years later it was back to the Unite jurisdiction[36]. The Unite Chelm diocese stretched out to the territories of two Latin dioceses – of Lublin and Podlasie. Few parishes were on the territory of the diocese of Sejny. The Unite pariochal network overlapped with the Latin one[37]. On 8 February 1830, the diocese of Chelm was excluded from the Halych and Lvov metropolis by the pope Pius VIII and placed under the jurisdiction of the Apostolic See[38]. The process of return to the Orthodox Church began in 1840 when Felix Szumborski – the bishop of Chelm – arrived in Petersburg at the invitation of Tsar. He was to observe the genuine, unspoilt liturgy and the orthodox rite. He stayed in Petersburg for nearly six months. In 1841 he returned to his diocese and started to gradually introduce the changes. He recommended saying the mass in accordance with the liturgy of the Orthodox churches. This had caused a tremendous stir among clergy and the faithful of the Chelm diocese and lead to the previous regulations being cancelled. The bishop was described in a very disapproving way by Nicholas I in his letter to Ivan Paskievicz, the governor of the Congress Kingdom of Poland, but so far the Tsar expected the bishop "to stay quiet". Tsar did not take any steps towards breaking the Union because of the talks on relations between Russia and Rome that were held with the Apostolic See.

In the last years of bishop Szumborski's life two parishes of Chelm diocese – Babice and Górny Potok – left the Union. That was the first attempt to dissolve the Union in the Congress Poland. The vicar capitular and administrator of the diocese was Jan Teraszkiewicz. He was perceived as a weak man, submissive to the Russian authorities. Initially his nomination was rejected by Rome. He died in 1863. After the January uprising the liberal policy of Alexander II stopped being valid. The Warsaw archbishop Zygmunt Feliński, after being called in to Petersburg in June 1863, was sent into exile to Yaroslavl on Volga. The diocese of Podlasie in the Congress Poland as well as the dioceses of Minsk and Kamyanets in the Russian Tsardom – all Latin – were dissolved.

The successor of the Teraszkiewicz was Jan Kalinski. Still, the tsarist authorities struggled to prevent the consecration because Kalinski wanted to emphasize his independence from Petersburg. In September 1866 he was arrested and taken to remote Russia – to Vyatka where he died as the Union martyr[39]. At the same time it was decided to bring to Congress Poland Unite priests from Galicia since they were more susceptible to any propaganda. The head of the diocese became the – entirely submitted to Russian authorities – priest Jozef Wojcicki. His work was condemned by the pope Pius IX in the encyclical *Levate* of 17 October 1867. Regardless of the pope's criticism and resistance of both clergy and the faithful, Wojcicki began removing all Latin elements from the Unite churches[40]. All Latin elements were eradicated from the orthodox mass and a reform of Clerical Academy in Chelm was conducted[41]. In June 1866 Wojcicki was succeeded by priest Michal Kuziemski – faithful to the pope in religious matters, but in political sphere – entirely dedicated to Russian authorities[42]. Under his rule persecutions were milder. However, he resigned from the position at the beginning of 1871 and his place was taken by Marceli Popiel whose rule marks the fiercest and most brutal persecution of the Unites defending their right to the Catholic creed.

In June 1872, in Petersburg, the Special Committee on Chelm Diocese Matters was established by Alexander II. Its head became the governor of the Congress Poland – count Fiodor Berg[43]. The main task of the newly established institution was to eradicate all Latin – that is foreign to Greek Catholic rite – elements from the Unite rite[44]. A special instruction said that in case of any opposition the authorities should take relevant steps to restore the order[45]. Petersburg tried to soften the information that left the borders of Chelm diocese. Shooting to Unites was given up, but continuously they were persecuted to achieve the intended goal of incorporating of the Unite church to the Russian Orthodox Church. In the *Omnem sollicitudinem* encyclical of May 1874, addressed to Unite bishops, the pope Pius IX confirmed the validity of rites and liturgy used in Unite churches. That was a reply to the accusations of the Chelm diocese's authorities concerning illegitimacy of latinization of rites in Unite churches. Despite this, on the 12 (24) January 1875 in Biała first forty five Unite parishes were admitted to the Orthodox Church. On 20 March, in Chelm cathedral the apostasy was announced and on 4 April approved by tsar

[34] H. Dylągowa, *Unia brzeska i unici w Królestwie Polskim...*, s. 23.
[35] Ibidem, s. 17–18.
[36] Ibidem, s. 18–19; look: M. Żubryd, *Unia hadziacka jako próba zlikwidowania Unii Brzeskiej*, [in:] *400-lecie unii brzeskiej...*, s. 86–89.
[37] H. Dylągowa, *Unia brzeska i unici w Królestwie Polskim...*, s. 20.
[38] B. Kumor, *Historia Kościoła*, part 7..., s. 98.
[39] H. Dylągowa, *Unia brzeska i unici w Królestwie Polskim...*, s. 28–29.
[40] Ibidem, s. 32–37.
[41] B. Kumor, *Historia Kościoła*, part 7..., s. 361.
[42] H. Dylągowa, *Unia brzeska i unici w Królestwie Polskim...*, s. 38–39.
[43] M. D. Dołbiłow, *Chołmskij wapros*, [in:] *Zapadnyje okrainy Rossijskoj Impierii*, Moskwa 2006, s. 372–373.
[44] D. Szpoper, *Kościół Katolicki w Cesarstwie Rosyjskim przed 1863 r. Przyczynek do porozbiorowych dziejów ziem byłego Wielkiego Księstwa Litewskiego*, [in:] *Cuius regio eius religio? Zjazd Historyków Państwa i Prawa Lublin, 20–23 IX 2006 r.*, red. G. Górski, L. Ćwikła, M. Lipska, Lublin 2006, s. 245–256.
[45] H. Dylągowa, *Unia brzeska i unici w Królestwie Polskim...*, s. 41–42.

Alexander II. Chelm diocese was incorporated to the orthodox diocese of Warsaw. The union ceased to exist[46]. Further mergers took place in the consecutive months of 1875[47]. However, the reunion of Unites and the Orthodox Church did not solve the problem. Passive resistance was a proof of commitment to Catholicism. The faithful avoided new churches. On Podlasie, the Union survived until 1905, when after issuing of Nicholas II ukase of tolerance tens of thousands Unites returned to the Roman Catholic Church[48]. The priests from dissolved diocese of Chelm who did not convert to the Orthodox church were interned in the Congress Poland or taken to remote corners of Russian Tsardom. Some of the priests run away to Galicia.

From the times of Catherine II the Union on was doomed to be annihilated. The Orthodox Church viewed Unites as its brothers, separated from the Tsardom in the 16th century. The policy of Russian authorities was very consistent, with short breaks during the rule of Paul I, Alexander I and at the beginning of Alexander II rule[49]. It finished in Eastern Galicia in March 1946 when this land was incorporated to the Soviet Union in 1945. At a council convoked that year relations with Rome were severed and the local Greek Catholic Church was incorporated to Russian Orthodox Church. Soviet authorities of Greek Catholic episcopate headed by Lvov metropolitan Josyf Slipyj conducted a number of arrests before the session of the council[50].

[46] B. Kumor, *Historia Kościoła*, part 7..., s. 362–363.

[47] H. Dylągowa, *Dzieje unii brzeskiej (1596–1918)*, Warszawa – Olsztyn 1996, s. 118–119; 146–147; 152.

[48] Eadem, *Unia brzeska i unici w Królestwie Polskim...*, s. 65; look: D. Szpoper, *Konserwatyści byłego Wielkiego Księstwa Litewskiego wobec kwestii równouprawnienia osób narodowości polskiej w guberniach północno-zachodnich Imperium Rosyjskiego w latach 1863–1905*, [in:] „Gdańskie Studia Prawnicze", t. XIII, Gdańsk 2005, s. 326; idem, *Sukcesorzy Wielkiego Księstwa. Myśl polityczna i działalność konserwatystów polskich na ziemiach litewsko-białoruskich w latach 1904–1939*, Gdańsk 1999, s. 18; P. Dąbrowski, *Narodowa Demokracja byłego Wielkiego Księstwa Litewskiego. Studium z zakresu mysli politycznej i działalności obozu narodoowego na ziemiach litewsko-białoruskich w latach 1897–1918*, Kraków 2010, s. 38–39; E. Woyniłowicz, *Wspomnienia 1847–1928*, part I, Wilno 1931, s. 108; *Dział prawny. Najwyższy Ukaz Imienny do Senatu Rządzącego z dnia 17 kwietnia 1905 r.[oku] (wyjątki)*, [in:] *Kalendarz Towarzystwa Powściągliwość i Praca na 1909 rok*, Wilno 1909, s. 142; W. Tarnawski, *Skutki wydania Ukazu Tolerancyjnego z dnia 17/30 kwietnia 1905 roku w Królestwie Polskim*, [in:] *Polacy i sąsiedzi – dystanse i przenikanie kultur*, red. R. Wapiński, part II, Gdańsk 2001, s. 92; look too: *Przyjmowanie katolicyzmu*, [in:] *„Nad Świsłoczą". Kalendarz miński na 1914 rok*, Mińsk 1914, s. 120.

[49] J. A. Drob, *Unia brzeska. Stereotyp i granica kultur*, [in:] *Czterechsetlecie zawarcia unii brzeskiej 1596–1996...*, s. 25–32.

[50] H. Dylągowa, *Unia brzeska i unici w Królestwie Polskim...*, s. 69.

General Principles in the Commercial Code of France of 1807

Anna Klimaszewska *

Abstract

No general part was created in the French Code de commerce of 1807, which was one of the basic objections to this act since its very beginnings. Book I was in fact entitled Of Commerce in General, however, even superficial analysis of its content indicates irrefutably that it contained regulations governing a specific subject matter. The lack of a general part did not mean that codifiers were not guided in the works on the code by any higher principles. On the contrary, while creating or copying given standards from earlier binding acts, they realised a legislative policy which had been adopted in advance, and which, paradoxically, did not aim at creating a liberal background for trade, but at managing the economic crisis with intense state control.

Key words: *French Commercial Code; Napoleonic codification; ordinances of Louis XIV; commercial law; maritime law; commercial partnerships; general principles.*

The promulgation of Napoleon's *Code de commerce*, which came into force on 1st January 1808 [1], was certainly a landmark in the history of the codification of the commercial law in the world. Until the publishing of the German HBG (*Handelsgesetzbuch*) in 1897, it was the only model of a commercial code, owing to which it was adopted and followed in a lot of countries on different continents [2]. However, despite sanctioning the idea of free access to trade on the strength thereof [3] and doing away with various kinds of class corporations of merchants [4], the atmosphere of an economic crisis and the rush during the legislative works [5] resulted in a lack of order and a well-thought-out construction [6]. Additionally, no general part was created in *Code de commerce*, which was one of the basic objections to this act since its very beginnings. The title of Book I (*Of Commerce in General*) might have been misleading in this respect. However, even superficial analysis of its content indicates irrefutably that it contained regulations governing a specific subject matter. The lack of a general part did not mean that codifiers were not guided in the works on the code by any higher principles. On the contrary, while creating or copying given standards from earlier binding acts, they realised a legislative policy which had been adopted in advance.

1. The Principle of Security in Trading

The idea of security essentially manifests itself in ensuring the *stability* and *effect* for given rules. "The law, the standards, which are to guarantee preservation and [development] of cultural values in a certain condition of social life, first of all have protective functions calculated to maintain some important factors of relations which make up a given social condition: religion, freedom, unity, ownership, security etc. In the field over which it has power the law brings about the feeling of security – a necessary foundation for all healthy human activities" [7]. From the point of view of the policy of law including this principle in legal stan-

* Anna Klimaszewska, Ph.D., Chair of Comparative Legal History, Faculty of Law and Administration, University of Gdansk, Poland.

1 On the strength of: *Loi du 15 septembre 1807 qui fixe l'époque ŕ laquelle le Code de commerce sera exécutoire.*

2 Its influence can be observed among others: in Belgium, the Netherlands, Luxembourg, Monaco, on the Italian, Polish and German lands, in Switzerland, Serbia, Montenegro, Croatia, Slovenia, Romania, Greece, Egypt, Algeria, Tunesia, Maroco, Turkey, Lebanon, Syria, Spain, Portugal, in the countries of Latin America, in Quebec and Louisiana and Japan.

3 It was proclaimed in the act of 2nd – 17th March 1791, sometimes called a *Decree d'Allarde.*

4 On the basis of the act *le Chapelier* of 14th – 17th June 1791.

5 More on the course of the legislative works: J.G. Locré, *Esprit du Code de commerce, ou commentaire puisé dans les Procès – verbaux du Conseil d'Etat, les Exposés de motifs et discours, les Observations du Tribunat celles de Cour d'appel, Tribunaux et Chambres de commerce, complément du Code de commerce, par la conférence analytique et raisonnée avec ses dispositions, des articles du Code civil, du Code de procédure civile, et généralement des Lois, Rčglements et décrets antérieurs qui s'y rapportent, ou auxquels il se réfčre*, Paris 1811, 4 vol., passim.

6 It is enough to give as an example article 1 of the *Commercial Code* which defines the concept of a merchant as a person who is continually occupied by commercial activities, which in turn were catalogued in article 632. It should also be mentioned that it was corrected in the version of the year 2000.

7 J. Namitkiewicz, *O najważniejszych zasadach badania prawa handlowego*, Warszawa 1927, p. 33, after: G. Jellinek, *Die socialethische Bedeutung von Recht, Unrecht und Strafe*, Wien 1878, p. 58; R. Demogue, *Notions fondamentales du droit privé, essai critique*, Paris 1911, p. 484. All translations in this paper are my own, unless otherwise noted.

dards determines their stability, and security in trading prevents the principle of freedom from turning into general licence[8].

After 1789 the political and economic situation in France undoubtedly called for strengthening the security in trading. Besides the liquidation of the class society and the confiscation of many estates, the introduction of a paper currency instead of the hitherto used money had exceptionally negative effects on the economy. After an enforced launch into trading its value dropped rapidly, which brought about a loss in the value of the money and strengthening of speculation on the black market. Additionally, the loss of class privileges and the collapse of many family fortunes made whole masses of the society engage in trade with no knowledge or experience in respect thereof, contrary to the adequately educated and easy to control, already nonexistent, class of merchants[9]. The effect thereof was a constantly increasing number of bankruptcies and failures, which anyway gave a direct impulse to the legislative works on the code of the commercial law ordered by Napoleon[10].

In consequence, the fundamental core of the codifiers' work was based on the absolutist principles of Louis XIV's ordinances and on adjusting specific solutions to the new reality of a classless society[11]. Only the solutions within the scope of the bankruptcy law adopted in *Ordonnance du commerce* of 1673 were regarded as not strict enough, and even favourable to dishonesty[12]. This resulted from the lack of compatibility of the standards based, to a great extent, on trust in the merchants' class, with the new reality. In connection with the above, Book III of the *Commercial Code* (*Of Failures and Bankruptcies*), as the only one, constituted a law which, in vast majority, was new and unrelated to the previous regulations. Book II, in turn, was practically an accurate copy of *Ordonnance de la marine* of 1681 with small changes, which, anyway, was openly admitted by the authors of the code[13]. The subject matter contained therein was an effect of separation of the regulations concerning the administration or the port police, and all others of public character, out of the ordinance content. Books I and IV also drew on J.B. Colbert's achievements. However, the introduced modifications were much more serious. From today's viewpoint such proclamation of the absolutist ideology constitutes a peculiar paradox given the doctrine of revolution in force at that time. Nonetheless, it must have been decided that adopting those principles was a good way to put the idea of security in trading into practice[14].

However, it must be pointed out that the security was understood by the authors of the *Commercial Code* in the potential (static) meaning, not the dynamic one. It protected the possessing party, not the active party. It was also called conservative security (contrary to the progressive one), or objective security (contrary to the subjective one)[15]. It was realised through the formalism of some institutions, through means which secured the meeting of the liabilities in respect of the creditor, as well as through limiting the risk.

Basically, the Napoleonic commercial law could not be considered to be formalistic, for it met the demand for "sanctifying legal relations, resulting from internal phenomena (the will) and sufficiently revealed in the social life, without imposing on them any specific, definite form"[16]. However, sometimes, "for the sake of usefulness"[17] this law required a definite form, especially when it concerned an act of will which directly brought about a legal effect.

In consequence, the formalism of commercial titles ensured them both credit and circulation[18]. In the case of the bill of exchange the form even determined the commercial character of

[8] *Exposé des motifs, des titres I ŕ VII, inclusivement du livre Ier du Code de commerce, présentés au Corps Législatif, par M. Regnaud, Conseiller d'Etat, séance du premier septembre 1807,* included in the 5th official edition of *Code de commerce* of 1808, p. 318 and the subsequent ones.

[9] More on the subject: J.B. Capefigue, *L'Europe pendant le consulat et l'empire de Napoléon*, Bruxelles 1840, v. VI, p. 112.

[10] While presenting *Exposé des motifs* the members of the Council of State explicitly sought the causes of the economic situation of the country in these aspects. Compare *Exposé des motifs du livre III du Code de commerce, présenté au Corps Législatif, par M. Ségur, pour une portion, et M. Treilhard, pour l'autre portion, séance du jeudi 3 septembre 1807,* included in 5th official edition of *Code de commerce* of 1808 r., p. 424 and the subsequent ones.

[11] A. Klimaszewska, P. Sosnowski, *Kodeks handlowy Napoleona jako wyraz doktryny ekonomicznej absolutyzmu*, „Przegląd Naukowy Disputatio", v. XI, Gdańsk 2010, p. 349 and the subsequent ones.

[12] First of all, each failure was viewed as an inculpable misfortune until any abuse was proved, an effect whereof was leaving the bankrupt a possibility of managing their own property; compare V. Bécane, *Commentaire sur l'Ordonnance du commerce du mois de mars 1673, avec des notes et explications coordonant l'Ordonnance, le Commentaire et le Code de Commerce*, Paris 1828, p. 249 and the subsequent ones. Besides, the creditors of the insolvent debtor were often left at their mercy. The assembly of creditors, who should theoretically manage the bankrupt's estate (Title XI, articles V, VI and VII), received neither support nor guidelines from the state or experts in this respect, as a result whereof the resolutions adopted by them were not always favourable. The assembly of creditors chose administrative receivers out of their circle; compare A. Klimaszewska, *Ordonans o handlu lądowym z 1673 r. (Kodeks Savary'ego)*, „Czasopismo Prawno – Historyczne", v. LXI, of 1/2009, pp. 103–124. However, it was often the debtors' friends or relatives who became one, and who introduced themselves as fictional creditors, whose all energy was focused on covering up potential embezzlements or forcing the creditors to accept unfavourable agreements; see Title XI, articles VI, VII and VIII. In connection with the presumption of goodwill, it was necessary to prove all the abuse, which lay with the creditors and was held at their expense; compare J. Rodman, *The Commercial Code of France with the motives, or discourses of the Counsellors of State delivered before the legislative body illustrative of the principles and provisions of the code, translated from the French with explanatory notes and a complete analytical index*, Stanford 1814, p. 54. It was then natural for them to be interested to a bigger extent in regaining their own property rather than in revenge on the debtor.

[13] J. Rodman, *The Commercial Code...*, p. 28.

[14] *Exposés des motifs présentés au Corps Législatif par les orateurs du Conseil d'État, suivis des discours prononcés par les orateurs du Tribunat,* included in the 5th official edition of *Code de commerce* of 1808, pp. 311–526.

[15] This classification was adopted by: G. Tarde, *Les lois de l'imitation*, Paris 1890, p. 159; R. Demogue, *Notions fondamentales du droit privé, essai critique*, Paris 1911, p. 484.

[16] M. Planiol, *L'habitude du droit moderne de ne pas exiger de termes sacramentels pour exprimer une volonté*, [in :] *Traité Élémentaire de Droit Civil*, v. II, Paris 1923, no. 480.

[17] F. Gény, *Science et technique en droit privé positif*, Paris 1914, v. III, pp. 94–122.

[18] L. Lacour, J. Bouteron, *Précis de droit commercial*, Paris 1921, v. II, p. 115.

the activities irrespective of the cause of the obligation (article 632). It was regarded as a solemn form, which could not be omitted by the will of the parties. Another example of the *solemn formalism* was the requirement of writing articles of association of partnerships under a collective name and limited partnerships (art. 39). In the case of these partnerships the written form was always required, whereas in the case of civil partnerships, only when the object of the partnership amounted to over 150 francs. (art. 1834 and 1341 of the *Civil Code* of 1804). This requirement was, anyway, introduced with respect to the necessity of publishing the agreement of the partnership, which would have been impossible without a written form. Besides, this form was indispensable *ad probationem* due to the introduction of the prohibition of calling witnesses for establishing the content of the articles of association (art. 41). The basic objective of these solutions was to protect any third parties who wanted to enter commercial transactions with a company, and for whom the knowledge of its condition was necessary.

The authors of the code also introduced the *formalism of public announcement* (*publicité*). It concerned, among others, the articles of association of partnerships under a collective name, limited partnerships and marital agreements introducing the regime of separate property when one of the spouses was a merchant. It was aimed at protecting both third parties and those who publicised specific information. The first ones knew the legal form of the act which produced definite legal effects with regard to them, the others benefited from the power of the evidence resulting from the public announcement (what was published was later regarded as evidence). Failure to observe the formalities resulted in the nullity of the articles (art. 42).

In force was also the *formalism of approval (homologation).* Its manifestation can be noticed, first of all, in the requirement of the court's confirmation of the agreement made by the bankrupt with the creditors (art. 524) and in the introduction of specific formalities in the case of a sale of real property of a minor, even if they were engaged in trade (art. 6).

Numerous means were introduced in order to ensure security in trading which enabled the creditor to enforce the performance of the obligations. They included, among others, joint and several liability, guarantee, privileges, the right of lien. The joint and several liability was borne, among others, by the partners of a partnership under a collective name, by the active partners of a limited partnership and a partnership limited by shares (art. 22 and 23), as well as by all the debtors of the bill of exchange (art. 140), including the guarantors. The right of lien on the entrepreneur's goods was granted among others to the commissioner due to the costs incurred to the entrepreneur's benefit (art. 95).

A model example of pursuing the idea of limiting the risk connected with trade was the introduction of regulations concerning commercial partnerships: the limited partnership, the anonymous partnership and the partnership limited by shares (art. 23–46), in case of which at least some partners did not bear any personal responsibility for the partnership's liabilities. It was a solution which aimed at enabling people without adequate education for undertaking trade to invest funds[19].

The function which minimised the risk of an merchant's activity was also fulfilled by the institutions of the general average and the commercial insurance. In *Code de commerce* the issue of insurance is only regulated with regard to the maritime commerce (Book II, Title X). Nevertheless, in practice, these regulations were also applied with regard to the land insurance.

2. The Principle of Freedom in Trading

According to art. IV of the Declaration of the Rights of Man and of the Citizen passed on 26th August 1789 "Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law"[20].

In consequence, the authors of the *Commercial Code* abandoned the subjective system, for it was believed that creating a vocational law would be contrary to the revolutionary principles of equality and freedom[21]. Nonetheless, the idea of security in trading and preventing an economic crisis constituted a superior goal during the legislative works. Because of that, the objective system carried too many threats, and, as a result, it was a mixed, subjective and objective solution that was chosen[22].

[19] *Exposé des motifs, des titres I ŕ VII…*, pp. 323–325.

[20] Translation after: C.F. Doebbler, *International human rights law: cases and materials*, Washington 2004, vol. 1, p. 13.

[21] Art. I. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good. *The Declaration of the Rights of Man and of the Citizen* of 1789, translation after: Ibidem, p.12.

[22] According to art. 1 of *the Commercial Code* "merchants are they who carry on commerce *(actes de commerce)* and make it their habitual profession". However, a full analysis of this regulation would require a definition of commercial activities, which was not provided in *Code de commerce*. What is more, no other act contained a legal definition which would define the basic qualities of *actes de commerce* that, in turn, would differentiate them from other activities. Only the provisions of Title II in Book IV contained a catalogue of enumerated commercial activities. Basically, however, the provisions contained therein were "Of the Competency of the Tribunals of Commerce", which meant no well-thought-out taxonomy of *actes de commerce* was provided. The legislator only made a statement in art. 632 that "the law recognises, as commercial acts [...]," and it was a mixture of commercial activities with respect to their nature *(actes de commerce par nature*) and form (*actes de commerce par forme*) as well as accessorial activities (*actes de commerce accessoires*). The list, made arbitrarily, did not include, however, the purchase of real property for reselling purposes, land insurance, or securities other than the bill of exchange. Commercial activities with respect to their nature, such as the purchase of crops or goods for resale, or banking activities, like commercial activities with regard to their form including among others the bill of exchange, were regarded as absolute commercial activities (*absolus*), that is the ones that were commercial activities irrespective of who performed them: a merchant or a non-merchant. However, there were also relative commercial activities (*relatifs*), whose commercial character depended on the status of the person who performed it. On the strength of art. 632 "the law recognises, as commercial acts [...] all contracts between merchants, shopkeepers, and bankers". This imparted a commercial character to all acts, contracts, quasi-contracts, delicts, or quasi-delicts (for example dishonest competition), made by entrepreneurs while performing their trade and for the needs thereof. Thus, they were *actes de commerce* neither with respect to their form nor their nature, only remaining in relation to the person of a merchant., which was called "the theory of accessoriness" (*théorie de l'accessoire*). Compare P. Arminjon, B. Nolde, M. Wolff, *Traité de droit comparé*, Paris 1950, v. II, pp. 168 and 169.

It is true that in *Exposé des motifs* representatives of the Council of State expressly indicated that the keynote of the works on the code was the motto: *„en France toute personne a droit de faire le commerce"*[23] ("in France everybody has a right to carry on trade"). Nevertheless, it was *de facto* the only manifestation of the principle of freedom, not devoid of limitations[24]. On principle, the liquidation of the class system made it possible for every social group to undertake trade. Additionally, the idea of "equality" of all the people capable of making contracts, irrespective of their class, religion, sex and background, covered also women, who in the sphere of trade were treated as equal to men (a trading married woman), and minors, who were recognised as adults with respect to their commercial activities.

It is difficult, however, to seek significant manifestations of the principle of freedom in trading, or, in particular, the realisation of the idea of freedom to make contracts: e.g. the possibility of making a contract of an anonymous partnership depended on gaining the government's accreditation. The freedom of the content of contracts was also incredibly limited. Most of them were defined in detail (e.g. the requirement of placing the exact time of making an insurance contract in its content). Only the idea of the freedom of evidence got finally realised on the strength of the *Commercial Code*. The mentioned rigorism of the bill of exchange (*rigor cambialis* – author's own) and the partnerships' rigorism were, in fact, introduced, but without the legal theory of evidence being in force. Additionally, the possibility of using means of evidence other than the ones in a civil procedure was also admitted (art. 109).

3. The Principle of the Promptness of Trading

Already when Louise XIV's ordinances were coming into effect, the economy of time was viewed by the legislator as a basic factor of intensive development of economic relations[25]. Generally, the principle of promptness was contrary to the idea of security. Nonetheless, the efficiency of commercial transactions required specific legal solutions which, in some cases, enabled the omission of the formalities typical of the civil law. This way the authors of *Code de commerce* introduced an amount of legal fiction which had successfully been functioning in trading in the common law for centuries, e.g. the fiction of substituting for a person on behalf of whom activities are carried out through an institution of commercial brokerage; the fiction of the ownership of sent goods in the case of possession of a bill of lading; or the fiction of the legal personality of commercial partnerships[26].

The principle of the promptness was also supported by the idea of separate commercial jurisdiction, where procedures were much less formalised, shorter and cheaper than the common procedures (Book IV: *Of Commercial Jurisdiction*). Additionally, the authors of the code introduced the principle of obligatory arbitration in disputes between the partners of commercial partnerships (art. 51–63).

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It was long argued in *Exposé des motifs* presented to the Council of State that *Code de commerce* had been designed, like *Code civil*, as "a code of peoples", a universal and timeless legal act, which was to become another monument of Napoleon's genius, who maniacally pursued the idea of regulating almost every field in his own way. Nevertheless, analysis of principles sanctioned on the strength of the code proved explicitly that the emperor decided on utilitarianism. His efforts were first of all focused on managing the crisis and finding means for further war, not on spreading "liberal demagogy", which, on principle, required resignation from protectionism and the control of the state.

[23] *Exposé des motifs…*, p. 321.

[24] It resulted not only from the very code, but also from other sources of law. For instance, the canon law prohibited all the clergy from undertaking trade. On the strength of a decree of 14th December 1810 such a ban was also introduced with respect to advocates. On 31st October 1784 an ordinance was issued on the strength of which consuls in foreign countries, officers and clerks of the navy were also forbidden to undertake trade. After *Code de commerce* came into force, these regulations were still applied. Moreover, a few limitations were introduced in the very *Commercial Code*, which were based, however, on the status of a given person. An example thereof is art. 85, according to which exchange agents and brokers could not undertake any commercial activities on their own account. An analogical ban was introduced on the strength of art. 176 of *Code pénal* with respect to some public officers while on the strength of art. 614 no bankrupt was allowed to belong to the merchants' exchange before his rehabilitation. Furthermore, running some forms of trade was conditioned with gaining the government's authorisation (e.g. setting up a bank or an anonymous partnership (art. 37)). The citizens, due to the state's monopolies (eg. tobacco), could also be deprived of access to certain types of trade.

[25] Compare the preamble of *Ordonnance du commerce*.

[26] More on the topic of recognising real persons in legal persons in France: H. Capitant, *Introduction ŕ l'étude du droit civil*, Paris 1898, p. 780 and the subsequent ones; R. Saleilles, *De la personnalité juridique*, Paris 1922, p. 523 and the subsequent ones; A. Pillet, *Les personnes morales en droit international privé*, Paris 1914, p. 29 and the subsequent ones.

The Geopolitical Thought of Józef Piłsudski and his Political Camp Concerning Central Europe in Comparison to the Achievements of Other Political Centers

Jakub H. Szlachetko *

Abstract

The paper focused mainly on the ideas created by Marshall himself or people from his closest circle. It is worth stressing that federalism, the policy of balance of power or colonialism are not the only manifestations of spatial thinking in Piłsudski's camp's foreign policy. During the interwar period, the members of various social organizations united in the so-called Zet Movement were very active, and created interesting variants of the ideas outlined in the article. During the Second World War and the People's Republic of Poland, owing to political reasons, Piłsudski's camp's thought on Central Europe did not influence the reality of the time at all. Yet it persisted within certain circles of the anti-communist independence movement until the 21st century, and it is at present, to a smaller or greater extent, implemented by the right-wing political parties.

Key words: *Marshall Józef Piłsudski; Second Republic of Poland; geopolitical thought; the idea of federalism; the idea of policy of balance; the colonial idea.*

Introduction

One of the features of every sovereign state is the right to be active in the foreign sphere. Foreign policy plays a crucial part and is of great significance to states and their citizens. For this reason one of the most important issues, as far as exercising power is concerned, is skillful administration of the country on the plane of foreign relations. Foreign policy should be carried out in a well-thought-out and reasonable way, which is why a situation in which a political party which comes to power has its principles prepared should be viewed as a positive one. The topic of this article is precisely those principles, known as geopolitical ideas, which are a result of political thoughts, research work and historical events which shaped them and are still affecting them in a varied way.

In literature on the subject there are many definitions of the term "geopolitical idea". According to one of them, it is a "plan of action whose aim is to conquer a particular territory, move the borders, expand the country's influence or to increase its security through the employment of military action or an international agreement" [1]. It is worth emphasizing that geopolitical ideas are closely linked with the country's territory and geographical situation. *Ergo* in short, it could be understood as "political activities in spatial terms" [2].

When the Republic of Poland was being established, different visions concerning its future spatial order were competing against one another. However, the most significant ones were two ideas whose authors were two antagonistically disposed towards each other social and political leaders – the so-called federalism of Józef Piłsudski and incorporationism of Roman Dmowski. The conflict in views as regards this matter between those statesmen is well reflected in Stanisław Cat-Mackiewicz's statement, who said that "the story of my generation is the conflict between those two men".

The Idea of Federalism

Marshal Piłsudski's geopolitical thought was shaped by factors of diverse nature. One of the main determinants was the issue of Russia and the constant conviction that it poses a potential threat, both the Russia of the Czars and the Bolshevik one. Russia has always played a substantial role in the history of Poland but mainly the negative one. The Polish-Russian relations were molded by various conflicts, a great number of which took the most fierce and extreme form, that of war. The actions of Russia, Austria and Prussia were the reason why Poland ceased to exist. Józef Piłsudski was mindful of the past and treated history as a lesson out of which inferences should be drawn. He came to the conclusion that only Poland, together with other countries of East-Central Europe, can provide a counterbalance for Russia. It is worth stressing that Marshal based his views on cool political, economic and military calculation – he was not motivated by negative emotions: "Sometimes there are attempts to present him as an irresponsible crusader, an initiator of an armed conflict and a man infected with anti-Russian phobia. But Piłsudski was not opposed to Russia. He was only opposed to imperialism, he denied this country the right to hold other nations prisoner" [3]. Other sources seem to confirm

* Jakub H. Szlachetko, The Centre of Political and Legal Analyses, Gdansk, Poland.

1 P. Bartosiewicz, *Polskie koncepcje geopolityczne w XX wieku,* in: *Świat wokół Rzeczypospolitej. Problematyka zagraniczna w polskiej myśli politycznej w pierwszej połowie XX wieku,* Lublin 2007, p. 35.

2 Ibidem.

3 J. Cisek, *Józef Piłsudski,* Warszawa 2007, p. 149.

this view. Dymitr Mereżkowski stresses Piłsudski's positive attitude to the idea of the so-called third Russia – a democratic Russia, not the Czar or the Bolshevik one – "Józef Piłsudski is not Russia's enemy. He does not have a stone up his sleeve"[4]. Anyway, Chief of State himself told Hughes Gibson, an American congressman, that as soon as the factors which caused the partitionings of Poland vanish a rapprochement between the two countries will take place: "The dispute between Poland and Russia is not in fact a dispute. On the part of Poland it is an eternal, lasting for over 500 years defense against Russian aggression. […] it is a dispute inasmuch as an eternal owner's defense against eternally splayed hands of a robber can be called a dispute"[5].

Other determinants of Piłsudski's political camp's geopolitical thought was the tradition of a multinational and multiethnic Poland within the borders from before 1772, the one which was inhabited by Poles, Lithuanians, Belorussians, Ukrainians, Jews and other minorities. Moreover, one cannot ignore the considerations of purely personal nature. The Piłsudski family was an old Lithuanian family whose many members held high and responsible public posts for centuries, during the glory days of the multinational Polish state.

Marshal's views on the matter of spatial order, borders and Poland's ethnic and national composition were shaped in the presented context. Józef Piłsudski thought that the Polish state should be separated from Russia by the territories of Poland's allies. They were supposed to be Lithuania, Ukraine and Belarus. The nature of the relations which were supposed to exist between the above-mentioned states was defined in various ways. In accordance with the final idea, which was not solely Marshal's work, they were to create a federation, and it was precisely in this way – the "great plan of restructuring of Eastern Europe"[6], that this idea was finalized on the theoretical plane. Iwan Kiedryn – Piłsudski was "indeed the author of the great and an advocate of the most enterprising and powerful political idea created by the Polish thought since Stephen Báthory – an idea for a radical solution of the issue of the eastern part of Europe and disposing of the threat posed by the Russian colossus once and for all"[7]. Marshal was steadfast and consistent in this view, which is reflected in the fact that he stressed the rightness of his views regardless of circumstances. 1920, after the victory in the Polish-Soviet War – "Everything which was done is only paving the way which leads to independence. […] Poland may not be truly independent between two colossi. […] For as long as numerous nations are under Russian yoke we cannot look to the future without fear"[8]. The idea of federalism was well received in the circles of the independence movement and by borderlanders. Such eastern border would simultaneously form a barrier between the countries belonging to the Western Civilization and the Orthodox one. The above thesis is perfectly exemplified by a source material – Józef Łobodowski's memoirs. "And a several dozen years after the [January] Uprising, the tradition of the former Republic persisted, and often manifested itself under the most unforeseen circumstances. It so happened that I was entrusted with the preparation of Jełowiecki's memoirs for print. While reading it I came across a description of an encounter which perfectly corresponds to Piłsudski's words […] Jełowiecki has often heard of a famous "miedwieżatnik", in other words, a bear hunter, whose name was Nikifor […]. When asked about whether he has ever killed a bear in a shakedown, Nikifor denied with indignation […]. <<It is only Muscovites in Vologda Province, I heard, who do so, and they slay even bears with cubs, but here, in Polyand, there are no such scoundrels.>> Jełowiecki was surprised because Nikifor spoke only Russian. […] <<No, Sir – he replied – we no Russians, we Poles from Vitebsk. Muscovites live on the other side of the border, in Pskov Province. We no peasants, we are free farmers with land which the Polish king, Styephen Báthoriy, gave us.>>. It is obvious – Łobodowski writes – that in all of those cases the word <<Poland>>, << Polyand>> denotes not a nation but a state, the former Republic". Then he draws a conclusion – "Piłsudski's concept matured within the same psychology"[9].

It is worth stressing that Piłsudski's federation was meant to be composed of politically-independent, linked by common interest and bound by ties of friendship countries of Central Europe. It is untrue that Chief meant to annex the mentioned territories at all costs. An idea based on a single geopolitical body, pervaded with Polish nationalism, was presented and promoted by National Democracy led by Roman Dmowski. Stanisław Swianiewicz – "Even though Piłsudski loved Vilnius, he did not want to incorporate it into Poland. It is a period in which the breadth of Piłsudski's historical horizons and the boldness of his aims is the most clearly visible. If Ukraine was rebuilt at the time, the world of today would be different"[10]. Professor Piotr Wandycz – "Piłsudski was prepared to hand Vilnius over to Lithuanians and Lviv to Ukrainians in return for a close bond with Poland"[11].

The process of implementation of Marshal's vision was spread in time and abundant in great events of international significance. At the beginning of the 20th century, the independence milieux were longing for a conflict in which the partitioners of Poland would turn against each other. Józef Piłsudski, an activist of the Polish Socialist Party at the time, and who later became the Chief of the Riflemen's Associations, did not waste time: unwaveringly, in a more or less effective way, he realized his dream and the dream of many Poles – that of a free Republic

[4] D. Mereżkowski, *Józef Piłsudski*, Warszawa 1920, p. 7.
[5] M. Pawlikowski, *Sumienie Polski, Rzecz o Wilnie i kraju wileńskim*, Londyn 1946, p. 34.
[6] J. Cisek, op. cit., 149.
[7] I. Kiedryn, *O prawdę historyczną dla imienia Józefa Piłsudskiego*, in: *„Biuletyn Polsko-Ukraiński"*, R.IV, no. 21, (108), 26.05.1935.
[8] C. Syedahmet Kirimer, *Moje wspomnienie z rozmowy z marszałkiem Józefem Piłsudskim*, in: *Niepodległość*, 1950, vol. 2, p. 47.
[9] J. Łobodowski, *Koncepcje wschodnie Piłsudskiego*, *"Wiadomości"*, no. 423 (949), 07.06.1964.
[10] List S. Swianiewicza do W. Poboga-Malinowskiego, Londyn 23.05.1959, IJP, AOG, Archiwum W. Poboga-Malinowskiego, vol. XXXII *Materiały do biografii Józefa Piłsudskiego*, p. 227.
[11] P. Wandycz, *Poland's Place in Europe…* p. 459.

of Poland. That is why when the First World War broke out he did not remain passive. He was not discouraged by numerous failures. The indomitability of his will and his doggedness bore the expected fruit – Piłsudski as a national hero, military leader and an authority on politics after his return to Warsaw came to the plenitude of military power, and, with time, also the political one. Then he began his lasting for several years march east, and began the creation of the Central-European federation.

The relations between the newly-built Poland and centers of political power which were developing on the borderland were, especially after the First World War, of a diverse nature. In 1918 the Republic's purpose was to delimit and demarcate the state boundaries. The interest of the state and that of the Polish nation generally came to the aid of other nations' interests. Lviv, along with adjacent areas, whose occupation by the Polish army began on November 1, 1918, became a reason of the Polish-Ukrainian conflict. The fight flared up. The situation changed in 1919, when Kiev was captured by the Whites – a Russian pro-Czar political-military movement. Then Ukrainian political leaders and commanders began to favor the view that it is necessary to enter into a Polish-Ukrainian anti-Russian alliance – an alliance directed against Russia, the White, as well as the Bolshevik one. The first to reach such a conclusion was the commander-in-chief of the Ukrainian People's Republic – Symon Petliura. The talks began, and they resulted in two international agreements concluded in April 1919: a political alliance and a military convention. In the same month the eastern campaign began, which resulted in the regaining of Kiev which was under the Bolshevik control. On April 26, 1920, Józef Piłsudski made an appeal to the Ukrainian people, in which he emphasized the principles of the mentioned foreign policy. Until then everything was going as Poles intended. But soon, precisely on June 5, Semyon Budyonny's Cavalry Corps broke the front line, forcing the Polish troops to retreat and leave Lviv. It was not the greatest failure, since the defeat on the southern front was accompanied by a major offensive in the north commanded by Mikhail Tukhachevsky, which posed a greater threat. Bolsheviks were moving west at an alarming pace, capturing within less than three weeks Minsk, Vilnius, Grodno, Białystok one after the other, and subsequently Brest, which according to the plans was meant to stop the main attack. In August, the decisive battle took place. The victory of Polish soldiers, known in history under the name the Battle of Warsaw or, belittling Marshal's military genius – the Miracle at the Vistula, turned into counteroffensive in an easterly direction. The conflict ended with a peace treaty concluded in Riga, which thwarted the efforts made in order to establish a federation of Central and Eastern Europe. However, by virtue of the treaty, lands inhabited to a considerable extent, sometimes by a majority of Lithuanian, Belorussian and Ukrainian people, but also Polish, were incorporated into the Republic: Vilnius, Grodno and Lviv. In this manner the so-called Second Polish Republic became in a way an heir to the former pre-partition Poland.

The Idea of Policy of Balance

The policy of balance was formulated when the implementation of the idea of federalism and intermarium met with failure and there were no prospects for it. Its main originator was Józef Piłsudski, together with several of his closest associates, August Zaleski and Józef Beck among others, who, during the interwar period, performed the function of the Minister of Foreign Affairs one after the other. This idea was a result of a number of analyses conducted on the basis of the observed processes and phenomena taking place in the geopolitical reality which could be divided into several types of reasons.

Primo. Piłsudski's camp had a clearly defined and consolidated theoretical outlook on the surrounding reality, international situation and foreign policy. In their opinion, foreign relations were shaped simultaneously by two categories of factors – the permanent ones (geopolitical, historical, cultural and political) and the impermanent ones. Thus historical continuity, ties between generations and resistance to drastic changes played an important role. Sovereign state was recognized as the basic entity for the community. It is countries in the international arena who, like pawns on the chessboard, cause "forces and values to clash"[12]. The Piłsudski's camp assumed that the status of individual countries varies. They recognized global superpowers, regional superpowers and their clients, which made it necessary to view the international community as an undemocratic and hierarchical one.

Secundo. The international order, which was a result of the Treaty of Versailles, was criticized. According to Józef Piłsudski's words, it combined "old habits" with "new features and systems of life". It was based on "utopian ideals and fragile organizations, ignoring the factors upon which safety was in fact dependent. Instead of counterbalancing Germany and the USSR in Central Europe, the victorious superpowers decided to introduce two new elements: an organization in the form of the League of Nations, and disarmament and pacifism"[13] – which, as was expected, and what turned out with time, proved to be an ineffective and inefficient solution.

Tertio. An important part of the deliberations concerned regional order. The attempts of forming a federation of Central-European countries (1919–1920) and of establishing a political-military bloc in Intermarium (1921–1923) were unsuccessful. In such circumstances it was necessary to seek for new ways of ensuring the safety of the country, as dark clouds were starting to emerge on the horizon. Piłsudski as early as in 1926 presumed that after a period of stabilization and peaceful transformations Europe may plunge into another war[14].

In order to comprehend the policy of balance, it is essential to become aware of certain patterns of thought permanently employed by Piłsudski's camp. Marshal – "[...] there are cer-

[12] Przemówienie J. Becka przez radio, 1 X 1938, *Gazeta Polska,* 2 X 1938, no. 270, p. 2.

[13] W. Paluch, *Piłsudczykowska koncepcja polityki równowagi (1926–1939): przesłanki, założenia, składniki, ewolucja,* in: *Świat wokół Rzeczypospolitej. Problematyka zagraniczna w polskiej myśli politycznej w pierwszej połowie XX wieku,* Lublin 2007, p. 192.

[14] Cf. zapiski J. Becka i wypowiedzi J. Piłsudskiego na posiedzeniu Komitetu Obrony Państwa z 23 XI 1926 roku – J. Beck, *Ostatni raport,* Warszawa 1987, p. 27.

tain traditions and sentiments in our policy we will never renounce"[15]. "The weaker the enemies and the stronger the allies, the safer the Polish state"[16] principle consisted in the primacy of independence over clientelism, and the rejection of another principle, according to which "you should hate your enemies and demean yourself before your friends"[17]. The enemies were specified: they were Germany and the USSR. France and Romania were recognized as strategic allies, with whom a military treaty was concluded; the United Kingdom became one later.

The idea of policy of balance recognized the necessity of maintaining neutral relations with Germany and the USSR. This state was to be kept regardless of political and systemic transformations in those countries. Józef Beck – "Warsaw's policy cannot be dependent neither on Moscow nor on Berlin [...] those are the limits of our political options"[18]. The only way of achieving this aim was the tactics which consisted in balancing between the more powerful neighbors, and developing bilateral relations between Poland and Germany and between Poland and the Soviet Union in a similar manner. Piłsudski was explicit in excluding the possibility of Poland's active support for one of the those countries – Poland "will not support one of those countries against the other", "The Polish barrier is strong enough to prevent any marches of troops". The repercussions could be the following – "we could win the war and find foreign soldiers in our country afterward"[19].

In addition to keeping both the western and the eastern neighbor in balance, another priority was to normalize the relations with Central European states which were threatened by the same dangers. Another form of ensuring the country's security were alliances with France and the United Kingdom.

The policy of balance was carried out in this form from 1926 to 1935, until Marshal's death. In accordance with Józef Beck's words uttered in 1935, the disintegration of foreign relations has begun: "all concepts of collective safety based on the League of Nations failed, and all hopes for the League need to be be excluded from any political hopes". A new system of safety, the one made of blocks, began forming – democratic states united in the League, and the totalitarian ones. With the fall of the Second Republic, the implementation of the policy of balance was abandoned. The country's collapse was triggered by a cause which the idea was meant to prevent – an outbreak of a two-front war, a war Marshal Piłsudski was warning against, as he considered it as one which could not be won.

The Colonial Idea

An unusual geopolitical idea conceived within Piłsudski's camp was the colonial idea, which was implemented by various socioeconomic organizations one after the other, especially by the Maritime and River League, operating from 1924 to 1930, and the Maritime and Colonial League, which was created out of the former. Within the structures of the above organizations many political, social and economic activists were active, including General Kazimierz Sosnkowski and General Gustaw Orlicz-Dreszer, who was the Chairman of the League's Main Board from 1930 to 1936, among others.

The League's program of action consisted in the acquisition of overseas lands, which were supposed to be handed over to Polish emigrants. At the same time retail outlets and the ocean fleet were to be developed. During a dozen years or so when the organization was active, the plans were implemented to a certain extent. In the 30's a joint-stock company called International Colonial Society (Międzynarodowe Towarzystwo Osadnicze) was established. Its objective was to purchase agricultural properties in Southern America. A few years later MTO owned over 51 thousand ha of land in Argentina and 63 thousand ha in Brazil. The far-reaching plan of implementation of the colonial idea's guidelines was included in the document "The Emigration Policy Department Program" which consisted in the purchase of 400 thousand ha of land in Argentina, Brazil and Paraguay for over 50 thousand settlers. Regrettably, the outbreak of the Second World War thwarted those ambitious plans.

The colonial idea should be treated "not only as an element of the propaganda of superpower, but also as a real and feasible plan for solving demographic problems"[20], since important reasons for its creation and implementation included, apart from the principles, such as the enhancement of the country's image and the building of its strong position in the international arena, the impoverishment of Polish society, high unemployment rate and overpopulation of smaller towns.

Other Geopolitical Ideas

Józef Piłsudski and his camp's geopolitical thought concerning Central Europe constitutes a substantial intellectual contribution to the development of the theory of foreign relations and political practice. The idea of federalism and the policy of balance of power played a major part in the process of shaping the spatial order in Central Europe. Yet it must be emphasized that they are not the sole product of ideologists and doctrinaires' thinking process. Thus in the light of the above ideas, it is worth depicting other ideas, which were frequently competitive to the above political ideas.

During the First World War and the interwar period, in opposition to the idea of federalism stood Roman Dmowski's idea of incorporationism. Incorporationism is regarded as a valuable and significant contribution to the science of foreign relations. It was a plan of reconstruction of the country's territory. Its main assumption was the willingness to include within the borders of the newly-built state as many stretches of eastern lands as possible, ignoring the interests of nations and peoples other

[15] Quotation from: A. Korzecki, *Od Wersalu do września 1939: Z tajnych frontów dyplomacji,* Warszawa 1982, p. 66.
[16] W. Paluch, op. cit., p. 191.
[17] J. Krasuski, *Tragiczna niepodległość: Polityka zagraniczna Polski w latach 1919–1945,* Poznań 2000, p. 18–19.
[18] B. Miedziński, *Między Wschodem a Zachodem,* in: *Gazeta Polska,* 1 I *1933,* no. 1, p. 1.
[19] R. Piestrzyński, *Uwagi o aktualnej polskiej polityce zagranicznej, "Awangarda Państwa Narodowego",* March 1935, no. 3, p. 28.
[20] P. Bartosiewicz, *Polskie koncepcje geopolityczne w XX wieku,* in: *Świat wokół Rzeczypospolitej. Problematyka zagraniczna w polskiej myśli politycznej w pierwszej połowie XX wieku,* Lublin 2007, p. 42.

than the Polish one. In Roman Dmowski's opinion, the country's power was dependent on two factors: its size and national cohesion, which is why he suggested incorporation, the inclusion of Lithuania, Belarus and Ukraine into Poland. Yet there is a perceptible contradiction between the above assumptions, since the bigger the state, the greater the national and ethnic diversification, and the more unfavorable to Poles the proportion of Poles to other communities – so it is difficult to call it national cohesion. The leader of National Democracy put forward the following counterargument: he claimed that because the Polish Nation was better developed, it would dominate the minorities, which will result in common Polonization. He *de facto* denied those three nations the right to self-determination regarding their states. However, Roman Dmowski acted in good faith, justifying his claim with the necessity of protection of Polish national interests. Only a powerful Republic could provide a suitable counterbalance for Russia. Besides, National Democrats feared that if independent Lithuania, Belarus and Ukraine were established, their lands would become Germany's subject of interests.

During the Cold War, negotiations aimed at disarming regions with the greatest potential for conflict were repeatedly conducted. Certainly, Central European countries could be regarded as such. With a view to prevent the potential war and to ensure the stability of the region, Polish Minister of Foreign Affairs, Adam Rapacki, in 1957 presented a plan of establishing a non-nuclear zone which would include the People's Republic of Poland, the GDR and the FRG before the United Nations. The so-called Rapacki's plan consisted of obligatory bans directed at those countries, namely bans on production, storing and use of nuclear weapon in the zone, and a ban on handing this weapon or devices essential for its use to the states involved in the plan. After the Minister's address, Czechoslovakia expressed the willingness to participate in the plan. Subsequently, the Polish Ministry of Foreign Affairs handed a diplomatic note and a "Memorandum" to the USA, the USRR, the United Kingdom, France, the GDR, the FRG and Czechoslovakia. The plan became a subject of international discourse but was not universally accepted. During the next years its altered versions were prepared. One of them, called Gomułka's plan, was not accepted either.

The consequence of the events which took place in the 1980's was Poland's political transformation. Simultaneously to the change in the political and socioeconomic systems, and a partial change of the political elites, a drastic change in the direction of foreign policy occurred. From 1945 to 1989, the People's Republic of Poland, the USSR's satellite state, belonged to international organizations, such as the Warsaw Pact or the Council for Mutual Economic Assistance, in which Moscow was the nerve center. Since 1989 the West has been the priority. Polish authorities began the integration process of the Republic of Poland and Western Europe. In 1991 Poland became the member of the Council of Europe. A treaty of cooperation was concluded by Poland with the European Communities. In 1994 the Republic of Poland became an associate member country of the Western European Union. In 1999 Poland was admitted as a member of the North Atlantic Treaty Organization, and in 2004 of the European Union. Fifteen years after, the idea, with the participation of many political parties, was implemented. Unlike former geopolitical ideas, it would be difficult to specify its only or even several authors, as the idea was implemented by various governments, Prime Ministers and Ministers of Foreign Affairs.

Conclusion

The paper focused mainly on the ideas created by Marshall himself or people from his closest circle. It is worth stressing that federalism, the policy of balance of power or colonialism are not the only manifestations of spatial thinking in Piłsudski's camp's foreign policy. During the interwar period, the members of various social organizations united in the so-called Zet Movement were very active, and created interesting variants of the ideas outlined in the article. During the Second World War and the People's Republic of Poland, owing to political reasons, Piłsudski's camp's thought on Central Europe did not influence the reality of the time at all. Yet it persisted within certain circles of the anti-communist independence movement until the 21st century, and it is at present, to a smaller or greater extent, implemented by the right-wing political parties.

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The Internal Organization and Supervision as Vital Issues in Post-War County Administration in Poland

Kamila Kędzierska*

Abstract

In the article the matters of internal organization and supervision issues in post-war county administration in Poland are discussed on the example of Krakow County. In the first part statutes that dealt with the practical matters such as mail circulation, storing and marking the official documents are discussed. Author underlines their importance in relation to functioning of administrative offices. Next the matter of the provisions concerning handling of confidential correspondence such as internal order of the Krakow starosta issued on April 17th 1945 is discussed.

The second part of the article is focused on the supervision and approval of developed documents. Author points out that internal decree number 15 issued on 26th of March 1945 was the first regulation about internal supervision. In this decree matters such as time schedules for delivering of official documents and meetings with starosta were regulated.

Author's conclusion is that provisions, that today seem natural for administration, were introduced to the newly created administration, which did not exist during the war and occupation, therefore they were crucial for the proper functioning of the county office.

Key words: *administration; history; Krakow County; postwar Poland.*

In post-war political and legal reality, the matters of internal organization and supervision in local administration were not the most crucial ones – neither the pre-war legal acts maintained in force after WWII, nor subsequent regulations (as the Polish Committee of National Liberation's decree from 21st August, 1944 on the way of establishing the general administration authorities 1st and 2nd instance[1] and decree from 23rd November, 1944 on the local self-government's organization and scope of function[2]) did not undertake the above mentioned problems. The legislator stated only that county's offices should be organized as 1st instance authority, with the starosta as its head[3], and the internal matters were left for the voivod to regulate in county office's statute. In the Krakow County, which is the point of interest in this article, the statutes titled "The Provisional Work Statute[4]" and "The Provisional Organizational Statute[5]" were enacted by the Krakow Voivod in the 1945. Nevertheless, issues of internal organization were of such great important for the newly organized county administration, that they had been partly regulated previously by the Krakow Starosta.

This regulations issued by starosta since the very beginning of the year 1945, after the County Office was established on 26th of January, 1945, covers a lot of questions relating to the practical functioning of administrative offices in postwar reality, such as mail circulation inside the office and its flow on the outside, storing and marking the official documents, terms of handling matters, the supervision and approval of developed documents. Although it might seem that these matters are not very important from the viewpoint of citizens benefiting from the actions of administration, they are very important and even necessary for the proper functioning of the administration. With reference to issues related to the circulation of letters and official correspondence, it should be pointed out that they were in detail regulated from the beginning of organizing the postwar administration at the district of Krakow.

First regulations concerning generally understood rules of office work in post-war administration in Krakow County were issued by the starosta in the circular letter no. 2 (unfortunately undated; one could presume that it was enforced before 30th of January, 1945 – such a date is marked on circular letter no. 4, which is the next document preserved in archives). The document covers not only working hours in county office, business trips, admitting and informing clients, but safekeeping (storage) of official acts (documents)[6].

There was a specific instruction enclosed in the letter applying to appropriate methods of document storage in the county office. After working hours all of official acts, that were held by the clerks whom were dealing with matters and by the county chancellery should be gathered in closed closets or desks, and the

* Mgr. Kamila Kędzierska, Jagiellonian University in Krakow, Poland.

1 Dz.U. 1944.2.8.

2 Dz.U. 1944.14.74.

3 Dz.U. 1944.2.8, art. 7.

4 StPKr 2, pp. 131–215.

5 StPKr 2, pp. 239–270.

6 StPKr 1, p. 15–17.

keys were to be hanged on separate board in the office of orderly officers. In case of business trip of illness a clerk was obliged to send keys to the closet and desk to the vice-starosta[7].

Almost all of the matters regulated provisionally in the above mentioned circular letter were subsequently changed, during the working of the county office. Such changes were inevitable due to everyday practice of office work in the county that instantly verified issued at the begging by the starosta. One should not be surprised by this situation, because above mentioned regulation was enforced in the first week of functioning of county office, when there was no proper experience in discussed matters. Even though changes were made, one should not deprecate the significance of above mentioned document, as it certainly improved office work in the county in the first days and weeks of its functioning.

The first order in the matter of internal and external correspondence was issued on 11 April 1945[8]. The starosta by the decree No. 23[9] regulated the division of chancery operations in county office. General rules for the circulation of documents and mail remained almost unchanged throughout the life of the county district in Krakow (i.e. the years 1945–1950). All the correspondence flowing into the office by mail and telegraph, or personally contributed was recorded by the office of information and journal, and then allocated to specific officers by the content (in accordance with the scope of their activities).

Detailed regulation for the mail circulation was included in the Provisional Chancellery Instruction issued by the Krakow Voivode, dated 17th June 1945[10]. Correspondence is collected from the post office by a janitor authorized for this operation, according to a book collection and is given to the head of the chancellery in county office. Post is taken by the janitor in special closed bag, a key for which is held by a postal clerk in county office, and the second one by the head of the county chancellery. While receiving mail, the postal clerk investigates whether:

a) the application is signed and accompanied by a petitioner address,
b) pointed or required annexes are attached to the document,
c) the petition does not contain several different claims, each of which should be covered by a separate administration,
d) the fees are paid.

In case of shortages, the official urges the petitioner to remove them, instructing a petitioner of the consequences of failure to comply with the summons. If interested party does not withdraw the application, or will not correct faults in the application, clerk will make an endorsement on the side and will instruct submitting party, subsequently clerk will stamp postmark on the bottom left-hand corner. At the request of a petitioner postal clerk would give him a signed acknowledgment of receipt of application, specifying the attachments, paid according to the regulations on stamp duty charges.

Ordinary correspondence should be opened by the head of county chancellery, who stamps it with the incoming stamp and divide it into different document case for every county department. Folders with the incoming mail should be presented (at appointed hour, as soon as possible) to starosta of vicestarosta, who reviews it, provides directives and possible changes in the allocation of correspondence. With a greater inflow of correspondence starosta may order that he preferred to review only certain categories of cases, and the rest being turned over for review by the vicestarosta. Correspondence designated by the superior authority or by the starosta (vicestarosta) as urgent should be provided to in a separate (red) briefcase, and after concluding the case, given to the starosta or authorized official for signature.

Similarly as the procedure of sorting incoming mail., the dispatch of official correspondence was also centralized – the office dealing with this was the forwarding department, in which ultimately a signed letter was placed, which was then sealed, enveloped and addressed. Also in this matter confidential and secret correspondence was an exception, it has to be brought by the appropriate official sealed (in double envelope) and addressed in order to send to the recipient[11].

There was a different form of proceeding with the secret acts which was affected in the internal order of the starosta on April 17th, 1945[12], but the change with reference to the normal course of action was limited only to the moment of inflow and outflow of such correspondence within the county office. Regarding the first of these moments, it was found that the letters marked as secret or confidential, as well as addressed by name to the starosta, postal office in the county does not open, but transfers directly to the starosta, which opens them himself and assigns for further action. Regarding the forwarding of correspondence within the county office, in the above mentioned order, there was only instruction that secret and confidential letter should be sent in double envelopes. This adjustment was repeated in the provisions of the Provisional Chancellery Instruction without significant changes. Cases marked as „top secret" and „classified" are sent in two envelopes. When the case is 'classified' only 'inner' envelope is addressed by and marked as classified by the clerk who is in charge of the case. In 'top secret' correspondence both envelopes are addressed by the clerk, inner envelope is marked 'top secret', but within his duties clerk also has to make sure that such a letter is registered in a special dispatch book and that it is send properly.[13]

The Provisional Work Statute in relation to the circulation of internal mail regulated following matters: the avoidance of

[7] StPKr 1, p. 17.
[8] StPKr 1, p. 69.
[9] StPKr 1, p. 69.
[10] StPKr 2, pp. 101–106.
[11] StPKr 1, p. 69.
[12] StPKr 1, pp. 71–73.
[13] StPKr 2, p. 106.

redundant mail[14], making interstate telephone calls[15], handwritten mail[16] and usage of proper forms[17]. According to the discussed act, all of internal correspondence should be used for the fastest and final conclusion of entirety of the case. Due to this, all of redundant and indirect mail should be avoided, as it is not aiming to the end of the case. In cases in which the fastest way of concluding the handled matters is to make a phone call instead of issuing written mail, a phone should be used. The entire preparatory correspondence needed to collect all significant information before the conclusion of the case should be concise but in the same time exhaustive and all elements giving basis for concluding of the case should be gathered.

For acceleration of clerks' work in the county office the greatest possible number of mail should be made in handwritten form on the proper act, or by the usage of appropriate forms, without rewriting on the typewriter. Such hand-written documents should be used mostly in preparatory mail, inquires, reminders, mail return, requistion of documents, derogation due to legal property, without the regard to the addressee of the letters. The use of ready forms (schemes) in preparation of the final conclusion of cases which are recurrent in the almost identical outside form is said to be highly purposeful, as it relieve clerks, who are then released from rewriting stereotypical formulas (so their work is a lot faster and efficient); also the homogeneous line of settlement was maintained. Fair copies of such documents were made by the county office chancellery also on ready forms.

In the internal and external correspondence clerks should use every methods and means that facilitate the addressee to find, understand and conclude the case, or that cease the need for the following mail, i.e.:

a) refer (quote) the presumptive document of the addressee, giving its date, reference symbol (no. of the case) and headline, as well as the content (subject) of the case;
b) use proper official names;
c) while sending the identical documents to number of administration authorities or offices, include at the end of the act distribution list specifying all of addressees.

Determination (marking) of cases coming into the individual cells of the county had also been regulated in detail by above mentioned Provisional Chancellery Instruction. This act stated that any new case coming into the department receives a separate number composed of a letter sign denoting the department, number of group of cases (included in a division of activities), then the next number or letter sign from the register of cases and at the end the year. These data have led to the arrangement of incoming cases, to facilitate their subsequent location and assign a specific official responsible for the settlement that, if necessary, to draw for him to disciplinary liability. The responsibility for proper arrangement of cases in every department and for conducting so called department register was to be beard by the head of the department.

This regulation was supplemented by the Provisional Work Statute which settled the problem of acts and documents arrangement[18]. All of the cases handled by the clerk should be arranged in chronological order and sewed when needed, without distinction for documents deposited in county office and sent to other authorities.

Punctuality of handling matters had been a priority in the activities of the county, however, it could not affect the substantive value of the prepared documents. Each clerk had to keep the overall portfolio of cases coming into the department (ordinary and urgent separately), divided in terms of time in which a case is to be definitively settled. Folders with a specified deadline should be kept in a separate closet intended for this purpose. Every day before the start of normal work a clerk or his assistant should remove a portfolio punctual for the current day and depending on the status of the case move the case for a further term or urge the matter and sets a new deadline, after which the file is put into a new folder on time. Documents, to which in a given period had been no reply clerk urges in accordance with a special form. If the remainder had not been effective clerk would have referred the matter to the starosta who had to have intervened directly to the unsuccessfully urged authority (office).

In order to avoid unnecessary reminders, terms of cases' conclusion should be fixed in accordance with the capabilities of the office that had the case ordered. Certain factors such as mail circulation, local communication conditions, the need to contact other organs and additional circumstances such as necessity to conduct inquiries also should be taken under consideration. Terms should be carefully chosen in order to avoid choosing deadlines on holidays. Clerk should decide whether the term is appropriate either should it be rescheduled or should it be ceased. If summoned for the first subordinate office would not answer, clerk could have demanded an inquiry about reasons of the delay. Failure to respond by the superior office was a ground for intervention in the form of a reminder, admonition or complaint[19].

Deadlines fixed by the superior authorities should be unconditionally respected by the County Office[20]. In the case when for any reason reply could not be sent on time, relevant explanation and request for an extension of term should be immediately sent. In the document sent the information about the term in which case would be settled. Such an explanation must be sent in such a time that superior office would receive it before the end of the term. Deadline specified in the letter should be set with regard, that reply should be received by the superior authority before the end of the deadline (Circular letter of MIA signed on 29th April 1927 no. OL 1452).

[14] The Provisional Work Statute, point 46.
[15] The Provisional Work Statute, point 47.
[16] The Provisional Work Statute, point 48.
[17] The Provisional Work Statute, point 49.
[18] The Provisional Work Statute, point 65.
[19] The Provisional Work Statute, point 59.
[20] The Provisional Work Statute, point 60.

For the first time the issue of internal supervision was regulated by the internal decree number 15 issued on 26th of March 1945[21]. In the document Starosta underlined, that heads of the departments could meet him every day from 1 o'clock to 3 o'clock. Folder with the documents had to be presented for approval in the starosta's office everyday to 1 o'clock – folders could be collected on the next day at 8 o'clock. Starosta obliged other clerks to comply with those rules and terms, emphasizing that meeting with heads of the departments and signing of the documents in other terms would only be possible under exceptional circumstances.

Issues of supervision and approval of writings prepared by civil servants became subject to regulations subsequently on February 5th, 1945[22]. All projects of documents were initially approved by the starosta personally, or his deputy or any officials entitled by the starosta within the limits of written authorization. With time, due to the increasing number of affairs handled by the county administration and the rapidly increasing number of documents prepared for the starosta's approval, he had reserved for himself only the papers addressed to the office of provincial and higher authorities as well as to detached authorities' offices and any decision of a legislative or fundamental nature. Approval of vice-starosta covered a wide range of issues including the budget, criminal conduct and administrative matters as well as social service. Managers could accept documents written by themselves or their subordinates, besides matters reserved exclusively for the approval of starosta and vice-starosta, and all matters of a legislative and basic nature, all provincial and higher authorities' documents as well as addressed to the authorities and offices of detached administration[23].

As for the other aspects of starosta's supervision over the papers created by subordinated officials, the way of presenting document was also regulated. Clerks were supposed to present prepared drafts every day between 8 and 10 o'clock. Only prompt matters were granted the exception and could be presented to starosta every time during the day. Documents could be taken back by the officials around 2 o'clock and send first to chancellery for rewriting (on a typewriter) and then to the forwarding department. Documents on which starosta noted corrections had to be revised and the whole procedure had to be carried out from the beginning[24].

From the documentation of the County, it should be concluded that this matter was not definitely resolved with the above mentioned decree as on 7th April 1945 Starosta issued other internal decree dealing with regulation of hours on which officials may meet with Starosta[25]. Starosta ordered that deputies of departments should prepare document folders with the name of the departament. All cases that had to be approved by the starosta could be submitted on every work day from 1 o'clock to 2 o'clock to the head of county's chancellery (exception was made for the officials with urgent cases and officials of the war department with whom Starosta met individually). Furthermore, Starosta stated, that some of deputies of departments approved some cases sent to Voivodship Office by themselves, which was unlawful. Therefore he reminded that the preliminary and final approval of the documents sent to Voivodship Office falls only into his jurisdiction. Subsequently he reminded clerks about using the official channels to contact superior authorities in every case[26].

Not only relations between starosta and subordinate officials were the point of interest of the regulator, but inter county clerks as well. Communication between the county officials on issues that concern two or more papers should not exceed the framework of relevant needs. Separation of operations indicates referent which the matter must be discussed with. Communication in official matters within the county office is usually by direct contact (verbally, by phone). The referring official includes in the act a short note on agreement reached or the disagreement that occurred. When it comes to matters of particular importance, complex, or requiring extensive reasoning clerk should handle to the appropriate official whole act with a suitable note. Official correspondence between the departments and officials of the same county office is unacceptable, only professional officials, performing action in two or more counties may employ internal correspondence (about the nature of information and report) with the starosta as their superior. Also, the county that are not the abode of professional official (expert) send handwritten documents directly at his records to settle or prepare a draft opinion[27].

All the above mentioned rules (as well as many others) were designed to standardize and improve the work of the County Office of Krakow. It should be noted that these provisions were introduced to the newly created administration after the war and occupation, so nowadays they might be considered natural and simple, but one should bear in mind that for more than five years this type of Polish administration did not exist. After the WWII government authorities were mostly interested in acquire and sustain the central power and most important offices. Due to this fact, regulations on internal organization and supervision in local administration were left for voivodes and starostas to settle. One should also bear in mind that the county offices were not the most crucial ones in the hierarchy of local authorities – newly settled communist authorities were more interested in organizing national councils, as proper offices for the subsequent change of administrational model in Poland.

While regulating internal organization of County Office in Krakow, starosta and voivode had to settle proper conditions for this institution to revive, or even to be created from the beginning. Rules had to be made concerning all aspects of work – working hours, correspondence, supervision etc. As almost fifty percent of clerks hired after the war did not have any kind of experience in official line of work even most fundamental matters were to be regulated, otherwise the office would not function effectively, creating chaos for citizens of the county.

[21] StPKr 2, p. 55.
[22] StPKr 1, p. 14.
[23] StPKr 1, p. 14.
[24] StPKr 1, p. 14.
[25] StPKr 2, p. 67.
[26] StPKr 2, p. 67.
[27] The Provisional Work Statute, point 40.

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Punishments Connected with Person of Offender in Selected Countries of Ancient World*

Michaela Uhlířová**

Abstract

The article deals with sanctions directly connected with the person of offender in the established group of selected ancient states (Egypt, Mesopotamia, Hittite Empire). In this article these sanctions are divided and, furthermore, their impact from personal (humiliation), religious (posthumous life) as well as legal ("legal death") view is discussed. In particular the legal norms extant in collections of laws (Mesopotamia, Hittite Empire) or court protocols (Egypt) were used as the basic sources for elaboration of this article.

Key words: *Hittites; Mesopotamia; Egypt; shame; degradation; personality; designation; outlaw; society; law; punishment.*

1. Introduction

Ancient penal law had rather wide scale of different punishments which can be categorized based on their character. First of all there is a group including capital punishment and corporal punishments (usually spanking or mutilation punishments). The second group is than composed of property sanctions, either in kind or monetary form. The third group being subject of this article includes rather waste scale of punishments connected with the person of offender. During the development of the individual states also punishments imposed changed and capital and corporal punishments predominantly used before were later reserved only for selected crimes and in majority of other cases they were replaced by property punishments. This procedure results from the classical development, when the principle of revenge is replaced by the principle of indemnification.[1]

Sanction, on which this article concentrates are connected with standing of offender in society, if his position is significantly worsen or if he is excluded from the society at all. This regards in particular punishments concerning honor of offender (humiliating punishments), furthermore, loss of personage and expatriation.

First of all, we have to stipulate, that only honor of free man could have been damaged in Ancient world as slave had no honor from the point of view of that time.[2] Another important aspect was differentiation – typical for than society.[3] The honor of member of higher class was considered more important and therefore if we find legal regulation in this area, it regards more privileged persons. Honor of lower standing persons against dishonor from embers of higher ranks was probably not protected.

2. Humiliating Punishments

These are different sanctions, the aim of which is dishonoring the crime offender and very often also making him ridicule. The level of punishment seriousness is individual for each and every offender. If such punishment was imposed to person from higher class it damaged such person usually more than in the case of imposing the same punishment to person of lower standing. Humiliating punishments can often be found together with other punishments (e.g. forced labor) and therefore they have basically add up the punishment of offender by humiliating him.

If we consider this type of punishments in general, we an further divide them into simple humiliating punishments, the aim of which was nothing else but humiliation of offender, and punishments typical by decreasing of its intensity in time. Cutting hair or public spanking belong to examples of such cases. *"If an awîlu*[4] *should strike the cheek of an awîlu who is of status higher*

* This article concentrates on legal regulation in ancient Egypt, Hittite Empire and Mesopotamia states (Sumer, Babylon, Assyria).

** JUDr. Michaela Uhlířová, Department of the History of the State and Law, Faculty of Law, Masaryk University, Brno, Czech Republic.

1 Transfer from revenge to indemnification depends on social development not from time. Therefore we can find it in Sumer time, nonetheless later in Babylon, *talio* – revenge dominates again. Transfer from talonic punishment to the indemnification in Mesopotamia is worked up in Klíma, Josef, *Nejstarší zákony lidstva, Chammurapi a jeho předchůdci,* Academia, Praha, 1979, pp. 276–281. Very visible is the change e.g. in Hittite law, or, as the case may be, in so called Hittite Laws comp. Hoffner jr., Harry A., *The Laws of the Hittites: a critical edition*, Brill, Leiden – New York – Köln, 1997.

2 Klíma, Josef, *Nejstarší zákony*…, p. 301.

3 Differentiation occurs expressively only in some countries (e.g. Mesopotamia), sometimes we can see only partial differentiation (e.g. Hittites knew only slaves and free man as different social groups), in some laws we do not see it at all (law fragments from Egypt – e.g. Haremheb's laws). Nonetheless in praxis such differentiation existed in all above mentioned states and being member of higher social rank meant higher protection by law. Comp. Dopis Epiho in: Lexa, František, *Veřejný život ve starověkém Egyptě, II. doklady*, Nakladatelství československé akademie věd, Praha, 1955, p. 188 or Povídka o výmluvném venkovanu in: Lexa, František, *Beletristická literatura staroegyptská*, J. Šnajdr, Kladno, 1923,pp. 129–146.

4 Awíl – citizen with full rights, differences in social standing could be very significant. More to this see e.g. Klíma, Josef, *Nejstarší zákony*…, pp. 161–182.

than his own, he shall be flogged in the public assembly with 60 stripes of an ox whip." [5] In this case the privileged citizen suffered more on his honor than physically, namely due to the fact that the attack was aimed from the person of lower rank who should show respect towards him. Due to this fact also the sanction is adequate to the character of committed crime. Punishment of spanking represented corporal punishment, however, the execution of such punishment by ox tail made it humiliating, moreover reinforced by the fact of public execution of punishment. In the context of the following provision it is clear that such sanction did not punish the offender for the physical detriment, but for the fact that he breached the borders between social classes:*"If a member of the awîlu-class should strikethe cheek of another member of the awîlu-clas who is his equal, he shall weigh and deliver 60 shekels of silver."* [6] Therefore the corporal punishment stipulated in § 202 had humiliating effect in particular and by applying such punishment not only the offender was dishonored but also the insult to awíl of higher rank was softened.

Within the framework of Mesopotamian Law, we have to add, that the above mentioned protection of honor regarded also women. *"If a man causes a finger to be pointed in accusation against an ugbabtu* [7] *or against a man´s wife but cannot bring proof, they shall flog that man before the judges and they shall shave off half of his hair.*[8] Protection of women regarded again only privileged women, i.e. members of priestess rank or wives of fully-fledged citizens.[9] Social class or, as the case may be belonging to certain social rank was crucial in ancient world, also from legal point of view. Then legal orders provided higher protection [10] to more privileged persons or even provide them advantages also in the case they committed crime.[11]

Certain punishments, nonetheless they belong to the group of punishments established in the introduction, could also have humiliating effect. IN this group we can find public spanking, denouncement, or, as the case may be, certain types of mutilation punishments. However, humiliation effect is provided only by some selected types of mutilation punishments. To determine, if the respective case represents humiliation punishment, we have to consider many aspects connected with the actual situation. First of all, we have to consider the mutilation punishment in the context of the respective civilization and time, as the same detriment could be caused not only by execution of judgment but also as result of war or injury – cutting of hand represents classical example. At the same time, we also have to consider the frequency of the respective punishment in the legal order, as the more specific the punishment's effect was for the offender of the respective crime, the higher was the probability of humiliation effect as such punishment clearly marks the crimes committed by that person. As it was already mentioned above, the loss of arm was not necessarily something special. On the other hand, loss of ears or nose represented, at the same time, also detriment which was not probable to occur in everyday life. This type of punishment was often in many ancient states including ancient Egypt or Hittite Empire. The condemned person was punished not only by the pain and subsequent impact of hearing downgrade and limitation of breathing but it was also "marked" for the rest of the life. It was permanent disgrace for the rest of the life and the punished person's neighborhood considered him/her as punished offender. He/She was marked by this stigma until his/her death.

In ancient Egypt the mutilation punishment was imposed in combination with forced labor, namely e.g. for robbery of mandatory duties for the king: *"If the common man levies mandatory duty for the brewery and for king's kitchen to the hand of representative, [and his ship and his property is robbed], My Majesty orders, that each and every soldier (?officer?), who takes the ship to anyone, to soldier or any other person from the whole land, shall be punished by cutting off his nose and shall be sent to Carev* [12]*."* [13]

After the reform represented by so called Hittite Laws, in Hittite Empire the corporal punishment was reserved to slaves [14] exclusively and therefore we cannot speak about sanction in form of loss or damage to honor but rather of decrease of slave's value in economic view.

Also punishment included in the Hammurabi Laws: cutting off the language or ripping out of eye for adopted son who expressively repudiates his adoptive parents [15] and by doing this he unlawfully breaks the relation occurred based on the adoption [16], could also be mutilation punishment with dishonoring effect: *"If the (adopted) son of chamberlain or the (adopted) son of an epicene states tho the father who has brought him up or the mother who has brought him up 'Thou art not my father' (or) 'Thou art not*

[5] § 202 of Hammurabi law in: Roth, Martha T., *Law Collection from Mesopotamia and Asia Minor*, second edition, Scholar Press, Atlanta, 1997, p. 121.
[6] § 203, same as above.
[7] Ugbabtu means priestess.
[8] § 127 Hammurabi laws in: Roth, Martha T., *Law Collection*..., p. 105.
[9] Klíma, Josef, *Nejstarší zákony*..., p. 131.
[10] Ancient Mesopotamia represents classical example and division of people into classes.
[11] Only in the cases when the crime was not aimed against the state and ruling class. Such crimes were considered so serious, that there was no mercy. In particular during unquiet times king had to intervene also again the privileged persons. E.g. Haremheb's edict expressively points out the validity of the same sanction regardless of offender(s person comp. Lexa, František, *Veřejný život… II*, p. 23.
[12] Carev was border fortress through which the condemned persons were transported to forced labors in Sinai mines, see Lexa, František, *Veřejný život ve starověkém Egyptě, I. výklad*, Nakladatelství československé akademie věd, Praha, 1955, p. 86.
[13] This regards the provision in king Haremheb's edict. Lexa, František, *Veřejný život… II*, p. 71. Farao Haremheb was the last ruler of XVIII dynasty which ruled Egypt until approx. 1292 BC. See Chronology table in: Verner Miroslav, *Objevování starého Egypta*, Ladislav Horáček – Paseka, Praha and Litomyšl, 2008, pp. 394–398.
[14] Comp e.g. Hoffner jr., Harry A., *The Laws*….
[15] It is a special case of adoption, when adoptive parents is either important palace officer or priestess. More to this theme Klíma, Josef, *Nejstarší zákony*…, p. 248–251.
[16] However, this does not mean that adoption was generally unchangeable status. On the other hand, there were legal way to cancel it. Driver, G. R. – Mills, John C., *The Babylonian Laws*, Volume I, Oxford University Press, Oxford, 1955, p. 401.

my mother', they shall cut out his tongue."[17] *"If the (adopted) son of a chamberlain or the (adopted) son of an epicene has discovered the house of his (natural) father and hated the father who has brought him up or the mother who has brought him up and (goes) to his (natural) father's house, they shall pluck out his eye."*[18] It is rather solitary and specific sanction in the Hammurabi Law, and from the above mentioned citation the symbology of the respective punishment for the committed crime clearly results. It is such type of detriment, which occurs very rarely in the common life. Nonetheless it is rather logical consideration, as in this case it is impossible to prove if such provision was really applied in praxis[19] or if person on whom such punishment was applied was automatically seen as someone, who committed this crime. Moreover, without context with then customary legal regulation, we cannot qualify occurrence of this sanction in comparison with other crimes.

Also Central Assyrian laws include many punishments characteristic by very strong symbology with committed crime and the respective person is eternally marked due to such punishment (exactly due to the specificity the probability of dishonor is higher). For example, the punishment of chopping of lower lip was reserved for man kissing[20] someone else's wife: *"...If he should kiss her, they shall draw his lower lip across the blade (?) of an ax and cut it off."*[21] Unfaithful woman could be punished by cutting her nose: *"...if the woman´s husband kills his wife, then he shall also kill the man; if he cuts off his wife´s nose, he shall turn the man into a eunuch and they shall lacerate his entire face...."*[22] With regard to rather often existing corporal and in particular mutilation punishments in Assyrian law, the intensity of vilifying effect is questionable.

3. Loss of Social Standing, Loss of Personality[23]

We can meet rather strange types of detriment connected with person of offender in ancient Egypt within the framework of sanction imposed in proceedings with participants of conspiracy against the king Ramesse III. By committing regicide attempt the offender committed one of the most severe crimes. Attack against the king was not only attack against the state authority, but it was also aimed against gods, as person of king had divine character. Therefore, sanctions imposed were the most severe possible and their aim was to exclude the offenders not only from the world of living but also from the world of dead. In most cases the capital punishments were imposed, even absolute capital punishments, when liquidation of condemned's body meant also definitive loss of posthumous life. Except of capital punishment also other, below mentioned sanctions were imposed in cumulative way.

3.1 Loss of Office

Sanctions in form of loss of office had economic character in particular. Within the above mentioned proceedings, the economic point of view is rather secondary, as thus punishment was imposed together with capital punishment and therefore the economic sanction had no effect to condemned person. Therefore, the main detriment was the loss of honor and dignity of the respective person.[24] It is certainly interesting, that he was recalled from the office retrospectively and the condemned person was seen as if it would never be in such office. Change of past matters into wished form was not exceptional in the case of ancient Egyptians.

One of accused in the respective court proceedings Pebekkamen is in one of the parts, in which he plays only secondary role, called "minister of chamber"[25] On the other hand, in the part speaking about his guilt and punishment, it is written that "his nomination to office of minister of chamber was impeded by Ré".[26] In this was high professional standing of Pebekkamen he reached was subsequently denied.[27] However this, on the first sight rather useless, punishment had great impact in major area – area of posthumous life. Officers, especially those in higher functions, were adequately proud of their offices and therefore they let their biography concentrating on their professional carrier, or, as the case may be, to merits and awards from the king of course carve onto the walls of their tombs. The king and his personal praise and accolade meant in all cases increase of prestige of the tomb owner not only in this but also in posthumous word.[28]

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[17] § 192 of Hammurabi laws e.g. in. Driver, G. R. – Milles, John C., *The Babylonian Laws*, Volume II, Oxford University Press, Oxford, 1955, str. 73–74, Roth, Martha T., *Law Collections*…, p. 120.

[18] § 193 same as above.

[19] We can often meet speculations that Hammurabi laws, or as the case may be, all its provisions were actually used in praxis. Also in the case the provisions would not be directly applied for concrete cases, it is a collection providing idea of than society of law and showing us how they regulated their relations in society. More to this e.g. Charpin, Dominique, *Writting, Law, + Kingship in Old Babylonian Mesopotamia*, University of Chicago Press, Chicago and London, 2010, str. 79–81 or VerSteeg, Russ, *Early Mesopotamian Law*, Carolina Academic Press, Durham, North Carolina, 2000, str. 13–18.

[20] It is not sure if it applies to kiss or bite. Klíma, Josef, *Zákony Asýrie a Chladeje, Pokračovatelé Chammurapiho*, Academia, Praha 1985, ppr. 89–90.

[21] § 9 of Central Assyrian laws in: Roth, Martha T., *Law Collections*…, p. 157.

[22] § 15 of Central Assyrian laws in: same as above, p. 158.

[23] This part partially stems from author(s text: Soudní proces s aktéry harémového spiknutí proti Ramessovi III. in: Knoll, Vilém (ed.), *Naděje právní vědy*, Býkov, 2010, Plzeň, in print.

[24] Position of any officer in ancient Egypt was very honored as the execution of office job required education which was not usual with regard to the literacy in ancient times. Office job in any level of state apparatus was considered prestigious, as it was well paid and in comparison with very demanding work of farmers or risky life of soldiers it was far more comfortable. Berlev, Oleg, officer in: Donadoni, Sergio, *Egyptský člověk a jeho svět* [Egyptians], Vyšehrad, Praha, 2006, p. 94.

[25] Lexa, František, *Veřejný život… II*, p. 95.

[26] Same as above, p. 94.

[27] More to this e.g.Vernus, Pascal, *Affairs and scandals in Ancient Egypt*, Cornell University Press, 2003, p. 117.

[28] Vachala, Bedřich, *Nejstarší egyptské životopisy* in: Nový Orient, Number 1, Ed 46/1991, Orientální ústav AV ČR, Praha, 1991, p. 8.

3.2 Full Loss of Personality

In connection with the above mentioned court proceedings also other sentence used to be imposed having similar, nonetheless much serious effect – loss of name, namely already during the proceedings itself. Together with his/her name the condemned actually lost himself/herself. To be able to understand the impact of such sentence, we have to provide at least short explanation about the importance of name for ordinary Egyptian. The name of each Egyptian was strongly connected with his/her personage. Therefore, it was not mere denomination based on which he/she was recognized from the others. It rather represented a code including all information about man.[29] The first name used to be given to Egyptians by birth, its modifications occurred in important occasions.[30]

Change of names of conspiracy participants not only meant defamatory denomination. Name represented very important part of personage. Knowledge of name of either god or human being represented the power over it. The importance of name was crucial for the journey to the kingdom of deaths and the loss of name represented loss of identity ad consequently also of the posthumous existence.[31] Offenders who lost their names gained new ones, not very flattering – very often the expressions like "Re disdains him", "Re loathes him", "Snake – Demon" etc were used.[32] Due to the change of the original name, which usually reflected positive relation to gods, due to the name of this type, offender could not become one of blessed ones after the death.[33]

4. Expatriation

Not very often, however, time to time, we can find the punishment of expatriation in the ancient written legal norms. It represents a relict of relatively often used sanction existing in all countries as of the beginning of human society still used in the time of written laws in many regions thanks to the customary law.

Expatriation was used as punishment for person, who committed some very serious penal crime (or several such crimes) and his/her persistence in the society was considered harmful. On the first sight, we could see such institute redundant, as for the society it would be simpler to sentence him/her to death. However, execution of such punishment did not bring the expected peace in all cases. On the other hand it could cause more sorrow than good, in particular if not respected by relatives and friends of condemned. Similarly, it prevented the application of vendetta[34], in the case of which there was the risk of so called catenation and one death could start never ending spiral.[35] At the same time, we have to take into consideration, that social corrective in the form of vendetta worked only outside the basic social unit, i.e. outside the family or tribe, not inside of it. Therefore, such issues were sometimes resolved using expatriation, or, as the case may be, by exclusion of offender from the respective commune.[36] Also if such sentence was imposed the basic goal was reached, i.e. the influence of offender onto the rest of society was impeded.[37] The effect of expatriation in ancient times was similar to the one of interdict in Middle Ages.[38] Member of the society expatriated in this was also used to loose all his/her fortune, rights, family ties were broken (including those of husband and wife). The sentenced was legally dead for the society where he/she used to live (inheritance was settled etc.). The fat that it was assumed, that by expatriation the condemned looses also the protection of gods represented another aspect and for then society it was terrible sentence.[39] Offender became cursed due to his/her act and as such he/she was bearer of destruction for everyone who lived with him/her. Fear of transfer of contamination he/she used to bear existed. Therefore he/she was expatriated. Expatriation did not cause spill of blood and the commune was not contaminated. The contaminated person takes his/her curse with him/her and the commune is heal by his/her departure.[40]

As it was already mentioned above, curve was reserved in particular for persons in the case of which the incompatibility of his/her permanence in the society and assurance of peace and order were assumed, or as the case may be, such sentence represented an alternative to capital punishment. It is in no case modulation of capital punishment, as the curse was very often connected with early death of respective person. Such person could not easily start a new blameless life in other part of the country, where he/she and his/her crime were not known. As he/she was dispossessed of his/her fortune and all social liens, the entry into the society in other city or village was very complicated for him/her. Originally, the expatriated person finished in the waste land where the lonely being without the help of

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[29] Janák, Jiří, *Lidská bytost v myšlenkách starověkých Egypťanů* in: Nový Orient, Number 6, Ed 50/1995, Orientální ústav AV ČR, Praha, 1995, p. 211.

[30] More to this furthermore Baines, John, *Náboženství ve starověkém Egyptě*, [Religion in Ancient Egypt], Verbum Publishing s.r.o., Neratovice 2009, p. 188 ff.

[31] More to this furthermore Mertz, Barbara, *Lid obou zemí* [Red Land, Black Land: Daily Life in Ancient Egypt], Domino, Ostrava, 2009 p. 376 ff.

[32] More to this in more detail Lalouettová, Claire, *Ramessova říše, Vláda jedné dynastie* [L'impero dei Ramses], Levné knihy a.s., 2009, p. 258.

[33] Janák, Jiří, *Lidská bytost*…,, p. 211.

[34] I.e. solution of crime between families.

[35] More to this see Šejvl, Michal, *Nejstarší počátky trestního práva* in: Salák, Pavel, Tauchen, Jaromír (eds.), *Československé trestní právo v proměnách věků (sborník příspěvků),* Masarykova univerzita, Brno, 2009, pp. 7–21.

[36] Janák, Jiří, *Lidská bytost*…, p. 211.

[37] Bryce, Trevor, *Life and Society in the Hittite World*, Oxford University Press, Oxford, 2002, p. 49.

[38] Klíma, Josef, *Nejstarší zákony*…,p. 301. To the medieval interdict e.g. Knoll, Vilém, *Žít "mezi vlky a ptáky" črta z dějin trestního práva na Chebsku* in: Knoll, Vilém, Bednář, Václav (eds), Naděje právní vědy, Býkov 2006, Plzeň, Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2006, pp. 271–278. In broader context Knoll, Vilém – Šejvl, Michal, *Living Dead – Outlaw, Homo Sacer and Werewolf: Legal Consequences of Imposition of Ban. in: Leben nach dem Tod. Rechtliche Probleme im Dualismus: Mensch – Rechtsubjekt.* Grazer rechtswissenschaftliche Studien 64, Ed. A. Gulczyński, Graz, Leykam Buchverlagsgesellschaft m.b.H. Nfg. & Co. KG, 2010, pp. 139–153.

[39] The same as above. We can meet the expatriation also in the Roman Law, when offender is cursed (consecratio) and exluded from the society. Bartošek, Milan, *Dějiny římského práva ve třech fázích jeho vývoje*, Academia, Praha, 1988, p. 150.

[40] Comp. Šejvl, Michal, *Psanci, vlkodlaci a homines sacres mezi mýtem a právem* in: Knoll, Vilém, Karhanová, Martina (eds.), Naděje právní vědy, Býkov 2007, Plzeň, 2008, pp. 143–162; Knoll, Vilém – Šejvl, Michal, *Living Dead*…, spec. p.. 143–144.

collective (family, tribe) had practically no chance to survive. He/she was deprived of "water and fire" as described by newer Roman institute of *aquae et ignis interdictio*. He/she was given in common to nature, elements, and foreign people.[41] Suspicion and wariness towards newcomers represented another complication. If for example someone was expatriated from his/her home town in ancient Mesopotamia (Sumer), his/her position was really not enviable. Towns represented specific units providing their rights only to their citizens and foreigners were not let into the city (except of businessmen, diplomats, or foreigners asking for political asylum with royal permit).[42] Person condemned to expatriation was much more likely to finish his/her life on the edge of society as beggar or thief. Therefore, it was very important sentence, to certain extent comparable with capital punishment. However, the severity of sanction corresponded also to fault committed, i.e. to the severity of committed crime. As an example we can cite the provision from Code of Hammurabi:*"If a man should carmally know his daughter, they shall banish that man from the city"*[43] The punishment of banishment in this case is defined as "loss of walls" and applies also in the case of disclaimer of son by his father in so called Sumerian Family Law:*"If a father says to his son 'Thou art not my son', je forfeits house and wall."*[44]

Sanction of exclusion from the society was known also to Hittite law. In one of the provisions of Hittite laws it is stipulated: *„If anyone elopes with a woman [and] afterwards a rescuer follows them, if two men or three men die, there shall be no compensation. „Thou art a wolf".*[45] Base don the fat the respective offenders became wolfs, they lost protection provided by the legal order to people and act usually considered to be against the law – their killing – became fully legal. Persons excluded from the society were often marked "wolfs" not only in the Middle East states but also in Europe. In some cases we an also consider the possibility of connection of werewolf myth with punished individuals.[46] Also the cited provision represents rather old provision or, as the case may be, anachronism from the time, when issues were resolved by vendetta.[47]

5. Conclusion

As it is clear from the above mentioned, punishments connected with the person of offender could range from moderate impact represented by simple humiliation to the most severe one in the imagination of ancient man represented by the loss of posthumous life. In all cases these are sanctions rejected by the modern legal orders. In the states of ancient world (as well as of the world of Middle Ages) these punishments could be very effective, not only with regard to repressive function but also the preventive one, when even single execution of the respective punishment could discourage other potential offenders from committing the crime.

41 Šejvl, Michal, *Psanci*…, pp. 156–161; Knoll, Vilém – Šejvl, Michal, *Living Dead*…, p. 144.
42 VerSteeg, Russ, *Early Mesopotamian Law*…, str. 66–67.
43 § 110 of Hammurabi law in: Roth, Martha T., *Law Collection*…, p. 121.
44 § 2 of Schedule A z *ana ittišu*, e.g. in: Driver, G. R. – Milles, John C., *The Babylonian Laws… II*, pp. 73–74.
45 § 37 of Hittite laws, Götze, Albrecht, *The Hittite Laws*, in: Pritchard, James B., Ancient Near Eastern Texts, Princeton University Press, Princeton, 1950, p. 190 ff.
46 Šejvl, Michal, *Psanci*…, pp. 144–153; Knoll, Vilém – Šejvl, Michal, *Living Dead*…, pp. 144–148. More to this also Larson, Gerald, James – Littleton, C. Scott – Puhvel, Jaan, *Myth in Indo-European antiquity*, University of Californnia Press, Santa Barbara, 1974.
47 Neufeld, Ephraim, *The Hittite Laws*, Luzac & Co. Ltd, London, 1951, p. 153.

Präambel im Fokus –Anmerkungen zum Vorspruch des Podiebradschen Friedensvertrages

Magda Schusterová*

Abstract

The preambles are generally considered to constitute an introductory or even poetical part of a legal text. The promulgation of the document is announced in the preamble and the reason for its promulgation. However a closer examination reveals that their content could be far reaching. Namely the preamble of the peace treaty of the Bohemian King George of Poděbrady (1458–1471) reflects interesting philological and juridical aspects of the medieval times, in that it mentions the general peace mission of the princes and their natural commitment to defend the Christian faith. We also find therein citations from the Holy Bible, from the Codex Iustinianus or a partially copied imperial writing of Frederick III. However the Bohemian text does not go beyond the tradition of the late medieval preambles in form and content- peace making among European princes in order to fight enemies of Christianity was one of the common topos at this time.

Key words: *Preamble; Peace; Treaty; Christian faith; George of Poděbrady; Bohemia.*

I. Einleitung

Dieser Artikel will zeigen, dass die Präambeln der mittelalterlichen Dokumente keinesfalls als nur informative oder sogar poetische Texte anzusehen sind. Sie können durchaus neben typischen kanzleimäßigen Ausdrücken, Zitaten klassischer Autoren oder der Bibel, wichtige „rechtsstaatlichen" Prinzipien des mittelalterlichen Lebens oder Verweise auf das römische Recht beinhalten. Bei der Untersuchung eines mittelalterlichen Vertrages oder einer Urkunde sollte mithin keinesfalls auf eine gründliche Untersuchung der Präambel verzichtet werden.

II. Gegenstand der Untersuchung

Hier soll die Präambel eines bereits bekannten Friedensvertrags, der zwar nie realisiert wurde, aber doch seinen Eingang in die Geschichte fand, analysiert werden. Es handelt sich um den Friedensvertragsvorschlag des böhmischen „Ketzerkönigs" Georg von Podiebrad (1458–1471), der in der polnischen königlichen Kanzlei unter dem Namen „*Tractatus pacis toti christianitati fiendae*" registriert wurde.[1]

Zu diesem Friedensvertrag existiert eine reichhaltige Sekundärliteratur.[2] Die meisten Autoren widmen sich vor allem dem geschichtlichen Hintergrund, der der Entstehung des Friedensprojekts vorausging. Natürlich werden auch juristische Aspekte des Vertrages behandelt, doch eine tiefgehende rechtshistorische Analyse der einzelnen Artikel steht noch aus. Die Präambel wird meist vor allem im Zusammenhang der Analyse des Traktates von Antonius Marini aus Grenoble behandelt. Dieser unternehmerische und abendteuerlustige Franzose italienischer

* Mgr. Magda Schusterová, European Legal Studies Institute, Universität Osnabrück, Deutschland.

1 Václav VANĚČEK, *Cultus Pacis*: Études et documents du »Symposium Pragense *Cultus Pacis* 1464–1964«: Commemoratio *pacis* generalis ante quiengentos annos a Georgio Bohemiae rege propositae, Prag 1966, S. 81.

2 Der böhmische Vertragstext wurde zum ersten Mal in den Memoiren von Commines abgedruckt. Lenglet du FRESNOY, *Memoires de Messire Philippe de Commines, seigneur d´Argenton*, London/ Paris 1474, Bd. II, S. 424–431. Erst in den sechziger Jahren des 19. Jahrhunderts, begannen sich die Historiker überhaupt mit ihm auseinandersetzen. Nach Voigt (Georg VOIGT, *Georg von Böhmen, der Hussitenkönig*, in Historische Zeitschrift, Bd. 5, 1861, S. 398–475.) und Markgraf (Hermann MARKGRAF, *Ueber Georgs von Podiebrad Project eines christlichen Fürstenbundes zur Vertreibung der Türken aus Europa und Herstellung des allgemeinen Friedens innerhalb der Christenheit*, Historische Zeitschrift, Bd. 21, 1869, S. 245–304) geriet das böhmische Friedensprojekt in den Focus der Aufmerksamkeit und es entstanden zahlreiche Monographien, 3 Dissertationen (Ernst SCHWITZKY, Der *europäische Fürstenbund Georgs von Poděbrad. Ein Beitrag zur Geschichte der Weltfriedensidee*, Leipzig 1907; Jerzy POGONOWSKY, *Projekt związku władców króla Jerzego z Podiebrad*, Warszawa 1932; Günter SELTENREICH, *Georgs von Podiebrad Plan eines europäischen Fürstenbundes*, juristische Dissertation, Heidelberg 1951) und wurde es regelmäßig in Büchern behandelt, die sich mit der Geschichte der Friedensidee oder der internationalen Organisation beschäftigen (Walter SCHÜCKING, *Organisation der Welt*, Leipzig 1909; Jacob TER MEULEN, *Der Gedanke der Internationalen Organisation in seiner Entwicklung 1300–1800*, Haag 1917; Sylvester John HEMLEBEN, *Plans for World Peace through Six Centuries*, Chicago 1943; Hans-Jürgen SCHLOCHHAUER, *Die Idee des ewigen Friedens. Ein Überblick über Entwicklung und Gestaltung des Friedenssicherungsgedankens auf der Grundlage einer Quellenauswahl*, Bonn 1953; Rolf Hellmut FOERSTER, *Europa. Geschichte einer politischen Idee. Mit einer Bibliographie von 182 Einigungsplänen aus den Jahren 1306–1945*, München 1967; usw.) Zum 500jährigen Jubiläum wurde eine Konferenz in der damaligen Tschechoslowakei veranstaltet. Der aus dieser Veranstaltung hervorgegangene Tagungsband gehört denn auch zur nützlichsten Sekundärliteratur. Václav VANĚČEK (Hrsg.), *Cultus Pacis. Etudes et documents du „Symposium Pragense Cultus Pacis 1464–1964". Commemoratio pacis generalis ante quingentos annos a Georgio Bohemiae rege propositae*, Praha 1966. Bei vorstehendem Überblick handelt es sich lediglich um eine exemplarische Aufzählung der Sekundärliteratur, die sich mit dem böhmsichen Friedensprojekt auseinandersetzte.

Herkunft stand in den Diensten des böhmischen Königs am Anfang der sechziger Jahre des 15. Jahrhunderts. Aus seiner Feder stammt eine an die Könige Böhmens und Polens gerichtete politische Schrift über die Notwendigkeit der Befriedung Europas sowie dem nachfolgenden Kampf gegen die Türken.[3] Dass er in der ganzen Geschichte des großen böhmischen Friedensprojekts einen großen Beitrag geleistet hat, ist unbestreitbar. Auf die Gemeinsamkeiten, die zwischen der Präambel des Vertrages und seiner Schrift bestehen und auf die in der Literatur bereits hingewiesen wurde, wird im Rahmen es Artikels später eingegangen. Bevor ich aber zur Analyse des Präambeltextes übergehe, ist es notwendig, den Leser mit einigen wenigen Sätzen mit der damaligen geschichtlichen Situation vertraut zu machen. Diese Einführung wird aber kurz gehalten, denn die Umstände der Entstehung des großen Friedensprojekts wurden – wie bereits erwähnt – in der Literatur unzählige Male behandelt. Anschließend wird der lateinische Text des Friedensvertrages kommentiert. Zur Orientierung ist der lateinische Text mit Randnummern verseht.

IV. Kleines historisches Intermezzo

Das 15. Jahrhundert brachte Böhmen eine im damaligen Europa unerhörte Sache: eine gewisse Religionsfreiheit. Wie Šmahel bemerkt hat gingen die Basler Kompaktata (1436), welche die Ausübung des utraquistischen Glaubens im Böhmischen Königreich erlaubten, über den mehr als ein Jahrhundert späteren Augsburger Frieden (1555) weit hinaus.[4] Die Wahl (1458) des Utraquisten Georg von Podiebrady zum böhmischen König sollte den Fortbestand der beiden Konfessionen und somit den Frieden im Lande sicherstellen. Dieser geschickte Politiker war sich aber bewusst, dass dem gesamten Königreich durch den Heiligen Vater Gefahr drohte, denn nicht nur erkannte dieser die Kompaktata als Produkt des Konzils nicht an, sondern hob sie im Jahre 1462 sogar öffentlich auf. Es ist schwer zu sagen, wer dem humanistischen Papst Pius II. aus der Familie Piccolomini ein größerer Dorn im Auge war – die Hussiten oder die Türken?

Bald nach seiner Krönung zum böhmischen König versuchte Georg von Podiebrady unter der Einflüsterung seines ausländischen Beraters – des deutschen Juristen Dr. Martin Mair die Reichsfürsten für seine Wahl zum römischen König zu gewinnen. Der Rang des zweiten Mannes im Reich würde Georg, so die dahinterstehende Überlegung, seine Position und damit die Position des böhmischen Königreiches sichern. Als dieser Plan scheiterte, blieb der König weiter Figur in den Planspielen dieses deutschen Juristen. Georg sollte mit den Reichsfürsten einen Bund schließen, um im Anschluss die Reichsreform durchzuführen.[5] Auch dieses Vorhaben war jedoch erfolglos. Schließlich versuchte Georg, den Papst mit seinen eigenen Waffen zu schlagen. Das päpstliche Bestreben, einen Kreuzzug gegen die Türken zu führen, war allgemein bekannt. Georg, von seinem zweiten ausländischen Berater Antonius Marini aus Grenoble dazu angehalten, ließ ein weiteres Projekt auf den Weg bringen. Es sollte eine Friedensliga der europäischen Fürsten (bestehend aus Frankreich, dem Deutschen Reich, einschließlich der Königreiche Böhmen, Polen, Ungarn, sowie Italien und Kastilien) gebildet werden. Diese sollte einen organisatorischen Aufbau inne haben. In einem Bund, der Krieges oder Fehde zwischen den Bündnispartnern ausschloß, sollten die befriedeten europäischen Herrscher gegen die Türken losziehen. Die geplante böhmische Friedensliga war also zugleich ein Bündnis gegen einen gemeinsamen Feind.

V. Analyse der Präambel des böhmischen Friedensvertragstextes

Der mittelalterlichen Tradition folgend beginnt unsere Präambel mit der üblichen *Invocatio*, also mit der Anrufung Gottes (Zeile 2). Die wichtigste Funktion der Präambel ist bereits in ihrem ersten Satz ausgedrückt – *„notum facimus universis et singulis ad perpetuam rei memoriam"* (Zeile 2) und zwar die Bekanntmachung.[6] Die Bekanntmachung für die eigenen Untertanen war von großer Wichtigkeit, aber auch für die anderen Mächte Europas, denn wie Steiger schreibt: „[E]s ging jeder Friedensschluss grundsätzlich ganz Europa an".[7] Adressiert werden in der Promulgatio wortwörtlich alle und der Einzelne und zwar für die Zukunft.[8] Die Herrscher stellen also ihr Vorhaben vor und im Anschluss gehen sie zu dessen Begründung über. Die Unentbehrlichkeit ihrer Intention sowie eine gewisse Legitimation des Unternehmens werden dem Leser angeboten.

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[3] Anthonii Marini Gratianopolitani ex Delphinatu epistola ad reges Bohemiae et Poloniae de unione Christianorum contra Turcos, Bayerische Staatsbibliothek, CLM 15606, 1r–8v.

[4] František ŠMAHEL, Mezi středověkem a renesancí, Praha 2002, S. 98.

[5] Zu beiden Unternehmungen des Königs, die von Mair initiiert und begleitet wurden zum Beispiel: Rainer HANSEN, Martin Mair. Ein gelehrter Rat in fürstlichem und städtischem Dienst in der zweiten Hälfte des 15. Jahrhunderts, Kiel 1992; Adolf BACHMANN, Böhmen und seine Nachbarländer unter Georg von Podiebrad 1458–1461 und des Königs Bewerbung um die deutsche Krone, Prag 1878; Gustav von HASSELHOLDT-STOCKHEIM, Herzog Albrecht IV. von Bayern und seine Zeit: archivalischer Beitrag zur deutschen Reichsgeschichte in der zweiten Hälfte des 15. Jahrhunderts, Leipzig 1865; Constantin HÖFLER, Über die politische Reformbewegung in Deutschland im XV. Jahrhunderte und den Antheil Bayerns an derselben, München 1850; August KLUCKHOHN, Ludwig der Reiche Herzog von Bayern. Zur Geschichte Deutschlands im 15. Jahrhundert, Nördlingen 1865; Rudolf URBÁNEK, Věk Poděbradský, České dějiny III, 1–4, Praha 1915–1962.

[6] Heinhard STEIGER, *Vorsprüche zu und in Friedensverträgen der Vormoderne*, in: H. Duchhardt / M. Peters, (Hg.), Kalkül – Transfer – Symbol. Europäische Friedensverträge der Vormoderne, Mainz 2006-11-2 (Veröffentlichungen des Instituts für Europäische Geschichte Mainz, Beihefte Online 1), Abschnitt 6 URL:<http://ieg-mainz.de/vieg-online-beihefte/01-2006.html>.

[7] Heinhard STEIGER, *Vorsprüche zu und in Friedensverträgen der Vormoderne*, in: H. Duchhardt / M. Peters, (Hg.), Kalkül – Transfer – Symbol. Europäische Friedensverträge der Vormoderne, Mainz 2006-11-2 (Veröffentlichungen des Instituts für Europäische Geschichte Mainz, Beihefte Online 1), Abschnitt 10–11. URL:<http://ieg-mainz.de/vieg-online-beihefte/01-2006.html>.

[8] Der Bezug auf die Zukunft ist in spätmittelalterlichen Friedensverträgen durchaus keine Ausnahme. Heinhard STEIGER, *Vorsprüche zu und in Friedensverträgen der Vormoderne*, in: H. Duchhardt / M. Peters, (Hg.), Kalkül – Transfer – Symbol. Europäische Friedensverträge der Vormoderne, Mainz 2006-11-2 (Veröffentlichungen des Instituts für Europäische Geschichte Mainz, Beihefte Online 1), Abschnitt 8. URL:<http://ieg-mainz.de/vieg-online-beihefte/01-2006.html> Mit der gleichen *Promulgatio* wird zum Beispiel der über ein hundertachtzig Jahre ältere Friedensvertrag von Münster-Osnabrück eingeleitet.

Es wird die verschlimmerte Lage der Christenheit geschildert, die sich ursprünglich über 117 Königreiche erstreckte (Zeile 5). Hier kann man eine direkte Verbindung zum Marinischen Traktat finden, obwohl die Zahlen nicht ganz stimmen. Dort heißt es: „… *Christiani perdiderunt centum et unam provinicias christianorum in quibus erat vera obedientia et ritus sancte romane ecclesie… et non remanserunt plusquam sedecim regna christianorum*“.[9] Die Zeilen 12 bis 20 könnte man mit den in dieser Zeit üblichen Turcica des 15. Jahrhunderts vergleichen. Der ungläubige Mohammed führt zuerst die Araber auf Abwege und bewerkstelligte es dann, zahlreiche Gebiete Asiens und Afrikas seiner Macht zu unterstellen (Zeilen 12–16). Die lateinischen Ausdrücke *perfidus und perfidia* die normalweise als „treulos, wortbrüchig“ und „Treulosigkeit/Verrat“ zu übersetzen wären, müssen hier im Religionskontext interpretiert werden. Mit dem Wort *perfidus* wurden schon seit der Zeit der patristischen Literatur vor allem die Häretiker und Schismatiker bezeichnet, also diejenigen, die den christlichen Glauben nicht teilten. Also wäre hier „ungläubig/Unglaube“ die passende Übersetzung.[10] Selbst der böhmische König Georg von Podiebrady wurde mit diesem Adjektiv in einem Brief des Papstes Pauls II. bezeichnet.[11]

Und als ob dies nicht genügen würde, wird weiter erwähnt, dass die „erzschändlichen“ Türken das griechische Kaisertum und zahlreiche christliche Königreiche und Länder erst kürzlich ihrer Macht unterstellt hätten (Zeilen 16–17). In der Präambel spiegelt sich die uneinheitliche Terminologie für die Bezeichnung der Türken wieder. Die Ausdrücke *Teucri* und *Turchi* werden austauschbar benutzt. Der Terminus *Teucri* – „Trojanen“ tauchte am Ende des 14. Jahrhunderts auf. Diese neue Bezeichnung wurde sowohl von den Humanisten als auch vom internationalen Schriftverkehr übernommen (in den Bullen von Eugen IV, in der Korrespondenz der italienischen Stadtstaaten).[12] Allerdings nicht von allen. Papst Pius II. kämpfte hartnäckig gegen den Gebrauch von *Teucri* und vor allem gegen deren Identifizierung mit den Trojanen. Diese „Trojanen“ eroberten im Gegenzug für die Vernichtung ihrer Stadt im Jahre 1453 Konstantinopel und übten so Rache an den Griechen. Dies war eine in der humanistischen Literatur verbreitete Ansicht, die auch in diesem Textabschnitt zum Ausdruck kommt, denn der Ausdruck *Teucri* wird nur an dieser Stelle gebraucht und eben nur im Zusammenhang mit dem Verlust der griechischen kaiserlichen Stadt. An anderen Stellen der Präambel sowie im Rest des Friedensvertragstextes griffen die Autoren zum üblichen Ausdruck *Turci/Turchi* zu. Die Gestalt der Türken wurde in der humanistischen Literatur des 15. Jahrhunderts mit bestimmten Stereotypen verbunden.[13] Die Autoren der Präambel schreiben in den Zeilen 19 und 20: „*plurima monasteria magnaque Dei templa demoliebantur…, .. animas pene infinitas e cristianorum finibus asportarunt…*“ – und gerade die Zerstörungen der Gotteshäuser und Sakrilegien sowie die Versklavung und Verschleppung der unterworfenen Bevölkerung gehören zu den klassischen Topoi bei der Schilderung der Missetaten des türkischen Heeres[14]. Sie waren Ausdruck der *Immanitas*, der Grausamkeit, die den Türken zugeschrieben wurde im Gegensatz zur geforderten *Humanitas*.

In den folgenden Zeilen 20–30 fragen die Verfasser lamentierend nach dem vergangenen Ruhm und Glanz der Christenheit und konstatieren, dass die Felder doch immer noch fruchtbar wie jeher sind, die Menschen vernünftig, fleißig und aus den Bergwerken immer noch Gold und Silber geschöpft werden. Was ist also geschehen, dass die Christen so an Macht verloren haben, dass die Türken soweit kommen konnten? Es ist nicht einfach zu begreifen, welche Hintergründe diese Änderungen haben, *quia occulta sunt iudicia Dei*[15] (Zeile 27). Grundsätzlich richtet Gott gerecht, nur der Mensch mit seiner beschränkten Vernunft ist nicht imstande, seine Urteile zu verstehen.[16] Deswegen ist es stets verwunderlich, dass das Böse den Kampf oft gewinnt. Die Christen dürfen aber nicht vergessen, dass die anscheinend ungerechten Urteile Gottes, es keineswegs sind. Erst am Jüngsten Tag erfolgt das wahre, in den Augen der Menschen gerechte *iudicium Dei*.[17] Dieses Zitat lebte sein eigenes Leben und fand als übliches Sprichwort Eingang in einigen europäischen Sprachen.[18]

[9] Anthonii Marini Gratianopolitani ex Delphinatu epistola ad reges Bohemiae et Poloniae de unione Christianorum contra Turcos Bayerische Staatsbibliothek, CLM 15606, 1r.

[10] Dieses Adjektiv wurde in erster Linie im Zusammenhang mit den Juden erwähnt und findet in den lateinischen Karfreitag-Gebeten weiter Verwendung. Zur der Geschichte und näheren Erläuterungen des Begriffs siehe: Erik PETERSON, *Perfidia iudaica*, in: Ephemerides liturgicae, Anno L, Novae Seriei 10, Vatikan 1936, S. 296–311.

[11] František PALACKÝ, (Hg.), Urkundliche Beiträge zur Geschichte Böhmens und seiner Nachbarländer im Zeitalter Georg´s von Podiebrad (1450–1471), Fontes rerum Austriacarum,20, Wien 1860, Nr. 379.

[12] James HANKINS, Renaissance Crusaders: Humanist Crusade Literature in the Age of Mehmed II., Dumbarton Oaks Papers, Vol. 49, Symposium on Byzantium and the Italians, 13th–15th Centuries, 1995, S. 111–207, hier S. 136.

[13] James HANKINS, Renaissance Crusaders: Humanist Crusade Literature in the Age of Mehmed II., Dumbarton Oaks Papers, Vol. 49, Symposium on Byzantium and the Italians, 13th–15th Centuries, 1995, S. 111–207, hier S. 112.

[14] Claudius LEHMANN-SIEBER, *Der türkische Sultan Mehmed II. und Karl der Kühne*, in: Europa und die osmanische Expansion im ausgehenden Mittelalter, Berlin 1997, S. 19.

[15] In Römer 11, 33 steht zwar, dass die Gerichte Gottes *inconprehensibilia* sind und seine Wege *investigabiles*, doch von der Bedeutung her stimmt dieses mit unserem Text überein.

[16] Katharina GRESCHAT, *Die Moralia in Job Gregors des Großen. Studien und Texte zu Antike und Christentum,* 31, Mohr Siebeck: Tübingen, 2005, S.106.

[17] Herbert KOLB, *Himmlisches und irdisches Gericht in karolingischer Theologie und althochdeutscher Dichtung*, in Frühmittelalterliche Studien, Bd. 5, 1971, S. 284–303, hier S. 293.

[18] Bereits im Mittelalter wurde dieser Satz zu einer Redewendung – die Braunschweigische Reimchronik (13. Jahrhundert) spricht zum Beispiel von “Gotes urteyl sin vorholen”. Andere Beispiele aus dem deutschen Raum in Samuel SINGER, *Thesaurus proverbiorum medii aevi*, Bd. 5, Berlin 1997, S. 156. Die englische Version lautet – “God moves in mysterious ways. (The judgments of God are hidden)“ und die tschechische “Cesty Boží jsou nevyzpytatelné“, im Finnischen „Tutkimattomat ovat Herran tiet“, auf Bulgarisch: „Неведомни са пътищата“(Nevedomni sa patistata gospodni) Господни, auf Russisch: „пути Господни неисповедимы“ (Puti Gospodni neispovedimy), Schwedisch „Huru outgrundliga äro icke hans domar, och huru outrannsakliga hans vägar!“, Italienisch „I disegni di Dio sono imperscrutabili“, Ungarisch „A Teremtő/Isten útjai kifürkészhetetlenek“, auf Griechisch „άγνωσται αι βουλαί του Κυρίου“, Estisch „Jumala teed on ettearvamatud“.

Die Verfasser fragen sich wiederholt, warum nun lediglich 16 christliche Königreiche übriggeblieben sind und wer für dies alles die Schuld trägt, um sie mit einer anderen Frage zu beantworten: „*Sunt fortasse nonnulla peccata, que Deus punire vult, quemadmodum in Veteri testamento nonumquam factum legimus?* (Zeile 32). Bereits während der ersten Kreuzzüge wurden die Niederlagen und das Unglück der Christen mithilfe der Sünde interpretiert.[19] Anfang des 16. Jahrhunderts kamen Erasmus und Luther in dieser Interpretation überein.[20] Aber der neutestamentarische Gott ist nicht grausam, sondern barmherzig – *misericors* und er betrachtet die Menschen als seine Söhne/Kinder und liebt sie. Das bringt aber auch eine gewisse Erziehung und Züchtigung mit sich, die als Beweis seiner väterlichen Liebe zu verstehen sind. In Zeile 36 bedienen sich die Verfasser daher eines Bibelzitats. "… (versteh Gott) *ipse homines pro filiis habet, et quos diligit, corrigit et castigat…* .".[21] Es ist wichtig, dass der dieser Prüfung unterzogene Mensch diese übersteht, denn so werden seine Standhaftigkeit und sein Durchhaltevermögen größer.[22] Die Türken können als Werkzeug Gottes bei dieser Züchtigung begriffen werden. Durch die von Türken verursachte Unbill haben die christlichen Fürsten die Möglichkeit, sich vor den Augen Gottes zu verbessern. Als von ihm bestrafte Söhne wollen die Fürsten mit ihrem Friedensvorhaben Gott den Vater erweichen. Die Begründung einer *vera, pura et firma pax, unio et caritas* untereinander ist der Weg zur Wiedergutmachung (Zeile 40).

Eigentlich ist es die primäre Aufgabe der Fürsten, sich um den Frieden verdient zu machen: *Ad hoc enim ad nos derivata sunt regna et principatus, ut solicitudine et diligentia nobis possibilibus* ***pax decoretur, status rei publice sustenetur****…* (Zeilen 42–44). Mit der Zitation der Bestimmung der Codexstelle C. 1. 17. 1.[23] drücken sie einer der wichtigsten mittelalterlichen staatsrechtlichen Prinzipien aus und zwar: *principes debent diligere pacem*, wie es zum Beispiel Martinus Garatus[24], ein italienischer Jurist des 15. Jahrhunderts formulierte. Diese Formulierung kann man bei vielen weiteren Autoren finden – Peter von Andlau schrieb in seinem gelehrten Traktat *Libellus de cesarea monarchia*: „*Decorare pacem, remque publicam perturbantes compescere imperatoris et cuiuscunque principis maxime proprium esse debet*".[25] Das römische Recht lieferte auch andere Belegstellen für die friedensstiftende Aufgabe des Fürsten. So wurden die Digestenstellen D. 01.18.13pr[26] und D. 01.12.01.12.[27] etwa als Beleg dafür angeführt, dass sich die Fürsten für den Frieden in ihren Territorien einsetzen müssen. Treffend kommt dies bei Meister Žídek zum Ausdruck: „Der Mensch soll im Wald sowie in einer geschlossenen Kammer an seinem Körper und Vermögen sicher sein".[28] Nach Rufinus bildete die Friedensgewährung seitens des Fürsten nämlich die Basis für das Verhältnis zwischen dem Herrscher und seinen Untertanen (*pactio tacita). Princeps* sicherte Frieden durch Gerechtigkeit und beschützte seine Leute, diese waren ihm ihren Gehorsam schuldig.[29] Der „Friedenskaiser" Friedrich II. spricht in seiner *Constitutio Pacis* – dem Mainzer Landfrieden über *vinculum pacis et iusticiae*, und über die Pflicht des Herrschers diese gegenüber den Untertanen zu gewährleisten.[30] Gott handelt nämlich durch die Fürsten. Sie werden von ihm durch die Salbung beauftragt, Gerechtigkeit, Frieden und Schutz ihrer

[19] Kelly DE VRIES, *God and Defeat in Medieval Warfare: Some Preliminary Thoughts*, in: The Circle of War in the Middle Ages, hrsg. von Donald J. Kagay und L.J. Andrew Villalon, Woodbridge 1999, S. 87–97, hier S. 91.

[20] Kelly DE VRIES, *The Lack of a Western European Military Response to the Ottoman Invasions of Eastern Europe from Nicopolic (1396) to Mohacs (1526)*, in: The Journal of Military History, Bd. 63, Nr. 3, 1999, S. 539–559, hier S. 553.

[21] Hebräer 12,5–11.

[22] Harald HEGERMANN, *Der Brief an die Hebräer, Theologischer Handkommentar zum Neuen Testament*, Bd. 16, Leipzig 1988, S. 247–251.

[23] *(De veteri iure enucleando et auctoritate iuris prudentium qui in digestis referuntur) C. 01.17.01pr.: Imperator Justinianus Deo auctore nostrum gubernantes imperium, quod nobis a caelesti maiestate traditum est, et bella feliciter peragimus et pacem decoramus et statum rei publicae sustentamus: et ita nostros animos ad dei omnipotentis erigimus adiutorium, ut neque armis confidamus neque nostris militibus neque bellorum ducibus vel nostro ingenio, sed omnem spem ad solam referamus summae providentiam trinitatis: unde et mundi totius elementa processerunt et eorum dispositio in orbem terrarum producta est.*

[24] Martinus GARATUS LAUDENSIS, *De Confederatione, pace et conventionibus Principum*, in: Tractatus universi iuris, Bd. 16, Venetiis 1584, fol.302r–303r, hier fol. 302r.

[25] Peter VON ANDLAU, *Kaiser und Reich. Libellus de cesarea monarchia*, hrsg. von Rainer A. Müller, Berlin 1998, S. 297.

[26] D. 01.18.13pr. Ulpianus 7 de off. procons. *Congruit bono et gravi praesidi curare, ut pacata atque quieta provincia sit quam regit. quod non difficile optinebit, si sollicite agat, ut malis hominibus provincia careat eosque conquirat: nam et sacrilegos latrones plagiarios fures conquirere debet et prout quisque deliquerit, in eum animadvertere, receptoresque eorum coercere, sine quibus latro diutius latere non potest*. Baldus kommentierte dieser Stelle mit einem einfachem Grundsatz: *provinciarum rectores provinciam malis hominibus purgare debent*. Baldus de Ubaldis, Commentaria in Primam Digesti Veteris Partem, Venetiis 1572. Dopis folie.

[27] D. 01.12.01.12 Ulpianus l.S. de off. praef. urb. *Quies quoque popularium et disciplina spectaculorum ad praefecti urbi curam pertinere videtur: et sane debet etiam dispositos milites stationarios habere ad tuendam popularium quietem et ad referendum sibi quid ubi agatur*. Nach Baldus sollten die Könige ihre Untertanen zum friedlichen Zusammenleben zwingen, da die öffentliche Ordnung meistens aus privaten Gründen gestört werde.

[28] Zdeněk V. TOBOLKA, *M. Pavla Žídka Spravovna*, Prag 1908, S. 125. Im Jahr 1413 geboren wurde Meister Žídek zum *magister artium* an der Wiener Universität und zog danach nach Italien weiter, wo er zum Doktor der Medizin, die gewissermaßen zu seinem Hauptfach aufstieg, promoviert wurde. Nach seiner Italienreise wurde er zum Priester in Regensburg geweiht und wurde Mitglied der Gemeinschaft der Meister an der Prager Universität. Aufgrund seiner nicht gerade einfachen Natur und Ansichten (*omnis medicus est homicida* und Beschimpfung des Rektors der Universität mit „*sillabicator*") musste er Prag aber bald verlassen. Er verdiente sein Brot mit der Zusammenfassung verschiedener Traktate. Auf Anordnung Georgs von Podiebrads verfasste er seine Správovna. Zdeněk V. Tobolka, M. Pavla Žídka Spravovna, Prag 1908, S. I.–IV.

[29] Otto Gerhard OEXLE, *Friede durch Verschwörung*, in: Träger und Instrumentarien des Friedens im hohen und späten Mittelalter, Johannes Fried (Hrsg.), Sigmaringen 1996, S. 115–150, hier S. 126.

[30] MGH, Constitutiones et acta publica imperatorum et regum, Bd. II, Hannover 1986, S. 241.

Untertanen zu gewährleisten. Somit erfährt[31] ihre Herrschaft eine höhere Legitimation.[32]

Die Betonung der Friedensaufgabe ist in zahlreichen Präambeln der spätmittelalterlichen Friedensverträge zu finden genauso wie in den Arengen der Herrscherurkunden.[33] Neben der Sicherung des Friedens und einer gerechten Regierung wurden den Fürsten und Königen auch weitere Eigenschaften vorgeschrieben, die im Kommentar zur Promulgationsbulle (*Rex pacificus)* der Dekretalensammlung von *Liber Extra* des Papstes Gregor IX. zu lesen sind.[34]

Die Fürsten fühlen sich aufgrund ihnen vom Gott anvertrauten Friedensaufgabe verpflichtet, die Christenheit zu beschützen und für sie zu kämpfen. Nicht einmal der Liebreiz der Heimat, wunderschöne Paläste und große Reichtümer sollen sie davon abhalten (Zeilen 49–50). Der Heilige Geist verdammt nämlich diejenigen, die nicht mit ihm gegen den Feind kämpfen und sich nicht "*qui ex adverso non ascendunt, qui se murum pro domo Israel*[35] *non ponunt*" (45–49). Hier zitieren die Verfasser den fünften Vers des dreizehnten Kapitels des Buches Ezechiel. Der gleichnamige israelitische Priester gehörte zu den ersten, die in babylonische Gefangenschaft verschleppt wurden. In seinen Visionen wird den falschen Propheten vorgeworfen, dass sie nichts zum Kampf um Israel beigetragen haben. Dieses Zitat soll nach den Schöpfern des Textes die Notwendigkeit des Kampfes gegen die Türken unterstreichen.

Um gegen den gemeinsamen Feind ins Feld ziehen zu können, müssen die Fürsten aber zuerst sämtliche Kriege aus der Welt schaffen. Bei der Aufzählung der einzelnen Missstände bedienten sich die Verfasser wahrscheinlich einer Vorlage, denn die Zeilen 57–59 sind fast wortgleich mit Zeilen 39–41 des Schreibens von Kaiser Friedrich III. vom 1. Juni 1443 an die Könige der Christenheit bezüglich eines in Planung befindlichen dritten Konzils. Eine andere Deutungsmöglichkeit wäre, dass beide Urkunden eine andere, damals bekannte Vorlage hatten.

Der Anschaulichkeit halber werden beide Texte nebeneinandergestellt.

Böhmischer Friedensvorschlag:

…et ob id rei cupientes, ut talis modi **bella, rapinae, tumultus, incendia et caedes,** quae, ut, pro dolor! Referimus, crsitianitatem ispam iamiam quasi undique circumdederunt, quibus **agri vastantur, urbes diripiuntur, provinciae lacerantur et innumeris regna et principatus miseriis conteruntur**…..

Schreiben des Königs Friedrich III.:

…scimus etenim, qua turbata exxlesiastica pace nec populi nec principes conquiescunt, sed insurgentibus **bellis rapinis tumultibus incendiis cedibus vastantur agri, urbes diripiuntur, provinciae lacerantur et innumeris regna miseriis conteruntur**….[36]

In den Ausdruck *bellum* muss man *diffidatio* hineinlesen, die auch in weiteren Artikeln des Friedensvertrages erwähnt wird. Brandstiftung und Raub waren ihre typische Merkmale, also die Erpressung des Feindes und Stärkung der eigenen Position. Die Regeln ihrer Bekämpfung sind dann in den der Präambel nachstehenden Artikeln zu finden.

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[31] Wie einst Samuel salbte Saul und später David mit dem heiligen Öl.

[32] Es muss betont werden, dass das Thema des Friedens im 12. Jahrhundert an Popularität gewinnt und seit dem 13. Jahrhundert dem Frieden in der bestehenden Welt mehr Aufmerksamkeit gewidmet wird. Die Autoren fangen deutlich stärker an, sich mit der Friedensaufgabe der Herrscher zu befassen. Albrecht HAGENLOCHER führt in seinem Werk – Der ‚guote vride': Idealer Friede in deutscher Literatur bis ins frühe 14. Jahrhundert, (Historische Wortforschung, Band 2), Berlin 1992, S. 72 weitere Beispiele an, wie z. B. die Schrift von Pierre Dubois *De recuperratione terrae sanctae* oder *De monarchia* von Dante. Als ein weiteres Beispiel ließe sich Thomas von Aquinos Werk *De regimine principum* nennen, der sich folgendermaßen zum Thema äußert*: „hoc igitur est quod maxime rector multitudinis intendere debet, ut pacis unitatem procuret"*. Joseph MATHIS (Hrsg.), Divi Thomae Aquinatis – De regimine principum ad regem Cypriet de regimine Judaeorum, Romae 1948. Egidio Colonna, ein Schüler von Thomas von Aquins, bestand in seinem Werk vor allem auf der Einhaltung der Gerechtigkeit seitens des Fürsten. Egidio COLONNA, De regimine principum libri III., Roma 1607, reprint Aalen 1967, S. 79.

[33] Zu den Herrschertugenden in den Arengen der Urkunden siehe Heinrich FICHTENAU: *Präambel. Spätantike und Mittelalter im Spiegel von Urkundenformeln*, Mitteilungen des Instituts für Österreichische Geschichtsforschung Ergänzungsband 18, Wien 1957.

[34] Panormitanus beschreibt anhand der königlichen Insignien die einzelnen königlichen Tugenden. Der Ring des Königs soll an seine Treue erinnern. Man beruft sich hier vor allem an die Dekretalen Stelle C. 30 q. 5 c. 3, wo es um die eheliche Treue geht. Ein Armband als Schmuck für die Hände soll an gute Arbeit erinnern. Das Zepter steht für die Gerechtigkeit des Herrschers. *Malos comprimere et bonos sublevare, regum officium est*. C. 35 q. 5 c. 33. Der König/Fürst muss sich für die Schwachen einsetzen, die sich nicht wehren können, typischerweise die Waisen und die Witwen – sogenannte *personae miserabiles*. Interessant ist, dass nach Baldus nicht nur Witwen und Waisen in diese Kategorie fallen, sondern auch solche Frauen, *que habet maritum inutilem, vel danuatum ad perpetuum carcerem* (Kommentar zu C. 3.4.1), Baldus de UBALDIS, *Commentaria In primum, secundum & tertium Codicis lib.: Adnotationibvs Alexandri Imolensis, Andreć Barbatić, Celsi, Philippiq[ue] Decij Illustrata ...; Adiectus est insuper vtilissimus Tractatus de Pactis, & de Constituto*, Venetiis 1572, Fol. 212. Das Schwert dient dem König zur Bestrafung der *„mali homines"*. C.23 q. 5 c. 27. Das purpurfarbene Gewand, Stirnbinde und Krone zeugen von seiner Erhabenheit. Die böhmischen Könige waren neben der Krone des Heiligen Wenzel, des Zepters, des Mantels mit Stola, Gurt und dem sogenannten Manipel (Hand, Mundtuch) mit einem Königsapfel ausgestattet. Für die Beschreibung und Entwicklung der tschechischen Insignien Karel CHYTIL, Karel VRBA, Antonín PODLAHA. Korunovační klenoty království Českého. Archeologická komise při České Akademii císaře Františka Josefa pro vědy, Prag 1912.

[35] *„Domus Israel"* ist mit der Kirche, mit den Gläubigen gleichzusetzen.

[36] Deutsche Reichstagsakten unter Kaiser Friedrich III., 1442–1445, Bd. 17, hrsg. von Walter KRAEMMERER, Göttingen: Vandenhoeck&Ruprecht, 1963, S. 148.

Die Herrscher wollen sich zu einer *connexio, pax, fraternitas*[37] *et concordia* (Zeilen 63–64) zusammenschließen und zwar für ewige Zeit. Die „ewige Zeit" könnte man mit der Lebenszeit der einzelnen Fürsten übersetzen, denn im späten Mittelalter waren es immer noch die Fürsten, von denen die Einhaltung der abgeschlossenen Verträge abhing. Der Staat im modernen Sinne und sein von einer Person unabhängiges Verbleiben in „internationalen Vereinbarungen" war noch nicht geboren.

Schlussstein des Vertrages bildet eine kanzleitypische Formulierung. Der Terminus technicus *de certa scientia* (Zeile 61) wurde von der päpstlichen Kanzlei erarbeitet und im weltlichen Bereich vollständig übernommen. Diese fast in jeder Vereinbarung zwischen den Herrschern verwendete Formel besagte, dass der Aussteller den Inhalt geprüft habe und ihm die Sachlage deshalb zur Gänze bekannt sei. So war der Einwand einer Erschleichung ausgeschlossen und die Urkunde erhielt volle Rechtskraft.[38]

"*Mit Rade unser Rete*" in den deutschen Quellen oder eben auf Lateinisch proklamieren die Fürsten, dass sie bei ihrer Entscheidungsfindung auch andere miteinbezogen haben.....*matura deliberatione praehabita, invocata ad hoc gratia Spiritus sancti, praelatorum, principum, procerum, nobilium et iuris divini et humani doctorum nostrorum ad hoc accedente consilio et assensu…"* (Zeilen 61–64). Ein institutionalisierter Fürstenrat entwickelte sich aus einer Gruppe von *Consiliarii*, deren Herkunft auf die ursprüngliche Pflicht des Vasallen seinem Herrn gegenüber zurückzuführen ist, diesen mit Ratschlägen zu unterstützen – *„consilium praestare"*.

VII. Zusammenfassung

Obwohl die Präambel des böhmischen Friedensvertrages den Rahmen der spätmittelalterlichen Vorsprüche nicht sprengt, birgt sie die Beschreibung der damaligen politischen Situation sowie viele interessante Elemente des mittelalterlichen Denkens in sich. Im Geiste der antitürkischen humanistischen Reden werden die europäischen Feinde des 15. Jahrhunderts beschrieben. Da der Schutz der *fides Christi*[39] sowie der *res publica christiana* als eine religiöse Pflicht der Fürsten angesehen wurde[40], mussten diese sich untereinander befrieden und einen Bund der Eintracht und Brüderlichkeit schließen, um den gemeinsamen Feind bekämpfen zu können. Die Begründung des Friedensabschlusses zur Bekämpfung der Türken stellt in der zweiten Hälfte des 15. Jahrhunderts einen typischen Topos vieler Friedensverträge dar.[41] Daneben finden sich staatsrechtliche Gedanken, die für das Mittelalter typisch sind – wie etwa die Friedens- und Gerechtigkeitsmission des Fürsten. Mit Selbstverständlichkeit wurden in den Text der Präambel einige Zitate aus der Bibel sowie Teil eines kaiserlichen Schreibens inkorporiert.

Präambel von „Tractatus pacis toti christianitati fiendae"

In nomine Domini nostri Ihesu Christi. Nos A.B.C. notum facimus universis et singulis ad perpetuam rei memoriam, quod, dum veterum historicorum scripta recensemus, reperimus cristianitatem florentissimam quondam fuisse et hominibus opibusque beatam, cuius tanta longitudo latitudoque fuit, ut in eius ventre centum decem et septem regna amplissima clauderentur, que eciam ex tot populos emisit, ut magnam gentilium partem una cum Dominico sepulcro longo tempore occuparit; nec gens fuit tunc orbe toto, que cristianorum regimen lacessere auderet. At nunc quantum lacerata, confracta, cassata atque omni nitore splendoreque pristino enudata sit, omnes agnoscimus. Tanta etenim mutacio in ipsa cristianitate a paucis temporibus citra facta est, ut si quis regum, principum atque procerum antiquorum iam ab inferis resurgeret et cristicolarum partes intraret, nullatenus suam propriam recognosceret. ***Perfidus*** *nempe Mahumetus cum pene universus orbis cristiane religionis sanctitate polleret, principio gentem exiguam Arabum seduxit; verum ibi primis confatibus eius occurrere neglectum est, continuo perditorum hominum tantam manum sibi acquisierat, ut latissimas Africe pariter es Asie regiones subiugavit et in dampnatissimam impulerit perfidiam. Spurcissimi denique Teucri, qui a diebus paucissimis primo inclitum Grecorum imperium, deinde quamplures cristianitatis provincias et regna in suam potestatem redigere, animas pene infinitas e cristianorum finibus asportarunt, omnia in predam ducunt, plurima monasteria magnaque Dei templa demoliebantur, et ut ruerent, disposuerunt; alia*

[37] Die Brüderlichkeit auch in ihrer negativen Ausprägung – man denke an die Brudermorde in der Bibel- gehört zu den wichtigsten zwischenmenschlichen Bindungen. Mit diesem Begriff wurden viele Erscheinungsformen des mittelalterlichen Lebens, seien sie weltlicher oder kirchlicher Natur, bezeichnet: Klerikerverbände, Handwerkergilden, Pilgergemeinschaften oder Bündnisse zwischen Städten und Herrschern. Wolfgang Hardtwig, Genossenschaft, Sekte, Verein in Deutschland vom Spätmittelalter bis zur Französischen Revolution, München 1997, S. 30–31. In unserem Kontext geht es vor allem um die Ideale und Regeln des brüderlichen Zusammenlebens. Wie etwa bei der Freundschaft – *amicitia* – auch hier ist einer verpflichtet, seinem Bruder Hilfe und Rat zu leisten – *auxilium vel consilium praestare*- und mit ihm in der Liebe und im Frieden zu leben. Die *fraternitas* ist in der Regel in den spätmittelalterlichen Verträgen in Verbindung mit anderen Ausdrücken zu finden, wie es auch hier der Fall ist. Neben *amicitia*, die weiter im Vertragstext aber nicht in der Präambel vorhanden ist, taucht hier die *concordia* auf. Die Eintracht war einer der wichtigsten Elemente der mittelalterlichen Gilden und Kommunen. Otto Gerhard Oexle, Friede durch Verschwörung, in: Träger und Instrumentarien des Friedens im hohen uns späten Mittelalter, hrsg. Von Johannes Fried, Sigmaringen 1996, S. 115–150, hier S. 129.

[38] Othmar HAGENEDER, *Die Rechtskraft spätmittelalterlicher Papst- und Herrscherurkunden „ex certa scientia", „non obstantibus" und „propter importunitatem petentium"*, Köln 1999, S. 401–429.

[39] In den Vorsprüchen wird der religiöse Glauben mit dem Zusatz *„catholica"* oder *„Christi"* angeführt, denn der Ausdruck *fides* an sich bedeutete vor allem Treue oder einen nicht näher spezifizierten Glauben. Heinrich FICHTENAU: *Präambel. Spätantike und Mittelalter im Spiegel von Urkundenformeln*, Mitteilungen des Instituts für Österreichische Geschichtsforschung Ergänzungsband 18, Wien 1957, S. 61.

[40] Heinhard STEIGER, *Von der Staatsgesellschaft zur Weltrepublik? Aufsätze zur Geschichte des Völkerrechts aus vierzig Jahren*, Baden-Baden 2009, S. 88.

[41] Randall LESAFFER, Peace treaties from Lodi to Westphalia, in: Randall LESAFFER, (Hrsg.) Peace treaties and international law in European history, Cambridge 2004, S. 9–44, hier S. 30.

quoque infinita mala commiserunt et perpetraverunt. O aurea provincia! O terrarum decus cristianitas, quomodo sic ex te nitor omnis abscessit, quomodo sic abiit color optimus? Ubi vigor ille tuorum hominum? Ubi reverencia, quam tibi omnes gentes impendebant, ubi maiestas regia, ubi gloria? Quid tibi tot victorie profuerunt, si tam cito in triumphum duci debebas? Quid gentilium ducum restitisse potentie iuvat, si nunc vicinorum impetus ferre non potes? Heu fortuna, heu vicissitudo; quam cito imperia variantur, quam cito mutantur regna, quam cito dilabuntur potestates! Que sit autem tante mutacionis ac ruine causa, ***non est intueri facile, quia occulta sunt iudicia Dei****. Non minus hodie quam olim fertiles sunt agri, non minus fecunda pecora, assunt vinearum proventus, reddunt usuram effosse auri et argenti minere, sensati homines sunt, industri, magnanimes multarum rerum experti, littere tam vigent quam umquam. Quid enim est, qoud cristianitatem adeo depressit, ut ex praedictis centum et decem septem regnis dumtaxat in ventre cristanitatis sex decim remanserint ? Sunt fortasse nonnulla peccata, quae Deus punire vult, quemadmodum in veteri testamento non nunquam factum legimus. Ob quam rem nobis diligenter considerandum videtur, ut si quid erratum est, emendetur et per opera pietatis divina maiestas mitigetur, quam propter iniquitatem aliquam constat iratam esse. Sed quia cum animadvertimus, quod cum his pie ac misericorditer Deus agat, quorum delicta in hoc mundo punit,* ***quodque ipse homines pro filiis habet, et quos diligit, corrigit et castigat*** *per multasque adversitates ad opera virtutis inducit, ideo spem nostram jactantes in Dominum, cuius res agitur, scimus, quod sanctimoniae nostrae nihil religiosius, integritati nil congruentius et laudi nil gloriosius efficere poterimus, quam dare operam, quod vera, pura et firma pax, unio et caritas inter cristianos fiat, et fides Christi adversus* ***immanissimum*** *Turchum defensetur.* ***Ad hoc enim ad hoc derivata sunt regna et principatus, ut sollicitudine et diligentia nobis possibilibus pax decoretur, statur reipublicae sustentetur,*** *bella adversus infideles feliciter peragantur et fines reipublicae tueantur et propagentur. Ad quas etiam res omnes populi, omnes nationes omnesque reges et principes laetis et promptis animis debent et tenentur intendere. Nam si cristianos nos dicimus, sollicitudinem habere tenemur, ut cristiana religio tueatur ;et si contra Christum esse nolumus, pro fide sua certare et secum esse debemus. Spiritus enim Sanctus eos damnat, qui secum in bello non sunt,* ***qui ex adverso non ascendunt, qui se murum pro domo Israhel non ponunt****. Nec aliquem patriae dulcedo nec palatia amplissima nec divitiarum multitudo a servitio Dei retrahere debent. Illi namque inserviendum erit, qui pro nobis mortem crucis subire non expavit, qui daturus est pro mercede unicuique fideli coeli coelorum patriam, ubi vera patria, ingentia habitacula, divitiae incomparabiles et aeterna vita consistit. Etenim, quamvis hoc tempore lugubris sit fortuna Graecorum et dolenda nimis Constantinopolitana et aliarum Provinciarum clades, nobis tamen, si glorie cupidi sumus, optanda fuit haec occasio, que nobis possit hoc decus reservare, ut defensores conservatoresque cristiani nominis appellaremur; et ob id rei cupientes, ut talis modi bella, rapinae, tumultus, incendia et caedes, quae, ut, pro dolor! referimus, cristianitatem ipsam iamiam quasi undique circumdederunt, quibus* ***agri vastantur, urbes diripiuntur, provinciae lacerantur et innumeris regna et prinipatus miseriis conteruntur****, cessent et penitus extinguantur et ad statum debitum mutue caritatis et fraternitatis unione laudabili deducantur, nos* ***de certa scientia****,* ***matura deliberatione praehabita, invocata ad hoc gratia Spiritus sancti, praelatorum, principum, procerum, nobilium et iuris divini et humani doctorum nostrorum ad hoc accedente consilio et assensu,*** *ad huiusmodi connexionis, pacis, fraternitatis et concordie inconcusse duraturam, ob Dei reverentiam fideique conservationem devenimus unionem in modum, qui sequitur, pro nobis, haeredibus et successoribus nostris futuris, perpetuis temporibus duraturam.* [42]

[42] Die lateinische Fassung des Traktates wurde aus: Václav VANĚČEK (Hrsg.), *Cultus Pacis. Etudes et documents du „Symposium Pragense Cultus Pacis 1464–1964". Commemoratio pacis generalis ante quingentos annos a Georgio Bohemiae rege propositae*, Praha 1966, S. 61–69 übernommen.

A Brief History of River Navigation in Bohemia up to the 19th Century – Part 1

Bohumil Poláček *

Abstract

According to archaeological findings in the Elbe river bed alluvium, navigation of rivers existed in the area of Bohemia already in the middle Stone Age (i.e. 6,000 to 4,000 years ago). The first written reports on the navigation along the Elbe preserved in the chronicles relate to the time when the armies of Charles the Great conquered the Elbe Serbs and Bodrces. Around the year 805, Charles the Great forbade its traders to export arms and equipment to Bohemia and the same year some of his troops were sent into the battle on the boats upstream the Elbe to Magdeburg, where they clashed with the Elbe Slavs. Duty as a fee for the use of waterways belonging to the sovereign was introduced in Bohemia according to the Magdeburg example sometime around the 60s of the 10th century. For the college of priests gathered in the church centre of the Litoměřice Castle, the Prince Spytihněv II founded the chapter with the Church of St. Stephen around the year 1057. With the founding charter, which is the oldest in our country and preserved in the original, the prince donated many of his revenues, among others the revenues from the Ústí and Litoměřice water shipping duties. With the gradual centralization of state administration and the growth of royal power it became possible to disrupt the Litoměřice trade monopoly on the Elbe, when with the decree issued by the King Přemyslid Otakar II on November 25, 1274 the town of Mělník received the right to conduct shipping on Elbe. The trade in Roudnice started to flourish from the second half of the 14th century. It was an old settlement of the Prague bishops, which was promoted to the town before the year 1279. Apart from towns, there were also several boats owned by monasteries and nobility which contributed to shipping and trade on the Elbe. In 1226 the Premonstratensian church in Doksany was given the duty-free privilege to bring one boat with salt from Serbia and one boat to export domestic products. In 1340, while he was only the Margrave, Charles IV gave the Prague reeves and councilors a privilege to choose eight sworn millers. The sworn millers eventually become the highest authority on the water in Bohemia and also oversaw the construction on rivers and their navigability, etc. In doubtful cases, they published their final opinions as "the sworn miller court", a special arbitration tribunal, which had the responsibility of deciding water management disputes.

Key words: *Elbe river; waterway; navigation; water shipping duties; the sworn miller court.*

The oldest illustration of a boat in the area of Bohemia (3rd quarter of the 12th century) [1]

According to archaeological findings in the Elbe river bed alluvium, navigation of rivers existed in the area of Bohemia already in the **middle Stone Age** (i.e. 6,000 to 4,000 years ago). Navigation during **the early and late Stone Age** is proven by the stone tools found in the river. From this period originates the oldest finding of a prehistoric monoxyle (a boat made from one piece of a tree trunk). Findings of copper and bronze objects illustrate the use of the Elbe River especially in the **early Bronze Age** (1,200 to 800 BC). The strategic importance of the river is evident in the fortified walls and the nearby settlements. Shipping of salt from the North German salt deposits probably started on the Elbe at that time. An indirect evidence of the Elbe navigation comes from the **Iron Age**, when our country was inhabited by the Celts (500 BC to 0) as the first historically known ethnic group. Construction of large fortified Celtic settlements on the hills above the rivers occurred from the 2nd century BC. The Germanic tribes started to penetrate from the north through the valley of the Elbe. A busy Elbe trade at that time is documented by a large number of objects imported from the north. The Germanic population of the Czech basin left

* JUDr. Ing. Bohumil Poláček, Ph.D., MBA, LL.M., Departement of International Law, Faculty of Law, University of West Bohemia, Czech Republic.

[1] Romanesque fresco in the Church of St. Kliment in Stará Boleslav – St. Kliment thrown to the sea. See ŠITTLER, Eduard; PODLAHA, Antonín. *The list of historic and artistic monuments in the Karlín political district. Prague: Archaeological commission at the Czech Academy of Emperor Franz Josef for the Science, Literature and Art. 1901. S. 67a.*

its settlements during **migrations** (4th to 6th century), which disrupted the traditional trade links and the navigation on the Elbe started to lose its meaning.

The navigation on our rivers during the early **Slavic settlement**, i.e. from the 6th century, can be attested by the numerous findings of monoxyle remnants in the Elbe alluvium. It is likely that by the end of the 8th century the Slavs had barges and large vessels, which they started to build since the time they reached the Baltic. The revitalization of the Elbe navigation occurred only after the stabilization of relations between the powers, which means after the Elbe area in Bohemia was inhabited by the Slavs during the 7th to 9th century, when it served as a link with the related Slavic tribes who were settled almost along the entire river flow.

The first written reports on the navigation along the Elbe preserved in the chronicles relate to the time when the armies of Charles the Great conquered the Elbe Serbs and Bodrces. The Czechs were forced to buying the peace with annual fees paid to the Frankish and later to the Roman Empire. Around the **year 805, Charles the Great forbade its traders to export arms and equipment to Bohemia** and the same year some of his troops were sent into the battle on the boats upstream the Elbe to Magdeburg, where they clashed with the Elbe Slavs. The report concludes that already that time the Elbe was navigated by a number of large boats serving the trade in the peacetime.[2] The main article of trade and navigation on the Elbe in Bohemia since the beginning of the Slavic settlements was the salt mined and boiled in the area of Halle and Lüneburg and loaded mainly in Pirna, then herring, cloth, wool and yarn. And from Bohemia it was corn, wood, stone, leather, later also iron ore, tin, lead, copper, plow knives, wine, malt and hops. In 937 (December 27) founding charter, the German Emperor Otto I assigned the revenue from the oldest known Elbe duty to the Magdeburg monastery of St. Mauritius. Rafting gained importance after the forests in the vicinity of Prague were cut down and it supplied Prague and some nearby towns in the Elbe area by the building material and firewood harvested in the Vltava, Otava, Sázava and Beroun area and in the Lužnice basin. Rafting probably started already in the 11th century (it is documented since the 12th century) and ended in the 50s of the 20th century.[3]

Duty as a fee for the use of waterways belonging to the sovereign was introduced in Bohemia according to the Magdeburg example sometime around the 60s of the 10th century. Its collection to the chamber treasury was entrusted to the administrators of royal castles along the Elbe, in Děčín, Ústí and Litoměřice. The shipping duty was later expanded by the **protective duties** levied for the protection of shipments under the Střekov Castle and then the Czech (Upper Lužice) Royal Stone (Königstein) and the **customs duties collected by the towns and the administrators of the church and aristocratic estates** in the Elbe area (Roudnice, Ústí, Pirna, Dolní Zálezly, Svádov, Vaňov, in Těchlovice under the Vrabinec Castle, Krásné Březno, Hřensko and elsewhere). It was customary that the ruler donated part of the duty in favor of some religious institution or town for its improvements. The local customs houses were handled differently; they were either rented out or sold.

The most important port for the Elbe boats shipping salt and other goods to Bohemia was **Litoměřice**.[4] The Elbe trade and navigation was operated by the Litoměřice folk under the customary law at the time the Přemyslid state administration was not available, i.e. without the ownership privileges. For the college of priests gathered in the church centre of the Litoměřice Castle, the Prince **Spytihněv II** founded the chapter with the Church of St. Stephen **around the year 1057**. With the founding charter, which is the oldest in our country and preserved in the original, the prince donated many of his revenues, among others the revenues from the Ústí and Litoměřice water shipping duties. The amount of duty paid on the shipments of salt was precisely specified by the customs regulations.[5] The foreigners had to pay duty on the "large boat" with two measures[6] of salt, on the "medium boat" with one measure and for "small boats", they had to pay as many dinars[7], as the amount of salt the boat was shipping. The local shippers, whether free or not, had to pay duty of two measures

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2 HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 14.

3 In 1088 Prince Vratislav II gave Vyšehrad three Bráník estates and Záton, a place lying under the Vyšehrad creek at the mouth of the Botiče River. Záton is likely identical with the later Výton, a place where they collected duty on the lumber transported to Prague on the river so that the trunks which were to be delivered were removed (cu-out) from the rafts. The Podskalí settlement inhabited by the shippers and fishermen, which emerged in this area, is known from the year 1199. Since the beginning of the 14th century and until 1377 it belonged to the Prague Old Town and then to the New Town. Podskalí soon became a large timber marketplace for Prague, which also had the customs house, called Na Výtoni. Over the time other custom houses were built at Vltava and its tributaries, usually without the consent of the king. The result was an unsustainable increase in the prices of wood in the Prague market. An order to the situation was brought by the decree of Charles IV dated August 3, 1366, which emphasized that already during Wenceslas I "*the wood from our town of Budějovice shall be shipped on the water of Vltava to Prague freely and without any hindrances* ". And then after the order for the installation of twenty-yard doors in the barrages, Charles IV ordered under the fine of 50 bushels of the Prague groshen, the closure of all customs houses established after Wenceslas I (1253) "replaced the customs houses Hluboká, Újezdec, Zvíkov, Orlík, Kamýk, Bráník and Vyšehrad." This oldest regulation on the duty from the wood trade was valid until 1592. HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. Page 27–28. JUNGMANN, J. *Defunct Podskalí. Rafts and boats on the Vltava.* 2nd Edition. Prague: Prague: Prague City Museum, 2008. ISBN 978-80-85394-57-3. P. 8.

4 *Civitas Luthomericensis* in Latin, *Leitmeritz* in German.

5 HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 15.

6 The measure – old Czech hogshead of a different content. Since 1764 the Vienna measurement was 61.4871. The old grain rate was 2/3 of one bushel, i.e. 62.4 liters. V., SMRŽ, L. *Nová soustava jednotek*. 1. vydání. Praha: Státní pedagogické nakladatelství, 1968. P. 438.

7 Dinar – a silver coin, which was the monetary unit in Bohemia from 10th to 13th century. Its original usual weight of 1.7 g decreased to 1 g around the year 1050. Accessible at: http://numis.wgz.cz/denar.

only for the "large boat", and 15 dinars for the "small boat"[8]. The monetary amount for small boats suggests that the boats did not ship only salt but also other goods on which the duty in kind was not payable. The shippers and traders transporting salt to the princely court had to pay only half the duty, therefore a one measurement of salt.[9]

The founding charter of Litoměřice[10]

The first towns on the Elbe with a certain type of autonomy and legal subjectivity started to emerge in the beginning of the 13th century. The first of them to receive the town status was Magdeburg, which was ensured by the so-called Magdeburg law.[11] Gradually, there were other places on the Elbe in our

[8] Depending on the duty specified in the measurement of salt, which had to be paid and provided that the measurement was a barrel of 70 liters, i.e. about 90 kg of salt, the capacity of a large boat with the crew and supplies came to about 4 tons, 2 tons for a medium boat and 1.5 tons for a small boat. The capacity can be used to calculate the selected boat draft of about 0.4 m for the loaded boat and the ratio of the length to the width and the boat size. A large boat could have been 9 m long, 2.3 m wide and 0.8 m high, a medium boat had the size of 7 x 1.8 x 0.7 m and the small boat 5.5 x 1.6 x 0.6 m. It is likely that the ships had a flat bottom and sloped portions of the hull because they were easier to build, could be dragged through the shallows; they were easy to dock even at the natural river banks and could be easily loaded with the goods.

[9] The composition of traders from among the foreigners, from the local independent and dependent traders, the traders dependent on the prince and three types of boat sizes suggest that there was a trade on the Elbe which took a long time to develop along with the selection of standard boats as well as the participation of Litoměřice in the Elbe trade.
The text C of the Litoměřice founding charter from the 14th century mentions the harness, severance, slave, pot and rye duty. The Litoměřice town statute entitled *"The Statute on collecting a duty on salt and other goods"* prescribes the specific amount of duty *"in cash, cents, lots and in "vědruňky"*. HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 22. The rein of Ladislav Pohrobek (1439–57) used the Meissen penny, 7 white coins each for 2 hellers and the Prague penny was the basic unit of Czech monetary system in the years 1300 to 1547. It was a silver coin with a diameter of about 28 mm which initially weighed about 3.8 grams. At that time, the pure silver was denoted as a 16 Lot – the Prague penny was minted from a high-quality 15 lot silver, i.e. the coin was composed of 15 parts of silver and 1 part of copper. The Prague's Hryvnia, which weighed 253 grams was used to mint 64 pennies, the Hryvnia was divided into 8 ounces of 2 lots, or to 16 lots and it was also counted as 4 quarters (věrdunky) with 4 lots each. 1 lot was divided into 4 kventlíks (kvintlíks). Hryvnia was that time used not only as a unit of weight, but it also represented the quantity, the Prague Hryvnia weighed 253.14 grams, věrdunk 63.285 grams, 1 lot was 15.821 grams and kvintlík was 3,955 grams, the heavy Hryvnia had 64 pennies, the royal or the light Hryvnia had 56 pennies. In some places the Hryvnia was calculated at 62 or 60 pennies, the lightest was the mining Hryvnia, which had only 48 pennies, but later the number of pennies in 1 Hryvnia stabilized at 60 units = 1 pile. The Miessen pennies started to be minted approximately in 1322, which however deteriorated over the years so that in the 15th century 2 Miessen pennies were used to buy 1 Prague penny, but also for the goods in kind (a dish of salt, 4 pots from the pile of pots, etc.), composed of salt, grain, wine, beer, raw and tanned skins (cleaned or furry) of various animals, honey wax, chandler goods, cloth, hops, isinglass (a modified membrane of sturgeon bladder used as a purifying agent in the production of fermenting beverages), herrings, tin, lead and other metals, hens, pigs, grease, chalk, tallow, pitch, shoulders, cheese, pots and furniture *(puol vědruňka).* HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 22.

[10] Accessible at: http://ff.ujep.cz/kapitula/dejiny.php.

[11] HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 16.

country which became towns, such as Hradec Králové, Kolín, Nymburk, Mělník, Roudnice, Litoměřice, Ústí nad Labem and Děčín (then in Saxony it was Meissen and Pirna – which since 1293 belonged to the Kingdom of Bohemia – etc.).[12]

The first townsmen of Litoměřice, which was promoted to become a town sometime between 1210 to 1228, were probably the Saxon merchants, who had a closer relationship to Magdeburg and in the 80s of the 13th century they instituted their statute law. Litoměřice was the **appeal site of Magdeburg laws** for half of north Bohemia in the Elbe river basin (south referred to the Swabian laws, which were incorrectly referred to as the Nuremberg laws), while the Lesser Town and Prague (Malá Strana) referred to the Litoměřice laws. Gradually, Litoměřice created the "**right to store**" which represented not only the obligation to load and unload the cargo destined for the privileged places, but even the preferential right of local citizens, according to which the shippers passing through Litoměřice had to unload the goods from the boats and to offer the goods for three days in the Litoměřice market or to pay duty to get rid of this obligation. They claimed the right to conduct all the trade on the Elbe with Meissen for themselves and if possible they did not want anybody else to be involved in the trade, with the exception of Litoměřice ship-owners.

But because Perno (Pirna),[13] Ústí nad Labem, Roudnice, Mělník were also interested in conducting trade on the Elbe, there were tough disputes during the entire 14th century. Litoměřice townsmen were considering the river to be the royal road, and such as they strictly ordered the shippers where and for how long they can display the goods to sell and what duties they have to pay on it. They wanted the same from the owners of boats who were importing or exporting their goods to Bohemia on Elbe and who were navigating around their town.

With the gradual centralization of state administration and the growth of royal power it became possible to disrupt the Litoměřice trade monopoly on the Elbe, when with the decree issued by the King **Přemyslid Otakar II on November 25, 1274**[14] the town of **Mělník**[15] received the right to conduct shipping on Elbe.[16] Mělník received the confirmation of this privilege from Wenceslas II on July 19, 1290.[17] Freedom of importing meant the exemption from the payment of duties and the storage was more meant as unloading the boats, rather than the right for the storage, which Litoměřice had. The privilege Mělník had on navigating four boats was apparently not always respected on the Elbe, since on **March 28, 1352 the Emperor Charles IV**[18] ordered the townsmen from Roudnice, Litoměřice, Ústí, Děčín and Pirna and the burgrave at the Střekov and the Royal Stone castles not to stand in the way of Mělník townsmen and to "wish them a safe navigation".[19] Based on these privileges the Mělník townsmen did not want to unload their goods for the sale in Litoměřice and in return the local authorities gave them difficulties in the navigation.

The dispute between the two towns had to be again resolved by the Emperor Charles IV with the decree issued on October 19, 1352 to the detriment of Mělník.[20] According to the decree, the Mělník townsmen were able to ship down on the river three boats with grain and other goods and when they were returning upstream on the Elbe, they were able to load only two ships with salt and the third boat could carry any goods, except for salt. The boats were also freed from the obligation to unload the goods in Litoměřice and only had to pay duty and had to be

[12] Accessible at: http://www.psp.cz/kps/knih/prawa/cs/descr.htm.

[13] *Codex Jurix Municipalis Regni Bohemiae*, Tomus II., Privilegia Regalium Civitatum Provincialium Annorum 1225–1419. Sbírka pramenů práva městského Království českého. Díl II., Privelegia královských měst venkovských z let 1225–1419, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1895. P. 212. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=118&page=242.

[14] *Codex Jurix Municipalis Regni Bohemiae*, Tomus II., Privilegia Regalium Civitatum Provincialium Annorum 1225–1419. Sbírka pramenů práva městského Království českého. Díl II., Privelegia královských měst venkovských z let 1225–1419, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1895. P. 59–61. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=118&page=89.

[15] *Civitas Melnic* in Latin, *Melnik* in German.

[16] "*For the comfort of the town of Mělník and its welfare and maintenance it needs, so that it could be fortified, I give this municipality a special permission to store four boats with salt, herrings and other goods and I prohibit any hindrance to the storage of these boats…*" HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 17.

[17] *Codex Jurix Municipalis Regni Bohemiae*, Tomus II., Privilegia Regalium Civitatum Provincialium Annorum 1225–1419. Sbírka pramenů práva městského Království českého. Díl II., Privelegia královských měst venkovských z let 1225–1419, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1895. P. 108–109. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=118&page=138.

[18] *Codex Jurix Municipalis Regni Bohemiae*, Tomus II., Privilegia Regalium Civitatum Provincialium Annorum 1225–1419. Sbírka pramenů práva městského Království českého. Díl II., Privelegia královských měst venkovských z let 1225–1419, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1895. P. 467–469. Accessible at: //147.231.53.91/src/index.php?s=v&cat=12&bookid=118&page=497.

[19] HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 17

[20] According to him: „*… the ones from Mělník should have three boats of such size, that they could ship grain downstream on Elbe and that they could also use these boats for anything else … and if they would be coming back upstream on Elbe, they could use two of these three boats for salt or other goods and the third boat could be loaded with anything except for salt. If they could not find anything else to ship, then they have to navigate the third boat upstream on Elbe empty it without salt…*". It is true that with this document the Mělník traders in Litoměřice "would be coming to the warehouses empty meet these three boats, …", but "*they will have to pay duty in the places where it is necessary*". Further text clarifies the obligation of "*marking*" or "*guilding*" of Mělník boats in Litoměřice under various situations. What this act meant is not known, but it lasted until the end of 15th century. Initially it was perhaps valid for all boats navigating around Litoměřice upstream or downstream, therefore primarily for the Mělník boats and later perhaps only for the boats navigating downstream with the shipment of grain or hops. Instead of "marking" it was required that the boats in the 15th century would have the Litoměřice "*official stamp or list*". HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 18. *Codex Jurix Municipalis Regni Bohemiae*, Tomus II., Privilegia Regalium Civitatum Provincialium Annorum 1225–1419. Sbírka pramenů práva městského Království českého. Díl II., Privelegia královských měst venkovských z let 1225–1419, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1895. P. 477–486. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=118&page=507.

marked in Litoměřice. Mělník received the confirmation of this navigating privilege from the King Vladislav II on August 31, 1475,[21] and it was again for the shipment and storage of goods from four boats.

On April 22, 1325, the King John of Luxembourg renewed the privileges granted to the townsmen in **Ústí nad Labem**[22] by Přemyslid Otakar II during the founding of the town (probably in the mid-13th century), which they lost during the fire. When shipping the goods on the Elbe and Vltava, the Ústí townsmen were supposed to enjoy the same rights as the Litoměřice townspeople. After the payment of the prescribed duties, they were free to navigate the river and to unload grain and other goods. The Ústí townsmen used this privilege to the fact that they were purchasing grain in Lovosice and other places and shipped it to Meissen and from there they imported salt and other goods and stored them in Lovosice. The Litoměřice townsmen strongly spoke against the general wording of the Ústí nad Labem privileges, because in his decree dated on May 4 and 6, 1325, the King John of Luxemburg clarified the Ústí townsmen obligations.[23] The Litoměřice townsmen, seeing in that the violation of their privileges to store the goods, extorted for themselves from the king the ban the new storing of the goods. The king ordered that the Ústí townsmen can buy grain and other goods only in the Litoměřice market and can buy only as much as was previously offered to the Litoměřice townsmen. They can ship salt along the Elbe, as long it is first offered for the sale in Litoměřice. In contrast, the goods they were to unload in Lovosice or elsewhere were to be forfeited to the Litoměřice townsmen as a penalty. Further, the Ústí townsmen were not allowed to buy grain and other goods in the Lovosice market. With these additional restrictions in favor of Litoměřice, the navigation of the Ústí townsmen became quite complicated and there was very little left from the originally prescribed freedom.

Having learned from the disputes with Mělník and Ústí, Litoměřice finally decided to have its customary laws legalized. In 1348, the town asked the Emperor Charles IV to confirm and renew the testimony of King John of Luxembourg from the dispute with Ústí and to give the town a special "**protective status**" for the right to store the goods. When the emperor became convinced that *"such a storage has been in Litoměřice ever since the people can remember and that no one could prove the opposite,"* he ordered on January 1, 1349,[24] that *"the Litoměřice townsfolk should retain the storage of grain, salt, fish, wine and other things, which they have been doing since the old ages",* and the municipality should adopt a resolution[25], that anyone shipping grain upstream on the Elbe from Mělník or downstream from Roudnice is obliged to sell it to the townsmen in the town and not on the river banks. And the resolution should also include that the townsmen can buy salt at the Elbe and then they can sell it in the market. To be able to do that, they must pay a fee to the Litoměřice burgrave and provost and that the townsmen must pay duty on the grain and other commodities shipped to the town on the Elbe, but they do not have to pay duty on the grain shipped out on the Elbe.[26]

Finally in March of 1351, Litoměřice and Ústí have reached an agreement "on storing the goods on the Litoměřice riverbanks". The Litoměřice townsmen permitted that if the Ústí townsmen bring to their shores fish, tin and lead and pay the duty, then they can ship the goods further on the river, or they can load it onto trucks and similarly if they pay duty, they can also ship out the grain which they purchased in Litoměřice, Lovosice or elsewhere. With his decree dated April 25, 1373,[27] Charles IV confirmed the storage of goods to the Pirna townsmen and declared that the Litoměřice townsmen who are shipping grain downstream on the Elbe must offer it in Pirna for the sale.

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[21] *Codex Jurix Municipalis Regni Bohemiae*, Tomus III., Privilegia Regalium Civitatum Provincialium Annorum 1420–1526. Sbírka pramenů práva městského Království českého. Díl III., Privelegia královských měst venkovských z let 1420–1526, vydává Historický spolek v Praze, v Praze tiskem národní správy fy Dr. Edvuard Grégr a syn, 1948. P. 622–624. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=119&page=646.

[22] In the Latin records of the Prague Benedictines at the St. George from the year 1368 the name of the town is *Vsk super Albium,* and the later Latin name is *Austia super Albea* and in German it is *Aussig an der Elbe. Codex Jurix Municipalis Regni Bohemiae*, Tomus II., Privilegia Regalium Civitatum Provincialium Annorum 1225–1419. Sbírka pramenů práva městského Království českého. Díl II., Privelegia královských měst venkovských z let 1225–1419, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1895. P. 219–222. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=118&page=249.

[23] *„… our Ústí townsmen … we firmly want to establish an exemption for their boats in Lovosice or any other places except for the riverbanks in front of Litoměřice, that they would be sent to unload all of these goods for their benefit…"* HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 19. *Codex Jurix Municipalis Regni Bohemiae*, Tomus II., Privilegia Regalium Civitatum Provincialium Annorum 1225–1419. Sbírka pramenů práva městského Království českého. Díl II., Privelegia královských měst venkovských z let 1225–1419, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1895. P. 229–235. Accessible at: //147.231.53.91/src/index.php?s=v&cat=12&bookid=118&page=259.

[24] *Codex Jurix Municipalis Regni Bohemiae*, Tomus II., Privilegia Regalium Civitatum Provincialium Annorum 1225–1419. Sbírka pramenů práva městského Království českého. Díl II., Privelegia královských měst venkovských z let 1225–1419, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1895. P. 419–423. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=118&page=449.

[25] The town statue says: "*No one is allowed to sell salt on or around Elbe, except for the townsmen residing together with us in our town, for ten piles and with thirty Hryvnias… also, if the guest brings a salt, then he must not unload the salt from the boat before he sells the salt to the townsmen…, from the ordinary areas and places no one is supposed to load the boats except with the grain from our townsmen."* HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 22.

[26] *Codex Jurix Municipalis Regni Bohemiae*, Tomus II., Privilegia Regalium Civitatum Provincialium Annorum 1225–1419. Sbírka pramenů práva městského Království českého. Díl II., Privelegia královských měst venkovských z let 1225–1419, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1895. P. 477–486. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=118&page=507.

[27] Srov. *Codex Jurix Municipalis Regni Bohemiae*, Tomus II., Privilegia Regalium Civitatum Provincialium Annorum 1225–1419. Sbírka pramenů práva městského Království českého. Díl II., Privelegia královských měst venkovských z let 1225–1419, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1895. P. 677–678. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=118&page=707.

The trade in **Roudnice**[28] started to flourish from the second half of the 14th century. It was an old settlement of the Prague bishops, which was promoted to the town before the year 1279. The Roudnice town folks were mainly trading with grain, which they purchased on the town's archbishop estate and in the Eger area all the way to Louny. When the Litoměřice town folks complained, the King Wenceslas IV forbade them in 1384 to ship grain on the Elbe. And when they did not comply and the Litoměřice townsmen started to confiscate their boats, then Jan the Archbishop of Jenštein, who owned Roudnice and who suffered a considerable damage because of this ban, placed a spell on the Litoměřice townsmen. They appealed to the Pope. But in the meantime during the year 1387,[29] the king's caretaker of urbury (the sovereign's share in the profits in the mining of metals) and the hereditary magistrate Kunrát Kaplíř of Sulevice made an agreement between the disputing parties, which said that Litoměřice townsmen are not to cause any difficulties when the Roudnice townspeople once in a year will be navigating one or two ships with a load of 1,200 strychs[30] of grain downstream on the Elbe to Meissen and will return with other goods through the same way. Shipments usually ended in Meissen and the boats were exempted from unloading in Litoměřice. It seems that when they were coming back, they were transporting salt, because in 1440 Jan Smiřický built the salt works in Roudnice and to the resentment of the Litoměřice townsmen, there was a lively salt market.[31]

Apart from towns, there were also several boats owned by monasteries and nobility which contributed to shipping and trade on the Elbe. Around the mid-12th century, the **Vyšehrad chapter** owned the river port in Lounky.[32] In 1226 **the Premonstratensian church in Doksany**[33] was given the duty-free privilege to bring one boat with salt from Serbia and one boat to export domestic products. The Doksany boats were using the port in Libotenice.[34] A similar privilege was given in 1253 to the **Prague Franciscans**. They were allowed to ship goods by land, as well as on all navigable streams in the kingdom. **Smil of Lichtenburg** kept boats in Lovosice around the year 1250, which is perhaps related to the fact that people without land lived there without paying taxes on salt and therefore they were operating a salt trade.[35] In the first half of the 14th century there were 10 customs houses between Roudnice and Pirna. These were slowing down and making the navigation on Elbe so much more expensive that Charles IV lowered the amount of duties collected and reduced the number of customs houses to five.[36]

On April 30, 1379,[37] Wenceslas IV confirmed to Litoměřice the charters issued by the King John of Luxembourg and King Charles IV on the use of the Magdeburg rights to store goods. Naturally, the shippers did not like to be delayed with unloading and offering the goods for three days in the Litoměřice market and were trying to navigate around the city unnoticed. Following a complaint from Litoměřice on the noncompliance of this obligation by many boats, in his decree dated February 11, 1393[38] Wenceslas IV restored the Litoměřice privilege and on top of that he increased and stiffened the penalties. He permitted that each boat navigating a shipment of grain, salt, fish, wine or other goods upstream or downstream on Elbe would have to pay a duty amounting to 30 gold coins and whoever passed through their town without unloading and without paying duty would have the boat seized and be imprisoned and fined by the King. That was to force the shippers to unload their goods in Litoměřice, while the trade competition with Litoměřice on Elbe was still allowed. These privileges were completed on July 6, 1409[39] by the Royal consent, which gave the village the right to collect a duty[40] for the needs of the village

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28 The town's original name was *Rúdník* or *Rúdnica, Raudnice* in Latin and *Raudnitz an der Elbe* in German.

29 *Codex Jurix Municipalis Regni Bohemiae*, Tomus II., Privilegia Regalium Civitatum Provincialium Annorum 1225–1419. Sbírka pramenů práva městského Království českého. Díl II., Privelegia královských měst venkovských z let 1225–1419, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1895. P. 791–794. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=118&page=821.

30 Strych and Korec were the same names used for the same measurement. It was a measurement used both for the spatial content, as well as for the volume (especially for the grain used for sowing). The volume Korec was roughly equivalent to 93 liters. The grain used for sowing had the quantity expressed by the volume which was necessary to sow the same unit of the spatial content. One Korec (Prague of Bohemia Korec) = 4 věrtels = 16 measurements = 32 achtels = 48 pints. ŠINDELÁŘ, V., SMRŽ, L. *Nová soustava jednotek*. 1. vydání. Praha: Státní pedagogické nakladatelství, 1968. P. 496.

31 HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 19.

32 A village on Elbe, between Roudnice-on-Elbe and Litoměřice.

33 A village on Eger, between Roudnice-on-Elbe and Lovosice. *Regesta diplomatica nec non epistolaria Bohemiae et Moraviae*. Pars I. Annorum 600–1253. Opera Caroli Jaromiri Erben. Pragae, typis c. r. typografiae aglicae filiorum Theophilii Haase, 1855. 813 s. S. 325–326. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=8&bookid=222&page=331.

34 A village on Elbe, between Roudnice-on-Elbe and Litoměřice are on the other riverbank opposite Lounky.

35 Trade on Elbe was also conducted with a special royal permit. That is confirmed by the report, according to which in 1364 Charles asked the Prague merchant Rotlév "to send two boats directly to Hamburg, so that the Czech goods could be sold for better prices and the foreign goods could be purchased for less without a middleman". HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 20.

36 But after the Husite wars a number of customs houses were reopened and new ones were established in the new estates. A radical closure of customs houses occurred again only in the 19th century. HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 22.

37 *Codex Jurix Municipalis Regni Bohemiae*, Tomus II., Privilegia Regalium Civitatum Provincialium Annorum 1225–1419. Sbírka pramenů práva městského Království českého. Díl II., Privelegia královských měst venkovských z let 1225–1419, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1895. P. 722–724. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=118&page=752.

38 HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 20.

39 *Codex Jurix Municipalis Regni Bohemiae*, Tomus II., Privilegia Regalium Civitatum Provincialium Annorum 1225–1419. Sbírka pramenů práva městského Království českého. Díl II., Privelegia královských měst venkovských z let 1225–1419, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1895. P. 1103–1104. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=118&page=1133.

40 Ungelt = medieval market duty (or a place where the duty was collected).

from each guest or from anyone who navigates Elbe around the town with a shipment of grain, without changing anything on the obligation to unload the goods.[41]

In 1459[42] King George of Poděbrady confirms Litoměřice its privileges, especially the right of Magdeburg and the right to store goods. It has been said about the town, that *"it is an old and distinguished town, which serves as a comparison to many towns in the judging and appeals"* and therefore *"its name comes from this comparison."* At the Jagiellonian time Litoměřice gained many new rights. Because the old privileges for storing the goods came into oblivion, Litoměřice had them reaffirmed in 1473[43] by the King Vladislav Jagiello and extorted the right to stop anyone who would against the law ship down the Elbe grain or malt from Ústí nad Labem or elsewhere with the fact that they could not invoke the special royal consent if there is no permit from their town.

In 1340, while he was only the Margrave, Charles IV gave the Prague reeves and councilors a privilege to choose eight sworn millers, who *"on oath would prescribe the measurements to the mills and that anyone who cheated on the measures would be punished by the councilors"*.[44] Resolution of the Old Town Council was confirmed by the King John of Luxembourg in a letter dated December 23, 1340.[45] The sworn millers eventually become the highest authority on the water in Bohemia and also oversaw the construction on rivers and their navigability, etc. In doubtful cases, they published their final opinions as "**the sworn miller court**", a special arbitration tribunal, which had the responsibility of deciding water management disputes. The court was composed of four councilors and four millers who were under oath. The court dealt with the disputes related to the retention of water for milling, treatment of thresholds and similar disputes. If anyone failed to comply with its orders or decisions, then the court ordered material sanctions against such person. The first violation of the rules, which meant the failure to comply with the permissible level of water for milling, was punished by the fine of 10 groschen. With the repeated violations, the material sanctions were increased. In the event of the repeated serious violations, the offender could have been sentenced to death.[46]

The miller court findings were possible to appeal at the lower provincial court, so you can see that the miller court had considerable respect, perhaps already because that office of the sworn millers was under the supervision of royal officials. Its books are stored in the Archives of Prague, where the first entry says *"On the Mills and Boats of the First King Wenceslas in the Year 1384..."*. The work of millers is explained in particular by this sentence: "*... whereas we, having given us a considerable, but important need for the trade which supplies not only several towns of this famous Prague, but all the land of the Czech Crown, either in water rates, the river weirs, administering to the mills and various castles as well as bringing water supply to cities, to bring the many benefits and also to prevent future damage, not only under the judicious law, but to manage under the fines if we withdraw...*".[47] Members of the miller court were not only the Prague millers, but also the rural millers. Their technical nature has meant that many of them excelled in the land surveying. The institution which regulated the water rights was established by the first "Act" of this kind in Europe, and remained until 1764, when it was replaced by the then established **Navigation Commission**[48], composed of experts in charge of water transport in Bohemia.

Mělník, where cargo boats were arriving since the mid-13th century is separated from Prague by only 50 km of the lower Vltava river flow. But it took almost 400 years before this stretch of the river became navigable to such extent that the Elbe boats could continue their voyage against the Vltava current to Prague.[49] Due to the invading Swedish troops after 1646, the exact date of navigability and the launch and navigation of cargo boats sailing to Prague is not known, but it was probably only after the Thirty Years War in 1648, when the newly

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41 "*… so that the shippers navigating from Roudnice or elsewhere would pay a duty of four hellers on each container of grain, so that in accordance with old customs, they would not have to unload the grain in Litoměřice"* HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 21.

42 *Codex Jurix Municipalis Regni Bohemiae*, Tomus III., Privilegia Regalium Civitatum Provincialium Annorum 1420–1526. Sbírka pramenů práva městského Království českého. Díl III., Privelegia královských měst venkovských z let 1420–1526, vydává Historický spolek v Praze, v Praze tiskem národní správy fy Dr. Edvuard Grégr a syn, 1948. P. 366–369. Accessible at: http: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=119&page=390.

43 *Codex Jurix Municipalis Regni Bohemiae*, Tomus III., Privilegia Regalium Civitatum Provincialium Annorum 1420–1526. Sbírka pramenů práva městského Království českého. Díl III., Privelegia královských měst venkovských z let 1420–1526, vydává Historický spolek v Praze, v Praze tiskem národní správy fy Dr. Edvuard Grégr a syn, 1948. P. 602–604. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=119&page=626.

44 HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 25.

45 *Codex Jurix Municipalis Regni Bohemiae*, Tomus I., Privilegia Civitatum Pragensium. Sbírka pramenů práva městského Království českého. Díl I., Privelegia měst pražských, vydává JUDr. Jaromír Čelakovský, v Praze tiskem knihtiskárny Dra. Edv. Grégra, 1886. P. 60–62. Accessible at: http://147.231.53.91/src/index.php?s=v&cat=12&bookid=117&page=231.

46 "*the miller court got its name from the fact that he was making judgments on the damages caused to the neighbors by the river floods on the mills and bridges, water mains, weirs, water reservoirs and other water works. It is the core of the Prague millers serving under oat, which then judge the disputes on the basis of their trade, regulations, experience and previous findings in the place where something new happened, whereas they declare what they deem to be justified."* That much for the finding of the miller court. Should the convicted side see this decision as unjustified, it could appeal to the lower provincial court. In other courts it used to be customary that our predecessors were filing appeals at the higher Prague court. Only a few other towns, such as Litoměřice (Leitmeritz), Louny, Slaný, Nymburk, Ústí n/L. (Aussig) and the neighboring towns were filing appeals at the court of the Magdeburg counselors. See: From the development of the Czech technical work. A collection issued on the 75th anniversary of the founding the Association of the Czech Engineers in Prague, 1940, compiled by Ing. Josef B. Stránský. Available at: http://www.zememeric.cz/default.php?/clanek_tisk.php?zaznam=554.

47 See: From the development of the Czech technical work. In addition issued on the 75th anniversary of the founding the Association of the Czech Engineers in Prague, 1940, compiled by Ing. Josef B. Stránský. Available at: http://www.zememeric.cz/default.php?/clanek_tisk.php?zaznam=554.

48 HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 25.

49 Navigation of Vltava from Bubeneč to Charles Bridge was not possible due to the shortage of funds and technical problems until 1921.

opened waterways were probably used by the Swedes for the first time to transport their booty from the Prague Castle and Lesser Town. Central Vltava between Prague and Budějovice was considered safely navigable for boats and rafts under normal water levels since 1783. But with the high or low water, the currents were still dangerous for the boats.

Timber harvested on the slopes of the Beskydy Mountains, Hostýn and Vsetín Hills was floated by the Moravian raftsmen on Bečva and Moravia rivers since the 15th century. Shallow waters, minor alterations to the flow and low-pass weirs which were hardly passable by the floating rafts did not allow in the 15th and 16th century systematic navigation of cargo ships, especially upstream on the Moravia River. The plan from the 16th century to set up cargo shipping on the Moravia River emerged in the same place and for the same purpose as the idea to navigate the middle section of Vltava – in the imperial court in Vienna. Its purpose was to allow for cheap water transport of salt to the Czech lands from the salt works in the Austrian Salzkammergut[50], which belonged to the Habsburgs. Low profitability of private shipping companies, inadequate for the funding of the river maintenance, and even less for its regulation without public support, resulted in the final realization that the Moravia River can be successfully regulated only by the state. In 1819, Emperor Francis I said that the navigability of the rivers is the most efficient means to facilitate transport, and thus to encourage industry and increase the prosperity of nations. Subsequently he ordered to clean Moravia from Hodonín to its outfall and to make it navigable at the expense of the country. The river was mainly frequented by the boats shipping timber from Moravia to Vienna and Bratislava.[51]

[50] Salt Chambers (Salzkammergut) is an area of the central Austria located on the federative lands of Salzburg, Upper Austria and Styria.
[51] HUBERT, M. *History of navigation in Bohemia, Volume I.* 1st Edition. Děčín: Regional Museum of Děčín, 1996. P. 133–137.

The Crime of the „Forced Abortion“ before the Regional Court in Olomouc in the Second Half of the Eighties and in the First Half of the Nineties of the Nineteenth Century

Lucie Bendová Bednářová*

Abstract

In this article I go in for the second half of the eighties and the first half of the nineties of the nineteenth century. I focus on the characterics of women who committed (or attempted to commit) the crime of the "Forced Abortion", but also on the characteristic of men who often urged their partners to get the "Forced Abortion" carried out and also of persons who performed the illegal abortions, whether they were physicians, midwifes or persons without medical education. The specific criminal cases of the Regional Court in Olomouc identify the causes of crime, methods of its implementation (mechanical or chemical means used), the way of decision making of the court on the mitigating and aggravating circumstances, guilt and punishment and also the attitude of the Prosecutor's Office in Olomouc and advocates towards the accused and the crime. In the end I present pertinent conclusions and I try to compare two periods – the second half of the eighties and the first half of the nineties of the nineteenth century and the first quarter of the twentieth century.

Key words: *The crime of the "Forced Abortion"; the Criminal Code of 1852; the Regional Court in Olomouc; woman as a perpetrator; the second half of the eighties and the first half of the nineties of the nineteenth century.*

I. Introduction

Researching of the crime of the „Forced Abortion“ at the time when abortion was possible only because of health reasons (in all other cases it was a criminal offence) is undoubtedly significant and interesting.[1] The beginning of the twentieth century, World War I. and subsequent twenties, in the czech milieu, represent period of an intense professional discussion on the question whether the abortions should be culpable or non-punishable, or as the case may be, under which conditions this conduct should be non-punishale.[2] A growing tension between the statutory criminalization of abortions (it was crime of the „Forced Abortion" under § 144–§ 148 of the Penal Code of 1852) and the social reality of their increasing frequency and changing perspective on them appears to have given rise to this debate. „The deed, which the penal code qualifies and punishes as a crime, is daily in countless cases committed by decent, moral and impeccable people…the forced abortion…is nowadays not considered as a criminal activity anymore", stated for instance Social Democrat woman member of parliament Fanni Blatny in the rationale of the Draft Law on the Abortion of 1926.[3] The government, women´s movement, physicians, lawyers and some woman members of parliament and other MP´s at that time gave their opinions on the given issue in the curricula of the new penal code, draft laws on amending pertinent provisions of the existing Penal Code and in their justifications; in the professional discussions, lectures, articles and books,

* Mgr. Bc. Lucie Bendová Bednářová, Department of the History of the State and Law, Faculty of Law, Masaryk University, Brno, Czech Republic.

1 Impunity woman who herself aborted her pregnancy, or that asked someone to do it, or allowed him do it, and the possibility of abortion for medical or other reasons deserving special consideration, were first regulated by the Act No. 68/1957 Coll. On the Abortion. For the possibility of abortion by a physician for medical reasons, see MIŘIČKA, August: Přerušení těhotenství lékařem a jeho povinnost oznamovací hledíc k osnově trestního zákona (hereinafter only as Přerušení těhotenství lékařem…). Právník, 1918 (roč. 57), p. 81–90, 119–125.

2 For this professional discussion see HAJN, Alois: Ženská otázka v letech 1900–1920 (hereinafter only as Ženská otázka…). Praha, Pokrok, 1939, p. 170–187, MIŘIČKA, A.: Přerušení těhotenství lékařem…, c. d., p. 81–90, 119–125, www.psp.cz/eknih/1920ns/ps/tisky/t 0694-00.htm, Návrh poslanců Landové-Štychové, MUDr. Boh. Vrbenského, dr. Bartoška a spol. na novelisaci ustanovení XVI. Hlavy I. dílu všeob. trest. zákona ze dne 27. května o vyhnání plodu ze života a jeho odůvodnění (hereinafter only Návrh poslanců Landové-Štychové, MUDr. Vrbenského z roku 1920…), www.psp.cz/eknih/1925ns/ps/tisky/t 0219-00.htm, Návrh poslankyň Blatny, Kirpal a spol. na novou úpravu trestních ustanovení o vyhánění plodu a jeho odůvodnění (hereinafter only as Návrh poslankyň Blatny, Kirpal z roku 1926…), www.psp.cz/eknih/1925ns/ps/tisky/t 0535-01.htm, Návrh poslanců Landové-Štychové a spol. na novelisaci ustanovení XVI. Hlavy I. dílu všeob. trest. zákona ze dne 27. května o vyhnání plodu ze života a jeho odůvodnění (further see Návrh poslanců Landové-Štychové a spol. z roku 1926…), further MIŘIČKA, A.: Referát k otázce trestnosti vyhnání plodu. In: Zápis o jednání finančně-právní sekce II. sjezdu československých právníků v Brně dne 31. května a 1. června 1925 (further only as Zápis o jednání…). Brno, Pořadatelstvo II. sjezdu československých právníků, 1925, WASSERMANN, Max: Otázka trestnosti vyhnání plodu (further only as Otázka trestnosti…). In: Zápis o jednání…, c. d., HALÍK, Ivo: Přerušení těhotenství de lege ferenda. In: c. d., HUBÁČEK, G.: K otázce vyhnání plodu. Ibid., KISSICH, Ant.: Otázka trestnosti vyhnání plodu. Ibid.

3 See Návrh poslankyň Blatny, Kirpal z roku 1926…, c. d. Biographical data regarding Fanni Blatny see for instance ONDŘEJOVÁ, Petra: Ženy v československém parlamentu 1918–1938 (Diplomová práce). Brno, Filozofická fakulta, Historický ústav, 2006, p. 20.

they brought arguments either in favour of the impunity or for maintenance of the culpability of the deed, or as the case may be, took their views of the adequate type of punishment. They often tried to support their held opinions by analysis of a social situation which they knew from their occupations. Members of parliament, if you like political parties (save exceptions), unfortunately did not draw consequences out of this discussion and did not adopt a new regulation of pertinent criminal law provisions.[4]

In the preceding article The crime of the "Forced abortion" (The culpability of foeticide in the first quarter of twentieth century) I, among other things, sought answers to questions what women (in terms of age, marital status, social status and property) the crime concerned, what causes led to its commission and what was the practice of the Regional court in Olomouc in these criminal cases.[5] Now, I will go in for the second half of the eighties and the first half of the nineties of the nineteenth century. I will focus on the characterics of women who committed (or attempted to commit) the given crime, but also on the characteristic of men who often urged their partners to get the "Forced Abortion" carried out and also of persons who performed the illegal abortions, whether they were physicians, midwifes or persons without medical education, in the words of contemporaries "humbugs and abortionists".[6] The specific criminal cases of the Regional Court in Olomouc will identify the causes of crime, methods of its implementation (mechanical or chemical means used), the way of decision making of the court on the mitigating and aggravating circumstances, guilt and punishment and also the attitude of the Prosecutor's Office in Olomouc and advocates towards the accused and the crime. In conclusion, I will try to compare the two periods.

The important sources related to the examined delict include Penal Code of 1852, Criminal Procedure Act of 1873 and the criminal files of the Regional Court in Olomouc, which are located in the collection called the Regional Court in Olomouc I. finding itself in Olomouc branch of the Provincial Archives in Opava. The auxiliary book – criminal records of defendants A–M of the years 1886–1895 shows that the Regional Court heard a case of crime of "Forced Abortion" almost every year.[7] The criminal files on the "Forced Abortion" of the seconf half of the eighties and the first half of the nineties of the nineteenth century contain first of all information tables on the defendants, court protocols on the trial, court protocols on deliberation, judgements and often also expert opinions. The testimonies of the defendants and the witnesses from the preliminary investigations, which could provide further important information, are missing though, nevertheless overall the criminal files are very valuable informational sources. Knowledge of social and legal reality related to the crime "Forced Abortion" in the second half of the eighties and the first half of the nineties of the nineteenth century can also be obtained from professional scientific articles by lawyers, doctors and journalists, concerned with women's issue, from the relevant provisions of the curricula of the new Penal Code and from political proposals for amendments to existing penal provisions and their justifications. Although they date back to the beginning of the twentieth century, to the period of the World War I and to the twenties of the twentieth century, they do not reflect only its presence, but also the past social and legal situation.

II. The Legal Form

Due to the fact that I dealt with the facts in issue of the "Forced Abortion of the Own Fetus" and the "Forced Abortion of the Alien Foetus" already in the previous article and that the facts in issue are well imaginable, I will first of all point out the penalties then inflictable on this delict. Under the provision of § 145 of Criminal Code of 1852, woman who attempted to abort should be punished by 6 months to 1 year of jail; in the event she accomplished the crime, she could have faced a punishment of 1 to 5 years of heavy jail. The provision of § 146 governed penalty for a father of "child expeled from life" who participated in the crime. He should be punished by "the same penalty, nevertheless aggravated…" by some of the methods provided for in the Criminal Code. The interpretation of the given provision is not entirely easy. § 145, to which it is referred by the applicable provision, talks about two different penalties, for the attempt and for the accomplished crime. However, provision of § 146 uses the phrase "by the same penalty", which is not completely clear, whether "the same penalty" is related to the attempt as well as to the accomplished crime, or only to the accomplished crime, which is mentioned by the provision of § 145 in the last part of the sentence after the semicolon. The latter alternative is suggested by the fact that in § 146 it is talked about the child "expelled from life" and not also about a child who the mother or father attempted to "expel". Due to the fact that from the examined criminal files on the crime of "Forced Abortion" I learned that, as far as the father is concerned, the court did not impose the penalty for an attempt by the provision of § 146, but according to § 145, while the court used to punish the father for an accomplished crime according to the provisions of § 145 and § 146, I figure that the provision of § 146 was applicable solely to an accomplished crime perpetrated by the father. The third party who carried out the abortion against the will of a pregnant woman, was threatened by penalty of imprisonment in heavy jail in the length of 1 to 5 years under the provision of § 148 and namely also for an attempt of this crime. Providing such a person endangered a woman´s life or caused bodily harm to her, this person was to be punished by 5 to 10 years of heavy jail. Nevertheless, the third parties perpetrated the given crime most frequently with consent of a pregnant woman, therefore

4 See foot-note no. 1.

5 See BENDOVÁ BEDNÁŘOVÁ, Lucie: Zločin „vyhnání plodu" (Trestnost umělého přerušení těhotenství v první čtvrtině 20. století). Právo, ekonomika, management, 2010, č. 1, p. 86–94.

6 See HAJN, A.: Ženská otázka…, c. d., p. 183 and ŠEJNOHA, Josef: Systém kriminalistického vzdělání a vědeckého poznání člověka. Praha, František Kodym, p. 537.

7 See PROVINCIAL ARCHIVES IN OPAVA (hereinafter only as PAO), Olomouc branch, Collection Regional Court in Olomouc I. (hereinafter only as RC in Olomouc I.), The auxiliary books – criminal records of defendants A–M, book no. 346.

they used to be punished under the provisions of § 5 and § 145 of the Criminal Code as accomplices (law understood by those the instigators and abettors) or as participants (persons aiding mentally) of the crime of "Forced Abortion of the Own Foetus". They were meant to be mated out essentially the same penalty as the perpetrator himself.[8] Criminal Code was silent on situation where physicians had to perform an abortion for health reasons. This question was resolved only by the legal science and practice, which determined that such a physician should be impune, because an intervention in order to save woman´s life was not illegal. The government curriculum of new Criminal Code of 1912 proposed enactment of an express provision on impunity of physicians. Some women and physicians of course abused the only given possibility of legal abortion and merely pretended the existence of health reasons.[9]

The mitigating circumstances were taken into account by the provision of § 54 of the Criminal Code, under which the court was authorised, in the case of concurrence of several mitigating circumstances, based on which the remediation could reasonably be expected, and on condition that the law at the same time did not provide for the punishment of imprisonment longer than 5 years, to alter the jail into a more moderate degree and lower the penalty as far as below 6 months of imprisonment. Following provision of § 55 enabled the court the alteration of penalty – penalty of imprisonment which was not longer than 5 years could be shortened below 6 months, providing longer duration of penalty would cause an important damage to the sustenance of an innocent family. In such a case the sentenced had to count on the aggravation of his shorter term. The court was entitled to apply both provisions simultaneously. The moderation of the penalty could also concern the third party who carried out the abortion against the will of a pregnant woman. Provision of § 338 of the Code of Criminal Procedure of 1873 regulated the possibility of alteration of the jail into a more moderate grade and to lower the penalty of imprisonment, with its length ranging between 5 and 10 years, to 1 year of imprisonment, providing that more important and prevalent mitigating circumstances occurred.[10]

III. The Legal Practice

What is possible to learn from the criminal protocols of Regional Court in Olomouc? In September 1887 the Regional Court in Olomouc heard the case of indictment of Olomouc Prosecution against Julie Dohnálková and František Kafka for an attempt of the crime of "Forced Abortion". Twenty years old Julie Dohnálková was unweded and worked as maidservant in a little municipality of Citov. She was born and lived in nearby Dub nad Moravou, she had a good reputation. František Kafka, identified by the indicted as father of the child, was 23 years old unweded shoemaker from Citov. He also had a good reputation. With problem of an unwanted pregnancy, the defendants approached Valentin Kocourek from Brodek who made a living selling the medicines. This person was only heard as a witness. He was not sworn in by the court because he was suspected of the crime of "Forced Abortion".[11]

At the trial the defendant Julie Dohnálková confessed to the attempt of the crime, the defendant František Kafka, represented by the advocate dr. Novotný, denied the guilt. Julie Dohnálková testified that she was pregnant with František Kafka and told him about this fact. He allegedly replied to her: „Take it easy, I will give you money and go to Kocourek to Brodek, he helps young maidens get rid of it." He also advised her to pay much attention not to be seen by anybody as she would walk there and not to tell a soul about it. So she went to Kocourek and told him that she was sick. As lately as after several visits, after urging of Kafka, she reportedly told Kocourek that she was pregnant and asked him to send her a medicine against pregnancy. He promised to send the medicine via his daughter, but he did not send her anything. Valentin Kocourek denied that he was told by Dohnálková about the fact she was pregnant. The indicted Julie Dohnálková admitted that she did not say it directly to him, but let him know via his daughter. The witness afterwards confessed that he learned this fact from his daughter, however declared that he did not send any medicine to Dohnálková. Kafka again denied he knew anything about the pregnancy of Dohnálková and that he suggested her to visit Kocourek.[12]

The presiding judge later declared the trial closed. The prosecuting attorney suggested that the defendants were convicted, while as a mitigating circumstance he denoted Kafka´s hitherto impeccability. As for Dohnálková he proposed to take into account the impeccability, confession and the fact that she was still less than 20 years old when committing the crime. On the contrary the advocate of Kafka asked the court to acquit his client.[13]

With regard to the confession of the defendant Dohnálková the Regional Court arrived at conviction that she was guilty. Despite Kafka´s denials, on the basis of the testimony of Dohnálková, the court came to the conclusion that he was also guilty. In the case of both defendants the deed was classified as ofense of an incomplete seduction to a crime, which should be punished as an attempt of that crime. The court punished Julie Dohnálková for an incomplete seduction of Valentin Kocourek to complicity in the crime of „Forced Abortion" by 4 weeks of jail aggravated by one fast per week, while with regard to mitigating circumstances, the provision of § 54 was applied and with respect to her innocent family also provision of § 55 was applied. František Kafka was penalized for instigation of

[8] See LEPAŘ, Mojmír: Trestní zákon ze dne 27. května 1852 č. 117 ř. z. se zákonem o tisku a jinými (Hereinafter only as Trestní zákon…). Praha, Knihtiskárna dr. Edvarda Grégra, p. 77–78 and ŠEJNOHA, J.: Systém kriminalistického…, c. d., p. 537. For the complicity and the participation and the penalties for them see MIŘIČKA, A.: Trestní právo hmotné. Část všeobecná (hereinafter only as Trestní právo hmotné…). Praha, Všehrd, 1920, p. 60–67.

[9] See MIŘIČKA, A.: Přerušení těhotenství lékařem…, c. d., p. 82–87, 119.

[10] See LEPAŘ, M.: Trestní zákon…, c. d., p. 30–31, 33–34 a § 338 DIE STRAFPROZESSORDNUNG VOM 23 MAI 1873.

[11] See PAO, Olomouc branch, fund RC in Olomouci I., sg. C 1887/458, č. kart. 1031, vyhnání plodu – Julie Dohnálková a František Kafka.

[12] See Ibid.

[13] See Ibid.

Dohnálková to an incomplete offense of seduction to a crime also by four weeks of jail, however without aggravation. While imposing the penalty, the court applied the provision of § 54, in the eyes of the court, Kafka was favoured by a mitigating circumstance of hitherto impeccability. Nevertheless, concurrence of several mitigating circumstances was a condition required by the law. The court did not state another mitigating circumstance in the justification of the judgement, that is why it is possible to speculate either on the violation of a legal provision or on a negligence of the court (for instance the fact that merely an attempt of a crime was in question could be a mitigating circumstance). It is also not clear why the punishments of Dohnálková and Kafka differed (albeit only in the aggravation); the penalty for instigation should have namely been the same as the penalty imposed to a perpetrator.[14]

Three years later, the Regional Court in Olomouc heard again the criminal case of an incomplete seduction to the complicity in the crime of „Forced Abortion." The defendant Jenovéfa Hrudová was 22 years old unweded maidservant coming from a small municipality Hradčany. She was poor, had already had one illegitimate child, she could neither read nor write. So far she enjoyed a good reputation. Another defendant was her mother, 53 years old peasant woman owning a house (not a field) Marta Hrudová who also could not read and write and also enjoyed a good reputation. They allegedly attempted to seduce the midwife Eva Trávníčková from Prostějov to complicity in the crime. The prosecution did not file an indictment against her and the court only heard her as a witness. In contrast to Valentin Kocourek, she stated in testimony under an oath, although in this case a suspicion of her participation in the crime must have existed.[15]

The midwife testified that Jenovéfa only talked to her about the fact that she did not have menstruation and that she had pain in the legs, not about an abortion. The third parties claimed this fact relatively often. The pregnant women did not expressly request the „Forced Abortion", all persons involved nevertheless knew the score. The midwife Hrudová allegedly replied, she could not then give her any medicine. Mother of Jenovéfa Hrudová reportedly did not visit her due to the pregnancy of her daughter, but because of her own disease.[16]

On the basis of the proofs, the prosecutor decided to withdraw the indictment against Marta Hrudová. As for Jenovéfa Hrudová, he proposed to punish her in accordance with the indictment, while as a mitigating circumstance he denoted her confession, the fact that she looked after a child and that she only attempted to commit the crime.[17]

From the court protocol on deliberation we can learn that the first and the second judge voted in favour of acquittal of Jenovéfa Hrudová, the third one vice versa voted for her conviction. The presiding judge shared the opinion of the first two judges, thus the court acquitted her, taking into account the fact that the prosecutor failed to prove that the crime was committed and also the the sworn testimony of the witness.[18]

In the following year 1889 the Regional Court heard a criminal case of a completed crime of the „Forced Abortion". The threesome comprised 19 years old unweded impecunious maidservant Aloisie Dosedělová, born in Čunín, last time residing in Bedihošť, 19 years old Franitšek (Franz) Knirsch from Uničov, unweded assistant at a farm, according to his statement speaking German as well as Czech, impecunious, but educated and 51 years old widowed midwife Marie Kubíčková, impecunious mother of three children, born in Ohrozim and living in Prostějov. In 1886 she was punished by the local district court for misdemeanour of Public Insult and Ill Treatment under § 496 of the Criminal Code by a statutory penalty of 5 pfennig in favor of Prostějov fund of the poor, alternatively by a jail in the duration of 24 hours.[19]

At the trial all of the three defendants stated that they were guilty. The facts of the crime can be reconstructed from their testimonies and the expert opinion. Also Aloisie told the partner František (Franz) Knirsch about her pregnancy, while he advised her to visit a midwife in Prostějov. For the „help" he promised 30 guldens to the midwife and indeed he handed over the first installment of 20 guldens to the daughter of the midwife. At the first visit Marie Kubíčková allegedly still could not with certainty tell, whether Dosedělová was pregnant. However, soon afterwards Aloisie Dosedělová felt motions of an infant and visited the midwife once again. As for the description of the way Kubíčková carried out the abortion, the testimonies differed. According to the statement of Dosedělová, the midwife stepped on her, she repeated this the next day once again, provoking miscarriage. Kubíčková testified that she broke the brood pouch of Dosedělová, then the amniotic fluid started to outflow and there was a miscarriage. The medical experts stated in their expert opinion that the indicted found herself in 4–5 month of the pregnancy. In their eyes, it was not possible to prove the fact whether the foetus was alive or not, but the defendant confessed herself that she felt the motions of a child. The midwife attempted to carry out the „Forced Abortion" twice, when performing the second intervention, she broke the brood pouch by her fingers and the abortion followed. No one could come up with an evidence that she used some instrument while performing the intervention. The medical experts also assesed the question, whether the abortion could be caused by ingestion of pills composed mostly of aloe which were seized during the investigation. They stated that these pills serve as a means of abortion in large quantities, however in the given case the amount of the pills was too low to bring about the

[14] See Ibid. For the punishment for an incomplete seduction to the crime and for the instigation to the crime see MIŘIČKA, A.: Trestní právo hmotné…, c. d., p. 67.
[15] See PAO, branch Olomouc, fund RC Olomouc I., C 1888/250, č. kart. 1040, vyhnání plodu – Jenovéfa a Marta Hrudovy.
[16] See Ibid.
[17] See Ibid.
[18] See Ibid.
[19] See PAO, branch Olomouc, fund RC Olomouc I., C 1889/144, č. kart. 1049, vyhnání plodu – Aloisie Dosedělová, František (Franz) Knirsch a Marie Kubíčková. For § 496 see LEPAŘ, M.: c. d., p. 234.

effects.[20] The advocate of Kubíčková dr. Ambrož asked with respect to the expert opinion, whether the foetus could not be dead already before the intervention. Dr. Cantor answered that dead foetus could not move and that the defendant stated that she felt motions, thus it is possible, she felt motions of a living foetus. Afterwards the advocate asked whether the indication of the defendant, that a fluid spilled from her before the delivery, could imply that the foetus was dead. The medical expert declared that in such a case a smelling colourless fluid shall spill, regardless the fact that a liquid spilled before the delivery is not a proof of death of a child.[21]

After the end of the proofs the prosecuting attorney proposed the court to convict the defendants, while he reffered to the expert opinion of the medical experts who stated with certainty that the defendant was pregnant and that the midwife carried a conduct on her which was in connection with the „Forced Abortion". Regarding Dosedělová he denoted the impeccability, confession, fear of the mother and seduction to the crime by Kubíčková as mitigating circumstances. As for Marie Kubíčková he took the impeccability and partial confession for mitigating circumstance and he regarded the fact that she advised to submit to the „Forced Abortion" as an aggravating circumstance. As far as Knirsch was considered, the prosecutor proposed to take into account the age under 20, the confession and the seduction to the deed by Kubíčková. Therefore he requested the court to apply the provision of § 54 on Dosedělová and Knirsch, the provisions of § 54 and 55 on Kubíčková. The advocate of Knirsch, dr. Hynek, nevertherless requested his client´s acquittal, he claimed that the objective aspect of the crime was not fulfilled because the medical experts could not in his eyes indicate whether the foetus was alive. As for the subjective aspect of the crime, he assumed that Dosedělová used the word „help" in the ordinary sense and not in the sense „to help from pregnancy". Further he claimed that his client spoke minimally Czech which was contrary to the data about the client from the beginning of the investigation. He added the upset of Knirsch among the mitigating circumstanes. The advocate of Dosedělová, dr. Pšenčík, figured that she committed the crime in the error excluding the „bad faith", in the case that the court convicted her, he desired that neglected upbringing was involved among the mitigating circumstances and proposed to apply § 54. The advocate of Kubíčková requested the acquittal of his client, in the case that she was convicted, he protested against the proposed aggravating circumstance of seduction of the other defendants to the crime because in his opinion they vice versa seduced her to the crime. He drew the attention to the mitigating circumstances of uncaused longer custody and in accordance with the prosecutor he proposed to apply the provisions of § 54 and § 55.[22]

The Regional Court in Olomouc convicted the defendants with regard to their testimonies and also the expert opinion. Marie Kubíčková was punished by 3 months of jail aggravated by 1 fast per a week, Aloisie Dosedělová by 2 months of jail aggravated by 1 fast per a week and František (Franz) Knirsch by 1 months of jail aggravated by 1 fast per a week and one hard bed during the punishment. Regarding the mitigating and aggravating circumstances, as for Kubíčková, the court took into consideration the partial confession, impeccability and an innocent family, thus it did not accept the seduction to the crime of the other two defendants, as proposed by the prosecutor, in the case of Dosedělová as mitigating circumstances the confession, impeccability and upset were acknowledged and not the neglected upbringing, as for Knirsch the age under 20, impeccability and a fierce upset played a role in the decision making of the court. When imposing the punishment, the court applied the provision of § 54 and in the case of Dosedělová and Knirsch and § 54 and § 55 in the case of Kubíčková. Reading the judgement it is possible to come to conclusion that it is obvious that the Regional court did not abide by the provision of § 146 of the Criminal Code which laid down that partner of a woman, who was a complice in the crime, should be punished the same way as the woman and morover he should be imposed an aggravation. What is more, as was already mentioned above, the instigator should be punished basically according to the same penalty as the perpetrator himself. It is truth that the court imposed the punishment according to the provisions of § 145 and § 146, inflicted double aggravation, but the punishment of František Knirsch was 1 month shorter than the punishment of Aloisie Dosedělová, eventhough the both were favoured by the same number of analogous mitigating circumstances. What also arouses the question, is, why the court did not take into account the mitigating circumstance of the age under 20 in the case of Dosedělová, while in the case of Knirsch the court did so. The criminal file circumstantiates that both were 19. And why did the court denote the upset of Knirsch as fierce and the upset of Dosedělová as „ordinary"? On the contrary it is possible to agree with refusal of the court to acknowledge the seduction to the crime as an aggravating circumstance in the case of Marie Kubíčková. Although it could happen that with motivation of a reward, midwife offered her services to a helpless hesitating person and convinced her of simplicity and painlessness of the intervention, however more often was undoubtedly situation when a person came to a midwife with clear vision of what she wanted.[23]

Further imprtant findings in relation to the crime in question brings the criminal case of „Forced Abortion" of the year 1890. This time the prosecutor prosecuted neither midwife nor guy selling medicine, but two women without medical education who earned their living by carrying out of illegal abortion. 43 years old unweded maidservant Františka Kubová having three illegitimate children was poor, so far impeccable person who came from municipality Jesenec, last time she resided in Prostějov. She could neither read nor write. Her co-worker, 33 years old wife of a joiner, Františka Dědáčková, also had three children, read and wrote only a little bit, was domiciled in Spytihněv and as well resided in Prostějov. Further defendants

[20] See Ibid.
[21] See Ibid.
[22] See Ibid.
[23] See Ibid.. See also PAO, branch Olomouc, fund RC Olomouc I., sg. Vr IX 414/10, kart. 699, vyhnání plodu – Anežka Šopová a Anna Stavělová.

were their female clients. 18 years old unweded dressmaker Marie Matinohová, poor and so far impeccable, was born in Stražisko and was domiciled in Čunín, but last time resided in Prostějov. 22 years old unweded businesswoman Rosa Šťastny, poor, so far impeccable person, was born in Klein Latein, was domiciled in Slavkov and lived in Prostějov. 22 years old unweded maidservant Therese Haberland, also poor and so far impeccable woman who could neither read nor wrote was born in municipality Studená Loučka and last time resided in Medlov. The group of defendants was completed yet by 29 years old Jakob Fiala, married businessman having three children, moderately wealthy man born in Jesenec and last time residing in Studená Loučka, denoted by Haberland as a guy who she was pregnant with and who allegedly urged her to go to Prostějov to get the abortion carried out.[24]

At the trial both Kubová and Dědáčková claimed that their clients did not tell them they were pregnant, they allegedly only mentioned the fact, they already had not had the menstruation for two months and asked for help. Kubová and Dědáčková thus inserted a little wire into their vagina and moved a little bit with it. In the case of all clients bleeding followed. Matinohová and Šťastny insisted on the fact that they were not pregnant, in the case of the first defendant the menstruation allegedly left out as a consequence of catching cold and the second one had reportedly difficulties with drope outs of the menstruation in the long term. On the contrary Haberland confessed that she had sexual intercourse with Jakob Fiala who after being told that she had not had menstruation for two months, urged her to go to Prostějov to get the abortion carried out and told her that his wife would otherwise divorce him and he would have to shoot himself. Fiala did not deny the intimate contacts, nevertheless he claimed that he used contraception. He tried to throw a doubt on his alleged fatherhood by statement that Haberlandová liaised also with other men, which she rejected. Fiala denied that he spoke about divorce and suicide. Afterwards the court bestowed the word to the medical expert dr. Cantor. He stated that leaving out of the menstruation in connection with sexual intercourse showed evidence of the probablility of pregnancy, nevertheless it was not an absolute symptom because leaving out could also be caused by another disorder of the organism. Through the examination of the women, he ascertained that they were not virgins anymore and what is more, he discovered another suspicious factor, deep dents on the cervix in the case of Matinohová and Haberland, which could be caused by an uneducated person through a wire manipulation. Such a manipulation is hereat capable of bringing about an abortion. In case of all defendants bleeding followed after the manipulation, in case of Šťastny a bigger piece of gore was in question, which was another suspicious moment. However, as the properties of the leaked out blood could not be ascertained, it was only a probability moment in favour of the pregnancy, nevertheless not an unmistakable token, as was the case of the aforementioned factors.[25]

After reading the expert's opinion, the prosecutor asked the medical expert to comment on whether the manipulation, as carried out by Kubová and Dědáčková, could provide allignment of the period. The court expert, pressurized by another questions of the prosecutor towards a definite and exact answer to this question, answered no and stated that there was not a menstrual period. The second medical expert agreed and stated that there was obviously an abortion. The prosecutor afterwards declared that the expert opinion did not sound distinct and clear to be unomissible in the further proceedings. He drew the attention first of all to the contradiction between the present expert opinion, excluding the renewal of the period as a consequence of the performed manipulation, and the expert opinion from the preliminary investigation, which admitted the possibility of menstrual bleeding as a consequence of the given manipulation. Therefore the prosecutor proposed the court to adjourn the main proceeding and requested the Faculty of Medicine of the Imperial University in Vienna to revise the expert opinion and deliver a new expert opinion. The advocates joined his proposal and requested the release of the defendants Kubová and Dědáčková from the custody. The Regional Court unanimously granted the both proposals. The faculty of medicine was subsequently requested by the court to give answers to the two questions: whether the described manipulation could bring about the renewal or acceleration of the period and whether the defendants were pregnant when the manipulation was performed. The question of pregnancy of the defendant women represented the key issue because providing Kubová and Dědáčková had carried out the „Forced Abortion" on nonpregnant women, there would have been an attempt on an absolutely unfit subject, which, according to the prevailing opinion of the doctrine, was non-punishable. The expert opinion of the faculty of medicine is unfortunately not contained in the present criminal file. With regard to the result of the main proceeding, it is possible to presume that the expert opinion of the Faculty of medicine did not confirm the pregnancy of the defendants.[26]

At the main proceeding that was held two months later with exclusion of the public, the defendants repeated their previous testimonies, Jakob Fiala further stated that as a consequence of poor business, he lost almost all of his remaining property. Kubová was questioned on the fact how much money she and Dědáčková gained from the individual defendants which she enumerated before the court. The prosecutor proposed the court to convict the defendants of the crime of „Forced Abortion" and for the sake of their acquittal to convict at least Kubová and Dědáčková of misdemeanour of practising medicine as a business or being a healer without permit under § 343 of the Criminal Code. The advocates requested acquittal of their lady clients. The court acquitted Kubová and Dědáčková of the crime „Forced Abortion". However, first of them was convicted of a misdemeanour under § 343 and sentenced to 6 weeks of heavy jail aggravated by one fast per a week and the second

[24] See PAO, branch Olomouc, fund RC Olomouc I., sg. C 1890/411, č. kart. 1065, vyhnání plodu – Františka Kubová, Františka Dědáčková, Marie Matinohová, Rosa Šťastny, Therese Haberland, Jakob Fiala.

[25] See Ibid.

[26] See Ibid. For the atempt on absolutely unfit subject see MIŘIČKA, A.: Trestní právo hmotné…, c. d., p. 49.

one was sentenced to 4 weeks of heavy jail with one fast per week. When imposing their punishments, the court, according to § 260, letter b) took into account the fact that in the case of a longer punishment the feeding of their families could suffer. The other defendants were acquitted.[27]

The criminal case of „Forced Abortion" of 1892 brought before the Regional Court in Olomouc 38 years old married peasant woman owning a house (not a field) Anna Pospíšilová from municipality Sokol near Dub nad Moravou, about whom for years rumors circulated that she dealt with abortions. In 1886 the court investigated her due to a suspicion of this delict, but the crime was not proved to her, that is why the court convicted her merely of the misdemeanour according to the provision of § 343 and sentenced her to jail in duration of 48 hours. The prosecution indicted also two of her lady clients – 22 years old unweded maidservant Rosalie Dokoupilová from Brodek and 29 years old unweded peasant woman owning a house (not a field) Josefka Humpová from Bolelouc.[28]

The gendarmery managed to find out that in 1891 and 1892 Pospíšilová was visited by a number of women. One of them was Rosalie Dokoupilová who took the drugs cousing abortion from Pospíšilová. Nevertherless, according to her testimony and to the testimony of Pospíšilová, she obtained the drugs only once and eventually she did not use them. Josefka Humpová received altogether four times the drugs from Pospíšilová for 26 guldens, she used them, however without effect. The court experts ascertained that the drugs, which Pospíšilová sold without necessary permit, contained aloe capable of bringing about the abortion, nevertherless the amount of aloe in the pills was merely little. The prosecutor proposed to convict Dokoupilová and Humpová of the crime of incomplete „Forced Abortion" and to convict Pospíšilová of complicity in this crime, eventually of the crime of fraud and of the misdemeanour in the sense of § 354 of the Criminal Code.[29]

Since Dokoupilová, according to her testimony, did not use the drugs, the court acknowledged that she broke away from the attempt of the crime and acquitted her. Anna Pospíšilová was sentenced for the complicity in an incomplete crime of „Forced Abortion" to 6 months jail, as for the misdemeanour according to § 354, she was acquitted because the unpermitted sale of drugs, which were subject to limitations, was merely a means to commit the „Forced Abortions". Josefka Humpová was sentenced for and attempt of „Forced Abortion" to three weeks jail with one fast. As for Pospíšilová, the court recognized the partial confession as a mitigating circumstance and the repetition of the deed as an aggravating circumstance. Regarding Humpová, the court took into account the confession, hitherto impeccability and the fact that she only attempted to commit the crime and applied the provisions of § 54 and § 55. The court protocol on deliberation documents that this time the guilt and punishment were discussed for some time. All the five judges agreed on acquittal of Dokoupilová of the attempt of the crime and on acquittal of Pospíšilová as far as the aforementioned misdemeanour was considered. However, the presiding judge proposed that the court adjourned the main proceedings, for in his opinion the pregnancy of Humpová was not proved. However, the other judges did not agree. Eventually the judges Krayatsch, Feigel and also the presiding judge voted to convict Pospíšilová and Humpová, on the contrary Neubauer voted in favour of acquittal of Humpová and in favour of acquittal of Pospíšilová as far as the complicity in the incomplete crime of „Forced Abortion" of Humpová was considered but not regarding the attempt of „Forced Abortion" of Dokoupilová. The judges determined the punishment for Humpová unanimously, for Pospíšilová the presiding judge proposed 4 months jail, however the other judges agreed on 6 months.[30]

What women came on force as far as the „Forced Abortion" was concerned? In the examined cases we came across the young unweded women, mostly maidservants. They did not have property, did not obtain more significant education, in some cases could not even read or write. They were never punished. On the other hand, in the criminal files, there also appeared women who were relatively poor, but still had better living conditions that than those maidservants, it was for instance case of a sewer, businesswoman, peasant woman owning a house (not a field). No really well off woman occured among the woman perpetrators of the „Forced Abortion", however this finding should not mislead us. The literature and sources pertaining to the issue of the „Forced Abortion" from the beginning of the twentieth century, period of World War I. and also from the twenties of the twentieth century pointed out the fact the wealthy women had means to seek discrete aid of professional physicians and that the punishments thus struck mainly on poor women. Woman member of parliament Luisa Landová-Štychová claimed for example that affluent women appropriated the right to decide on their pregnancy already ages ago. It is possible to introduce the example of the woman journalist Milena Jesenská in this context. Mary Hockaday states in her biography that young Milena Jesenská, pregnant with her lover (whom she married less than two years later), underwent an abortion in 1916. It is not known whether in Milena´s case the health reasons for abortions existed. Her father, well off physician, who was initiated to the entire matter, must have been very well aware of the fact that this was a criminal offense. Neither Milena Jesenská nor the physician, who carried out the abortion, were prosecuted. According to law professor

[27] See PAO, branch Olomouc, fund RC Olomouc I., sg. C 1890/411, č. kart. 1065, vyhnání plodu – Františka Kubová, Františka Dědáčková, Marie Matinohová, Rosa Šťastny, Therese Haberland, Jakob Fiala.

[28] See PAO, branch Olomouc, fund RC Olomouc I., sg. C 1892/224, č. kart. 1077, vyhnání plodu – Rosa Dokoupilová, Josefka Humpová a Anna Pospíšilová.

[29] See Ibid.

[30] See Ibid.

[31] See HAJN, A.: c. d., p. 183. The fact, that wealthy women had means to get aid of expert physicians, states not only Alois Hajn, but also german lawyer Gustav Radbruch. See also Návrh poslanců Landové-Štychové, MUDr. Vrbenského z roku 1920..., c. d., Návrh poslanců Landové-Štychové a spol. z roku 1926..., c. d., HOCKADAY, Mary: Kafka, láska a odvaha (Život Mileny Jesenské). Praha, Pragma, p. 33 and MIŘIČKA, A.: Přerušení těhotenství lékařem..., c. d., p. 119.

August Miřička it was more difficult to ascertain an abortion performed by a physician and it was more complicated to prove that he performed an abortion without medical indication in the light of the physician´s expert knowledge which he could use to claim there was a health reason for the abortion.[31]

In some of the criminal cases the Olomouc prosecution also indicted men who advised their partners to get the abortion carried out or exerted a psychical pressure on them, as was the case of Jakob Fiala. These were often young unweded men with higher social status than their partners and had better economical background, which was for instance case of shoemakers, assistants at farms. They did not intend to marry their pregnant partners (sometimes only accidental best girls). Another time they were married men with good social and economic status, for whom the young maidservants were only a short epozode.

What kind of people satisfied these women and men, eventhough the deliquency was in question? They were women and men who, without permit, sold drugs that could bring about the abortion and it was generaly known about them. Sometimes the court punished them for it already ín the past. Some women without medical education performed also mechanical interventions with instruments which, with respect to missing education, was very tricky. The consideration for the intervention perhaps constituted a substantial factor why they were determined to commit such a conduct, sometimes it generated an important source of subsistence. From the criminal files it comes to light that some of them did not own any greater property or were unweded mothers having several children. The illegal abortions were further carried out by the midwifes, persons with special medical education. Not all of them were willing to perform the illicit interventions, but some were probably tempted by the vision of the reward, especially in the event they were poor and widowed, with several children. Examining the relevant cases I did not come across the indicted physicians, however the literature and the sources from the beginning of the twentieth century, the period of the World War I. and the twenties of the twentieth century document that also they did perform the illicit abortions. In his article on abortion by a physician, lawyer August Miřička did the justice evaluating their role. He stated that it was an open secret that apart from the midwifes also the phsysicians carried out the abortions. According to the author, some of the doctors did not too much care about the fact whether a medical indication for the abortion existed and willingly satisfied the wishes of the pregnant ones, of course not only because of suffering and love for he near one, but for money. Doctor Max Wassermann, opponent of culpability of abortion on the contrary justified some performed abortions by sympathy of the physicians for the poor mothers having many children who did not wish and even could not afford to have another children. Not only the physicians themselves, but also the other persons carrying out the illegal abortions could have the sympathy and personal conviction about the incorrectness of the criminalization of abortions by law.[32]

The examined criminal files do not contain (except for one case – fear of a mother´s rage) the information why the indicted women and men made up their minds to solve the situation of pregnancy just by the „Forced Abortion". I figure that this used to happen because their marriage did not come to question, either on the ground of difference between the social statuses of both of them or of an accidental relationship between them. In the case of married men, there were worries of family rupture or also of the possible divorce providing the existence of an illegitimate child came to light. They could have been endangered by a social disgrace and in the case of court defeat perhaps by duty of alimony payments in favour of the child. Reasons of women were further represented by bad economic situation, fear of shame associated with unmarried motherhood, of the parents´ reaction or sometimes also pressure of the partners.

In what way was the abortion carried out? Various drugs were used, for instance made of aloe, drinking of hot wine used to be advised, further steaming and so on. Other means were posed by mechanical action such as stepping on the abdomen, rupturing of brood pouch and often inserting of catheters or ordinary wires into the common genital tract and puncture of the membranes.[33]

IV. Conclusion

In both periods the crime of „Forced Abortion" was commited by young poor, mostly unweded, women, very often maidservants, sometimes woman day labourers, peasant women owning a house (not a land), but also dressmakers, businesswomen and also well off women, although these did not appear in the criminal files of the Regional court in Olomouc. The wealthy women partly disposed of financial means as well as of contacts, enabling them get the abortion carried out discretely by experts – physicians, partly the knowledge of the contraception was in their case presumably more widespread than in the case of people with lower social status.[34] The partners of the women, mostly young unweded men, sometimes also the married ones, had better social and economic status than their girlfriends. The third parties, women and men with medical education and also without it, often let themselves get tempted by the vision of a consideration for carrying out of the abortion, sometimes also for the reason of their bad economic situation. The sympathy and conviction that the criminal law regulation was wrong sometimes played a role in the decision making of the third parties in the sense whether to carry out the illegal abortion or not.

The shame of having an illegitimate child, the fear of parents and economic reasons ocurred in the both periods and it is hardly possible to superordinate one reason the others.

The used chemical means, for instance drugs containing aloe, did not operate too much. Mechanical means – pressure, stepping on the abdomen, but first of all medical catheters and wires were vice versa efficient, however they were accompanied by considerable risks, pain during the intervention, diseases

[32] See MIŘIČKA, A.: Přerušení těhotenství..., c. d., p. 119, WASSERMANN, M.: c. d. and Návrh poslanců Landové-Štychové a spol. z roku 1926..., c. d.

[33] Compare ABRAMS, Lynn: Zrození moderní ženy (Evropa 1789–1918) (dále jen Zrození moderní...). Brno, Centrum pro studium demokracie a kultury, 2005, p. 111, which also states usage of sabine juniper and mint in the countryside and of chinin and lead in the town.

[34] For the prevalence of contraception in the different social strata see for example ABRAMS, L.: Zrození moderní..., c. d., p. 110.

caused by tracking in of infection from used instruments, injuries.

The estimations on number of diseases, lasting effects and deaths of women, caused by illegal abortions, started to be carried out as far as from the beginning of the „Czechoslovak First Republic“. Did the social situation and judicial practice of the Regional Court in Olomouc, as far as the „Forced Abortion“, in the periods of the second half of the eighties, of the first half of the nineties of the nineteenth century and of the first quarter of the twentieth century are considered, differ? In contrast to the previous period, the first quarter of the twentieth century was time of an intense expert debate on the question whether the abortion should be culpable or not, eventually which punishment would be adequate. As I mentioned in the introduction, this debate eventually did not result in the amendments of the criminal legislation. The practice of the Regional Court in Olomouc was in the both periods steady, without divergences, relatively benevolent, noted for the fact that woman and men as perpetrators were not convicted at all costs. Providing doubts about pregnancy of the indicted persons or about seducing of the third party to the crime existed, the court acquitted the indictees. When determining the punishments, the courts widely applied so called extraordinary moderation law and alteration of the punishment. One month, 6 weeks or 2 months jail represented usual punishment for women who underwent an illegal abortion. In the period of the second half of the eighties and the first half of the nineties of the nineteenth century, however, at least in two cases it appeared that without respect to the provisions of the Criminal Code, either lower punishments were imposed on the sentenced men than on women, or punishments without aggravation were inflicted on the men, once the extraordinary moderation law was applied in the case of an indicted man without meeting the legal requirements. On the contrary, in the first quarter of the twentieth century a stricter penalty was imposed on a man who himself carried out the illegal abortions to his partner. The court inflicted the strictest punishments on the third parties who with consent of the pregnant women carried out the abortions. In terms of the examined cases the strictest punishment was the 6 month jail imposed by the court on a woman who sold unpermitted drugs and participated as an accomplice in two attempts of the „Forced Abortion“ while the woman was engaded in this activity for a long time, however the court did not hitherto, except the last criminal proceeding, succeed to prove her the crimes. At the end of the Worl War I., the court imposed 5 months long punishment to a former midwife for a completed crime. She committed the crime repeatedly and was favoured by no mitigating circumstances. The court did not take into account the fact of an innocent family, eventhough she had two children. The regional court did not always accept the proposals of the prosecutors and the advocates to have a respect to various mitigating, eventually aggravating circumstances. Even so, the court took into consideration relatively large number of mitigating circumstances, occasionaly some mitigating circumstance was apparently missed out.

Justices of the Peace in the Judicial Reform of Tsar Alexander II.

Katarína Fedorová *

Abstract

The article deals with the creation, organization and action of the justices of the peace, established by the judicial reform of the Russian tsar Alexander II. Justices of the peace adjudged minor criminal and civil legal disputes between citizens in proceedings specifically modified for the conciliation with the fundamental acts of the judicial reform of 1864: the Court Establishment Act, the Criminal Process Act, the Civil Process Act and the Law establishing penalties, imposed by the conciliation courts. Despite the undoubted successes in deciding legal cases, hostility of the executive power led in 1889 to abolition of the justices of the peace.

Key words: *Russia; Judicial Reform; Alexander II.*

Introduction

Early in the second half of XIX. century the crisis of the state apparatus of the tsarist Russia have become obvious. Defeat in the Crimean War unveiled the general backwardness of the country, which for its feudal – totalitarian nature could not keep up with the developed countries of Western Europe. One of the biggest symbols of this retardation was the judiciary based on *„a collection of unrelated provisions from different periods"*[1]. The court, which was in fact a body of the executive power[2], had unprofessional and bureaucratic nature. In proceedings were applied principles of formal evaluation of the evidence, closed sessions, the accused had no right to defense, the process was inquisitional and written. These factors, along with generally low legal literacy of the judges led to factual unenforceability of rights[3], negatively perceived by all segments of society. There was consensus across the social spectrum on the necessity of reforming the judicial system, conflicts resulted from the question how to carry out the reform.

Creation of Justices of the Peace

In November 1864 after a long and difficultlt preparation[4] tsar Alexander II. issued the fundamental codes of the judicial reform – the Court Establishment Act, the Criminal Process Act, the Civil Process Act and the Law establishing penalties, imposed by the conciliation courts. Following this laws the institute of Justices of the Peace was established in the governorates of Russia[5], which was ideologically conceived by the authors of the judicial reform as an authoritative mediator of minor disputes between residents of different estates and social groups, completely separated from the executive[6], acting directly at the place where the dispute arised. Establishment of the conciliation courts followed previous reforms of Alexander II.,

* JUDr. Katarína Fedorová, Department of the History of the State and Law, Faculty of Law, Masaryk University, Brno, Czech Republic.

1 This is how Anatolij Fedorovic Koni describes the Anthology of applicable laws of the Russian Empire, a collection of laws compiled by M. M. Speranskij, which incorporated the legislation in force since 1649. KONI, Anatolij Fedorovic: Otci i deti sudebnoj reformy. Moscow: Statut, 2003, p. 109.

2 Dependence of the judiciary on the administration was so significant that in the opinion of the Minister of the Interior C. Lanskij in 50-ies of XIX. century was administrative power in Russia *"riding the judiciary"*. One of the fundamental reasons for this phenomenon laid in often intervence of governors to court proceedings, particularly in criminal matters. DZANSIEV, Grigorij Avetovic: Osnovy sudebnoj reformy. Moscow: Tipografia M.P. Scepkina, 1891, p. 52.

3 Dragutin Pelikan alleges that, according to the report of the Minister of Justice to the Tsar, the number of pending court cases in the year 1842 reached 33 millions. PELIKAN, Dragutin: Dejiny ruskeho prava. Prague: C.H.Beck, 2000, p. 49.

4 Preparation work on the concept of the judicial reform began in 1852. A project of the judicial reform aroused contradictory reactions induced by a different vision of liberal and conservative-oriented nobility on philosophical foundations of the reform – while the liberals (represented by prince P. Dolgorukij) suggested reception of the Western, bourgeois countries law, conservatives (e.g. D. N. Bludov) enforced continuity of the Russian legal system, with slight modifications, without introducing the principles of oral deposition, public trial, equality of the parties, institute of advocacy.

5 Judicial reform was put on the Russian territories fragmentary, both in terms of territorial and chronological. In 1870, conciliation courts operated in 23 governorates, in western Poland and nine governorates were established in the years 1871–1875, in the Northwest and Southwest in the 80-ies and in Siberia in the 90-ies of the 19th century. Judicial reform was officially completed in the year 1899 by issuing special law on its termination. Paradoxically, in some governorates were the conciliation courts introduced after the abolition of the justice of peace institute by contrareform of 1889.

6 FOJNICKIJ, Ivan Jakovlevic: Kurs ugolovnogo sudoproizvodstva. Sankt Petersburg: Obcestvennaja polza, 1912, p. 290.

primarily the emancipation of serfs in the Emancipation Manifesto of 19th February 1861[7], which aroused the need to solve many legal disputes between landlords and peasants concerning the allocation of land and the police reform of 1862[8], which excluded the arbitration of infringements from the scope of the police. The judicial reform acts created a new organization of courts, consisting of general courts[9], Justices of the Peace and peasant volost courts[10]. There were also ecclesiastical, commercial and military courts with specific jurisdiction. The justices of the peace embodied a separate branch of justice execution.

Organisation of Justices of the Peace

The Russian territory was divided into circuits, a special unit of the judicial organization different from administrative units. Circuits were divided into districts, where the justices of the peace and honorable justices of the peace were active. Justices of the peace and honorable justices of the peace of each circuit constituted Assize of the peace, a conciliation court of second instance. Justice of the peace was elected to his office for a period of three years by the provincial councils, in cities by city dumas from the list of candidates drawn up three months before the election separately for each district.[11] A candidate had to be a local resident[12], and besides the general conditions for holding any public office[13], he had to meet the conditions of property and education qualification, which were justified as necessary to select most educated people immune from financial pressure.[14] Regarding the property census, the rural candidate had to possess real property valued for tax purposes of at least 15,000 rubles, candidates in St. Petersburg, Moscow and the capitals of governorates of at least 6,000 rubles and candidates from other cities of at least 3,000 rubles. Differences in property census were invoked by the need to support and extend low-number of burghers. Another census associated with the function was the education qualification, a candidate for justice of the peace had to complete at least secondary level education (not necessarily legal). Candidate who did not meet this requirement, was electible in case he worked for a period of three years in an office, where he could gain practical experience with judiciary.

Adopting such an exemption was necessary due to the fact that in Russia of XIX. century not enough people had the secondary or higher education.[15] Despite the fact that one of the fundamental theoretical basis of the judicial reform was the complete separation of judicial and executive power, executive bodies could interfere to the election of justices of the peace as the governor had the right to advise the electors that a candidate in his opinion does not meet the requirements for the office. List of elected justices of the peace was exposed for confirmation to the Senate, court of the third instance, which within the confirmation process dealt also with exceptions of the governor, if a candidate was elected despite his reservations.

If the council did not elected sufficien number of justices of the peace, the remainder of the required number of judges was appointed by the Senate on the proposal from the Minister of Justice from the list of candidates for justice of the peace drawn up before the elections. In the ideological platform of the institute of conciliation judiciary there is evident the importance of local bondage of a conciliator with the districts in which he operates, his knowledge of local environment, customs and people. Justice of the peace was required to permanently reside in his district. His office was open on all working days, excluding days when the Assize of the peace met.[16] Function of justice of the peace was incompatible with any other official function, except purely honorary functions in local charitable and educational institutions. Justice of the peace received a salary, determined by the specific regulation of the local budget.[17]

Competence of honorary justices of the peace[18] differed only marginally from the powers of justices of the peace. Honorary

[7] Based on the Emancipation Manifesto peasants gained personal freedom and right to allocate land from agricultural landowners. Peasant became the owner of the allocation by payment of the total price to the landowner, which was for the majority of Russian peasants unattainable. Peasants stayed in the position of "interim" commitment, and were dependent on the compulsory attended the common, basic unit of peasant self-government. Several commons formed the volost, managed by elected bodies – council of elders and volost administration body.

[8] An important element of police reform was also exclusion of pre-trial investigation from the scope of the police and its delegation to newly created judicial investigators. Pre-trial investigation was often used by the police to influence investigation, and hence subsequent results of the trial.

[9] Three-tier system of general courts consisted of district courts, judicial chambers and the Senate.

[10] Action of volost peasant courts, established in 1861 by the General regulations on farmers, freed from servile dependence, sholud had been ended up by the judicial reform, but it did not happen. Volost peasant courts, which decided mutual legal disputes between peasants and collected payments and taxes, thus remained the only post-reform courts of status exclusivity.

[11] Eligibility and temporality differ the conciliators from other judges who were appointed to their office by Tsar on the proposal from the Minister of Justice for unlimited period.

[12] For meeting this condition was sufficient, if the candidate had at the time of the elections residence in the governorate including the district, where he run for the office.

[13] General prerequisites for holding any public office were Russian nationality, age of 25 years, male gender, moral integrity.

[14] KONI, Anatolij Fedorovic: Otci i deti sudebnoj reformy. Moscow: Statut, 2003, p. 109.

[15] Also were excluded church officials, persons against whose is conducted the investigation or proceeding and debtors, whose were appointed guardians for vanity.

[16] In addition district justice of the peace was obliged to accept petitions and applications, both oral and written in any time, whereas could not refuse to accept offered documents. Justice of the peace had to admit also petition in disputes out of his jurisdiction and depute them to competent bodies. In the interest of quicking the enforcement of law, he could settle down the hearing aside his office. The Assize of the peace could obligate justice of the peace to regular court sessions in places faraway his seat.

[17] Justice of the peace was entitled to refuse a salary, in this case used the title "honorary district justice of the peace" with all rights and obligations of the "non honorary" justice of the peace.

[18] According to Alexander Bernasevskij institute of honorary justices of the peace is needed, as persons: *"deserving full respect and trust, can not loose the opportunity to participate in the accomplishment of justice only because of their business".* BERNASEVSKIJ, Alexander: Sud v starinu i v nase vremja. Moscow: Tipografia M.P.Scepkina, 1905, p. 91.

justice of the peace did not have an office and his official duties started from the moment of his residence in the district. Jurisdiction of honorary justice of the peace was voluntary, which meant that his activity in criminal proceedings was limited to only a small number of things susceptible to settlement of parties. Honorary justice of the peace did not get salary. The legislature, however, allowed him to perform functions incompatible with the position of justice of the peace.[19]

In addition to his role as a conciliator, a justice of the peace performed in his district also other duties – he deputized for a notary, at the time of a doctor's absence he issued confirmations of the disease, supervised construction of cells for detainees, sit in commission investigating mentally ill and commission drawing up lists of jurors of the general criminal courts, opened peasant congresses and attested their representatives. Justices of the peace were also obliged to attend the Assize of the peace[20], which acted as a conciliation court of second instance and organised action of justices of the peace in the circuit. The Assize of the peace on the basis of data from conciliators prepared annual reports about operation of conciliators in the circuit, supervised activities of a conciliator, released a conciliator on leave and appointed his deputy.[21]

Criminal Proceedings at the Justice of the Peace Court

Criminal proceedings were reformed by the Criminal Process Act of 1864. The law established a special procedure for criminal proceedings at a conciliation court, with application of general principles of trial[22]. To their jurisdiction were subjected offences punishable under the law with warning, reprimand, fine of maximum 300 rubles, detention to the limit of 3 months and imprisonment not exceeding 18 months, with exception of those cases, where the accused could be punished with deportation from home, prohibition of commercial and industrial activity or closure of commercial and industrial facility, and where remedy claimed by the aggrieved exceeded 500 rubles, or if the accused is a farmer and the case is under jurisdiction of the peasant court. Territorial jurisdiction of the conciliator was limited to offenses commited in his district. In case of multiple offenses committed in different districts, the matter was dealt by the justice of the peace, in whose district the most serious offense was commited. Competence conflicts between justices of the peace were decided by the Assize of the peace.[23] Criminal proceedings at a conciliation court were initiated by petitions of private persons who had suffered damage[24], by notification from police or other administrative bodies, or ex officio in relation to acts subjected to review independently of the actions of private individuals. This was particularly the case of marginal infringement of military and provincial responsibilities, the Mining Act, the Act of salt, the laws on the manufacture and sale of tobacco, the Customs Act, the Press Act. Conciliation Courts also looked at issues affecting the unauthorized increase in fixed prices of bread, charges for transportation across the river, poor road maintenance, failure to remove combustible materials to a safe place despite a request of the police. The legal action was taken by the plaintiff by himself or through a representative, in writing or orally to protocol.[25] Important role in criminal proceedings at a conciliation court played the police, which was obliged to carry out all necessary research at the request of the conciliator. Police and other bodies of executive power had to inform the conciliator of offenses under the jurisdiction of a conciliator, which he considered ex officio. The police was also obliged to taking in a person for hearing if he was caught in the act and his identity was not known or unable to credibly prove, or if the commited offense was punishable with imprisonment and it existed a reasonable concern that the accused will try to hide or destroy the evidence. If the police did not carry out the obligations imposed by the justice of the peace, he had to inform the prosecutor of circuit court.[26] Criminal proceedings at a conciliation court were public[27], with steady course. At the beginning of the hearing, the justice of the peace asked the defendant whether he feels guilty. If the defendant did not feel guilty, justice of the peace summoned the plaintiff, witnesses, and even the defendant himself. The most important means of proof were witnesses, documentary evidences and inspection of sites and objects potentially or demonstrably related to the offense. A witness could not be mentally ill and mentally handicapped, priest could not denounce facts learned during confession, representative and advocate of defendant could not testify. Testimony was more valuable, if conducted under an oath. Under the oath could not testify a victim and a defendant, his relatives in the direct and lateral line, a person excluded from the church by a church court, mi-

[19] With the exception of a prosecutor, his deputy, police personnel and personell of prisons and function elder of volost.

[20] Assize of peace consisted of a chairman, a permanent member (chosen from among the conciliators of a circuit, combining the activities of a judge with the official duties in preparing meeting the Assize) and conciliators, in Assize worked also the secretariat and the office.

[21] In the absence of the district justice of the peace in the district, for example because of vacation, illness, family reasons, Assize delegated its obligations to honorary justice of the peace, but even in this case he was not entitled for salary or other remuneration.

[22] Judicial reform of 1864 brought into the court proceedings new principles not known in Russian procedural law such as oral process, publicity, equality of sides, right to defense.

[23] Competence conflicts between conciliators of different circuits ruled the Assize of the peace, where the first unjust act was commited, competence conflicts between assizes of the peace and justice of the peace and a district court decided judicial chambers.

[24] One of the features distinguishing conciliation and general justice was precisely a position of a victim in the criminal process. In criminal proceedings at a conciliation court had the aggrieved the position of prosecutor, in criminal proceedings at a district court held this position a prosecuting attorney.

[25] The essentials of the legal action under the Act were identification of the plaintiff, defendant or suspect with their name, father's name, surname and place of residence, description of the act, time and place of its commission, determination of caused damage, designation of witnesses and other evidences attesting the claim.

[26] Although the police was obliged to provide all necessary assistance to the conciliator, it often attempted to sabotage activities of conciliator.

[27] Apart from the case of offenses against the family law, against women's honor and, if the non-public hearing was requested by both parties for serious reasons.

nors younger than 14 years, demented persons and persons of other than orthodox religion. An Inspection of sites and objects was carried out by conciliator or by the police in presence of two bystanders. Both parties have the procedural right to be represented by an advocate.[28] A case was usually dealt within a single hearing, which could be adjourned if it was necessary to submit additional evidence. In this case, the defendant could not move from the venue of the court without the submission of statutory guarantee, which in dependence on the threating punishment ranged from a written commitment to a deposit.[29] After hearing the parties and reconing all evidences, justice of the peace adjudged the guilt or innocence of the accused in accordance with his own account, established under evidences in consonance with the law. Unlike a judge of a general court, justice of the peace might take into account the well-known local customs not offending the law. If the defendant was found guilty, justice of the peace also imposed a sentence and the remedy, if the offense caused damages. Judgement was publicly declared at the hearing, together with instructions on appeal.[30] In terms of resorting of a remedy, judgments of the conciliator were divided into sentences, which could not be challenged with proper appeal, but only with an action or protest of prosecutor in cassation process and judgments which could be challenged with appeal. Appeal against a judgement of justice of the peace was not possible, if it imposed warning or reprimand, a fine not exceeding 15 rubles for one prisoner, detention for a maximum of three days, if the value of caused damages did not exceed 30 rubles. In other cases an appeal against the sentence was allowed, filed within two weeks from the declaration of judgement, in writing or orally, to the justice of the peace who ruled the matter. He was required to forward the appeal within three days to the permanent member of the Assize of the peace together with the judgment and related documents. Appellate proceedings conducted collectively by the Assize of the peace were oral and public. The hearing began with reading the appeal and then the parties presented their arguments. Within the appelate proceedings new evidences, including new testimonies of witnesses could be presented. Right for the last word belonged to the defendant, respectively to his representative. The assize of the peace either confirmed the judgement or imposed new sentence. The assize of the peace decided by simple majority, with the decisive vote of the chairman. Judgement of the assize of the peace could not be questioned with proper remedy. Final judgments of justices of the peace and their assizes were examined in cassation process, only by reason of an apparent violation of law and its misapplication in the circumstances and nature of the case, due to serious breach of procedural principle enshrined in law resulting in ulawfulness of the case, or if the justice of the peace or the Assize of the peace exceeded its jurisdiction. Actions and protests against a final judgement of the conciliator in the first instance were administered within two weeks after declaration of the judgement to justice of the peace. Actions and protests against the decision of the Assize of the peace in an appellate proceedings were administered within two weeks after declaration to the permanent member of the Assize of the peace. Actions and protests against final judgement of justice of the peace were decided by the assize of the peace, actions and protests against final judgements of the Assize of the peace were decided by the Senate, which either confirmed or abandoned the judgement and forwarded it to decision of other Assize of the peace. Final judgment of conciliation court was immediately enforceable. Its realisation was supervised by the justice of the peace who imposed the judgement. Warning or reprimand were imposed orally. If a fine had been imposed or the convicted was ordered to pay damages caused by the offense and he did not have the necessary sum of money, the conciliation court might allow payment of the amount in installments, adapted to the possibilities of the sentenced person. If the convicted did not pay a fine or compensation within prescribed period, the summ he was obliged to pay was pursued by the justice of the peace, police and local administration bodies. Persons sentenced to detention were held in buildings set up to carry this penalty in conciliation districts. Persons sentenced to imprisonment were transferred to the place of punishment with police assistance, the time spent on transportation to the place of imprisonment was substracted from the lenght of punishment.

Costs[31] were payed by the convicted or by the applicant, if the defendant was recognized innocent. If there were more convicted persons, they contributed on the payment jointly and severally.

Civil Proceedings at the Justice of the Peace Court

After the reform of 1864 civil process was based on the Civil Process Act, which governed also proceedings at conciliation courts. Justice of peace adjudged matters of personal commitments and contracts and matters concerning real estate, with value not exceeding 500 rubles, compensation matters if the value of caused damage did not exceed 500 rubles, or if at the time of the action was not possible to determine the value of damage, libel, unauthorized encroachment to property, if the illegal situation did not last more than 6 months. From the jurisdiction of the district justices of the peace were exempt actions in matters of title to property resulting from a formal legal action, lawsuits between farmers population falling within the jurisdiction of peasant courts, unless the claimant and the defendant agreed to refer the matter to the decision of the justice of the peace and disputes concerning the rights of discovery or invention. In

[28] Institute of advocacy, called "sworn mandates" was incorporated to the Russian legal system with the judicial reform of 1864.

[29] The deposit, composed by paying an amount of money or transfering of real property was determined by the conciliator, deposit assembled defendant or any other person.

[30] The essentials of the sentence were the date of the judgment, name, father's name and surname of the parties, the facts of the case leading to the appeal, the relevant statutory provisions, quantifying the costs of the proceedings, the signature of a conciliator. Judgement was published in a special file or book maintained for all procedures.

[31] For example, a witness was entitled to reimbursement of travel expenses of 3 kopeek for verstva if his place of residence was far from the seat of the court more than 500 versts. Witness was entitled to compensation for loss of time of 25 kopeeks for each day of absence in the place of residence.

terms of territoriality, jurisdiction of justice of the peace covered the district in which the defendant had permanent or temporary residence. In cases with more then one defendant residing in different districts, the plaintiff decided where to submit the petition. Civil proceedings at a conciliation court began with submitting a petition[32] on the basis of which justice of the peace summoned the defendant to court.[33] Procees was public, justice of the peace could exclude the public only from serious reason on based on the request of both parties. The hearing started with plaintiff's testimony about the circumstances of the matter followed by presenting the evidences. Justice of the peace based his decision solely on evidences exposed by the parties. In the civil proceedings at a conciliation court could not witness persons declared uncapable to properly express themselves in writing or orally, persons who for their physical or mental deficiencies could not be aware of the facts of the case, persons excluded from the church by church court, children and spouses of procedural parties, priest could not denounce facts learned during confession. Documentary evidences were submitted to justice of the peace with rebuttable presumption of their authenticity.[34] If the party had challenged the authenticity of the documents, justice of the peace could verify the evidence using other documents, testimonies and review of signatures. Confession of one of the parties was not further proved. In case of more participants on the defendant or plaintiff's side, the confession was proof against all the participants only in case of procedural indissoluble community. On the basis of the evidence the justice of the peace declared a judgement, which was not possible to challenge with the ordinary remedy, if the case value of it was not more than 30 rubles. Procedure of appelation and cassation in civil cases was the same as in criminal matters.

Abolition of Justices of the Peace

In general, new courts were enthusiastically percieved within the population. Conciliation courts acted in particular in matters of oppression, libel, small thefts and fraud, which previously often remained outside the attention of judicial authorities. Already in 1867, justices of the peace in the first instance decided 147,651 criminal cases, giving an average of 430 cases per district judge. Conciliation judiciary enjoyed the favor of the Minister of Justice D. N. Zamjatnin according to whom *"simplicity of the conciliation, oral proceedings, absence of burdensome formalities attracted general trust to this institute. People found in this court the court fast and fair for their small and neglected interests and continue to bless the Supreme legislator that gave Russia the court which is close to the nation and fully compatible with its needs „.*[35]

Ear of the Supreme legislator, however, began to be more affected by voices of the representatives of the administrative apparatus headed by provincial governors and police officials, accustomed from the pre-reform to virtually boundless power, who used situation created by *"terrorist forms of fight of the revolutionary movement"*[36] victim of which became also Alexander II. Persecution of the conciliation judiciary, in the opinion of A. F. Koni despite some shortcomings *„not only place where a nation access the justice, but also a school of decency and respect for human dignity"*[37], eventually led to its factual destruction. In 1889 were most of the conciliation courts replaced by local district chiefs, city judges, reformed volost courts and uyazd members of district courts. As appellate courts acted uyezd congresses, courts of cassation became governorate courts, called gubernskie prisustvija. Besides this institutes existed a three-instance system of general courts, and conciliation courts in St. Petersburg, Moscow and Odessa, with the Assize of the peace as appelate court and the Senate as a court of cassation. This led to actual untransparency of the judicial system and negation of most principles of fair trial and the nature and objectives of the judicial reform. In 1912, justices of the peace were restored in certain parts of the Russian territory, but not for long. After the October revolution was the conciliation judiciary in Russia abolished for more than 80 years.[38]

Conclusion

The aim of authors of the reform of Russia's dysfunctional justice system was to set up an independent mediator of a just solution to many minor legal disputes, who shall be able to act quickly and with deep knowledge of local conditions and customs. The starting point for the regulation of justices of the peace position in the judicial system, their organization, as well as the procedure for hearing criminal and civil agenda, was the fulfillment of this approach. The paradox is that precisely the implementation of tasks entrusted with the conciliation courts by the judicial reform of 1864 had evoked resentment of wide range of officials of the executive, who in 1889 finally achieved the abolition of almost all of the conciliation courts, and thus cripple the implementation of fundamental principles of the judicial reform.

[32] The essentials of a petition under the Act were identification of the plaintiff, the defendant and witnesses with their first name, fathers name, surname and address, description of the case, determination of evidences and description of what the plaintiff asks for.

[33] The date of hearing was established so that the plaintiff had at least one day for 15 versts from his place of residence to the seat of the court.

[34] With the exception of documents issued by notaries and verified in manner prescribed by law, which authenticity could not be questioned.

[35] DZANSIEV, Grigorij Avetovic: Epocha velikich reform. Istoriceskie spravki. Moscow: Tipo-litografia B.M. Volfa, 1907, p. 716.

[36] PELIKAN, Dragutin: Dejiny ruskeho prava. Prague: C.H.Beck, 2000, p. 46.

[37] KONI, Anatolij Fedorovic: Otci i deti sudebnoj reformy. Moscow: Statut, 2003, p. 111.

[38] The restoration of justices of the peace in the Russian Federation was adopted by the Federal law on conciliation courts in the Russian Federation in the year 1998.

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The journal "Contributions to Austrian Legal History" (BRGÖ) was established by the decision of the Austrian Academy of Sciences on November 10, 2010 in order to encourage research in Austrian legal history.

BRGÖ is a body of the Committee for Austrian Legal History of the Centre for Research in New and Contemporary History of the Austrian Academy of Sciences. Hence, its headquarter is in Wien and its editorial staff is from Committee for Austrian Legal History. BRGÖ is to be published twice a year both in paper edition and on-line. The first volume of the year will be dedicated to a specific topic studied by the sessions of the Committee for Austrian Legal History, whereas the second one should contain papers on various subjects from non-associated contributors. This actual call for papers from any legal historian who studies Austrian history in an innovative way may make BRGÖ an international journal. Additionally, its international potential is reinforced by the broad treatment of its main subject, since the meaning of 'Austria' underwent several changes in history but generally was wider than we know it today. This uneasy endeavour will be assisted by the international council of renowned scholars from several academic institutions, mostly in Germany, but also in Belgium, Czech Republic, Hungary, Poland, Slovenia.

The first volume of BRGÖ published this summer is entitled "*Last Wills in the Habsburg Empire: Everyday Culture, Law, Tradition*" and presents the results of the symposium organized by the Committee for Austrian Legal History in November 2009. 'Last wills' are understood in a broader sense including all acts of (universal and partial) disposals at death.

Last wills have been chosen as a rich and underestimated source of knowledge for all historical sciences including legal history. This thesis is supported in multiple ways in all 11 papers of this volume presented by contributors from Austria, Czech Republic, Germany and Hungary. Even a brief overview of these papers will give an idea of a variety of issues raised.

Leopold Auer overviews last wills and their treatment at the Aulic (judicial) Council for the Holy Roman Empire. *Cecilie Hollberg* undertakes a close-up study of two last wills in 'Venetian style' placed in the context of the mid 15th century in order to take a better look into Venetian succession law. *Kornelia Holzner-Tobisch* analyses last will protocols in the town registers of a small Austrian town of Korneuburg which turn out to be a helpful source of information continuously covering the vast time-span between early 15th and late 18th century and hence containing a comprehensive description of this local society and its typical activities. *Jozsef Horvath* pays tribute to his colleagues who undertook the most significant studies in Hungarian last wills from the 15th to the 19th century. *Gerhard Jaritz* briefly presents last will of town dwellers from the 14th and the early 15th century as means to assist young women to find their spouse (as a European phenomenon). *Gertrude Langer-Ostrawsky* turns her attention to poorly studied peasant last wills from the late 18th and the first half of the 19th century from Low Austria. *Tomáš Malý* fills in the gap in research of last wills in Bohemia and Moravia after 1620s by studying premises to make such documents, practice and its spread in the 17th and the 18th century. *Christian Neschwara* presents recent critical editions of several Vienna's "last-will books" from the years 1395 to 1430, containing proper last wills alongside with other disposals at death; the author groups them around into disposals of all estate, donations and transactions. *Michael Pammer* analyses last wills from ethical perspective by examining several examples of legacies for pious causes around 1800. *Susan Richter* turns her attention to political testaments of the Habsburgs as a mirror of changing government policy and significant means to pass on knowledge from one generation of rulers to another which led to sustained religious and political tradition in the 16th–19th centuries. *Stefan Seitschek* studies form and reconstructs general structure and process of making a dozen last wills of nobles in the second part of the 16th century.

The authors of the first BRGÖ volume convincingly show the benefits of bearing on 'last wills' (including political testaments, legacies and codicils, town registers and protocols dealing with succession issues) in pursuit of historical truths about the Habsburg monarchy from the 14th to the 19th century. Indeed, last wills research may yield some new data regarding lives of monarchs and humble bureaucrats, aristocracy and peasants, wealthy bourgeois and ordinary town dwellers, on a European, imperial and local levels. It shed light on both material, legal and spiritual aspects of society, state, family, gender and individual stories.

However, the overall presentation of last wills as a rich historical source lacks consistency as to its specific goals and methodology. The first volume of BRGÖ combines articles containing primary literature overviews, reviews of recent critical editions of last wills and other documents, proper studies of several documents and single last wills. The contributors to this volume seem to work

independently from each other and focus on different specific topics in their articles recurring to divergent methods. Speaking from a perspective of an East European reader, the volume leaves an impression of a patchwork occasionally covering a broader subject and inviting careful readers to combine the results into a bigger image.

The reviewed volume is surely an invitation to further research in the field of succession law and other domains of Austrian legal history. Indeed, the editor invites *expressis verbis* the community of legal historians to submit their papers for the new journal.

Fair winds and following seas!

Dmitry Poldnikov*

* Dr. Dmitry Poldnikov, Assistant Professor of Legal History, Faculty of Law, National Research University "Higher School of Economics"; Senior Researcher at Faculty of Law, Moscow State University "M.V. Lomonosov", Russia.

Anti-Semitic Legislation in Slovakia and in Europe (Report from a Conference)

On September 8–9, a scientific conference titled Anti-Semitic legislation in Slovakia and in Europe was held at the Comenius University in Bratislava on the occasion of 70th anniversary of enacting the so-called Jewish Codex. This conference was organized by the Nation's Memory Institute and the European Network of Remembrance and Solidarity in cooperation with the Comenius University in Bratislava, specifically with the Department of General History of Faculty of Philosophy and with the Department of Legal History of Faculty of Law.

There were 27 participants from 10 countries who presented their contributions in seven geographically oriented thematic blocks. Contributions of several other contributors, who could not personally appear at the conference, were presented in absentia and will be published in the conference volume.

The conference was opened by speeches of Mgr. Ivan A. Petranský, PhD., the chairman of the Board of the Nation's Memory Institute, prof. JUDr. Pavol Kubíček, CSc., the dean of the Faculty of Law of Comenius University, and Dr. Burkhard Olschowsky, the representative of the European Network of Remembrance and Solidarity. The first block was dealing with anti-semitic legislation in Germany and Austria. Christine Schoenmakers (Universität Oldenburg) and Hans Safrain (Universität Wien) presented their contributions on aryanization process in Wien and so-called Altreich. Ján Vyhnánek (Comenius University in Bratislava) introduced his contribution titled Anti-Semitism as a Historical Phenomenon. Daniel Krošlák (Trnava University in Trnava) a Ingo Loose (Institut für Zeitgeschichte, Berlin) demonstrated their works on the Nürnberg Laws and the radicalization of anti-Jewish legalism in the Third Reich. Gregory Weeks (Webster University, Wien) pointed out the influence of anti-semitic legislation on the Vienna police 1938–1941. The block was closed up by Claudia Kuretsidis-Haider (Zentrale österreichische Forschungsstelle Nachkriegsjustiz, Wien) with the contribution on forced labour camps for Hungarian Jews. The second block concentrated on the Protectorate of Bohemia and Moravia and the Interwar Poland. Pavel Suk (Univerzita Karlova, Prague) addressed the implementation of anti-Jewish laws in the Protectorate of Bohemia and Moravia. His contribution was thematically followed up by Jaromír Tauchen (Masarykova univerzita, Brno) dealing with the legal form of dispositions with Jewish property and its administration in the Protectorate. Grzegorz Krzywiec (Polska Akademia Nauk, Warszava) spoke about projects of anti-Jewish legislation in the Interwar Poland. In the third block Kilian Bartikowski (Zentrum für Antisemitismusforschung, Berlin) presented the contribution on the anti-semitic legislation in Italy from the National Socialist viewpoint, Piotr Podemski (Uniwersytet Warszawski) subsequently described the situation of Italian Jews 1938–1943. The first day of the conference was enclosed by the fourth block in which Bryce Evans (University College Dublin) reported about the cultural-legal standing of Jews in 1930s and 1940s Ireland and Tomáš Gábriš (Comenius University in Bratislava) compared anti-Jewish measures in Netherlands and in Slovakia during the Second World War.

The second day of the conference commenced with the fifth block regarding anti-Jewish policies in Slovakia. As the first speaker Michal Malatinský (Comenius University in Bratislava) presented his contribution on human rights of the Jewish population in Slovakia according to the Jewish Codex and pre-codex enactment. Mara Dissegna (Fondazione per le Scienze Religiose Giovanni XXIII, Bologna) subsequently informed about the Jewish Codex in the pages of the American Jewish Yearbook. Martin Macko (Slovak Academy of Sciences) addressed the exclusion of Jews from social life. Rudolf Manik (Law office, Košice) focused his contribution on anti-semitic legislation imposed on attorneys in Slovakia. Martina Fiamová (Nation's Memory Institute) spoke about aryanization of Jewish-owned land in Slovakia. Ján Drgo (Trnava University in Trnava) analyzed later phases of anti-Jewish measures – legal framework of ejecting Jews from Slovakia and the Protectorate. The morning block was closed up by Bogdan Wrzochalski (Ministerstwo Spraw Zagranicznych Rzeczypospolitej Polskiej, Uniwersytet Kardynała Stefana Wyszyńskiego, Warszawa), discussing the relation between racial legislation and the philosophy of law. The sixth block was opened by Marta Švolíková (State Archives in Nitra, Levice Branch) with the contribution on impacts of Hungarian anti-Jewish legislation on Jewish community in Levice. Miroslav Svircevic (Srpska akademija nauka i umetnosti, Beograd) addressed functioning and significancy of camp in Belgrade and also mentioned gas van actions in Yugoslav countries. Marija Vulesica (Zentrum für Antisemitismusforschung, Berlin) described anti-Jewish laws in the Independent State of Croatia in 1941. Last, seventh block

was opened by Natalya Lazar (Clark University, Worcester) with her contribution on the destruction of Bukovina Jewry. Livia Carare (Academia Română, Cluj-Napoca) discussed racial legislation in Romania and also spoke about the fate of Bukovina Jews. The Conference was concluded by the contribution of Jan Rychlík (Univerzita Karlova, Prague) on Bulgarian anti-semitic legislation in 1940–1944.

After presenting of all contributions Mgr. Ondrej Podolec, PhD. from the Nation's Memory Institute evaluated the conference. The conference contributed to the research of totalitarian regimes and anti-Jewish legislation during 1930s and 1940s, therefore aim of the conference was fulfilled. The papers from the conference will be published in a conference volume.

Michal Malatinský [*]

[*] Bc. Michal Malatinský, Faculty of Law, Comenius University, Bratislava, Slovakia.

200 Years of ABGB – from the Codification to the Recodification of Czech Civil Law, 2nd–3rd June 2011*

Within days of 2nd–3rd June 2011, there was held an international conference titled „*200 years of ABGB – from the codification to the recodification of Czech Civil law*", at the Faculty of Law, Palacký University in Olomouc, under the chairmanship of the Minister of Justice of the Czech Republic Jiří Pospíšil and the chairwoman of the Supreme court of the Republic of Austria Hon. Prof. Dr. Irmgard Griss.

This scientific meeting was one of many conferences, which dealt with the current 200th anniversary of ABGB. This meeting in Olomouc reminded one more important event of the academic life, because we also reminded the 20th anniversary from restore of activities of the Faculty of Law, Palacký University in Olomouc.

The opening ceremony of the conference was held by Prof. JUDr. Milana Hrušáková, CSc. (the Dean of the Faculty of Law, Palacký University in Olomouc), Prof. RNDr. Miroslav Mašláň, CSc. (the Rector of Palacký University in Olomouc), JUDr. Jiří Pospíšil (the Minister of Justice of the Czech Republic) a Hon. Prof. Dr. Irmgard Griss (the chairwoman of the Supreme court of the Republic of Austria).

Conference was not divided into traditional discussing departs, but there were plenary sessions, where the regarded Czech, Austrian and Polish academicals and representatives of the legal practice were asked to present their contributions.

On Thursday, the plenary session was opened by Prof. Pavel Höllander, DrSc. (the Constitutional Court of the Czech Republic) with a plenary theme „*The natural law and ABGB, the natural law today*", where Prof. Höllander presented his contribution called "*Loophole in the Law, Section no. 7 of g.c.c. and Pure Theory of Law (notes to an idea of Franz Bydlinský).*" Prof. Höllander introduced a fundamental interpretative conception of *Pure Theory of Law*, which is based on rejection of extreme cognitivistic along with denacionalistic interpretative theory. According to Kelsen, there ought not to exist a scientific method establishing standards for choice of the one right interpretation from those that are possible. In event of any conflict between dictions of law and of legislator, there is the same importance of both, which means that there is no agreement what the Law is, if a norm that was enacted by legislator or the previous intended rule of behaving. This theory was demonstrated by Prof. Höllander on the provision of Section no. 7 g.c.c.

The second plenary theme was "*The Czech and ABGB*", where Prof. JUDr. Jan Kuklík, DrSc. (the Faculty of Law, Charles University in Prague) performed a contribution called "*The General Civil Code in the Czechoslovak law of the years 1918–1950.*" The paper charted the fate of ABGB in the Czechoslovak legal order from its reception of the Austrian law in 1918 to its replacement by the Civil Code. Prof. Kuklík focused on three main questions: the reception of ABGB in Czechoslovak legal system, the legislative attempts to establish a new Civil Code and fundamental reforms that modified the adopted Civil Code.

The third plenary theme was devoted to "*ABGB in the Austrian view*". Prof. Dr. iur. Dr. h.c. Willibald Posch (the Faculty of Law, Charles Franc University, Graz, Austria) performed a contribution on this subject. Prof. Posch presented ABGB as one of the oldest modern codifications of Civil law in the scope of the Central and Eastern Europe, which is still in force. The original version of the General Civil Code is currently still in force from 57%.

In the fourth plenary block that was titled "*ABGB and the Public Law*", there was presented a contribution by Prof. JUDr. Jan Filip, CSc. (the Faculty of Law, Masaryk University, Brno) on the theme "*The General Civil Code and the Public Law. The Austrian Monarchy on the way to a modern state*." The motto of this paper, which is mostly able to define it, was the words of R.Walter "*There are still many persons in this building, who believe that the basis of the Austrian law is the General Civil Code and not its Constitutional law.*"

The last plenary session of the first day of conference was devoted to the theme "*ABGB and the current Czech law*." Within this block, there was presented a contribution by Mgr. Michal Králík, Ph.D. (the Supreme Court of the Czech

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Republic) on the subject of "*ABGB and the role of Czech judges through the changes of time*." The contribution was devoted to historical and social contexts and there was defined the decision-making role of judges in particular stages of development of the General Civil Code in accordance with it.

The second day of the conference was started with a plenary theme titled "*ABGB and the recodification.*" Within this session, there was performed a contribution by Prof. Dr. JUDr. Karel Eliáš (the Faculty of Law, the University of West Bohemia in Pilsen) on the theme "*Inspirational power of the General Civil Code within the draft of the Civil Code for the Czech Republic*". Prof. Eliáš pointed out particular legal provisions contained in the draft of the Civil Code, which found an inspiration in ABGB. But he also pointed out the places, where we could talk about a literal reception, for example the provision in Section no. 16 ABGB and the wording of Section no. 19 of the draft of the Civil Code.

The second block devoted to the theme "*the Austrian codification tendencies*", where Hon. Prof. Dr. Johannes Stabentheiner (the Faculty of Law, University of Vienna) presented a contribution on the theme "*Project of the successive modernization of the Austrian Civil Code (ABGB) and the reflection of the European development of the Law of Contracts.*" Prof. Stabentheiner introduced fundamental categories of modifications that changed ABGB. All over the first hundred years from its effectiveness, the text of ABGB remained unchanged. Later, there were three particular amendments, which resulted in a modification or complete remove of certain passages from its text. These removed passages were transferred to special statutes. Prof. Stabentheiner also introduced novelties, which were going to occur in the Austrian Civil Code in order to fit to the current economic, social and legal conditions.

The penultimate session was devoted to the theme "*Poland and ABGB*". Within this block, Prof. zw. dr. hab. Maksymilian Pazdan (the Faculty of Law and Administration, the University Silesian in Katowice) presented his paper that dealt with influences of the Austrian legal culture on the Polish legal system, which was established in the early 20th century, when the Austrian law was in force in certain parts of Poland. The influence of Austrian law did not lay only in the form of statutory regulation, but also in the fact that many Polish lawyers got their legal education in Vienna or at universities that were in the Austrian part of Poland (Krakow, Lvov).

The last contribution was presented within a division devoted to "*ABGB and Family law*" by Prof. JUDr. Milana Hrušáková, PhD. (the Faculty of Law, Palacký University in Olomouc). The paper by Prof. Hrušáková was called "*The Family law in the light of the social changes.*" Prof. Hrušáková led us through the regulation of family legal relationships from ABGB until current days, including the legal regulation de lege ferenda. She mentioned the collision norms of international private law and the regulation Brussels II, which affected the increasing common problem as a marriage between citizens of two different states.

Miroslav Frýdek, Silvie Filanová**

** Mgr. Miroslav Frýdek, Department of the Theory of Law and Legal History, Faculty of Law, Palacký University Olomouc; Institute of Legal Skills and Innovation of Studies, Faculty of Law, Masaryk University, Czech Republic; Mgr. Silvie Filanová, Faculty of Law, Masaryk University, Czech Republic.

Konferenz „Die Entwicklung des Privatrechts auf dem Gebiet der Tschechischen Republik"

Am 15. September 2011 fand die Konferenz *„Die Entwicklung des Privatrechts auf dem Gebiet der Tschechischen Republik"* an der Juristischen Fakultät der Masaryk Universität in Brünn statt. Sie stellte eine der Ergebnisse des Forschungsvorhabens dar, an dem sich die Mitglieder des Lehrstuhls für Rechts- und Staatsgeschichte der Brünner juristischen Fakultät in den Jahren 2010–2012 beteiligen.

Die Transformation der tschechischen Rechtsordnung erreichte im Jahre 2011 ihren entscheidenden Markstein: Die Regierung überließ dem tschechischen Parlament den Entwurf des neuen Bürgerlichen Gesetzbuches zur Verhandlung. Aus dem veröffentlichten Entwurf ergibt sich, dass sich seine Autoren durch historische Quellen inspirieren ließen (Entwurf des tschechoslowakischen Bürgerlichen Gesetzbuches von 1937 oder Allgemeines Bürgerliches Gesetzbuch von 1811). In einigen Passagen gingen die Autoren offensichtlich noch weiter, und zwar direkt zu Quellen des römischen Rechts. Dies stellte gewiss einen guten Grund für ein Zusammentreffen von Rechtshistorikern und Zivilisten zur Analyse der Privatrechtsgeschichte in böhmischen Ländern und in der Slowakei dar. Einen Impuls für die Veranstaltung dieser Tagung in diesem Jahr war selbstverständlich das 200. Jubiläum seit dem Erlass des Allgemeinen Bürgerlichen Gesetzbuches (ABGB).

Das Ziel der Konferenz lag also in der Analyse von Quellen, von denen der Entwurf des neuen tschechischen Bürgerlichen Gesetzbuches ausging, sowie auch in der in möglichst breitesten Zusammenhängen aufgefassten Analyse der Entwicklung des tschechischen Privatrechts. Die Tagung wurde chronologisch in vier Blöcke eingeteilt. Den ersten Block leitete der Lehrstuhlinhaber der Gastinstitution Ladislav Vojáček ein, der die Teilnehmer zuerst begrüßte und in diesem Zusammenhang die Forschungsergebnisse des schon oben erwähnten Forschungsvorhabens vorstellte.

Die Beiträge des ersten Blocks wurden dem feudalen und frühneuzeitlichen Privatrecht gewidmet (Miroslav Lysý: *Eigentumsverhältnisse und Donationen in Ungarn im 11. und 12. Jahrhundert*; Naďa Štachová: *Erbrecht in böhmischen Ländern im 12. und 13. Jahrhundert*; Vilém Knoll: *Ausgewählte Aspekte des Schuldrechts nach dem Stadtrecht von Böhmen*; Pavla Slavíčková:

Die Entwicklung der Mitgift seit den ältesten Zeiten bis das ABGB; Magda Schusterová: *Reservatum rusticum – der Ausgedingsvertrag im böhmischen Recht*).

In den zweiten Block wurden diejenigen Vorträge eingereiht, welche die ausgewählte Problematik des Privatrechts im 19. und der ersten Hälfte des 20. Jahrhunderts behandelten (Adriana Švecová: *Die Änderungen des ungarischen Privatrechts in der ersten Hälfte des 19. Jahrhunderts und ihre Äußerung in der Verfassung von Preßburg*; Pavel Salák: *Die Entwicklung der Rechtsregelung der Eigentumserwerbs durch Aneignung*; Jiří Šouša: *Dienstbarkeiten nach ABGB*; Martin Cempírek: *Schadensersatz beim Transportbeziehungen*; Ján Drgo: *Die Stellung der jüdischen Angestellten im Arbeitsrecht in der Slowakei*).

Im dritten und vierten Block wurden u.a. folgende Beiträge gehalten (Ladislav Vojáček: *Arbeitsvertag und Arbeitsverhältnis nach 1948*; Michal Považan: *Sachenrechte nach dem ABGB und dem Bürgerlichen Gesetzbuch von 1950*; Tomáš Kohút: *Die Rechtsregelung der Arbeitszeit und ihre historische Reflexion*; Ondřej Horák: *Eine Betrachtung über die Quellen des bürgerlichen Rechts auf dem Beispiel der Kollation und des Widerrufes einer Schenkung nach der Verkürzung des Pflichtteils*; Stanislav Balík: *Persönliche Nutzung einer Wohnung zwischen 1964–1989*; Lukáš Králík: *Die heutige Ausnutzung der alten Rechtssprechungssammlungen*).

Die Beiträge erscheinen in einem Tagungsband, der bis Jahresende herausgegeben wird.

Jaromír Tauchen*

* JUDr. Jaromír Tauchen, Ph.D., LL.M.Eur.Integration (Dresden), Lehrstuhl für Rechts- und Staatsgeschichte, Juristische Fakultät der Masaryk Universität Brno, Tschechische Republik.

Conference of Doctoral Students from the Department of the History of the State and Law at the Faculty of Law, Masaryk University, Dated 30th June, 2011

On the 30th June 2011, under the chairmanship of the head of the Department of History of State and Law, the Faculty of Law, Masaryk University, **Prof. JUDr. Ladislav Vojáček, CSc.** and **doc. JUDr. Karel Schelle, CSc.**, the doctoral student from this department in the field of the History of Law and Roman law met in order to present conclusions of their research work.

The opening speech was gave by Prof. Vojáček, who opened the first meeting of that kind to be held twice a year, so that the doctoral students would present their partial and also complete conclusions from their research fields.

The first performer was **Ivana Stará** with a contribution "*Few remarks on marriage in Roman law*." The contribution dealt with coexistence of a man and a woman in form of marriage in the Ancient Rome. The meritum of the performed paper was a view of Romans and Roman law on marriage, which was not based on equality, because the marriage was in accordance with the Roman law concluded primarily in the interest of the man in order to ensure the continuity of his family. The author focused an attention within her interpretation on the types of marriage, which determined the legal status of a woman, on an engagement and habits that accompanied not only the engagement, but also the wedding. Conclusion of the presentation was devoted to possible ways of dissolution of marriage. The author herself mentioned in the introduction that it was only a little excursion, because the topic was very extensive and the detailed analysis would be done through both in her doctoral thesis and also would be regularly published in her future contributions and articles.

The other presenter was **Miroslav Frýdek**, who performed a contribution on the theme of *Poena multa in the Title 21 of the Book 47 of the Digest of Emperor Justinian*. The presenter made an etymological and juristic analysis of both terms (*poena* and *multa*), where he pointed out the original function of punishment – poena as a ceremonial adjustment of the collective from the crime and initiation of the offender to Gods, where the term had probably roots in *piaculum* which was within the judicial trial replaced by the trial bet called *sacramentum*. The presenter showed using of the terms *poena* and *multa* on the exegesis of the Title 21 of the Book 47 of the Digest of Emperor Justinian titled *De termino moto*, which deals with replacing of boundary stones from the fields.

Martin Cempírek presented a contribution on the theme of "*Application of lease agreement on transportation*." There was outlined the development of legal regulation of transport with regard to the use of the institute of lease agreement within this area. The contribution was prepared developmentally, the regulation of lease agreement and tenancy stated in ABGB was comprehensively examined. There was mentioned also the difference between lease and tenancy, where both of these types of contracts had been applied on transportation. The paper affected a development of interpretation of lease agreement and tenancy as it was held by the jurisprudence of the First Republic. Presenter pointed out the contemporary practice, in which the lease agreement was being concluded, by which the leased vehicle was rented, and the tenancy of transport concessions, where the whole transport company was "rented out" in order to gain a profit. At the end of the paper, there was described the fundamental comparison of the lease agreement to the current commercial regulation of lease agreement for vehicle that was laid down in the effective Commercial Code.

Lucie Bednářová Bendová made a speech on the theme of *Moral offenses in the I.r. agenda of the Regional Court in Olo-*

mouc in the second half of 19th century. Presenter informed the participants of the conference about the I.r. agenda of the Regional Court in Olomouc as a judiciary court of the 1st instance along with the jury court, where were included among other crimes and offenses also so-called moral crimes. Presenter performed the selected offenses, which were preserved in the criminal register of that court and which were related to offenses "against public decency" if they were committed in concurrence with the crime or if they were associated with crime of another offender. The presented contribution systematically analyzed subject matters of the moral crimes, misdemeanors and offences prosecuted in accordance with the Criminal Act of the year 1852. The other introduced issue was an attitude held by the I.r. Prosecutor's Office in Olomouc to crimes and offenses.

Michal Škerle presented a contribution titled "*The political process with the former social democrats from Brno- a group of Křepelka and co.*" The paper took us to the 20 till 23rd July 1955, when there were eleven former members and officials of the party ČSSD brought before the Regional Court in Brno. All defendants were found fully guilty of the crimes of treason, espionage, a failure to notify a crime and favoritism. The defendants were in the investigative and judicial files designated as "right-minded officials of the Social Democratic Party " or more often as a group of "dr. Křepelka's and co.'' Presenter acquainted us not only with details of the judicial trial, but also with similar processes with former members of the Czechoslovak Social Democratic Party, which was affiliated with the Communist Party and therefore liquidated by it after the Communist Putsch in February 1948. This tide of persecution of social democrats was situated in the campaign against the „Social-Democracy" that was launched after the demonstrations in June 1953. In these processes, there were convicted several hundred of Social Democrats.

The last speaker was **Katarína Fedorová**, who made a speech on "*The status and mission of Advocacy in Judicial Reform of Tsar Alexander II*." The presented contribution dealt with an impact of advocacy, the sworn representatives, who were incorporated into the Russian judicial practice by the Judicial Reform of the Russian Tsar Alexander II, which was made in 1864. Professional legal representation (the advocacy) was completely a new institute for the Tsarist Russia, both for its content and its form as well. Autonomy of advocacy, relative independence on the State power, the principle of eligibility and accountability brought a new element into the courtroom, which did very well in practice especially in the political trials with defendants of crimes against the state.

In these trials, advocacy had an important role of the defenders who came in for a considerable displeasure from side of the state power. Presenter introduced legal contra-reforms which were the reactions to well done work by advocates within the political trials that were accepted in 80-ies and 90-ies of the 19th century. These reforms led to significant restriction of the Democratic Institute of advocates. The termination of activities of advocates was completed by the Court decree, which was issued after the October Revolution. Contributions are published on the CD compilation of this meeting. The next meeting of doctoral students of the Department of History of the State and law is planned for the end of the year 2011.

Miroslav Frýdek, Silvie Filanová*

* Mgr. Miroslav Frýdek, Department of the Theory of Law and Legal History, Faculty of Law, Palacký University Olomouc; Institute of Legal Skills and Innovation of Studies, Faculty of Law, Masaryk University, Czech Republic; Mgr. Silvie Filanová, Faculty of Law, Masaryk University, Czech Republic.

Viva Voce Examination Report

On 13 June 2011 two theses were defended and viva voce examinations held at the Department of Legal History of the Law Faculty at the University of West Bohemia.

The graduate of this faculty, Mgr. Barbora B e d n a ř í k o v á (Master of Law) presented her viva voce on the subject of *Roman fideicommissum and its impact on the historical development of trusteeship.* The opponents of the thesis were Stanislav Balík and Stanislav Balík Jnr., and Ladislav Soukup chaired the viva voce commission.

"Besides an introduction and conclusion, the thesis is divided into five chapters. The purely Romanist chapter recapitulates the development of fideicommissum in ancient Rome, from its beginnings to its regulation in the Justinian Code, followed by an interpretation of trusteeship in the Czech Lands since its introduction to the present day, with the correctly determined periods up to ABGB (Allgemeines bürgerliches Gesetzbuch) until the end of its effect in 1924 and the next stage, including consideration of its future legislation. There is also an interpretation about trusteeship and the trust fund under Anglo-Saxon law and in the Quebec Civil Code.

This subject requires reliable knowledge of more than one area. The author chose these while being aware that she is capable and can work in the field of Roman law, common legal history and requires language knowledge, including Latin," writes Professor Stanislav Balík in his expert opinion.

The next graduate of the Law Faculty at the University of West Bohemia, Mgr. Tomáš P l í h a l (Master of Law) presented a work on the subject of *The legal profession in Semily region in 1868–1948*. The opponents of the thesis were Karolina Adamová and Stanislav Balík Jnr., and Ladislav Soukup chaired the viva voce commission.

"Plíhal's thesis is based on the one hand on an individually selected and hitherto unexamined subject, and on the other is another contribution to the mosaic of gradually compiled regional history of the legal profession. The fact cannot be overlooked that this subject is also followed with interest in the activities of the History Committee of the Czech Bar Association and that Tomáš Plíhal has successfully presented a paper on the history of the legal profession in Semily region at the Seventh Conference on the History of the Legal Profession. The candidate's involvement in this regional research in which historians, for example from the Philosophical Faculty of Masaryk University, Silesian Institute etc., legal historians and authors of qualifying theses from other Czech law faculties, lawyers and legal trainees from the Czech Republic and Slovakia, is a further significant factor which highlights the importance of the thesis," writes Stanislav Balík Jnr. in his expert opinion.

After successfully defending their viva voce thesis both candidates then passed their viva voce examinations in legal history and were awarded the right to use the title JUDr. (Doctor of Law).

Stanislav Balík*

* JUDr. PhDr. Stanislav Balík, Constitutional Court of the Czech Republic, Brno and Faculty of Law, West Bohemian University Pilsen, Czech Republic.

Anhang
Die Entwicklung des Privatrechts auf dem Gebiet der böhmischen Länder

Annex
The Development of Private Law throughout the Czech Territory

Geleitwort

Ladislav Vojáček*

Liebe Leser,

die Redaktion der Zeitschrift „Journal on European History of Law" hat sich entschieden, die im Rahmen des Forschungsvorhabens *„Entwicklung des Privatrechts auf dem Gebiet der Tschechischen Republik* (Nr. GAP408/10/0363)" entstandenen Beiträgen im Anhang zu veröffentlichen. Am oben erwähnten Forschungsvorhaben arbeiten die wissenschaftlichen Mitarbeiter des Lehrstuhls für Rechts- und Staatsgeschichte an der Juristischen Fakultät der Masaryk-Universität in Brünn seit 2010. Diese Aufsätze sind vor allem an die ausländischen Leser gerichtet, deswegen erlaube ich mir, einen Teil aus der Einführung zur Monographie *Ladislav Vojáček – Karel Schelle – Jaromír Tauchen [Hrsg.] Die Entwicklung des tschechischen Privatrechts. Brno: Masaryk Universität, 2011* auszunutzen, um anzudeuten, wie sich der Bereich des Privatrechts auf dem Gebiet der böhmischen Länder in den vergangenen zwei Jahrhunderten entwickelt hat.

In der Entwicklung des neuzeitlichen Privatrechts auf dem Gebiet der Tschechischen Republik können wir etliche bedeutende Marksteine sehen, die sich aus der Entstehung der Rechtsordnung und der grundlegenden politischen Veränderungen ableiten lassen. Am Anfang stand ohne Zweifel die Genesis der österreichischen Kodifikationen aus dem 19. Jahrhunderts – des ABGB und des Allgemeinen Deutschen Handelsgesetzbuches (ADHGB). Ein weiterer Markstein reflektiert die politische Entwicklung, deswegen ist er mehr oder weniger symbolisch. Es handelt sich um die Gründung des selbständigen tschechoslowakischen Staates. Dies bedeutete vor allem, dass sich das in den böhmischen Ländern (in Böhmen, Mähren und im „tschechischen" Teil Schlesiens) geltende Recht in eine direkte Konfrontation zu dem ehemaligen ungarischen, im östlichen Teil der Republik (d.h. in der Slowakei und in der Karpatenukraine) geltenden Recht geriet. Dieser Zustand trug selbstverständlich eine Reihe von praktischen Schwierigkeiten mit sich. Aus diesem Grunde begannen die Arbeiten an der Vereinheitlichung der Rechtsordnung schon kurz nach der Gründung der Republik. Zwar ist es nicht gelungen, eine einzige große Kodifikation zu erlassen, doch brachte die Vereinheitlichung einige Teilerfolge. Vor allem wurde eine einheitliche Wechselordnung erlassen, die Adoption erhielt eine einheitliche Regelung und es kam auch zur Vereinheitlichung des Eherechts sowie der arbeitsrechtlichen Vorschriften.

Die kurze Zeitperiode des „Protektorats Böhmen und Mähren" wies zwar sehr spezifische Züge auf, stellte aber in der Entwicklung des Privatrechts keine so bedeutende Etappe dar wie in der politischen Geschichte.

Die Organe des Protektorats und die Besatzungsmacht griffen mit einer Reihe von Vorschriften grundsätzlich auch in den Bereich des Privatrechts ein. Für die Nachkriegsentwicklung blieben diese Eingriffe jedoch ohne Bedeutung. Nach der Konzeption der Wiederherstellung der Rechtsordnung wurden nämlich die Vorschriften der Zweiten Tschechoslowakischen Republik, des Protektorats Böhmen und Mähren und des Slowakischen Staates für einen Bestandteil der tschechoslowakischen Rechtsordnung gehalten. Nach dem Kriegsende wurden die meisten von ihnen nicht mehr angewendet. Ein Beispiel der Vorschriften aus dieser Zeit stellen die rassistisch motivierten Eingriffe in den Bereich des Eherechts oder in die Eigentumsverhältnisse dar.

In der unmittelbaren Nachkriegszeit (1945–1948) kam es zur Wiedergutmachung von einigen Unrechten aus der vorherigen Zeit und zu weiteren, diesmal lange anhaltenden Eingriffen in die Eigentumsverhältnisse, vor allem zur Konfiskation des feindlichen Vermögens und zur umfangreichen Verstaatlichung. Das ABGB aus dem Jahre 1811 blieb immer noch ein Grundgesetz, welche die privatrechtliche Materie auf dem Gebiet der Tschechischen Republik regelte.

Die kommunistische Machtergreifung im Jahre 1948 und der sog. „rechtliche Zweijahresplan" stellten einen weiteren bedeutenden Markstein dar. Diese Ereignisse beeinflussten das tschechoslowakische Recht für weitere vierzig Jahre. Der rechtliche Zweijahresplan verlief zwischen 1949 und 1950, als es in Anknüpfung an die politische Änderung aus dem Jahre 1948 aufgrund der Beschlüsse der Parteiorgane zu einer beschleunigten Rekodifikation der tschechoslowakischen Rechtsordnung kam.

Die neu erlassenen Vorschriften vereinheitlichten die Rechtsordnung und führten ganz offen das „volksdemokratische"

* Prof. JUDr. Ladislav Vojáček, CSc., Lehrstuhl für Rechts- und Staatsgeschichte, Juristische Fakultät der Masaryk Universität Brno, Tschechische Republik.

Klassenrecht ein.[1] In diesem Prozess verschwand praktisch das Handelsrecht wogegen das Familienrecht selbständig geregelt wurde. Aus dem bürgerlichen Recht schied das Arbeitsrecht aus, dem allerdings die Kodifikation versagt blieb. Schrittweise wurden die Voraussetzungen für eine spätere Kodifikation des Wirtschaftsrechts in spezifischer tschechoslowakischer Auffassung geschaffen. Es entstanden auch neue Kodifikationen des Zivil- und Strafprozesses, des materiellen Strafrechts und eine Reihe von weiteren bedeutenden Rechtsvorschriften. Aus diesen ist z.B. die Regelung verschiedener Formen der Nutzungsverhältnisse oder wirtschaftlichen Schuldverhältnisse für uns von Bedeutung.

Im Rahmen der erwähnten vierzigjährigen Epoche ist noch auf die neue, komplexe Rekodifikation des Rechts in der ersten Hälfte des vergangenen Jahrhunderts aufmerksam zu machen, weil sie das Volksdemokratische Recht in das Sozialistische umwandelte. Eine Anregung stellte die politische Proklamation *„Der Aufbau des Sozialismus“* in der Verfassung von 1960 dar. Sie wurde mit der Änderung der Klassenstruktur der Gesellschaft verbunden, in der die Klasse „der Ausbeuter“ erloschen und alle Bürger zur Schicht der „Werktätigen“ geworden waren. Neue Regelungen erhielten auch das Bürgerliche und das Familienrecht. Das Bürgerliche Gesetzbuch wurde sehr eng aufgefasst und die vermögensrechtlichen Beziehungen auch im Wirtschaftsgesetzbuch und im Gesetzbuch über den Internationalen Handel geregelt. Nach Jahren unterbrochener Vorbereitungen gelang es endlich, auch das Arbeitsrecht zu kodifizieren.

Der letzte Markstein in der Entwicklung des tschechoslowakischen Privatrechts ist wieder mit einer politischen Veränderung, diesmal mit der sog. Samtenen Revolution im Jahre 1989 verbunden. Ähnlich wie die Entstehung der Ersten Tschechoslowakischen Republik im Jahre 1918 handelte es sich im Jahre 1989 nur um einen Anlassimpuls, welcher die wichtigsten Änderungen der Rechtslage erst nachstehend eintreten ließ. In den meisten Fällen wurden sie erst nach der Auflösung des gemeinsamen tschechoslowakischen Staates (1992) vollendet; einige wurden bis heute nicht durchgeführt. Bis zur Gründung der selbständigen Tschechischen Republik kam es zur Inkraftsetzung einer einzigen Kodifikation – des in aller Eile vorbereiteten Handelsgesetzbuches. Weitere Änderungen geschahen in den Jahren 1990 bis 1992 vor allem in Form von Novellierungen früherer Vorschriften. Dabei handelte es sich jedoch um durchaus grundlegende Novellierungen, denn sie gingen in das ideologische Wesen zahlreicher Rechtsvorschriften ein.

[1] Das nach der kommunistischen Machtergreifung eingeführte Recht wird unterschiedlich bezeichnet. Dabei sind alle Bezeichnungen ungenau. Am meisten wird wohl die eingelebte zeitgenössische Bezeichnung „Sozialistisches Recht“ benutzt (sie entstand als Gegensatz zum Kapitalistischen Recht). In seinem Rahmen wurde zwischen dem Volksdemokratischen Recht und dem Sozialistischen Recht im engeren Sinne unterschieden (das Zweiterwähnte entstand erst zwischen 1960 und 1965 als Folge der gründlichen Rekodifikation der tschechoslowakischen Rechtsordnung). Heute spricht man gelegentlich auch vom Kommunistischen Recht.

The Term "Causa" in Roman Law and in the Later Legal Science*

Petr Dostalík**

Abstract

This article concerns with the problem of the "cause" of the legal obligations. It traces the origin of the term "cause" from the philosophy of Aristotle and the ways in which this term was used in the Roman legal science. The article aims at the various definitions of the term "cause" in their linguistic, philosophical and legal definitions. The importance of the "cause" in the Roman law of obligations is demonstrated with the help of the most important Roman verbal contract – stipulation. During the evolution of the private Roman law stipulation was present in the both form either causal or abstract. The second part of the article concerns with the later destiny of Roman law cause doctrine, in – as it is usually called – medieval ius commune. The doctrine of "cause" had a significant influence for the evolution of the Czech municipal law and we can find several remarks either in the Municipal Law (Práva městská) of Pavel Kristián Koldín or in the Austrian civil code (ABGB) or in the previous edition of the Czech civil code (Občanský zákoník).

Key words: *Roman Law; Corpus Iuris Civilis; Law of obligations; stipulation; legal science of the ius commune; history of the legal science; Czech civil law.*

1. Introductory Notices

The term *"causa"*[1] belongs to terms we can generally describe as inheritance from Roman law. It was accepted by modern science and modern legal thinking and forms a part of many European legal orders. However, it is not purely legal term. Originally it was taken over from Greek, or, as the case may be, Roman legal philosophy and therefore it can have several meanings which, surprisingly, could cause certain issues in legal praxis. Therefore it may prove useful to provide a definition of "cause", its genesis, and use in Roman law, as well as, finally, make a comparison with today's Czech law.

For each legal order it is of great practical importance the difference between result, reason and motive, we have to differentiate in the case of each and every act. The result of wood-cutter activity is that the wood falls into pieces, mean of such acting is the ax and the reason of such act is the intent of wood-cutter to make the fire. Immediate minor reason having disproportionate result (effect) we call incentive.

The difference between immediate reason and motive was taken over from Aristotle philosophy also into Roman legal philosophy,[2] and due to Hellenization of Roman legal science in the 1st century B.C. if was also reflected in the Roman law. Also in he Roman law it has several meanings, partially overlapping.[3]

In the 1st century B.C. praetor started to refuse petitions based on contracts concluded validly pursuant to civil law (*ius civile*), the purpose of conclusion of which (*causa remota*) however was fraud, intentional trick on the side of seller or use of violence. Similarly, praetor could cancel the legal results of inheritance acceptance, if someone accepted the inheritance under duress. Therefore, the first meaning of the term "cause" is subjective motive to act e.g. under duress (*metus causa*) and such legal act can be challenged using the praetorian law petition[4] or if I kidnap a prostitute due to passion (*libidinis causa)* and my acting shall not be considered as theft.[5] Praetorian protection was also not provided to acting based on inadmissible or shame-

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** Mgr. Petr Dostalík, Ph.D, Faculty of Law, Palacky University Olomouc; Faculty of Law, University of West Bohemia, Pilsen, Czech Republic.

1 The term cause can be considered in two levels: as linguistic and philosophical term or as fully legal term. This difference will be reflected in the text by different terminology – term in the first meaning will be written in Latin form (*causa*), in the second meaning in English translation (*cause*).

2 As stipulated in the third book of the work M. T. Cicero *De officiis*.

3 Classification and definition of term cause take over from Bartošek, Milan., *Encyklopedie římského práva (Roman law encyclopedia),* Prague 1994, p. 54.

4 Actio quod metus causa.

5 Pursuant to Roman lawyers the essential characteristic of thievery is missing here, namely the intent to richen – thievery has to be done for the purpose of enrichment *lucri faciendi gratia*.

ful motive (*causa turpis*, *causa illicita*) – it is possible to enforce it using *condiction* of contractual performance which is otherwise formally valid, if someone made other person promise him/her performance if he/she does not commit a crime. Such *condiction* was named *condictio ob turpis causa*.[6]

2. The Term "Causa" in Roman Law

In Roman law, the "cause" had two basic meanings:

- „Economical-social purpose for which the parties conclude their act, for which their make their legal act" [7] – as e.g. delivery of the thing, transfer of receivable, provision of loan, release of a slave, establishment of dower, provision of performance in expectation of counter-performance etc. This purpose often determines the title of petition. With regard to the fact that abstract term "petition" or abstract term of liability were unknown to Roman civil proceedings and, on the other hand, it was only possible to enforce the typical liabilities by the court in which case each liability was linked to its own type of petition, the cause was essential civil element of petition merits.[8] Only causes acknowledged by the civil law could become subject of court proceedings. In many case it was the main task of cause to determine which type of petition can be used. In this case, legal reason – cause – means individual contractual types, based on which temporary of permanent hand over of the thing occurred – as e.g. purchase, lease, borrowing, etc. and based on legal reason hand over of the thing occurred (in the case of real contracts) or consent regarding *essentialia negotii* was provided. Such hand over or consent causes occurrence of liability between debtor and creditor.
- Legal basis of acting – if such reason does not exist or if it elapses, it is possible to require returning of performance without legal reason using *condictio indebiti.*

Importance of "cause" lies in its application for classification of contracts to:

- causal, on one hand. From historical point of view we can further divide them to typical comprising typical cause protected by civil law already, and atypical contract protected merely by praetorian law,
- abstract contracts the validity of which is not contingent on expression of cause, however, inadmissible cause makes such contracts invalid.

Stipulation as Example of Cause Doctrine Application by Roman Legal Science

Stipulation represents typical civil law abstract contract. Stipulation is oral, formal promise of debtor to make what creditor asks him/her to do. The reason of the obligation is only the fact that debtor using the same words replied to debtor's question (*dari mihi spondes*? *spondeo*!).[9] "Furthermore, the stipulation is general form applicable to any and all cases in which one person (*promissor*) accepts an obligation against the other one (*stipulator).* It does not matter what merits represented the basis for execution of such stipulation... Therefore, stipulation represents abstract general form of voluntary acceptance of an obligation."[10] Using stipulation it is possible to accept any liability of *dare* – to pay any amount or *facere* – any activity or non-activity or sufferance.

Exactly due to its abstract nature the stipulation became a tool flexibly applied by the Roman legal science to ever changing needs of everyday life as the absence of cause made its wide application possible.

However, stipulation lost its abstract nature, if the cause was included into the stipulation wording. E.g. *Centum dotis nomine dari spondes?* Do you promise to give ten as dowry? Or *Centum quae ex causa venditionis mihi debes dari spondes?* Do you promise to pay me one hundred you owe me based on purchase?

In this case we speak about causal stipulation and validity of such stipulation (and subsequently existence of an obligation) dependent on cause. If one hundred was promised as dowry, the obligation to fulfill based on stipulation occurred as late as to the moment of occurrence of marriage and lasted only for the time of its existence. If the stipulation wording did not include the reason for execution of such stipulation, the obligation became fully independent on the cause – nonetheless the cause was defective or if it did not occur at all or if the debtor made a promise based on non existing cause (e.g. provided performance of non existing debt), the debtor could not file a petition for unjustified enrichment, as he/she provided performance based on existing formal promise. Issues connected with such abstract situation are demonstrated by the following fragment from the Digest.

Dig. 15.1.38.1

Africanus 8 quaest.

Si nuptura filio familias dotis nomine certam pecuniam promiserit et divortio facto agat de dote cum patre, utrumne tota promissione an deducto eo, quod patri filius debeat, liberari eam oporteret? respondit tota promissione eam liberandam esse, cum certe et si ex promissione cum ea ageretur, exceptione doli mali tueri se posset.

If the married woman promised to her son a part of money as a dowry, and after divorce she filed petition on payment of dowry against his father, there is a question, if the whole amount is to be deducted or only the amount she promised to father's son. I answered the whole amount shall be deducted from the amount she promised as even if someone would file a petition against her based on her promise, she can protect herself using the objection of bad faith.

This fragment is interesting as it shows that besides the advantages of abstract stipulation (flexibility, versatility), also

[6] Bartošek, Milan, *Encyklopedie římského práva (Roman law encyclopedia),* Prague 1994, p. 73.

[7] Bartošek, Milan, *Encyklopedie římského práva (Roman law encyclopedia),* Prague 1994, str. 54, comp. also Bartošek M., *Dějiny římského práva ve třech fázích jeho vývoje (Comparison of three phases of the development of the Roman law),* Prague 1995, p. 206, where the cause is defined as "economic-social reason causing the occurrence of obligation."

[8] Rebro, Karol, *Rímské právo (Roman law)*, Bratislava 1980, p. 170.

[9] Other examples see Gaius III.92-110.

[10] Vážný, Jan, *Římské právo obligační (Roman obligatory law)*, Brno 1946, p. 42.

disadvantages exist. If the wife promised a dowry to her husband using a stipulation and if she divorced before she could pay such dowry, her obligatory promise was still binding for her and she had to sue her father-in-law (who was bearer of father power and addressee of the promise), to let her free form the obligation to pay the dowry (one of possibilities was e.g. *acceptilatio*). It arises from the notice on possibility to use objection of bad faith (in the last sentence) that the classical Roman legal science already acknowledged the issues arising from abstract nature of stipulation and faced it by the use of objection of bad faith – if a dowry was promised for he case of marriage and such marriage was never concluded or if someone promised to repay a sum in form of a stipulation and such amount has never been paid to him/her and petition based on stipulation was filed against him/her, the petitioner's act was considered immoral and defendant could protect himself/herself against such petition using objection of bad faith. If husband or other person to whom respect had to be shown and against whom the use of *actio doli* was impossible was the petitioner, the *actio non numeratae pecuniae* applied.

Justinian Amendments

Justinian law made yet another progress and under influence of "new, common principles of post-classical and Justinian law"[11] a situation occurred in which if *exceptio doli* or *exceptio non numeratae pecuniae* applied, the debtor had not to prove that money he promised to repay were actually never paid and such burden of proof was transferred to the creditor.

In contrast to classical law, which provided for validity of stipulation regardless of existence of cause and protected the debtor only in apparent cases using the means of objection, in Justinian law, the stipulation became causal acting and stipulation become invalid due to lack of cause. Immoral cause represented such invalid cause.

Dig. 45.1.26

Ulpianus 42 ad sab.

Generaliter novimus turpes stipulationes nullius esse momenti

It is generally known, that shameful stipulations are invalid.

Dig. 45.1.27pr.

Pomponius 22 ad sab.

Veluti si quis homicidium vel sacrilegium se facturum promittat. sed et officio quoque praetoris continetur ex huiusmodi obligationibus actionem denegari.

Similarly as if someone would promise to make a murder or sacrilege. However, it is one of praetor's official obligations, to deny (denegari) petition on enforcement of such obligations.

In such cases, the debtor is entitled to protect his right by the court stating that money were not paid out, firstly, and that stipulation itself is invalid, secondly, namely by using the petition named *querella non numeratae pecuniae.*

It results from the above mentioned explanations that the term of cause as reason or ground stems from area of speculative philosophical ideas accepted by Roman legal science, namely in three different areas:

a) In line with philosophical basis of the doctrine on grounds, the cause doctrine helped the development of praetorian means of *vis ac metus* a *actio doli*.
b) Cause doctrine significantly influenced the classification of contracts – it helped to make the difference between the typical and innominate contracts.
c) In connection with popularity of stipulation and *mancipatio* and solution of connected issues, already the classical Roman school acknowledged the difference between abstract and causal contract and used the advantages of such difference /simplicity, wide applicability). Moreover it tried, using *actio doli* to avoid circumstances making the misuse of abstract stipulation possible.[12] Subsequently, Justinian law with regard to the cancellation of difference between *ius civile* and *ius honorarium* acknowledged nonexistence or immorality of cause the reason for invalidity of obligation.

3. Later Destiny of Roman Law Cause Doctrine

The term cause was used in medieval legal science[13] and in general law science similarly as in Roman law sources. Based on fragments from Digest, as changed (interpolated) by emperor Justinian, the stipulation in the medieval legal science is considered to be causal. The mere declaration of debtor could no more represent a basis for his/her liability. In the way the obligation between the debtor and creditor would occur a cause had to be expressed in the stipulation.[14] In the case of innominate contract, which were protected by the remedial action in Justinian sources, if one of parties already provided its performance, such pre-performance was considered a cause and therefore it was possible to file a petition regarding such contract.

In medieval European law the issue of cause is connected also with the issue of non-actionable contracts, so called *pactum*. *Pactum*, which was considered valid but non actionable in Roman law,[15] and was protected in form of objection, was considered actionable in the doctrine of Canonists, however, its validity was dependent on existence of a valid cause. The validity of cause was determined similarly to the Justinian law.[16] In the Commentators' doctrine (Baldus de Ubaldis) the term of cause was made significantly broader. The cause meant each and any reasonable motive and the provision of the Roman law *ex pacto nudo actio non oritur* gained a new sense. In the way *pactum* was considered valid, a cause had to be proved. The simple declara-

[11] VÁŽNÝ, Jan, *Římské právo obligační (Roman obligatory law)*, Brno 1946, p. 47.

[12] In this sense we can say the Roman legal science takes into consideration the social-economic sense (i.e. to the other meaning of "cause") of stipulation. Stipulation is a tool which shall provide legal protection to exchange and economic relations in Roman Empire and misuse of it could lead to decrease of stipulation effectiveness. Therefore *exceptio doli* has to apply in such cases.

[13] SOLLNER, Alfred, *Die causa in Kondiktionen und Vertragsrecht des Mittelalters bei den Glossatoren, Kommentatoren und Kanonisten*, SZ. (1970), pp. 212 ff.

[14] „Es musste ein Grund fur sie, etwa ein Empfangens darlehen, in den Beziehungen zwischen Glaubiger und Schuldner hinzutreten." RANIERI, Filippo, *Europaisches Obligationsrecht*, 2. ed.2003, p. 381.

[15] So called *pacta adiecta* represented an exception, in the case of which the petition from contract could apply where such pactum made part of such contract, e.g. reservation of better purchaser and purchase agreement.

[16] I.e. in line with good manners, see Dig. 45.1.26. a Dig. 45.1.27. pr. cited above. Comp. also Dig. 44.4.2.3.

tion of debtor did not represent a basis for obligation. The cause which was *falsa* or *erronea* caused ineffectiveness of an obligation.[17] It seems that the French, Spanish, and Italian general law science kept this doctrine unchanged until the end of 18th century, i.e. until the end of general law era. It made existence of cause a part of the valid contract. On the other hand, authors of Dutch *scholae elegantiae jurisprudentis* (school of elegant legal science) and German school *usus modernus pandectarum* made this doctrine fade out as of the second half of the 17th century. Abstract declaration of an obligation is not binding, as its cause has to be proved and certified.[18]

In the medieval legal science and in the general law science the term of cause was interpreted based on Roman Justinian law. Under the influence of Glossators and Commentators, the emphasis of cause was even stronger than in the Roman law. The cause was made essential appurtenance of legal acts. On the other hand, reception of the School of elegant legal science *usus modernus pandectarum* considers the cause as objectively existing reason for closing a contract which has to be proven in the case of need, however which does not need to be expressed in the obligation.

4. The Term Cause in the Czech Municipal Law

In the Czech medieval legal books we can find notes speaking about *cause* of legal acts. For example Pavel Kristián Koldín requires for the possibility to prescribe the inheritance "due ownership"[19] of assets, namely based on *iusto titulo.*[20] This term is taken over from Roman law and by its content it is adequate to term *iusta causa possessionis*. Furthermore, the proof of existence of cause is necessary for determination, if prescription can occur. Person, who cannot prove the holding based on just reason "by purchase, gift, inheritance, or transfer"[21] is "*carens justo titulo*" and cannot prescribe the ownership right to the assets.

Moreover, the Czech municipal law acknowledges the rule *violentia est legibus contraria*.[22]

Koldín's legal book also deals with the issue of error as *causa* (in broader meaning – *causa remota)* of the legal act. He makes difference between omission and error in writing in official record. If such omission occurred unintentionally, aldermen can make correction themselves. However, the clerk shall not make any attempt to make changes in books under the threat of capital punishment.[23] We can also show several other examples, when the term *causa* is not directly mentioned in Koldín's text, however, the legal regulation provides protection of honestly acting party against the *fraud* of dishonest party.[24]

Furthermore, in Koldín's text we can find the issue of fraud which can be classified, based on classification of Roman law, as the issue of cause – it regards more remote reason of legal acting (*causa remota*). In this connection Koldín says with regard to the purchase agreement, that such purchase agreement has to be concluded without foxiness and fraud.[25] He also states, that if the seller stipulates unclear provision in the agreement, such provision will be interpreted for the benefit of the purchaser, not the seller[26] In this case, in our opinion, the principle of Roman law *in ambiquitatem contra stipulatorem* applies.[27]

Therefore, we can conclude, that also in the Czech municipal law in the 16th and 17th century we can meet the issue of *causa*, namely both in form of just legal reason (*iustus titulus*) of acquisition of asset holding acquired by purchase or inheritance, and in form of protection o person acting in error. The fact that purchaser was protected against the fraud of the seller, but also against the intentional unclear wording of the purchase agreement an be considered proof of maturity of Koldín's text – this shows that at least in the Czech municipal law the doctrine of legal act motives in legal science was completely taken over, i.e. that in this issue the Czech municipal law roughly followed the European development.

5. The Cause Doctrine in the Recent Czech Law

Historical Development of the Theoretical Concept of Cause

As the liability doctrine is widely considered stable part of civil law legal science, there was a significant shift of doctrine in the last hundred years, first – mainly due to social-political events – the shift from Roman law concept and later to partial re-acceptance or Roman Law (traditional) cause doctrine. To be bale to understand the actual status correctly, we have to have a short look on historical development.

General Civil Code

The concept of Austrian Civil Code was based on Roman law, however, we have to note in the Justinian concept[28] and it refused the differentiation between causal and abstract liabilities, in the sense of non existence of cause, nonetheless

[17] Ranieri, Filippo, *Europaisches Obligationsrecht*, 2. ed. 2003, p. 381.
[18] Ranieri, Filippo, *Europaisches Obligationsrecht*, 2. ed. 2003, p. 382.
[19] This term can be ideally explain by description of Latin term *possessio bonae fidei.*
[20] Koldín, Práva městská království českého a Markrabství moravského spolu s krátkou jich sumou od Pavla Krystiána z Koldína. The Czech version of the text was taken from the edition of J. Jireček, 5th Ed. Prague 1876 (*Municipal law*), F. 21, p. 181: "If someone gained due ownership of any assets or inheritance j*usto titulo* and freely dispose with it, it would be in his/her possession one year and a day."
[21] Koldín, Práva městská (*Municipal law*), F.26, p. 183.
[22] Koldín, Práva městská (*Municipal law*), F.27, p. 183.
[23] Koldín, Práva městská (*Municipal law*), F.35, p. 187.
[24] For example Koldín, Práva městská (Municipal law), G. 30, p. 213, where the principle *vigilantibus iura* applies, but it is necessary to protect honest party against the fraud and foxiness of dishonest party or when while purchasing and selling the principle *periculum est emptoris* applies, but only in the case if it is not proved that the assets was destroyed by fraud or intentionally by the seller.
[25] Koldín, Práva městská (Municipal law), H.20.II, p. 229.
[26] In the same place.
[27] On this principle and its influence on the development of European private law see Dajczak, Wojciech, Giaro Tomas, Longschamp de Bérier, Franciszek *Prawo rzymskie. U podstav praw priwatnych*, Warszawa 2009, p. 467.
[28] Not fully reflected by Sedláček, Jaromír, *Obligační právo I. (Obligation law),* Brno 1924, p. 58.

the Code "made difference between causal liabilities, including the cause (economic cause of the liability), as the mean of individualization of the liability, from abstract liabilities,... where the debtors obligation is stipulated in a different way (submission of a bill or check)."[29] In contrast to cause the importance is given to form of liability, similarly as in the case of Roman *stipulatio*.

Middle Code

So called Middle Code ("Střední kodex") regulated the issue of case in its Section 219. Nonetheless the wording of the above cited provision which is different from the wording of ABGB, we can say the interpretation of the importance of cause was taken over from the Roman law doctrine. V. Špaček makes a difference between the final purpose (*causa finalis*) and motive (*causa remota*). The final purpose is the idea of final use of the thing or idea of importance of results of legal act for satisfaction of necessaries of life. The final purpose represents motive at the same time. The difference between the purpose and motive is "if it emphasizes the purpose or process leading to its fulfillment. Usually, the final purpose and motive are the same."[30] If they are not, they usually represent a menace creating justified fear or mistake created by a trick. The motive stems from the fear from results of evil being used as a menace, or, in the case of mistake, from the incorrect idea of final purpose of the thing due to lack of factual assumptions regarding the intended result. Similar is also the legal act executed under duress. It represents inner psychological status, which is usually legally unimportant. Important only is if the person executing the act is aware of legal results of his/her legal act.[31]

Motive is not decisive, but if the manifestation of will aims to the same legal act. If yes, its results shall follow. The importance of motive is based on the fact, that the motive is the main factor which leads parties of some negotiations to conclude certain and specific contract to satisfy their particular needs. For the satisfaction of their need, people choose such legal act, Furthermore, it makes difference between the motive (*causa remota*) and immediate purpose (*causa proxima*), which it identifies with cause in legal sense. The final purpose is the reason, why the act is done – e.g. I deny the inheritance due to bad interpersonal relations with other heirs, legal cause is represented by "immediate legal and economic results,"[32] arising at the moment of effectiveness of the legal act – I gain no assets (economic results) and inheritance shall pass to the other heirs (legal result).

The individual contractual types have their abstract causes, general legal results of legal acts types (purchase price – transfer of ownership and change of money, lease agreement – temporary use of individually established thing and change of money etc).

V. Špaček sees the importance of cause in the fact that "legal reason is important for the determination of validity of legal act as well as for establishment of results arising from it."[33] Final reason and motive are generally unimportant for the law if they were not expressed in contract in form of a condition. Defect of the motive can influence the validity of legal act pursuant to Sections 33, 35, 37 (wording of Middle Code – just cases of violence and fear or conclusion of legal act under duress etc. – note of author).

We can conclude that in the above mentioned cases the legal science is based on Roman law notion of cause. Similarly as Roman law (and ABGB) it makes difference between final purpose and motive on one hand and cause in more narrow definition (*causa proxima*) – immediate legal and economic results on the other hand.

In the Central Code the motive, similarly as in Roman law, has importance only in some cases, in which it works in blamable way (violence and fear). However, the "doctrine of final purpose" (*causa finalis*) was misused in new social-political circumstance after the year 1948.

Pursuant to V. Špaček, legal cause (*causa proxima*) is decisive for the determination of validity (see Section 36 of than legal regulation), however, the invalidity of legal act may also occur **in the case when the final result** (causa finalis) **of such legal act breaches or evades the law** – e.g. if someone buys a thing to use it for blamable purpose if such purpose is known to the seller. Similarly, also legal acts breaching state national economy development plans pursuant to Section 1 of the Act No. 237/1948 Coll.[34] are invalid. *Causa finalis* can also be represented by vague term of "common interest" see e.g. Act No. 65/1951 Coll. on transfer of real estates and lease of forest land – the consent of the district people's committee is required for such transfer of real estate. Consent will be withheld if such transfer is in contradiction with common interest. Legal acts made without such consent are invalid.

Therefore we can conclude that cause doctrine was accepted by the Czechoslovak legal science after passing of the Central Code, however its application in changed social-political includes inadmissible mixing of legal and non-legal facts.

Applicable Legal Regulation in the Present Czech Civil Code

We can find the issue of cause of legal acts also in applicable Czech law. We can state the Sections 49a, 558, 110, 495 CC, 540 CC as examples of application.

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[29] ELIÁŠ,Karel et al., *Občanský zákoník. Velký akademický komentář (Civil Code, Big academic commentary)*, volume 2, Prague 2008, p. 1423.

[30] ŠPAČEK, Vincent *Projevy vůle a právní úkony v občanském právu (Demonstration of will and legal acts in civil law)*, Prague 1953, p. 72.

[31] "For the occurrence of legal effects of legal at it is not decisive for which final reason or, as the case may be, based on which motive such legal act is done, but what type of legal act it is. The motive is aimed to the change in the society and such changes occurs as a result of legal acts; the demonstration of will aims to occurrence of such effects." ŠPAČEK, Vincent, Projevy vůle a právní úkony v občanském právu (Demonstration of will and legal acts in civil law), Prague 1953, p. 73.

[32] ŠPAČEK, Vincent, Projevy vůle a právní úkony v občanském právu *(Demonstration of will and legal acts in civil law)*, Prague 1953, p. 73.

[33] ŠPAČEK, Vincent, Projevy vůle a právní úkony v občanském právu *(Demonstration of will and legal acts in civil law)*, Prague 1953, p. 74.

[34] ŠPAČEK, Vincent, *Projevy vůle a právní úkony v občanském právu (Demonstration of will and legal acts in civil law)*, Prague 1953, p. 128–129.

6. Conclusion

While studying the doctrine of cause having its origins in the Classical philosophy of Aristotle, we find out that it influenced essentially the Roman legal science. Already classical lawyers influenced by Greek philosophy quited pointing out the form of legal acting (phenomenon typical for the old *ius civile*) and while considering the enforceability of the legal act they started to review also its content and purpose.

Doctrine on importance of immediate legal-economic results of the legal act was taken over (received) by French, Spanish, and Italian legal science, however not by the German or Dutch ones which fact we can see on today's legal regulation. Also the General Civil Code (ABGB) and Middle Code were based on the Roman law (in its Justinian version). Cause doctrine in limited version made part of our legal science until 1960s. However in 1970s it was deleted without compensation, without change of legislation and without any justification, nonetheless practical results of the cause doctrine were preserved in legal praxis.

Due to this reason there are certain ambiguities regarding cause and it would be useful if today's legal science would build the theory of cause on unitary theoretical basis regardless of the fact if such basis will represent strict following the Roman law cause doctrine or its strict refusal.

Influence of Roman Law on the Law of Obligations according to ABGB – the Comparison of Selected Contract Types*

Miroslav Frýdek**

Abstract

The article analyses an influence of Roman Law on modern civil law codifications. A Roman classification is studied in details. The present paper compares an influence of selected Roman law institutes on law of obligation according to ABGB.

Key words: *Roman Law; ABGB; mutuum; emptio-venditio; iuris vinculum.*

The current legal regulations have adopted many fundamental rules, principles and institutes of Roman Law. These influences keep their continuity up to this day in the identical rules, principles and institutes of modern codes of law. The legislators adopt the Roman Law institutes, classification, principles and terminology (the reception). The aforementioned creates a continuity of Roman Law in the modern codes. This continuity does not impact only on the identical rules, but also on the modified ones. In those branches of law, wherein the Roman rules are generalized and also still extend or restrict, there is generated an interaction of the social development and legal relationships being constituted in society, because the Law is being created within society and in its benefit.[1] The Law must react to the social and economic changes. The Roman legal history itself presents many evidences of those reactions to the social, or rather human needs: *ius honorarium* and primarily the Corpus iuris civilis. The most significant influence of Roman Law on modern civil law codifications is the Roman Law classification and in sophistication of particular legal institutes. The fundamental rules or principles, as bases of modern codifications (and also the current ones), are the consequences only of the scientific elaboration of Roman Law during the Middle Ages and Modern Times. Primarily there are included the scientific schools of glossators, commentators, the historical school of law and the law school called the Usus modernus pandectarum.

In the fundamental instruments of Roman Law (as stated previously) are included:
- inviolability of an individual's right to dispose of his own property
- respecting the real will of an acting person and deference to it
- resistance to a superfluous formalism

Roman Law established also certain fundamental freedoms
- contractual – in the meaning of autonomy of the will
- proprietary
- protection of the weaker party – the women and children (eg. *restitutio in integrum* or *legis actio Plaetoriae*)

The classification of Roman Law has been violated by the scientific elaboration of Roman Law, or rather by diverse schools:

The Roman Law classification:
- Res
- Personae
- Actiones

Versus (being used also at present time) the Usus modernus pandectarum:
- The General part
- The Property Law
- The Law of Obligations (general and special part)
- The Family Law
- The Law of Succession

The Roman Law principles as we perceive them today were not the aims of Roman Jurisprudence, they actually consist in sentences resolving concrete legal issues. Roman lawyers mastered the creation of abstract rules perfectly, though that was not their target. The principles, currently called as Roman Law principles, were in the significant part created only by the scientific elaboration of Roman Law, especially by commentators. We must perceive the influence of Roman Law as a natural development of the European legal culture. Since 19th century the interpretation of Roman Law has been meant as a dogmatic in-

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** Mgr. Miroslav Frýdek, Department of the Theory of Law and Legal History, Faculty of Law, Palacký University Olomouc; Institute of Legal Skills and Innovation of Studies, Faculty of Law, Masaryk University, Czech Republic.

1 Bonfante, P.: Instituce římského práva. ČS a S Právník v Brně. 1932. Brno. Translated by J. Vážný, p. VII.

terpretation of the Justinian's Law and its institutes which have been situated in the historical development.

Within the scope of the Roman Law of Obligations and its influence on the Law of Obligations contained in modern civil law codifications, we should focus primarily on the classification of Law of Obligations itself, on the division of origins of obligations, on the types of obligations, on the object and subjects of obligations, the alternation and termination of obligations and others. In the process of concrete analysis of particular contractual and delictual types of obligations, it is necessary to analyse these institutes very thoroughly (eg. the real, consensual and others). We are not able to ascertain the Roman Law roots, or rather the extent of inspiration and applicability of the Roman Law way of contemplation in the legislative process, until we do not analyse particular institutes, systematic inclusion (argumentation ad rubricam and others) in Roman Law and modern civil law codifications.

The most expedient method to discover the extent of inspiration by Roman Law in modern codifications is a comparison of selected contractual institutes. For illustration, there are chosen 3 areas of the Law of Obligations:

1. The term of obligation and origin of obligation
2. The purchase agreement
3. The loan

Selected institutes are located to a table wherein the Roman Law text is placed beside the legal text version of ABGB (by the year 1872) in order to point out the coincident traits of the legal regulations.

THE TERM OF OBLIGATION AND ORIGIN OF OBLIGATION	
Roman Law	**ABGB**
Inst. 3, 13 pr. *Obligatio est iuris vinculum, quo necessitate adstringimur alicuis solvendae rei secundum nostrae civitatis iura*. Now let us pass to the discussion of obligations. An obligation is a bond of law by which we are reduced to the necessity of paying something in compliance with the laws of our state.[2]	Section 859: The individual rights to a thing whereof a person is obliged to carry out a performance to someone another.
Omnis enim obligatio aut ex contractu aut ex delicto nascitur Each obligation shall be established either by a contract or by an offence.	Section 859: …shall be established either directly by a statute or by a contract or a damage incurred.

THE PURCHASE AGREEMENT / EMPTIO-VENDITIO	
Roman Law	**ABGB**
Dig. 18.1.2.1 Ulpianus 1 ad sab. *Sine pretio nulla venditio est.* No sale can take place without a price.[3]	Section 1054: …The market price shall be assessed in cash.
Just. Inst. 3, 23, 1 *Pretium autem constitui oportet: nam nulla emptio sine pretio esse potest. sed et certum pretium esse debet*. Moreover, a price should be fixed, for there can be no sale without a price; and the price should be certain.[4]	Section 1053: The content of purchase agreement is to transfer an object of purchase for a purchase price.

In the terminology of Roman Law, the purchase agreement means a barter of a thing for money. The purchase agreement belonged to the informal consensual contracts which were created by consensus. The market agreement was and still is one of the most significant and applied contractual types of obligations. The object of purchase, the price and consensus are its essential elements. In Roman Law, the purchase agreement pertained to the consensual contracts: the moment of consensus on object and price causes perfection of a legal act and causes also passage of the ownership to a purchaser. The aforementioned principle was not adopted by ABGB so that the ownership transferred only by delivery of the thing and not before § 1053: Ultimately, the ownership would be acquired by delivery of a purchased thing. The vendor holds the title until its delivery.

[2] English text from: http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/just3_Scott.gr.htm#XIII [cited 1/8/2011].
[3] English text from: http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/D18_Scott.htm#I [cited 1/8/2011].
[4] English text from: http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/just3_Scott.gr.htm#XIII [cited 1/8/2011].

THE LOAN / MUTUUM	
Roman Law	**ABGB**
Dig. 12. 1. 2pr. Paulus 28 ad ed. *Mutuum damus recepturi non eandem speciem quam dedimus (alioquin commodatum erit aut depositum), sed idem genus: nam si aliud genus, veluti ut pro tritico vinum recipiamus, non erit mutuum.* Dig. 12. 1. 2pr. Paulus 28 ad ed. We make the loan called mutuum when we are not to receive in return the same article which we gave (otherwise this would be a loan for use or a deposit) but something of the same kind; for if it was of some other kind, as for instance, if we were to receive wine for grain, it would not come under this head.[5] *„Tantundem eiusdem genesis et qualitatis"*	Section 983: If the consumable thing is delivered to a person in order to dispose of it at his own will but also to be obliged to return thing of the same quantity, sort and quality, the contract of loan is created. Section 984: The object of loan shall be either money or some other consumable thing.
Actio de certa credita pecunia **–** an action, which is being applied in case the object of loan is money ***Actio de certa re*** **–** an action, which is being applied in case the object of loan is a thing.	Section 984: The object of loan shall be either money or some other consumable thing.

In Roman Law, the subject-matter of loan is lender ,s delivery of substitutable things in determinate quantity to ownership of the borrower in order to use it with an obligation to return the same quantity of the same sort and quality in certain period of time *tantundem eiusdem genesis et qualitatis*. The purpose of loan is a consumption of things, therefore the sole object of loan may be a generic thing and the ownership is transferred. The borrower undertakes to return *in genere* (not *in specie*) the thing that has been lent to him. The borrower cannot be relieved even for incidental destruction or loss. The risk *periculum* is passed onto borrower at the moment of delivery and he can be excused assuming only that it would affect the lender also (e.g. case of earthquake, volcanic eruption, if both are sailing on one wrecking ship).

The conception of loan in ABGB remained essentially devoted to the Roman Law pattern. The generic things (things and money included) remained the only eligible object. Money (coins and also banknotes) as an object that is applicable for loan is mentioned in provision of Section 986 ABGB.

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[5] English text from: http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/D12_Scott.htm#I [cited 1/8/2011].

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Law of Obligations in Light of the Bohemian Diplomatic Documents of the Thirteenth Century*

Naďa Štachová**

Abstract

The paper focuses on the presentation of representative examples from the diplomatic material of the late thirteenth century, which contains the evidences to the characteristic relationships (mainly emptio and venditio) in the sphere of law of obligation in the Czech lands generally. The emphasis is placed on the encroachment of Roman law elements in these texts and their confrontation with the provincial (domestic) law as well as on their value assignment for the legal historical studies.

Key words: *Law of obligations; middle ages; diplomatic documents of the thirteenth century; emptio; venditio.*

There has always been a fundamental milestone on which all researches being focused on "incursion" of the influence of Roman law to our territories stood and which they were able to draw upon. The diplomatic documents that are the subject herein are, in respect to the thirteenth century, the only possible grounds on which the following thoughts may be based. There were certain limits to the efforts of the previous generations of researchers – especially in insufficient critical accessibility of written documents. We do not have to emphasize that in the nineteenth century the regestaries were aimed especially on reproducing non-mandatory core of the appropriate sources without concentrating on the fine legal nuance and, from legal perspective, the relevant circumstances of particular legal agreements included therein. The ongoing work on resurrection of the edition of the Bohemian Diplomatary of the era of the King Václav II and Václav III have overcome many of these insufficiencies and so that it is possible to make a legal-historical analysis of this issue more precisely than how it was done before.

The sphere of law of obligation, which we are going to target, may undoubtedly be understood as an indicator of the "incursion" of Roman law elements on the field Bohemian provincial law during the thirteenth century.[1] Whereas the contractual relationships among clerics regulating their mutual rights and obligations were clearly influenced by Roman law[2] – analogous to such relationships in cities,[3] the legal relationships among noblemen, which create the core of domestic provincial law, had not absorbed the Roman law elements until the second half of the thirteenth century.

Of course that the most common types of transactions in which noblemen had been engaged were all kinds of conveyances of real estate and this applied to gifts, barter and sales. From all the broad range of acts of conveyance, we have chosen model cases of transferring property for a pecuniary interest,

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** Mgr. Naďa Štachová, Ph.D, Department of the History of the State and Law, Faculty of Law, Masaryk University Brno, Czech Republic.

1 On Roman law in diplomatic documents compare: BOHÁČEK, M.: Římské právo v listinné praxi českých zemí 12.–15. století, *Sborník archivních prací* (further to be referred to as SAP) 24, 1974, p. 461–486 and: Einflüsse des römischen Rechts in Böhmen und Mähren. In: *Ius Romanum Medii aevi*. Pars V, 11. Mediolani 1975.

2 Encroachment of Roman and canon law into the Czech lands in the High and Late Middle Ages was researched especially by: OTT, E.: Působení práva církevního na rozvoj řízení soudního vůbec a v zemích českých zvlášť, *Právník* 16, 1877, p. 1–16, 73–85, 109–121, 145–154, 182–188, 217–229, 253–263, 289–297, 325–331, 361–371, 397–412, 433–439, 469–476, 511–515, 541–545, 577–582, 613–620, 653–660, 685–689; and: *Beiträge zur Receptionsgeschichte des Römisch- Canonischen Processes in den Böhmischen Ländern*. Leipzig 1879; and: Das Eindringen des kanonischen Rechts, seine Lehre und wissenschaftliche Pflege in Böhmen und Mähren während des Mittelalters, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung* 34, 1913, p. 1–107; ČÁDA, F.: K recepci v českém právu. (An attempt to collect new findings), *Právník* 71, 1932, p. 8–14, 45–56; VANĚČEK, V.: Pronikání římského a kanonického práva na území dnešního Československa od 2. pol. 9. století do 1. pol. 14. století, *Právněhistorické studie* (further to be referred to as PHS) 12, 1966, p. 27–38; further, KEJŘ, J.: Pronikání kanonického práva do středověkého českého státu, *Revue církevního práva* 8, 1997, p. 137–156; the most actual is: KRAFL, P.: Církevní právo v Čechách a na Moravě ve 13.–15. století. In: *Sacri canones servandi sunt. Ius canonicum et status ecclesiae saeculis XIII–XV*, edited by P. Krafl, Praha 2008, p. 81–123, there is a reference to further reading.

3 This is pointed out by KEJŘ, J.: *Vznik městského zřízení v českých zemích*. Praha 1998, p. 149 et seq., there is a reference to further reading.

i.e. purchases (*emptio*) or sales (*venditio*)[4] which play an important role in the sources describing real estate transactions. The property which was subject to conveyance was usually a part of an entailed estate and thus was of "allodial" nature. When such estate was being conveyed, there was always a danger that seller's relatives would cast doubt upon buyer's title to that property. By looking at the extant documents, we can see that such disputes, which had been motivated by such reasons, occurred very often. Since the beginning of the thirteenth century special provisions on guaranty of legal defects or to be more precise guaranty of accepting an obligation to take care of such defects were included in agreements regarding conveyances of property of pecuniary interest.[5] Aside from the so-called concepts of "*defensio*" (defension) or "*disbrigatio*" (disbrigation), there was also a concept of an insurance protecting against eviction ("*eviccio*"), i.e. in case that the item sold would be adjudged to a third party,[6] getting into common wording of the Bohemian diplomatic documents. Another group of documents are contracts of sale concluded in certain markets. In these cases price for the appropriate real estate was paid just partially. At that time special provisions ensuring that seller would be paid the remaining balance got to the business documents. The types of guarantee that we may find in the documents fully correspond with two types of guarantee.[7] Personal guarantee carried out by a person being indicated as a hostage (a surety)[8] or eventually by means of "*obstagium*" (in Czech "ležení"),[9] which may be looked on as a remnant of such a guarantee, on the one hand, and a guarantee of pledging a thing as a security, which was done in form of providing so-called "*vadium*"[10] or entering into mortgage contracts,[11] on the other hand.

It is really interesting that there was no source evidence of creating voluntary liens (mortgages) on real estate among noblemen until the end of the Seventies of the thirteenth century. Notwithstanding that one can assume that similar legal arrangements were more usual than what is apparent from the extant documents having been written during this era, we suppose that using liens on real estate as one of the modes of a security interest granted over a property to secure a payment of a debt was not very usual.[12] The very first extant document is a dateless deed which is considered, on the grounds of paleographic and diplomatic critics, by its last editors of the so-called edition *Codex diplomaticus et epistolaris regni Bohemiae* (CDB) to be written prior to January 10, 1278.[13] The debtor, in this case Boreš of Rýzmburk, states what should have happened had not he fulfill his obligation to Monastery of Osek. The document mentions only a debt of 110 silver marcs without explaining what the cause of the debt was. Nevertheless the provision regulating consequences of Boreš's not fulfilling one time. The obligation to pay was supposed to be secured by hostages – probably residents of the City of Freiberg (*„fideiussione, qua pro me in Vriberg obligati sunt"*). Aside from that Bores mortgaged some of his real estate (a Village of Střimice near the City of Most and half of the Village of Bžany near Teplice) which could be sold by the Cistercians of Osek to release the hostages in question. Moreover the document even has provisions on Boreš's possible death or taking captive. Then the pledged real estate would be conveyed to the creditor, who would be entitled to dispose of it as they would please (*„sit in eorum optione eadem predia vel vendere vel ecclesie sue perpetuo retinere"*).

The fact that the provisions of the abovementioned deed of Boreš of Rýzmburk regarding lien on real estate are, from the legal point of view, very vague, should not surprise us since it is very likely that, with respect to this document, we are at the very beginning of including such provisions in documents. The terms which were used in the documents having been issued during the era of Václav II are more precise. Nonetheless such documents were used rarely. We can mention, for instance, the document which was issued by Bohuslav of Budětice and Svojše of Vzdouny on December 22, 1291.[14] Two persons acted as hostages (sureties) promising that (*„Nos ... preposito Chotessoui-*

[4] For all kinds of levels of meaning of the term *"venditio"* see: ČÁDA, F.: K osobní exekuci podle čes. práva zemského I. In: *Práce ze semináře českého práva na Karlově univerzitě v Praze*, No. 2, Praha 1920, especially p. 11 et seq.

[5] The oldest evidence of such agreements from 1207 – Codex diplomaticus et epistolaris regni Bohemiae (further to be referred to as CDB) II, No. 75 (II), p. 66–68. Compare: BOHÁČEK, M.: Římské právo v listinné praxi, s. 472n., where other examples. For details see also BOHÁČEK, M.: Římské a kanonické právo v díle Všehrdově, *PHS* 7, 1961, p. 177.

[6] See BARTOŠEK, M.: *Encyklopedie římského práva*. Praha 1994, p. 104 and BOHÁČEK, M.: Římské právo v listinné praxi, p. 473 and Římské a kanonické právo, p. 177 et seq. and VANČURA, J.: Kritické poznámky k nauce o evikci při římském trhu*, Sborník věd právních a státních* 22, 1922, p. 120–165.

[7] On the general level, compare: STIEBER, M.: *Dějiny soukromého práva ve střední Evropě*. Praha 1930, p. 22–41; RAUSCHER, R.: *Přehled dějin soukromého práva ve střední Evropě*. Bratislava 1934, p. 90–105 and SATURNÍK, T.: *Přehled dějin soukromého práva ve střední Evropě*. Praha 1945, p. 109–129.

[8] See RAUSCHER, R.: *K rukojemství v českém právu zemském*. Praha 1923, however it pursues the older development just marginally. The development that may be traced in diplomatic practice that began in the thirteen century is collected in: BOHÁČEK, M.: Římské právo v listinné praxi, p. 475 and: Římské a kanonické právo, p. 179–181.

[9] BRANDL, V.: Dobývání peněz dlužních na rukojmích skrze ležení, lání a vyvolání, *Právník* 9, 1870, p. 422–433, 483–492, 513–522, 555–556 and ČÁDA, F.: *Ležení podle českého práva zemského*. Praha 1922.

[10] BRANDL, V.: *Glossarium illustrans bohemico-moravicae historiae fontes*. Brünn 1876, p. 378; JIREČEK, H.: *Prove.* Historický slovar slovanského práva. Praha-Brno 1904, p. 419 et seq.

[11] See: KAPRAS, J.: *K dějinám českého zástavního práva*. Praha 1903, summary of development: BOHÁČEK, M.: Římské právo v listinné praxi, p. 475 et seq.

[12] See KAPRAS, J.: *K dějinám*, p. 50.

[13] CDB V/2, No. 855, p. 573 et seq. Older literature connected this document with Boreš mladší (the Younger) and was considered to be written at the beginning of the fourteen century. Nonetheless its assumed date of origination was changed due to two reasons: 1) *„scripturae suae ductu charta ab usu graphico saec. XIV.in. evidenter differt.* 2) *„nonnulli de testibus in eadem nominatis in aliis chartis sinceris inter annos 1254–1264 datis ... deprehendi possunt"*. The editors were aware of the fact that by looking at the content the legal essence of this document is unique for the end of the seventies: *„Ante terminum modo dictum igitur charta nostra legitime ponenda est, quamquam (quod haud praeterire volumus) argumentum eius (obligatio enim bonorum) ante annum 1278 singulare videtur esse"*.

[14] Regesta diplomatica nec non epistolaria Bohemiae et Moraviae (further to be referred to as RBM) II, No. 2739, p. 1198.

censi ... promisimus et cautionem fideiussoriam prestitimus") in the transaction in which the Monastery of Chotěšov lent 250 marcs of silver to Bořislav (*Borzislaus pro ducentis et quinquaginta marcis argenti pignore obligavit eidem preposito"*) all Bořislav's obligations would be fulfilled. We emphasize that the Village of Mutěnice is *"pignore obligata"*. Thus the term "pignus" is used here in connection with the creating of a lien. Despite what was said above, one can assume that including these legal acts into documents was not common. This presumption may be deduced from the fact that the notary in question describes very precisely – one could even say "in a narrative way" – the obligation of hostages who were supposed to be responsible for debtors "*in possessione ville Muczinin ... non debeant impedire nec per se vel alios procurare impediri vel offendi quomodolibet in eadem"*. Aside from that the hostages were supposed to be liable for such a damage to the monastery which would arise because of an incompetent act by debtors (*„nos ei pro dampnis huiusmodi ... tenebimur et promittimus respondere testimonio huius scripti"*).

In the dispute between the Monastery of Vyšší Brod and suns of Jindřich of Kosová Hora (Záviš and Vítek of Ledenice) regarding an estate in Hořice in Bohemian Forest (Šumava) registered on July 12, 1293,[15] a hostage is mentioned just marginally. In this dispute the Monastery of Vyšší Brod bought this estate from Jindřich, who waived his rights to it in front of Václav II (probably at the Provincial Court). However his suns claimed their rights to it later. Both parties invited the issuers of this document to act as arbitrators in this dispute. These arbitrators decided that such a party who would not comply with their ruling should pay a penalty of 50 marcs of silver. In case that the plaintiffs did not want to pay this fee, Bernard of Bernatice was chosen to be a hostage (*ex parte dictorum puerorum versus nos est fideiussor"*).

More information on hostages is recorded in two inextricably intertwined documents of April 28, 1297, which describe Albert of Žeberk's trial.[16] In the first document, there is mentioned Albert's resignation from estate and all rights to the City and Castle of Tachov being accompanied by his vow to secret remains. Had not he fulfilled his obligation, he would have been excommunicated by the Prague's bishop and all the guaranteeing hostages (*„fideiussores mei …, qui se … regi in premissis obligaverunt, tunc promissa sua, que pro me … regi fecerunt, … explere et facere tenebuntur"*). If such a situation had occurred, both of the guarantees had had to arrive in Prague upon request made by King's delegate or by a document and stay there until the obligation was fulfilled (*„ex tunc requisiti per … regem nuncio vel litteris suis statim omni occasione postposita civitatem Pragensem promittimus et tenebimur ingredi, non exituri de civitate ipsa, donec … regis graciam invenerimus sibique pro dicto Alberto satisfecerimus pro … regis libito voluntatis"*). The source describes the concept of so-called "*obstagium*".[17]

This explicitly sets out the sale of Imperial feoff near Cheb on October 18, 1292,[18] which took place between Ekhard Nothaft of Vildštejn and Walter Höfer and which was assisted by the Cheb's District Reeve. In case that there were any legal defects, it was agreed by the contractual parties that seller would remain *"ratione obstagii"* in the City of Cheb until everything was taken care of (*„profitemur, … quodsi dicto Walthero aut heredibus suis in ipsa curia aliqua vendicatio seu impeticio suborta fuerit, nos … civitatem Egrensem racione obstagii subintrabimus, nullatenus exituri, donec … curiam ab omni occupatione fecerimus liberam et solutam"*).

The so-called "*obstagium*" is also mentioned in the following transaction regarding estate in Grüssau/ Krzeszów that took place in Lehnice on July 29, 1298 between Opatovice's abbot and Silesian duke Bolek.[19] The sales price was 140 Polish marcs and was supposed to be paid in an agreed term. If it had not been fulfilled, Bolek and three knights would have had to enter the City of Lehnice and stay there until the amount was paid (*„Quam si termino adveniente non persolverent, ..., ex tunc dominus dux una cum … militibus Legnicz civitatem intrabunt obstagio ad iacendum ipsam nunquam exituri, donec prenumeratum argentum … persolverint ex integro"*).

Aside from personal guaranteeing, the diplomatic documents mention also estate security interests. Evidence may be found in a document which was originated at the Provincial Court (cúda) in Olomouc on February 26, 1287, in which certain officers declare that some parts of Olšany estate were sold to the St. Catherine Monastery of Olomouc.[20] The seller Drslav of Olšany bestowed two hostages – including all their property – to serve as a security for the transaction (*„Dirslaus … Pitrelfum …et Budiz cum omnibus bonis eorum per cautionem fideiussoriam obligavit, ut omnes …insultus et strepitus …deberent dissolvere"*).

The grantor's obligation in a form of so-called "*vadium*" may be found in two documents coming from urban environment merely. The first case took place in Brno and may be considered as a unique evidence of legal practice of the first interregnum, and, on the other hand, it may be looked on as an interesting illustration of "everydayness" of urban community.[21] For unknown reasons, Gisela, who was a resident of the City of Brno, owed 19 marcs without loto (*marcas minus lotone*) to some monks of the Order of Saint John. For the brethren of the Order probably knew the woman in question and for they did not trust her, they requested a "*vadium*" (*„Nos … ab ea certificari voluimus vadio"*). In spite of the fact that Gizela must have known about their doubts, she bound herself to provide them with a house and two garden out of the city (*„hec Geisla … primo in vadio obligavit").* The doubts that brethren had proved to be right, for Gizela did not pay her debt and as a result of that she was forced by a decision of a city court to give up the "*vadium*" in favor of her creditors (*„coacta iuris sentencia huius civitatis Brunnensis ipsa Geisla … nobis libere resignavit").* After the described

[15] RBM II, No. 1623, p. 696 et seq.
[16] RBM II, No. 1750, p. 751 et seq. and ibid. No. 1751, p. 752.
[17] ČÁDA, F.: *Ležení*, p. 16.
[18] RBM II, No. 1594, p. 685n.
[19] Schlesisches Urkundenbuch (further to be referred to as SUB) V, No. 423, p. 326n.
[20] RBM II, No. 1399, p. 601 et seq.
[21] CDB VI/1, No. 163, p. 213 et seq.

time period, the brethrens raised their claim before the court again and it was confirmed by the final judgment that they were free to use the estate in question (*„finito sentencia iuris … optinuimus, quod … domum et pomeria sine omni inpedimento possidere vel vendere libere debeamus“*).

The document of October 31, 1281 from the City of Most is a testament, which was made by certain Arnold and which stated that five fertons of silver should be passed to the Monastery of Osek.[22] This testament is followed by a sale made by a resident of the City of Most, Liphard, who conveyed a right to keep a periodical profit of three marcs arising out of Střimice estate for an unspecified sum to the Cistercians of Osek. The regular income resulting from this was secured by Monastery's entitlement to claim its "*vadimonium*" on this estate if the payment was late (*„monasterium … poterit libere et licite et absque ullo iudicii strepitu et cuiuslibet contradiccione in eodem allodio vadimonia tollere*) so that the due payment could be obtained together with interest for delayed payment (*„tam pro … tribus marcis et quinque fertonibus quam eciam pro emenda“*).

In connection with buying or selling real estate and with granting guarantee for legal defects, the Bohemian provincial law used a concept of protection of the new acquirer. It was based on the protection which lasted for a period of three years and 18 weeks and in the old Czech was called "správa" ("*defensio*", defension).[23] Many references from the end of the era of Přemyslid dynasty serve as evidence that this was very common in that era. The document issued by Budislava of Loučky on April 7, 1292, for Templar Knights may serve as an example.[24] In this document, Budislava promised that, in compliance with provincial law, she would protect an acquirer against any claims made by third parties (*„promittentes eidem Ecchoni … ipsam villam iuxta terre consuetudinem ante amicos nostros seu impetitores quoslibet libertare“*). Moreover she pledges another village of hers in favor of the Templar Knights, in case that a damage would arise out of the sale in the future (*„Si autem hanc libertatem efficere non possemus, … ab hoc impedimento … cruciferis villam …obligamus, … quoad usque de dampno, si quod eos habere ex prefata empcione contingeret, per nos fuerint finaliter expediti“*).

We can find similar wording in the following document as well. Hartleb, a nobleman of Dubno, who also served as a butler being in charge of Znojmo and Bítov, had it issued when the Village of Újezd was to be sold to the Monastery of Tišnov.[25] This agreement contained a "defense" ("*defensio*") clause as requested by the Bohemian provincial law (*„promisimus ipsam villam … dominabus infra tempus determinatum secundum terre consuetudinem defensare“*). By analogy, we read about emendation ("*emendatio*") of the given property of the highest butler of the Bohemian kingdom Ojíř of Lomnice, who had *„easdem villas a quolibet inpeditore in sive affini vel non affini per triennium secundum ius terre emendare“*.[26]

In some cases, there is a prospective danger that buyer's possession might be endangered by an attack by a third party. Roman law terminology calls an attack eviction ("*evictio*"). Such a case may be found in a document of the Bohemian king Václav II, which was issued on July 28, 1293,[27] and in which the issuer declares his being willing to protect an acquirer (Ortlib of Rožmitál) against eviction and to compensate any potential damage: *„De eviccione autem … eidem Ortlibo … sit cavendum, quod non … Ortlibum …, sed nos … inpeti voluissent et requiri, et … Orlibus et heredes sui non teneantur alicui … in aliquo iudicio respondere. Et si qui ius … ostenderint vel probaverint se habere, illud nos … pro ipso Ortlibo … promittimus compensare et eis satisfacere pro eodem“*.

As opposed to the materials from the Bohemian and Moravian provenience, in Silesia, one can find wording which is much more precise in both the using of terms of Roman law (including the renunciation formula)[28] and expert legal view on particular sale of real estate. The aforesaid assertion may be supported by looking at the style of the document of April 10, 1290, which was used by a notary to record a sale of the Village of Pischyz/Sandau near Ratiboř.[29] The seller, Count Velislav, waived all his rights which he had ever had to the real estate in question and, moreover, he promised the buyer that he would not take any action against him nor help anybody who would be in dispute with the buyer. Furthermore, he promised to provide a protection for an eventual eviction and that he would compensate any damage and judicial and extra-judicial costs during his life: *„promittens per se et suos heredes dicto emptori …litem vel controversiam ei …de dicta re …ullo tempore non inferre nec inferenti consentire, set ipsam rem …ab omni homine et universitate legittime defendere et disbrigare et de evictione, ut iura precipiunt, se teneri et predictam venditionem … firma et rata habere et tenere et non contrafacere vel venire …aliqua causa vel ingenio de iure vel de facto, item reficere et restituere sibi omnia … dampna et expensas et interesse litis in iudicio sive extra, que … promisit …, quoad vixerit, observare“.*

Even the cross-border transactions – both the sales and purchases – are specific. For example, we can look at a sale of five and a half talents of profit gained in the Village of Klein Weikersdorf in Austria, which was made in favor of the Cistercian Monastery in Zwettl by Ludmila of Stará Říše.[30] This was approved by all her relatives, for, undoubtedly, it was allodial estate. As a guarantee of the sale in question, Ludmila appointed to defensors ("*defensores*") of the Austrian environment and four of the Bohemian one. The Austrian defensors were, according to the document, supposed to: *„eiusdem possessionis redditus pro ipsis*

[22] CDB VI/1, No. 180, p. 233 et seq.
[23] BRANDL, V.: *Glossarium*, p. 387, in more detail in STIEBER, M.: *K vývoji správy.* Vliv českých živlů na správu v Dolních a Horních Rakousích a její význam pro rakouský exekuční proces. Praha 1901.
[24] RBM II, No. 1570, p. 674 et seq.
[25] CDB VI/1, No. 145, p. 193et seq.
[26] RBM II, No. 1409, p. 605 et seq.
[27] RBM II, No. 1622, p. 696.
[28] See BOHÁČEK, M.: Římské právo v listinné praxi, p. 477 et seq.
[29] SUB V, No. 442, p. 338 et seq.
[30] CDB V/1, No. 443, p. 654 et seq.

(i. e. Zwettl) stando tueri ac defendere teneantur secundum ius terre Austrie generale". As one could expect, both groups of defensors were supposed to comply with their domestic provincial law.

Of course, the abovementioned examples should not be looked on as an evidence of direct encroachment of Roman law into domestic Bohemian provincial law in the thirteenth century. As it is generally assumed by Romanists,[31] it is very likely that it is a reflection of a dictate of particular notaries. They stood before a task how to aptly formulate legal practice of particular "*consuetudines*" by which the provincial law was marked in that period. Nonetheless the inherence of Roman law terminology itself in diplomatic documents could not stay without a feedback on domestic legal reality. Especially if we take into account the growing approach which understood documents as evidence in medieval court proceedings.[32] The end of the thirteenth century may be marked as an era in which, aside from clerics, there were more and more noblemen having their property transaction recorded in writing, and who typically had been rejecting such documentation before.[33] We admit that the number of particular Roman law elements may be of different intensity and that it corresponds with the territory studied or with the particular diplomatic area, as it resulted from comparison between the Bohemian and Silesian background. This trifling nuance notwithstanding, there is a clear trend towards terminological preciseness and preferring exact Romanistic terminology in the domestic legal development.

[31] BOHÁČEK, M.: Římské právo v listinné praxi, p. 461 et seq.
[32] MARKOV, J.: *Kapitoly z dějin českého zemského soudního řízení XII.–XVII. stol.* Praha 1967, p. 142 et seq.
[33] ŠEBÁNEK, J., DUŠKOVÁ, S.: Česká listina doby přemyslovské. (Listina nižších feudálů duchovních – listina feudálů světských), *SAP* 6/1, 1956, p. 136–211.

Mining Business Pursuant to "Ius Regale Montanorum" in the 14th Century*

Petra Jánošíková**

Abstract

The paper deals with the forms of mining business in the 14th century, its assumptions, and importance within the context of than legal regulation based on interpretation of sources and their political-economical analysis.

Key words: *Mining law; mining regal; mining freedom; mining; lending of right to mine mineral resources; mining business; mineral resources; Jihlava; Kutná Hora; Ius montium et montanorum; Ius regale montanorum; miner; association of miners; mining field; fief-mining system (lénhavéřská soustava).*

Mining law on the territory of the Czech State developed as of the first half of the 13th century already. The reputation of the Czech mining law was based on the Jihlava-Kutná Hora law. This law was very often named Czech law and belongs to the oldest written mining law norms in Europe. The genesis of the Czech mining law is based on two sources, namely the older one from Jihlava, and the younger one from Kutná Hora.

Mining law was based on two principles, namely mining regal and mining freedom. Mining regal existed in every country, where the state or landowner power reserved the right to handle some of mineral resources and their beds excluding any third persons, i.e. also the owner of the plot. This power did not allow for mining without the State's consent (so called lending of right to mine mineral resources). The State used the mining regale in the way that it mined either itself or through others either by announcing the mining freedom, i.e. granted it to anyone who searched and mined on its plots, or by granting the law of lending to someone, who found the bed, and after receiving it to gain the minerals. Therefore, the mining regal in Middle Ages meant collection of rights to mine the minerals claimed by rulers. It was based on the principle that all minerals belong to king, so called „*iura regalia*." Only ruler had exclusive right to grant mining consent, lend it, and for this he/she received the respective part of gain in the form of so called *urbura* [1]. The rules also claimed the reservation of preemption right which was necessary for coining "regale" and reservation of coinage.[2] The mining regal was a basis for enforcement of the principle of mining freedom. The principle of mining freedom was based on the principle of free commencement of mining without the consent of the plot's owner. In Jihlava in the 1249 the first drawing of the mining custom law occurred in the form of Privilege of Wenceslas I and margrave Přemysl Otakar named

*"Iura montium et montanorum" (*Rights of mines and miners*),* which was part of so called *"Iura civium et montanorum" (*Rights of townsmen and miners) including beside the mining law also the Town Privileges.[3] This legal document influenced significantly mining legislation in Bohemia, in Slovakia, in Germany but also on Balkans.[4] Mining law of Jihlava did not represent separate legal order of the Czech State, however only its regional part. However, it had great importance for drawing and development of mining law.

The town of Kutná Hora developed from mining villages spontaneously founded in the second half of the 13th century and inhabitants of which were predominantly German com-

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** JUDr. Petra Jánošíková, Ph.D., Department of Administrative Law and Department of Legal History; Faculty of Law, University of West Bohemia, Pilsen; Czech Republic.

1 Full JÁNOŠÍKOVÁ, Petra, Urbura jako nástroj finanční politiky státu ve 13. a 14. století, Sborník z konference věnované prof. Sejbalovi (1929–2001), Ostrava, 2007, p. 31–44; JÁNOŠÍKOVÁ, Petra, Institut urbury z pohledu finančního práva, Sborník z konference k 75. narozeninám prof. Hubenáka, Banská Bystrica, 2001, p. 149–154.

2 In more details JÁNOŠÍKOVÁ, Petra, Vliv horního regálu na regál mincovní, Acta historico-iuridica Pilsnensia 2006, Plzeň, 2007, p. 48–54.

3 Full wording: District State Archive Jihlava, fol. 48/2, Privilegium „A"; Codex diplomaticus et epistolaris regni Bohemiae. Ed. ŠEBÁNEK, Jindřich – DUŠKOVÁ, Saša, Prague, 1962, Nr. 177, p. 290–328; Codex iuris municipalis regni Bohemiae II. Ed. ČELAKOVSKÝ, Jaromír, Prague, 1895, Nr. 5, p. 7–30; HOFFMANN, František, Jihlavské právo, Havlíčkův Brod, 1959, p. 31–64; JANGL, Ladislav, České horní právo I, České horní zákony, Kutná Hora, 1977, p. 11–13.

4 SMRŽOVÁ, Petra, Vlivy jihlavského horního práva, Sborník mezinárodní konference 750 let jihlavského horního práva „Iura montium et montanorum" I, Ostrava, 1999, p. 91–107.

ing from Jihlava copying the way of mineral beds.[5] As of the 1290 we can consider it a mining town nonetheless it lacks any founding act.[6] At the beginning of the14th century the administrative and economic function of town was enhanced by issuance of the mining code of Wenceslas II. Codification of Wenceslas II named "*Ius regale montanorum"* alias "*Constitutiones iuris metallici*" (hereinafter referred to as "IRM") of the 1300 issued as general mining law for any and all mining-legal and technical-operational issues[7] represents the oldest code of customs and written mining law drawn up in Europe.[8] From legal point of view, the IRM belonged to the most perfect regulations of the Czech and European mining law and had undisputable influence also on the development of the ‚mining regulation in several European countries, e.g. in Poland, in Slovakia, in German as well as in Spain.[9] From the content point of view, the IRM partially stem from privilege of Jihlava and copies some of its provisions, however, it cancelled or amended much more provisions due to their obsoleteness. Therefore we cannot conclude that the IRM represented a reception or development stadium or mining law of Jihlava.[10]

Basic assumptions of mining business are mining field and businessman-miner executing business activities on such field, in particular. Mining field was not property of miner, but it was lent to him/her. Act of lending was preceded by searching or mining of the bed. Based on principles of mining freedom anyone was entitled to mine in the free field, however the mining shafts had distant at least 1 *látro*[11] (1 látro, approx. 2 m) from each other. The first person, who found a bed on such field, had right to the area of 2 *lány*[12] long (1 lán, approx. 14 m). Other miners received 1 *lán* each. The mining started "*de iure*" as well as "*de facto*" as late as after submitting the proof, that the mining will be profitable. Opened bed was examined by the senior "*scansores, štajgeři"* together with town sworn townsmen and sworn miners took a sample. If it was worth of Ľ *hřivna* (1 *věrduňk*, 50 g) of silver exceeding the costs of mining, the bed was considered suitable for mining[13]. As late as after that the mining field was measured in presence of "*urburarius, urburéř*" and sworn townsmen and miners. For each lending a certificate was issued, named *handfest*, including the seal of mining office and town and, at the same time, it was registered into the mining books. The registration of lending was an important legal document.

The basis of mining field was mining well found with the closest two measures, i.e. 3 *láns* in total. Afterwards, 2 *láns* were measured on each side, where at least two other shafts had to be opened. Therefore, the applicant received the field 7 *láns* long with the obligation to found at least 3 shafts on it. In the hanging wall 3 ″ *láns* were measured, and 1 *lán* into subsoil. Such mining field, so called "measured mine" had the length of 7 *láns* or 49 *láters* and width of 31 ″, in praxis 32 *láters*[14]. The lengths of *lán* of Jihlava is unknown, we assume it was approximately 2 m. Basic field had rectangular form 98 x 64 m. The filed had unlimited depth. To this basic field, another *lán* was added on each side for the king, the town, and landlord[15]. If there was any surplus between the measures, it belonged to the king pursuant to the IRM[16]. As the measure followed the bed of the mineral into the depth, in the case the beds crossed, disputes on right to the mining field occurred. In such case precedence was given to the right of person having older lending[17]. As support of business person had the right to mine in someone else's field in the depth, if it got there first, however only until the breach of corridor into someone else's mine. Together with the right to the "measured mine", the acquirer gained also right to the 16 places (*městiště*)[18] of the plot for the building alias *kavna*, originally used for bath and deposit of food and drinks. Besides 16 places (*městiště*) the owner of the lending received from the landlord also pastures at bow shot length and if the landlord owned also woods, then also mining weed. Landlord received adequate indemnity for damages caused by mining work on his plots[19]. Royal *láns* and surpluses were originally lent by *urburarius* and should have been lent for eternity in the way miners do not change along with the change of *urburarius* person. In the case the owners of the lending did not meet their obligations, *urburarius* could divest them of the lending[20]. Sworn townsmen worked on municipal *láns* on their own costs or they sold or leased the *láns*. Similar possibilities pertained also to the landlord. In the case of Kutná Hora it was the king, the abbot of Sedlec monastery, or the Prague canonry. On each lent added *lán* one shaft had to be founded each with three working faces[21].

[5] ŠTROBLOVÁ, Věra, ALTOVÁ, Blanka et al., Kutná Hora, Praha, 2000, p. 41.
[6] ŠTROBLOVÁ, Věra, ALTOVÁ, Blanka et al., ibidem, Praha, 2000, p. 45.
[7] Full wording: BÍLEK, Jaroslav, Ius regale montanorum, právo královské hornikuov, ed. České horní právo II, Příbram, 1978 or newer edition BÍLEK, Jaroslav, Ius regale montanorum, právo královské hornikuov, Kutná Hora, 2000 (used for citations).
[8] JÁNOŠÍKOVÁ, Petra, KNOLL, Vilém, RUNDOVÁ, Alena. Mezníky českých právních dějin, 3. ed., Plzeň, 2010, p. 31–36.
[9] JÁNOŠÍKOVÁ, Petra, KNOLL, Vilém, RUNDOVÁ, Alena, ibidem, p. 36.
[10] BÍLEK, J, ibidem, 2000, s. 6.
[11] BÍLEK, Jaroslav, ibidem, Book II., chapter I, Section 3, p. 40.
[12] BÍLEK, Jaroslav, ibidem, Book II., chapter I. Section 8, p. 40.
[13] BÍLEK, Jaroslav, ibidem, Book II., chapter II., Section1, s. 41–42 a Book I., chapter X, Section 1, p. 31. Štejgeři (scansores), so called mining climbers – royal officers enforcing the application of law in the mines.
[14] BÍLEK, Jaroslav, ibidem, Book II., chapter II., p. 41.
[15] BÍLEK, Jaroslav, ibidem, Book II., chapter II., Section 2, p. 42.
[16] BÍLEK, Jaroslav, ibidem, Book II., chapter II., Section 3, p. 42.
[17] BÍLEK, Jaroslav, ibidem, Book II., chapter II., Section 4, p. 42.
[18] BÍLEK, Jaroslav, ibidem, Book II., chapter III., Section 1, p. 44.
[19] BÍLEK, Jaroslav, ibidem, Book II., chapter III., Section 4, p. 44.
[20] BÍLEK, Jaroslav, ibidem, Book III., chapter I., Section 3, p. 53.
[21] BÍLEK, Jaroslav, ibidem, Book III., chapter I., Section9, p. 53.

As anyone could apply for lending of such mining field, three business forms existed in the feudal mining: individual miner-businessman, association of miners, and association of mining businessmen-miners. Special business form connected with the mining business was oar commerce alias *erckaufěřství (metalli emptio)*.

Original form was an individual miner. At the very beginning miner was side-job made by farmers in their free time[22]. Miner-businessman needed only little mining field, his work was done without any schedule and therefore it made no rational operation possible. He was helped by members of his family and if he had mercenary labor force, it was very often certain type of apprentice working for meal and oar.

Several miners founded an association the members of which worked on the individual parts of the mine and divided the yield of their work. The miners' associations were found basically due to technical obstacles of mining the overcoming of which was impossible for an individual.

The most usual form of the mining business were mining groups including businessmen – miners, oar loaders, so called *kverks (gewerken, coloni)*, who paid the financial costs of the individual six-hours shifts.[23] Based on the number of *kverks* participating on costs of one shift, of which a so called (*pars, tál*) belonged to them, the mining groups usually had eight to thirty-two members. *Kverks* had ideal and not real shares on mines[24]. Membership in mining group was gained "*ex lege*" by legal acting, by purchase, change, or donation in particular. Mining field was lent to one person representing the whole mining group. The mining property was divided into shares, i.e. *tál*s. Each such property unit, fief (*léno, lehne*) later named "*cech*" or "*cecha*" had 32 *tál*s in Kutní Hora, i.e. *thirtieth*. These thirtieth were not calculated from the whole *cech*, but only from 8/9 of it, as 1/9 belonged to the mining smiths[25]. One thirtieth was further divided into 4 parts pursuant to 6-hours shifts, named *kuks*. From this results the later division of one *cech* into 128 *kuks*, which did not usually apply under the IRM. Royal, municipal, and lord's *láns* added to the mining field, were divided into quarters and these were furthermore divided pursuant to shifts to quarters, i.e. to sixteenths in total. Shares were transferable. They could be sold, inherited, leased, mortgaged and changed. The exchange rate of *tál*s changed and was based on the yield of the mine and business ability of mining group management.

The supreme body of the mining group was meeting of miners, alias "*rejtung*". Miners' meetings were held once a week and decided which *čelbas* are to be handed over to fief-miners (*lénhavéř, lehnhäuer, metallicus)*, what costs will be invested into the mining, and if any changes are to be made between mining officers. The meetings were preceded by master of the mine (*hormistr, magister montium*)[26] as the principal officer of the mining group. This position was usually held by one miner up to the 15th century. The decisions were approved by the majority of present voters.

Miner, who got lending from royal officer were also called primary miners (*kverks*). They were owners of shares and their number in mining group was not limited. Each *kverk* had a share from profit alias "*ybrláf"* and from mine costs alias "*cupus*". Share paid up from net profit were called "*auspejt*". If someone of the miners did not pay *cupus*, which were usually declared in the case of major liabilities, they lost their shares which were subsequently divided between other miners. Also the king was one of miners, as as "regale" lord" he has got 1/32 from each measured mine and Ľ from the smithery's 1/9-share[27] and the owner of the land, who also got 1/32[28]. They were only entitled to receive profit from thirtieth, if they paid *cupuses*.

Kverks could lend the individual parts of their mining field to secondary miners and these then to other ones.[29] In praxis this often represented the lending of the individual working faces to miners called fief-miners (*lénhavéř, lehnhäuer, metallicus*), or, as the case may be, lending of *tál*s, so called *stranní*.[30] Basically immoral fief-miner system made it possible for the most economic exploitation of a bed. Technical level of medieval mining operation required many miners for quick exploitation of a bed. However, it was not profitable for the businessman to hire so many mercenary miner, if they were partially free. Fief-mining system represented an advantage for the owner of the regale as based on it the primary miners were considered enemy and officers of the regal law considered advocates. In disputes between regal lord and miners, the fief-miner usually took the side of regal lord.

Conditions of lending of a fief-mine (*lehnsaft)* were based on understandings between fief-miner and miner. Fief-miner usually received the lending against certain share of expoited oar. Pursuant to the IRM this share amounted to ˝ to 1/5 of profit based on parties' agreement.[31] The primary miners often lent up to several *láns* from a bigger mining field, the whole mine or several mines, against share on profit (1/5) or, on the 16th century, against certain share on mining costs (usually ˝). Such lendings were usually done with master of the mine (*hormistr, magister montium)* and mining office consent. Lendings to fief-miners were usually time limited and they were hereditary only very rarely (hereditary *lehnsaft*).[32] Fief-miners received from primary miner (*kverk*) usually waterbags and ropes unless stipu-

[22] KOŘAN, Jan, Dějiny dolování v rudním okrsku kutnohorském, Praha, 1950, p. 66. We assume placer mining of gold was used by us, proved is also mining of coal or graphite in the 18th and the 19th century.
[23] BÍLEK, Jaroslav, ibidem, Book I., chapter XIV, SectionSection 1–5, p. 34.
[24] POŠVÁŘ, Jaroslav, Společenské vztahy v Ius regale montanorum. In: Studie z dějin hornictví 9, Praha, 1978, p. 17.
[25] BÍLEK, Jaroslav, ibidem, Book I., chapter XVI, Section 6, p. 36.
[26] BÍLEK, Jaroslav, ibidem, Book I., chapter VIII „De magistris montium", p. 27–30.
[27] BÍLEK, Jaroslav, ibidem, Book II., chapter II, Section 14, p. 43.
[28] BÍLEK, Jaroslav, ibidem, Book II., chapter III. Section 4, p. 34.
[29] BÍLEK, Jaroslav, ibidem, Book I., chapter XIV, Sections 1–5, p. 44.
[30] BÍLEK, Jaroslav, ibidem. Book III., chapter IV, p. 56.
[31] BÍLEK, Jaroslav, ibidem, Book III., chapter I, Section 2, p. 52.
[32] KOŘAN, Jan, Dějiny dolování v rudním okrsku kutnohorském, Praha, 1950, p. 68.

lated otherwise by the agreement. The primary miners also had to take care so that water from their working faces does not flow into those lent to fief-miners.[33] As demonstrated by the IRM, it was usual to use the work of fief-miners for the benefit of miners. The legislator prohibited such acting and stand on fief-miner side.[34] Reason for this was the increase of income of royal treasury as the more people worked in mines, the bigger was the profit from royal *urbura*[35].

Miners and fief-miners (*lénhavéř, lehnhäuer, metallicus*) sold the mined minerals to mineral merchants (*rudokupec* alias *erckauféř, metalli emptor)*. They represented another type of businessman in Kutná Hora. Merchant (*erckauféř)* was at the same time also owner of silverworks alias "lock chambers" and governed the production of metals. Person who sold them minerals was dependant of their will as they deliberately decided on the price of ore. The sale was organized so that merchant (*erckauféř*) proposed the price and if miner considered it low, he/she did not accept it. If the seller needed money, he/she had to sell even for a very low price. Higher purchase price could only be offered by financially strong miners. Disadvantage of private purchase of oar was also the fact that merchants (*erckauféř*) only wanted rich oar which forced miners to plunder the bed and extracting only quality oar. Private purchase of oar and operation of mills were kept until the 1559 when they were assumed by royal administration and prices of purchased price of oar were established.[36]

[33] BÍLEK, Jaroslav, ibidem, Book III., chapter I, Sections 16–18, p. 54–55.
[34] BÍLEK, Jaroslav, ibidem, Book III., chapter I., Sections 15–17, p. 54–55.
[35] KOŘAN, Jan, ibidem, p. 69.
[36] KOŘAN, Jan, ibidem, p. 72.

ABGB und das kanonische Eherecht

Stanislav Přibyl *

Abstract

Unlike the Napoleon Civil Code of 1804 which established obligatory civil marriage for all citizens, the Austrian legislature chose confessional principle of matrimony. Different norms were applicable to three parts of population: Christian catholic, Christian non-catholic and Jewish. From the canon law of the Catholic Church the Civil Code adopted the impediment to marriage due to priestly ordination and monastic wows. It also recognized the impediment owing to indissolubility of matrimony as conceived by the Catholic Church. Model permitting people of various confessions to marry according their specific religious rules was later supplemented by an alternative civil marriage in case that the engaged couple would not meet the requirements imposed upon them by the canon law. Since 1870 the civil marriage was made possible between people without religion. By a special law of 1912 the civil marriage was made mandatory to citizens of Islamic faith.

Key words: *Austrian General civil code (ABGB); canonical matrimonial law; Catholic Church.*

I.

Das Mittelalter betrachtete die ausschließliche Kompetenz der Kirche in den Angelegenheiten der Ehe als selbstverständlich und unbezweifelbar. Das Dekret des Gratianus (1140) bringt diesen Rechtsstand mit der lapidaren Maxime *„matrimonia reguntur iure poli et non iure fori"* zum Ausdruck, deren Sinn sich am trefflichsten mit der Formel „die Ehe richtet sich nach dem Recht des Himmels, und nicht nach dem Recht des Gerichts" deuten lässt. Als die Scholastik auf ihrem Höhepunkt stand, entfaltete sich in schnellem Tempo die gesetzgebende Tätigkeit der Päpste sowie die Jurisprudenz der Dekretisten und Dekretalisten [1]; dies alles hatte zur Folge die Herausbildung eines sophistischen Systems des kanonischen Eherechts. Diese rechtsbildende und mit ihr verbundene rechtstheoretische Aktivität setzte zugleich eine ausschließliche Jurisdiktion kirchlicher Organe in der Realisierung der durch die Kirche herausgegebenen Normen voraus [2].

Die stufenweise Entstehung des modernen Staates rückt jedoch die rechtlich-normative Gestalt und die kompetenzgerechte Jurisdiktionswirksamkeit in Eheangelegenheiten immer mehr in Richtung Staatsmacht. Damit tritt die Ehe allmählich in die „gemischte" Sphäre von Kontakten oder Streitigkeiten zwischen der geistlichen und der weltlichen Macht ein und gehört also künftig zu den *res mixtae* oder *res mixti fori.* Während im Jahre 1580 als Lösung konfessioneller Unversöhnlichkeit in den Niederlanden die Möglichkeit auch einer zivilen Eheschließung eingeführt wurde, um in einigen Fällen das eigentliche Recht von Personen auf Eheschließung (*ius matrimonii*) zu verwirklichen, hat die Diktatur Cromwells die bürgerliche Trauung bereits zur Pflicht gemacht. Diese Entwicklung mündete in den Grundsatz *„la loi ne considčre le mariage que comme contrat civil"* ein, der sich in der französischen revolutionären Verfassung von 1791 [3] findet und in den napoleonischen Kodex als Art. 165 aufgenommen wurde.

* JUDr. Stanislav Přibyl, Ph.D, JC.D, Metropolitan Kirchengericht Prag; Lehrstuhl der systematischen Theologie, Theologische Fakultät, Südböhmische Universität, České Budějovice, Tschechische Republik.

1 „Das Dekret eröffnete eine neue Ära des kanonischen Rechts und verdrängte schnell alle bisherigen Sammlungen. Es wurde zum Gegenstand wissenschaftlicher Auslegungen (…); demnach begann man unter den Kanonisten eine Unterscheidung zu machen zwischen Dekretisten, die sich mit Gratianus´ Dekret befassten, und Dekretalisten, welche die päpstlichen Dekretale (innerhalb sowie außerhalb des Dekrets) auslegten." – HRDINA, Antonín, *Prameny ke studiu kanonického práva (Quellen zum Studium des kanonischen Rechts),* Plzeň 2007, S. 37.

2 „Zwischen dem 12. und dem 14. Jh. hat sich endgültig die kanonische Ehedoktrin konstituiert, sowohl in den wesentlichen Elementen der Ehe, als auch in den Prozessangelegeheiten, verbunden mit den Fragen deren Ungültigkeit. Die ausschließliche Kompetenz der kirchlichen Tribunale für das Urteilen und Entscheiden dieser Angelegenheiten blieb undiskutabel." – Dalla TORRE, Giuseppe, *La cittŕ sul monte*. *Contributo ad una teoria canonistica sulle relazioni fra Chiesa e Comunitŕ politica*, Roma 1996, S. 39.

3 Titel II., Art. 7.

Obwohl im Laufe des 19. Jahrhunderts das säkulare „napoleonische" Modell begann, sich in zahlreichen bürgerrechtlichen Modifikationen in Europa sowie außerhalb Europas allmählich durchzusetzen, hat die katholische Kirche noch in dem ersten Kodex des kanonischen Rechts von 1917 ihre volle Rechtsmacht über die rechtliche Form sowie das rechtliche Regime der Ehe von Christen einseitig bekräftigt[4]. Im Prinzip rezipierte und entfaltete der Kodex umfangreich die durch das Konzil von Trient (1545–1563) eingeführte rechtliche Eheregelung. Das Konzilsdokument *Tametsi* aus dem Jahre 1563 erklärt als ungültig die heimlich geschlossenen Ehen (*matrimonia clandestina*) und stellt eine strikte Forderung: die Ehen sollten künftig nach der so genannten kanonischen Form geschlossen werden, d. h. in Anwesenheit des die Trauung vollziehenden Pfarrers und zwei oder drei Zeugen[5]. Die im napoleonischen Kodex sowie in durch ihn inspirierten bürgerlichen Gesetzbüchern enthaltene Regelung ist im Grundschema der Trauungszeremonie – der Trauungsvollziehende plus zwei Zeugen – eigentlich eine faktische Nachahmung der tridentinischen kanonischen Form. Der napoleonische Kodex hat übrigens auch gegenüber dem damaligen revolutionären Libertinismus für die Disziplin Ehe strengere Maßnahmen getroffen, sodass er auf diesem Weg dem Vorbild der nach außen hin sonst verworfenen katholischen rechtlichen Regelung näher gekommen war[6].

Eine radikale Abwendung von der kanonischrechtlichen Regelung – und überhaupt von der bisherigen katholischen Auffassung der Ehe – war allerding zunächst auch die Absicht der Protagonisten der europäischen Reformation, auf deren „Neuerungen" das Tridentinische Konzil mit seinem Dekret *Tametsi* reagierte[7]; in den aus der Reformation entstandenen einzelnen Kirchen begann sich allmählich ein eigenes Eherecht herauszubilden, welches aber im Unterschied von der katholischen Gegenseite unter anderem auch die Möglichkeit einer Scheidung zuließ[8]. Die jüdische Synagoge verwendete von jeher ihr auf den ursprünglichen Vorschriften der Tora gründendes Eherecht, aus welchem sich übrigens die katholische Auffassung der Ehe emanzipiert hat durch die strikte Applikation des neutestamentlichen Ausspruches Jesu (*logion*), der die absolute

Untrennbarkeit der Ehe postuliert[9]. Die Praxis rabbinischer Gerichte, die nach erfolglosen Versuchen einer Versöhnung zwischen den Eheteilen ermöglicht, dem Mann eine Scheidungsurkunde (*get*) für der Frau auszustellen[10], existiert weiterhin in der jüdischen Religion, und zwar auch in der ultraorthodoxen Linie.

II.

Das Österreichische Gesetzbuch von 1811 ist als „allgemein" charakterisiert (*„allgemeines" Gesetzbuch*). Kaiser Franz I. lässt in seiner Präambel zum Gesetzbuch klar erkennen, dass er diesen Allgemeincharakter nicht nur als flächendeckende Einsetzung einheitlicher Parameter der Rechtsregelung für alle Bürger unterschiedslos versteht, sondern dass er auch mit einer Differenzierung der Rechtsmaterie in Hinsicht auf die einzelnen Kategorien von Bürgern rechnet. Gemäß Präambel würden Privatrechte künftig „nicht nur nach den allgemeinen Grundregeln der Gerechtigkeit, sondern auch mit Rücksicht auf die besonderen Verhältnisse der Bürger" angewandt. Das im Gesetzbuch enthaltene Eherecht verrät deutlich, dass der die spezifische Lage einzelner Bürgergruppen berücksichtigende Allgemeincharakter ernst gemeint war auch in Sachen Religionskonfession der Einwohner des österreichischen Imperiums.

Man muss sich hier der grundlegenden historischen Zusammenhänge bewusst sein. Das Gesetzbuch erscheint praktisch dreißig Jahre nach dem josephinischen Toleranzpatent. Im Au-

[4] „Der Kodex von 1917 hat also erneut das Prinzip eingeführt, dass der Kirche volles, ausschließliches und eigenes Recht zusteht sowohl in Betreff Wesen des ehelichen Bandes, als auch dessen untrennbare Wirkungen, und zwar hinsichtlich der Tatsache, dass die Ehe eine natürliche, zur sakramentalen Würde erhobene Institution ist (can. 1013). Infolgedessen richtet sich die Ehe Getaufter nach dem kanonischen Recht, dem göttlichen wie auch dem natürlichen, während der weltlichen Macht lediglich deren bürgerliche Wirkungen zu regeln zusteht – beispielsweise Eigentumsbeziehungen zwischen Ehegatten (…)" – DALLA TORRE, Giuseppe, *Lezioni di Diritto Ecclesiastico,* Torino 2000l, S. 129.

[5] „Und jene, die den Versuch unternähmen, die Ehe anderweitig zu schließen als unter Anwesenheit des Pfarrers (oder eines anderen Priesters mit Zustimmung des jeweiligen Pfarrers oder Ordinarius) und zwei oder drei Zeugen, macht die heilige Synode einer solchen Ehe gänzlich unfähig." – in: *Conciliorum Oecumenicorum Decreta,* Bologna 2002, S. 756.

[6] „Der *Code civil* aus dem Jahre 1804 beharrte zwar unbeirrbar auf obligatorischer bürgerlicher Ehe, erschwerte jedoch bedeutend die Scheidung. Wo das Gesetz nicht hinreichte, wurden Einschränkungen durch bürgerliche Moral ergänzt." – HATTENHAUER, Hans, *Evropské dějiny práva (Europäische Rechtsgeschichte),* Praha 1998, S. 468.

[7] „Die Ungebührlichkeiten gipfelten gerade in den Zeiten, als die protestantische Bewegung sowohl in die kirchliche Organisation, wie auch in Sachen der Glaubenslehre Verwirrung über Verwirrung brachten. Zur Zeit des Tridentinums, das erneut Ordnung in beiden Richtungen bringen sollte, drängten die weltlichen Regierungen, welche noch nicht aufhörten, die kirchliche Gesetzgebung und Rechtspflege in Eheangelegenheiten als ausschließliche Domäne der Kirche zu betrachten, nachdrücklich auf das Konzil wie auch auf den päpstlichen Stuhl, es mögen hinsichtlich der Form der Eheschließung genaue und klare Vorschriften herausgegeben werden, die von vornherein Sicherheit darüber garantierten, wer in wahrer Ehe lebt und in welchen Fällen das Zusammenleben von Mann und Frau nicht als Ehe betrachtet werden kann." – VACEK, Josef, *Manželské právo dle názorů církve římskokatolické u srovnání s hlavními názory moderních právních systémů (Das Eherecht gemäß der Auffassung der römisch-katholischen Kirche im Vergleich mit den vorwiegenden Ansichten moderner Rechtssysteme),* Brno 1922, S. 120–121.

[8] „Die Reformation untergrub die Grundfesten, welche die christliche Doktrin der Ehe gewährte, denn sie bestritt den sakramentalen Charakter der Ehe, ließ die Scheidung zu und bestand auf der Zustimmung von Eltern als unumgänglich für die rechtliche Gültigkeit der Ehe. (…) Ein Recht abzuschaffen ist jedoch nicht ganz leicht. Etwa von 1560 an beginnt sich ein protestantisches kanonisches Eherecht zu formen." – GAUDEMET, Jean, *Storia del diritto canonico Ecclesia et Civitas,* Milano 1998, S. 736.

[9] „Da sagten sie zu ihm: Wozu hat dann Mose vorgeschrieben, dass man der Frau eine Scheidungsurkunde geben muss, wenn man sich trennen will? Er antwortete: Nur weil ihr so hartherzig seid, hat Mose euch erlaubt, eure Frauen aus der Ehe zu entlassen. Am Anfang war das nicht so. Ich sage euch: Wer seine Frau entlässt, obwohl kein Fall von Unzucht vorliegt, und eine andere heiratet, begeht Ehebruch." Mt 19,7–9.

[10] Der Urgrund dieser Praxis, zu der Jesus eine ablehnende Stellung nimmt, findet sich im fünften Buch Mose: „Wenn ein Mann eine Frau geheiratet hat und ihr Ehemann geworden ist, sie ihm dann aber nicht gefällt, weil er an ihr etwas Anstößiges entdeckt, stellt er ihr eine Scheidungsurkunde aus, übergibt sie ihr und schickt sie aus seinem Haus fort." – Dt 24,1.

genblick des Inkrafttretens des bürgerlichen Gesetzes entfalten ihre Tätigkeit – allerdings nicht frei, sondern unter der Botmäßigkeit des absolutistischen Staates – nicht bloß die katholische Kirche[11] und die jüdische Synagoge[12], sondern auch die geduldeten und unter restriktiven Bedingungen lebenden protestantischen Kirchen des Augsburgischen und Helvetischen Bekenntnisses sowie die orthodoxe (prawoslawische) Kirche. Das österreichische Gesetzbuch wählte jedoch nicht den „napoleonischen" Weg und überführte nicht das Rechtsregime der sonst privaten Institution Ehe grundsätzlich unter die Staatsgewalt, was die spezifischen Merkmale der Ehe in den einzelnen Kirchen oder der jüdischen Religion verwischen würde. Stattdessen rezipiert es in seinen die Ehe betreffenden Bestimmungen einige der bedeutendsten von diesen Spezifika; allerdings nicht in Form von „Blankettverweisen" auf innerkirchliche Regelungen, wie dies heute in den Rechtsordnungen demokratischer Staaten gewöhnlich der Fall ist, sondern durch Einführung eigener Rechtsbestimmungen, deren Inhalt eben jene Konfessionsspezifika reflektiert. Das Gesetzbuch beinhaltet deshalb getrennt einige Gruppen von besonderen Normen, die nur für die Ehe von Katholiken angewandt werden, andere dann für die Ehe nichtkatholischer Christen, und andere wiederum für die Ehe von Juden.

III.

Der auffallendste Ausdruck dieses Vorgehens des Gesetzgebers ist die Inkorporierung des kanonischen Eherechts in der Frage der Untrennbarkeit der Ehe. Der Gesetzgeber berücksichtigt die katholische Auffassung der Untrennbarkeit, indem er für die Bürger katholischer Konfession das Ehehindernis des katholischen Glaubens (*impedimentum catholicismi*) festlegt, wie im § 111 des Gesetzbuches angeführt ist: „Der gültige eheliche Bund zwischen katholischen Personen kann lediglich durch den Tod eines der Ehegatten getrennt werden. Der Ehebund ist genauso untrennbar, wenn eine der Seiten bereits in der Zeit der geschlossenen Ehe der katholischen Religion angehörte[13]." Die Rezeption des kanonischen Rechts der katholischen Kirche in Sachen Eheunauflöslichkeit hat also eine gespaltene Auffassung von Bigamie zur Folge, nämlich eine bürgerrechtliche und eine kanonisch-rechtliche. Das Gesetzbuch formuliert das Bigamieverbot durch Ehehindernis für Bürger aller Konfessionen im § 62: „Ein Mann darf lediglich mit einer Frau und eine Frau zu derselben Zeit nur mit einem Mann verheiratet sein. Wer bereits vermählt war und erneut in den Ehestand zu treten beabsichtigt, muss rechtlich nachweisen, dass der frühere Ehebund gänzlich getrennt worden ist."

Der kanonische Rechtskodex aus dem Jahre 1917 trat zwar mehr als hundert Jahre später in Kraft als das österreichische Gesetzbuch, aber sein Sinn war, das bisher gültige, jedoch in unzählige und heterogene Quellen zerstreute kanonische Recht zu läutern und systematisch zu ordnen. In der Stoffsystematisierung bediente sich der kirchliche Kodex des Vorbildes großer Privatrechtskodifizierungen[14]. Er lässt sich also *cum grano salis* auch für den Vergleich des kanonisch-rechtlichen Ehemodells mit der im österreichischen bürgerlichen Gesetzbuch stehenden Regelung verwenden.

Im Einklang mit der ganzen, im Jahre 1811 wie heute gleichen kanonisch-rechtlichen Tradition fasst der Kodex der katholischen Kirche die Bigamie strikter auf als das bürgerliche Recht, das die Eventualität einer Scheidung zulässt. Das kanonische Recht hält für Bigamie bereits selbst den „Versuch" eine zweite Ehe zu schließen (*attentatio matrimonii*), wenn der untrennbare, kanonisch geschlossene Ehebund noch fortbesteht. Ein geschiedener und bürgerlich wiederverheirateter Katholik wird zum Bigamisten eben in diesem Sinne, wie dies die Formulierung des kanonisch-rechtlichen Hindernisses für das bestehende Eheband (*impedimentum vinculi*)[15] in dem Kodex von 1917 im can. 1069 ausdrückt: „§1. Ungültig bemüht sich um die Ehe jeder, der durch den früheren, möglich auch unter Vorbehalt des Glaubensprivilegs (*salvo privilegio fidei*) vollbrachten Ehebund gebunden ist. § 2. Auch wenn die frühere Ehe aus welchem Grunde auch immer ungültig oder getrennt ist, ist es darum nicht erlaubt eine zweite Ehe zu schließen, solange nicht rechtsgültig und mit Sicherheit nicht die Ungültigkeit oder Trennung der früheren Ehe festgestellt worden ist[16]." Die bisherige kanonisch-rechtliche, vom Kodex aus dem Jahre 1917 übernommene Disziplin

[11] „Die Stellung der katholischen Kirche, wenn auch erschwert durch die bindende Staatsgesetzgebung und nur eine beschränkte Wirkung kirchlicher Vorschriften, war prioritär. Die katholische Kirche wurde während der ganzen Toleranzzeit durch den Staat protegiert und bevorzugt, obwohl sie ihre frühere Autonomie sowie manche gesetzlichen Ausnahmen längst eingebüßt hatte." – TRETERA, Jiří Rajmund, *Stát a církve v České republice (Staat und Kirchen in der Tschechischen Republik)*, Kostelní Vydří 2002, S. 21.

[12] „In der gleichen Zeit, in der er das ‚Toleranzpatent' einführte, und schrittweise in den folgenden Jahren erließ der Kaiser Anordnungen, die die Rechte und Pflichten der Juden regelten und in ihre Jurisdiktion, Gemeindeverwaltung, in ihr wirtschaftliches, schulisches und teilweise auch persönliches und religiöses Leben bedeutend eingriffen." – PĚKNÝ, Tomáš, *Historie Židů v Čechách a na Moravě (Geschichte der Juden in Böhmen und Mähren),* Praha 1993, S. 86–87.

[13] Das Gesetzbuch führte dieses Hindernis nicht als etwas gänzlich Neues ein: „Der katholischen Lehre von der Unauflöslichkeit der gültigen Ehen auch von Nichtkatholiken trägt das sog. ‚Ehehindernis des Katholizismus' Rechnung, das in seinem Ursprung auf das Hofdekret vom 15. April 1789 zurückgeht (…)". – KNECHT, August, *Handbuch des katholischen Eherechts,* Freiburg im Breisgau 1928, S. 389.

[14] „Der Kodex gliedert sich in fünf Bücher nach dem Vorbild justinianischer Institutionen, wobei das erste Buch (wohl unter dem Einfluss des deutschen Bürgerlichen Gesetzbuches – BGB) stellt den allgemeinen Teil dar." – HRDINA, Antonín, *Kanonické právo. Dějiny pramenů, teorie, platné právo (Das kanonische Recht. Geschichte, Theorie, gültiges Recht),* Plzeň 2011, S. 46.

[15] „Es handelt sich aufgrund des naturrechtlichen Monogamieprinzips um ein Hindernis des natürlichen Rechts, deshalb geht es um ein undispensierbares Hindernis. Es erlischt gänzlich durch den Tod eines der Ehegatten sowie aufgrund der Ehetrennung durch kirchliche Autorität; relativ (wahrscheinlich) erlischt es durch die Erklärung der Ehe für ungültig von Anfang an (aufgrund rechtskräftiger Entscheidung) sowie durch erfolgte Todeserklärung des Ehepartners." – NĚMEC, Damián, *Manželské právo katolické církve s ohledem na platné české právo (Das Eherecht der katholischen Kirche in Hinsicht auf das gültige tschechische Recht)*, Kostelní Vydří 2006, S. 53.

[16] Das Vorrecht des Glaubens, bezeichnet als *privilegium paulinum,* definiert der kirchliche Kodex von 1917 im can. 1120 § 1: „Eine legitime Ehe zwischen Nichtgetauften, wenn auch vollendet, wird getrennt zugunsten des Glaubens kraft des paulinischen Privilegs."

verband mit der so verstandenen Bigamie auch eine Strafsanktion, bekräftigt im can. 2356 des Kodexes: „Bigamisten, d. h. diejenigen, welche, obwohl durch ihren Ehebund daran gehindert, einen Versuch unternehmen werden eine möglicherweise nur so genannte bürgerliche Ehe zu schließen, sind ohne weiteres ehrlos; falls sie, die Ermahnung ihres Ordinarius missachtend, in der unerlaubten geschlechtlichen Gemeinschaft verbleiben, sollen sie gemäß ihrem unterschiedlichem Verschulden exkommuniziert oder mit persönlichem Interdikt bestraft werden." Von diesem Blickwinkel aus gesehen, hinderte das durch das bürgerliche Gesetzbuch festgelegte *impedimentum catholicismi* die österreichischen katholischen Bürger daran, in eine mit kanonisch-rechtlicher Strafe verbundenen Lage zu fallen.

IV.

Anders verhält es sich natürlich mit den nichtkatholischen Kirchen.

Diese waren im Augenblick des Inkrafttretens des Gesetzbuches sowohl die evangelischen beider Konfessionen, als auch die „griechisch-östliche" Kirche, also orthodoxe, die sich zwar im Unterschied zu den aus der Reformation herkommenden Kirchen bis heute nach einem althergebrachten kanonischen Recht richtet, aber trotzdem die Ehetrennung toleriert[17]. Den nichtkatholischen Christen behielt das Gesetzbuch im § 115 eine taxative Aufzählung von fünf Ursachen vor, die eine bürgerliche Trennung ermöglichten und so formuliert waren, um nicht in Konflikt mir den innerkirchlichen Vorschriften der betreffenden Kirchen zu geraten. Namentlich: „Wenn eine Seite den Ehebruch oder ein Verbrechen begangen hat, für welches Verurteilung zu einer Gefängnisstrafe von wenigstens fünf Jahren auferlegt ist. Wenn eine Seite die andere böswillig verlassen hat und ihr Wohnort unbekannt ist, sowie wenn sie nicht der öffentlichen rechtlichen Vorladung binnen eines Jahres Folge leistete. Das Leben oder die Gesundheit bedrohende Nachstellungen. Wiederholte schwere Quälerei. Unwiderstehlicher gegenseitiger Ekel, aufgrund dessen die Seiten um Ehetrennung ersuchen." Hinsichtlich der Ehe der Juden wird vom Gesetzbuch ihr Vertragscharakter berücksichtigt, der die Willkür einer einseitigen Ausstellung der Scheidungsurkunde durch den Ehemann einigermaßen mildert[18]. Versöhnungsvermittler im Scheidungsprozess ist der zuständige Rabbiner, wie aus § 133 des Gesetzbuches hervorgeht: „Die gültig geschlossene Ehe der Juden kann aufgrund beiderseitigen freien Willens durch eine vom Mann der Frau gegebene Scheidungsurkunde getrennt werden. Die Seiten müssen jedoch zwecks ihrer Trennung vor dem Rabbiner oder Religionslehrer erscheinen und dieser soll bestrebt sein, sie durch nachdrückliches Zureden wieder zusammen zu bringen, und lediglich wenn solcher Versuch ohne Erfolg geblieben ist, ihnen ein schriftliches Zeugnis auszufertigen von der Erfüllung der ihm auferlegten Pflicht, die trotz allen Bemühens die Seiten von ihrem Vorhaben doch nicht abwenden konnte."

Eine weitere Kautel zur Sicherung der Stabilität jüdischer Ehen ist die Vorlegung des „Zeugnisses" vom Rabbiner der zuständigen Verwaltungsbehörde, welche, „falls aus den Umständen befunden wird, es gebe noch die Hoffnung auf eine erneute Vereinigung, die Ehetrennung nicht sofort genehmigen soll, sondern die Seiten auf einen Monat oder zwei abschlagen." Das endgültige Verdikt gehört dann dem Gericht, denn „falls die Seiten vor dem Gericht abermals zur Kenntnis gaben, sie seien aus freiem Willen bereit die Scheidungsurkunde zu geben und zu empfangen, soll die Urkunde für rechtsgültig gehalten und die Ehe damit getrennt werden". Der österreichische Staat war sichtbar an der Stabilität seiner Bürger interessiert; das kanonische Recht der katholischen Kirche kam dieser Absicht des Gesetzgebers eindeutig entgegen, während die liberale Vertragsauffassung der jüdischen Ehe den Staat dazu zwang, eigene einschränkende Mechanismen zwecks Förderung einer größeren Stabilität der Ehe der Juden anzuwenden.

V.

Das Institut vorehelicher Aufgebote wird vom österreichischen bürgerlichen Gesetzbuch aus der kanonisch-rechtlichen Tradition rezipiert, verankert bereits durch das erwähnte, am Schluss des Konzils von Trient herausgegebene *Tametsi*-Dekret[19]. Das Gesetzbuch verlangt strikt die Aufgebote für Bürger aller Religionskonfessionen zwecks Gültigkeit (*ad validitatem*) und unter Sanktion der Nullität der Ehe im § 69: „Zwecks Gültigkeit der Ehe wird das Aufgebot des Brautpaares verlangt sowie eine feierliche Zustimmungsäußerung. Ohne vorher stattgefundene Aufgebote darf keine Ehe geschlossen werden." Angesichts des Umstandes, dass das Gesetzbuch in der Zeit der religiösen Toleranz erschienen ist, werden gemäß § 71 parallele Aufgebote von Christen nichtkatholischer Konfessionen auch in katholischen Gotteshäusern verlangt: „Das Aufgebot muss an drei Sonntagen oder Feiertagen während der gewöhnlichen örtlichen Versammlungen in der Kirche des Pfarrsprengels stattfinden, und falls jedes der künftigen Eheseiten in einem anderen Sprengel wohnt, muss dies in beiden Sprengeln geschehen. Bei Ehen zwischen Bekennern nichtkatholischer christlicher Konfession muss das Aufgebot nicht nur in ihren Gebetshäusern vorgenommen werden, sondern auch in den katholischen Pfarrkirchen ihres jeweiligen Wohnsprengels, und bei Ehen

[17] „Die Kirche akzeptierte nie die sündhafte Ansicht sowie Gewohnheit der Menschen, eine erfolglose Ehe leicht zu trennen. Da sie Verständnis für die menschliche Natur hat und noch schlimmere Situationen vermeiden will, wich sie den Bedürfnissen der Gesellschaft und des Staates und erlaubt in einigen Fällen auch die Trennung der Ehe. So wurde die sog. Scheidung definiert" – BOUMIS, Panagiotis I., *Kanonické právo Pravoslávnej církvi (Das kanonische Recht der orthodoxen Kirche)*, Prešov 1997, S. 24.

[18] So wird die positive Entwicklung des Synagogenrechts berücksichtigt: „In früheren Zeiten konnte sich der Ehemann von seiner Frau ohne ihre Zustimmung scheiden lassen, aber bei den *Aschkenazim* ist solcher Akt seit der Zeit des Rabbis Gerschom Ben Jehuda (960–1028) verboten, ausgenommen Abtrünnigkeit der Ehefrau, ihr auffallend schlechtes Benehmen oder unheilbare Geisteskrankheit; zu dem Akt ist immerhin die Zustimmung von hundert Rabbinern zu holen (…)". – NEWMAN, Ja´akov – SIVAN, Gavri´el, *Judaismus*, Praha 1992, S. 166.

[19] „Die Synode, in den Spuren des heiligen, unter Innozenz III. gefeierten Laterankonzils schreitend, entscheidet darum, dass künftighin, bevor die Ehe geschlossen werden wird, durch den jeweiligen Pfarrer der Verlobten dreimal an den aufeinander folgenden Festen während der Messfeier öffentlich aufgeboten wird, zwischen wem die Ehe geschlossen werden soll; und nach dem Vollzug dieser Aufgebote, falls kein gesetzliches Hindernis entgegenwirkt, trete man an die Feier der Vermählung vor dem Angesicht der Kirche." – in: *Conciliorum Oecumeniroum Decreta…,* S. 755–756.

zwischen katholischer und nichtkatholischer christlicher Konfession nicht nur in der Pfarrkirche der katholischen Seite und im Gebetshaus der nichtkatholischen Seite, sondern auch im katholischen Gotteshaus des Sprengels, in dem die letztgenannten Seite ihren Wohnsitz hat." In dieser Bestimmung ist ein doppelter Parallelismus verborgen, gegeben durch eine eventuelle Unterschiedlichkeit des Domizils der Kontrahenten wie auch durch die Eventualität ihrer nichtkatholischen Konfession. Diese Bestimmung lässt ihr Verpflichtetsein dem Geist des Toleranzpatents erkennen, gemäß welchem „auch weiterhin der Vorrang in der öffentlichen Religionsausübung einzig der katholischen Religion bewahrt bleiben soll"[20]; sie scheint jedoch damals auch eine praktische Bedeutung gehabt zu haben, denn die absolute Mehrheit der Einwohner der österreichischen Monarchie gehörte immerfort zur katholischen Kirche. Das Gesetzbuch ließ allerdings im § 77 auch die Anwesenheit des nichtkatholischen Geistlichen bei Trauungen konfessionell gemischter Eheseiten zu: „Falls eine katholische Person die Ehe mit einer nichtkatholischen eingeht, muss die Erlaubnis vor dem katholischen Pfarrer in Anwesenheit zweier Zeugen erklärt werden; auf Gesuch der anderen Seite kann jedoch bei der feierlichen Handlung auch der nichtkatholische geistliche Administrator zugegen sein." Im Vergleich mit dem kanonischen Recht der katholischen Kirche, die die Anwesenheit eines nichtkatholischen Geistlichen bei der Hochzeitsfeier erst gemäß der gegenwärtigen, nach dem Zweiten vatikanischen Konzil erschienenen Rechtsregelung[21] zulässt, war hierin das bürgerliche Gesetzbuch zu Beginn des zweiten Dezenniums des 19. Jahrhunderts überraschend sehr liberal. Völlig ablehnend war allerdings die Stellungnahme des Gesetzgebers zu Ehen zwischen Getauften und Nichtchristen, wie es § 64 des Gesetzbuches bezeugt: „Die Eheverträge zwischen Christen und Personen, welche die christliche Religion nicht bekennen, können nicht gültig geschlossen werden." Der Kodex des kanonischen Rechts von 1917 fasste das bisherige Herantreten der katholischen Kirche an die Ehe zwischen getauften Katholiken und nichtgetauften Personen in der Hindernisformulierung *mixta religio* (gemischte Religion) zusammen, jedoch kann gemäß dem kanonischen Recht und im Unterschied zu der strikten Haltung des österreichischen Gesetzgebers von diesem Hindernis dispensiert werden[22].

VI.

In der einzigen Bestimmung seines § 63 rezipiert das Gesetzbuch auch zwei aus dem kanonischen Recht der katholischen Kirche stammenden Ehehindernisse, nämlich das Weihehindernis (*ordo*) und das Ordensgelübdehindernis (*vota*): „Geistliche, die bereits eine höhere Weihe empfangen haben, sowie Ordenspersonen, die bereits feierliche Gelübde der Ehelosigkeit abgelegt haben, können keinen gültigen Ehevertrag schließen." Der bürgerliche Gesetzgeber kommt der kanonisch-rechtlichen Regelung entgegen auch durch eine genauere Spezifikation, die besagt, um welche Weihen und welche Ordensgelübde es im gegebenen Falle geht. Die Disziplin der katholischen Kirche des lateinischen Ritus kannte bis zu der nach dem Zweiten vatikanischen Konzil (1963–1965) erfolgten Reform auch die sog. „niederen" Weihen, nämlich das Ostiariat, das Lektorat, das Exorzistat und das Subdiakonat, die für die Priesteraspiranten vielmehr einen propedeutischen Charakter hatten und noch keine endgütige Verpflichtung bedeuteten[23]. Erwägenswert ist außerdem, dass auf dem Gebiet Österreichs auch die katholische Kirche des byzantinischen sowie des armenischen Ritus[24] wirkten, welche beide auch verheiratete Männer zur Priesterweihe zulassen. Ebenfalls stellen für den bürgerlichen Gesetzgeber nicht alle Ordensgelübde ein Ehehindernis dar, sondern nur jene, die er als „feierlich", bezeichnet. Das kanonische Recht unterscheidet eben zwischen diesen feierlichen, „ewigen" Gelübden (*vota perpetua*) und den „einfachen", zeitlichen, nicht endgültigen, mit denen die kanonisch-rechtliche Disziplin noch gemäß dem Kodex des kanonischen Rechts von 1917 bloß das verbietende Hindernis (*impedimentum impediens*) verband, formuliert durch die Bestimmung des can. 1058 § 1: „Gehindert wird die Ehe durch das einfache Gelübde der Jungfräulichkeit, völliger Keuschheit, des Ledigbleibens, des Empfangs heiliger Weihe und des Lebens im Ordensstand." Eine so geweihte Person würde die Ehe auch vor der Kirche gültig kontrahieren, aus disziplinären Gründen jedoch unerlaubt. Der Staat hat sich zur normativen Subsumption dieser kanonisch-rechtlichen Norm ins Ehehindernis durch Ordensgelübde nicht verpflichtet. Ein wirklich trennendes, ausschließendes Hindernis unter der Sanktion der Ungültigkeit (*impedimentum dirimens*) verbindet das kanonische Recht erst mit den ewigen Gelübden. Es war daher genügend und angemessen, dass die österreichische bürgerrechtliche Regelung die kanonisch-rechtliche Normative lediglich in der Angelegenheit dauerhaft verpflichtender Ordensgelübde rezipiert hat.

VII.

Die Eherechtsregelungsphilosophie des Gesetzgebers des österreichischen Allgemeinen bürgerlichen Gesetzbuches, näm-

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[20] In: HRDINA, Ignác Antonín, *Texty ke studiu konfesního práva – II. Český stát (Texte zum Studium des konfessionellen Rechts – II. Der tschechische Staat)*, Praha 2007, S. 291.

[21] Gemäß can. 1137 § 3 des Kodexes des kanonischen Rechts von 1983 muss jedenfalls deutlich sein, wer von den beiden Geistlichen der eigentliche, die Trauung vollziehende ist; „nicht erlaubt ist daher eine Zeremonie, bei der der katholische Geistliche und zusammen mit ihm der nichtkatholische gleichzeitig jeder seine Zeremonie vollziehen und das Jawort zur Ehe verlangen".

[22] „Da das trennende Hindernis des Religionsverschiedenheit auf dem kirchlichen Rechte beruht, so kann die Kirchenbehörde auch vom demselben Dispense gewähren, unter der Voraussetzung, daß es die generell drohenden Gefahren in concreto beseitigt erscheinen, wichtige Dispensgründe vorliegen und die von der Kirche geforderten Kautelen geleistet werden." – SCHÖNSTEINER, Ferdinand, *Grundriss des kirchlichen Eherechts*, Wien 1937, S. 309.

[23] Aufgehoben bzw. restrukturalisiert im Motu proprio des Papstes Paul VI. *Ministeria quedam* aus dem Jahre 1972 – in: *Acta Apostolicae Sedis* LXIV (1972), S. 529–534.

[24] Die Bezeichnung „griechisch-katholisch" für die katholische Kirche des byzantinischen Ritus rührt vom österreichischen konfessionellen Recht her. „Durch das Dekret von Maria Theresia wurden den Orthodoxen alle Kirchen und Besitze weggenommen und den Uniaten überschrieben, die sich griechische Katholiken nennen. Diese Neubenennung ist aber inadäquat, unwahr und höhnisch und wird in den vatikanischen Dokumenten nicht verwendet." – PRUŽINSKY, Štefan, *Aby všetci jedno boli. Pravoslávie a ekumenizmus (Damit alle eins werden. Orthodoxie und Ökumenismus),* Prešov 1997, S. 52.

lich durch eigene spezifische Normen Bürgern der jeweiligen Konfession entgegenzukommen, gründete allerdings auch auf der prinzipiellen Annahme, jeder Bürger gehöre einer dieser Konfessionen an. Zu einer bedeutenden Modifizierung der grundsätzlich ausgewogenen Adaptation spezifischer Konfessionsformen der Ehe kam es aber infolge des Abschlusses eines Konkordats zwischen dem Heiligen Stuhl und dem österreichischen Kaiserreich[25], in dessen zisleithanischem Teil in der Zeitperiode 1855–1870 ein besonderes rechtliches Regime herrschte[26]. Die Durchführung des Konkordats sollte die Absicht des Kaisers realisieren, die im Art. II. formuliert ist: „Unser Wille ist es, dass die bischöflichen Ehegerichte in höchstem Maße ins Leben treten sollen auch in den Ländern, wo es sie bisher nicht gab, damit sie über die Eheangelegenheiten unserer katholischen Untertanen entscheiden (…) Den Zeitpunkt der Aufnahme ihrer Tätigkeit lassen wir bekannt geben, nachdem wir uns die Bischöfe angehört haben. Vorläufig werden verlautbart auch die nötigen Änderungen der bürgerlichen Gesetze über Eheangelegenheiten." Die spezifisch die Ehe von Katholiken betreffenden Bestimmungen des bürgerlichen Gesetzbuches wurden aus dem Gesetztext extrapoliert und die kirchlichen Gerichte richteten sich künftighin nach der neuen Instruktion mit nicht weniger als 251 Paragraphen[27].

Zwei Jahre vor der einseitigen Konkordatskündigung eliminierte jedoch das erste aus der Serie der sog. Maigesetze alle Konkordatserrungenschaften im Bereich des Eherechts der Katholiken; dies bezeugt dessen Titel selbst: „Gesetz, gegeben am 25. Mai 1868, Nr. 47 des Rgbl., durch welches die Bestimmungen des Kapitels 2 des Allgemeinen Gesetzbuches über das katholische Eherecht erneuert werden, die Gerichtsbarkeit in Eheangelegenheiten von Katholiken den weltlichen Gerichten zugeordnet wird, sowie bestimmt wird, wann die Eheschließung vor den weltlichen Behörden stattfinden kann[28]." Dieses Gesetz führt im Art. II eine subsidiäre bürgerliche Ehe für jene katholischen Nupturienten ein, die nach dem Kanonischen Recht die für eine gültige Eheschließung geforderten Bedingungen nicht erfüllen würden: „Im Falle, dass ein geistlicher Administrator, welchem dem Allgemeinen bürgerlichen Gesetzbuch gemäß zusteht die Ehe aufzubieten, aus irgendeiner Ursache, die in den Staatsgesetzen als Hindernis nicht anerkannt ist, den Verlobten das Eheaufgebot verweigern würde, (…) und sind sie des Willens, können sie ihre Ehe durch die weltliche Behörde aufbieten lassen, und erklären vor derselben Behörde feierlich ihre Eheeinwilligung.[29]" Die Tendenz zur Säkularisierung der Ehe wurde vollendet 1870 durch die rechtliche Anerkennung des selbständigen Standes „konfessionslos", wie es wiederum der Titel des betreffenden Komplexes neuer Rechtsnormen bezeugt: „Gesetz vom 9. April 1870 über die Ehe von Personen, die keiner von dem Staat anerkannten Kirche oder Religionsgesellschaft angehören, und über die Evidenzführung ihrer Geburt, Trauung und Tod." Damit wurde die Modifizierung des ursprünglichen Vorhabens des Gesetzgebers des Allgemeinen bürgerlichen Gesetzbuches konstituiert. Statt der Annahme, jeder Bürger sei Mitglied einer der christlichen Kirchen oder der jüdischen Religionsgemeinde, wird die Tatsache in Erwägung gezogen, dass einige Bürger sich zu keiner Religion mehr bekennen. Das ergibt ein Modell, das zwar auch weiterhin eine religiöse Ehe mit bürgerlichen Wirkungen vorzieht, das jedoch Personen, welche die durch die Rechtsvorschriften ihrer Religionsgemeinschaften gegebenen Bedingungen nicht erfüllen, sowie jenen, die konfessionslos sind, subsidiär die Möglichkeit einer nur bürgerlichen Eheschließung bietet[30]. Der Ausgangspunkt dieses die Verhältnisse im österreichischen Imperium reflektierenden Modells ist allerdings jene ursprüngliche Dreiteilung: katholische Christen – nichtkatholische Christen – Bekenner der jüdischen Religion; also das Schema, welches der österreichische Gesetzgeber des Allgemeinen bürgerlichen Gesetzbuches als den vom einseitigen Etatismus der napoleonischen Kodifikation abweichenden Weg glücklich gewählt hat.

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[25] Verlautbart durch das kaiserliche Patent Nr. 195/185 Rgbl.

[26] Gekündigt wurde das Konkordat wegen der kaum verfechtbaren Interpretation der Klausel *rebus sic stantibus*, nämlich „dass auf der Seite des Heiligen Stuhls infolge der Verkündigung des Dogmas von der Unfehlbarkeit des Papstes eine Änderung auf der Seite des Vertragssubjekts erfolgt ist. In diesem Zusammenhang klingen die Worte des Kaisers unaufrichtig: ‚Auch mir ist die Kündigung schwer gefallen, habe mich jedoch dazu entschlossen, weil dies das mildeste und meiner Meinung nach das richtigste Vorgehen gegen die misslichen Entscheidungen Roms war und weil sich damit nichts an den Rechten und der Position der Kirche in Österreich ändert'." – HRDINA, Ignác Antonín, *Texty ke studiu konfesního práva…*, S. 312.

[27] *Instructio judiciis ecclesiasticis Imperii Austriaci quoad causas matrimoniales,* Pragae 1856.

[28] „Das Verhältnis des offiziellen Österreichs zum Heiligen Stuhl war bekanntermaßen sehr gespannt – Pius IX. erwog nach der Herausgabe der Maigesetze ernstlich eine Exkommunikation des Kaisers – beide Seiten waren jedoch bemüht, nach außen hin den Schein vollkommenen Einverständnisses zu wahren." – KADLEC, Jaroslav, *Přehled církevních českých dějin (Abriss der tschechischen Kirchengeschichte),* Roma 1987, S. 209.

[29] „Erst nachdem die liberale Ideenbewegung der nachfolgenden Zeit den Staat dazu gezwungen hatte, die Tragweite des Konkordats von 1855 insofern aufzuheben, dass er für die Katholiken die Gültigkeit des Bürgergesetzes von 1811 erneuerte und die Angelegenheiten der Ehe den Gerichten zuwies, konnte er nicht jene Erwägungen außer Acht lassen, die darauf hinwiesen, wie manchmal auch bei ernsthaften Katholiken Fälle vorkommen können, wo die römisch-katholische Kirche eine Trauung verbietet, ohne dass ein Einvernehmen mit der staatlichen Gesetzgebung vorläge. So kam schließlich die Staatsverwaltung zu der Meinung, dass für Fälle dieser Art, d. h. für jene, in denen das geistliche Amt den Verlobten die Vermählung abgesprochen hat aus dem Grunde, den die staatliche Gesetzgebung nicht anerkennt, ist es möglich eine Abhilfe zu schaffen, indem den Verlobten das Recht gegeben wird, die vorgesehene Trauungszeremonie vor einem Angestellten der Staatsmacht zustande kommen zu lassen." – VACEK, Josef, *Manželské právo …,* S. 131–132.

[30] Eine Ausnahme bildete die islamische Konfession, anerkannt im Zusammenhang mit der Annexion von Bosnien und Herzegowina im Jahre 1908 durch ein besonderes Gesetz Nr. 159/1912 Rgbl., „gemäß welchem die Anhänger des Islam nach dem Hanefit-Ritus als religiöse Gesellschaft anerkannt werden". Es war insbesondere die Furcht vor polygamen Ehen, die die Gesetzgeber bewog, eine selbständige, von der einfachen rechtlichen Anwendung des allgemeinen Gesetzes Nr. 68/1874 Rgbl., über Ankerkennung von Kirchen unterschiedliche Regelung zu formulieren. Für die Muslime wurde obligatorische Zivilehe eingeführt: „Die Gesetzform war notwendig, weil hier keine Bedingungen vorhanden waren für die Anwendung des erwähnten Gesetzes von 1874; es mangelte an Gewährleistung wenigstens einer Religionsgemeinde und auch die Lehre der islamischen Kirche stimmt in manchem nicht mit den Gesetzen und Sitten unserer Länder überein. Daher wurde die Anerkennung der Lehre und der Sitten der erwähnten Religionsgesellschaft lediglich mit der Einschränkung ausgesprochen – ‚sofern diese nicht den staatlichen Gesetzen widersprechen'." – HOBZA, Antonín, *Poměr mezi státem a církví. Jeho vývoj a přítomný stav. (Das Staat-Kirche-Verhältnis. Entwicklung und gegenwärtiger Stand),* Praha 1931, S. 31.

Die Bedeutung des österreichischen Gesetzes über den Versicherungsvertrag aus dem Jahre 1917*

Karel Schelle**

Abstract

The 1917 Insurance Contract Act was an important milestone in the development of enactments in the field of liability in insurance system. However, the whole act never became effective. Above all, enactments dealing with special types of insurances have not come into force for a long time. Though, the Insurance Contract Act was indisputably important. In the period of the First Czechoslovak Republic it became the main condition of a new reform, which consisted in a new 1934 Insurance Act.

Key words: *Austria; Czechoslovakia; insurance system; insurance contract; liability.*

Am Anfang der Abhandlung betreffend das Gesetz über den Versicherungsvertrag aus dem Jahre 1917 sind vor allem einige mit seinem Inkrafttreten und mit seinem Bezug zur vorherigen Versicherungsordnung zusammenhängende Tatsachen zu erläutern. Die Zeitperiode seit der Erlassung der Versicherungsordnung bis den Zeitpunkt des vorausgesetzten Inkrafttretens des Gesetzes über den Versicherungsvertrag (1. Januar 1919) kann in drei Etappen eingeteilt werden:

1. Etappe – seit 1. Januar 1916 (Inkrafttreten der im Art. I unter der Nr. 1–20 angeführten Vorschriften der Versicherungsordnung) bis 1. Januar 1918 (die Aufhebung der Versicherungsordnung durch die Bestimmung des § 170 des Gesetzes über den Versicherungsvertrag). In dieser Zeitperiode galten also die Bestimmungen der Versicherungsordnung, die neben den alten Normen in Kraft trat. Die Reform betraf keine Seeversicherung, Rückversicherung und Losversicherung, sowie keine Versicherungsverträge, die von keiner gesetzmäßig errichteten und zum Betriebe zugelassenen Versicherungsanstalt abgeschlossen wurden.
2. Etappe – das Jahr 1918; am 1. Januar sollten die übrigen Normen der Versicherungsordnung in Kraft treten. Wie schon oben angeführt wurde, dies geschah nicht, und die bisher geltenden Normen der Versicherungsordnung wurden durch entsprechende Normen des Gesetzes über den Versicherungsvertrag ersetzt.
3. Etappe – seit 1. Januar 1919; die übrigen Teile des Gesetzes über den Versicherungsvertrag sollten in Kraft treten.

Für die Abgrenzung des Wirkungsbereichs des Gesetzes über den Versicherungsvertrag waren die §§ 164 und 165 einschlägig. Die Vorschriften dieses Gesetzes fanden keine Anwendung auf:

a) auf Verträge der nach dem Gesetz vom 16. Juli 1892, RGBl. Nr. 202 errichteten Hilfskassen. Diese Abgrenzung war wichtig in der Richtung, dass die Versicherungsordnung diese Verträge beinhaltete. Der Grund, warum diese Verträge in das Gesetz über den Versicherungsvertrag nicht einbezogen wurden, bestand darin, dass es nicht gelungen ist, das Gesetz über die Hilfskassen an das Gesetz über den Versicherungsvertrag anzupassen;
b) auf alle Versicherungsverhältnisse der Träger einer Versicherung öffentlichen Rechtes (z.B. Krankenkassen, die auch sog. kleine Lebensversicherung betrieben);
c) auf die mit Versicherungsanstalten im Bereiche der Pensionsversicherung der Angestellten geschlossenen Ersatzverträge;
d) auf die Seeversicherung, Rückversicherung und Losversicherung

Das Gesetz über den Versicherungsvertrag bestand in der schon damals eingelebten Auffassung des Versicherungsvertrages, der folgende charakteristische Züge auswies: das Wesen des Vertrages sollte die Unsicherheit betreffend das Ergebnis beim Vertragsabschluss sein. Im Falle des Versicherungsvertrages wurde diese Unsicherheit durch die Bindung der Leistung des Versicherungsnehmers an Erscheinen eines gewissen unsicheren, jedoch möglichen Umstandes (eines Versicherungsereignisses) erzielt.

Die Unsicherheit betreffend das Versicherungsereignis konnte verschieden sein: es musste nicht bekannt sein, ob es zum Versicherungsereignis überhaupt kommt; die Unsicherheit konnte jedoch auch nur die Intensität der hervorgerufenen Folgen oder sogar nur den Zeitpunkt des Eintrittes dieser Folgen betreffen. Es war nur davon abhängig, d.h. wie das Wertverhältnis gegenseitiger Vertragsleistungen wird.

Zu weiteren Wesensmerkmalen des Versicherungsvertrages gehörte die Tatsache, dass die Leistung des Versicherungsneh-

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** Doc. JUDr. Karel Schelle, CSc., Lehrstuhl für Rechts- und Staatsgeschichte, Juristische Fakultät der Masaryk-Universität Brno, Tschechische Republik.

mers zur Deckung bestimmter Vermögensbedürfnisse dient. In diesem Merkmal unterschied sich die Versicherung von einem Lotteriespiel, das gleiche Züge mit der Versicherung aufwies, jedoch der Unterschied bestand gerade im Wirtschaftszweck. Nach Prof. Hermann-Otavský gehe es in Falle der Lotterie nur um einen Gewinn, während ein Schutz vor nachteiligen wirtschaftlichen Folgen bestimmter Umstände im Falle der Versicherung gesucht werde.

Als drittes Merkmal des Versicherungsvertrages wurde die Art und Weise der Festsetzung der Leistung des Versicherungsnehmers betrachtet; sie hatte den Charakter eines durchschnittlichen Äquivalents.[1]

Wie schon oben angeführt wurde, das Gesetz über den Versicherungsvertrag trat als Ganzes gleich nicht in Kraft. Am 1. Januar 1918 trat nur ein Teil des Gesetzes (s. § 168) in Kraft und im Wesentlichen ersetzte sie diejenigen Normen der Versicherungsordnung, die im Jahre 1916 in Kraft traten. Die übrigen Vorschriften dieses Gesetzes sollten am 1. Januar 1919 in Kraft treten. Die politischen mit dem Zerfall der habsburgischen Monarchie und der Entstehung der selbständigen Tschechoslowakei zusammenhängenden Ereignisse verursachten jedoch, dass der Anfang des Inkrafttretens weiter verschoben wurde und dieser Teil des Gesetzes trat formell nie in Kraft. Aus diesem Grunde konzentriert sich diese Abhandlung vor allem auf die Bestimmungen, die eine praktische Auswirkung auf die Entwicklung des Versicherungswesens in den böhmischen Ländern in der Zeit der Ersten Tschechoslowakischen Republik hatten.

Aus den allgemeinen Vorschriften galt vor allem eine Mischung von mannigfaltigen Bestimmungen §§ 9–21 mit Ausnahme des § 13 Abs. 1 und des § 17. Es handelte sich um Bestimmungen über die Neuausfertigung einer vernichteten oder abhanden gekommenen Versicherungsurkunde und über die Ersatzversicherungsurkunde, über das Recht des Versicherungsnehmers auf Abschrift, über das Schiedsgericht, über den örtlichen Gerichtsstand, über vertragliche Anzeigen und Erklärungen, über die Kenntnis des Versicherers von einem anzuzeigenden Umstand, über die Wohnungsänderung des Versicherungsnehmers, über die Vertragsstrafe, über stillschweigende Verlängerung des für bestimmte Zeit vereinbarten Versicherungsverhältnisses und dauernde Versicherung und über den Einfluss des Konkurses und des Ausgleichsverfahrens auf den Versicherungsvertrag.

Eine zusammenhängende Gruppe von geltenden Vorschriften stellten die Bestimmungen über die Entrichtung der Versicherungsprämie dar (§ 23 Abs. 4, §§ 24–27 und 31). Es wird hier vor allem festgelegt, dass der Zeitraum eines Jahres als Versicherungsperiode galt, wenn die Prämie nicht nach kürzeren Zeitabschnitten bemessen war. Die Prämie hatte den Charakter einer Bringschuld, die jedoch in eine Holschuld umwandelte, wenn der Versicherer die Prämie an mindestens drei aufeinanderfolgenden Terminen beim Versicherungsnehmer einheben ließ. Als Zeitpunkt der Zahlung galt, wenn die Prämie durch Vermittlung der Post gezahlt wurde, der Zeitpunkt, in dem der Prämienbetrag durch die Post abgesendet oder bei der Post angewiesen oder eingezahlt worden war. Sofern nicht schon die Art der Einzahlung dem Zahlenden eine ausreichende urkundliche Bescheinigung verschaffte, waren Prämienzahlungen, ohne dass es eines Begehrens des Zahlers bedarf, vom Versicherer zu bestätigen. Fällige Prämien oder Zahlungen musste der Versicherer, wenngleich der Versicherungsnehmer der Zahlung nicht zustimmte, auch vom Pfandgläubiger oder vom Begünstigten, der ein Recht auf die Leistung des Versicherers erworben hat, annehmen. Schließlich wurde auch eine wichtige Frage des Rechtes des Versicherers geregelt, der den Betrag einer fälligen Prämienforderung von der ihm obliegenden Leistung in Abzug bringen konnte, wenngleich diese nicht dem Versicherungsnehmer, sondern einem Dritten geschuldet wurde.

Von außerordentlicher Bedeutung für den Versicherungsnehmer war die Bestimmung des § 32 des Gesetzes über den Versicherungsvertrag über die Verwirkungsabreden. In dieser Vorschrift schützte der Gesetzgeber den Versicherungsnehmer vor einem unbegründeten Verlust seines Anspruches auf die Leistung des Versicherers wegen der Verletzung zahlreicher Informationspflichten, Sicherheitsvorschriften usw., die im Vertrag vorgeschrieben waren. In dieser Richtung wurde es vor allem zwischen den Pflichten unterschieden, die vor und nach dem Versicherungsfall erfüllt werden mussten. In der ersten Kategorie konnte der Versicherer bei einer Verletzung der Obliegenheit, solange der Versicherungsfall nicht eingetreten ist, den Vertrag innerhalb eines Monates, ohne Kündigungsfrist kündigen, es sei denn, dass dem Versicherungsnehmer ein Verschulden an der Verletzung nicht zur Last fiel. Ist jedoch der Versicherungsfall eingetreten, so konnte sich der Versicherer auf die Verwirkungsabrede nicht berufen, wenn dem Versicherungsnehmer ein Verschulden nicht zur Last fiel oder wenn die Verletzung einer Obliegenheit, die behufs Verminderung der Gefahr oder behufs Verhütung einer Gefahrerhöhung übernommen worden ist, weder den Eintritt des Versicherungsfalles noch den Umfang der dem Versicherer obliegenden Leistung beeinflusst hat. Was die zweite Kategorie anbelangt, auf eine Verwirkungsabrede konnte sich der Versicherer nur berufen, wenn dem Versicherungsnehmer Vorsatz oder grobe Fahrlässigkeit zur Last fielen. Diese Vorschriften fanden keine Anwendung auf Vereinbarungen, durch die dem Versicherer das Recht eingeräumt wurde, bei Verletzung einer ihm gegenüber zu erfüllenden Obliegenheit eine Vertragsstrafe zu verlangen oder den Vertrag zu kündigen, sofern eine Kündigungsfrist von mindestens einem Monat vereinbart worden ist.

Eine ähnliche Schutzbedeutung für den Versicherungsnehmer hatten die Bestimmungen des §§ 39 und 41 des Gesetzes über den Versicherungsvertag. Vor allem wurde hier die Pflicht des Versicherungsnehmers festgesetzt, den Eintritt des Versicherungsfalles unverzüglich, nachdem er von ihm Kenntnis erlangt hat, dem Versicherer anzuzeigen. Ferner war er verpflichtet, dem Versicherer auf Verlangen jede zur Feststellung des Versicherungsfalles oder des Umfanges der Leistung des Versicherers erforderliche Auskunft zu erteilen und ihm die zu diesem Zweck erforderlichen Erhebungen zu gestallten. Die Belege konnte der Versicherer gegen Vergütung der Barauslagen insoweit fordern, als ihre Beschaffung dem Versicherungsnehmer „billigerweise

[1] Čapek, J.: Pojištění soukromé (smluvní). In: Slovník veřejného práva československého, Band. III. Brno 1934, S. 147ff.

zugemutet werden konnte“. Der Versicherer konnte sich auf Vereinbarungen berufen, nach denen der Beweis bestimmter Tatsachen nur durch bestimmte Beweismittel erbracht werden konnte, oder nach denen die Leistung des Versicherers erst mit der Feststellung des Anspruches durch Anerkenntnis, Vergleich oder rechtskräftiges Urteil fällig werden sollte. Die Geldleistungen des Versicherers waren mit dem Ablauf eines Monats nach der Anzeige des Versicherungsfalles fällig, bzw. 14 Tage nach dem Abschluss der Erhebungen zur Feststellung des Versicherungsfalles und des Umfanges der Leistung des Versicherers oder der Bezugsberechtigung. Der Versicherer konnte sich nicht auf eine Vereinbarung, durch die der Versicherer von der Verpflichtung, Verzugszinsen zu zahlen, befreit wird. Waren die nötigen Erhebungen bis zum Ablauf eines Monates seit der Anzeige des Versicherungsfalles noch nicht beendigt, so konnte der Versicherungsnehmer eine Abschlagzahlung nach Lage der Sache verlangen.

Es folgten weitere schwerwiegende Bestimmungen. Es handelte sich um § 50 Abs. 1, der den Begriff des versicherten Interesses als Gegentandes des Versicherungsvertrages einführte. Nicht nur die Sache selbst, sondern das wirtschaftliche Interesse stellten den Gegenstand des Vertrages dar. Wenn die Versicherungssumme den jeweiligen Wert des versicherten Interesses erheblich überstieg, konnten beide Vertragsparteien verlangen, dass die Versicherungssumme, unter verhältnismäßiger Minderung der Prämie für die künftigen Versicherungsperioden herabgesetzt wurde. Neben dem versicherten Interesse führte das Gesetz im § 63 auch den Begriff „Interesse an der Versicherung“ ein. Es handelte sich um eine Durchführung des Grundsatzes „ohne Gefahr keine Versicherung“, wobei die Existenz der Versicherungsgefahr in Bezug auf den Versicherungsnehmer beurteilt wurde. Der Begriff des Interesses an der Versicherung erschien auch im Falle der Unfallversicherung.

Die Vorschriften über die Veräußerung versicherter unbeweglicher Sachen (§§ 64–68) sollten die Kontinuität bei der Veräußerung von Liegenschaften, sowie im Falle der Erbschaft für einen neuen Erwerber erhalten. Beiden Seiten wurde jedoch das Recht eingeräumt, den Vertrag im Falle der Veräußerung einer unbeweglichen Sache zu kündigen. Das Schicksal der Versicherung verfolgte hier das Schicksal der Sache und löste sie sich von der Person los. Bei der Veräußerung einer versicherten beweglichen Sache erlosch das Versicherungsverhältnis mit dem Ausscheiden der Sache aus der Gewahrsame der Veräußerers. Im Falle der Hagelversicherung und der Viehversicherung galten Sondervorschriften der §§ 94 und 109.[2]

Im besonderen Teilen des Gesetzes über den Versicherungsvertrag (II. Hauptstück) traten nur Vorschriften betreffend die Versicherung zum Schutze des Versicherungsnehmers und der geschädigten Person, ggf. zum Schutze der öffentlichen Interessen in Kraft. Zugleich traten die Vorschriften über die Exekution auf Ansprüche aus der Versicherung in Kraft (§§ 147–150).

Weil die Teile des Gesetzes über den Versicherungsvertrag betreffend die einzelnen Versicherungsarten meistens nicht in Kraft traten, galt in dieser Richtung die alte Rechtsregelung, bzw. die einzige Quelle blieben die allgemeinen Versicherungsbedingungen einzelner Versicherungsanstalten.

Zu Hauptarten der Schadenversicherung gehörten die Feuer-, Hagel-, Vieh-, Transport- und Haftpflichtversicherung.

Im Falle der Feuerversicherung haftete der Versicherer für den Schaden, der durch Brand, Blitzschlag oder durch Explosion der im Vertrag bezeichneten Art verursacht worden ist. Der Versicherer hatte den durch die Zerstörung oder Beschädigung der versicherten Sachen entstandenen Schaden zu ersetzen, soweit die Zerstörung oder Beschädigung auf der unmittelbaren oder mittelbaren Einwirkung des Feuers beruhte oder bei dem Brand durch Löschen, Niederreißen, Ausräumen oder ähnliche Maßregeln verursacht wurde. Das gleiche galt auch, wenn die versicherten Sachen bei dem Brand abhandengekommen sind. Im Gegenteil haftete der Versicherer nicht für einen Brand- oder Explosionsschaden, der durch ein Erdbeben oder durch kriegerische Ereignisse verursacht wurde oder der die Folge eines Aufruhres oder Aufstandes war. Die Feuerversicherung war besonders aktuell in der Zeit des Ersten Weltkrieges. Weil der Versicherer für keine Brandschäden haftete, die durch kriegerische Ereignisse verursacht worden sind, war es nötig, diese Fälle genau abzugrenzen. Deswegen wurde eine Reihe von Entscheidungen des Obersten Gerichtshofes in Wien in dieser Zeit erlassen; sie reagierten auf dieses Problem auch in der Situation, wenn dieser Teil des Gesetzes noch nicht in Kraft trat. Nur des Interesses halber werden die einige Erkenntnisse angeführt:

„Die Kriegsklausel eines Versicherungsvertrages sind im Falle der Zertrümmerung einer versicherten Auslagescheibe durch ein russisches Militärauto im Kriegsgebiete unandwendbar“.[3]

„Die Bedeutung der Kriegsklausel bei der Feuerversicherung: ursächlicher Zusammenhang des wenn auch nur durch Unvorsichtigkeit entstandenen Feuerschadens in einem von feindlichen Militär besetzten Gebäude mit dem Kriege.“[4]

„Ein durch die Unvorsichtigkeit des im Kriegsgebiete einquartierten Militärs in den belegten Gebäuden ausgebrochenes Schadensfeuer ist als durch den Krieg veranlasst anzugehen und somit durch die normale Versicherung nicht gedeckt.“[5]

„Die Bedeutung der Kriegsklausel bei der Feuerversicherung: Keine Ersatzpflicht für den im Orte einer feindlichen Invasion durch anarchistisches Gesindel herbeigeführten Schaden“.[6]

„Kein Entschädigungsanspruch für Einbruchsdiebstähle in einem vom Feinde besetzten Orte selbst bei Aufrechterhaltung der öffentlichen Ordnung“.[7]

„Kein Entschädigungsanspruch für Diebstähle in einer im engern Kriegsgebiet gelegenen und zeitweilig vom heimischen Militär besetzten Villa“.[8]

[2] Hermann-Otavský, K.: Soukromé pojišťovací právo československé podle zákona z 23. prosince 1917; Sedláček, J.: O materiálně-právních funkcích pojistky, Praha 1911; Kašpárek, M.: O uzavření smlouvy pojišťovací podle práva československého, Brno 1920.

[3] Entscheidung des Obersten Gerichtshofes in Wien vom 15. Februar 1916, R II 65/16, Juristische Blätter 1916, S. 369.

[4] Entscheidung des Obersten Gerichtshofes in Wien vom 31. Oktober 1916, Rv IV 327/16, Zentralblatt 1917, S. 167.

[5] Entscheidung des Obersten Gerichtshofes in Wien vom 31. Oktober 1916, Rv IV 269/16, Juristische Blätter 1917, S. 105.

[6] Entscheidung des Obersten Gerichtshofes in Wien vom 19. Dezember 1916, Rv IV 382/16, Zentralblatt 1917, S. 276.

[7] Entscheidung des Obersten Gerichtshofes in Wien vom 22. Mai 1917, Rv IV 190/17, Zentralblatt 1917, S. 824.

[8] Entscheidung des Obersten Gerichtshofes in Wien vom 26. Juni 1917, Rv VII 49/17, Zentralblatt 1917, S. 826.

Aus dem Grunde der Vollständigkeit sind die wichtigsten Rechtsnormen aus anderen Bereichen anzuführen, die sich zur Problematik der Feuerversicherung bezogen:

- die Verordnung des Ministeriums für Handel, Gewerbe und öffentliche Bauten vom 14. September 1854, betreffend die Erteilung von Konzessionen für Privateisenbahnbauten vom 14. September 1854 Nr. 238 RGBl. Nach § 10 Buchs. b) waren die Eisenbahnunternehmungen verpflichtet, alle im Zusammenhang mit dem Eisenbahnbetrieb entstandenen Schäden an öffentlichem oder Privatgute zu vergüten (also auch die durch Funkeln der Lokomotive entstandenen Feuer);
- die Feuerpolizeiordnung (für Böhmen – Gesetz vom 25. Mai 1879, Nr. 45 LGBl. für das Königreich Böhmen; für Mähren – Gesetz vom 5. Mai 1873, Nr. 35 LGBl. für die Markgrafschaft Mähren; für Schlesien – Gesetz vom 2. Februar 1873, Nr. 20 LGBl. für das Herzogtum Ober- und Niederschlesien);
- Erlass der Statthalterei vom 31. Juli 1872, Z. 38.004 (Nr. 49) betreffend die Pflicht der Gemeindeämter, mit dem Feuer im Umgebung der leicht brennbaren Objekte schonend umzugehen und die Feuerlöschanlagen sicherzustellen;
- Erlass der Statthalterei vom 30. Mai 1874, Z. 28.667 (Nr. 406) betreffend die Pflicht der Gemeinden, für die Isolierung der Strohfeime zu sorgen;
- Erlass der Statthalterei vom 6. Juli 1874, Z. 37.073 (Nr. 420) betreffend die Pflicht der Gemeinden, die Inhaber der Liegenschaften über die Wichtigkeit der Feuerversicherung zu belehren;
- Verordnung des Handelsministeriums vom 18. Juli 1906, Nr. 176 RGBl. (Gasregulativ).

Im Falle der Hagelversicherung haftete der Versicherer für den Schaden, der an den versicherten Bodenerzeugnissen durch die Einwirkung des Hagelschlages entstanden ist. Diese Art der Versicherung wurde als eine der riskantesten überhaupt betrachtet.[9]

Weiteres Kapitel des Gesetzes über den Versicherungsvertrag wurde der Viehversicherung gewidmet. Es ist interessant, auf einige Besonderheiten in der Entwicklung dieser Versicherung Aufmerksam zu machen. Diese Versicherungsart wurde erst nach der Einführung des Gesetzes betreffend ansteckende Viehkrankheiten und nach einer konsequenten Durchführung des Veterinärdienstes lebensfähig. Angesichts eines erheblichen Risikos fand diese Versicherungsart kein Verständnis bei Privatversicherungsanstalten und aus diesem Grunde wurden einzelne Versicherungsanstalten für Viehversicherung unter der Aufsicht von Landesbehörden errichtet. Diese Landesversicherungsanstalten beruhten auf einer Grundidee der gegenseitigen Haftung und des freiwilligen Beitrittes und wurden von den Ländern unterstützt. Die Frage der Viehversicherung war in den letzten zwanzig Jahren des 19. Jahrhunderts sehr lebhaft. Davon zeugt auch der erwähnte Versuch in Mähren, wo das Gesetz vom 23. März 1883 betreffend die Hebung der Rindviehzucht und die Rindviehversicherung Nr. 43 LGBl. in Anknüpfung an § 41 des Gesetzes vom 29. Februar 1880 betreffend die Abwehr und Tilgung aufsteckender Tierkrankheiten Nr. 35 RGBl. eine obligatorische Viehversicherung einführte. Zur raschen Tilgung der Lungenseuche, des Milzbrandes, der Maul- und Klauenseuche unter den Rindern wurde aus Beiträgen der Viehbesitzer ein Versicherungsfond gebildet, aus welchem den betreffenden Besitzern eine Entschädigung zu gewähren war, soweit diesen nicht eine Entschädigung aus dem Staatsschatze gebührte. Dieser Versuch hielt jedoch nicht lange aus, weil diese obligatorische Versicherung im Jahre 1892 aufgehoben wurde.[10] Eine gründlichere Rechtsregelung der Viehversicherung beinhaltete erst das Gesetz über den Versicherungsvertrag, bzw. die Versicherungsordnung von 1915 für Privatversicherungsanstalten. Bei der Viehversicherung haftete der Versicherer für den Schaden, der durch den Tod (Verenden, Nottötung) des versicherten Tieres entstand.

Der Versicherer haftete nicht:

- für den infolge einer Seuche oder Krankheit entstehenden Schaden, für den nach dem Gesetz aus öffentlichen Mitteln Ersatz zu leisten war, mochte auch der Ersatzanspruch durch eine Verletzung seuchenpolizeilicher Vorschriften verwirkt worden sein;
- für den Schaden, der durch kriegerische Ereignisse verursacht wurde oder der die Folge eines Aufruhrs oder Aufstandes war;
- für den Schaden, der durch Brand, Blitzschlag, Explosion, Überschwemmung oder Erbeben verursacht wurde;
- für den Schaden, der bei oder aus Anlass der Beförderung versicherter Tiere auf Eisenbahnen, Schiffen oder anderen Transportmitteln sowie anlässlich des damit verbundenen Ein- und Ausladens entstand;
- für den Schaden, der durch die Verwendung von Pferden auf Rennbahnen oder für andere Sportzwecke entstand.

Genauso wie im Falle der Feuerversicherung konnte sich der Versicherer nur auf die Vereinbarung berufen, dass der Versicherer bei einer Entfernung des versicherten Tieres aus einem bestimmten Orte von der Verpflichtung zur Leistung frei sein sollte, wenn die Entfernung länger als acht Tage gedauert hat.[11]

Eine weitere Art der Schadensversicherung stellte die Transportversicherung dar. Dabei trug der Versicherer die Gefahren, denen Güter bei ihrer Beförderung zu Lande oder auf Binnengewässern oder Schiffe bei der Binnenschifffahrt ausgesetzt waren. Bei der Versicherung eines Schiffes haftete der Versicherer auch für den Schaden, den der Versicherungsnehmer dadurch erlitt, dass es infolge eines Zusammenstoßes des versicherten Schiffes mit einem anderen Schiffe dritten Personen Schaden zu ersetzen hatte. In diesem Zusammenhang ist auf das Gesetz vom 29. Juli 1912, Nr. 15 RGBl., betreffend die Haftung für den Zusammenstoß von Schiffen Aufmerksam zu machen.

[9] Horn, J.: Pojistné právo, S. 461ff.; Horst, E.: Základy pojišťování, S. 118ff; Viškovský: Pojištění krupobití v Čechách, jeho nedostatky a náprava, 1897.

[10] Näher dazu Chaloupecký, J. – Marvan, M.: Pojišťování hospodářských zvířat v habsburské monarchii. In: K dějinám pojištění hospodářských zvířat, Praha, Česká státní pojišťovna 1985, S. 28–29.

[11] Horn, J.: Pojistné právo, S. 471; Horst, E.: Základy pojišťování, S. 241ff.

Der Versicherer haftete nicht:

- bei der Versicherung von Gütern für den Schaden, der vom Absender oder vom Empfänger vorsätzlich oder fahrlässig verursacht wurde;
- für den Schaden, der durch natürliche Beschaffenheit der Güter, durch mangelhafte Verpackung oder durch Ratten oder Mäuse verursacht wurde, die durch einen Unfall herbeigeführt wurde, für den der Versicherer zu haften hatte;
- bei der Versicherung eines Schiffes für den Schaden, der daraus entstand, dass das Schiff bei Antritt der Reise in einem nicht fahrtüchtigen Zustand oder nicht gehörig ausgerüstet oder bemannt gewesen ist;
- für den Schaden, der durch kriegerische Ereignisse verursacht wurde, oder der die Folge eines Aufruhrs oder eines Aufstandes war;
- für den infolge Verzuges bei der Beförderung durch Konjunktur-, Kurs- oder Zinsenverluste zugefügten Schaden;
- für den Schaden, der durch Eisgefahr oder durch Explosivstoffe herbeigeführt wurde.

In Österreich-Ungarn wurde die Transportversicherung fast ausschließlich von den Aktiengesellschaften betrieben.

Die Haftpflichtversicherung stellte die letzte Schadensversicherung dar, die sowohl von der Versicherungsordnung, als auch vom Gesetz über den Versicherungsvertrag geregelt wurde. Bei dieser Versicherung war der Versicherer verpflichtet, den Versicherungsnehmer für die Leistung schadlos zu halten, die dieser infolge einer während der vereinbarten Zeit eingetretenen Tatsache aufgrund des im Vertrage bezeichneten Haftpflichtverhältnisses an einen Dritten zu bewirken hatte.[12]

Aus dem Grunde der Vollständigkeit ist wiederum nötig, die in österreichischen Kronländern geltenden gesetzlichen Bestimmungen anzuführen, die eine gesetzliche Haftpflicht auferlegten:

- Allgemeines Bürgerliches Gesetzbuch von 1811 (§§ 970, 1293–1341);
- Gesetz vom 5. März 1869, Nr. 27 RGBl., betreffend die Haftung der Eisenbahnunternehmungen für die durch Ereignungen auf Eisenbahnen herbeigeführten körperlichen Verletzungen oder Tötungen von Menschen;
- Verordnung des Ministerium für Handel vom 14. September 1854, Nr. 238 RGBl., betreffend die Erteilung von Konzessionen für Privateisenbauten;
- Gesetz vom 9. August 1908, Nr. 162 RGBl., über die Haftung für Schäden aus dem Betriebe von Kraftfahrzeugen;
- Forstgesetz vom 3. Dezember 1852, Nr. 250 RGBl. (§ 34 – Triftfahrt);
- Jagdgesetz für Böhmen vom 1. Juni 1866, Nr. 49 LGBl.; für Mähren vom 13. Januar 1903, Nr. 123 LGBl.;
- Berggesetz vom 23. Mai 1854, Nr. 146 RGBl.;
- Wassergesetz vom 30. Mai 1869, Nr. 93 RGBl.;
- Gesetz vom 2. Dezember 1884, Nr. 72 LGBl. für Königreich Böhmen, betreffend die Anpflanzung und den Schutz von Baumalleen oder Baumreihen längst der öffentlichen Straßen (§ 11 – Haftung für Gesinde bei der Beschädigung der Straßenalleebäume);
- Gesetz vom 29. Juli 1912, Nr. 15 RGBl., betreffend die Haftung für den Zusammenstoß von Schiffen;
- Gesetz vom 28. Dezember 1887, Nr. 1 RGBl. (1888), betreffend die Unfallversicherung der Arbeiter, in der Fassung der Novellen vom 29. April 1912, Nr. 96 RGBl. und vom 21. August 1917, Nr. 363 RGBl.

Das dritte Hauptstück des Gesetzes über den Versicherungsvertrag wurde der Lebensversicherung gewidmet. Diese Versicherungsart entwickelte sich in den österreichischen Ländern ziemlich langsam. Auch trotz einer langsamen Entwicklung entwickelten sich um Jahrhundertwende einige ihre Arten. Emanuel Horst führt folgende Versicherungsarten an: Versicherung für Heiratsausstattung, für Kinderversicherung, Kapitalversicherung für die Zeit des Militärdienstes, Versicherung der Gesellschafter, Versicherung der allgemein nützlichen Betriebe oder Stiftungen, Versicherung zur Deckung der Erbschaftsgebühren, Versicherung für landwirtschaftliche Kreise (Hypothekarlebensv ersicherung).[13] Diese Aufzählung war jedoch nur demonstrativ.

Das Gesetz über den Versicherungsvertrag ging von den eingelebten allgemeinen Versicherungsbedingungen der bedeutenden österreichischen Versicherungsanstalten aus und regelte die Lebensversicherung allgemein im § 130. Bei der Lebensversicherung war der Versicherer verpflichtet, nach dem Eintritt des Versicherungsfalles den im Vertrag festgesetzten Betrag an Kapital oder Rente zu zahlen. Nach dem Charakter des Versicherungsfalles unterschied die Rechtspraxis und – theorie folgende Gruppen und Arten der Versicherung:

A. Den Versicherungsfall konnte entweder der Tod der Person, auf dessen Leben die Versicherung abgeschlossen wurde („Versicherungsträger“), oder die Tatsache darstellen, dass diese Person nach Ablauf einer bestimmten Frist nicht mehr leben wird. Die vom Versicherer getragene Gefahr stand im Grunde gegeneinander. Im ersten Falle handelte es sich um eine Todesgefahr, im zweiten Falle um eine Erlebensgefahr. Nach dieser Maßgabe wurden alle Formen der Lebensversicherung in zwei Gruppen eingeteilt: Versicherung auf den Todesfall und Versicherung auf den Erlebensfall.
B. Die zweite Gruppe bildeten die Versicherungen, wo der Versicherungsfall sicher war; unsicher war nur die Zeit, wann er eintritt. Dementsprechend wurden zweierlei Formen unterschieden:
   1) Die Versicherung mit einer unbedingten Obliegenheit des Versicherers zur Leistung, wohin diese Hauptformen der Versicherung auf den Todesfall gehörten: lebenslängliche Versicherung (Leistung nach eingetretenem Tode), sog. gemischte Versicherung (Leistung nach der Erlangung eines bestimmten Alters oder Todes, falls dieser früher eintritt), gegenseitige Versicherung für den Fall des Überlebens (nach dem Tode einer Person trat die Leistung gegenüber einer anderen Person ein) und Versicherung mit einer bestimmten Zahlungszeit (die Leistung am einen vorher festgesetzten Tag).

[12] Horn, J.: Pojistné právo, S. 494; Horst, E.: Základy pojišťování, S. 125ff.
[13] Horst, E.: Základy pojišťování, S. 255ff.

2) Die Versicherung mit einer bedingten Obliegenheit des Versicherers zur Leistung umfasste alle Versicherungen auf den Erlebensfall, weiter alle Rentenversicherungen, sog. kurze Versicherungen auf den Todesfall und einseitige Versicherung auf den Überlebensfall. Diese Versicherungsarten waren in den meisten Fällen noch in ihren Anfängen, demungeachtet wurden sie zu einer guten Grundlage für ihre spätere Entwicklung in der Zeit der Ersten Tschechoslowakischen Republik.
3) Die Versicherung konnte auf das Leben des Versicherungsnehmers oder eines anderen genommen werden. Mit der Lebensversicherung befassten sich in Österreich sowohl die Aktiengesellschaften, als auch die gegenseitigen Versicherungsanstalten, wobei die Aktiengesellschaften bald begannen, eine Oberhand zu haben.

C. Neben der angeführten Lebensversicherung entwickelte sich jedoch in Österreich die Krankenversicherung selbständig, dessen Charakter der vertraglichen Lebensversicherung ähnlich war, jedoch sie war viel gründlicher geregelt (s. die Rechtsnormen aus dem Bereich der Sozialversicherung) und durch die Krankenkassen sichergestellt.[14]

D. Die letzte im Gesetz über den Versicherungsvertrag geregelten Versicherungsart stellte die Unfallversicherung dar. Gleichfalls konnte sich dieses Fachgebiet seinen Platz im Privatversicherungswesen lange nicht finden, wobei es langjährige Traditionen im Weltmaßstab hatte. Aus den österreichischen Aktiengesellschaften gründete erst Assicurazioni Generali in Terst eine selbständige Aktiengesellschaft zur freien Entwicklung dieses Gebietes im Jahre 1882 (Erste Allgemeine in Wien). Seit diesem Moment verbreitete sich diese Versicherungsart, wenn auch ihr Umfang im Vergleich zum Deutschen Reich unvergleichbar gering war. Nach der amtlichen Veröffentlichung des österreichischen Innenministeriums befassten sich mit der Unfallversicherung: 5 heimische Aktiengesellschaften, 2 gegenseitige Anstalten, 2 ungarische Aktiengesellschaften, 8 ausländische Aktiengesellschaften und eine ausländische gegenseitige Versicherungsanstalt. Genauso wie bei der Lebensversicherung hatten die Aktiengesellschaften eine Übermacht.[15]

Zu den Hauptgründen, warum die österreichischen Versicherungsanstalten dieser Versicherungsart keine Aufmerksamkeit widmeten, gehörte die fehlende Rechtsregelung. Erst das Gesetz über den Versicherungsvertag aus dem Jahre 1917, bzw. die Versicherungsordnung von 1915 sollten die Schaffung einer Rechtsgrundlage bedeuten.

Genauso wie bei der Lebensversicherung war der Versicherer verpflichtet, die im Vertrag bestimmte Kapital- oder Rentenzahlung oder die sonst vereinbarte Leistung zu bewirken, wenn derjenige, auf dessen Person die Versicherung genommen wurde, von einem Unfall der im Vertrage bezeichneten Art betroffen wurde. Die Versicherung konnte gegen Unfälle, die dem Versicherungsnehmer, oder gegen Unfälle, die einem anderen zustießen, genommen werden. Das Gesetz sah zugleich die Möglichkeit einer Gesamtversicherung und einer Versicherung zugunsten Dritten vor. Es grenzte auch die Schuldherbeiführung des Unfalles und die zeitliche Befristung der Haftung ab.[16]

Wie schon oben angeführt wurde, bis Erlassung des Gesetzes über den Versicherungsvertrag vermisste das österreichische Versicherungsrecht eine gesetzliche Regelung dieser Versicherungsart. Eine völlig andere Situation herrschte dabei im Falle der Sozialversicherung, wo eine ziemlich ausführliche Regelung der Krankenunfallversicherung seit den achtziger Jahren des 19. Jahrhunderts schrittweise kristallisierte. Zum Vergleich führen wir einige Grundangaben an:

Schon im Jahre 1887 wurde das Gesetz über Unfallversicherung der Arbeiter, im Jahre 1888 das Gesetz über die Krankenversicherung der Arbeiter erlassen und ein Jahr später wurden die unzureichenden Vorschriften des Berggesetzes über die Bruderladen durch neue Vorschriften ersetzt. Im Jahre 1892 wurden die sog. eingetragenen Hilfsladen errichtet und zwei Jahre später (1894) wurde die Novelle des Gesetzes über die Unfallversicherung erlassen. Die endgültigen Änderungen dieser Versicherungsart fielen dann in das Jahr 1917.[17] In der Zeit, wann sich genauere Rechtsnormen betreffend die private Unfallversicherung in Österreich zu formieren begannen, hatte die schon im Bereich der durch öffentliche Institutionen sicherstellende Unfallversicherung eine längere Tradition.

Das fünfte Hauptstück des Gesetzes über den Versicherungsvertrag beinhaltete Schluss- und Übergangsbestimmungen, welche den Anwendungsbereich dieses Gesetzes und seinen Wirksamkeitsbeginn regelten.

Das Gesetz über den Versicherungsvertrag von 1917 trat als Ganzes nie in Kraft. Vor allem die Bestimmungen betreffend die Sonderversicherungsarten blieben für eine lange Zeit nur auf dem Papier. Eine unbestreitbare Bedeutung hatte es jedoch. In der Zeit der Ersten Tschechoslowakischen Republik wurde es zur Hauptvoraussetzung für eine neue Reform, die auf einem neuen Versicherungsgesetz von 1934 beruhte.

[14] Horn, J.: Pojistné právo, S. 565ff.; Flieder, K.: O některých pochybných otázkách v řádu pojišťovacím v oboru životního pojištění, Právník 1917, S. 59, 161, 231, 264; Wagner, K.: Das Problem vom Risiko in der Lebensversicherung, Jena 1898; Svoboda, K.: Hospodářská a právní povaha životního pojištění, Praha 1916; Kubíčel, Fr.: Pojišťování anormálních životů; Frucl-Dörslig: Das Recht des Lebensversicherungsvertrages, Berlin 1924; Horn, R.: Die Todeserklärung Kriegsverschollener, Wien 1916.

[15] Horst, E.: Základy pojišťování, S. 306ff.

[16] Horn, J.: Pojistné právo, S. 654 ff.

[17] Dazu z.B. Lukáš, J.: Úvod do československého sociálního pojištění, Praha; Houser, J.: Vývoj hornického pojištění, Praha 1960.

Die Ersitzung im tschechischen und römischen Recht*

Pavel Salák**

Abstract

The article describes the evolution of the usucaption in civil codes on territory of Czech Republic in 19th and 20th century in the comparison to Roman Law. The bearing of the Czech legal regulation on the Roman law changed in the time. In the Austrian civil code (ABGB) we can see great influence. On the other side, the Civil Code 40/1964 Coll. deleted the institutes of possession and usucaption from the czech legal regulation and both were reverted in the novelization in 1982. From five conditions of usucaption in Roman law (res habilis, titulus, bona fides, possessio, tempus) constitutes Civil Code today res habilis, legitimate possessio and tempus. Bona fides and also titulus are included in the term "legitimate possession".

Key words: *usucaption; private law; Roman law; Czech Republic; civil code.*

Der Bezug der neuzeitlichen Gesetzbücher zum römischen Recht ist gerade beim Eigentumserwerb durch Ersitzung am meisten offensichtlich. Im 19. und 20. Jahrhundert kam es in der Rechtsregelung in den böhmischen Ländern schrittweise zu einer starken Inspiration durch das römische Recht, zur Schwächung seines Einflusses, nachstehend zu seiner Umdrehung und sogar zur Aufhebung dieses Instituts.

1. Die Entwicklung des Instituts der Ersitzung im römischen Recht

Vom beträchtlichen Alter der Ersitzung zeugt u.a. auch die Tatsache, dass wir einen Nachweis über diese Art des Eigentumserwerbs schon im Zwölftafelgesetz finden. Aus fünf bekannten Voraussetzungen der Ersitzung: *res habilis, titulus, bona fides, possessio* und *tempus* kannte die damalige Rechtsreglung nur drei – *res habilis, possessio* und *tempus.* M. T. Cicero berichtet über den Eigentumserwerb durch Ersitzung unter der Bezeichnung *usu auctoritas*. Worin der Unterschied zwischen der Früh- und Spätersitzung bestand, ist heute nicht genau klar, jedoch die meisten Autoren vertreten die Ansicht, *usu auctoritas* sei ein Institut des Beweisrechts gewesen.[1] Ursprünglich wurde das Gewicht nicht auf den Eigentumserwerb gelegt, sondern auf die Pflichtentziehung, etwas weiter nachzuweisen. Das Zwölftafelgesetz löste die Frage des guten Glaubens wahrscheinlich nicht, demungeachtet legte schon seine Rechtsregelung fest, dass es unmöglich ist, eine gestohlene Sache zu ersitzen (Gai II, 45). Zu dieser Zeit wurde die Ersitzungszeit genauso festgesetzt; sie betrug ein Jahr bei Mobilien, bei Grundstücken zwei Jahre. Auch diese verhältnismäßig kurze Zeit macht auf alte Wurzeln dieses Instituts aufmerksam (auf die Zeit, als sich Rom auf einem sehr kleinen Gebiet erstreckte). Die zweijährige Ersitzungszeit bei Grundstücken hängt offensichtlich mit dem Bodenbewirtschaftungszyklus zusammen; in einem dreijährigen Zyklus wurden nacheinander Wintergetreide und Sommergetreide angebaut, danach herrschte ein Jahr Brache, in dem sich der Boden erholen konnte.[2]

Was die weiteren zwei Ersitzungsvoraussetzungen, also *titulus* und *bona fides* anbelangt, erscheinen sie erst später in der vorklassischen Zeit und es gibt Vermutungen, dass sie ursprünglich nur eine einzige Voraussetzung bildeten. In der klassischen Zeit trennte sich *titulus* als selbständige Bedingung ab.[3] In dieser Gestalt blieb das Institut der Ersitzung *(usucapio)* bis 6 Jahrhundert n. Chr. unverändert. Dies beeinflusste vor allem die Tatsache, dass es sich um ein Institut des Zivilrechts handelte, dessen Charakter sehr rigid war.

Die Möglichkeit seiner Ausnutzung in den Provinzen schien als sehr gering zu sein und deswegen kam es im Laufe der Zeit auch zur Einführung des Instituts *longi temporis praescriptio*. A prirori bezog sich dieses Institut auf die sich in den Provinzen befindenden Grundstücke, aber zusätzlich kamen noch der Ausländer- und Mobilienschutz hinzu. Dieses Institut reagierte

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** JUDr. Pavel Salák, Ph.D., Lehrstuhl für Rechts- und Staatsgeschichte, Juristische Fakultät der Masaryk Universität Brno, Tschechische Republik.

1 Capandová, P., Inšittút vydržania v Rímskom práve a v občianskom zákonníku 1950. In: *COFOLA 2008*, *Europeanization of the national law, the Lisbon Treaty and some other legal issues* (CD ROM). Brno: Tribun EU s.r.o., 2008, S. 987–997.

2 Bělovský, P., Vydržení v římském právu a komparativním pohledu. In: *Ad Notam*, 2007, Nr. 4, S. 118.

3 Bělovský, P., Vydržení v římském právu a komparativním pohledu. In: *Ad Notam*, 2007, Nr. 4, S. 110.

mehr flexibel auf die Tatsache, dass sich das Reich der Römer wesentlich erweiterte. Am Ende des 2. Jahrhunderts n. Chr. wurde es auf zehn Jahre festgesetzt, sofern der Eigentümer und der Besitzer aus einer Gemeinde stammten; stammten sie aus verschiedenen Gemeinden, verlängerte sich die Zeit auf zwanzig Jahre.[4] Die Voraussetzungen für *longis temporis praescriptio* waren prinzipiell dieselben, wie bei der Ersitzung *(usucapio)*; neben der Länge der Zeit gab es noch mehrere Unterschiede, z.B. es war nicht möglich, das Eigentum des Kaisers oder eines Minderjährigen zu ersitzen.

Im Jahre 531 n. Chr. führte die justinianische Kodifikation einen Zusammenschluss beider Institute in sog. ordentliche Ersitzung (C 7, 31, 1) durch, demungeachtet entstand noch ein Institut, das als außerordentliche Ersitzung – *praescriptio longissimi temporis* – bezeichnet wird (errichtet durch Konstitution von 528). Diese Bestimmung gewährte einen Schutz der Person, gegen die die Klage des Eigentümers schon unwirksam war, weil er schon den Besitz jener Sache verlor. Aufgrund dieser Konstitution konnte diese Person also *actio in rem* auf Rückgabe der Sache benutzen, die sich im ihren Besitz befand. Der gutgläubige Erwerb der Sache (*bona fides*) stellte dafür eine Voraussetzung dar. Weil sich dieses Institut auf die Verjährung stützt, die Bedingungen unterscheiden sich von einer ordentlichen Ersitzung; es war also kein Titel notwendig und auf diese Art und Weise konnte man auch einige ersitzungsfähige Sachen erwerben.[5] Die Zeit bei der außerordentlichen Ersitzung betrug dreißig, bzw. vierzig Jahre (im Falle der Kirchen und frommer Stiftungen).

Die ordentliche Ersitzung hat *usucapio* und *praescriptio longi temporis* verbunden, was sich vor allem in der Ersitzungszeit widerspiegelt. Bei beweglichen Sachen betrug sie drei Jahre, bei unbeweglichen Sachen zehn, bzw. zwanzig Jahre (wiederum mit Unterscheidung *inter praesentes* und *inter absentes*). Der Grund für die Festsetzung dieser Ersitzungszeit bestand darin, dass der Eigentümer der Sache genug Zeit für seine Verteidigung hätte; dies wird in der justinianischen Institutionen ausdrücklich angeführt (Just. Inst. II, 6, pr.). Der Wohnort wurde nicht nach der Gemeinde beurteilt, sondern er bezog sich auf die Provinz.

2. Die Ersitzung im ABGB (Gesetz Nr. 946/1811 JGS)[6]

Der erste Unterschied zwischen römischem Recht und dem ABGB besteht in der Einreihung dieses Instituts in die Kodifikation. Wenn auch das ABGB die Einteilung der römischen Institutionen (seien sie von Justinian oder von Gaius) übernahm und nur gering änderte, reiht es die Ersitzung nicht in den zweiten den Sachenrechten gewidmeten Teil, sondern in den dritten Teil zusammen mit dem Institut der Verjährung ein. In dieser Einreihung kann man jedoch einen Einfluss anderer römischrechtlicher Quellen – des Justinianischen Kodex sehen. Von der Inspiration des römischen Rechts zeugt auch die Tatsache, dass ein Modell zweier Ersitzungsarten, also der ordentlichen und außerordentlichen Ersitzung, übernommen wurde. Das Gesetzbuch benutzt diese Begriffe in diesem Sinne ausdrücklich nicht, demungeachtet arbeiten die Kommentare und die Fachliteratur mit diesen geläufig.

Im Prinzip berücksichtigt die ordentliche Ersitzung nach dem ABGB die Bedingungen, die schon das römische Recht kannte, nichtsdestoweniger ist die Einreihung manchmal einigermaßen verschieden. Im Falle des Titels und des guten Glaubens handelt es sich um keine selbständigen Gründe, denn sie sind dem Besitz untergeordnet. Im Falle des Titels ging es um einen rechtmäßigen Besitz (§ 1461) und im Falle des guten Glaubens sprechen die §§ 1463 und 1464 ABGB über redlichen und echten Besitz. Wie sich aus dem § 1461 ABGB ergibt, es wurden bloß die Titel des abgeleiteten Erwerbs anerkannt; wo keine Verträge über die Eigentumsübertragung gaben, gab es auch keine ordentliche Ersitzung.[7] Im Vergleich zum römischen Recht, ließ das ABGB weder einen Originaltitel, noch einen putativen Titel zu. Im Falle des putativen Titels bestand auch ein Streit zwischen den klassischen Juristen.[8]

3. Die Ersitzung im tschechoslowakischen Bürgerlichen Gesetzbuch von 1950 (Gesetz Nr. 141/1950 Slg.)

Das Bürgerliche Gesetzbuch von 1950 sollte das Recht den neuen gesellschaftlichen Bedingungen anpassen und zugleich führte es eine Vereinheitlichung des bürgerlichen Rechts auf dem Gebiet der ganzen Tschechoslowakei durch. Der Gesetzgeber hat ein Gesetz geschaffen, das sich durch größere Einfachheit und Verständlichkeit im Vergleich zu seinem Vorgänger kennzeichnete. Diese Vereinfachung betraf selbstverständlich auch das Institut der Ersitzung. Ihre Rechtsregelung wurde nur in vier Paragraphen (115–118) enthalten.

Aus der Ersitzung waren die sich im sozialistischen Eigentum befindenden Sachen ausgeschlossen (§ 115). Zu den Ersitzungsvoraussetzungen gehörten der rechtsmäßige Besitz und die Ersitzungszeit. Der Titel als Ersitzungsvoraussetzung verschwand aus der Rechtsregelung.[9] Die Frage des Besitzes gehörte zu weiterer Änderung; es wurde ein gutgläubiger Besitzer verlangt (§ 145). Im Unterschied zum römischen Recht waren *bona fides* und *possessio* in einer Bedingung verbunden.[10]

Die letzte Änderung stellt die Verkürzung der Ersitzungszeit dar. Bei beweglichen Sachen betrug sie drei und bei Lie-

[4] Heyrovský, L., *Dějiny a systém římského práva soukromého*. 4. Auflage. Praha: J. Otto, 1910, S. 368–369.
[5] Heyrovský, L., *Dějiny a systém římského práva soukromého*. 4. Auflage. Praha: J. Otto, 1910, S. 371.
[6] Mit Rücksicht auf das Thema dieses Aufsatzes wurde die ungarische Rechtsregelung ausgelassen. Dazu vgl. Salák, P., Tendence naší občanskoprávní kodifikace v 19. a 20. století na příkladu institutu vydržení. In: *Vývoj právních kodifikací: sborník z mezinárodní vědecké konference*. Brno: Masarykova univerzita, 2004, S. 136–149.
[7] Rouček, Fr., Sedláček, J., *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a Podkarpatské Rusi*. 6. Teil. Praha: V. Linhart, 1937, S. 453.
[8] Bělovský, P., Vydržení v římském právu a komparativním pohledu. In: *Ad Notam*, 2007, Nr. 4, S. 112–113.
[9] Bělovský, P., Vydržení v římském právu a komparativním pohledu. In: *Ad Notam*, 2007, Nr. 4, S. 111.
[10] Capandová, P., Inšittút vydržania v Rímskom práve a v občianskom zákonníku 1950. In: *COFOLA 2008, Europeanization of the national law, the Lisbon Treaty and some other legal issues* (CD ROM). Brno: Tribun EU s.r.o., 2008, S. 996–997.

genschaften zehn Jahre, denn die ursprüngliche Zeit entsprach nicht *„dem beschleunigten Tempo des Wirtschaftslebens."*[11]

4. Die Ersitzung im tschechoslowakischen Bürgerlichen Gesetzbuch von 1964 (Gesetz Nr. 40/1964 Slg. in der Fassung bis 1990)

Die Erlassung einer neuen Verfassung der Tschechoslowakischen Sozialistischen Republik im Jahre 1960 brachte auch eine Bemühung um Änderung des bisherigen bürgerlichen Rechts mit sich. Die Grundlage stellten die Richtlinien für Rekodifikation des Zentralkomitees der Kommunistischen Partei der Tschechoslowakei vom 8. Dezember 1960 dar. Das neue Bürgerliche Gesetzbuch sollte sich nur auf die Regelung der Beziehungen der Bürger bei Befriedigung ihrer persönlichen Bedürfnisse beschränken.

Dieses Gesetzbuch hob eine Reihe von klassischen privatrechtlichen Instituten, unter anderem auch selbständige Regelung des Besitzes und der Ersitzung auf. Der Begründungsbericht zum Bürgerlichen Gesetzbuch von 1964 führt an, dass es für diese Institute keinen Platz mehr gebe; der Erwerb des Eigentumsrechts durch Ersitzung stünde im Widerspruch zu den Regeln des sozialistischen Zusammenlebens.[12] Gegenüber den Eigentümern stellte die Ersitzung ein sehr hartes Instrument dar und darüber hinaus wurde sie für verfassungswidrig gehalten, denn sie sollte den verfassungsrechtlich garantierten Schutz des persönlichen Eigentums verletzen.[13] Weiter wurde diese Tatsache durch frühere Argumentation ergänzt und zwar, die Ersitzung erscheine in der sozialistischen Gesellschaft nur am selten.[14] Beide Institute blieben also nur im Gesetzbuch über den internationalen Handel erhalten. Zu einem ähnlichen Schritt kam es in keinem sozialistischen Land, sogar auch in der UdSSR nicht. Seit 1979 erschienen schrittweise die Bemühungen um eine Novellierung des Bürgerlichen Gesetzbuches und damit auch die Bemühungen um Wiedereinführung des Instituts des Besitzes und der Ersitzung.[15] Es geschah durch das Gesetz Nr. 131/1982 Slg.

Es kam jedoch zu keiner Rückkehr zur Rechtsregelung des Bürgerlichen Gesetzbuches von 1950 – es wurde eine völlig neue Rechtsregelung geschaffen. Das Gesetz sprach nur über den rechtsmäßigen (gutgläubigen) Besitz und es fehlten sogar die Bestimmungen über die Vermutung der Berechtigung des Besitzes. Die Änderung betraf auch *res habilis*; es konnte sich nur um solche Sache handeln, die zum Gegenstand des persönlichen Eigentums werden konnte. In Beziehungen zu den Liegenschaften entstand eine Sonderkonstruktion der Ersitzung zu Gunsten Anderen. Statt des Besitzers erwarb der Staat das Eigentum zum ersessenen Grundstück. Die Person, die das Grundstück ersaß, hatte nur einen Anspruch auf den Abschluss einer Vereinbarung über persönliche Nutzung nach § 200 des Bürgerlichen Gesetzbuches (Gesetz Nr. 40/1964 Slg. in damaliger Fassung).[16]

5. Aktuelle Rechtsregelung (Gesetz Nr. 40/1964 Slg. in aktueller Fassung)

Nach der im Jahre 1991 durchgeführten Novellierung (Gesetz Nr. 509/1991 Slg.) wurde das Institut der Ersitzung in § 134 verschoben, wobei die Rechtsregelung im Prinzip ähnlich blieb, wie in den Jahren 1950–1989. Es verschwanden die Bestimmungen, die sich zum sozialistischen Eigentum und zur sozialistischen Auffassung des Eigentumsrechts bezogen.

Der berechtigte Besitzer wird Eigentümer einer beweglichen Sache, wenn er sie ununterbrochen drei Jahre im Besitz hat, und einer unbeweglichen Sache, wenn er sie ununterbrochen zehn Jahre im Besitz hat *(tempus)*. Auf diese Weise kann nicht Eigentum an Sachen erworben werden, die nicht Gegenstand von Eigentum sein können oder die nur Eigentum des Staates oder gesetzlich bestimmter juristischen Person sein können *(res habilis)*.

Es ist umstritten, ob das Gesetz auch den Titel verlangt, denn wie sich aus der Rechtsprechung ergibt, für einen berechtigten Besitz wird nur ein solcher Besitz gehalten, der sich auf einen Titel stützt. Andererseits muss der Titel nicht direkt gegeben werden; es ist auch der putative Titel zugelassen (NS 22 Cdo 1398/2000).[17]

Aus der Rechtsprechung ergibt sich auch der Unterschied der objektiven und römischrechtlichen Auffassung des *bona fides*. Zum Beispiel ist es nicht möglich, ein Grundstück zu ersitzen, wenn der Vertrag über die Übertragung der Liegenschaft nur in mündlicher Form abgeschlossen wurde. Dies gilt auch in der Situation, dass die Person subjektiv überzeugt ist, dass eine solche Form hinreicht und über obligatorische Schriftform nicht weiß.[18]

In der Zeitperiode zwischen 1950–1989 fehlt das Institut der außergewöhnlichen Ersitzung völlig in der Rechtsregelung. In der Entwicklung kann man also eine gewisse Annäherung beider Institute – der ordentlichen und außerordentlichen Ersitzung – und ihre Vereinigung sehen, denn heute ermöglicht die tschechische Rechtsordnung auch die Ersitzung einer gestohlenen Sache.[19] Meinem Erachten nach handelt es sich um keine Absicht des Gesetzgebers, sondern eher um eine Folge der Vereinfachung dieses Institutes.

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[11] *Občanský zákoník*, Praha: Orbis, 1950, (§§ 115–118 – Kommentar zum Bürgerlichen Gesetzbuch; besonderer Teil), S. 242, 243.
[12] Knapp, V. – Luby, Š. [Hrsg.], *Československé občainske právo. I. zväzok*. Bratislava, 1973, S. 313.
[13] Stenographischer Bericht aus der 24. Sitzung der Nationalversammlung der Tschechoslowakischen Sozialistischen Republik, Prag den 26. Februar 1964. http://www.psp.cz/eknih/1960ns/stenprot/024schuz/s024003.htm.
[14] Kol.: *Nové občianske právo*. Bratislava, 1967, S. 153.
[15] Trimaj, I., K návrhu zásad novelizácie občianského zákonníka. In: *Právny obzor*, 1980, Nr. 1, S. 35 ff.
[16] Svoboda, J., K novele občianského zákoníka. In: *Socialistické súdnictvo*, 1983, Nr. 3–4, S. 16.
[17] Eliáš, K. [Hrsg.], *Občanský zákoník – Velký akademický komentář. 1. svazek § 1–487*. Praha: Linde Praha, 2008, S. 569.
[18] Eliáš, K. [Hrsg.], *Občanský zákoník – Velký akademický komentář. 1. svazek § 1–487*. Praha: Linde Praha, 2008, S. 570.
[19] Bělovský, P., Vydržení v římském právu a komparativním pohledu. In: *Ad Notam*, 2007, Nr. 4, S. 118.

6. Die in Vorbereitung stehende Rekodifikation des tschechischen Privatrechts

Die in Vorbereitung stehende Rekodifikation knüpft an das ABGB und vor allem an den Entwurf von 1937 an.[20] Demungeachtet gehörte auch die bestehende Rechtsregelung zu den Inspirationsquellen (z.B. in der Frage der Ersitzungszeit). Gegenüber der jetzigen Rechtsregelung kommt es zur Erweiterung der Rechtsregelung (§§ 1031–1037); zu einer der Grundänderungen gehört die Rückkehr zum Institut der außergewöhnlichen Ersitzung (§ 1037). Es soll auf die Situation reagieren, *„in der die Person eine Sache ersitzt, und diese Person ist nicht im Stande, ihren Vorgänger zu nennen oder sie erwarb die Sache direkt vom unberechtigten Besitzer."*[21] Nach der Ansicht der Autoren der Rekodifikation reagiert der Entwurf des neuen Bürgerlichen Gesetzbuches also auf Situationen, die das heutige Recht *expresis verbis* nicht regelt; es handelt sich um Situationen, deren Grundlage zwar zweifelhaft oder umstritten ist, jedoch das behauptete oder vermutete Eigentumsrecht dauert schon eine deutlich lange Zeit. In der vorbereitenden Rekodifikation kehrt die „schwierigere" vom ABGB ausgegangene Auffassung des Besitzes wieder zurück; sie unterscheidet einerseits einen berechtigten und unberechtigten Besitz (§ 937 – die Existenz des Titels) und einen redlichen und unredlichen Besitz andererseits (§ 938 – die Existenz des *bona fides*).

7. Zum Schluss

Seit den ältesten römischen Zeiten gehört das Institut der Ersitzung zu traditionellen Instituten des Eigentumsrechts. Wenn auch sich das sozialistische Recht bemühte, dieses Institut aus dem Rechtssystem völlig auszulösen, zeigte sich schließlich, dass diese Idee ganz unrealistisch war. Seit den Zeiten des alten Roms entwickelte sich die Ersitzung in zwei Linien – ordentliche und außerordentliche Ersitzung. Eine ähnliche Rechtsregelung kannte auch das österreichische bürgerliche Recht, wenn auch es beide Ersitzungsarten ausdrücklich nicht bezeichnete.

Die Rechtsregelung aus den Jahren 1948–1989 brachte vor allem eine Einschränkung dieses Institutes, was vor allem *res habilis* betraf, und später auch eine Auflösung dieses Institutes. Die Praxis erzwang sich jedoch eine Rückkehr der Ersitzung in die Rechtsregelung, jedoch nicht in ursprünglicher Form. Eine endgültige Form erhielt dieses Institut nach den Novellierungen des Bürgerlichen Gesetzbuches am Anfang der neunziger Jahre des zwanzigsten Jahrhunderts. De facto kam es zur definitiven Vereinigung der ordentlichen und außerordentlichen Ersitzung. Diese Vereinigung stellt die Konsequenz einer sehr kurz gefassten Rechtsregelung dar, welche keinen großen Raum der Rechtsprechung gewährt. Die vorbereitende Rekodifikation führt wiederum zu einer Doppellinie der Ersitzung, wo es im Falle der außerordentlichen Ersitzung zur Milderung betreffend die Fragen des Titels kommt; die Ersitzungszeit wird auf das Doppelte verlängert.

Aus der Sicht der Rechtsentwicklung ist folgendes interessant: während das römische Recht die Ersitzung sowohl von beweglichen, als auch unbeweglichen Sachen kannte, wurde die Ersitzung von beweglichen Sachen für außergewöhnlich gehalten. Am Ende des 20. und am Anfang des 21. Jahrhunderts ist es eher umgekehrt. Einen Grund dafür stellt das Argument dar, dass die Person, welche die Ersitzung beansprucht, in Rücksicht auf die Immobilienevidenz nie gutgläubig sein kann.

[20] Hier handelt es sich vor allem um eine unterschiedliche Auffassung des Besitzes zwischen dem ABGB und dem Entwurf vom 1937. Allgemeines Bürgerliches Gesetzbuch hielt den Besitz für faktischen Zustand im Geiste der römischen Tradition, dagegen der Entwurf vom 1937 und die Rekodifikation für eine Rechtsbeziehung. Eliáš, K. [Hrsg.], *Občanský zákoník – Velký akademický komentář. 1. svazek § 1–487*. Praha: Linde Praha, 2008, S. 568.

[21] Der Text der Rekodifikation, sowie der Begründungsbericht sind zugänglich unter: http://obcanskyzakonik.justice.cz/cz/navrh-zakona.html.

Die Änderungen im Familienrecht in der Tschechoslowakei in der Zwischenkriegszeit*

Renata Veselá**

Abstract

The article contains the description of legal regulation of the family law during 1918–1938 in the first Czechoslovak republic. The basic theme are the Act of divorce (320/1919) and the attempts of preparing of the new Civil code including family law during that time.

Key words: *Family law; first Czechoslovak republic; Act of divorce; civil code.*

1. Annahme des Trennungsgesetzes

Das Ende des Ersten Weltkrieges brachte mit sich den Zerfall der Monarchie und das Entstehen des tschechoslowakischen Staates. Die allgemein bekannte Rezeptionsnorm (Gesetz Nr. 11/1918 Slg.) übernahm auch für das Gebiet des Familienrechts österreichische und ungarische Normen und dieser Rechtsdualismus rief Schwierigkeiten praktisch für die ganze Zeit der Existenz der Ersten Republik hervor.

Für das Gebiet des Familienrechtes ist es bestimmt interessant, dass überhaupt den ersten Entwurf, vorgelegt schon auf der ersten Sitzung der Revolutionären Nationalversammlung am 14. November 1918, der das Eherecht zu reformierende Entwurf von Dr. Bouček darstellte. Andererseits ist es aber auch die historische Tatsache, dass gerade die Verhandlungen über die Novellierung des Eherechtes bei dem Versuch das Bürgerliches Gesetzbuch aus dem Jahre 1811 zu revidieren, einer der wichtigsten Gründe dafür waren, warum die Kodifizierungsbemühungen in der Schlussphase mit Misserfolg endeten.

Anfangs schien es, dass der Entwurf der Eherechtsreform, so wie der ausgearbeitet und Ende 1918 vorgelegt wurde, keine besondere Polemiken hervorrufen wird. Seine gesamte Auffassung laisierte beträchtlich die Sicht auf Ehe; die konfessionelle Prägung des Eherechts verwischte sich. Aber schon der begründende Bericht enthielt eine Menge von Rügen, nicht einverstanden waren die Kirchenkreise selbstverständlich am meisten mit dem Entwurf einer Zivilehe und die Möglichkeit der Trennbarkeit einer Ehe. Die halbjährige Verhandlung verschiedener politischer Parteien endete schließlich mit der Annahme des Regierungskompromissentwurfs, der in dem Parlament am 22. Mai 1919 verabschiedet und in der Gesetzsammlung unter der Nummer 320 bekannt gemacht wurde.

Das Trennungsgesetz, so wie die Eherechtsnovellierung im allgemein genannt wurde, führte eine fakultative kirchliche Eheschließung ein, was bedeutete, dass die Verlobten die Wahl hatten, ihre Ehe in der Kirche und oder auf dem Bezirksamt zu schließen. Die Novellierung hob ferner einige Ehehindernisse auf und formulierte einheitlich die die Ehetrennung ermöglichenden Gründe. Die Bestimmung über die Hindernisse und Trennung hatte jedoch keine Gültigkeit für die Slowakei, wodurch sich auf diesem Gebiet der unpraktische Dualismus weiter vertiefte. Die Novelle beschränkte beträchtlich die Konfessionselemente des Eherechts durch die Aufhebung der Hindernisse des kanonischen Ursprungs und durch die Bewilligung der Ehetrennung. Im allgemein können wir das Gesetz Nr. 320/1919 Slg. als den bedeutendsten Eingriff in das Familienrecht für den ganzen Zeitraum der Ersten Republik betrachten.

Die Praxis zeigte jedoch bald einige Schwächen des Trennungsgesetzes. Die sollten durch eine Gesamtreform des Eherechts beseitigt werden, die gleichzeitig mit der Revision des Allgemeinen Bürgerlichen Gesetzbuchs durchgeführt werden sollte. Der fast zwanzigjährige Zeitraum von Revisionsarbeiten (damit wurde es schon im Jahre 1920 angefangen) brachte jedoch mit Ausnahme einiger Entwürfe kein erwartetes Ergebnis.

Das Ehe- und Familienrecht wurde also im Verlauf der Ersten Republik nur durch eine Reihe von Teilgesetzen, z.B. Ges. Nr. 256/1921 Slg. zum Schutz der Kinder in fremder Pflege und nichtehelicher Kinder (= zák. č. 256/1921 Sb.), Ges. Nr. 56/1928 Slg. über Adoption (= zák. č. 56/1928 Sb.), Ges. Nr. 4/1931 Slg. zum Schutz der zur Unterhalts- oder Versorgungsforderung berechtigten Personen (Alimentationsgesetz = zák. č. 4/1931 Sb.) und einige zur Durchführung einzelner Gesetze erlassene Regierungsverordnungen geändert. Weiteren Änderungen auf dem Gebiet des Familienrechts geboten zuerst München und dann der Krieg Einhalt. Die Nachkriegsgeschichte der Familienrechtsentwicklung bei uns ist schon eine andere Geschichte.

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** JUDr. Renata Veselá, Ph.D., LL.M.Eur.Integration (Dresden), Lehrstuhl für Rechts- und Staatsgeschichte, Juristische Fakultät der Masaryk Universität Brno, Tschechische Republik.

2. Vorbereitung der Kodifizierung des Familienrechts

Die Aufmerksamkeit von Rechtshistoriker wird gewöhnlich auf die Rechtsakten gerichtet, die zumindest auf eine kurze Zeit zum Bestandteil der gültigen Rechtsordnung wurden und dadurch beweisbar in die Rechtskultur des bestimmten Staates infiltriert haben. Die Rechtsentwicklung wurde jedoch auch von den Rechtskonstruktionen beeinflusst, die in der Schlussphase auf dem Gebiet *de lege ferenda* blieben. Dazu gehört auch der Versuch um die Kodifikation des Familienrechts im Rahmen der Vorbereitung des Bürgerlichen Gesetzbuchs in dem Zeitraum der Ersten Republik, mit dem sich kurz der folgende Beitrag befasst.

Das Entstehen der Tschechoslowakischen Republik stellte eine wesentliche Änderung nicht nur für das Gebiet des Staates, sondern auch des Rechts dar. Die schon am 28. Oktober 1918 erklärte Rezeptionsnorm fixierte zwar vorläufig die Rechtsverhältnisse, in der Tat, wie bekannt, verursachte gerade sie den Rechtsdualismus auf dem Territorium der Republik. Auf dem Gebiet des Zivilrechts, dessen Bestandteil nach der damaligen Kodifikation auch das Familienrecht bildete, entstand eine schwierige Situation. Auf einem vorher österreichischen Territorium wurde das Zivilrecht durch das Allgemeine Bürgerliche Gesetzbuch (ABGB) vom Jahre 1811, auf dem Gebiet des Familienrechtes abgeändert und ergänzt besonders mit den Kriegsnovellen aus den Jahren 1914 bis 1916, kodifiziert, während auf dem vorher ungarischen Territorium wurden mit dem Gesetz nur einige Teile des Zivilrechts geregelt, im übrigen fand das Gewohnheitsrecht Anwendung, hinsichtlich Quellen manchmal schwierig zugänglich. Das Familienrecht regelte sich nach dem Ges. Nr. XXXI/1894 (= zák. č. XXXI/1894).

Unter diesen Umständen zeigte sich als erforderlich, ein neues, auf dem ganzen Territorium der Republik geltendes bürgerliches Gesetzbuch zu besorgen. Es gaben dafür einige Gründe: Der einheitliche Staat brauchte eine einheitliche Rechtsordnung gerade auf dem so wichtigen Gebiet wie das Zivilrecht ist. Der zweite Grund war auch der praktische Hinsicht und die Angst vor möglichen Kollisionen zwischen den beiden bisher gültigen Rechtsordnungen. Nicht zuletzt dann sollte die Bejahrtheit des alten österreichischen bürgerlichen Gesetzbuchs in Betracht gezogen werden. Eine umfangreichere legislative Arbeit wagten sich jedoch die Regierungskreise am Anfang nicht. Es wurde die einfachste Lösung gewählt: das Justizministerium bereitete die tschechische Übersetzung des bürgerlichen Gesetzbuchs aus dem Jahre 1811, das gerade auf dem Gebiet des Familienrechts schon im Jahre 1919 mit dem Trennungsgesetz Nr. 320 Slg. ergänzt wurde, um diese Übersetzung auf dem ganzen Territorium der Republik als ein neues bürgerliches Gesetzbuch einzuführen. Die Zivilrechtsexperte, Professoren Krčmář und Svoboda, denen dieser Entwurf zur Beurteilung vorgelegt wurde, stellten sich jedoch zu dieser Vorgangsweise negativ ein. Deswegen holte das Justizministerium von einer Sachverständigenkommission ein Gutachten ein, in welche Richtung bei der Vorbereitung des neuen bürgerlichen Gesetzbuchs zu gehen. Aus den am 6. März und am 16. Juni 1920 stattgefundenen Konsultationen ergab sich die Richtlinie einer „vorsichtigen Revision" des bisherigen bürgerlichen Gesetzbuchs. Gleichzeitig wurde es empfohlen, die bisher gültige Rechtsregelung in der Slowakei und Karpatenrussland zu berücksichtigen.

Mit den konkreten Arbeiten an der Änderung des bürgerlichen Gesetzbuchs wurden vier bzw. fünf Sub-Komitees beauftragt, an deren Tätigkeit neben den Vertretern des Justizministeriums und des Vereinheitlichungsministeriums auch die Experte besonders aus dem Justizgebiet beteiligen sollten.

Dem für das Familienrecht zuständigen Sub-Komitee wurden die Vorschriften der Abschnitte 2 bis 4 des Ersten Teils und die Vorschriften über Eheverträge – Abschnitt 28 des Zweiten Teils zugewiesen. Der Sachbearbeiter dieses zweiten Sub-Komitees war Professor Katka, seine Mitglieder waren dann der Rat des Oberlandesgerichts dr. Cerman, der Notar Dr. Černý, die Rechtsanwälte dr. Löwy und dr. Sobička, der Rat des Oberlandesgerichts Wunsch und der Notar dr. Zemek. Während die für den allgemeinen Teil des bürgerlichen Gesetzbuchs und für das Obligationsrecht zuständigen Sub-Komitees ihre Arbeit schon im Dezember 1920 beendigten, arbeitete die Subkomitee für das Familienrecht bis zum Jahre 1923 und ihr Entwurf wurde erst im Jahre 1924 veröffentlicht.[1] Auch in Hinsicht auf die Beurteilung der vorgeschlagenen Regelung und des bisher gültigen Rechts in der Slowakei und Karpatenrussland gab das Vereinheitlichungsministerium in den Jahren 1923 und 1924 seine Stellungnahme ab.[2]

Durch Vorlegung der Entwürfe des Sub-Komitees zur öffentlichen Diskussion wurde die erste Etappe der Revisionsarbeiten beendigt. Eine weitere Aufgabe nach der Richtlinie aus dem Jahre 1920 war es, einzelne Teile des Entwurfs in ein einheitliches Ganzes zu vereinigen, und bei diesen Integrationsarbeiten sollte auch die sich aus der öffentlichen Diskussion ergebenden Anregungen berücksichtigt werden. Die Arbeiten in der mit dieser Aufgabe beauftragten Superrevisionskommission wurden im Geist der schon im Jahre 1920 beschlossenen Grundsätze nach der Beratung mit den Vertretern des Vereinheitlichungsministeriums am 20. Mai 1925 aufgenommen. Die Arbeit der Superrevisionskommission selbst wurde am 15. Februar 1926, und zwar unter der Teilnahme der Mitglieder der für das Zivilrecht zuständigen Slowakischen Kommission aufgenommen. Die Superrevisionskommission hielt insgesamt 321 Sitzungen, die letzte davon fand am 4. November 1931 statt. Der Entwurf, der sich aus diesen Verhandlungen ergab, wurde anfangs 1932 ausgedruckt und an verschiedene Behörden und Organisationen versandt, damit er der Öffentlichkeit zugänglich gemacht wird. Gleichzeitig wurde darüber das zwischenministerische Verfahren eröffnet. Dieses Verfahren wurde zuerst in der gewöhnlichen Schriftform geführt. Es zeigte sich jedoch, dass diese Art der Vorbereitung der Finalversion des Entwurfs allzu langwierig wäre. Auf Antrag des Justizministeriums wurden also alle Teile der Vorlage des neuen bürgerlichen Gesetzbuchs mündlich auf zweiunddreißig zwischenministerischen Beratun-

[1] In Buchform herausgegeben von Kafka, Bruno: Familienrecht. Entwurf des Sub-Komitees für die Revision des bürgerlichen Gesetzbuchs für die Tschechoslowakische Republik in Prag 1924.

[2] Das Gesetz, durch das das Allgemeine Bürgerliches Gesetzbuch erlassen wird. Entwurf der Superrevisionskommission. Teil II. Begründender Bericht. Prag 1931, S. 8.

gen behandelt, die von 18. Juni 1934 bis 24. Juli 1935 verliefen. Im Herbst 1935 wurde von dem Justizministerium die Superrevisionskommission zur Arbeit an der letzten Redaktion der Vorlage einberufen. Der Senat der Nationalversammlung erließ sie schon im Jahre 1937 in Druckschrift Nr. 425 unter dem Namen Regierungsentwurf des Gesetzes, durch den das bürgerliches Gesetzbuch erlassen wird.[3]

Auch in diesem Fall blieb grundsätzlich die Basis des Entwurfs das österreichische ABGB, bzw. die Vorlage des bürgerlichen Gesetzbuchs aus dem Jahre 1931. Zu wesentlichen Änderungen kam es jedoch gerade in der Regelung der Familienrechtsinstitute. Aus dem ersten Teil der Vorlage aus dem Jahre 1931, einbegreifend ähnlich wie der erste Teil des ursprünglichen Gesetzbuchs das ganze Gebiet des Personen- und Familienrechtes, übergingen in den ersten Teil des Regierungsentwurfs nur die im Abschnitt 3 zusammengelegten Personenvorschriften. In den Regierungsentwurf wurden Abschnitt 2 bis 5 der Vorlage aus dem Jahre 1931 nicht einbegriffen, die das Familienrecht, konkret das Eherecht, das Rechtsverhältnis zwischen Eltern und Kindern, Adoption, Vormundschaft und Pflegschaft, Unterstützung regelten. Umgekehrt einige Teile des Familienrechts des österreichischen bürgerlichen Gesetzbuchs sowie der Vorlage aus dem Jahre 1931 wurden in den Entwurf im Jahre 1937 einbegriffen. Es ging um die Vorschriften über Verpflichtungen der Kinder in väterlicher Gewalt und Mündel, ferner um die Vorschriften des ehelichen Vermögensrechts samt der Bestimmung über Eheverträge. Die erwähnten Teile des Familienrechts sollte in das Obligationsrecht eingegliedert werden, die Vorschriften über den Erbvertrag blieben auch in dem Entwurf aus dem Jahre 1937, wo ihre Stelle die Superrevisionskommission bestimmte, also in den Partien über das Erbrecht.[4]

Aus der Kodifikation des Familienrechts blieb ein Torso. Auch zur Gesetzwerdung dieser Partien war die Einstellung nicht einheitlich.[5] Es gab eine Reihe von Ursachen, die dazu führten, dass der überwiegende Teil der Materie des Familienrechts in die Finalversion des Entwurfs des bürgerlichen Gesetzbuchs nicht einbegriffen wurde und zum Bestandteil des gültigen Rechts auch im Falle der erfolgreich beendigten legislativen Arbeiten nicht würde. Einige dieser Ursache werde ich kurz erwähnen.

Die Frage der Selbständigkeit des Familienrechtes als eines eigenartigen Rechtszweiges hat die Rechtswissenschaft ausreichend begründet. Die Einstellung einiger zwischenkriegerischen Rechtstheoretiker war jedoch anders; das Familienrecht betrachteten sie als einen Bestandteil des Zivilrechts. Und es scheint, dass gerade die Unterschiedlichkeit der Qualität der Verhältnisse, die mit dem bürgerlichen Gesetz gleichzeitig „einheitlich" geregelt werden sollten, zu einer wichtigen Hindernis wurden, die zwar zur Regelung des Vermögensseite der Ehe- und Familienverhältnisse in der Vorlage des bürgerlichen Gesetzbuchs führte, verhinderte jedoch ihre persönliche Seite einzubegreifen. Aber auch wenn wir die eher positivistische Bewertung verlassen würden, würden wir eine Menge von weiteren Ursachen finden, die den Misserfolg der Kodifikationsversuche auf dem Gebiet des Familienrechtes während der Ersten Republik verursachten. Als Hauptgründe können Folgendes bezeichnen: der mit der Rezeptionsnorm eingeführte Rechtsdualismus, Beharrung auf Ansichten auf Ehe und Familie, für Jahrhunderte beeinflusst von der Religionsideologie und Kirchenrecht, und schließlich die konservative Einstellung zu der Vereinheitlichung, bzw. einer milderen Anpassung des österreichischen ABGB an die Bedingungen der Republik.

Die sich aus der unterschiedlichen Regelung in beiden Teilen der Republik ergebenden und den Gegenstand mancher ernsthaften Streitigkeiten darstellenden Unterschiede betrafen insbesondere die Substanz einer Ehe, deren Entstehen und Erlöschen sowie die Gleichberechtigung der Ehepartner, samt Vermögensgleichberechtigung.

Die Frage der Substanz einer Ehe wurde in der Geschichte mehrmals gelöst. Die traditionelle Religionsauffassung einer Ehe als „Sakrament" verletzte nach Josef II. auch das ABGB, und zwar durch Bezeichnung der Ehe als einen Vertrag. Trotzdem vererbten die böhmischen Länder nach einer Menge von Änderungen, denen das Eherecht während der Monarchie ausgesetzt wurde,[6] den Zustand, wo das Familienrecht – ausgenommen Vermögensbeziehungen – überwiegend in Gefangenschaft von „kanonischen Bestimmungen des Zivilrechts war".[7] Für die Verhältnisse der Slowakei übernahm die Rezeptionsnorm das Wecklers Gesetz Nr. XXXI/1894, das in machen Hinsichten bestimmt progressiver war und sich mehr zur Zivilauffassung der Ehe neigte. Die Situation komplizierte sich weiter dadurch, dass von der Eherechtsnovelle aus dem Jahre 1919 den slowakischen Teil der Republik nur §§ 1 bis 12, 25 und 29 betrafen.

Diese unterschiedlichen Ausgangspunkte hatten dann im Verlauf der Vorbereitung der neuen Kodifizierung des Familienrechts für die ganze Republik viele Streitigkeiten zu Folge. Schon die Frage der Eheschließung selbst wurde kompromisslerisch durch das Gesetz Nr. 320/1919 Slg. gelöst. Sein zwölfer Paragraph beließ es nämlich auf dem Willen der Verlobten, ob sie sich für eine Zivilehe oder eine kanonische Ehe entschließen. Für die Slowakei war das bestimmt ein Schritt zurück, denn dort war schon seit 1894 obligatorisch die Zivilehe eingeführt.[8] Also ähnlich wie diese Bestimmung eine Welle von widersprüchliche Ansichten schon bei der Formulierung der Eherechtsnovelle erweckte, waren die Widersprüche betreffend diese Frage an der Tagesordnung auch bei der Behandlung der Vorlage des bürgerlichen Gesetzbuchs. Obwohl in dem Entwurf aus dem Jahre 1924 die Zivilehekonzeption gewann und analogisch die Eheschließung im Entwurf aus dem Jahre 1931 geregelt wurde, waren sich die Urheber von möglichen negati-

[3] Für das Parlament wurde derselbe Entwurf in der Druckschrift Nr. 844 veröffentlicht.
[4] Regierungsentwurf des Gesetzes, durch den das bürgerliches Gesetzbuch erlassen wird, Prag 1937, S. 242–243.
[5] Einige Teile des Familienrechts gelang es im Verlauf der Existenz der Tschechoslowakischen Republik schon zu vereinheitlichen. Zum Beispiel die Gesetze Nr. 61/1918 Slg., Nr. 447/1919 Slg., Nr. 256/1921 Slg., Nr. 56/1928 Slg. oder Nr. 4/1931 Slg.
[6] Vacek, Václav: Scheidung und Trennung, Prag 1920, Seite 7–8; Sedláček, Jaromír: Reform des Eherechts, Prag 1938, S. 43 ff.
[7] Svoboda, Emil: Familienrecht, Praha 1921, S. 8.
[8] Sedláček, Jaromír: Reform des Eherechts, Prag 1938, S. 24–25.

ven Reaktionen bewusst.[9] Die kamen selbstverständlich seitens klerikaler Parteien vor. Die Finallösung dieses Problems wurde endlos verschoben und schließlich wurde es zu einem der Teile des Familienrechts, die in die Vorlage aus dem Jahre 1937 nicht einbezogen wurden.

Konflikte kamen auch bei der Beurteilung der Arten des Erlöschens einer Ehe vor. Ein gewisser Fortschritt in der Rechtsregelung wurde zwar durch die Annahme des Trennungsgesetztes erreicht. Dieses galt jedoch in der Slowakei im vollen Umfang nicht, sodass das völlige dauerhafte Erlöschen einer Ehe – die Trennung – das Gesetz in beiden Teilen der Republik unter unterschiedlichen Bedingungen zuließ.[10] Die Vorlage formulierte zwar in allgemein zwei Gründe für die Trennung – Zerrüttung der Ehe und unüberwindliche Abneigung, wobei die Auslegung dieser Begriffe wieder eine Menge von verschiedenen Polemiken erweckte.[11]

Während der ganzen Zeit der Vorbereitung des bürgerlichen Gesetzbuchs wurden auch die Frage der Stellung und Aufgabe der Frau und des Mannes in der Familie und die damit unmittelbar verbundenen Fragen der Vermögensbeziehungen zwischen den Ehepartnern unzählige Mal diskutiert. Auch auf diesem Gebiet wurden ganz unterschiedliche Vorschläge vorgetragen. Neben der Tatsache, dass die Vorlage von dem ABGB das komplizierte System des gesetzlichen Vermögensrechts der Ehepartner und des Vertragsvermögensrechts übernahm, war die Situation komplizierter noch wegen der Unnachgiebigkeit der tschechischen und slowakischen Normgeber, die das Prinzip der Trennung des während der Ehe erworbenen Vermögens auf der einen Seite und das bewährte ungarische Prinzip des Vermögensgemeinschaft folgten.[12] In der letzten Redaktion des Entwurfs – wie sonst – wählten die Gesetzgeber wieder eine Kompromisslösung. Sie entschlossen sich zwar endlich für das Institut der Vermögensgemeinschaft der Ehepartner bezüglich des während der Ehe erworbenen Vermögens, schlossen jedoch nicht gleichzeitig aus, dass der Richter im Streitfalle nach seinem eigenen Ermessen anders entscheidet. Darüber hinaus, wenn die Ehefrau nicht widerspricht, hatte ihr Vermögen der Ehemann zu verwalten. Auch diese Bestimmung betrachteten insbesondere Frauen als keinen Ausdruck der Gleichberechtigung in der Familie.

Es gab noch viel mehr von Uneinigkeiten und Widersprüchen bei der Vorbereitung der Kodifikation des Familienrechts im Rahmen des bürgerlichen Gesetzbuchs, so wie ich schon in der Einleitung angedeutet habe. Und sich wenn zumindest einige seine Partien für die Kodifizierung als akzeptabel schienen, sprach das Oberste Gericht seine Zweifel, ob es geeignet sei, einige Teile des Familienrechts unter den Umständen zu kodifizieren, wo dieses Recht selbst ungeregelt bleibt.[13] Eine ähnliche Einstellung trat Ende des Jahres 1937 auch auf dem ganzstaatlichen Vereinheitlichungskongress von Juristen in Bratislava ein. Seine Resolution beantragte, in den Kodex die Regelung des ganzen Familienrechts einzubegreifen. Manche Teilnehmer des Kongresses wiesen rechtmäßig darauf hin, dass die Halbheit der vorgeschlagenen Lösung weitere unvorsehbare und schwer zu behebbare Schwierigkeiten verursachen würde.[14]

Trotz allen diesen Schwierigkeiten wurde der Entwurf des bürgerlichen Gesetzbuchs samt der erwähnten Teile des Familienrechts in Ausschüssen und Kommissionen der Nationalversammlung behandelt und für die parlamentarischen Gremien vorbereitet, aber das Münchner Diktat im Herbst 1938 hat die Arbeiten eingestellt. Auch die verzweifelten Versuche, die Vorlage wieder zum Leben zumindest in der Form von einer Regierungsverordnung aufgrund eines Ermächtigungsgesetzes zu erwecken, änderten nichts daran, dass die Arbeiten unvollendet blieben. Der 15. März 1939 vereitelte definitiv das Ergebnis der fast zwanzigjährigen Kodifikationsbemühungen auf dem Gebiet des bürgerlichen und Familienrechts.

[9] Das Gesetz, durch das das Allgemeine Bürgerliches Gesetzbuch erlassen wird. Entwurf der Superrevisionskommission. Teil II. Begründender Bericht. Prag 1931, S. 36.

[10] Sedláček, Jaromír: Reform des Eherechts, Prag 1938, Seite 29; Vacek, Václav: Scheidung und Trennung, Prag 1920, S. 15.

[11] Zum Beispiel siehe Sedláček, Jaromír: Reform des Eherechts, Prag 1938, S. 42; Das Gesetz, durch das das Allgemeine Bürgerliches Gesetzbuch erlassen wird. Entwurf der Superrevisionskommission. Teil II. Begründender Bericht, S. 60 ff.; Papežová, Jarmila: Vorlage des Familienrechts im Bürgerlichen Gesetzbuch. Der ganzstaatliche Vereinheitlichungskongress von Juristen in Bratislava 26.–28. IX. 1937, S. 5.

[12] Näher siehe Sedláček, Jaromír: Reform des Eherechts, Prag 1938, S. 51 ff.; Telecká, Zdenka: Der ganzstaatliche Vereinheitlichungskongress von Juristen in Bratislava 26.–28. IX. 1937, S. 13.

[13] Regierungsentwurf des Gesetzes, durch den das bürgerliches Gesetzbuch erlassen wird, Prag 1937, S. 242.

[14] Geschichte des Staates und des Rechtes auf dem Gebiet der Tschechoslowakei in der Epoche des Kapitalismus, Bratislava 1973, S. 371.

Die Einziehung des jüdischen Vermögens im Protektorat Böhmen und Mähren*

Jaromír Tauchen**

Abstract

This contribution deals with the anti-Jewish property regulations, which were issued during the period of the Protectorate of Bohemia and Moravia (1939–1945). Attention is paid to both, the regulations of the Protectorate Ministries and to the regulations of the Reich Protector of Bohemia and Moravia, the most important being the Decree about Jewish property from June 1939.

Key words: *Protectorate of Bohemia and Moravia; Jews; Jewish property; the Reich Protector; Aryanization.*

1. Einführung

Die Rechtsstellung der Juden im Protektorat Böhmen und Mähren[1] regelte sich nach den vom Reichsprotektor in Böhmen und Mähren und von der „autonomen Regierung" erlassenen Rechtsnormen. Nach dem Sachinhalt kann man die im Protektorat erlassenen antijüdischen Vorschriften in zwei Hauptgruppen einteilen. Die erste Gruppe bilden die Beschränkungen vom persönlichen Charakter betreffend von allem die Ausschaltung der Juden aus dem öffentlichen Leben und den Verkehr der arischen Bevölkerung mit Juden, während die Wirtschafts- und Vermögenseinschränkungen in die andere Gruppe fallen.[2] Die erste Gruppe kennzeichnete sich vor allem durch Eingriffe der Regierung und Ministerien des Protektorats, dagegen die wichtigsten Maßnahmen wirtschaftlichen und vermögensrechtlichen Charakters wurden vom Reichsprotektor in Böhmen und Mähren erlassen.[3] Die Rechtsregelung des Prozesses, in dem die Juden „im legalen Wege" ihr sämtliches Vermögen verloren, war wegen häufiger Änderungen sehr unübersichtlich, wobei die meisten Rechtsvorschriften in den ersten zwei Jahren des Protektorats erlassen wurden. Die im Altreich geltenden antijüdischen Vorschriften bildeten ein Vorbild für die Judengesetzgebung im Protektorat; im Jahre 1939 waren die Juden im Altreich aus dem öffentlichen und Kulturleben längst ausgeschlossen und der Arisierungsprozess lief im vollen Gange.[4]

2. Erste Verfügungsverbote über jüdisches Vermögen

Schon sechs Tage nach der Errichtung des Protektorats bestand die Möglichkeit, die wirtschaftlichen Unternehmungen einer Staatsausicht zu unterwerfen.[5] Die Aufsicht über die wirtschaftlichen Unternehmungen hatte zwei Formen. Wenn es das öffentliche Interesse erforderte, konnte für eine wirtschaftliche Unternehmung ein Vertrauensmann, oder wenn es sich um eine vom Gesichtspunkt des öffentlichen Interesses besonders wichtige oder von ihrem Besitzer verlassene Unternehmung handelte, ein Zwangsverwalter bestellt werden.

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** JUDr. Jaromír Tauchen, Ph.D., LL.M.Eur.Integration (Dresden), Lehrstuhl für Rechts- und Staatsgeschichte, Juristische Fakultät der Masaryk Universität Brno, Tschechische Republik.

1 Aus der deutschsprachigen Literatur zum Charakter des Protektorats Böhmen und Mähren vgl. z.B. Schelle, K., Tauchen, J. *Recht und Verwaltung im Protektorat Böhmen und Mähren*. München: Dr. Hut Verlag, 2009; Schelle, K., Tauchen, J. *Grundriss der Tschechoslowakischen Rechtsgeschichte*. München: Dr. Hut Verlag, 2010, S. 63 ff.; Rill, B. *Böhmen und Mähren. Geschichte im Herzen Mitteleuropas. Band II: Von der Romantik bis zur Gegenwart.* Gernsbach: Kazimir Katz Verlag, 2006, S. 904 ff.

2 Zu antijüdischen Vorschriften vgl. z.B. Utermöhle, W., Schmerling, H. *Die Rechtsstellung der Juden im Protektorat Böhmen und Mähren.* Prag: Böhmisch-Mährische Verlags- und Druckereigesellschaft, 1940; Svatuška, L. Přehled právních předpisů o Židech v Protektorátu Čechy a Morava. In: *Moderní stát*, Jahrgang XIV, 1941, Nr. 11, S. 277–283; Jurášek, S. Právní a hospodářské postavení Židů v Protektorátě Čechy a Morava. In: *Právník*, 1940, Jahrgang 79, Nr. 7, S. 391–404; Petrův, H. *Právní postavení Židů v Protektorátu Čechy a Morava (1939–1941)*. Praha: Nakladatelství Sefer, 2000; Medeazza, J. Judenfrage und Judengesetzgebung in Europa. In: *Deutsches Recht*, Jahrgang 11, Heft 13, 1941, S. 674–682.

3 Svatuška, L. Přehled právních předpisů o Židech v Protektorátu Čechy a Morava. In: *Moderní stát*, Jahrgang XIV, 1941, Nr. 11, S. 277.

4 Zur antijüdischen Gesetzgebung im Altreich vgl. z.B. Tauchen, J.: 1938 – Křišťálová noc a některé navazující otázky právního postavení židovské menšiny v období národního socialismu. In: *Olomoucké právnické dny 2008. Sborník příspěvků z konference.* Olomouc: Iuridicum Olomoucense o.p.s., 2009, S. 779–786; Jurášek, S. Právní a hospodářské postavení Židů v Říši. In: *Právník*, 1939, Jahrgang 78, Nr. 9, S. 480–502; Jurášek, S. Právní a hospodářské postavení Židů v Říši (Dokončení). In: *Právník*, 1939, Jahrgang 78, Nr. 10, S. 558–566.

5 Regierungsverordnung vom 21. März 1939 Nr. 87/1939 Slg., über die Verwaltung von wirtschaftlichen Unternehmungen und Betrieben und über die Aufsicht über dieselben.

Dem Vertrauensmann stand die Beaufsichtigung über die Tätigkeit der wirtschaftlichen Unternehmung vom Gesichtspunkt des öffentlichen Interesses zu. Alle Verfügungen der Unternehmung unterlagen seiner Genehmigung unter der Sanktion der Ungültigkeit. Der Vertrauensmann war verpflichtet, bei der Ausübung seiner Tätigkeit die wirtschaftlichen Interessen der Unternehmung mit der Sorgfalt eines ordentlichen Kaufmannes zu beachten.

Der Zwangsverwalter war berechtigt und verpflichtet, alle Verfügungen zu treffen, die zum ordentlichen Betrieb der Unternehmung notwendig waren. Auf ihn ging die Verwaltung der Unternehmung über und er nahm alle Rechtshandlungen vor. Er vertrat die ihm zu Verwaltung anvertraute Unternehmung vor Gerichten und Behörden. Der Zwangsverwalter bedurfte zu Verfügungen, die nicht zur gewöhnlichen Wirtschaftsführung gehörten, wie zur Veräußerung, Verpachtung oder zu Anleihen, der Zustimmung des Ministeriums oder der beauftragten Behörde. Zu Verfügungen des Zwangsverwalters über 200.000 Kronen war eine Genehmigung des Ministeriums immer erforderlich. Der Reinertrag der Zwangsverwaltung der Unternehmung wurde nach der Abrechnung dem Besitzer der Unternehmung ausgefolgt.

Obwohl es in dieser Verordnung nicht ausdrücklich verankert wurde, dass sie sich auf jüdische Unternehmungen bezieht, war offensichtlich, dass es sich um ein Mittel der Protektoratsregierung zur Arisierung jüdischer Unternehmungen handelt, die in tschechische Hände übergehen sollten.[6] Dieser Versuch um eine tschechische Arisierung war durchsichtig und daher blieb auch ohne Erfolg.[7]

In der letzten Märzwoche des Jahres 1939 wurde eine Serie der Verordnungen des Chefs der Zivilverwaltung bei der Heeresgruppe 3 erlassen; sie stellten die Eingriffe der Besatzungsverwaltung in das Wirtschaftsleben in Böhmen mit dem Ziel dar, die Übertragungen jüdischen Vermögens zu verhindern. Der käufliche Erwerb sowie jede Verfügung über wirtschaftliche Unternehmungen, Beteiligungen und Vermögenswerte aller Art, die ganz oder teilweise in jüdischem Eigentum standen, waren verboten. Ausgenommen waren selbstverständlich die Käufe und Verkäufe von Waren, die im Rahmen einer ordentlichen Geschäftsführung von Geschäftsunternehmungen verwirklicht wurden. Soweit Umstellungen jüdischer wirtschaftlicher Unternehmungen und Vermögensveränderungen seit dem 15. März 1939 bereits erfolgt waren, war hierzu nachträglich eine Genehmigung einzuholen.[8] Der Inhalt dieser Verordnung bezog sich nur auf Böhmen; eine analogische Regelung wurde auch für Mähren erlassen.[9] Es war verboten, die Vertrauensmänner und Zwangsverwalter in jüdische Unternehmungen zu bestellen, was die Anwendung der oben erwähnten Regierungsverordnung Nr. 87/1939 Slg., über die Verwaltung von wirtschaftlichen Unternehmungen und Betrieben und über die Aufsicht über dieselben verhinderte. Über die Verfügungen mit jüdischem Vermögen sollten also künftig ausschließlich nur die Besatzungsorgane entscheiden. Alle diese Verordnungen der Chefs der Zivilverwaltung traten am 21. Juni 1939 außer Kraft, als sie durch die Verordnung des Reichsprotektors in Böhmen und Mähren über jüdisches Vermögen (VBlRProt. S. 45) ersetzt wurden. Sie bildete eine Grundlage der Rechtsregelung der Verfügungen mit jüdischem Vermögen.

3. Devisenmaßnahmen

Im Zusammenhang mit den ersten von der deutschen Militärverwaltung unmittelbar nach der Errichtung des Protektorats eingeführten Verfügungseinschränkungen mit jüdischem Vermögen erließ das Finanzministerium des Protektorats Ende März und Anfang April einige Runderlässe, die für die Geldanstalten bestimmt waren. Ihr Zweck bestand im Schutz der Währung, sowie in der Evidenz des Vermögens und in seinem Schutz vor seiner Überführung ins Ausland.[10]

Seit Ende des Jahres 1939 waren die Miete und der Pachtschilling von Liegenschaften, welche sich im Eigentum oder Miteigentum von Juden, jüdischen Unternehmen und jüdischen Personenvereinigungen befanden, auf ein gebundenes Konto der Miete bei einer Devisenbank zu erlegen. Dem Erlag unterlag nicht die Miete bis zur Höhe der nachgewiesenen fälligen Kosten, welche unmittelbar mit der Verwaltung und Erhaltung der Liegenschaft zusammenhängten (Steuern, Abgaben, Versicherungsprämien, nötige Reparaturen u.a.). Der Zins und die Amortisation von den auf der Liegenschaft haftenden Hypotekardarlehen durften direkt aus der eingehobenen Miete nur dann gedeckt werden, wenn der Gläubiger ein Arier war. Über das gebundene Konto der Miete konnte es nur mit Genehmigung der zuständigen Finanzbezirksdirektion verfügt werden.[11]

Seit Januar 1940 konnten alle Zahlungen zu Gunsten von Juden (jüdischen Unternehmen) nur auf ein gebundenes Konto des Empfängers bei einer Devisenbank oder einer ermächtigten Geldanstalt geleistet werden. Vom Erlag auf ein gebundenes Konto waren Zahlungen für Waren und Leistungen aus einem Unternehmen oder aus einem Gewerbe befreit, insofern eine Barbezahlung dafür üblich war. Der Zahlende war verpflichtet, die Zahlung auf ein gebundenes Konto bei einer ihm vom Empfänger bezeichneten Geldanstalt anzuweisen. Der jüdische Inhaber dieses Kontos durfte für sich und seine von ihm zu erhaltenden Familienangehörigen insgesamt wöchentlich 1500 Kronen beheben. Entnahmen aus jüdischen gebundenen Konten über den erlaubten wöchentlichen Betrag hinaus waren nur mit Genehmigung des Finanzministeriums (Prüfungssektion) oder der von ihm ermächtigten Behörden gestattet.

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[6] Kárný, M. *„Konečné řešení". Genocida českých Židů v německé protektorátní politice*. Praha: Academia, 1991, S. 22–29.

[7] Uhlíř, J. *Protektorát Čechy a Morava v obrazech*. Praha: Ottovo nakladatelství, 2008, S. 697.

[8] Verordnung des Chefs der Zivilverwaltung bei der Heeresgruppe 3 vom 29. März 1939 über Verfügungen, betreffend jüdisches Vermögen aller Art, kundgemacht im Amtsblatt Nr. 78 vom 1. April 1939.

[9] Verordnung des Chefs der Zivilverwaltung bei der Heeresgruppe 5 vom 20. März 1939 betreffend Unterlassung unzulässiger Eingriffe in die Wirtschaft im Lande Mähren, kundgemacht im Amtsblatt des Landesamtes Brünn Nr. 67 vom 21. März 1939.

[10] Kundmachung des Finanzministeriums vom 25. März 1939 Nr. 6.766/39-VI, über einige Maßnahme zum Schutze der Währung.

[11] Kundmachung des Finanzministeriums vom 10. November 1939 Nr. 18.753/1939-VI betreffend den Erlag von Mieten und Pachtschillingen von in jüdischem Eigentum stehenden Liegenschaften auf ein gebundenes Konto, kundgemacht im Amtsblatt Nr. 258 vom 13. November 1939.

Seit Dezember 1940 durften die Juden aus allen seinen bei einer oder mehreren Geldanstalten geführten gebundenen Konten ohne Genehmigung im Laufe eines Kalendermonats insgesamt höchstens beheben: 2000 Kronen – wenn sie ledig oder verwitwet waren; 3000 Kronen – wenn sie verheiratet waren und im gemeinsamen Haushalt mit dem anderen Ehegatten lebten.[12]

Übertragungen jüdischer Einlagebücher auf andere Personen, sowie die Umlegung von Wertpapieren von einer Geldanstalt zu einer anderen waren nur nach einer Genehmigung gestattet.

Ohne Genehmigung konnten die Juden Safes und geschlossene Depots bei Geldanstalten nicht anlegen. Die Geldanstalten waren verpflichtet zu überprüfen, welche Safes und geschlossene Depots den Juden gehörten und diese dem Finanzministerium zu melden.

Seit März 1940 bezogen sie diese Verbote und Pflichten auch auf die arische Gattin (den Gatten) eines Juden (einer Jüdin), soweit die Ehe bestand.[13]

Nach der Kundmachung des Finanzministeriums vom 15. November 1940 waren die Juden und jüdische Unternehmen verpflichtet, ihre Einlage- und Sparkassenbücher bis Ende des Jahres 1940 zwecks Aufhebung denjenigen Geldanstalten vorzulegen, die sie ausgestellt haben. Die Geldanstalten hoben die die Einlage- und Sparkassenbücher auf und übertrugen die entsprechenden Einlagen auf die bei ihnen geführten oder zu diesem Zwecke errichteten gebundenen jüdischen Konten.[14]

4. Verordnung des Reichsprotektors in Böhmen und Mähren über das jüdische Vermögen

Die Verordnung des Reichsprotektors in Böhmen und Mähren über das jüdische Vermögen vom 21. Juni 1939 (VBlRProt. S. 45) und ihre neun Durchführungserlässe bildeten die Grundlage für die Sicherstellung und Überführung des jüdischen Vermögens in die arischen Hände.[15] Sie beinhaltete nicht nur die Regelung zur Verfügung und Verwaltung jüdischen Vermögens, sondern auch Abgrenzung der Begriffe „Jude“ und „jüdisches Unternehmen“. Diese Definition nutzten dann auch andere antijüdische Rechtsnormen aus.[16]

Für die Entscheidung der Frage, wer Jude ist, war grundsätzlich nur die rassische Abstammung maßgebend.[17] Als Jude galt, wer von mindestens drei der Rasse nach volljüdischen Großelternteilen abstammte. Als volljüdisch galt ein Großelternteil ohne weiteres, wenn er der jüdischen Religionsgemeinschaft angehörte.[18] Als Jude galt auch der von zwei volljüdischen Großeltern abstammende jüdische Mischling, der am 15. September 1935 der jüdischen Religionsgemeinschaft angehörte oder danach in sie aufgenommen wurde, oder der am 15. September 1935 mit einem Juden verheiratet war oder sich danach mit einem solchen verheiratet, oder der aus einer mit einem Juden geschlossenen Ehe stammt, die nach dem 15. September 1935 geschlossen war, oder der aus einem außerehelichen Verkehr mit einem Juden stammte und nach dem 31. Juli 1936 außerehelich geboren wurde.

Ein Unternehmen galt als jüdisch, wenn sein Inhaber Jude war. Das Unternehmen einer offenen Handelsgesellschaft oder einer Kommanditgesellschaft galt als jüdisch, falls ein oder mehrere persönlich haftende Gesellschafter Juden waren. Im Falle einer juristischen Person galt das Unternehmen als jüdisch, wenn ein oder mehrere von den zu gesetzlicher Vertretung berufenen Personen oder Mitgliedern des Verwaltungsrates oder des Aufsichtsrates Juden waren; falls mehr als ein Viertel des Kapitals den Juden gehörte oder war eine entscheidende Beteiligung nach Stimmrecht gegeben, wurde das Unternehmen als jüdisch betrachtet.

Für jüdische Unternehmen konnte der Reichsprotektor einen Treuhänder bestellen, der seiner Aufsicht und Weisung unterstand. Der Treuhänder war ermächtigt, im eigenen Namen für Rechnung des Unternehmens alle gerichtlichen und außergerichtlichen Rechtsgeschäfte und Rechtshandlungen vorzunehmen, die zur Erfüllung des ihm erteilten Auftrages notwendig waren.[19]

Nach der Verordnung des Reichsprotektors über das jüdische Vermögen wurden den Juden, jüdischen Unternehmen und jüdischen Personenvereinigungen die Verfügung über Grundstükke, Rechte an Grundstücken, wirtschaftliche Betriebe, Wertpapiere aller Art, sowie die Verpachtung von Grundstücken und wirtschaftlichen Betrieben entzogen. Die Verfügung über dieses Vermögen war nur nach einer schriftlichen Genehmigung des Reichsprotektors zulässig, der seine Zuständigkeit ganz oder teilweise auf andere Stellen übertragen konnte. Die Befugnis zur Erteilung von Genehmigungen wurden den Oberlandräten übertragen; ausgenommen waren die wirtschaftlichen Betriebe mit einer Zahl von mehr als 100 Arbeitern und Angestellten oder einem Jahresumsatz von mehr als drei Millionen Kronen, Banken, Versicherungsunternehmungen und einige weitere aus-

[12] Kundmachung des Finanzministeriums vom 6. Dezember 1940 Nr. 73.537/40-VI, über freie Entnahmen aus jüdischen gebundenen Konten (Einlagen), kundgemacht im Amtsblatt Nr. 288 vom 9. Dezember 1940.

[13] Kundmachung des Finanzministeriums vom 8. März 1940 Nr. 9221/40-VI, betreffend Zahlungen zu Gunsten von Juden, kundgemacht im Amtsblatt Nr. 58 vom 9. März 1940.

[14] Kundmachung des Finanzministeriums vom 15. November 1940 Nr. 70.822/40-VI, über die Aufhebung jüdischer Einlage- und Sparkassenbücher und Einlageblätter, kundgemacht im Amtsblatt Nr. 270 vom 18. November 1940.

[15] Diese Verordnung wurde zuerst am 22. Juni 1939 in der Prager Tageszeitung *„Der Neue Tag“* veröffentlicht.

[16] Zum Arisierungsprozess vgl. aus der neueren Literatur z.B. Kuklík, J. *Znárodněné Československo – státní zásahy do vlastnických a dalších majetkových práv v Československu a jinde v Evropě*. Praha: Auditorium, 2010, S. 86 ff.

[17] Utermöhle, W., Schmerling, H. *Die Rechtsstellung der Juden im Protektorat Böhmen und Mähren*. Prag: Böhmisch-Mährische Verlags- und Druckereigesellschaft, 1940, S. 12.

[18] Dazu vgl. z.B. Jurášek, S. Právní a hospodářské postavení Židů v Protektorátě Čechy a Morava. In: *Právník*, 1940, Jahrgang 79, č. 7, s. 395.

[19] Zweiter Durchführungserlass zu Verordnung des Reichsprotektors in Böhmen und Mähren über das jüdische Vermögen vom 8. Dezember 1939 (VBlRPRot. S. 318).

gewählte Betriebe.[20] Weiterer Erwerb des oben erwähnten Vermögens war verboten.

Im Laufe der Jahre 1939–1940 wurde die Anmeldungspflicht den Juden zu ihrem Vermögen auferlegt. Die Juden hatten ihre Gegenstände aus Gold, Platin und Silber, sowie Edelsteine und Perlen bis 31. Juli 1939 bei der Nationalbank oder den von ihr bestimmten Stellen anzumelden. Das Gleiche galt auch für Schmuck- und Kunstgegenstände, soweit ihr Wert den Betrag von 10.000 Kronen überstieg. Die Gegenstände aus Gold, Platin und Silber, sowie Edelsteine und Perlen konnten ihre Eigentümer an die Handelsgesellschaft Hadega GmbH, Prag mit besonderer schriftlicher Genehmigung veräußern.[21]

In der Frist bis 31. Juli 1939 hatten die Juden ihre land- oder forstwirtschaftlichen Grundstücke beim zuständigen Oberlandrat anzumelden. Jüdische Unternehmen hatten ihr gesamtes in- und ausländisches Betriebsvermögen nach dem Stande vom 31. Dezember 1939 anzumelden. Bis zum 15. März 1940 hatten die Juden und jüdische Personenvereinigungen den in ihrem Eigentum stehenden Grundbesitz, grundstücksgleiche Rechte und Rechte an Grundstücken anzumelden.[22] Der Anmeldungspflicht unterstanden auch die Wertpapiere.[23] Bis 30. April 1940 mussten die Juden ihre Aktien, Kuxe, festverzinsliche Werte und Wertpapiere ähnlicher Art in ein auf ihren Namen lautendes Depot bei einer Devisenbank einlegen.[24] Dieselbe Pflicht galt auch für Briefmarken- und Ganzsachensammlungen.[25]

5. Endgültige Beschlagnahme jüdischen Vermögens

Das Jahr 1941 stand im Zeichen einer endgültigen Beschlagnahme des jüdischen Vermögens. Am 2. November 1941 veröffentlichte die Prager Tageszeitung *„Der Neue Tag“* das Verbot der Veräußerung jedweder Vermögenswerte von Juden ohne eine Sondergenehmigung, damit sich kein Vermögenswert der Arisierungsmaßnahmen entzogen konnte.[26]

Aufgrund der Verordnung des Reichsprotektors in Böhmen und Mähren vom 5. März 1940 über die Betreuung der Juden und jüdischer Organisationen (VBlRProt. S. 77) kam es zur Errichtung der Zentralstelle für jüdische Auswanderung in Prag und des Auswanderungsfonds für Böhmen und Mähren. Am Ende des Jahres 1941 wurde die Zentralstelle für jüdische Auswanderung mit der Abwicklung des Vermögens auswandernder Juden unter einer Bedingung beauftragt, dass dies bei ihr vom Verfügungsberechtigten in einer Niederschrift beantragt wurde.[27] Diesen Antrag hatte jeder Ausgewanderte in Sammellager bei der Transportabfertigung zu unterzeichnen. Die Juden waren auch gezwungen, eine Erklärung zu unterzeichnen, nach der ihr sämtliches Vermögen auf den Auswanderungsfonds überging (ausgenommen des Vermögens, das sich in ihrem Gepäck befand; dieses verloren sie nach der Einkunft in den KZ).[28]

6. Zum Schluss

Wie dieser Beitrag gezeigt hat, den Juden wurde die Verfügung über ihr sämtliches Vermögen in den Jahren 1939–1941 schrittweise entzogen. Dies wurde jedoch nicht mithilfe der Willkür, sondern aufgrund der genau formulierten legislativen Regeln durchgeführt, die sowohl von der deutschen Besatzungsverwaltung, als auch von der Regierung des Protektorats und ihrer Ministerien erlassen wurden. Die Nationalsozialisten und die tschechischen Kollaborateure konnten sich also hinter dem Deckmantel des Gesetzes verstecken.

Die Juden wurden zwischen 1939–1945 um alles beraubt und konnten sich weder das höchste Gut – eigenes Leben – behalten.

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[20] Erster Durchführungserlass zu Verordnung des Reichsprotektors in Böhmen und Mähren über das jüdische Vermögen vom 21. Juni 1939 (VBlRPRot. S. 45); sechster Durchführungserlass zu Verordnung des Reichsprotektors in Böhmen und Mähren über das jüdische Vermögen vom 29. März 1940 (VBlRPRot. S. 146).

[21] Dritter Durchführungserlass zu Verordnung des Reichsprotektors in Böhmen und Mähren über das jüdische Vermögen vom 26. Januar 1940 (VBlRPRot. S. 44).

[22] Vierter Durchführungserlass zu Verordnung des Reichsprotektors in Böhmen und Mähren über das jüdische Vermögen vom 7. Februar 1940 (VBlRPRot. S. 45).

[23] Achter Durchführungserlass zu Verordnung des Reichsprotektors in Böhmen und Mähren über das jüdische Vermögen vom 16. September 1940 (VBlRPRot. S. 507).

[24] Fünfter Durchführungserlass zur Verordnung des Reichsprotektors in Böhmen und Mähren über das jüdische Vermögen vom 2. März 1940 (VBlRPRot. S. 81).

[25] Kundmachung des Finanzministeriums vom 5. Februar 1941 Nr. 51.919/41-VI, über die Pflicht der Juden, Briefmarkensammlungen ins Depot einzulegen, kundgemacht im Amtsblatt Nr. 33 vom 8. Februar 1941.

[26] Kárný, M. *„Konečné řešení“. Genocida českých Židů v německé protektorátní politice*. Praha: Academia, 1991, S. 67.

[27] Zweite Verordnung des Reichsprotektors in Böhmen und Mähren vom 12. Oktober 1941 über die Betreuung der Juden und jüdischer Organisationen (VBlRProt. S. 555).

[28] Kárný, M. *„Konečné řešení“. Genocida českých Židů v německé protektorátní politice*. Praha: Academia, 1991, S. 66–67.

Czechoslovak Socialist Civil Law in the Years 1948–1989

Radovan Dávid*

Abstract

This article deals with the Czechoslovak civil law in years 1948 - 1989. It is connected with the importance of the changes in the society in years 1948 and 1989 and describes their effects on the legal regulations as well as on the future development. The main aim of this article is to describe a relation between regulations adopted by constitution and regulations adopted in Civil Code as well as to analyze typical institutes of Czechoslovak civil law, for example personal use or structuralism of ownership.

Key words: *Czechoslovakia; civil law, Czech civil code; socialism.*

After the social changes, as a result of so-called Victorious February in 1948, it was obvious that also elementary codification regulating everyday life of the Czechoslovak citizens and organizations must come through necessary changes. In accordance with these social changes there were opened works on new Civil Code and other legal acts. This process is also known as a legal two-year plan.[1]

The legal two-year plan was finished in year 1950 when the Civil Code[2] and other legal acts were adopted. It was especially Family Code, Criminal Code, Civil Procedure Code and some other. From 1st January 1951 the civil legal relations were under the regulation of new Civil Code that was in force for all the Czechoslovak State. From this day these civil relations were regulated by old Austrian (in the Czech part of the state) and Hungarian (in the Slovak part of the state) legal regulations no more. It is necessary to add that the Austrian Civil Code from 1811 was abrogated in 1966, because it still regulated the labour-law relations.

The adoption of new Civil Code also meant very important change, because the Czechoslovak legal system abandoned ideals of past First Republic and began the building up of new socialist society. The questions of family law were hived off to separate legal act, as well.

The elementary principles of newly establishing Czechoslovak socialist civil law were founded in the Constitution of 9th May from 1948.[3]

1. Constitution of 9th May 1948 and its Influence on the Socialist Civil Law

The preamble of the most important legal act that was adopted after the revolution in 1948, the Czechoslovak Constitution, stated, that the state would exist on the principles of public democracy that should lead the society to the establishment of socialism, as an early stage of communism. The further text of the preamble is dealing with the former history of the Czech and Slovak nations, the exploitation of the working class. This exploitation should be cleared; the constitution especially stated that the national economy should serve for all member of the society, not only for capitalists. It was obvious that the changes of the Czechoslovak legal regulations would be connected with the ownership of factors of production. The labour is connected with the human and it is impossible to transfer this factor to someone else. But, if we are thinking of other factors, land and capital, we have to add that the land and the capital were not divided to all member of the society. The land and capital were concentrated in the hands of narrow group of the richest people. These factors should be transferred to the hands of the whole society.

Other elementary principles of the future evolution of the civil law were stated in the art. XII. This article was based on the Marxist model of economy established on the central (controlled by the state) plan. The Czechoslovak economy in years

* JUDr. Ing. Radovan Dávid, Department of Civil Law, Faculty of Law, Masaryk University, Brno, Czech Republic.

1 See Bobek, M., Molek, P., Šimíček, V. a kol. Komunistické právo v Československu. Brno: Masarykova univerzita a Mezinárodní politologický ústav, 2009, p. 426.

2 Act no. 141/1950 Coll., Civil Code.

3 Constitutional act no. 150/1948 Coll., Constitution of the Czechoslovak Republic.

1948-1989 was not established on the basic economics factors known as an offer, an acceptance and a price. The elementary signs of the new socialist central planned economy were:

- the nationalizing of the mining and other industry, big businesses and banking,
- the ownership of land established on the principle that the land belongs to the working class,
- the protection of retail and middle-sized business and the protection of personal property.

The protection of property was guaranteed by the art. 8 and 9.

The civil law relations were also connected with other articles of the constitution that protected for example personal and domestic freedom, freedom of movement, freedom of expression etc.

2. The Criticism of the "Bourgeois" Civil Law

Almost every publication from the era of establishing a socialist society had the part dealing with the criticism of the bourgeois law.[4] This criticism arises from the elementary conception differences between the capitalist and socialist model of a society. After 1948 the Czechoslovak national economy was under the control of state. It was necessary to divide the factors of production again, mainly under the control of the working class. The "bourgeois" law was based not on the socialist ownership but on the private ownership.

The first point of the criticism was connected with the private ownership of the exploiting class. The second was dealing with the conception of the autonomy of will and the third with the differentiation of the public and the private law. The criticism was not against the conception but against the usage of autonomy of will and the differentiation of the public and private law. The socialist lawyers argued that the bourgeois law was only legitimizing the private ownership of factors of production and the exploitation of the working class by the capitalists.

3. Civil Code from 1950

After the socialist revolution in 1948 there were stated four elementary aims of future development of the socialist civil law:

- to develop socialist property – state and cooperative,
- to regulate legal relations between the socialist organizations fulfilling the central plan,
- to guarantee the satisfaction of material and cultural needs of the citizens,
- to bring up new socialist society.

In 1950 the new Civil Code was adopted, it came into force on 1st January 1950. It was the first civil code that's aim was to lead the society to the establishment of a socialism.

3.1 The Changes in the Sphere of the Ownership

Art. 100 and the other of the new Civil Code brought very new construction of ownership. The Civil Code established three kinds of the ownership – socialist, individual and private.

The socialist ownership was understood as a common ownership that belonged to everybody. At this point the civil law met the elementary condition of legal relations, the subjectivity of an individuals and entity of an organization. Every property must have its individual concrete owner. It is impossible to construct the ownership as a property of everybody. The term "society" or "everybody" is not concrete enough and nobody knows who is entitled to dispose with this property. Due to this fact the socialist ownership belonged to the state and cooperative society. The state was the one and only subject that may represent the interests of the society. The property under control of cooperative society was also influenced by the policy of the state.

Art. 103 of the Civil Code allowed transferring a part of a national property to national or communal enterprises and to socialist organizations. We have to add that this was not a transfer of right of ownership, but it was only a transfer of the right to use the thing. The national property belonged only to the state.

The Civil Code also established the individual and private ownership. These terms are quite similar, but the socialist legal theory didn't allow mistaking them. The individual ownership was not in the conflict with the interests of the society. Every working human was allowed to own his house or flat, his own personal belongings as well as savings from his salary. But the private ownership was in conflict with the interests of the society. The private ownership was dangerous because it represented the interests of the exploiting class and the main aim of the civil law was to clear it. The private ownership was only transitory.

3.2 Other Changes

The Civil Code from 1950 was also connected with other changes but they were not as important as the structuralism of the ownership. Some institutes typical for bourgeois law was also regulated by this code, because it was adopted in time when a large mass of property was not nationalized yet.

4. Constitution of 1960

In 1960 a new socialist Czechoslovak constitution was adopted.[5] This constitution stated the victory of socialism in Czechoslovakia and changed the official name of the country – Czechoslovak Socialist Republic. The national economy changed the aim of its activity from socialism based on principle "everybody has to work for society, everybody will get according to his merits" to communism based on the principle "everybody has to work for society, everybody will get according his needs". This change also influenced the development of Czechoslovak civil law. It was obvious that the former Civil Code form 1950 was not corresponding the needs of a new developed socialist society. It was necessary to prepare a new civil code.

The constitution from 1960 defined the socialist, individual and private ownership. The private ownership was also tolerated but only in accordance with the principle that nobody is allowed to exploit someone other.

[4] See Knapp, V., Plank, K. a kol. Učebnice československého občanského práva. Praha : Orbis, 1965.
[5] Constitutional act no. 100/1960 Coll., Constitution of the Czechoslovak Socialist Republic.

5. Civil Code from 1964

On 8th December 1960 the session of Central Committee of Czechoslovak Communist Party was held. This committee decided to begin works on preparation of new civil code that should better serve the modern socialist society. This works were finished in 1964 when the act no. 40/1964 Coll., Civil Code, was adopted. It came into force on 1st April 1964.

5.1 Preamble of Civil Code and the Elementary Principles

The preamble was an inseparable part of the new Civil Code. It continued older rules stated in the constitution from 1960. The preamble stated:

"*In the Constitution of the Czechoslovak Socialist Republic are introduced the main directions of development of our society and personality of human. It is a ground of total and new regulation of relations in the sphere of socialist production and labour and in the sphere of personal demand of citizens.*

The development of central planned socialist production, consistent attitude to the elementary principles of democratic centralism in the spheres of production and effective enforcement of whole society interests in the production of socialist organization need new regulation that is included in the Economic Code respecting the development of lawmaking.

The economy of socialist society is based on the common socialist property production means. The quantity of satisfaction of material and cultural needs of citizens are generally depended on the development of socialist economy and on the labour contribution of each citizen.

The Civil Code arises from the unity of socialist economy and from the correspondence of interests both of society and citizens. It qualifies the personal property as deferred from the common property and protects it as the one of the most important means of citizens' needs satisfaction.

The main aim of the Civil Code is to set and define the rights and duties of citizens and organizations rising in the spheres of satisfaction of material and cultural needs, to protect these rights if they are exercised in accordance with the interests of whole society, and to administer to consistent abidance of socialist rule of law in the civil relations.

The provisions of the Civil Code aspire to strengthening of socialist economic and other social relations and to get over the anachronisms in people's minds. These provisions help to make conditions for changing socialist relations to communist."

This preamble fully influenced the elementary principles of new socialist civil law that were listed in the art. I – VII:

"*I. The socialist social structure is a ground of civil-law relations.*

II. The constantly growing social production based on socialist common property is the mail source of the citizen's basic needs satisfaction. Everyone is obliged to diversify, to strengthen and to protect this kind of property.

III. Satisfaction of material and cultural needs of citizens is mainly provided by remuneration for work in accordance with its quantity, qualify and social importance. Redistribution is provided at no cost in accordance with the capacity of society and with the social importance of the needs.

IV. The main aim of socialist organizations is to satisfy the material and cultural needs of citizens. The citizens participate in direction of the activities and in control of performance of tasks.

V. Not only reciprocal subject's rights and duties but also the rights and duties to society arise from civil-law relations.

VI. The performance of subjective rights and duties must be in accordance with the rules of socialist society.

VII. Nobody is allowed to abuse his rights against the interests of society or fellow citizens and also nobody are allowed to enrich himself at the expense of society or fellow citizens."

This list is different from the lists of private law principles that are know from the era of first Czechoslovak Republic. It is impossible to find principles of equality, autonomy of will etc. These elementary socialist principles were used in the process of application and interpretation of concrete provisions of Civil Code.

The main problem is connected with the principle under art. V. As it is known from the general legal theory, the rights and duties from the legal relations arise only to participants of this relation. It is impossible to affect other subject negatively. So, the problematic question is how the relation between two citizens, between citizen and socialist organization or between two socialist organizations may affect the society, respectively who is to society.

5.2 Participants of Civil-Law Relations

The elementary civil-law terminology had changed. The Civil Code from 1964 didn't recognize the individuals as natural persons and legal entities any more. The individuals were called as citizens and the legal entities were called as socialist organizations. The term legal entity was used only by art. 488.

5.3 Structuralism of Ownership

Also the Civil Code from 1964 recognized the socialist, individual and private ownership but the definitions (due to rules stated in the constitution) were not as precise as they were in the Civil Code from 1950.

The individual ownership was defined in art. 123 et seq. Things that were in the ownership of the state might be transferred from the state to individuals or they might be entrusted to the individuals. Also people's work might be a source of their property, but it must be only the work for the whole society. The property acquired from the other sources (except of presents, inheritance etc.) was not protected by the law.

The individual ownership consisted of thing of domestic and personal use, one-family house, holiday homes etc.

The other things were in the property of state.

Private ownership was also possible but it was recognized as provisional.

The right of possession was not regulated by the Civil Code. This institute as well as positive prescription was adopted in year 1983.

5.4 Personal Use of Flats, other Rooms and Estates

The material and cultural needs were not satisfied only by the personal owned property, but also by the property owned by the state. The Civil Code (in accordance with the art. 152 et seq.) entitled the state to entrust the property to the individuals. The typical things subjected to personal use were for example flats, other rooms and estates. It means that these persons were not owners of the thing but they were entitled to use it.

The typical notes of this trust were non-limited period and payment. The body that was entitled to decide whether the part of socialist ownership (flats, living rooms, garages or ateliers) would be entrusted to the individuals was local people's committee. When the contract between this body and the individual was signed the individual was entitled to use the thing and obliged to pay for it. The trust of estates was in competence of district people's committee.

The institute of personal use was revoked at the beginning of 90's and it was changed to ownership or tenancy.

5.5 Services

The Civil Code from 1964 didn't recognize the typical obligations as they are known from today's legal regulations. These obligations were known as services that were provided by socialist organization. The main aim of socialist organization was to satisfy material and cultural needs, so citizens were entitled to use these services.

But the activity of socialist organizations was not the only way of satisfaction of material and cultural needs. The Civil Code from 1964 adopted the regulation of civil help. In accordance with art. 384 et seq. citizens were entitled to use the help of other citizens, for example it was possible to do something for someone else, to borrow money from someone else or to help other with something.

6. Changes after 1989

After important changes in Czechoslovak society after 1989 it was obvious that the Civil Code also needed changes. The national economy was based on central planning under the control of state no more and it was necessary to adopt an absolutely new legal regulation that will allow a national economy based on market.

The participation in collective companies (also under the control of state) was newly recognized as free and independent. It means that nobody was enforced to take part in collective companies no more.

Conclusion

At the beginning of 90's arose tendencies to change the Czechoslovak (Czech) civil law. The main problem was to answer a question whether the civil law would be changed by new codex or by "only" amendments to the Civil Code from 1964. The faster way was to amend former Civil Code, because an adoption of a new codex is a very difficult and time-consuming process. At present there exists draft bill of a new civil code. It is inspired by the old Austrian Civil Code from 1811, respectively by the civil law regulation from former first Czechoslovak Republic. Its potential adoption will definitely bring very important changes that will affect everyday life of each Czech citizen and legal entity.

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A Few Remarks on the Origination and the Concept of the Labor Code of 1965*

Ladislav Vojáček**

Abstract

The author of this contribution focused on the Czech Labor Code of 1965. He outlined both the ideologic foundation of the Code and the practical consequences it had. Moreover, the author explained how it developed over the years and how it was implemented in the practice.

Key words: *Czechoslovakia; Labor law; Labor Code.*

The Czechoslovakian Labor Code was passed by the National Assembly in 1965 (the Act No 65/1965 Coll.). The scientific works of the coming years were usually aimed at the final phase of the preparatory works on this Act that had started in 1962.[1] Nevertheless, proper searching for the origination of this codification will lead us to quite longer history.

Preparation of the Labor Code

While preparing the new Civil Code of 1950, it was decided that no labor law provisions should be implemented in it. The lawgiver argued ideologically that it cannot take over the "bourgeois conceptions" which considers work force as goods. The lawgiver also proclaimed that it would regulate the labor law relationships by an independent Code, which was similarly carried out in the field of family law.[2] The Ministry of Social Care acted as a guarantor of the project, at this stage (the Ministry was later renamed to the Ministry of Labor Forces). It created a commission for codification of labor law, which consisted of sixteen members, and this commission sent out the *Principles for Labor Code* to relevant institutions already at the beginning of the year. The grounds for these Principles were prepared by six work sub-commissions. According to the political instructions given to these sub-commissions, the Code was supposed to be based on the concept of employment relationships as a central institute and reshape it *"completely"*. It was supposed to cover all employees and comply with the needs and tasks of people's democratic society, *"which pursues socialism"*. As for the formal aspects, it was not supposed to be a mere frame law, which would let other laws to regulate, nor a detailed Act. It was supposed to be brief, but *"give a sufficient base for solving concrete issues"*. Its wording was supposed to be clear so that even laypersons would understand that. It was a requirement applying to other codes as well.[3]

The Central Council of Unions ("CCU"), which later replaced the Ministry in its role of a guarantor of labor law regulations, the Principles were reviewed by a "codification sub-commission for the Codex of Labor at Social Political Committee" in February and March 1949. Its findings[4] may serve as an interesting material, which shows that the first version of the Code was being developed in such an atmosphere that does not correspond with the schematic approach so typical for this phase. The commission grabbed its role very agilely and took several dissenting stands. It even had certain objections to the attempt to define "employment relationship" and some of its members wanted to emphasize the role of labor agreement.[5] The sub-commission understandably aimed at strengthening the position of the Union bodies.

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** Prof. JUDr. Ladislav Vojáček, CSc., Department of the History of the State and Law, Faculty of Law, Masaryk University, Brno, Czech Republic.

1 Especially HROMADA, J.: Niekoľko poznámok k vzniku Zákonníku práce. In: *Právny obzor*, XLVIII/1965, s. 513–519, but also older labor law textbooks.

2 A reporter Dr. Jan Bartuška (KSČ): *"It derives from the analysis of today's stage of the development and from the tendency of further development follows that the new Civil Code will regulate new civil law relationships of citizens. Thus family la, which is already codified and which regulates social relationships of man to family and marriage, was not included in the Civil Code. Hence, the special business law, which used to be a law of privileged classes of capitalist states, was not codified. Hence, the labor law was not included, for the former legal order allowed it and it expressed its nature. In capitalism, labor force was regarded to be goods and it was sold similarly as other goods. In our new society, in which labor is a thing of fame and heroism, employment relationships will be regulated by a special codex, i.e. labor code."* (Digital library NS RČS 1948–1954 steno protocols| 49th meeting, October 25, 1950).

3 *The Principles of a Labor Code* (first version). VoA, fond Zákoník práce 1949–1968, cart. 1, No. 3/1.

4 The proposal of the sub-commission served as grounds for the work of referents, who prepared the actual version of particular passages. This material was then deliberated by social commission of CCU and was later passed to the Ministry.

5 *„Employment relationship is a relationship between an employee and an employer and it means that an employee is obliged to carry out work in favor of whole entirety for wage and the work is carried out in person and under the lead of the employer".*

The Ministry's commission for implementing the comments shaped a new version of the Principles and in so doing it was inspired not only by the Soviet laws and scientific literature, but also Polish, East German, Hungarian and Romanian labor laws. It also had information from the People's Republic of China and Turkey.[6]

Unification of the labor law issues proved to be not only a difficult task, but also a task which was not achievable at that moment. Due to economic reasons, it was not possible to extend the most favorable measures to all employees, whereas it was due to political reasons that it was not preferable to establish lower standard for all, which, in comparison with the previous period, would disadvantage numerous groups of employees.[7]

A labor code started to be reconsidered after the twentieth gathering of the Communist party of the Soviet Union ("CPSU"). It was deliberated by the National General Conference in November 1957 and presented to CCU meeting. Finally,[8] the deliberations about the Code got interrupted because of and in connection with the economic reform that was being prepared. As opposed to most other European countries of the Soviet bloc, the field of labor law had not been codified until mid-sixties in Czechoslovakia.

The "socialist" Constitution of 1960 was presented as a reflection of the transformation of society into a higher stage of development, which was supposed to be reflected in reconstructing the whole legal order. In its resolution *on the issues of further strengthening of the socialist legislation* of the late 1960, the Central Committee of the Communist party of Czechoslovakia, an attention was paid *inter alia* to the fragmented field of labor law and it empowered the CCU to create a draft of a Labor Code.[9]

The work started already in 1962 and in 1963, when the CCU presented the *Principles of the Labor Code of the CSSR*[10] to public discussion. These Principles comprised in a concentrated form the content of the to-be-adapted Code. Although the ideal construction of the Labor Code was prepared by the highest party and union bodies who were probably inspired by some older texts, only public and legal experts were able to consider it. The text of the Code was prepared by three work groups and two sub-groups dealt with statistic and economic analysis of regulation of labor force. These groups consisted of the employees of CCU, the Office of Presidium of Government, State Planning Commission, State Wages Commission, Ministries, Slovak Union Councils, CSAV, Law Schools, CCU officials, etc. Four employees of the Ministry of Justice and of universities were engaged in these activities full time. The economic consequences of the new solutions were considered by the advisory committee of the secretariat of CCU, which was led by the Secretary of the CCU. The Prague Faculty of Law together with the labor law committee of CCU also helped to solve some problems. Certain special statistic researches regarding general labor law issues were taking place. They were aimed at processing especially the data of 1961 (as for the working hour, the data of 1960 were used and, as for the working conditions of women, the date of 1959 were used as these searches took place in 1959).[11] The Principles were being discussed in the period of January 10 to February 24. Then, the originally set dates for preparation and passage of the Code were not possible to achieve in the economic turbulent situation.

The draft of the sectioned Code was completed by CCU in fall 1963. Due to the economic problems the republic faced and owing to the discussions about the need of economic reform, the final talks on its passage were postponed again.[12] Thus in July 1965, the National Assembly approved a labor code that did not really react to the radical reform proposals arisen out of the discussions on dealing with the economic challenges. The government supplemented it with an executing decree (No. 66/1965 Coll.). These laws were soon amended by an ordinance of the CCU No 82/1965 Coll., which, despite being against non-constitutional,[13] dealt mainly with arbitrary proceedings and deviations in the scope of authority of enterprises' committees in state bodies and in social organizations.

There were two concepts that met during the preparatory works on the Labor Code. According to one of them, the Code, similarly to the first Soviet laws, was supposed to ensure only minimal rights of workers and allow that the management and unions could set better conditions if it was possible from the economic point of view. The proposal of this approach, which corresponded with the ideological approaches of the economic

[6] The records of the deliberations of the codification commission at social-political commission CCU and the Report on Activities of the Codification Sub-Commission at Social-political Commission CCO; all VoA, fund Zákoník práce 1949–1968, cart. 1, No. 1/1.

[7] Dr. Kodat said at the meeting of the codification sub-commission CCU that if trying to match the laborers' lebel with the level of private employees in higher services, it would be needed to moderate and such *"equalization would have tragic consequences"*; (VoA, fund Zákoník práce 1949–1968, cart. 1, No. 1/1.). This aspect was also emphasized by Jan Kostečka in his article on anniversary of deliberation and passage of the labor Code: KOSTEČKA, J.: První československá kodifikace pracovního práva. (Zamyšlení k 40. výročí osvobození Československa a k 20. výročí zákoníku práce). In: *Socialistická zákonnost*, Vol. XXXIX/1991, p. 323.

[8] VoA, fund Zákoník práce 1949–1968, cart. 38, i. No. 281/2/9, *Schůze předsednictva ÚRO*, December 5, 1957.

[9] JIČÍNSKÝ, Z., *Právní myšlení v 60. létech a za normalizace.* Praha: Prospektrum, 1992, No. 43.

[10] *Zásady zákoníku práce ČSSR.* A proposal issued by CCU for public discussion. Special issue for Union members and officials of CCU, January 1963.

[11] Classified (!) Informational Report on the Overall Material of the Proposal of the Principles of the Labor Code in CSSR. VoA, added to the Inventory of the fund of the Labor Code 1949–1968.

[12] A resolution taken by the presidium of the Central Committee of the Communist party of the Czechoslovakia ("CC of CPC") on November 5, 1963 altered the resolution of the political executive committee of the CC of CPC taken on July 9, 1962 and it postponed the date of passing the Code and the relating laws in such a way that they would enter into force as of July 1964; (VoA, Inventory of the fund of the Labor Code 1949–1968). This date was also not stick to.

[13] Despite the fact that the Labor Code, in its Sec. 23 included a provision grating power to CCU, under the Art. 72 of the Constitution, generally binding laws issued on the grounds of legislative acts and governmental decrees and for their execution could be passed only by Ministries and other central authorities of state administration, which, the CCU was not. This anomaly had not been fixed until the early 1970s.

reform that was being prepared at that time, believed that this would bring with it more motivation of the workers in the working process and flexible usage of the Code while implementing the market mechanisms into the reforming socialistic economy. Nevertheless, CCU decided for a "traditional" and cogent regulation of rights and obligations and the supportive provisions, stating only minimum rights, which could be improved collectively or individually, was used only exceptionally.[14] One of the reasons for having the cogent provisions was that the Code was supposed to enter into force in the initial phase of the planned transformation of the national economy when the economic stimuli would not work properly yet and that it was also supposed to apply to employees of state administration where there are no direct economic stimuli.[15]

Although labor law had used the methods of other branches of law, especially those on which it was based, i.e. methods of civil law and administrative law, the socialist legal science stated that in labor law, as it was laid down especially in the Labor Code, there is *"mutual penetration of both methods and thus a new method of legal regulation is developed."*[16] The argument supporting this approach was the fact that many rights and duties regarding labor were not stated in employment contract, but by imperative norms of laws and also the nature of labor law acts (onesidedly stated amount of the wages, transferring the worker to other work, etc.) and managing acts of superior workers, which were subject to an approval by union body or by an agreement, the "socialist" approach to the collective agreements, the role of the unions, etc. This approach however weakened the contractual nature of the labor law relationships.

The Concept of the Labor Law

The priorities of the drafters of the Code were defined by the following objective: *"to create new socialist law, which will be a complex, unified and comprehensive system, which will be a primary part of the socialist legal order."*[17] This goal was achieved by them, as the Code met the requirements of that era and was a complex and logical. The Code followed some provision of the Constitution and expressed the approach to the subjects of labor law relationships of that period. Aside from the compilation features, it also included numerous reform ones (these however are not connected with the attempt to carry out economic reform, but with a change of the content of labor law).

Even the mere fact that the Code unified and systemized the regulation of labor law relationships may be considered as a reform. It newly regulated the issue of legal capability and principally also origination, alteration and termination of labor law relationship. The reform efforts were also reflected in the fundamental terminology. According to the party ideologists, the traditional term "*employee*" and "*employer*" did not properly reflect the new quality of labor law relationships. The mutual relationship of the parties to a labor law relationship was, according to them, no longer antagonistic, as the working people were allowed to participate in management of the whole national economy and their enterprise, which was no longer owned by an entrepreneur, but was owned by the "*whole people*". Thus the terms "*worker*" and "*organization*" started to be used. The abovementioned conception however remained to be only an empty proclamation without any significant impact on the real decision making processes and thus the real quality of the labor law relationships did not get changed.

From the legislative-technical point of view the then science of law focused on understandability of laws, which we can still agree with. It was new and principally positive approach that the Code was a universal law uniformly regulating the labor law relationships of all employees, regardless of their function. The unification of regulation of labor law relationships was based on the ideologically proclaimed equal relationship of all citizens to means of production and their equality while working for the common good of society. Nevertheless the uniform regulation brought with it also several problems, as it was not appropriate for all professions. Soon it was proved that the former separate regulation of public officers had its logic. Even the drafters of the Code admitted that certain deviations were needed while respecting the differences based on giving privileges to some workers for the state's sake (hiring in key sectors), different labor conditions (for certain heavy jobs, work in harmful environment, specific layout of working hours, etc.), due to special nature of the work performed (for instance work of managers), special care for pregnant women, mothers, juveniles and disabled and in work contracts between the citizens themselves.[18] They also tried to minimize these deviations and thus as for some occupations, provisions on regular working hours was a mere fiction.

The drafters of the Czechoslovakian Labor Code were proud that their work differs not only from the "bourgeois" laws, but also from the very first codifications of the Soviet type, which as a result of undeveloped science of labor law had only taken over and modified the institutes of the former law. Legal science then stressed the broad scope, absoluteness and particularity of the regulation of labor law relationships,[19] but, aside from that, it accepted the cogent character of majority of the provisions.

The lawgiver included all basic forms of engaging citizens in working process into the Code. It also included certain partial modifications, apprentice work, work carried out on the

[14] We can find it for instance in the Sec. 31, para 1 (the option to agree on a shorter trial period) and the Sec. 51, para 1 (the option to agree on shorter the prolongation of the notice while giving notice due to other reason or with no reason). Under the Sec. 115 and 116, it was possible to adjust wages while the worker was transferred to other work due to a reason not caused by the worker.

[15] WITZ, K., Obecné pojetí zákoníku práce. *Právny obzor*, XLVIII/1965, p. 528.

[16] KALENSKÁ, M., *Pracovní poměr v socialistickém právu.* Praha: Academia, 1984, p. 80.

[17] *Informační zpráva k souhrnnému materiálu návrhu zásad zákoníku práce ČSSR*. VoA, supplement to the Inventory of the fund Zákoník práce (Labor Code) 1949–1968.

[18] See KOVAŘÍK, J., K otázce jednotné úpravy pracovněprávních vztahů v ČSSR. In: *AUC – Iuridica*, 1/1964, p. 16–18.

[19] The Sect. 1 of the Labor Code characterized it very broadly: *„There are labor law relationships between citizens participating in social work and socialistic organizations".* (It was followed by: *„these relationships are regulated especially by the Labor Code"*.)

grounds of an agreement to carry out certain work, etc. Moreover, particular provisions of the Code also widened its scope of application. When created, it was a "first labor act which applied to almost all citizens capable of working".[20] In the mid 1960s, out of the six and a half million people capable of working, there were over 82 per cent of people in labor relationship and the rest were especially members of agricultural and production cooperatives.[21]

In comparison with the older codes of the countries of the Soviet Union, the Labor Code was more complex. The Fundamental Principles included in the opening provisions of the Code was a completely new approach. As a result of the narrow approach of the new Civil Code, arising out of the very problematic bloc concept of the legal order trying to separate the particular branches of law, the lawgiver even included provisions on labor law acts, security and termination of rights and obligations, liability of the organization for a damage caused the a worker, etc. Even some of the issues that had not been included in the Economic Code, such as participation of workers in development, management and supervision over the activities of the organization, these were also included in the Labor Code.

Despite all that, the Code did not regulate the whole field of labor law. The laws themselves regulated other problematic area – the hiring and distribution of working forces and particular regulation of wages, organization and state supervision over security and protection of health at work place, etc. Karel Witz said that the lawgiver let out of the Code the *"regulation of other than basic labor law relationships and this solution and is usually justified".*[22] He nevertheless believed that supervision over security and protection of health at the workplace is very important and that it should be included in the Code at least as a framework regulation.

While comparing with other labor law codifications of the Soviet type, one cannot miss the fact that the Czechoslovakian Code was the most extensive and that it was carried out in a detail. This was appreciated by the legal science,[23] but it also kept in mind that the detailed provisions would require many deviations and exemptions and thus that many implementing laws would have to be passed. It also contemplated that many impulses for a change in legislation would be brought by the parallel economic reform, which however was later established only in a limited form.

* * *

The concept of the Labor Code was based on the reality of that period, which reflected the fact that most employees ("workers") were employed by so-called socialist organizations. The Code emphasized especially their – in fact it was only fictitious – participation in managing the enterprises and it put sometimes an excessive emphasis on the protection of their rights and the stability of the employment relationship. The labor law relationships were usually regulated by mandatory provisions which did not allow exercising a free will of the participants in the labor law relationships.

[20] KADLECOVÁ, M. a d., *Vývoj českého soukromého práva.* Praha: Eurolex Bohemia, 2004, p. 211.
[21] BERNARD, F. – PAVLÁTOVÁ, J., *Pracovní poměr.* Praha: Práce, 1967, p. 9.
[22] WITZ, K., Obecné pojetí zákoníku práce. *Právny obzor*, XLVIII/1965, p. 525.
[23] In contrast to the usual views Karel Witz appreciated that the Code *„does not allow for a unnecessarily large scope for judgments and interpretation made by authorities, whose activities are less efficient than laws"*; (WITZ, K., Obecné pojetí zákoníku práce. *Právny obzor*, XLVIII/1965, p. 529.

History of the Czech Copyright Regulation

Radka MacGregor Pelikánová *

Abstract

As with other central European countries, the Czech Republic has enjoyed a long continental legislative evolution. As a matter of fact, intellectual property and specifically Copyright is an integral part of the national law valid in the territory of the current Czech Republic for over two hundred years. During this longer period occurred many political changes with a strong legislative impact. The Copyright in the Habsburg monarchy had many similarities to the Czech Copyright between the World Wars, but just very few with the socialist legislation in the Stalinist and normalization Communist era. Fortunately, the times of the powerful leadership of the labor class is over and the current Czech Copyright satisfies the standards of the civilized and modern Europe.

That being said,it is always interesting and inherently enriching to take a step back from the status quo and to reflect upon what got us to this point, to critically review the legislative evolution. The myriad of Copyright Acts valid in the territory of the Czech Republic represents a great example for a comparative overview done in a chronological manner. The ultimate result of such an overview is an increase in one's historical awareness, as well as in the ability to understand current regulation,s and in the capacity to present legitimate comments regarding de lege lata as well as de lege ferenda.

Key words: *Copyright; History; Comparative; Czech Law; Sources; Creative Work; Artistic Work; Literate Work.*

Introduction

Around the world, the perception of intellectual property has evolved and, even unto the present day, there has not yet been established a consensus about its exact definition and determination. Nevertheless, the predominant European conceptual stream recognizes consistently two main types of intellectual property – industrial property and also other intellectual property, which involves predominantly the creative Law with an artistic character (the area of Copyright and of rights to artistic performances). It can prove most edifying to review and compare Copyright on both the international and national level as well as tracing its evolution.

The Czech Republic is a democratic and economically developed European country and the Czech Law appertains to the continental Codex systems. The Czech Republic is a party to a plethora of international conventions, treaties, and agreements, and has been a regular member of the European Union since 2004. Therefore, it has respected the European commitments,[1] namely the conformity efforts, for over two decades. As a result, it is absolutely instrumental to perceive the body of EU law as one of the sources of the legal framework applicable in the Czech Republic.

Therefore, the primary sources of the legal regime and regulations regarding whatsoever area of law, i.e. Copyright included, to be observed in the Czech Republic are of three provenience types – the body of International Law, especially in the form of concluded conventions, treaties and agreements, the body of European Law, predominantly in the form of regulations and directives, and the Czech national Law Acts.[2] For conciseness, the primary focus of this presentation will be consecrated to the national sources of Copyright regulations valid in the territory of the Czech Republic, and the international sources, such as major treaties, as well as the EU law, will be but briefly mentioned.

The roots of Czech Law can be traced back to Roman Law and consecutively the major codes from the 19th century. The Czech Republic and its legal predecessors are among those countries which have a long and developed history of Copyright law. As a matter of fact, Copyright regulation has been valid in the territory of the current Czech Republic for over two hundred years. The state forms have changed significantly, going from the Habsburg multinational monarchy over to a Czech democratic republic and German protectorate to a socialist state to, again, a democratic republic and member of the E.U., but the adherence to most important copyright international treaties

* JUDr. Radka MacGregor Pelikánová, Ph.D., LL.M., M.B.A., Metropolitan University Prague, Prague, Czech Republic.

1 Announcement of the Ministerium for foreign affairs Nr. 7/1995 Coll., on the conclusion of the European Agreement establishing the association of the Czech Republic to the European Communities.

2 MacGregor Pelikanova Radka, Dr., LL.M., Privacy of E-mail Correspondence of Employees in the Czech Republic (2007). Journal on Legal and Economic Issues of Central Europe, STS Science Centre Ltd., Spring 2011, Vol. 2, No.1, p. 31–35, E.U.

remained. The Czech general approach to Copyright and its content have evolved and, to some extent, mirrored the ongoing state transformation. It is instrumental to review the basic milestones in this respect. In order to reach a full understanding and clarity, a chronological approach has been chosen. Therefore, four crucial periods with their bodies of Copyright law will be consecutively presented: the Habsburg monarchy, the Czechoslovak democratic republic, the Czechoslovak socialistic republic and the Czech Republic as a member of the European Union. The conclusion, with several retrospective remarks, will constitute a logical culmination of this article.

1. Copyright in the Habsburg Monarchy

The Czech kingdom became an integral part of the Habsburg Austrian monarchy in 1526 and remained so until the end of the First World War. Therefore, the General Civil Code (ABGB)[3] as well as other Austrian legislations constituted the body of the Law governing relations, including relations involving immaterial assets, in the territory of the current Czech Republic. The most specific source of Law regulating the rights to creative works belongs to Nr. 17 Bibliothek´s order from 1806, which prohibited a new publication of a work already published in the Habsburg monarchy without the consent of its author and original publisher. Further regulations of rights to creative works were included in several provisions of ABGB as well as in the Court Decree Nr. 537 from 15.May 1841.[4]

The first Copyright Act per se valid in the territory of the current Czech republic was the Kaiser patent Nr. 992 from 19.October 1846, which introduced principles for the protection of creative literate, musical and visual works against their mechanical reproduction and the protection of dramatic and musical creative works against their public performance. The will and interests of the author of an artistic work that was a subject matter of the Copyright was recognized and considered. The Kaiser patent underwent several modifications and amendments, e.g. by a Ministerial order Nr. 6/1859 extending the protection of the exclusive performance right and by the Act Nr. 78/1893 extending the protection period with respect to literate and artistic ownership.[5]

A detailed and inclusive regulation with respect to authorship to literature, artistic and photograph works was incorporated in Act Nr. 197/1895, and later amended by Act Nr. 58/1907. To facilitate its application and implementation, the Order of Ministerium of internal affairs and commerce Nr. 198/1895 was adopted.

2. Copyright in the Czechoslovak democratic republic Era between Wars

With the end of the 1st World War the Habsburg monarchy vanished and Czechoslovakia emerged as an independent, democratic and multinational state. On one hand, this new state took over the previous laws, including the Copyright regulations. On the other hand, a membership in international conventions and treaties had been successfully achieved, i.e. in 1921 the adherence to the Bern Convention for the protection of Literary and Artistic Works from 1886 ("Bern Convention), and a serious attempt to update, replace and to codify the Law was initiated.

The first piece of purely Czechoslovak legislation with respect to Copyright was *lex specialis*, Act Nr. 106/1923 Coll., on publisher agreements. This particular part of the body of Copyright, *lex specialis*, consisted of 44 paragraphs and remained valid until 1953.

The legal unification trend in the 1st Czechoslovak Republic resulted also in the adoption of *lex generalis*, the Act Nr. 218/1926 Coll. on Copyright. This Act covered the entire Copyright field, except for the area of publisher agreements, and consisted of 70 paragraphs including general provisions and very specific provisions determining the scope, the validity duration, and protection as well as the public authorship register for literate and artistic works without the indication of the genuine name of the author, and the expertise assembly for Copyright expertise. An amendment occurred by Act Nr. 120/1936 Coll. and reflected significant changes to the Bern Convention by the diplomatic conference in Rome in 1928.[6] The transposition of this substantive body of law into the praxis was facilitated by Government order Nr. 10/1927 Coll.

3. Copyright in Socialist Czechoslovakia

Unfortunately, the democratic setting dramatically changed during and shortly after the 2nd World War. With the infamous Communistic takeover in 1948, the Czechoslovak regime become definitely Communistic and under the omnipresent pressure of the Soviet Union. The codification of the Private law accomplished during the democratic era of the 1st Czechoslovak republic was replaced by new Codices and Acts. The Act Nr. 218/1926 Coll., on Copyright and the entire Copyright regulations were among the first targets. Commencing in 1948, the "nationalization" of the agency representing authors began and the socialist state maintained it until its demise in 1989.[7]

In 1953, the Stalin-admiring communists in the legislation assembly adopted a new *lex generalis*, Act Nr. 115/1953 Coll., on Copyright ("1st socialist Copyright Act"). This Act consisted of 113 paragraphs grouped into the following parts: the Author and his creative work, the Rights of the Author, Organizations of Authors, Cultural funds, use of free works, rights related to the rights of the author, transfer of the creative work and its protection, interim and final provisions.

An abundance of secondary legislation, especially about organizations of authors and about their royalties, emerged to assist with the application of the 1st socialist Copyright Act.[8] It does not require any excessive imagination or practical experience to understand that the maxima *Cum finis est licitus, etiam*

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3 Kaiser Patent Nr. 946/1811, Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Österreichischen Monarchie (ABGB).
4 Telec, I. Autorský zákon a předpisy související – Texty s předmluvou. 2nd edition. Praha: C.H.Beck 1996, p. XI.
5 Telec, I. Autorský zákon a předpisy související – Texty s předmluvou. 2nd edition. Praha: C.H.Beck 1996, p. XI.
6 Kordač, J. Novela autorského zákona. Praha: Codex, 1996, s. 35.
7 Telec, I. Právo výkonných umělců v provozovatelské praxi. Brno: Masarykova Univerzita – Spisy Právnické Fakulty, 1993, p. 54–55.
8 Telec, I. Autorský zákon a předpisy související – Texty s předmluvou. 2nd edition. Praha: C. H. Beck 1996, p. XII.

media sunt licita,[9] was the motto and leitmotif of this socialist Copyright Act as well as of the consequent socialist legislations, which worshipped new ideological goals.

In 1965, a new socialist Copyright *lex generalis* emergered, the Act Nr. 35/1965 Coll., on Copyright ("2nd socialist Copyright Act"), which became for almost four decades the fundamental source of Copyright regulation. The adoption of the 2nd socialist Copyright Act was performed in accordance with the narrow understanding and scope of the new Czechoslovak civil code in 1964, which was prepared as an experiment deserving of worldwide appreciation and which instead turned out to be a total failure, and the Czech Constitution from 1960.[10] At the same time, it is necessary to point out that the Czech Communist legislators managed to resist partially some of the Soviet political pressure and did not replace all traditional concepts and instruments of the Czech Copyright by the "outstanding" examples and models from some other East European washouts.[11]

Since the 2nd socialist Copyright Act was a result of the renewed codification trend in the Czechoslovak Law and was strongly marked by the times and circumstances of its adoption, none of its six consecutive amendments has (or could have) changed this characteristic significantly. It was strongly based on the monist continental (European) concept implying the unity of the exclusive personal (moral) and exclusive proprietary (economic) rights of an author and kept its social features. As a matter of fact, in particular the last amendments designated to modernize it and adjust it to the EU law produced, instead, a great deal of confusion.

The socialist and inclusive nature resulted not only in ideological and conceptual deformities, but as well in very practical issues and the lack of readiness to address industrial and postmodern society with high technologies. For example, none of the six amendments correctly resolved the regime of payment and the regime of license agreement. Therefore, an author copying or multiplying his/her own work through a copy machine, CD or DVD had to pay for the use of these devices, i.e. had to pay other authors (his or her competitors). The formalistic and complex distinction of various types of license agreements based on the manner of use did not accommodate the real business life. Naturally, from a business point of view, it did not matter which type was selected and applied. Fortunately, a similar unnecessary dwelling over the classification of concert artists, i.e. whether he or she is a concert performer in the administrative spirit, was eliminated by an amendment in 1992 unifying the perception of performing artists and sending the previous "administrative spirit concert" classification to the artistic critic domain.[12]

Undoubtedly, some amendments had potentially good intentions and a strong drive to adjust e.g. to the emergence of complex software, e.g. the amendment from 1990 expressly proclaimed that computer programs can obtain Copyright protection provided they satisfy the general traits of works protected by the 2nd socialist Copyright Act. Previously, an implied software protection was at least partially available based on the general provisions of the socialist Commercial Code.[13] However, the praxis demonstrated massive problems generated by attempting to determine for which computer programs the condition of general traits is satisfied. With some exaggeration, it could be suggested that the previous implied protection was paradoxically more flexible and efficient.

A detour from the directive, paternalistic and mandatory approach and from the principle of the inseparability of property and personal rights was achieved only by the total replacement of the 2nd socialist Copyright Act by a Copyright Act in 2000, which is valid unto the present day, and by the effects of the EU law.[14]

4. Copyright in the Current Czech Republic

Similar to the majority of Czech Civil law statues, the Act Nr. 121/2000 Coll, on Copyright ("current Copyright Act") emanates out of the general principles of the Civil law and of special maxims which reflect its particularity and its subject matter (e.g., the maxim about the truthfulness of the authorship). Simultaneously, any binding international and European regulations are taken into account. Therefore, the current regulation continues to some extent the previous status and at the same time mirrors the obligations of the Czech Republic implied by its accession to two absolutely fundamental multinational treaties – from Rome and from Geneva, as well as its membership in the European Union since 2004.

Regarding its nature, although the current Czech Copyright Act is predominantly perceived as a statute from the Civil law area, which is distinctively reflected by the facultative trait of its provisions, it still embodies numerous Public law strands of a mandatory nature. Therefore, its framework is rather strict and unshakably reposes upon two critical elements, the author as a subject and the work as an object, and thus their definition is absolutely fundamental, and at the same time inherently complex.[15] With some simplification, it can be summarized that the subjects are physical persons whose creative activity resulted in a unique and materially depicted outcome, and a copyrighted work can be a creation of one or more physical persons, which are known or unknown (so called anonymous work). This understanding and definition represents a continuation of the continental (European) regulations created back in 1886 by the international Bern Convention.[16]

[9] *The end justifies the means.*
[10] Šebelová, M. Autorské právo – zákon, komentáře, vzory a judikatura. Brno: Computer Press, 1.vydání, 2006, p. 15.
[11] Kordač, J. Novela autorského zákona. Praha: Codex, 1996, s. 35.
[12] Telec, I. Právo výkonných umělců v provozovatelské praxi. Brno: Masarykova Univerzita – Spisy Právnické Fakulty, 1993, p. 37.
[13] Karásková, I., Karásek, P. Paragrafy a počítače. Brno: Spektrum, 1994, p. 60–61.
[14] Schelle, K., Tauchen J., Hejda, J., MacGregor Pelikánová, R. Základy občanského práva. Kapitola 9: Autorské právo (Copyright). Ostrava: B.I.B.S., KEY Publishing s.r.o., 2nd edition, 2010, p. 214.
[15] Schelle, K., Tauchen J., Hejda, J., MacGregor Pelikánová, R. Základy občanského práva. Kapitola 9: Autorské právo (Copyright). Ostrava: B.I.B.S., KEY Publishing s.r.o., 2nd edition, 2010, p. 217.
[16] Chaloupková, H., Holý, P. Zákon o právu autorském, o právech souvisejících s právem autorským a předpisy související. Komentář. Praha: C.H.Beck, 3. vydání, 2007, p. 3.

Concerning its scope, the current Copyright Act includes the pure copyright (right to literate, musical, artistic, photographic, and audiovisual work) and the hex of rights related to the copyright (the right of the performing artist, of the audio producer, of the audio-video producer, broadcaster and TV emitter, of the promulgator of as yet unpublished works and of the publisher) similar to its predecessors.

Conceptually, it is based on the continental (European) understanding of Copyright coincident with its predecessors. However, unlike them, it contains at the same time a myriad of approaches and perception novelties linked to the return to the traditional German and French conceptions and dualistically distinguishing personal rights and property rights. Furthermore, it includes a quantity of practical changes with an undeniable practical impact. At random, it can be made as a reference to the extension of the length of the property copyright from the original 50 year to the new 70 year period, since the decease of the author, the enlargement of the circle of beneficiaries and duty owning persons, the increase in the amount of fines, the unified understanding of the license agreement as principally a contract based upon payment, the clear definition of the exclusive and non exclusive license and the lack of an express mention of the computer programs as specific works appertaining to the Copyright coverage.[17]

5. Review of all Sources of Copyright Currently Valid in the Czech Republic

It can be summarized that the fundamental sources of the Czech copyright includes six international treaties regarding copyright *per se*, and sixteen concerning intellectual property. All of them are administrated by the World Intellectual Property Organization (WIPO, OMPI), which was created in 1967, resp. 1970, and which is a specialized agency of the United Nations Organization with its seat in Geneva, Switzerland. For the Czech legal regime, the most important are:[18]

- Bern Convention for the protection of Literary and Artistic Works from 1886 (announcement of the Minister of foreign affairs Nr. 133/1980 Coll.);
- Rome International Convention for the protection of Performers, Producers of Phonograms and Broadcasting Organizations from 1961 (announcement of the Minister of foreign affairs Nr. 192/1964 Coll.) and
- Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms from 1971 (announcement of the Minster of foreign affairs Nr. 32/1985 Coll.).

To the principal European sources of the Czech copyright legal regime belong the following directives:

- Council Directive 93/83/EEC of 27th September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission;
- Directive 2001/29/EC, of the European Parliament and of the Council of 22nd May 2001 on the harmonization of certain aspects of copyright and related rights in the information society;
- Directive 2004/48/EC of the European Parliament and of the Council of 29th April 2004 on the enforcement of intellectual property rights;
- Directive 2006/115/EC of the European Parliament and of the Council of 12th December 2006 on rental rights and lending rights and on certain rights related to copyright in the field of intellectual property (initially Council Directive 92/100/EEC of 19th November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property) and
- Directive 2009/24/EC of the European Parliament and of the Council of 23th April 2009 on the legal protection of computer programs (initially, Council Directive 91/250/EEC of 14th May 1991 on the legal protection of programs).

The principal national sources, i.e. the internal Czech sources, of the Czech copyright legal regime are:

- Act Nr. 23/1991 Coll. And Act Nr.2/1993, introducing the Bill of fundamental rights and freedoms as a Constitutional Act („Bill of fundamental rights“);
- Act Nr. 1/1993 Coll., Constitution of the Czech Republic („Constitution“);
- Act Nr. 121/2000 Coll., on copyright and rights related to copyright (“current Copyright Act“);
- Act Nr. 40/1964 Coll., Civil Code („Civil Code“);
- Act Nr. 513/1991 Coll., Commercial Code („Commercial Code“);
- Act Nr. 143/2001 Coll., on protection of the commercial competition („Antitrust Act“);
- Act Nr. 500/2004 Coll., Administrative order („Administrative Order“) and
- Act Nr. 40/2009 Coll., Criminal Code („Criminal Code“).

[17] Eligible computer programs are now treated and protected as other works, specifically literate works according the Bern Convention and E.U. legislation.

[18] Schelle, K., Tauchen J., MacGregor Pelikánová, R. Basis of the Civil Law, Chapter 9: Copyright, Ostrava: B.I.B.S., KEY Publishing s.r.o., 2nd Edition, August 2010, p. 214–216.

Conclusion

Quo vadis? Well, the current Copyright Act as well as the entire Czech body of law covering Copyright belongs in the 21st century and in a rather welcoming manner accommodates the challenges of our postmodern and high-tech society. Firstly, the Current Copyright act is not any retailored socialist act, instead it is a relatively new law act prepared and drafted in accordance with correct, valid and up-to-date society matching concepts. Secondly, the Czech Republic is, for over seven years now, a full member of the E.U., and respects the *acquis communautaire* as well as the new body of the E.U. law and implements it in rather a satisfactory manner. Thirdly, the Czech legislation has historically good continental roots which did not get totally destroyed during the unpleasant Communistic era. Fourthly, the Czech republic and its predecessors have always belonged to certain and stable parties of big international treaties and conventions dealing with intellectual property, including Copyright.

However, *Saepe nihil inimicius homini quam sibi ipse*.[19] Undeniably, the Czech republic has progressed to have an appropriate body of the Copyright Law, but at the same time it is worth noting that its enforcement in praxis is far from perfect. The court system is much more efficient and effective than during the socialist Czechoslovakia era and the early years of the current Czech republic, nevertheless until today it is challenging to bring, prove and win a Copyright case and manage to materialize the orders and instructions indicated in the judgment. The blame does not lie predominantly with judges, rather on the entire society which, until today, still underestimates and undervalues the creative work and its author. *Quod fors offert arripiendum*.[20] Well, it appears that we enjoy what authors from the entirety of human history have created, so maybe the Czech population should more responsibly open its eyes and give a true everyday support to authors. *Fiat lux!*[21]

[19] *Often the biggest enemy of a man is himself (Cicero).*
[20] *Let´s use what the destiny offers.* (Cicero).
[21] *Le there be a light.*(Bible – Book of Genesis).

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